GRIFFITHS -V- TUI (UK) LIMITED

AN APPEAL WAITING TO HAPPEN…

On 7 October 2021, the Court of Appeal handed down judgment in Griffiths v TUI (UK) Limited [2021] EWCA Civ 1442 (CA) By majority decision it held that courts were not bound to accept uncontroverted expert evidence which is compliant with CPR Part 35. However, given the strong dissenting voice of Lord Justice Bean, it seems only a matter of time before the arguments are rehashed before the Supreme Court.

BACKGROUND

Mr Griffiths became unwell whilst on an all-inclusive holiday to Turkey from 2-16 August 2014. His symptoms persisted once he had arrived home. In due course, he made a claim in contract and pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992.

Mr Griffiths fell ill on 4 August 2014. Prior to that date, and save for a burger eaten at Birmingham Airport, he had only eaten in his hotel. Even subsequent to that date, save for a single meal eaten in town on 7 August 2014, Mr Griffiths only ate in his hotel.

By 13 August 2014, Mr Griffiths' symptoms were such that he was admitted to hospital. A stool sample was taken which demonstrated the presence of multiple pathogens, both parasitic and viral.

FIRST INSTANCE

By the date of trial, causation of illness remained a live issue. TUI had put Mr Griffiths to proof as to when, where, and under what circumstances he had become unwell. The only expert evidence before the court on this issue came from Professor Pennington (Microbiologist) on behalf of the Claimant. That evidence was uncontroverted in that:

(a) TUI, despite having permission to do so, had not instructed a microbiologist of their own;

(b) TUI had not required Professor Pennington to attend the hearing to be cross-examined; and

(c) HHJ Truman having accepted the factual account of Mr Griffiths and his wife, the factual matrix on which Professor Pennington's opinion was based was not undermined.

Professor Pennington's report was minimalist – comprising only three substantive paragraphs. However, it clearly stated that that, "*On the balance of probabilities, Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel.*" Professor Pennington had given similarly glib answers to Part 35 questions put by TUI.

Counsel on behalf of TUI made submissions to the effect that Professor Pennington's report was not sufficient to prove Mr Griffiths' claim. HHJ Truman agreed, commenting that it was for the Claimant to prove his claim and it was "*open to a Defendant to sit back and do nothing save make submissions, and if the evidence is not sufficient to satisfy a court on the balance of probabilities, a claim will not succeed.*" [28] To paraphrase, she found Professor Pennington's report to lack clear reasoning for the conclusion it had reached. She also found it to not comply with Part 35 for failure to set out the range of reasonable opinion.

FIRST APPEAL

In the High Court before Mr Justice Martin Spencer, the Claimant's appeal against HHJ Truman's judgment was allowed. It was held that, although deficient in a number of ways, Professor Pennington's evidence was substantially compliant with CPR Part 35. It was uncontroverted and went beyond mere *ipse dixit* (unjustified statement). In such circumstances, the role of the court in assessing the weight a report is to be given falls away, and it should be accepted.

MAJORITY DECISION

As already stated above, a majority of the Court of Appeal comprising Lady Justice Aplin and Lord Justice Nugee disagreed with Mr Justice Martin Spencer.

Lady Justice Aplin was clear that, "*There is no rule that an expert's report which is uncontroverted and which complies with CPR PD 35 cannot be impugned in submissions and ultimately rejected by the judge.*" [40] She drew distinction between making a finding that an expert's report was "wrong" and making a finding that it was "insufficient to satisfy the burden of proof". In the present case, HHJ Truman had found the latter. She could see nothing inherently unfair in only challenging Professor Pennington's expert opinion in closing submissions.

Lord Justice Nugee essentially just agreed with Lady Justice Aplin. However, he perhaps explained the majority position more succinctly:

"*81. As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons.*

...

84. It follows in my judgment that even though TUI had neither called any expert evidence of its own, nor required Professor Pennington to attend for cross-examination, counsel for TUI was not precluded from making submissions as to the inadequacy of the reasoning in his report, and Judge Truman was not only entitled but right to examine that reasoning to see what weight to ascribe to his opinion, and whether the case had been proved. I see nothing wrong in what she did, and do not consider that the Judge was right to disturb her conclusion in the way that he did."

LORD JUSTICE BEAN

In what can only be described as a powerful dissenting opinion, Lord Justice Bean set out a proposition which he had assumed so obvious as to not require the citation of authority. He quoted directly from *Phipson on Evidence* [81]:

"*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 as it does in criminal. 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."* (*Phipson on Evidence,* 19th edn, 2018, para.12-12)

He did not accept the reasoning of Lady Justice Aplin that cross-examination would only be necessitated if questions of credibility arose. He did not accept that Kennedy v Cordia Services LLP [2016] 1 WLR 597provided support for the proposition that a defendant could seek to raise issue with expert evidence in submissions without having first cross-examined the author.

His overall view was that Mr Griffiths did not have a fair trial:

"*He instructed a leading firm of personal injury solicitors, who in turn instructed an eminent microbiologist whose integrity has not been questioned. Mr Griffiths and his wife gave evidence at the trial, were cross-examined, and were found by the judge to be entirely honest witnesses. The eminent expert gave his opinion that on the balance of probabilities Mr Griffiths' illness was caused by the consumption of contaminated food or fluid supplied by the hotel. No contrary evidence was disclosed or called, and the expert was not cross-examined. Yet the Claimant lost his case.*" [98]

SUPREME COURT?

Oral permission to appeal was refused, but it would seem likely in the light of Lord Justice Bean's dissenting opinion that further written submissions will be made.

As an interested observer, I am left feeling slightly cheated by the absence of satisfactory answer to where the balance lies between the basic propositions that:

(a) It is for a claimant to prove their case on the balance of probabilities; and

(b) A party is expected to challenge evidence in cross-examination or otherwise, should they wish to submit that it should not be accepted.

Watch this space.