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Case Comment

REJECTING AN UNCONTROVERTED EXPERT REPORT

Peter Griffiths v TUI (UK) Ltd [2021] EWCA Civ 1442

[2022] SAL Prac 16

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I. Introduction

1 Having canvassed some of the changes relating to expert evidence under the new Rules of Court 2021 in a previous article,[2] it would be timely to look at some issues relating to the use of expert reports at trial, specifically, in a situation where the expert evidence is "uncontroverted" in the sense that the opposing party did not call any evidence of its own to challenge the basis of the expert report, or where the opposing party made no attempt to undermine the factual basis of the report through cross-examination. In such a case, can the court evaluate and reject such a report? If so, under what circumstances can the court reject such a report? Further, are parties entitled to, having chosen not to challenge the report in cross-examination, criticise

1 The article is written in the author's personal capacity. The opinions expressed in the article are entirely the author's own views and do not reflect the views or positions of the entities the author belongs to.

The authors thank Prof Chen Siyuan for his comments on an earlier draft. All errors are the authors' alone.

2 Soh Kian Peng & Adel Zaid Hamzah, "Expert Evidence in Civil Proceedings after the New Rules of Court 2021" [2022] SAL Prac 12.

it in their closing submissions? In that regard, the decision of the UK Court of Appeal in *Peter Griffiths v TUI (UK) Ltd*[3] ("*Peter Griffiths*"), which is the subject of this note, may be of some interest to practitioners.

II. Facts and ruling

2 The claimant in this case, Griffiths, had purchased an all-inclusive holiday to Turkey from TUI for himself and his family for the period 2 August to 16 August 2014. At the airport, he ate a burger from a well-known burger joint. All other meals Griffiths consumed, save for one, were prepared and provided by the hotel in Turkey. On 4 August 2014, Griffiths was struck by a bout of stomach cramps and diarrhoea which left him confined to his hotel room for the next two days before his symptoms began to ease. Unfortunately for Griffiths, his condition did not improve with his symptoms taking a turn for the worse on 10 August 2014. After consulting with a doctor on 13 August 2014, he was admitted to hospital for three days and two nights. The diagnosis: acute gastroenteritis. Stool samples taken and analysed showed both parasitic and viral pathogens.

3 Understandably, Griffiths sued TUI, making a claim in contract and pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992. It was alleged that the cause of illness included: the food served at the hotel, dirty cutlery and crockery, the fact that the swimming pool appeared dirty and was inadequately cleaned, the fact that the public toilets near the pool smelt offensive and there was faecal contamination from a baby's nappy in the swimming pool. For Griffiths' claim to succeed, he had to prove that his illness had been caused by his consumption of food or drink at the hotel. To do so, he adduced the expert report of one Professor Pennington.

3 [2021] EWCA Civ 1442. See also Maxwell Davie, "The Court is not a Rubber Stamp for Uncontroverted Expert Evidence but it Looks Like a Good Place for an Ambush: *Griffiths v TUI UK Ltd* [2021] EWCA Civ 1442" (2022) 41(2) Civil Justice Quarterly 123.

4 The trial judge dismissed Griffiths' claim on grounds that he failed to show, on a balance of probabilities, that his illness was caused by contaminated food or drink supplied by the hotel.[4] On appeal,[5] the main issue was whether the trial judge had erred in rejecting the expert evidence of Professor Pennington absent any evidence challenging or contradicting his conclusion. To that end, in the view of Martin Spencer J (who heard the appeal), the following questions had to be answered: (a) whether a court was obliged to accept an expert's uncontroverted opinion even if that opinion was characterised as a mere *ipse dixit*, and if the court was not obliged to do so, under what circumstances would the court be justified in rejecting such evidence; and (b) whether Professor Pennington's report could be characterised as a mere *ipse dixit* which entitled the trial judge to reject it despite the fact that it was uncontroverted.[6]

5 In relation to the first question, Spencer J took the view that the court was entitled to reject an expert report which was a bare *ipse dixit* even though it was uncontroverted.[7] However, the level of analysis and evaluation a court would subject such an uncontroverted report to would differ from one that was contested. Where uncontroverted reports were concerned, the court merely had to decide whether the report fulfilled the minimum standards as set out in the Practice Direction accompanying CPR Part 35.[8] In contrast, where the report was contested, the court had to decide on the weight of the report in order to determine whether it was to be preferred to other evidence, be it that of an opposing expert or competing factual evidence.

