

PARTIES: TOYATAKE YAMOUCHI
v
CHIZYKO KISHIMOTO

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO: 32/98 (9812964)

DELIVERED: 7 June 2002

HEARING DATES: 23, 24, 27, 29, 30 and 31 May 2002

JUDGMENT OF: THOMAS J

CATCHWORDS:

PROCEDURE – Supreme Court Procedure – taking of evidence abroad – application for letter of request seeking permission from Japanese authorities for Japanese witnesses to give evidence via video link to the Supreme Court of the Northern Territory of Australia – application for letter of request seeking consent of competent judicial authority to take evidence of Japanese witnesses on commission – application refused.

Supreme Court Rules 1994 (NT) O.41, O.41.13, O.41.01(1)(b)

Evidence Act 1994 (NT), s 49E, s 50

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, *Department of Foreign Affairs & Trade Canberra, Australian Treaty Series* 1992 No. 37, (Hague Convention)

REPRESENTATION:

Counsel:

Appellant: S. Walsh QC and S. Gearin
Respondent: J. Reeves QC and B. O’Loughlin

Solicitors:

Appellant: K. Hardy
Respondent: R. Bennett

Judgment category classification: C
Judgment ID Number: tho200206
Number of pages: 9

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Yamouchi v Kishimoto [2002] NTSC 36
No. 32/98 (9812964)

BETWEEN:

TOYATAKE YAMOUCHI
Appellant

AND:

CHIZYKO KISHIMOTO
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 7 June 2002)

- [1] This is an application made by Mr Walsh QC on behalf of the plaintiff for an order pursuant to Order 41.01(1)(b) of the Rules for a letter of request to issue from this Court.
- [2] The application relied on the supporting affidavit of Kate Julia Hardy sworn 25 March 2002 and affidavits of Ai Inoue sworn 7 May and 10 May 2002. Affidavit of Hideki Shimizu sworn 7 May 2002 and affidavit of Roger Phillip Bennett sworn 13 May 2002.
- [3] The application refers to four witnesses who are residents of Japan. The plaintiff seeks to have the evidence of the respective witnesses given in this

trial by way of video link between Japan and the Supreme Court of the Northern Territory of Australia.

- [4] In the alternative the letter of request seeks the consent of the competent judicial authority to take evidence on commission allowing for representation on behalf of the plaintiff and the defendant including examination in chief, cross examination and re-examination and that such evidence be reduced to writing with proper identification of any documents produced at the hearing and requesting transmission of this material to the Supreme Court of the Northern Territory of Australia.
- [5] However, the primary purpose of the letter of request is to seek permission from the relevant authority in Japan for the evidence of Japanese witnesses to be given via video link to the Supreme Court of the Northern Territory.
- [6] Order 41.01(1)(b) of the Supreme Court Rules provides as follows:

“41.01 Order for witness examination

(1) The Court may, for the purposes of a proceeding, make an order for –

.....

(b) the sending of a letter of request to the judicial authorities of another country to take, or have the evidence of a person taken.”

- [7] The other relevant provision is Order 41.13 which provides as follows:

“41.13 Letter of request

(1) Where an order is made under rule 41.01(1)(b) for the sending of a letter of request, the party obtaining the order (in this Order called "the applicant") shall, when the letter of request has been signed –

- (a) lodge with a Registrar –
 - (i) the letter of request;
 - (ii) all interrogatories and cross-interrogatories to accompany the letter of request; and
 - (iii) a translation of each of the documents mentioned in this paragraph in accordance with rule 41.14, unless the Master has given a general direction in relation to the place to whose judicial authorities the letter of request is to be sent that no translation need be provided or the official language or one of the official languages of that place is English;
- (b) file –
 - (i) a copy of each of the documents mentioned in paragraph (a); and
 - (ii) an undertaking in accordance with rule 41.15; and
- (c) unless the Court otherwise orders, serve a copy of each of the documents mentioned in paragraph (a) on all other parties.

(2) A letter of request shall be in Form 41D.”

[8] I note that Form 41D is addressed to “the competent judicial authority”.

[9] This application for an order that a letter of request issue is opposed by Mr Reeves QC on behalf of the defendant.

[10] Both counsel for the plaintiff and the defendant are in agreement that this Court cannot make an order for taking evidence by video link or on commission in Japan without making a request through diplomatic channels, seeking the assistance of the Japanese authorities in the taking of evidence, as a matter of international or judicial comity. To do otherwise would be to infringe Japanese sovereignty.

- [11] This is because there is no treaty in force between Australia and Japan relating to the taking of evidence in civil proceedings. Japan is not a party to the Hague Convention On the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (see Exhibit marked “KJH2” in the affidavit of Kate Julia Hardy sworn 25 March 2002).
- [12] The issue in dispute is whether or not it is appropriate at this time for this Court to order the issue of such a letter of request. The proposed draft letter of request prepared by solicitors for the plaintiff is attached to these reasons for decision.
- [13] In his submission, Mr Walsh QC stated that what the plaintiff wanted to determine by way of a letter of request process was whether the Japanese Government, in the first instance, will allow this Court to take evidence by video. This would be a request to the Ministry of Foreign Affairs or the Japanese Government.
- [14] The alternative submission is that there would be a request to the Japanese Court, if the plaintiff was not allowed to have witnesses give evidence on video, to enable evidence to be taken in Japan on commission. However, it was agreed that this alternative submission to take evidence on commission was subject to further argument the defence may wish to raise on the issue of prejudice.
- [15] Accordingly, the essential reason for making an application for a letter of request is to establish whether or not the plaintiff can call witnesses in Japan

to give evidence by way of video link to the Supreme Court of the Northern Territory.

