Fairness Trumps All: Supreme Court Reverses the Decision of the Court of Appeal in TUI UK Ltd v Griffiths

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Author: Cassandra Williams

The Supreme Court has handed down its highly anticipated decision in *TUI UK Ltd v Griffiths* [2023] UKSC 48. The Supreme Court unanimously allowed the appeal of the Claimant, reversing the decision of the Court of Appeal. The judgment can be accessed here. The decision of the Court of Appeal is discussed in the author's blog entitled "Uncontroverted Expert Evidence is Not Incontrovertible", which can be accessed here.

The Background

The proceedings arise out of a claim brought by the Claimant for gastric illness that he suffered whilst on a package holiday to Turkey, which was supplied by the Defendant. The Claimant alleged that he developed acute gastroenteritis as a result of the consumption of contaminated food or fluid at the hotel where he was staying as part of the package holiday.

The Claimant relied on evidence from a microbiologist on the issue of causation. The Defendant obtained permission to rely on expert evidence but failed to serve a report from a microbiologist. The Defendant was left without any expert evidence at trial.

There was no dispute that the Claimant's microbiology evidence was uncontroverted in the sense that, the Defendant did not challenge or undermine it by calling or adducing any of its own evidence and, the Defendant did not successfully undermine the factual basis of the Claimant's expert evidence through cross examination of the Claimant and his witness.

Despite the Claimant's evidence being uncontroverted, the judge at first instance rejected the evidence of the Claimant's microbiologist essentially finding that the expert had failed, in a number of significant and material respects to adequately substantiate his conclusion that the Claimant's illness was caused by eating hotel food and that accordingly, those conclusions could not be relied upon and thus the Claimant could not prove his case. The claim was therefore dismissed.

The Claimant appealed.

The Decision of the High Court

Martin Spencer J allowed the appeal on the basis that where an expert report is uncontroverted, the court's only role is to decide whether the report meets certain minimum standards that any expert report must satisfy; those being that the report must be one which cannot be characterised as bare *ipse dixit* and the report must comply with the Practice Direction to CPR Part 35. Once the report meets those standards, if it is truly uncontroverted, the role of the court to analyse, critique and evaluate the report falls away.

Martin Spencer J considered that the Claimant's expert evidence met those minimum standards. The decision of the High Court is discussed in the author's blog entitled "The Limitations of Challenging Uncontroverted Expert Evidence", which can be accessed here.

The Defendant appealed.

The Decision of the Court of Appeal

By a majority (Bean LJ dissenting), the Court of Appeal disagreed with the decision of Martin Spencer J and allowed the Defendant's appeal.

Asplin LJ considered that there was no rule that an expert's report which is uncontroverted and which complies with CPR PD 35 cannot be impugned by submissions and ultimately rejected by the Judge.

Asplin LJ observed at [65]:

"I can see nothing which is inherently unfair in seeking to challenge expert evidence in closing submissions. It may be a high risk strategy to choose neither to adduce contrary evidence nor to seek to cross-examine the expert but there is nothing impermissible about it… As long as the expert's veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so. The defendant is entitled to submit that the case or an essential aspect of it has not been proved to the requisite standard. He cannot be prevented from doing so because some of the evidence is contained in an uncontroverted expert's report. Furthermore, he cannot be required to file his own contrary expert's evidence in order to enable the court to weigh the evidence. The Judge cannot be prevented from considering the quality of such evidence in order to determine whether the burden of proof is satisfied just because it is uncontroverted. As Judge Truman stated, the court is not a rubber stamp. If it were otherwise, the court would be bound by an uncontroverted expert's report which satisfied CPR PD 35, even if the conclusion was only supported by nonsense."

Bean LJ "*profoundly*" disagreed with the view of his colleagues that a party may reserve its criticisms of a report until

closing submissions if it chooses to do so. His Lordship considered that the Claimant did not have a fair trial of his claim and that the court should not allow litigation by ambush.

The Claimant appealed.

The Decision of the Supreme Court

The judgment was delivered by Lord Hodge, with whom the other Justices agreed.

His Lordship considered that the principal questions raised on the appeal were:

1. What is the scope of the rule, based on fairness, that a party should challenge by cross-examination evidence that it wishes to impugn in submissions at the end of the trial?

2. In particular, does the rule extend to attacks in submissions on the reliability of a witnesses' recollection and on the reasoning of an expert witness?