6 As for the second question, Spencer J was of the view that while Professor Pennington's report contained serious deficiencies, it was not a bare *ipse dixit*. To that end, Spencer J expressed doubt whether any report or opinion which substantially complied with the Practice Direction to CPR Part 35 could ever justifiably be characterised as a mere *ipse dixit*. Spencer J thus reversed the trial

4 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [2].
5 *Griffiths v TUI UK Ltd* [2020] EWHC 2268 (QB).
6 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [21].
7 *Griffiths v TUI UK Ltd* [2020] EWHC 2268 (QB) at [33].
8 *Griffiths v TUI UK Ltd* [2020] EWHC 2268 (QB) at [33]–[35].

judge's decision and allowed the claim, entering judgment for Griffiths. Dissatisfied, TUI appealed against Spencer J's decision where they succeeded, with the majority, comprising Asplin LJ and Nugee LJ, finding in their favour.

7 The majority took the view that an uncontroverted expert report which complied with the Practice Direction accompanying CPR Part 35 could still be impugned in submissions, and ultimately rejected by the judge depending on the circumstances of the case, the nature of the expert report, and the purpose for which the report was being used in the claim.[9]

8 The main disagreement, however, that the sole dissenting judge, Bean LJ, had with the majority was not with the reasoning that a judge was entitled to reject an uncontroverted expert report.[10] Rather, it was with the majority's view that a party could reserve criticisms of a report until closing submissions, if they choose to do so, and this would not be unfair.[11] In Bean LJ's view, this would amount to litigation by ambush, and accordingly, he would have dismissed TUI's appeal. Bean LJ also appeared to take issue with the majority's interpretation that the rule in *Browne v Dunn*,[12] being only concerned with "circumstances in which a significant aspect of the evidence of a witness is challenged on the basis that it is untrue"[13] did not apply in the present case.[14] According to Bean LJ, the basic principle was that if a particular point was not challenged in cross-examination, the party which failed to cross-examine on that point would face difficulty in submitting that the evidence should be rejected.[15]

9 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, *per* Asplin LJ at [40] and Nugee LJ at [84].
10 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [94].
11 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [99].
12 (1893) 6 R 67.
13 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [62].
14 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [90].
15 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [87] and [90].

III. Observations

9 As it stands, if an uncontroverted expert report does not comply with the requirements laid down in O 12 r 5 of Singapore's Rules of Court 2021, that expert's opinion may be accorded little or no evidentiary weight, but it does not mean the report would be inadmissible.[16] What then is the position in relation to an uncontroverted expert report that complies with the requirements spelt out by O 12 r 5 – would the court still be entitled to reject that report and, if so, in what circumstances should this be done?

10 One key holding in *Peter Griffiths* was the fact that the majority took the view that an expert report which complied with the requirements set out in the Practice Direction accompanying CPR Part 35 could still be rejected by the judge. The decision in *Peter Griffiths* stands in stark contrast to the approach taken by the Malaysian High Court in *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu*[17] ("*Leisure Farm Corp*"). In that case, the court took the view that it was not "in the position to substitute its own views for the uncontested expert's opinion", and even if the court wanted to "question the evidence, the content, the credibility, partiality, coherence and to analyse the evidence … based on the established facts", cross-examination or rebuttal must be done to challenge the expert evidence.[18] Because the plaintiff's expert affidavit complied with the requirements laid down in O 40A r 3 of the Malaysian Rules of Court, which is *in pari materia* with O 12 r 5 of Singapore's Rules of Court 2021, the court was satisfied that the plaintiff's expert had discharged its duty to the court and the evidence, which was uncontroverted, should be taken into account.[19]

11 The position taken in *Leisure Farm Corp* reflects a reluctance to intervene in matters beyond the realms of judicial expertise – as Davie points out, an awareness "of the epistemic issues at

16 See *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491; *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308.
17 [2019] 11 MLJ 71.
18 *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu* [2019] 11 MLJ 71 at [83].
19 *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu* [2019] 11 MLJ 71 at [83].

stake is important when the court is asked to evaluate non-legal expertise without expert assistance".[20] This concern is also being articulated in areas of law such as medical negligence. For example, in *Khoo James v Gunapathy d/o Muniandy*[21] ("*Gunapathy*"), which dealt with the applicable legal test for ascertaining the standard of care in medical negligence,[22] Yong Pung How CJ famously observed that "we often enough tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors".[23] But, as those specialising in medical negligence would well know, this does not entail a wholesale acceptance of a medical expert's opinion. *Gunapathy* endorsed the two-stage test set out in *Bolitho v City and Hackney Health Authority*;[24] essentially, an expert view had to satisfy the threshold test of logic before it qualified as being representative of a "responsible body" of medical opinion. This meant that the court would first look at whether the expert had directed his mind to the comparative risks and benefits relating to the matter – bare and unsupported assertions would not pass muster.[25] Second, the expert had to arrive at a defensible conclusion – this meant that the medical opinion had to be internally consistent on its face and could not be contrary to proven extrinsic facts that were relevant, or ignore or controvert known medical facts or advances in medical knowledge.[26]

12 It is therefore clear that the court can, and will, scrutinise an expert report for its logical consistency, and whether it is consistent with any extrinsic facts.[27] While this is abundantly

20 Maxwell Davie, "The Court is not a Rubber Stamp for Uncontroverted Expert Evidence but it Looks Like a Good Place for an Ambush: *Griffiths v TUI UK Ltd* [2021] EWCA Civ 1442" (2022) 41(2) Civil Justice Quarterly 123 at 127–128.

