



Neutral Citation Number: [2023] EWHC 719 (Comm)

Case No: CL-2015-000687

CL-2019-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Friday, 24th March 2023

Before:

HIS HONOUR JUDGE MARK PELLING KC
(Sitting as a Judge of the High Court)

Between:

SHEIKH MOHAMED BIN ISSA AL JABER	<u>Claimant</u>
- and -	
(1) SHEIKH WALID BIN IBRAHIM AL IBRAHIM	<u>Defendants</u>
(2) SHEIKH MAJID BIN IBRAHIM AL IBRAHIM	

STEPHEN NATHAN KC and **DANIEL CASHMAN** (instructed by **Axiom DWFM**)
appeared for the **Claimants**.

ANDREW GEORGE KC and **NICO LESLIE** (instructed by **Gresham Legal LLP**) appeared
for the **First Defendant**.

SHAIL PATEL (instructed by **Gresham Legal LLP**) appeared for the **Second Defendant**.

Approved Judgment

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HIS HONOUR JUDGE PELLING KC :

1. There is an application by the defendants for permission to give evidence remotely by video link from Saudi Arabia. The circumstances in which the application comes to be made in essence are that the defendants maintain that they were detained by the Saudi Arabian authorities as part of an investigation by a committee headed by Crown Prince Mohammed bin Salman and established by royal decree. That decree permits the committee responsible for oversight of the process to impose travel bans.
2. The uncorroborated evidence of the first and second defendants is that they are subject to travel bans. In those circumstances, they maintain that they should be permitted to give evidence remotely by video link from Saudi Arabia. The claimants maintain that I should not grant this application at any rate at this stage for two distinct reasons. First, they maintain that the evidence in relation to whether or not the laws of Saudi Arabia permit evidence to be given by remote video link is unsatisfactory in terms of the material that has been adduced by the defendants and, secondly, that the evidence as to the existence of the alleged travel ban is threadbare to say the least and is entirely uncorroborated.
3. Dealing with the first of these points, I think I summarise the evidence accurately when I say that an apparently senior and experienced Saudi Arabian lawyer, instructed on behalf of the defendants, has given advice to the solicitors who act for the defendants to the effect that there is no bar imposed by Saudi Arabian law which precludes the giving of evidence in foreign proceedings by video link. There is no evidence to contrary effect, whether adduced by the claimants or otherwise, other than the point that there was a protocol which positively permitted the giving of such evidence which apparently has expired.
4. In those circumstances, the first question which arises is should I refuse this application on the basis that to permit what is being applied for would contravene Saudi Arabian law? I am satisfied that I should not refuse the application on that ground. I am satisfied that where there is evidence of Saudi Arabian law from an apparently experienced and senior Saudi Arabian lawyer that Saudi law does not make it illegal for evidence to be given to a foreign court by video link from Saudi Arabia and there is no countervailing evidence to contrary effect. In those circumstances, it would be wrong for me to conclude that there was a legal impediment for the giving of such evidence imposed by Saudi Arabian law.
5. The more difficult question is whether or not this application should be adjourned rather than being granted now on the basis of the paucity of evidence given in support of it. The evidence is, as I have described it, threadbare for these reasons. First, it is asserted that the defendants have been made the subject of a travel ban, but there is no documentary evidence to support that proposition. This is surprising at any rate to an English lawyer familiar with basic English public law principles. It is all the more surprising in circumstances where those who were the subject of detention in the circumstances described in the evidence were released in excess of five years ago. Secondly, there is some evidence that both of the defendants have been able to travel. In the case of one defendant exclusively between Saudi Arabia and the United Arab Emirates, and in particular Dubai. In relation to the other defendant, more widely than that, outside the Gulf Cooperation Council area. Thirdly, the assertion that the defendants are subject to an unwritten travel ban or indeterminate duration is

unsupported by legal opinion and is unsupported by either copies of applications to the Saudi authorities for permission to travel either in the past or for this trial or of past permissions to travel or acknowledgements of such applications.

6. I inquired of leading counsel for the first defendant (who made submissions for both defendants on this issue) whether or not it would be possible to obtain a legal opinion from a Saudi Arabian lawyer confirming the assertions which have been made. I am told by counsel on instructions that is not possible because the Saudi Arabian lawyers will not commit themselves for all the reasons the defendants say they are not able to commit themselves in relation to this issue. The defendants are represented by very experienced commercial litigators in London who will have anticipated the dangers posed by threadbare evidence.

Although it is submitted by the claimant that the alleged restrictions are entirely unevicenced other than by assertion and the defendants evidence on the issue should be rejected. I am bound to say that unless the lawyer to whom leading counsel referred was giving dishonest advice, the absence of such advice in such circumstances provides some slight support for the defendants' case.

