



Press Summary

29 November 2023

TUI UK Ltd (Respondent) v Griffiths (Appellant)

[2023] UKSC 48

On appeal from [2021] EWCA Civ 1442

Justices: Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Briggs, Lord Burrows, Lord Stephens

Background to the Appeal

This appeal concerns the question of when a trial judge can decide that a claimant has not proved their case where the evidence of a claimant's expert witness on the central issue in the case has not been challenged by a defendant on cross-examination of that witness.

Mr and Mrs Griffiths and their youngest son went on an all-inclusive package holiday to a hotel resort in Turkey. While staying at the hotel, Mr Griffiths suffered a serious stomach upset, which has left him with long term problems.

Mr Griffiths sued the travel company, TUI Ltd, from whom he had purchased the holiday. At trial, Mr and Mrs Griffiths gave uncontested evidence as to the underlying facts. Mr Griffiths also presented evidence from an expert witness, Professor Pennington, who concluded that the likely cause of Mr Griffiths' stomach upset was the food and drink served at the hotel.

TUI did not cross-examine Professor Pennington, nor did it present any expert witness evidence of its own on the central question of causation. Instead, in its closing submissions, it argued that deficiencies in Professor Pennington's report, such as incomplete explanations and a failure expressly to discount other possible causes, meant that Mr Griffiths had failed to prove his case.

The trial judge agreed with TUI. She criticised Professor Pennington's report and found that it did not show that it was more likely than not that the food and drink at the hotel had caused Mr Griffiths' stomach upset. She therefore concluded that Mr Griffiths had not proved his case and dismissed his claim.

Mr Griffiths appealed this judgment to the High Court of England and Wales, which allowed his appeal and overturned the judgment of the trial judge. TUI appealed that judgment and the Court of Appeal of England and Wales found in TUI's favour. Mr Griffiths then appealed to the UK Supreme Court.

Judgment

The Court unanimously allows Mr Griffith's appeal. It holds that the trial judge was wrong to allow TUI to make the detailed criticisms of Professor Pennington's report and to accept those submissions. In doing so, she denied Mr Griffiths a fair trial. The Court also holds that, looking at the evidence that Mr Griffiths presented at trial, including Professor Pennington's evidence, he has shown that it was more likely than not that the food and drink at the hotel had caused his stomach upset.

Reasons for the Judgment

The Court holds that the general rule in civil cases is that a party must challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she claims should not be accepted by the trial judge. This includes both witnesses of fact and expert witnesses [61] and [70(i)]. As the justice system is adversarial (i.e., premised on both sides presenting their cases to an impartial judge), this requirement is essential to ensure fairness to the parties, the impugned witness, and the court [70(ii)] – [70(iv)]. This requirement gives the witness an opportunity to explain or clarify his or her evidence or defend his or her professional reputation if challenged and allows the trial judge to make a proper assessment of all the evidence in the case [70(iv) – 70(vi)]. This requirement is not confined only to instances in which a party impugns the character of a witness [70(vi)]. It applies more broadly, encompassing cases such as this one.

However, the Court explains that this requirement is not a rigid one. Its application depends upon the circumstances of each case. The question for a court is whether, taken as a whole, the trial is fair [70(vii)].

The Court gives seven (non-exclusive) instances in which this requirement may be relaxed [61] – [68] and [70(viii)]. First, the matter to which the challenge is directed is collateral or insignificant such that fairness to the witness does not require there to be an opportunity to answer or explain. Secondly, the evidence itself may be manifestly unbelievable and an opportunity to explain on cross-examination would make no difference. Thirdly, the expert report makes an assertion with no reasoning in support. Fourthly, where there is an obvious mistake on the face of the expert report. For example, the report may be clearly illogical or inherently inconsistent. Fifthly, a party's fact evidence may be contrary to the factual basis on which the expert witness made their report. Sixthly, an expert witness has been given a sufficient opportunity to respond to criticism of, or otherwise clarify, their report other than on cross-examination. For example, if questions were put to the expert witness by an opposing party (such as under the Practice Direction to the Civil Procedure Rule 35 ("CPR PD 35")) and the expert witness fails to answer them satisfactorily. There, the expert witness will have been given a sufficient opportunity to explain the report, negating the need for further challenge on cross-examination. Seventhly, the expert witness' report does not comply with the requirements of CPR PD 35.

In applying these principles to the case at hand, the Court holds that fairness required that Professor Pennington be given the opportunity to respond to TUI's criticisms [71] – [78]. TUI chose not to challenge Professor Pennington's report on cross examination, nor lodge its own expert report. The questions TUI asked under CPR PD 35 did not focus on the matters which it later criticised. While Professor Pennington's report was terse and could have included more reasoning, it was not a bare assertion. He also provided further explanation of his reasoning in response to TUI's CPR PD 35 questions. None of the exceptions identified at [61] – [68] apply. In accepting TUI's criticisms of Professor Pennington's report, the trial judge had denied Mr Griffiths a fair trial.

The Court also holds, relying on the trial judge's other findings of fact and the conclusions in Professor Pennington's report, that Mr Griffith has established that it was more likely than not that the food and drink at the hotel had caused his stomach upset [78].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)