TRANSCRIPT OF PROCEEDINGS

Ref. E57YX969

IN THE COUNTY COURT AT NEWCASTLE UPON TYNE

Quayside
Newcastle Upon Tyne

Before HIS HONOUR JUDGE FREEDMAN

IN THE MATTER OF

GEMMA TAYLOR (Claimant/Applicant)

-v-

TUI UK LIMITED (Defendant/Respondent)

MR I PENNOCK appeared on behalf of the Claimant/Applicant
MR T EDGE appeared on behalf of the Defendant/Respondent

JUDGMENT
22nd JANUARY 2021
(AS APPROVED)

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JUDGE FREEDMAN:

1. I shall give an ex-tempore Judgment. This is an application by Gemma Hall (the claimant) for permission to appeal the decision of Deputy District Judge Healey (to whom I shall refer as "the judge") made on 20 October 2020 whereby he gave the respondent (TUI UK Limited) permission to cross-examine the expert instructed on behalf of the appellant, Dr Al-Shamas. My order provides that if permission to appeal is granted then the court will proceed to hear the substantive appeal.

2. In reality, as is often the case, the application for permission to appeal has been rolled into the appeal itself, and whilst I will, of course, make a determination in relation to the application for permission, the issues which arise inevitably concern both the application for permission and the appeal itself. The Hearing has been conducted remotely, by telephone.

3. The background to this case is that the claimant developed diarrhoea and sickness whilst on holiday in a hotel in Sharm El-Sheikh in June of 2015. The holiday was organised and arranged by TUI UK Limited. There is no dispute but that the holiday package regulations apply, so that TUI UK Limited will be liable in the event that it is established that the gastroenteritis suffered by the claimant was caused by the provision of contaminated food at the hotel.

4. The appellant's case, based upon the medical evidence of Dr Al-Shamas, is that during the course of her stay at this hotel she selected food from the buffet which was contaminated with pathogens, such as to cause her to suffer acute gastroenteritis.

5. The chronology is as follows. Proceedings were issued on 21 June 2018. It should be observed that the value of the claimant is limited to £3,000. The report from Dr Al-Shamas dated 18 January 2018 was served with the Statement of Case. As I say, that report supported the proposition that, on balance, the Appellant's gastroenteritis had been caused by eating contaminated food whilst staying at the hotel in Sharm El-Sheikh.

6. A defence was filed. The respondent subsequently served Part 35 questions on Dr Al-Shamas. He replied to those questions on 6 January 2019. Summarising the position, he did not depart at all from the conclusions in his report. He indicated in his replies to the questions that he had considered other potential causes of the gastrointestinal infection but, based upon the account given by the Appellant - and of course he had no other factual basis upon which to come to a conclusion - he adhered to his original view that it was more likely that it was contaminated food eaten at the hotel which caused the illness.

7. He was asked about his experience in providing medico-legal reports and he set out, in some detail, his involvement in this kind of litigation; and he acknowledged that he had always provided reports on behalf of claimants and that he had never been instructed by a defendant. Interestingly, he did point out that in approximately 20 per cent of cases he had concluded that it could not be said, at least on the balance of probabilities, that the holidaymaker's illness had been caused by the consumption of contaminated food or drink whilst staying at a particular hotel; and that the reasons for rejecting such contentions were numerous and varied from case to case.

8. I should add that the report provided by Dr Al Shamas was fully CPR compliant and he made it clear that it was an independent objective report. It contained the usual declaration of truth; and that he was preparing the report for the court and not for a particular party.

9. The matter was due to come on for trial on 1 April of last year but, because of the pandemic, it was adjourned. I subsequently directed that there be given a new trial window between 6 July and 30 September 2020. I directed that the hearing should be heard remotely, by way of video link, in accordance with standard practice, at least in this area, for cases of this type (a low value fast track claim).

10. The case did not come on for trial during that trial window. On 8 September 2020, the respondent's solicitors made 2 applications: first, the trial be an attended trial and, secondly, that in accordance with CPR 28.4 "The defendant be given permission to call the claimant's expert to give oral evidence at trial."

11. The application was heard, as I say, by the judge on 20 October. He acceded to the application that Dr Al-Shamas should attend the trial. The order which was made was in these terms: "The defendant is permitted to cross-examine the claimant's medical expert, Dr Al-Shamas, at the trial of this claim on a date yet to be fixed." He affirmed my order that the trial should be heard remotely.

12. Mr Pennock, on behalf of the appellant, submits that the judge fell into serious error in making an order that the respondent be permitted to cross-examine Dr Al-Shamas at the trial.

13. Before I go to the substance of the appeal, it seems to me that a preliminary matter arises as to the court's jurisdiction. This was not canvassed in the court below. The application was said to be made in accordance with CPR 28.4. But, in my judgment, CPR 28.4 does not afford a power to the court to direct that an expert attend at trial for cross-examination. I raised the matter this morning with Mr Edge. He took me to CPR 35.5(2), which provides as follows— "If a claim is on the small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice."