21 [2002] 1 SLR(R) 1024.

22 See *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492, which adopted a modified version of the test laid down by the UK Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] 2 WLR 768 in the context of negligently provided medical advice. See also Vincent Ooi, "Decisional and Operational Negligence" (2018) 34(4) *Journal of Professional Negligence* 171.

23 *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 at [3].

24 [1998] AC 232.

25 *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 at [64].

26 *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 at [65].

27 See Liat Levanon, "Statistical Evidence, Assertions and Responsibility" (2019) 82(2) Modern Law Review 269 at 282–284, in particular, the following quote:

(cont'd on the next page)

clear in the context of medical negligence, *viz*, the standard of care, there is no reason why this cannot apply to the assessment of expert reports in general, especially where said report is uncontroverted.[28] After all, the court is the ultimate arbiter of both fact and law and therefore should not, and cannot, act as a rubber stamp for an expert report, even if it is uncontroverted.[29]

13 What this means, in the context of the new Rules of Court 2021, is that it is still open to the judge, as the fact finder, to reject uncontroverted expert evidence, even where such evidence meets the requirements set out in O 12 r 5. While such instances may be few and far between,[30] the authors take the view that if the expert report is either: (a) internally inconsistent (*ie*, where parts of the report contradict each other); or (b) externally inconsistent (*ie*, where parts of the report are simply unsupported by facts relevant to the case), it would be open to the court to either call for further submissions on the report to clarify these inconsistencies, or to reject the report.

> Accordingly, *when denied the opportunity to develop trust in the truth of her decisions by epistemically ensuring them through acquisition of knowledge*, the decision-maker is not substantively responsible for the burden of any erroneous decisions she makes despite having no trust in their truth. She would then have valid grounds to reject the decision-making arrangement that did not allow her opportunity to avoid this burden. She may justifiably ask 'why did you make me decide based on such evidence? Why did you not let me listen to myself and avoid this outcome?' [emphasis added]

While Levanon argued that naked statistical evidence (*ie*, data about human behaviour) cannot form the basis for judicial decisions, the justification he puts forth for his argument applies *mutatis mutandis* to cases involving uncontroverted (or joint) expert reports. The authors would, however, leave this point to be developed more fully elsewhere.

28 See Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) at para 6.062, citing *JSI Shipping (S) Pte Ltd v Teofoongwoonglcloong* [2007] 4 SLR(R) 460.

29 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) at para 6.067, citing *George Abraham Vadakathu v Jacob George* [2009] 3 SLR(R) 631 at [66] and *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [47]–[48].

30 See for example O 12 r 2(1) of the Rules of Court 2021, which states that no expert evidence may be used without the court's approval. Simply put, if the evidence is unlikely to materially contribute to the resolution of any issue in the case, the court is unlikely to approve its use. Given that the court will scrutinise the expert evidence at the pre-trial stage, this may well mean that by the time the evidence comes up during trial, it is unlikely to contain any internal or external inconsistencies.

14 The article turns now to examine the second interesting point raised in *Peter Griffiths*, specifically, the dissent between the majority and Bean LJ over whether a party was entitled to reserve its criticisms of an expert report until closing submissions, and whether it was fair to do so. Given that the difference between the majority and Bean LJ appeared to centre on the interpretation of *Browne v Dunn*,[31] it is perhaps apposite to set out what was said in that case. Lord Herschell LC said:[32]

> [I]t seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses.

15 In a similar vein, Lord Halsbury made the following remarks:[33]

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

31 For the application of *Browne v Dunn* (1893) 6 R 67 in a criminal context, see Mohamed Faizal, "The Rule in *Browne v Dunn* in Cross Examination: A Singapore Perspective" *Singapore Law Gazette* (July 2011); Justice Choo Han Teck, "Criminal Advocacy" [2019] SAL Prac 9 at para 36.

32 *Browne v Dunn* (1893) 6 R 67 at 70–71.

33 *Browne v Dunn* (1893) 6 R 67 at 76.

16 As noted by the Court of Appeal in *Asnah bte Ab Rahman v Li Jianlin*[34] ("*Asnah*"), the rule in *Browne v Dunn* is not a rigid technical rule and should not be applied mechanically as to require every single point to be put to the witness.[35] One must, in deciding what questions to put to the witness, remember the rationale of the rule, which is to give the witness an opportunity to respond to the allegations made and explain himself. It is also clear from the speeches of Lords Herschell and Halsbury that the rule is meant to prevent attacks on a witness's credibility without giving that witness a chance to respond.

17 That might hold true where lay witnesses are concerned, but there are differences where the cross-examination of an expert witness is concerned. For one, the credibility of an expert witness, as was the case in *Peter Griffiths*,[36] may be less likely to be challenged or be an issue at trial. Unless counsel has taken pains to either: (a) find out if said expert has given a contradictory opinion in an earlier case; or (b) advocated a contrary view in an academic forum,[37] the cross-examination of an expert will likely, in most cases, be limited to testing both the internal logic of the report, and whether it gels with the relevant extrinsic facts. If that is the case, then the majority's narrow reading of *Browne v Dunn* will, arguably, not apply.

18 That said, it has been argued that as a matter of the policy objectives underlying *Browne v Dunn*, specifically, achieving rectitude of decision, Bean LJ's broader reading is preferable. As Davie argues, the failure to put the contrary case may result in a greater loss of fact-finding accuracy. Omitting to cross-examine so as to avoid giving an opposition expert notice of the weaknesses in their evidence tends to distort and obscure what the facts really are. If counsel for TUI had cross-examined, Davie contends that whether Professor Pennington could have provided better answers or not, Truman J could have been more certain of her conclusions.

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34 [2016] 2 SLR 944.
35 *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 at [115].
36 *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [64].
37 *Modern Advocacy: Perspectives from Singapore* (Academy Publishing, 2018) at para 08.091.

19 In the authors' view, Davie's concerns may be somewhat overstated. Simply put, his contention is that testing weaknesses in expert evidence in cross-examination will allow for better fact-finding because the expert witness would have a chance to clarify their evidence. But this assumes that: (a) they are able to clarify their evidence in that they will proffer a different answer from that in their affidavit; (b) that the judge, as a finder of fact, cannot do this independently by reference either to extrinsic facts or matters of common knowledge;[38] and (c) that the court's role *qua* fact finder is to ensure epistemic accuracy.

20 None of these assumptions particularly stand up well to scrutiny. Dealing with point (a) first, in *Asnah*, respondent counsel had argued that the appellant's case that the respondent failed to check for oncoming vehicles was not put to the appellant when he took the stand, and should be struck down as it violated the rule in *Browne v Dunn*. The Court of Appeal ruled that the mischief targeted by the rule in *Browne v Dunn* was not violated for the following reasons:[39]

> (a) The appellant's case, that the respondent had failed to keep a proper lookout, was made clear in pleadings, and the only factual issue arising for determination was whether the respondent had indeed failed to keep a proper lookout.
>
> (b) The respondent had already answered the appellant's case in his affidavit of evidence-in-chief ("AEIC"), and the appellant was entitled to accept his answer and choose not to raise it in cross-examination. Further, even if the appellant had questioned the respondent in cross-examination, his answer was unlikely to differ from his AEIC.

38 See the remarks of Andrew Phang JC in *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [79] in relation to the use of scientific methods in motor accident reconstruction: "one must of course be careful not to allow such techniques to overwhelm the very valuable (and, I might add, paradoxically inexpensive) resources of plain intellect, logic and common sense".

39 *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 at [115(a)–(c)].

21 *Asnah* therefore illustrates the point that the rule in *Browne v Dunn* is not breached if, even assuming the question is put to the witness, the answer given would not differ from what has already been stated in their affidavit.

22 Where point (b) is concerned, as has been pointed out above, the court can and should assess the logical consistency of an expert report with reference to relevant extrinsic facts. As for point (c), the authors would not go so far as to argue what the court's role is, save that while the judge may give certain directions during trial, within an adversarial system, it is still up to parties as to how they want to run their case. The court can only decide based on the pleadings and the evidence that has been adduced. From a practical viewpoint, for counsel, it may be better to act *ex abundanti cautela*,[40] and put any questions that one thinks is important to the expert witness, and pick it up in closing submissions. This would pre-empt any dispute by opposing counsel seeking to invoke the rule in *Browne v Dunn*, or any allegations of litigation by ambush.

IV. Conclusion

23 *Peter Griffiths* has raised two interesting points in relation to the use of uncontroverted expert reports during trial. In summary, the court is entitled to reject or give less weight to an uncontroverted expert report and the rule in *Browne v Dunn* is, in the authors' view, unlikely to apply with equal force in the context of an expert witness where said witness's credibility is not in issue.

40 See the Canadian case of *Erco Industries Ltd v Allendale Mutual Insurance Co* [1988] OJ No. 2 at [19]. There, the defendant's failure to cross-examine the medical expert resulted in its own attempts to present contrary evidence being disallowed.