



Neutral Citation Number: [2024] EWHC 976 (Ch)

Case No: BL-2021-MAN-000033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Date: 23 April 2024

Before:

The Honourable Mr Justice Richard Smith

Between:

(1) Ben Leeson
(2) William Leeson

Claimants

- and -

Donald McPherson

Defendant

**Lesley Anderson KC, Tom Gosling and Arianna Barnes (instructed by Glaisyers ETL) for
the Claimant**

Hearing date: 23rd April 2024

APPROVED RULING

Mr Justice Richard Smith:

Introduction

1. Last Monday, 15 April 2024, the trial commenced in this matter. Given the Defendant's last minute indication that he did not intend to attend, or to be legally represented at trial, a preliminary question arose as to whether the trial should proceed in his absence. Having heard submissions from the Claimants, I ordered that the trial would proceed in the Defendant's absence for the reasons stated in my oral ruling given then ([2024] EWHC 889 (Ch)).
2. During the course of those submissions, the format of the trial was also discussed. The Claimants acknowledged then their duty of fair disclosure in the absence of the Defendant, the underlying objective being to ensure that the court was not misled. To that end, I permitted the Claimants to ask certain questions of their witnesses in evidence-in-chief to put to them points which, had he been present, the Defendant might have raised with them in cross-examination.
3. The oral testimony of a number of the Claimants' witnesses of fact has so far been conducted on that basis and I am satisfied that the Claimants understand and have discharged their related burden to this point at least.

The Defendant's evidence

4. There was also limited discussion last Monday as to the status of the Defendant's own witness statement and the reports of his expert pathologist, Dr Richard Shepherd. The Claimants' position in relation to the latter had already been foreshadowed in their supplemental skeleton (at [30]). That had been lodged and served on the Defendant in response to the Defendant's eleventh hour indication that he would not be present at trial after all.
5. In short, the Claimants argued that, in the Defendant's absence, there was no-one to call Dr Shepherd to give evidence. Since his report and evidence could not be tested in cross-examination, it should not be admitted at trial or little or no reliance can or should be

placed on it. However, the Claimants made clear that, consistent with the duty of fair disclosure, points favourable to the Defendant arising from Dr Shepherd's reports would, as with the other witnesses, be raised with the Claimants' pathology expert, Dr Ashley Fegan-Earl, in examination-in-chief.

6. I did not make any ruling then about the role of the Defendant's evidence, not least because, as I canvassed with Claimants' counsel, I could foresee the possibility that the Defendant's absence from trial notwithstanding, he might still seek to have his own expert give oral testimony. As it turns out, the Defendant's e-mail to the court dated 18 April 2024 concerning the expert evidence did suggest from its reference to the "attendance date" for his pathology expert that Mr McPherson was still contemplating Dr Shepherd giving oral testimony. I invited observations from the Claimants to which their solicitors responded along similar lines as had already been canvassed in their supplemental skeleton.
7. There was further related discussion about this with the Claimants at the hearing last Friday, 19 April 2024, albeit again not conclusive since the Claimants wished to consider the position further. However, given the Defendant's absence, the Court caused a message to be sent to him by e-mail on the same day, identifying the issue and inviting his views in the following terms:-

- “1. *The Judge has noted Mr McPherson's e-mail of 18 April 2024 in which he asks about Dr Shepherd's attendance date and indicates that he remains content for the Judge to consider summary judgment in this case.*
2. *Having previously indicated that this is not a case suitable for summary disposal on the papers, the Judge ruled on Monday of this week that the trial would proceed in the Defendant's absence.*
3. *To that end, the Court has so far heard evidence from 10 of the Claimants' factual witnesses.*
4. *Mr McPherson will have noted the Claimants' position in correspondence that, not being represented or present at trial, the Defendant cannot, alternatively should not, be permitted to call evidence in defence of the claims, including the report and oral evidence of Dr Shepherd.*
5. *The Judge raised this issue with the Claimants during the trial today and he anticipates hearing further from them about it on Monday.*
6. *The Judge has not yet made any decision on the issue.*
7. *Before he does so, he seeks any comments that Mr McPherson may have on the Claimants' position concerning Dr Shepherd's evidence.*

8. *Any comments should be provided to me **and copied to Glaisyers** by 6pm UK time on Sunday 21 April 2024 so that these can inform any further discussion on the subject when the trial resumes next week.*
9. *In the meantime, the Judge notes that both parties have now filed supplementary pathology reports. Given the contents of those reports, the Judge does not consider that any further joint expert statement is required.”*

8. Mr McPherson responded to my clerk on 21 April 2024, stating very briefly:-

“Thank you for your email dated 20 April 2024. I have no comment to make on these points. I will be happy to respect the decision of judge Richard Smith.”

9. As envisaged, I heard further submissions from Claimants’ counsel at the conclusion of the evidence yesterday, 22 April 2024. The Claimants reiterated the position indicated in their supplementary skeleton. In short, they say that, since there is no-one in court for the Defendant to ‘call’ the evidence of Dr Shepherd, it cannot be tested in cross-examination and should not be admitted in evidence. However, even if the court had a discretion in this regard, it should exercise it against the admission of Dr Shepherd’s evidence.
10. The Claimants submit that there is a ‘bright line’ to be drawn between a party who attends trial (whether in person or by his legal representative) and one who does not, as that distinction is made clear in the notes to the White Book (at CPR, Part 39.3.4). It is simply not possible for a party to be both absent and yet somehow sufficiently present to ‘call’ evidence. The Claimants have been unable to identify any cases in which a person who has failed to attend trial has been permitted to ‘call’ a (lay or expert) witness to give evidence but that absence of authority rather emboldens their view as to the impermissibility of such a course. Although it would be open to the court (including here) to read any witness statements or experts’ reports served on behalf of the absent party and to take these into consideration, they would not form part of the evidence in the case.
11. Further support for the Claimants’ position is said to be drawn from the fact of the protections already afforded to the Defendant in this case, namely having the Claimants putting to their own witnesses points potentially favourable to the Defendant. It would – the Claimants submit – be strange for the absent Defendant to have that benefit and, additionally, the further benefit of calling evidence, effectively countenancing an unrecognised form of ‘hybrid’ hearing.

12. Moreover, such a course, it is said, would run counter to the English adversarial system by which evidence is tested or challenged through cross-examination. As *Griffiths v TUI UK Ltd* [2023] UKSC 48 held (at, for example, [43]), that goes to the fairness of the proceedings as a whole. In effect, by calling Dr Shepherd and leading evidence through him, the Defendant would be seeking to impugn the evidence of Dr Fegan-Earl even though he (Dr Fegan-Earl) would not be cross-examined himself because there would not be anyone present for the Defendant to do so. For the court to take into account Dr Shepherd's oral evidence would, in effect, place it in the position of challenging Dr Fegan-Earl's evidence without the latter being properly and fairly tested as well.
13. The problem, it is said, would be compounded by other considerations. If, in the course of cross-examining Dr Shepherd, Claimants' counsel made significant in-roads into Dr Shepherd's evidence, the court might feel that fairness to Dr Shepherd required some re-examination but, without anyone present for the Defendant to do so, the court might be drawn improperly 'into the arena'.
14. Although there is no direct authority on the point arising here, in addition to the general principles indicated in *TUI*, the Claimants derive support for their position from the Court of Appeal decision in *Williams v Hinton* [2011] EWCA Civ 1123, cited in the White Book under CPR 39 in the context of whether the court should proceed with a trial in the absence of a party. In that case, the Appellants did not attend trial or call their witnesses or put in their statements as hearsay statements. As such, those witness statements never became evidence such that the judge was not obliged to consider them, albeit the judge did in fact go further than was required and he did have regard to them. As such, the complaint on appeal that the judge failed fully to consider the Appellant's case and evidence was not a good one (see *Williams v Hinton* at [42]-[46]).
15. To a similar end, the Claimants also rely on *Abdulrida and others v Al-Najar and others* [2021] EWHC 398 (Ch) in which Morgan J, although sceptical of the relevant defendant's reasons for not participating, admitted as hearsay evidence his witness statement, albeit with limited weight placed upon his evidence where it conflicted with that of the other witnesses who had attended trial. The Claimants in this case say that

the Defendant's non-attendance was deliberate rather than unavoidable and there is no basis upon which his evidence should be admitted here. The Claimants go on to say that the position is the same, if not stronger, with respect to the Defendant's expert pathology evidence since that is not only of the nature of opinion evidence, it also highly specialised, such that, if it is to be challenged, our system requires it to be subjected to proper cross-examination.

16. Finally in this regard, the Claimants point to *Bank of Baroda and others v GVK and others* [2023] EWHC 2662 (particularly at [6]-[9]). In that case, the Defendants did not attend trial and no evidence was called on their behalf. Although the court determined that it was not obliged to take into account the evidence of the Defendants' witnesses, it did so in that case with respect to the evidence of Indian law and the accounting evidence. Likewise, the Claimants in this case say, the Defendant not attending and therefore unable to call evidence, there is no scope for Dr Shepherd to give oral evidence, but the court can, in its discretion, take into account Dr Shepherd's written evidence as it sees fit.

Discussion

17. As to the Defendant's own witness statement, CPR, Part 32.2(1)(a) clearly states the general rule that "any fact which needs to be proved by the evidence of witnesses is to be proved ... at trial, by their oral evidence given in public." That is also consistent with the court's directions made on 5 January 2023 concerning the evidence of fact on which the parties *intended* to rely, such reliance being conditional on the relevant witness actually giving evidence.
18. In this case, Mr McPherson has elected not to attend trial. As I have already found in my ruling last week allowing the trial to proceed in his absence, no good reason has been advanced for his non-attendance. Nor has any application been made to admit his statement as hearsay evidence. In those circumstances, the court sees no reason why it should make any order contrary to the general rule stated under CPR, Part 32.2(1)(a). As such, his statement cannot stand as proof of the facts to which it refers.
19. No question of unfairness arises in that event. Mr McPherson has had every opportunity to attend trial. Indeed, he indicated through his counsel at the pre-trial review that he

would do so. He indicated the same thereafter to the Claimants' solicitors. He only indicated a change of heart at the eleventh hour when pressed on the point by the court and said that that he would not be attending after all. In forming my view, I do not lose sight of the extreme seriousness of the matter, including the principal allegation that Mr McPherson unlawfully killed his wife. Nor, obviously, would that seriousness be lost on Mr McPherson. However, for some undisclosed reason known only to him, he has deliberately decided to stay away. As I have also already noted, his suggested inability to fund legal representation was unpersuasive and did not explain his non-attendance in any event.

20. As regards Mr McPherson's expert pathology evidence, the procedural position was that expert evidence was directed, including in the field of pathology, with the parties each having permission to rely on the written report of an expert in that discipline. At the pre-trial review in March 2024, the parties were also given permission to call oral evidence from their pathology experts. As such, it seems to me that the written report of Dr Shepherd already forms part of the evidence that falls to be considered at trial, whether or not the Defendant chooses to exercise the right subsequently granted to him to call his expert. It does not seem to me that the Defendant's absence from trial alters that position.
21. The further question now arises whether, since there is no-one attending trial on behalf of the Defendant and therefore no-one in court to call Dr Shepherd, I should refuse to hear his oral evidence if, as he seems to foreshadow in his 18 April 2024 e-mail, Mr McPherson might instruct him to come to court and testify. I have to say that the present situation is an unusual, and possibly novel one, with no-one in court on the Defendant's side actually present to call his expert. Ultimately, however, the issue does not seem to me to turn on what precisely is meant by the term 'call' rather than the particular circumstances that might present themselves if Mr McPherson does seek to have Dr Shepherd give oral evidence in his absence and how the fairness of proceedings might be maintained in those circumstances.
22. I should also add that I was not persuaded that there are no circumstances in which a party would or should be allowed to call evidence (factual or expert) in his absence. Although perhaps exceptional, one could foresee circumstances in which a party is genuinely prevented from attending trial in person, and unable to do so through the

auspices of legal representatives, but still wished to adduce oral evidence from his witnesses. In those circumstances, the court might permit him to do so or at least entertain that prospect.

23. In this case, however, and, again, despite the seriousness of the allegations against the Defendant, I am not persuaded that the court should permit that unusual course if the Defendant does maintain his position of absence from the trial. Were Mr McPherson simply to be allowed to have Dr Shepherd give evidence orally, I consider that would lead to real unfairness. In those circumstances, the Defendant would effectively have the opportunity for Dr Shepherd's evidence to be fully tested in cross-examination. However, the evidence of Dr Fegan-Earl, whose clients have attended trial, would not be tested in the same fashion. That would be so even though, by leading the evidence of Dr Shepherd, the Defendant would, in effect, be impugning the evidence of Dr Fegan-Earl, at least to the extent of their divergence of opinion. In my view, that imbalance would be compounded by the current trial footing, with Dr Fegan-Earl also having put to him by counsel for the Claimants points of potential assistance to the Defendant.
24. I am also satisfied that simply leaving it to the Claimants and the court to regulate the conduct of the Defendant's own oral expert evidence could lead to further unfairness in circumstances in which the Defendant, had he been present, might have wished to re-examine on aspects of Dr Shepherd's oral evidence, but the court would not be able to do so on the Defendant's behalf without then descending into the arena.
25. Again, I do not lose sight of the potential importance of the pathology evidence in this case. Nor again, and relatedly, do I lose sight of the context of this case, namely one in which the central allegation against the Defendant is unlawful killing. Nor do I lose sight of the fact that the issues arising should not be overstated, particularly where, as here, there is not insubstantial common ground on the experts' written evidence. Finally, the court has wide case management powers, including to manage unusual situations and ensure that, so far as possible, fairness can be done. To that end, I have considered, for example, whether Dr Shepherd's oral evidence could be facilitated, perhaps through the experts giving evidence concurrently or suspending the fair disclosure regime presently in operation, at least during the phase of the pathology evidence.

26. Despite all these matters, the simple point is that Mr McPherson has deliberately chosen not to be present at the trial and not to participate in it. The simple answer to the potential dilemma that he appears possibly to have created by his absence is for him to attend trial, either himself or by counsel, if only for the limited phase of the expert pathology evidence. That course remains open to Mr McPherson.

27. Accordingly, if Mr McPherson does wish to call Dr Shepherd to give oral evidence, he must confirm to the court by no later than 4pm UK time on Thursday of this week, 25 April 2024, his intention to do so and that he will attend trial, either by himself or by a legal representative, on the date currently scheduled for the pathology evidence (29 April 2024). Should Mr McPherson not provide such confirmation by that time, Dr Shepherd will not be permitted to give oral evidence. However, in those circumstances, the court will still treat Dr Shepherd's written reports (including his supplementary reports) as evidence in the case, albeit attaching such weight to them as it considers appropriate in circumstances in which the Claimants have not been afforded the opportunity to test them in cross-examination.