14. The implication from the wording of that subsection is that the court, if it is in the interests of justice, can direct an expert to attend a hearing. If it was intended that the court was being given an express power to allow a party to require another party to call his or her expert for cross-examination, I would have expected that to have appeared in a specific provision of the CPR. But it may be said that, in accordance with the court's general management powers and in accordance with the overriding objective, if the court deems it is in the interests of justice that an expert attends a trial, then the court has the power so to order.

15. What I am very clear about is that the application itself was flawed because there is no power conferred by CPR 28.4 which permits the court, on the application by one party, to compel an expert, instructed by the opposing party, to attend at Trial. Nor was the application, in reality, an application that the respondent be asked to be permitted to call the appellant's expert to give oral evidence at trial. What was being sought was permission to cross-examine the appellant's expert. Plainly, however, for the respondent to be permitted to

cross-examine the appellant's expert, the order had to direct that the appellant call his expert to give evidence at trial. I say no more about the court's powers and I am not intending to decide this appeal on the basis that says the court did not have the requisite jurisdiction to make the order; I simply observe that there does not appear to be any express rule permitting the court to make the order sought.

16. I turn then to the substance of the Appeal. The respondent's application was primarily but not exclusively based upon the judgment recently handed down by Martin Spencer J in the case of *Griffiths v TUI UK Limited* [2020] EWHC 268 QBD. That was a holiday sickness case. It was an appeal brought by the claimant, who had not made out his claim in the court below, on the basis that the judge found that the medical report which had been provided in support of the claimant's claim was flawed in a number of material respects. In those circumstances, the judge found that causation was not established to the requisite standard.

17. Martin Spencer J analysed Professor Pennington's report in some detail before taking the opportunity to express, in very clear terms, how courts should approach uncontroverted expert evidence. At paragraph 33 he said this:

> "... I take the view that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare ipse dixit, for example if Professor Pennington had produced a one sentence report which simply stated: 'In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel'."

After referring to a judgment of Clark LJ in the case of *Coopers Payen Limited*, Martin Spencer J went on to say—

> "However, what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all."

At Paragraphs 34 and 35, the Judge set out what CPR 35 requires in terms of the form and content of an expert's report; and concluded that Professor Pennington's report fully complied with the provisions of CPR 35. At paragraph 36, Spencer J emphasised that where the report is uncontroverted the court does not consider what weight should be attached to the reasoning contained within the report providing, as I say, it is Part 35 compliant.

He went on to say, and, understandably, Mr Edge seizes upon this—

> "… the defendant did not seek to challenge the reasoning that might have lain behind Professor Pennington's conclusions by calling him to be cross-examined, as it had every right to do so."

18. Mr Edge says that that makes it clear that a defendant can apply, in these circumstances, for an expert to attend to be cross-examined. As I say, that might well be right, but Martin Spencer J does not refer to any specific provision within the CPR that confers such a power on the court.

19. Be that as it may, it was the decision of Martin Spencer J which led to this application. The statement in support of the application refers solely to the decision in *Griffiths*. The note provided by Mr Edge for the hearing before the judge, equally, simply made reference to the decision in *Griffiths* and Mr Edge's skeleton argument before me focuses again on the decision in *Griffiths*.

20. I emphasise all of that because in none of those documents is there any reference, at any point, to anything in Dr Al-Shamas' report which could be said to give rise to some deficiency in reasoning. There is no suggestion of any incorrect assumptions, or misrepresentations of fact, or lack of detail, or lack of consideration of other causes for the gastroenteritis. Indeed, no criticism at all is levelled against Dr Al-Shamas' report.

21. I am not entirely surprised that that is so because, having read the report, it seems to me that not only is it fully CPR compliant, but it is also well-reasoned. It does consider, in some detail, other potential causes for the gastroenteritis, but Dr Al-Shamas accepts at face value - as he must - the factual account given by the appellant and he explains why he concludes that, on balance, the gastroenteritis was caused by the consumption of contaminated food. He refers in particular to the timeline that one expects in terms of bacterial infection.

22. In my judgment, this report is entirely standard in this type of case. There is nothing remarkable or unusual about it. It is the kind of report to be seen in countless such claims and, indeed, I would say that in fact it is, in some ways, more thorough in that Dr Al-Shamas does consider in some detail other possible explanations for the gastroenteritis. Whatever, on face of it, there is no criticism to be levelled against this report.

23. What Mr Edge says to me is that he simply wants to keep his powder dry and have the opportunity to cross-examine Dr Al-Shamas as to the correctness (or otherwise) of his conclusions in Court. He says that in the past, before the decision in *Griffiths*, it would have been possible simply for counsel acting on behalf of the holiday company to address the court, at the conclusion of the evidence, identify flaws in the report and invite the court to disregard the conclusions reached on the basis that there was defective reasoning. I accept that that may have been the practice in some courts and that some counsel have adopted that approach.

