Falcon Chambers

Griffiths v TUI UK Ltd [2023] UKSC 48

Facts

Mr Griffiths did not have a good holiday. Having rapidly fallen sick on arrival in Turkey, he spent days in his hotel room and later in hospital with acute gastroenteritis. He suspected his illness resulted from contaminated food or fluid consumed in the hotel.

Mr Griffiths sued his all-inclusive holiday provider, Tui, for breach of contract. He relied on expert evidence as to the cause of his sickness to prove his claim.

In a terse written report and short answers to questions under CPR 35.6 the expert concluded on balance of probabilities Mr Griffiths had picked up his illness in the hotel.

Tui did not file expert evidence of its own, or seek to cross-examine the expert at trial.

Instead, trial counsel for Tui criticised the expert report as poorly reasoned and unreliable in a skeleton filed the afternoon before, and in closing submissions.

Rulings below

The trial judge agreed with Tui. It was for Mr Griffiths to prove his case; and the expert's evidence was unsatisfactory. Mr Griffiths had failed to prove causation to the civil standard of proof.

On appeal, the High Court overturned the trial judge.

Tui appealed, and the Court of Appeal (by a 2-1 majority) restored the trial judge's ruling.

Per Nugee LJ:

> *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. […] 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.*
>
> *[T]he expert and the party for whom he or she has been called are not entitled to require the opposing party to give them an opportunity to make good deficiencies in their evidence by seeking permission to pose further questions or by cross-examining the expert witness whose report contains lacunae in the subject matter considered or in the reasoning.*

Supreme Court decision

The Supreme Court has now (29 November 2023) unanimously rejected the Court of Appeal's approach, and in doing so has reasserted one of the rules integral to the right to a fair trial – the rule in *Browne v Dunn* (1893) 6 R. 67 – and explained how that rule interacts with the burden of proof in civil litigation.

Lord Hodge (giving the only judgment) explained that a decision by a judge not to follow an opinion expressed by an expert who has not been cross-examined (an "uncontroverted" opinion) will usually render a trial unfair.

Unless uncontroverted expert's evidence is incredible, it must be accepted. It is not simply a matter of weight, in part of the overall assessment of whether the claimant has proved its case on the balance of probabilities.

The Court made clear that the rule in *Browne v Dunn* applies both to witnesses of fact, and expert witnesses. It is not restricted to attacks on the reliability of a witness's recollection or credibility, but is a wider rule based on essential procedural fairness.

Why is it that a defendant cannot simply sit back and require the claimant to prove its case – the "high risk" strategy that Nugee LJ referred to?

Whilst the Claimant bears the burden of proof, under English law a trial judge does not decide the case by inquisition. The judge must decide the issues placed before the court by the parties; mindful always of the core principle that the parties must each have a fair chance to meet the case put against them. There must not be "trial by ambush" at the eleventh hour.

Here, the critique that had won over the trial judge was presented only in Counsel's skeleton argument and in closing – when it was far too late for Mr Griffiths to arrange for his expert to attend trial to answer the criticism made against his report.

As well as being a principle of fairness, it is also necessary for the trial judge to reach a sound conclusion to see how the witness responds to the case put against their evidence.

Understood in that light, there is no basis for confining the principle to challenges to the honesty of a witness of fact, or to analogous suggestions of bad faith or other aspersions against a witness's character.

Absolute fairness is an ideal for which parties and the Court must strive; but of course, the ultimate question of whether a trial is or is not fair cannot be settled by absolute requirements in every case.

In a concession to the realities of day-to-day litigation, Lord Hodge qualified the rule with **seven** important examples of when cross-examination would not be required:

1. **Firstly**, it may be disproportionate and unrealistic to expect every possible reason for disbelieving a witness, especially in a complex case, to be put to the witness: fairness does not require every collateral or insignificant matter to be put to the witness to answer or explain.

2. **Secondly**, if evidence is manifestly incredible, and the opportunity to explain would make no difference, e.g. if the contemporaneous documents properly understood put the position beyond doubt.

3. **Thirdly**, a naked assertion of opinion without any reasoning to support it – bare *ipse dixit* – does not need to be challenged. But, as with the expert report here, reasoning that appears inadequate and open to criticism is not the same as bare assertion.

4. **Fourthly**, in the event of an obvious absurdity or mistake on the face of an expert report.

5. **Fifthly**, a witness or expert's evidence may be based on assumptions which are incorrect or incomplete and ill-founded.

6. **Sixthly**, an expert may have already been given sufficient opportunity to respond to criticism – e.g. if there have been questions put with sufficient particularity under CPR 35.6 to which no satisfactory answers are given.

7. **Seventhly**, 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.

Commentary

This author confesses to having been initially persuaded by Nugee LJ below. One's heart goes out to trial counsel, who no doubt sought to do the best they could at the point of instruction and whose apparent error was doing perhaps a little *too* well on their feet.

It may seem counter-intuitive that the right thing to do when faced with a poor expert report is to invite the other side to perfect it.

But the Supreme Court was clearly right to clarify and re-state the ambit of the rule in *Browne v Dunn* and the reminders of the essential nature of English litigation, and the principle of fairness in adversarial proceedings are welcome.

And the Court also took pains to note that none of this need lead to disproportionate expense and anxious cross-examination for the sake of it.

By giving several clear steers on where cross-examination is not required, parties and their advisers (and trial advocates) should now be well-placed to understand the importance of when (and when not) to cross-examine. Rather than take the high-risk "you claim it, you prove it" stance, a judicious use of appropriately focussed questions – sent well before the deadline for skeleton arguments – or a joint meeting of experts, should ensure that if a critique is indeed well-founded, it can be safely relied on at trial.

Trial counsel will also note the observation that *"a focused cross-examination making the challenge and giving the expert the opportunity to explain his or her report and CPR Pt 35.6 answers need not be long."*

The Supreme Court's decision can be found here.

JAMES TIPLER

30 NOVEMBER 2023