

COVID-19: Virtually Swearing: The Taking of Oaths over Video Call.

The Concept of the Oath

In the renowned English judgment of *Omychund v Barker* (1744) 1 ATK 22, Lord Chancellor Hardwicke overturned a maxim of English law that only a Christian could swear an oath. *Omychund* was a significant judgment in developing English law in circumstances where, as recognised in the judgment, England at that time was becoming an epicentre for global commerce that relied upon commercial certainty and business efficacy. Legal codes needed to keep pace with prevailing trends and changing attitudes. Commerce required the trust in and enforcement of promises and the judgment emphatically stated (at 31):

“It is of the greatest moment, that we should have commerce and correspondence with all mankind; trade requires it, policy requires it, and in dealings of this kind it is of infinite consequence, there should not be a failure of justice.”

From the earliest passages of the Old Testament, the oath was the most sacred method of affirming or denying a thing, in order to “*bindeth his soul with a bond*” (Numbers 30:2). However, the concept of swearing an oath was not in fact solely a mechanism of Christian antiquity. The ancient Greeks incorporated oaths into social, political, legal and literary life. Homer wrote of heroes and demi-gods frequently confirming their promises or threats with an unalterable oath (see the *Iliad*, XXIII, 42), Thucydides recorded the process of swearing of oaths to guarantee the integrity of treaties (*History of the Peloponnesian War*, V, 47, 8) and Aristotle wrote of the swearing of an oath of office (*Athenaion Politeia*, 3, 3). By the time of the 18th Century and the judgment in *Omychund* it was an established tenet of English law that the sanctity of the oath was the strongest possible guarantee of truth (see for example *Lord Shaftesbury v Lord Digby* (1675) 3 Keble 631).

Oaths under Isle of Man Law

The Isle of Man has its own laws, promulgated by its parliament Tynwald, and common law (historically called ‘*Breast law*’) interpreted by the ancient office of the Deemsters in the High Court of Justice. Like the laws and process of England & Wales, the mechanism of swearing oaths has a long history in the Island; the Customary Laws Act of 1422 refers to the swearing of promises under oath before Manx courts.

Under Manx law the oath is sacrosanct and making a statement under oath that a deponent knows to be false or does not believe to be true is a criminal offence under the Perjury Act 1952. Like in England & Wales, an oath is required to swear the veracity of an affidavit of a deponent. Affidavits, although now largely superseded by witness statements in court process, continue to undertake an important function. For example, to engage a Manx court’s will to order the extreme ‘*Nuclear weapons*’ of civil litigation (per Donaldson LJ in *Bank Mellat v Nikpour* [1985] F.S.R. 87) in the form of Search Orders and Freezing Injunctions, affidavit evidence is required in support under the Rules of the High Court of Justice 2009 (Schedule 7.2(3)).

The Process of Taking Oaths

The process of the taking of oaths under the laws of the Isle of Man is governed by the Evidence Act 1871. Section 40 of the Evidence Act 1871 provides that for an oath to be used in any matter in the Isle of Man, it can be taken “*before any*” person in the Isle of Man sanctioned under Isle of Man law to administer oaths (“the Commissioner”). Such authorised persons include Commissioner for Oaths who are practising advocates or “*other fit and proper persons*” that are appointed by the Clerk of the Rolls under powers afforded by section 1 of the Commissioner for Oaths Act 1962. Section 3 of that Act sets out that on taking an oath a Commissioner for Oaths must state in the attestation at what place and on what date the oath was taken

Following the passing of the Oaths Act 1922, an affirmation can be taken by a Commissioner. An affirmative is the alternative to swearing an oath and carries the same credence. Accordingly, under the Interpretation Act 1976 reference to swearing or swear in an Act of Tynwald can be read as affirmation or affirm.

The Use of Video Conferencing to take Oaths

As the judgment of *Omychund v Barker* illustrates, the common law is a living system of law that can readily provide new interpretations of the law, to keep it up-to-date with changes in social and technological conditions. The Isle of Man court has recognised this role, in the judgment of *R v Parton* 2009 MLR 370 at paragraphs [101] and [102] Deemster Doyle referred to the comments of Lord Nicholls in the House of Lords judgment of *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41:

“For centuries judges have been charged with the responsibility of keeping this law abreast of social conditions and expectations. That is still the position... It is because of this that the common law is a living system of law, reacting to new events and new ideas.”

The global events and changes engendered by the COVID-19 pandemic has provided the context for an evolution in business practice in circumstances where social isolation and home-working is a ubiquitous reality. As examples, [the use of electronic signatures](#), [changes to the convening of AGMs](#) and the [use of remote Court hearings](#). Another expedient to support business continuity may be the use of video conferencing platforms to swear oaths.

As indicated above, for an oath to be validly taken under Isle of Man law it must be sworn “*before*” a Commissioner in the Isle of Man. The Isle of Man courts have not provided any recent interpretation of the law relevant to the taking of oaths in the Isle of Man. The Evidence Act 1871 celebrates its 150th birthday next year and clearly was not envisaged to encompass the Commissioner and deponent being physically located, for example, at opposite ends of the Isle of Man, and connected via linked cameras.

However, appreciating the COVID-19 context where physical distancing is paramount, the fact that video conferencing can afford all the practicalities in effect of a Commissioner being physically in the room with a deponent, it appears there may be no legal impediment to prevent a court or other public body from accepting an oath sworn before a Commissioner using a video conferencing platform. However, given the lack of a court decision on the subject or the issuing of any formal guidance from public bodies in the Isle of Man, there remains a risk that an oath taken in this manner could be challenged and rejected as failing to comply with the legislation.

Subject to the above caveats, if COVID-19 circumstances dictate a necessity to make use of video conferencing platforms for the swearing of documents, a Commissioner will have to be satisfied that the taking of an oath in this manner complies with the spirit of the legislation and does not put them at risk of failing to properly administer an oath. In administering the oath remotely, it is suggested that a Commissioner might consider the following matters to ensure best practice and enhance the chances of the remote swearing being treated as valid:

- Check that it is not a matter in which the Commissioner or their employer have any interest (applicable whether an oath is being taken electronically or physically).
- In circumstances where the oath is being sworn over video conferencing, the signed affidavit should be sent (electronically or physically) to the Commissioner in advance of the oath being taken.
- Whilst taking the oath, the deponent should confirm to the Commissioner that the signature of the affidavit is their own. It will be sufficient for the Commissioner to accept the deponent's word that it was their signature, unless there is clear evidence to the contrary.
- It would also be good practice to ensure that the deponent appears to understand what they are doing and that the purpose is to confirm that the contents of the document and any attachments are true.
- The Commissioner should ensure that the exhibits, if any, are the documents referred to. This will be satisfied by ensuring that the deponent includes in the oath "*and that these are the exhibits referred to*".
- As the Commissioner is under a legal duty to state the location the oath was taken, the attestation clause should include the location of both the Commissioner and the deponent and that it was taken via a video conferencing platform.

For more
information
please contact



Andrew Langan-Newton
Associate
+44 1624 638373
andrew.langan-newton@cains.com

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts at Cains or the above individuals.

T: +44 1624 638300 | E: law@cains.com | Cains, Fort Anne, Douglas, Isle of Man IM1 5PD

Cains is the trading name of Cains Advocates Limited, an incorporated legal practice in the Isle of Man with registered number 009770V. A list of all the directors' names is open to inspection at Cains' registered office. Registered office: Fort Anne, Douglas, Isle of Man IM1 5PD