IN THE HIGH COURT OF JUSTICE
KING'S BENCH

No. QB-2020-003519

Neutral Citation Number: [2023] EWHC 400 (KB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 15 December 2022

Before:

MR DEXTER DIAS KC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

(1) SUSAN LORNA FAWCETT
Suing as administratrix of her late husband,
ROY FAWCETT (Deceased)

(2) AIMEE LOUISE ALLEN

(3) JAMIE ELKALEH — Claimants

- and -

TUI UK LIMITED — Defendant

MR A YOUNG (instructed by Irwin Mitchell LLP) appeared on behalf of the Claimants.

MR A WIJEYARATNE (instructed by Kennedys Law) appeared on behalf of the Defendant.

J U D G M E N T

DEXTER DIAS KC :

(sitting as a Deputy High Court Judge)

1 This is the judgment of the court.

2 The court rules on an application to exclude expert evidence in an imminent personal injury trial. The parties to these proceedings are as follows. The first claimant is Susan Fawcett who is suing as administratrix of her late husband Roy Fawcett (deceased). Ms Fawcett is represented by Mr Young of counsel. The defendant is TUI UK Limited. The company is represented by Mr Wijeyaratne of counsel. The other parties to the main action were not represented and made no submissions.

Introduction

3 This is a fatal accident and personal injury damages claim arising out of the tragic death of Mr Fawcett on 12 October 2017. At that time Mr Fawcett and the other claimants were holidaymakers who were vacationing in the Dominican Republic. They purchased that holiday from the defendant, TUI. During the course of that holiday, they purchased a further trip, an excursion to a remote island described as "Paradise Island". While snorkelling during the excursion, Mr Fawcett drowned in shallow water. Sadly, all attempts to resuscitate him were unsuccessful.

4 These claims are brought in both contract and tort. It is not disputed between the parties that the applicable law for the claims is English law. But, and this is the nub of this application, local standards under Dominican law may be relevant in determining the duty of care owed by the excursion provider whose acts and omissions the defendant is (on the claimant's case) vicariously liable.

5 The claim was issued on 7 October 2020 and is said to amount in value up to £250,000. Liability is denied. The trial of the claim is listed to start on 17 January 2023 in a five-day window. Permission has been granted to parties for oral expert evidence. At B54 of the experts' bundle there is an order dated 22 October 2021 by Master Eastman, granted at a CCMC. It includes permission to the claimants and the defendant to rely on expert evidence of "local standards and Dominican public law". The reports were originally ordered to be served by 22 May of this year, but that date was extended by consent on several occasions, and ultimately to 18 October.

6 On 18 October itself, the defendant filed and served a report by Mr Tom Magner. The claimant makes a number of criticisms of the report and it is the target of this application. The application is to exclude it. The claimant's application was dated 8 November of this year and sought an order revoking permission granted to the defendant to rely upon Mr Magner's evidence. The central point made by the claimant, through Mr Young of counsel, is that it is the sheer extent of the disregard of the obligations and professional duties of an expert that necessitates its excision from the trial evidence. In a nutshell, as Mr Young pithily put it, Mr Magner is trying to fashion himself impermissibly as a legal and local standards expert. He is not. He is an engineer.

7 The application is resisted by the defendant. Mr Wijeyaratne submits that there is no "egregious breach", as he puts it, of the CPR Part 35 duties to the court to justify exclusion. I am grateful to counsel for their skeleton arguments and helpful submissions in court today. I have received a trial bundle which extends to 275 pages. I have read a significant part of it, but not all of it, because not all of it is relevant to this application.

8 I have read the report of Mr Magner, his responses to Part 35 questions, and a report of the claimant's expert, Mr Lucas Gomez. I have also read the statement of the claimant's solicitor Miss Heathcote, dated 9 November this year. In other words, I have read everything the parties suggested the court should read.

9 I do not recite the submissions made by counsel. It is not going to help at this point. I turn to what the parties want to know, which is the analysis of the court. I deal with each of the grounds of objections in turn. I adopt the numeration in Mr Young's skeleton.

Ground 1 – lack of expertise

10 The complaint of lack of expertise can be interrogated by reducing the problem to a number of sub-issues. The first sub-question is this: can this question be assessed at an interim hearing at all? Whether a purported expert possesses or lacks the necessary expertise is ultimately a question of fact. It is a question for careful assessment, looking at the evidence as a whole and in context. However, I accept that it is legitimate to interrogate this question at an interim hearing. Thus, the question before the court today is whether it can conclude that Mr Magner has the requisite expertise. If I conclude on the material before me that he is not, that necessitate exclusion.