24. The decision in *Griffiths* tends to exclude that approach because Martin Spencer J made it clear, as I have already pointed out, that if the report is uncontroverted and if it is

CPR compliant and it, at least, provides some reasoning, then the court is bound to accept the conclusions.

25. It is necessary to go back to the Civil Procedure Rules and look at what is said about the calling of expert evidence. The starting point is CPR 35.1— "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings." CPR 35.4(3A) provides this— "Where a claim has been allocated to a small claims track or the fast track, if permission is given for expert evidence, it will normally be given by only one expert on a particular issue." And then CPR 35.5(1)— "Expert evidence is to be given in a written report unless the court directs otherwise." And subparagraph (2), which I have already referred to— "If a claim is on small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice."

26. In his very helpful skeleton argument, Mr Pennock points out that there is now in existence the pre-action protocol for the resolution of package travel claims and that paragraph 12.1 makes it clear that, generally speaking, there should be one expert whose evidence should be in paper form only.

27. The judge was reminded of the provisions of the CPR, and he apparently had regard to them but, ultimately, he concluded that it was in the interests of justice for the defendant/respondent to be given permission to cross-examine Dr Al-Shamas. In short form, what the judge said at paragraph 11 is: "It seems to me that there is real risk that there would not be a fair trial." What he does not do, even in summary form, is set out why, if Dr Al-Shamas was not cross-examined, the trial would be rendered unfair.

28. I think that Mr Pennock's criticism that neither the respondent nor the judge sought to identify what it is that would render the hearing unfair is well-founded. It is not enough in the context of a fast track claim, with a value limited to £3,000, merely to assert that unless a defendant is given the opportunity to try and shake or displace the conclusion reached by an expert instructed on behalf of the claimant the judicial process is somehow rendered unfair.

29. In my judgment there must be something much more specific than that. In other words, if, most exceptionally and unusually, a court is to grant permission for a defendant to be given the opportunity to cross-examine the claimant's expert in these circumstances, it must be demonstrated that there is some flawed or deficient reasoning within the expert's report or some factual inaccuracy which needs to be exposed and needs to be clarified before the judge so that the judge can have an opportunity to evaluate the conclusion reached by the expert and reject it, if appropriate.

30. If the respondent had been in a position to identify something in Dr Al-Shamas' report which rendered his conclusions unsafe or if he was able to point to some factual inaccuracy which meant that the expert had provided his report upon a false premise, then (subject to the court being satisfied that it has the requisite power) it potentially might have been appropriate to permit the defendant in such circumstances to cross-examine the expert. But without that material before the court, it seems to me that the court is not being faithful to the CPR to the effect that expert evidence should only be permitted where it is necessary and that, in most circumstances, any such expert evidence should be in written form only.

31. I remind myself that the judge in exercising his case management powers has a very wide discretion. Providing it was exercised judicially, an appellate court should be very slow to interfere. Indeed, an appellate court should only interfere if the judge has failed to take into account relevant considerations (or taken into account irrelevant considerations) or has erred in principle so that the decision is flawed and cannot be sustained.

32. In my judgment, here, the judge failed to accord sufficient weight to the severe limitations imposed upon the calling of oral expert evidence in fast track cases, particularly where the value is limited to £3,000. He failed to have adequate regard to the question of proportionality. The costs incurred if a doctor is required to attend at court, the inconvenience to that doctor and the increased use of court resources if an expert is to give oral evidence at court are highly material considerations which should have been at the forefront of the judge's mind.

33. But, in my view, it goes further than that. The Judge erred in principle. In my judgment, there was no justification for the respondent to require Dr Al-Shamas to attend at trial, absent any indication that his report was somehow flawed or his conclusions could not be sustained. Merely to say that the desire is to put questions, the nature of which may become apparent during the course of the trial, to the expert to the effect that he is wrong in his conclusion goes nowhere close to justifying the calling of an expert to give oral evidence. I say again that it is incumbent upon a defendant in these circumstances to point to specific matters upon which they wish to cross-examine the expert.

34. It is correct that, in the light, particularly, of Martin Spencer J's decision, the probability is that a court would accept the conclusions of Dr Al-Shamas. But that is the nature of litigation. The remedy (if there is one) for a defendant in these circumstances is, having asked Part 35 questions, to try and persuade a judge that they should be entitled to obtain their own report if they can identify where it is that, potentially, the expert has gone wrong. And if they cannot point to an error or deficiency in the expert's report, then I apprehend that the district judge would be very slow to permit a defendant to obtain an expert report to challenge the conclusions of the original expert. Another possibility is to ask the Court to direct that an expert be jointly instructed.

35. What I am very clear about is that the decision of the judge below cannot be upheld. It follows that permission to appeal is granted on the basis that this appeal stood a real prospect of success and I allow the appeal for the reasons which I have given.

36. The trial will proceed without Dr Al-Shamas giving oral evidence. His evidence will be confined to his report and the answers to the Part 35 questions.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge