Neutral Citation Number: [2019] EWHC 275 (Comm)

Case No: CL-2017-000792

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/02/2019

Before :

MRS JUSTICE MOULDER

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Between :

A **Claimant**

- and –

B **Defendant**

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- -

Mr N Tse and Mr R Thukral (instructed by **Brown Rudnick LLP**) for the **Claimant**
Mr R Diwan QC (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing date: 25 January 2019

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the judgment of the court on the defendant's application dated 26 November 2018 by which it sought an order to declare inadmissible certain paragraphs of the expert report dated 28 September 2018 of Professor Gaillard and paragraph 17 of the joint expert report dated 14 January 2019.

2. In support of its application the defendant relies on the fourth witness statement of Mr Jeremy James Drew dated 26 November 2018.

3. In response the claimant has filed the third witness statement of Mr Ravinder Kumar Thukral dated 10 December 2018.

4. On 25 January 2019 the court dismissed the claimant's application dated 25 October 2018, seeking responses to its requests for clarification from the defendant's expert, M. Honlet. The reasons were set out in the court's judgment delivered on 25 January 2019.

5. The application arises within proceedings before the English Court concerning the defendant's challenge to the claimant's claim for recognition and enforcement of an arbitral award dated 11 September 2017 (ICC 20958). By that award the claimant was awarded damages for alleged breach of a franchise development agreement, the "FDA", dated 16 July 2001. Clause 14 of the FDA contains an arbitration clause including provision for the arbitration to conducted in Paris. Clause 15 of the FDA provided for the agreement to be governed by English law.

6. The Tribunal concluded that the defendant, KFG, became an additional party to the FDA by novation, and became a party to the arbitration agreement by French law principles, principally the performance of the FDA. KFG now resists recognition and enforcement of the award in the English proceedings brought by the claimant under s.103 of the Arbitration Act 1996 which enacts enacting Art.5(1)(a) of the New York Convention.

7. KFG's case is that the law that governs whether KFG became a party to the arbitration agreement is the law governing the transfer of the FDA, and even if this is not the case the validity of the arbitration agreement is governed by English law.

8. The claimant says that the law governing the transfer of the arbitration agreement is the law governing the validity of the arbitration agreement and French law applies.

9. KFG has also brought French annulment proceedings pursuant to Art.1520 of the French Civil Code, and the claimant has sought, by an application in March 2018, for an adjournment of the English proceedings under S103 before the English Courts pending the outcome of the French proceedings seeking annulment.

10. At a CMC Teare J made an order dated 15 June 2018. He directed a hearing to deal firstly with the claimant's application for an adjournment and security, and secondly to try certain identified preliminary issues in respect of the s.103 challenge. That hearing has now been fixed for March 2019.

11. Pursuant to Art.5(1)(a) of the New York Convention as enacted in s.103(2) it is provided that recognition or enforcement of an award may be refused if the party is under an incapacity or the arbitration agreement is not valid under the law to which the parties subjected it or the law of the country where the award was made.

12. In summary on this application counsel for the defendant submitted that:

    i) the sections of the report which deal with questions of construction or the application of the law to the facts are inadmissible;

    ii) the section which deals with Article 5 of the New York Convention cuts across arguments that the defendant will make at the March hearing;

    iii) the authority of *Rogers v Hoyle* [2014] EWCA Civ 257 is to be distinguished.

13. In *Rogers v Hoyle* the claimants, who were the executors of the deceased's will, brought a claim in negligence against the pilot of a bi-plane in which the deceased had been a passenger, alleging that he had lost control of the plane while executing an aerobatic loop for which he had insufficient training and experience. The claimants gave notice of their intention to rely on a report produced by the Department of Transport's Air Accident Investigation Branch ("AAIB"). The defendant applied (i) for a declaration that the report was inadmissible because of the rule that the findings of courts, other tribunals and inquiries were inadmissible in subsequent proceedings and it was wrong to allow expert opinion evidence which did not comply with the provisions of CPR Pt 35.1 , or (ii) alternatively, for the court to exercise its discretion to exclude the report from evidence pursuant to CPR r 32.1(2) . The judge refused the application, holding that the whole AAIB report was admissible as evidence in the proceedings, with it being a matter for the trial judge to make use of the report as he thought fit.

14. On appeal the appeal was dismissed: the Court of Appeal distinguished *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 and held that the rule that the findings of courts, tribunals and inquiries were inadmissible in subsequent proceedings did not apply to the AAIB report. The report contained various statements of opinion on causation of the accident and Christopher Clarke LJ giving the judgment of the court, with which the other judges agreed, stated that the AAIB appeared to be a body with the requisite special expertise to express an opinion based on the facts as it understood, or assumed, them to be.