11 That brings me to the second sub-question: who must prove what. Experts act as independent advisers to the court. They are not the “property” of any particular party. But if a party wishes to rely on or call an expert, that party must satisfy the court that the expert is suitably qualified. The *White Book* at 35.2.1 puts it this way:

> "A party seeking to adduce expert evidence on a particular issue must ensure that the proposed expert has the necessary experience in order to be regarded as an expert in that issue to advise the court…"

12 Here, the defendant has instructed Mr Magner and wishes to rely upon his evidence. Therefore, the defendant must satisfy the court that he has the necessary expertise.

13 The third sub-question is: how is sufficient qualifying ("necessary") expertise attained? It is clear that an expert gleans that status from relevant experience or from relevant qualifications - or both. Mr Young accepts this in his skeleton at para.12. The case of *De Sena & Anor v Notaro & Ors* [2020] EWHC 1031 is cited by the claimant. That was a judgment of His Honour Judge Matthews, sitting as a judge of this court. He stated that:

> "… expertise is acquired by doing the thing in question, usually over many years."

14 I accept that this is one obvious route. But nothing that the judge said precludes other means of acquiring "expertise". For example, in a completely unrelated situation, a police officer may qualify as an identification expert (gain the "necessary" experience), by looking repeatedly at a series of clips of video footage intensively over a relatively short period of time. He does not have any particular qualification when looking at video CCTV footage. It is his intimate and engaged connection with the nature of the material that elevates him to the status of expert. What I conclude is that each case of acquiring the requisite expertise is uniquely fact-specific.

15 The fourth sub-question: what is the standard of sufficient expertise? This was addressed by Christopher Clarke LJ in *Hoyle v Rogers* [2014] EWCA Civ 257. I should emphasise that I had the opportunity of reading yesterday evening not just *Hoyle*, but the second case cited in counsel's skeleton argument, *Lougheed v On the Beach Ltd* [2014] EWCA Civ 1538, per Tomlinson LJ. In *Hoyle v Rogers* Christopher Clarke LJ stated at [43]:

> "The bar to be surmounted in order to count as an expert is *not particularly high*, the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility."
>
> (emphasis provided)

16 As Bingham LJ (as then was) said in *R v Robb* [1991] Cr.App.R 161 at 164, "the English law is characteristically pragmatic" about the test for establishing expertise. Indeed, in *Hoyle v Rogers*, Christopher Clarke LJ did admit into civil proceedings the objected to "expert" reports (Air Accident Investigation Branch reports), upholding Leggatt J (as then was) at first instance. What is vital is that each case must be tempered with its facts. Even though the bar is said to be not particularly high, bar still there is. It is not simply a case of anybody who presents themselves as an expert does gain access to that status in this court. Therefore, the test must be, in my judgment, solid evidence of sufficient expertise of the relevant discipline or issue – self-proclamation as expert is not enough.

17 The fifth sub-question is this: what is the basis of Mr Magner's purported expertise? I have looked carefully at the relevant evidence. At B199 Mr Magner states:

> "The academic and practical experience of the author in the Dominican Republic is based upon a combination of case-specific enquiries and his collective experience of Dominican Republic standards in practice in that country since 1999 and before that in the field of forensic engineering from 1981 onwards, invariably working in the native Spanish language. "

18 He goes on to say:

> "Post-investigation assignments to develop improvements and troubleshoot ongoing problems involving locations, equipment and construction features as part of multi-disciplinary project teams working with lawyers, architects and other project professionals

across the Dominican Republic;

"Long term technical research studies, programmes and projects including input of practical experience into standards development;

"Advising on and contributing to tourist establishment risk assessments as well as devising and implementing updated safety provisions based on local Dominican Republic standard, custom and practice;

"Observation of Tourism Ministry inspections and certification processes under Law 541 and legislation arising from that as well local custom and practice"

19 At B171 he continues:

"1.7 All of the elements of local standard cited in this report are within the specialist working knowledge and experience of the author through his investigative work and post investigative assignments working singly or in combination with lawyers, architects, engineers, hoteliers and/or excursion organisers within the country.

…

"1.10 In this specific investigation, the author is familiar with the practical application of the legislative and other standards (including customs and practice) as well as having first-hand experience of the conduct of snorkelling activity practice. In addition, on one occasion in 2013 in the Dominican Republic, while investigating a snorkelling incident, the author was present during an unannounced inspection of the activity by the Tourism Ministry and witnessed at first hand the content of that inspection."

