Challenging expert evidence – fairness reigns supreme

The Supreme Court has recently given a long-awaited judgment in which it clarifies the principles that apply in circumstances where one party's expert report is not challenged by the opposing party – either by way of their own expert evidence or through cross-examination at trial – but the opposing party nevertheless seeks to do so in the course of submissions.

TUI UK Ltd v. Griffiths[1] was originally heard in the county court. The Claimant, Mr. Griffiths, had travelled with his family on a package holiday operated by TUI during which he fell ill with a serious gastric illness, which led to long-term health issues. Mr. Griffiths attributed his illness to food or drink served at his hotel and issued proceedings against TUI, seeking damages.

Mr. Griffiths supported his claim with an expert report from a microbiologist who concluded that, on the balance of probabilities, his illness was indeed caused by food or drink consumed at the hotel.

Although TUI's lawyers put written questions to Mr. Griffith's expert on their report (under CPR 35.6), which were answered, TUI did not produce its own expert report, nor did it require Mr. Griffith's expert to attend trial for cross-examination.

It was only in closing submissions at trial that TUI's lawyers challenged the expert report by arguing that it was incomplete and had not excluded other potential causes of Mr Griffith's illness. These were not matters that had been raised by way of the written questions under CPR 35.6. Citing the expert report, the trial judge concluded that Mr Griffiths had not proved his case and the claim was dismissed.

Questions for the Supreme Court

Subsequent appeals were made to the high court and court of appeal, before it finally came before the supreme court and the principal questions for the court to decide were essentially: (i) 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 its submissions at the end of trial? and (ii) does the rule extend to attacks in submissions on the reasoning of an expert witness?

The court's decision

In answering these questions, the Supreme Court endorsed a statement of longstanding practice given in *Phipson on Evidence* 20 ed. (2022), that:

"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. The rule applies in civil cases … In general the CPR does not alter that position.

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."

In doing so, the court confirmed that the status and application of this rule being as follows:

- The general rule that a party must challenge by cross-examination the evidence of the opposing party on any material point that they wish to submit to the court should not be accepted applies equally to the evidence of both factual and expert witnesses.
- The purpose of the rule is to ensure that the trial is fair. This includes:
- fairness to the party who relies on the challenged factual or expert evidence in support of their case;
- fairness to the factual or expert witness whose evidence is being challenged – whether on the basis of dishonesty, inaccuracy or some other inadequacy; and
- enabling the judge to make a proper assessment of all the evidence (including expert evidence) to achieve a just outcome.
- Cross-examination gives the expert or factual witness the opportunity to explain or clarify their evidence. This is particularly important when the witness is accused of dishonesty, but this consideration is not limited to such circumstances.

However, the court also clarified that the rule should not be applied rigidly, and its application (including any potential relaxation) will depend upon the circumstances of the case, bearing in mind that the criterion is the overall fairness of the trial. The court gave examples of matters to which the rule may not apply: for example, a bold assertion of opinion in an expert's report, without *any* reasoning in support); or an obvious mistake on the face of an expert report.

On the issue of proportionality in cases of modest value, the court commented that its conclusion does not necessarily mean that a claimant's expert report must always be met by a defendant's expert report, or that the claimant's expert must always be compelled to attend trial for questioning; for example, a defendant can ask carefully formulated questions under CPR 35.6 which clearly articulate the challenges that the defendant wishes to make and give the expert the opportunity to respond, thereby obviating the need for the expert's attendance at trial for cross-examination.

In this instance, however, the court concluded that the written questions put to Mr. Griffith's expert on behalf of TUI did not give adequate notice of the challenges ultimately made in submissions at trial. It decided that Mr.

Griffith's claim had been established, and allowed his appeal, restoring an earlier order of the High Court which awarded him damages.

Conclusion

The Supreme Court's decision helpfully clarifies the importance of ensuring that if material points in a party's expert (or factual) evidence are to be challenged by way of submissions at trial, they should normally be supported by appropriate cross-examination. Whilst there may sometimes be circumstances in which this rule should be relaxed, or may not apply,in all cases the criterion for this will be overall fairness of the trial.

How we can help

If you would like advice on any of the issues covered in this article, please do not hesitate to contact our commercial dispute resolution team.

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