- [16] I accept the submission made by Mr Walsh QC that without appropriate authorisation it would be a breach of Japanese sovereignty for this Court to order that such evidence be given by way of video link, because the room where the person is giving evidence on video is deemed to be part of the Northern Territory Supreme Court.
- [17] I agree that permission from the appropriate authority in Japan should be obtained before any orders can be made to enable evidence to be given by witnesses in Japan by way of video link to the Northern Territory. Subject to obtaining such authority, s 49E of the Evidence Act gives this Court power, subject to certain conditions, to order that evidence be taken by video from a place outside Australia.
- [18] It would appear that this initial authority must come from the administrative arm of government rather than the judicial arm of government.
- [19] I accept that there is a procedure under Order 41 of the Supreme Court Rules for this Court to address a letter of request to an “appropriate judicial officer” where it involves for example a request that evidence be taken on commission. Such a request involves participation of such judicial authority or other competent person. However, the giving of evidence on video link may not necessarily involve a judicial officer in Japan as such evidence

could be given by the witness from any video conferencing facility and without assistance from a judicial officer in Japan.

[20] The power to order the issue of a letter of request is contained in s 50 of the Evidence Act which provides as follows:

(1) This section applies to any proceeding before the Supreme Court, the Local Court or the Court of Summary Jurisdiction, other than a proceeding in which the court in question is exercising jurisdiction conferred on or vested in it by an Act of the Commonwealth.

(2) Where on the application of a party to any proceeding to which this section applies it appears to the court that it is in the interests of justice to do so, the court may in its discretion make in relation to a person outside the Territory an order –

- (a) for the examination of the person on oath at any place outside the Territory before a judge or justice of the court, an officer of the court, or such other person as the court may appoint;
- (b) for the issue of a commission for the examination of the person on oath at any place outside the Territory; or
- (c) for the issue to an appropriate judicial authority of a place outside the Territory of a letter of request to take, or cause to be taken, the person's evidence.

(3) In subsection (2)(c), "appropriate judicial authority" means –

- (a) in relation to a place in Australia (including a place in any external Territory of the Commonwealth for the government of which as a Territory provision is made by any Act of the Commonwealth) – a court or authority prescribed as such for that place; and
- (b) in relation to any other place – an authority appearing to the court to be appropriate having regard to the law of that place.

(4) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the court shall have regard include –

- (a) whether the person is willing or able to come to the Territory to give evidence in the proceeding;
- (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding; and
- (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting the order or refusing it.

(5) Where a court makes an order within subsection (2)(a) or (b), it may in its discretion (at the time of making the order or at a subsequent time) give such directions as it thinks just relating to the procedure to be followed in and in relation to the examination, including directions as to the time, place and manner of the examination and any other matter that the court thinks relevant.

(6) Where a court makes an order within subsection (2)(c), it may in its discretion include in the order a request as to any matter relating to the taking of the person's evidence, including –

- (a) the examination, cross-examination or re-examination of the person, whether his evidence is given orally, upon affidavit or otherwise;
- (b) the attendance of the legal representative of each party to the proceeding in which the order is made, and the participation of those persons in the examination in appropriate circumstances; and
- (c) any prescribed matter.”

[21] I note in particular subsection (3) which defines the meaning of “appropriate judicial authority” to whom the letter of request should issue.

[22] I consider there is insufficient evidence in support of this application for a letter of request to issue. This Court should be informed by the party making the application as to any relevant law in Japan which may govern the taking of evidence by video transmission from Japan to the Northern Territory of Australia. The information sheet from the Commonwealth Attorney General’s Office (Annexure KJH2 to the affidavit of Kate Julia Hardy sworn 25 March 2002) states inter alia:

“Other methods for the taking of evidence

The Japanese Ministry of Justice advised in March 1999 that evidence cannot be taken on commission in Japan by an Australian, in any circumstances. Evidence can only be taken by a Japanese court acting on a letter of request from the Australian court that has been transmitted through diplomatic channels. Also, evidence cannot be taken by video link.”

If this information is correct then evidence cannot be taken by video link.

- [23] If there have been any changes since March 1999 or it does not apply in civil cases where the witnesses are willing to give evidence by video transmission then this Court should be properly informed as to the law in Japan and the appropriate procedure. Such information should be obtained from persons properly qualified to inform this Court as to the law in Japan and the correct procedure, if in fact there are provisions that enable witnesses in Japan to give evidence by way of video link up to the Northern Territory Supreme Court.
- [24] I agree with the submissions made by Mr Reeves QC on behalf of the defendant that this application is premature and has not properly laid the foundation to support an order for the issue of a letter of request.
- [25] I note that Form 41D in the Supreme Court Rules does not address the issue of taking evidence on video.
- [26] I agree with the submission made by Mr Reeves QC, that the applicant should produce evidence as to what the appropriate authorities in Japan

advise can be done, before this Court makes an order for a letter of request to “an appropriate judicial authority”.

[27] It may ultimately be appropriate to issue a letter of request to “an appropriate judicial authority”. However, with respect to giving of evidence by video link up it may not be necessary to involve a Court or judicial authority in Japan if the video facilities are in places other than a court and the Japanese Government permit Japanese residents to give evidence via video link up wherever that facility may be located.

[28] I agree with Mr Reeves’ submission that it is for the applicant to inform this Court as to the law that gives this Court the power to make orders which would enable witnesses to give evidence by video link up from Japan, rather than the source of that power be ascertained through the “letter of request” system.

[29] Subject to arguments on the question of prejudice, the letter of request can be used to enable evidence to be taken on commission in Japan. It is not at all clear that a “letter of request” is the correct procedure with respect to seeking that such evidence be given by way of video link.

[30] Accordingly the application is refused.