20 It is not suggested that Mr Magner has any specific Dominican Republic safeguarding risk standards qualification. It is not for the court to know (no one has told me) or to speculate what type the qualification would be. Equally, Mr Magner is not a lawyer in the Dominican Republic or anywhere else. However, the claimant/respondent's characterisation of his experience does not, in my judgment, do justice to his relevant experience. His *curriculum vitae* must be read as a whole. It appears from that document, that he does have extensive experience working on relevant safeguarding issues, engaging the relevant standard in forensic investigations in the Dominican Republic. In one of his Part 35 answers at B212, he states:

> "My work on local standards in relation to underwater activities was then first applied outside Spain in Mexico in 1994, in Mauritius and the Maldives in 1998 and in the Dominican Republic in 2001."

21 On the face of his CV, he has contributed to risk assessment that engage the applicable safety standards in that territory or some others. The depth and quality of his relevant experience of course, if it were admissible, could be thoroughly examined and/or challenged at trial.

22 The defendant cites *R v Pabon* [2018] EWCA (Crim) 420, and also cited in the *White Book*, paragraph 35.33. Simplifying greatly, the principle can be reduced to my mind to this simple proposition: one cannot be an expert by proxy. Therefore, one cannot be an expert simply by speaking to other people. The Court of Appeal said this in *Pabon*, per Goss LJ:

> "You must not consult others in order to educate yourself in areas in which you are not expert."

23 In that case, the Court of Appeal criticised a purported LIBOR expert called on behalf of the Serious Fraud Office ("SFO") in a fraud trial as amounting to little more than an

"enthusiastic amateur" (at [58]). The instruction of this expert turned into "an embarrassing debacle for the SFO" (at [76]). In the instant case, however, Mr Magner has confirmed that he has not spoken to others to opine on what he proposes to tell the court. Rather he says that his expertise is based upon his experience and personal engagement. The claimant draws a strong contrast with her instructed expert.

24 Lucas Gomez's expert report is at B57. Mr Gomez has been a litigation lawyer in the Dominican Republic since 2010. He has more than a decade of experience "in the litigation area", as he puts it, as well as "enough experience in civil liability and several studies relating to this area of law." He is currently an associate lawyer in one of the Dominican Republic's "most recognised" law firms. Mr Young submits, if one puts these two experts (or purported experts) side by side, the relevant expertise of Mr Gomez becomes a revealing mirror exposing the defects of the expertise ("purported expertise") of Mr Magner.

25 The court must assess this question at this interim hearing on the papers. I have not heard the evidence. At this juncture, and assessing the matter purely on the papers as best I can, it seems to me there is clear evidence indicating that Mr Magner does possess sufficient relevant expertise about the Dominican Republic's standards to meet the "necessary expertise" test and evidence before the court. Looking again at the test in *Rogers* at [43], one can pose the question thus: if the qualifying bar is "not particularly high" (it is not), has Mr Magner reached that height? In the judgment of the court, he has. What the court at trial ultimately makes of it is a completely different matter. What is particularly noteworthy is that Mr Gomez concludes his report by stating at B63:

> "Standards related to adventure tourism in the Dominican Republic are very limited, there is not much regulation in the area."

26 Mr Young emphasises that the scope of Master Eastman's permission extended to expertise in Dominican Republic law, but I did not understand that Mr Magner offers himself as an expert in Dominican Republic law as opposed to applicable standards. I judge that there is a subtle but important distinction between the safety and safeguarding procedural standards and the substantive law of the Dominican Republic, which undoubtedly Mr Gomez is acquainted with.

27 In all these circumstances, to say that Mr Magner's evidence falls below that not particularly high threshold is to be, in my judgment, too forensically ambitious and unpragmatic. It is to press the case that effectively Mr Magner's evidence is intrinsically worthless. That submission cannot survive the information Mr Magner has provided in his CV. To reach a different conclusion on the papers would, in my judgment, require the court to hear oral evidence and have Mr Magner's expertise probed and dissected. That is not a necessary or proportionate course at this procedural stage. In fact, it is precisely what the trial is for. This is an objection, in my judgment, that goes to weight and not to admissibility (*Hoyle v Rogers* at [43]).

Ground 2: Mr Magner not identifying the relevant Dominican Republic standards

28 Mr Young no longer presses this particular ground; it has become unnecessary for me to deal with it.

Ground 3: expressing opinions outside areas of expertise

29 In short, this is a complaint about forensic overreach. At para.20 of the skeleton, Mr Young gives five bullet-pointed examples of “impermissible opinions” given by Mr Magner. These are as Mr Young puts it "blatant examples" of “offending” opinion.

