Can uncontroverted expert evidence be rejected?

On 29 November 2023 the Supreme Court handed down its judgment in TUI UK Ltd v Griffiths[1]. The appeal to the Supreme Court raised an important question of the fairness in the original trial, namely whether the trial judge was entitled to find that the claimant had not proved his case when his expert witness had given uncontroverted evidence on causation that was not illogical, incoherent or inconsistent, or based on any misunderstanding of the facts or unrealistic assumptions.

The unanimous decision of the judges in the Supreme Court set out in the speech of Lord Hodge is the culmination of a long-running saga concerning a relatively modest dispute arising out of a package holiday in 2014.

Although this is a travel industry case, the judgment confirms some important principles that are of general application to expert witness evidence in civil cases.

The Facts

Mr. Griffiths entered into a contract with TUI for a 15-night all-inclusive package holiday for his family and himself in Turkey between 2 and 16 August 2014. Mr. Griffiths fell ill while on holiday and ended up in hospital with acute gastroenteritis.

In August 2017 Mr. Griffiths commenced an action in the County Court claiming damages from TUI. TUI denied the claim and put Mr. Griffiths to proof as to the cause of his illness.

Mr. Griffiths relied *inter alia* upon an expert report from a microbiologist dealing with matters of causation. After service of the report, TUI put written questions to the expert pursuant to CPR Part 35.6, which he answered. TUI did not rely on any expert evidence of its own.

TUI did not seek to have Mr. Griffiths' expert witness attend the trial for cross-examination, with the result being that his evidence was accepted on paper. His expert evidence was, therefore, uncontroverted in the sense that it was not subject to challenge by cross-examination and, moreover, was not in conflict with any other evidence led at the trial.

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[1] [2023] UKSC 48

Notwithstanding this, counsel for TUI made specific criticisms of the expert's evidence in opening and closing submissions.

In judgment, the trial judge accepted the factual evidence of Mr. and Mrs. Griffiths, who she described as patently honest and straightforward witnesses. The only expert evidence on causation before the trial judge was the uncontroverted expert report of the microbiologist and his answers to the CPR Pt 35.6 questions. The judge nonetheless accepted TUI's challenges to the expert's report and was separately critical of some of his conclusions and answers to the CPR Pt 35.6 questions. The judge concluded that Mr. Griffiths had not proved his case and dismissed the claim.

Mr. Griffiths appealed to the High Court. In a judgment dated 20 August 2020[2] Spencer J allowed the appeal on the grounds that the trial judge was not entitled to reject the uncontroverted evidence of the expert, which he was satisfied complied with the minimum requirements of CPR Practice Direction 35.

TUI appealed. In a judgment dated 7 October 2021[3] the majority of the Court of Appeal (Asplin LJ and Nugee LJ) allowed the appeal, with Bean LJ dissenting. Asplin LJ delivered the leading speech, concluding that Spencer J had erred in law in holding that, where an expert's report is uncontroverted, the court is not entitled to evaluate the report but need only to ask itself whether the report meets the minimum standards prescribed by CPR PD 35. Bean LJ dissented in strong terms, describing it as trite law that a party is required to challenge the evidence of any witness of the opposing party in cross-examination if it wishes to submit to the Court that the evidence should not be accepted.

The Law

Following a detailed review of the legal authorities, the Supreme Court identified the following relevant propositions:

1. The general rule in civil cases is that a party is required to challenge by cross-examination the evidence of any fact or expert witness of the opposing party on a material point which it wishes to submit should not be accepted.

2. 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, whether on the basis of dishonesty, inaccuracy or other inadequacy. 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 so as to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

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

7. It is not, however, an inflexible rule. Its application depends upon the circumstances of the case, as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, for example, the trial judge has set a limit on the time for cross-

[2] [2020] EWHC 2268 (QB)
[3] [2021] EWCA Civ 1442

examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

8. Examples of further circumstances in which the rule may not apply include:

   (a) the matter to which the challenge is directed is collateral or insignificant and fairness to the witness does not require there to be an opportunity to answer or explain.

   (b) the evidence of fact may be manifestly incredible, and an opportunity to explain on cross-examination would make no difference.

   (c) there may be a bold assertion of opinion in an expert's report without any reasoning to support it, i.e., a bare *ipse dixit* (an argument based solely upon the authority of the witness), although reasoning which appears inadequate and is open to criticism for that reason is not the same as a bare *ipse dixit*.

   (d) there may be an obvious mistake on the face of an expert report.

   (e) the witnesses' evidence of the facts may be contrary to the basis on which the expert expressed his or her view in the expert report.

   (f) an expert has been given a sufficient opportunity to respond to criticism of, or otherwise clarify, his or her report. For example, if an expert faces focused questions in the written CPR Pt 35.6 questions of the opposing party and fails to answer them satisfactorily, a court may conclude that the expert has been given a sufficient opportunity to explain the report negating the need for further challenge on cross-examination.

   (g) a failure to comply with the requirements of CPR PD 35 may be a further exception, but a party seeking to rely on such a failure would be wise to seek the directions of the trial judge before doing so, as much will depend upon the seriousness of the failure.

   (h) there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a later witness.

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Application of the Law to the Facts

In assessing the fairness of the trial, the Supreme Court considered it important to have regard to TUI's conduct in not (i) calling fact or expert evidence of its own, (ii) asking questions under CPR Part 35.6 that were focussed on the criticisms relied upon at trial, (iii) putting the expert on notice of such criticisms and (iv) requesting that he attend trial for cross-examination.

The Court was also critical of Mr. Griffiths' expert's report, which was said to be terse, could and should have included more expansive reasoning, and left many relevant questions unanswered. However, it noted the factual evidence that was available to, and considered by, the expert—which evidence was accepted by the trial judge—and concluded that the report was far from a bare *ipse dixit*. Furthermore, the Court accepted that the expert may have thought that his full reasoning was implicit in the context of what was a claim of relatively low value. The Court also noted that an important part of the expert's reasoning was explained in his answers to the CPR Part 35.6 questions.

Although the Court concluded that the expert's assessment of causation was high level, it was found not to be irrational and may have been proportionate. The Court also decided that none of the exceptions identified under proposition eight (above) applied, and there was no basis for any assumption that the expert's reasoning would not have been explained more clearly if challenged in cross-examination.

The Supreme Court concluded that both the trial judge and the Court of Appeal failed properly to address the application of the rules to the facts of the case and therefore erred in law in a significant way. Accordingly, the Court decided that Mr. Griffiths did not receive a fair trial and allowed the appeal.

Can Uncontroverted Expert Evidence Be Rejected? The Take-aways

There are lessons from this judgment for the parties and their legal advisors, experts and tribunals.

Parties and their legal advisers should think carefully before deciding not to require a potentially important witness to attend a trial or hearing for cross-examination and should ensure that all material points are put to a relevant witness.

Experts should take care to ensure that the reasons for their opinions are adequately explained in their reports.

Tribunals should be slow to reject uncontroverted witness evidence unless one or more exceptions of the kind identified by the Supreme Court are relevant, or the circumstances of the case are such that it would otherwise be fair to do so.

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