SELBORNE CHAMBERS

Giarda and justice: The failure to cross examine an uncontroverted expert

TUI UK Ltd v Griffiths [2023] UKSC 48

Mr and Mrs Griffiths, along with their youngest son, embarked on an all-inclusive package holiday to a resort in Turkey. During their stay at the hotel, Mr Griffiths experienced a severe stomach upset, leading to ongoing health issues.

Mr Griffiths issued a claim against TUI UK Ltd ("TUI"), from whom the holiday was purchased. At the hearing, Mr and Mrs Griffiths provided uncontested factual evidence. Additionally, Mr Griffiths introduced evidence from an expert, Professor Pennington, who concluded that the probable cause of his stomach upset was the food and beverages provided at the hotel, rather than an airport Burger King or a single meal outside the hotel.

TUI chose not to cross-examine Professor Pennington, and due to lateness had no expert report of its own concerning the key issue of causation. Instead, in closing submissions, TUI contended that shortcomings in Professor Pennington's report, such as lack of comprehensive explanations and not explicitly ruling out other potential causes, meant that Mr Griffiths had not substantiated his claim. The trial judge agreed with TUI. She criticised Professor Pennington's report, determining that it failed to demonstrate that it was more probable than not that the hotel's food and drink were responsible for Mr Griffiths' stomach upset. Accordingly, she held that Mr Griffiths had not proven his case.

The matter went all the way to the Supreme Court, which looked at the following questions:

(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 the trial?

(ii) in particular, does the rule extend to attacks in submissions on the reliability of a witness's recollection and on the reasoning of an expert witness? and Phipson on Evidence 20th ed (2022) summarises the rule in *Browne v Dunn (1893)* 6 R 67 as follows:

"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."

Lord Hodge drew together the following eight points of principle from a review of authorities, in holding that the trial judge's approach was wrong:

1) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, 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, ie 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 to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

6) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

7) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. 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, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

1) There are also circumstances in which the rule may not apply, such as:

a. a challenge to a collateral issue;

b. cases where the evidence of fact is manifestly incredible;

c. where the expert's report contains bold assertion with no reasoning, rather than apparently inadequate reasoning;

d. cases involving obvious mistakes on the face of a report;

e. situations where the factual basis of the expert's report is wrong;

f. cases where an expert has already had sufficient opportunity to respond to criticism or provide clarification, e.g. through Part 35 questions;

g. cases where there has been a failure to comply with the requirements of CPR PD 35.

Overall, the Supreme Court has made it clear that *"if the court were to sanction the detailed critique and demolition of an uncontroverted expert report in closing submissions, that would undermine the CPR's arrangement for agreeing expert reports in advance of trial and narrowing down the areas of dispute. It might also encourage experts defensively to produce prolix reports and add to the cost of the legal proceedings."*

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