Tui UK Ltd. V. Griffiths [2023] UKSC 48

This was a claim brought under the Package Travel Regulations of 1992 for damages for a serious stomach illness with lasting consequences suffered on an "all-inclusive" holiday at a Turkish resort which the claimant Mr Griffiths had booked with the defendant Tui UK Ltd.

The claim failed in the County Court but the claimant's appeal was allowed by Martin Spencer J. The defendant travel company's appeal to the Court of Appeal was upheld by a majority of 2 to 1, only for Martin Spencer J's conclusion to be restored by a unanimous single judgment from the Supreme Court, given by Lord Hodge[1].

The occurrence of significant illness was not disputed. The claimant had had to be admitted to hospital in Turkey and his evidence of serious ongoing symptoms was accepted by the trial judge (see [6] and [10]). The trial judge would have awarded £29,000 for PSLA - see [6].

The issue was causation, in particular whether the contaminated food causing the illness had been consumed at the defendant's resort or elsewhere.

Relevant to the context of the trial was an earlier decision of the Court of Appeal involving the same travel company *Wood v TUI Travel plc* [2017] EWCA Civ 11 where in response to the "floodgates" argument that tour operators were potentially liable for every upset stomach on holiday, the Court of Appeal emphasised the requirement upon each such claimant to prove that the cause of their illness was the defendant's fault as opposed to other well-known causes (see [2017] EWCA Civ at [29] and [34]).

The only expert evidence on the crucial causation issue in this case was from the claimant's expert microbiologist Prof Pennington and was in the form of a report and replies to questions under CPR rule 35.6 (see [12] – [15]). Notably the defendant had evidence from a microbiologist Dr Gant whom it elected not to call [9]. The defendant also failed to meet the procedural requirements to call evidence from its expert gastroenterologist [9].

[1] Unless otherwise stated all paragraph number references are references to Lord Hodge' s judgment

The defendant did not require the claimant to call Prof Pennington at trial and gave no notice of a challenge to Prof Pennington's analysis and conclusion until its skeleton argument served on the afternoon before trial [11].

It is clear that the reasoning in Prof Pennington's report was open to question - this is acknowledged both by Martin Spencer J (see [24]) and the Supreme Court (see [73]), but crucially it was not a bare and unreasoned statement of opinion - described as "ipse dixit".

The claim failed in the County Court because the trial judge accepted the defendant's criticism made in submissions and rejected Prof Pennington's evidence – see [18]- [19].

Martin Spencer J held (in summary) that where there was uncontroverted expert evidence which was more than a bare assertion of opinion then the court had no role to play. There was no weighing of the evidence to be done – the evidence would stand as uncontroverted evidence. That was so even if the reasoning might have been better expressed – see [24] – [25].

By 2 to 1 the Court of Appeal overturned that approach, finding that there was scope to challenge in submissions evidence that had not been challenged in cross examination. The majority was Asplin and Nugee L.JJ. The Supreme Court describes the dissenting judgment of Bean LJ as powerful [76].

The Supreme Court was unanimous in overturning the Court of Appeal's decision and vindicating the approach of Martin Spencer J and Bean LJ.

The central point on the facts of the particular case was that the expert report in question – although open to some criticism – was not a bare statement of opinion (the ipse dixit). The Supreme Court emphasised the cruciality of there being reasoning in any expert report – a bare statement of opinion will not do – see [37] – [38]. (The statement by Martin Spencer J that the rules and guidance did not require the expert's reasoning to be set out was the one aspect in which the Supreme Court differed from his approach – see [39]).

Although the focus of the case was expert evidence, the real substance of the decision in the Supreme Court was as to the fairness of the trial – see the identification of the questions raised on the appeal at [34], echoing Martin Spencer J's identification of the issue at [20]. The fundamental question was whether the requirement for a fair trial in an adversarial

process makes it impermissible to challenge in submissions evidence which was not challenged by cross examination. The answer was Yes: "impermissible" – subject to exceptions.

In reaching that conclusion – that a party has to challenge in cross examination evidence that it intends to challenge in submissions - the Supreme Court emphasised it was restating a long-standing rule familiar to trial advocates. The role is often known as the rule in *Browne v. Dunn* (from 1893) but the Supreme Court traced its origin all the way back to *Queen Caroline's case* in 1820 [44] and cited textbook editions from 1970 (Phipson on Evidence 11th edition and Cross on Evidence 4th edition - see [53]). The Supreme Court emphasised that this rule is a general rule and is not limited to situations where it is the credibility of the witness that is in issue – see the references at [49] and [52] to the width of the expression of the rule in *Browne v Dunn* itself.

But having restated this rule the Supreme Court emphasised that it was simply one aspect of the overall requirement of the fairness of the trial. The Supreme Court approved the approach in cases such as *Chen v. Ng* and *Edwards Lifesciences* emphasising the objective as a fair trial and acknowledging the difficulty in certain circumstances of putting every single point of challenge to a witness (see [56] – [59]).