7. It is said by the defendants that an application has been made for permission to travel to the United Kingdom to give evidence in this trial, made apparently on 23rd January 2023, although as I have said a copy of it and any receipt or acknowledgement of it has not been produced. I accept the explanation that if was thought that permission would be granted, then leaving it until 23rd January might be an acceptable way to approach matters. But the fact remains that there is no evidence of the making of the application at all beyond oral assertion. A copy of any written application has not been produced. There is no written acknowledgment or receipt of it. There is no detailed evidence as to which government department it was made to, or by what means it was made. Furthermore, if it is to be said that there is a general permission which allows travel between Saudi Arabia and the UAE, then there is no documentary evidence of that either. Merely producing a passport showing entry and exit visa stamps is nothing to the point, unless it is to be said that there is a process operated at the airport which would preclude leaving Saudi Arabia other than to certain defined destinations; but that is not alleged either. There is no written permission to travel to Switzerland. There is no evidence in writing of applications to travel to any of those jurisdictions.
8. In those circumstances, Mr. Nathan KC submits, on behalf of the claimant, this is an application which simply cannot be permitted because the evidence is bare assertion. I agree that there is every reason to be sceptical about the application and I am.
9. On the other hand, the point which is made on behalf of the defendants, this is an application which should be permitted because if what the defendants says is correct then the defendants will be precluded from giving evidence at all in relation to these proceedings and that would be grossly unfair, particularly in a case where it is highly likely the outcome will depend upon the cross-examination of respectively the claimant and the first and second defendants and where, although there are some documents that are relevant to the issues that arise, it is not possible to describe the case as heavily documented.
10. The defendants rely quite heavily on some case law which has developed during and since the pandemic which demonstrates a greater willingness to accept evidence

delivered remotely than has been the case in the past. In fact, perhaps the most helpful of the decisions identified was that of Moulder J, who in April 2022 in Deutsche Bank AG v Sebastian Holdings 2022] EWHC 1555 (Comm) expressed the view that:

"The experience of the pandemic has demonstrated that counsel are able to cross-examine witnesses effectively over a link and the court is able to assess the evidence of witnesses and form a view on the credibility of witnesses who give evidence remotely."

She went on to make the additional point that where the allegations that are being made are sufficiently grave, then arrangements can be put in place to ensure that the witness is being appropriately scrutinised by the court while giving evidence. She concluded by saying that ultimately the test which a court should apply is whether the use of remote evidence is likely to be beneficial to the efficient fair and economic disposal of the proceedings in the case. I respectfully agree.

11. I leave to one side the impact of costs considerations, because the marginal difference between travelling to London and giving evidence and giving evidence remotely from Saudi Arabia is a margin which is probably immaterial. However, focus on efficiency and fairness, and in particular fairness, engages a rather more serious inquiry.
12. Mr. Nathan submits that what I should do is simply say, that this is an application which should be in effect adjourned and, if necessary, should be dealt with shortly before the trial, if necessary by material supplied to a judge but not to the claimants, to enable the judge to reach a conclusion as to whether in the circumstances it is appropriate to order the evidence to be given remotely. The difficulty about that submission is that implicit within it is the thought that if an order were not made today, but would or might be made two or three weeks before the trial, that would persuade the defendants to make renewed efforts to obtain the permission they allege they have sought that would not be made if the order they seek is made now. I consider that implausible. If the defendants evidence concerning travel bans is false and is motivated by a desire to avoid coming to the United Kingdom to give evidence, then it is highly likely that the defendants will simply renew the application on the basis of the materials available, and the judge will be left in more or less the same position I am in now. If on the other hand the defendants genuinely want to come to this country to give evidence then making the order sought will not discourage them from continuing to seek permission, particularly when it is accepted that submissions as to weight can be made by reference to the evidence having been given remotely rather than in person.
13. It seems to me, therefore, that I have to grasp this particular nettle at this stage. In relation to fairness, I have to weigh on one side the fact that this is a high value claim the outcome of which depends on allegations and counter-allegations of dishonesty, each of which points to cross-examination forming a critical part of the way in which this case to be resolved. That points firmly towards the defendants attending the trial if possible. Balanced against that is the fact that the issue that arises is not between the defendants giving evidence and not giving evidence (unless this application is refused) but between cross examination in person and cross examination remotely. That suggests that the disadvantage to the claimant is much reduced, particularly since in an appropriate case submissions can be made concerning the weight that should be accorded to evidence given remotely. I also take into account that in my experience at

least cross-examination via a remote link (particularly where interpreters are not involved) is as effective or nearly as effective as cross-examination in person. These two last mentioned factors when taken together with the possibility that if an order is not made the defendants will not be able to attend and give evidence at all, leads to the conclusion that the order sought should be made. In a case such as this the possibility that the defendants may be prevented from giving evidence when the outcome is likely to depend crucially on that evidence is the determining factor.

14. In those circumstances I will make the order. However, the order will be subject to qualifications. The order will require that there be a solicitor present at all times when the defendants' evidence is being given in the room where the evidence is being given from. I also direct that there should be a 360-degree camera which enables all in court to view the whole of the room from where the evidence is being - something which was adopted in a case I heard very recently and which was remarkably effective.

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