3. If the rule does so extend, was there unfairness in the way in which the trial conducted the trial in this case?

Lord Hodge observed that it is trite law that the role of an expert is to assist the court on matters of specialised knowledge, outside of the Judge's expertise but must not usurp the functions of the Judge as the ultimate decision-maker on the central issues in the case. The quality of the expert's reasoning is therefore of prime importance. His Lordship agreed with the following statement of Jacob J in *Routestone Ltd v Minories Finance Ltd* [1997] BCC 180, 188:

"What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does. If not, not."

Lord Hodge considered that it was the task of a Judge in conducting a trial in an adversarial system to make sure that the trial is fair and, regarded it as the task of the judiciary and the makers of the procedural rules to formulate rules and procedures to that end.

Lord Hodge identified (and endorsed) the statement of one such long-established rule set out in *Phipson on Evidence* (20th ed.) (2022) at 12-12:

"*In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected*."

Lord Hodge explored in his judgment, at some length, numerous cases confirming the existence of this rule. His Lordship observed however at [43] that:

"*[the rule] is not simply a matter of extensive legal precedents in case law. It is a matter of fairness of the legal proceedings as a whole. While many of the cases may have been concerned with challenges to the honesty of a witness, I see no rational basis for confining the rule to such cases or those analogous categories, such as allegations of bad faith or aspersions against a witness's character.*"

At [47], Lord Hodge derived assistance from the following passage in *Browne v Dunn* (1893) 6 R 67, 76-77 per Lord Halsbury:

"*To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or the accuracy of the facts they have deposed to*".

Lord Hodge identified seven exceptions to this rule at [61]-[68] of his judgment (which he did not consider to apply in the present case), recognising that the rule was not an inflexible one.

Having reviewed the relevant case law, Lord Hodge laid down the following propositions at [70]:

1. The general rule is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

2. In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

3. The rationale of the rule i.e. preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

4. Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned. An expert witness, in particular may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

5. Maintaining such fairness also includes enabling the Judge to make a proper assessment of all the evidence to achieve justice in the case.

6. Cross-examination gives the witness the opportunity to explain or clarify his or her evidence.

7. The rule should not be applied rigidly.

8. There are circumstances in which the rule may not apply (see the seven exceptions to the rule referred to above).

Applying the law to the facts, Lord Hodge concluded that in the absence of a proper challenge to the evidence of the Claimant's microbiologist on cross examination, it was not fair for the Defendant to advance detailed criticisms of that evidence in its submissions or for the trial Judge to accept those submissions. The Defendant's CPR Part 35 questions were not clearly focused on the matters which were the objects of criticism during the course of submissions and did not put the Claimant's expert on notice of those criticisms.

Lord Hodge considered that the trial Judge did not consider the effect on the fairness of the trial of the Defendant's failure to cross-examine the Claimant's expert and considered that the Claimant did not have a fair trial. His Lordship therefore concluded at [76] that both the trial Judge and the majority of the Court of Appeal "*erred in law in a significant way*".

In view of these errors in law, Lord Hodge considered that the Court must conduct its own assessment of the evidence. His Lordship made the following observations:

- The Claimant's expert evidence was unchallenged and therefore uncontroverted.

- The trial Judge had accepted in full the factual evidence of the Claimant and his wife.

- Although the Claimant's expert evidence left many questions unanswered, it was not bare *ipse dixit* and he explained an important part of his reasoning in the answers that he gave to CPR Part 35 questions.

- The expert's assessment of causation was expressed with a high level of generality but was not irrational and may have been proportionate to the circumstances of the claim.

- There was no basis for the concluding that the Claimant's expert would not have explained his reasoning more clearly if challenged on cross-examination.

Lord Hodge therefore concluded that the Claimant had established his case on the balance of probabilities.

Comment

The battle between Mr Griffiths and TUI has become something of a saga, but we now have a definitive decision from the final court of appeal. The clear emphasis on fairness in the judgment leaves no room for doubt that this is of paramount importance in legal proceedings.

The judgment makes clear that there are limited circumstances where a party will be permitted to criticise the expert evidence of an opposing party in closing submissions, where they have not:

- raised those criticisms by way of focused CPR Part 35 questions to enable the expert to explain their evidence in response to those challenges; or;

- challenged that expert's evidence in cross-examination.

Practitioners should think very carefully before deciding not to challenge the disputed expert evidence of an opposing party. Considering the highly prescriptive provisions of CPR Part 35, it will be rare for an expert's report to be so obviously bare *ipse dixit* or otherwise devoid of reasoning that it can be left uncontroverted but remain controvertible at trial.