Therefore - because the real requirement is one of overall fairness of the trial – having restated at [61] the rule and its application to a case involving uncontroverted expert evidence the Supreme Court then from [61] to [68] identified 7 exceptional circumstances where the rule would not be strictly imposed (note at [70(viii)] these are described as "examples" of exceptions). With deference and respect those qualifications seem to morph gradually from general circumstances where the rule should not apply to a challenge on evidence of fact (1st and 2nd) to more specific situations applicable to uncontroverted expert evidence. The exceptions are (in summary):

1. a collateral issue (at [61])
2. evidence manifestly incredible [62]
3. an expert opinion which is truly ipse dixit – a bold statement of an opinion – as distinct from one which is just poorly reasoned [63]
4. an obvious mistake (expert report illogical or inherently inconsistent) [64]

5. where facts are found contrary to the factual basis of the expert's opinion [66]
6. where an expert has had an earlier opportunity to respond to any criticism such as in answer to CPR rule 35.6 questions [67]
7. where there has been a failure to comply with the procedural requirements under CPR Part 35 Practice Direction [68].

The Supreme Court's conclusion is summarised at [70]:

i. a party must challenge in cross examination evidence (whether from factual or expert witness) which it will challenge in submission.
ii. the rule's purpose is to make sure the trial is fair.
iii. the rationale is to preserve the fairness of the trial including to the party who has adduced the evidence being criticised.
iv. the rationale also includes the protection of witnesses whose evidence is to be challenged.
v. the rationale also includes enabling the judge to make a proper assessment of all of the evidence and to achieve justice.
vi. cross examination gives the witness the opportunity to explain their evidence – particularly important where the accusation is dishonesty - but the rule is not confined to accusations of dishonesty.
vii. the rule is not to be applied rigidly – the overall requirement is of a fair trial - and the exigencies of trial may limit the application of the rule.
viii. the rule "may not" apply in the 7 exceptions identified at [61] – [68].

With due deference and respect to the majority of the Court of Appeal whose judgment was overturned, and to the erudite reasoning of all the judges (from Martin Spencer J upwards) who reached the opposite conclusion, most readers will say that the broad basis of the Supreme Court's decision is simply a restatement of that which all trial advocates know – if you want to challenge the other side's evidence fairness demands that you do so whilst the evidence is being heard rather than saving your criticisms for submission.

So what are the points to be taken from this decision?

Firstly, it should be seen as the result of an unfortunate (and one would hope unusual) set of circumstances – without knowing how or why events happened as they did I make no criticism of any individual involved in the case but the Supreme Court's summary of the conduct of the defendant's case at [71] is a situation few litigators would want to find themselves in. One could also say that the initial failure of the claim might possibly have been avoided had the deficiencies in Prof Pennington's report identified by Martin Spencer J and the Supreme Court been identified and addressed by the claimant team before the trial (for instance by supplementary report). Again knowing nothing of the circumstances I am not in a position to make criticism.

Secondly and of wider importance is that the focus should be upon the Supreme Court restatement of the general rule, rather than the exceptions identified. I would certainly advise against planning a trial strategy relying upon the exceptions. The reference to "satisfactory" rule 35.6 replies in the 6th exception begs the question. No one will be surprised to read my recommendation that if there is dissatisfaction with an expert's reply to rule 35.6 questions the appropriate step is to require the expert to be called for cross examination. Gambling upon the court accepting a submission that this was not necessary because the Supreme Court's 6th exception to the normal rule applies would be just that – a gamble.

For the same reason and on the same basis I would advise a pre-trial challenge rather than relying upon an assertion that the expert has in some way failed to meet the requirements of the Part 35 Practice Direction (7th exception). Such criticisms may or may not hold water with the trial judge and it would be an extremely unreliable basis upon which to leave any challenge to the application of the general rule until the trial itself.

Thirdly there is some acknowledgement of the demands and limitations in relatively low value claims – see at [74] from the standpoint of the claimant and [81] from the standpoint of the defendant. Thus, this decision - even with its emphasis on the cruciality of the reasoning - is not a charter for one side to say the other's expert report is worthless simply because it is relatively brief.

Fourthly the Supreme Court was keen to state that the decision on the facts of this case was consistent with and did not undermine the requirement emphasised in *Wood v Tui* for the claimant in a holiday illness claim to prove his case on causation – see [79] – [80].

Finally, a restatement by the Supreme Court in such trenchant terms of the fundamental importance of fairness in our adversarial process can do no harm. Whilst no Master or District Judge with a long list to get through will relish (or permit!) being taken through this decision paragraph by paragraph - it can be held up as a clear restatement of the importance of fairness and equality of arms in the adversarial process, something which can be relevant in all sorts of procedural contexts.

Dominic Nolan KC, Hailsham Chambers

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