

# TRAVEL LAW:

## NOTE ON GRIFFITHS V TUI (UK) LIMITED [2021] EWCA CIV 1442

A Case Note from the 2TG Travel Law Team

Autumn 2021

### Introduction

1. On 7 October 2021, the Court of Appeal handed down its much-anticipated judgment in *Griffiths v TUI (UK) Limited* [2021] EWCA Civ 1442, concerning the proper approach towards 'uncontroverted' expert evidence. A majority of the Court of Appeal (Asplin and Nugee LJ, Bean LJ dissenting) held that it was open to the Court to evaluate and reject expert evidence which was 'uncontroverted'. The decision is of significance, not only in the holiday-sickness context, but in all cases where expert evidence is required.

### Background

2. Mr Griffiths purchased an all-inclusive holiday to Turkey from TUI. During the holiday, all meals consumed by Mr Griffiths were prepared and provided by the hotel, save for one meal at Birmingham Airport and one meal in a nearby town. On the third day of his holiday, Mr Griffiths fell ill. His symptoms lessened before subsequently worsening. Thereafter, he was admitted to hospital where he was diagnosed with acute gastroenteritis.
3. Mr Griffiths brought a claim against TUI alleging that his illness was caused by, amongst other things, the poor food hygiene standards at the hotel. Mr Griffiths subsequently obtained permission to rely upon an expert report on causation from Professor Pennington, a consultant microbiologist. The report was minimalist and contained only three substantive paragraphs dealing with the cause of the illness. It concluded that, on the balance of probabilities, Mr Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel.



**Ben Phelps**

[BPhelps@2tg.co.uk](mailto:BPhelps@2tg.co.uk)

+44 (0)20 7822 1256



**Conor Ewing**

[CEwing@2tg.co.uk](mailto:CEwing@2tg.co.uk)

+44 (0)20 7822 1292

4. TUI had permission to obtain a report from its own expert consultant microbiologist but did not serve a report within the time specified. As such, it was left without expert evidence. However, TUI did pose questions to Professor Pennington pursuant to CPR Part 35. Professor Pennington was not called to be cross-examined. The only expert evidence before the Court, therefore, was that from Mr Griffiths.

### The Decisions Below

5. At first instance, HHJ Truman accepted the evidence of Mr Griffiths and his wife as to both what he had eaten and the history of his symptoms in full.

6. Despite the fact that there was no contrary factual or expert evidence challenging Professor Pennington's conclusions, HHJ Truman found that there were a number of deficiencies with the report. As such, she was not satisfied that the expert evidence showed that, on the balance of probabilities, Mr Griffiths' illness was caused by contaminated food or drink supplied by the hotel and dismissed his claim.

7. On appeal, Martin Spencer J found that HHJ Truman had erred in rejecting Professor Pennington's expert evidence in the absence of any evidence challenging or contradicting his conclusion. He found that Professor Pennington's report and Part 35 answers were "truly uncontroverted" in the sense that TUI did not call any evidence to challenge or undermine the factual basis for Professor Pennington's report, for example by calling witnesses of fact or putting in documentary evidence, nor was there any successful attempt to undermine the factual basis for the report, either through the cross-examination of the Claimant and his wife or Professor Pennington.

8. Martin Spencer J stated that whilst a court would always be entitled to reject a report, even where uncontroverted, which was literally a bare *ipse dixit*:

*"...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 has 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."*

9. In addition, Martin Spencer J held that for an expert's report to "pass the threshold for acceptance as evidence", it must "substantially comply" with the Practice Direction to CPR Part 35 and that Professor Pennington's did. Accordingly, despite the "strong criticisms" of Professor Pennington's report, Martin Spencer J held the Judge was not entitled to reject its conclusions.

### The Majority Decision

10. The majority of the Court of Appeal found that Martin Spencer J had erred in holding that where an expert's report is 'uncontroverted', the court is not entitled to evaluate the substance of the report. The lead judgment was given by Asplin LJ. Nugee LJ gave a short concurring judgment. In essence, the majority held that:

(i) None of the authorities cited supported the conclusion that there was a bright

line rule that if an expert's report is uncontroverted and complies with CPR PD 35, it cannot be impugned in submissions and rejected by the Judge (see paras. 40, 58 and 81 to 84).

- (ii) Where the report of a joint expert: (i) covers the relevant issues; (ii) the conclusions are supported by logical reasoning; and (iii) is the only evidence on the topic, it is difficult to envisage a situation in which it would be appropriate to decide that it is wrong. However, that does not mean that such circumstances may not exist (see paras. 46, 50 and 69).
- (iii) In any event, HHJ Truman did not decide that Professor Pennington's report was wrong, but rather that it was insufficient to satisfy the burden of proof which fell upon Mr Griffiths in relation to causation (see para. 51).
- (iv) The present situation could be distinguished from the well-known rule in *Browne v Dunn* (1893) 6 R 67 HL, which requires that if the credibility of a witness is to be impeached, fairness demands he should be given the opportunity to give an explanation. Professor Pennington's credibility was not in issue (see paras. 60 to 64).
- (v) Whilst it may be a high-risk strategy, there was nothing inherently unfair in seeking to challenge expert evidence in closing submissions. It was not for the opposing party to give the other side the opportunity to make good deficiencies in their evidence, rather, it was for the party who files the evidence in support of their case to make sure the content of the report is sufficient to satisfy the burden of proof on the issue

to which it is directed (see paras. 65 to 66).

### The Minority Decision

- 11. Bean LJ gave a strong dissenting judgment. He commented that it was a trite proposition that 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 (see para. 87).
- 12. Bean LJ went on to say that whilst Martin Spencer J was wrong to hold that where expert evidence is truly uncontroverted the role of the court falls away, a Judge is generally bound to accept the evidence of an expert if it is not controverted by other expert or factual evidence and the opposing party could have cross-examined the expert on the point but chose not to do so (see para. 94). He concluded that the approach of TUI was inherently unfair and that the courts should not allow litigation by ambush (see paras. 98 to 99).

### Conclusions

- 13. The majority's decision in *Griffiths v TUI* will undoubtedly be welcomed by defendants: it is permissible for a defendant to simply attack in submissions the expert evidence of a claimant without first in some way controverting the evidence.
- 14. It is clear, however, that the majority consider that this tactic is high-risk. This is certainly correct: it will take a poor report to persuade a Judge that the reasoning is so insufficient as to mean that the Judge cannot satisfy themselves that the issue subject to expert evidence is proved. It will be argued that the fact that the Court of Appeal has commented that the strategy is high risk should commensurately mean that it should not often succeed.

15. Further, whilst it is clear that the Court may reject uncontroverted expert evidence, the judgment in *Griffiths* does not assist in establishing just how deficient an expert's reasoning must be in order to be successfully attacked in closing submissions alone.
16. Accordingly, defendants should not lose sight of the weapons honed following Martin Spencer J's judgment, including, cross examination of the claimant to establish factual differences between the claimant's evidence and the facts reported to the expert, scrutiny of the requirements of Part 35 and whether they have been complied with, and applications for permission to rely on their own expert evidence.
17. For claimants, in our view, this is perhaps not a disastrous judgment. There is no doubt that the underlying report in *Griffiths*, whilst from an eminent microbiologist, was sparse. Claimants will be able to argue, when faced with this tactic, that the defendant has adopted a high-risk approach, forgoing the other tools available, and that on the facts of each case the relevant expert reports come up to proof. It will, however, require an active approach to one's own expert evidence to identify in advance if there is a risk a defendant will attempt to submit at trial that the expert evidence is deficient.

**Ben Phelps**  
**Conor Ewing**

---

#### **Disclaimer**

No liability is accepted by the authors for any errors or omissions (whether negligent or not) that this article may contain. The article is for information purposes only and is not intended as legal advice. Professional advice should always be obtained before applying any information to particular circumstances.

# ABOUT THE AUTHORS



**Ben Phelps**

[BPhelps@2tg.co.uk](mailto:BPhelps@2tg.co.uk)

+44 (0)20 7822 1256

## Ben Phelps

Ben specialises in private international law and its interplay with commercial and civil disputes. He is Junior Counsel in two private international law appeals to the Supreme Court covering important issues including, the Court's jurisdiction to hear tort claims against foreign defendants, the approach to the pleading and proof of foreign law, and the overriding/ mandatory effect of certain provision of English law.

He has recently assisted the National Rapporteur in writing the UK's report for the European Commission reviewing the operation of the rules on applicable law.

Ben regularly appears in Court in travel cases as well as advising and drafting.

For more information regarding Ben's practice, his profile can be found [here](#).



**Conor Ewing**

[CEwing@2tg.co.uk](mailto:CEwing@2tg.co.uk)

+44 (0)20 7822 1292

## Conor Ewing

Conor is developing a broad practice across all of chambers' core areas with a focus on private international law, professional negligence, product liability and property damage. Conor has a particular interest in cases with an international element and has experience in cases involving complex jurisdictional and choice of law issues.

In 2019-2020, Conor was judicial assistant to Lady Justice Asplin in the Court of Appeal. Prior to joining Chambers, Conor graduated from the University of Oxford with a First Class degree in Law. He read for the BCL the following year, where he studied Conflict of Laws.

For more information regarding Conor's practice, his profile can be found [here](#).

# CONTACT US



Lee Tyler  
Senior Clerk  
[ltaylor@2tg.co.uk](mailto:ltaylor@2tg.co.uk)  
+44 (0)20 7822 1203



Leanne Taylor  
Deputy Senior Clerk  
[ltaylor@2tg.co.uk](mailto:ltaylor@2tg.co.uk)  
+44 (0)20 7822 1204



Billy Hammonds  
Deputy Senior Clerk  
[bh@2tg.co.uk](mailto:bh@2tg.co.uk)  
+44 (0)20 7822 1213

*"Outstanding service"* (Legal 500)

*"On the ball, courteous and efficient"* (Chambers UK)

*"Approachable, modern and commercial in their outlook"* (Chambers UK)

# FIND US

## Address

2 Temple Gardens  
London EC4Y 9AY

## Telephone

+44 (0)207 822 1200

## Fax

+44 (0)207 822 1300

## Tube

Temple (Circle & District  
Blackfriars (Circle & District and Thameslink rail)

## DX

134 Chancery Lane

## Rail

Blackfriars  
City Thameslink