30 The approach to these types of issues was also considered by the Court of Appeal in *Hoyle v Rogers*. Christopher Clarke LJ stated at [52] that it was preferable to treat over-reaching opinions:

> "… as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree … the proper course is for the whole document to be put before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not…"

31 The judge then cited Thomas LJ and what he called his "trenchant" observation in *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2009] Bus. LR 809 where it is stated at [39]:

> "It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible."

32 I find that this particular objection is classically a matter for the trial judge's judgment and discretion. I conclude, first, that it is not a basis for the exclusion of Mr Magner's evidence; second, it is not appropriate at this point, as Mr Young submits as his subsidiary position, to excise or to remove a particular passage or passages. That is a matter for the trial judge to assess once the evidence is before her or him.

Ground 4: failure to maintain impartiality

33 I concur with defendant counsel that this is tantamount to an allegation of bias. This is inescapably a serious allegation. There must be a clear and cogent basis to make it out because it impugns the professionalism of a witness. In her witness statement Ms Heathcote, the claimant's solicitor, states in para.6(b) at B154 that:

> " The Defendant's local standards expert, Tom Magner, is well-known to my firm as an engineering expert who is frequently appointed by Defendants to provide expert engineering evidence in defence of foreign package holiday claims brought against tour operators."

34 Her complaint is framed as follows, at para.23 of the claimant's skeleton:

> "Mr Magner's report breaches its duty of impartiality and more seriously by repeatedly expressing the opinion that the excursion provider appeared to comply with local standards."

Then further at para.25:

> "It is submitted that in Mr Magner's opinion the evidence on which he relies establishes that the excursion was fully compliant with the relevant DR local standards is demonstrably wrong."

35 To support that submission, Mr Young points out concerns identified in the audit report at B233. He submits that it is impossible to understand how Mr Magner could have concluded that the local requirements were complied with in light of the audit findings. See for example Mr Magner's says to the contrary at B167 para.2. It strikes me that four points arise from this.

(1) Ms Heathcote's point may be factually accurate. But her direct experience of Mr Magner does not preclude his having wider experience than she has previously encountered;

(2) An expert expressing an opinion on the ultimate matter for the court (a) happens not infrequently and (b) is not in the circumstances of this case a credible basis to mount an allegation of witness impropriety. If indeed these points constitute overreaching, the judge can ignore it. My experience is that courts handle expert witnesses situated at every point of the spectrum between dispassionate and disinterested objectivity to impermissible and over-exuberant partiality. It will be a question for the trial judge where on that forensic spectrum Mr Magner falls and whether, as Mr Young submits, he is a "partial advocate", offering advocacy under the “guise of expertise”;

(3) The fact that the conclusion “demonstrably wrong” is ultimately a matter for the assessment of the trial court taking into account the totality of evidence. It is clear that Mr Magner is not constitutionally prone to being pro-defendant because as his *curriculum vitae* makes clear at B97, his instructions are split: 54% for claimants and 46% for defendants;

(4) As to the audit findings, that strikes me as being a legitimate valid line of cross-examination and challenge to Mr Magner at trial. I do not see how it is a basis for the wholesale exclusion of his evidence. If Mr Magner has indeed misconstrued an audit report, this is alternatively explicable as an error on his part. But to say this is evidence of the serious allegation of bias seems to me to be unsustainable – and forensic overreach in itself. Of course, he can be taxed about all of this when he is cross-examined.

36 Mr Wijeyaratne dealt with in his skeleton two further complaints that originated in Ms Heathcote's statement at para.7. Neither of those were pressed by the claimant at this point. Indeed, criticisms about the failure to set out his instructions and the lack of his response to

Part 35 questions seem to be overtaken by events. I note that Ms Heathcote dated her statement 9 October.

37 I have considered these various grounds of objection to Mr Magner's evidence both individually and cumulatively. I do consider the absence of a witness statement from him to deal with the criticisms to be significant and fatal to the effective opposition of this application. In fact, I find this application to be fundamentally misconceived. It is dismissed.

38 The secondary submission that there should be redaction of offending comments beyond scope, is a matter, as indicated, for submission to the trial judge when the case comes on. How she or he chooses to deal with the matter is for the judge, taking into account the context of the evidence as a whole.

Disposal

39 I conclude by summarising the orders of the court:

(1) The application is dismissed;

(2) Costs must follow the event.

40 I will hear further argument about costs.

41 That is my judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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