15. He said in this context:

> "53. In so far as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category. I agree with what he said in para 117 of his judgment:
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> "Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others

> which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be 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. As Thomas LJ trenchantly observed in *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2009] Bus LR 809 , para 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'.
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> 54. The judge concluded that the whole of the report was admissible, it being a matter for the trial judge to make use of the report as he or she thought fit. Even if he had concluded that it contained some inadmissible material he would not have thought it sensible to engage in an editing exercise. The trial judge should see the whole report and leave out of account any part of it that was inadmissible.
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> 55. Subject to the second and third grounds of appeal, I agree with this conclusion. It is not apparent to me that any part of the report should be regarded as simply expressing an opinion on matters of fact (as opposed to recording evidence) in relation to which the expertise of the AAIB has no relevance. But even if any part of the report was (or proves on close analysis hereafter) to have that character, the correct approach is as outlined by the judge."

16. In *Moylett v Geldof* [2018] EWHC 893 (Ch) Carr J dealt with the admissibility of parts of the claimant's expert report and the objection that the report went beyond what was permissible for an expert by expressing an opinion on the ultimate question in the proceedings. Carr J, having cited paras 52-55 of the judgment of Christopher Clarke LJ in *Rogers v Hoyle* said at [4]:

> "The ultimate message from that decision is that it is much preferable for the court, rather than picking through expert reports, seeking to excise individual sentences and engaging in an editing exercise, to allow the trial judge to consider the report in its entirety, assuming that it is genuine expert evidence, and to attach such weight as it sees fit at the trial to those passages in the report."

17. It was submitted for the defendant that it is incorrect to rely on these authorities for the following reasons:

    i) The evidence of Professor Gaillard is prejudicial;

ii) There is no room for doubt in this case as to admissibility and this stems from the instructions given;

iii) *Rogers v Hoyle* was concerned with an expert report which was outside CPR 35 and was concerned with the rule in *Hollington*;

iv) The decision in *Rogers v Hoyle* made sense because the report was addressing causation not foreign law and it was pragmatic to allow the physical report from an independent organisation rather than remove parts of it;

v) In *Rogers v Hoyle* the AAIB report was admissible and the application therefore was to exclude it and thus it was a completely different situation.

Discussion

18. I shall deal first with the submission for the defendant that *Rogers v Hoyle* was concerned with an expert report which was outside CPR 35 and was concerned with the rule in *Hollington.*

19. It seems to me clear from the passages cited above that the principle to be derived from *Rogers v Hoyle* is not limited to consideration of the rule in *Hollington* but clearly stated that there is nothing to be gained, except in very clear cases, from excluding or excising opinions where the expert's report opines on inadmissible matters; such an exercise is unnecessary and disproportionate.

20. As is also clear in my view from the judgment, the proper course is for the whole document to be 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.

21. I see no reason to limit the ambit of the principle in *Rogers v Hoyle* to expert reports which fall outside CPR35 and no basis in the judgment to draw such a distinction in this regard. As acknowledged in *Rogers v Hoyle* an expert report under CPR 35 is just dealing with a particular category of expert reports. It was submitted that the point concerning the scope of the principle in *Rogers v Hoyle* was not argued before Carr J but for the reasons just given, in my view Carr J was correct to regard the decision of the Court of Appeal as of wider application.

22. I was referred to *Hollander on Documentary Evidence* (13th Ed.) at 31-09:

> "Hoyle is an important commonsense judgment, sweeping away historic and unnecessary restrictions on admissibility and treating all matters as going to weight and for the trial judge to evaluate."

23. For the defendant it was submitted that this observation should be read as referring to the rule in *Hollington*. In my view the sentence is of wider application. The context of the statement in 31-09 is that *Hollander* refers in 31.08 to the argument advanced in *Hoyle* that the CPR 35 was an exclusive code for the admission of expert evidence at trial and the finding of Christopher Clarke LJ that the AAIB report did not fall within CPR Pt 35 but that CPR Pt 35 was not an exclusive code regulating the admission of expert evidence. In my view therefore the view expressed in *Hollander* at 31-09 was

not referring to the rule in *Hollington* and provides support for this court's conclusion on the correct approach to be taken to the defendant's application in the light of *Hoyle*.

24. It was also submitted for the defendant that the AAIB report was admissible and the application therefore before the court in *Rogers v Hoyle* was to exclude the report and thus it was a completely different situation from the present one.

25. In my view it is clear from paragraphs 54 and 55 of the judgment in *Hoyle* that this is not a valid distinction to draw:

> "…Even if he had concluded that it contained some inadmissible material he would not have thought it sensible to engage in an editing exercise. The trial judge should see the whole report and leave out of account any part of it that was inadmissible.
>
> "…even if any part of the report was (or proves on close analysis hereafter) to [be simply expressing an opinion on matters of fact], the correct approach is as outlined by the judge."

26. Counsel for the defendant submitted that in this case there is no room for doubt as to admissibility and this stems from the instructions given. Counsel for the defendant submitted that certain sections of the report (paras 44-49, 55 and 56) are pure application of the law to the facts and therefore inadmissible; further that the analysis of the facts is incorrect in relation to certain payments made by the defendant as demonstrated by the evidence of Mr Drew in his second witness statement.

27. Although the dicta of Christopher Clarke LJ appear to leave open the possibility of excising inadmissible evidence in a clear case, the court has to weigh whether this is in fact the correct course, even to those sections of the report which the defendant says are clearly inadmissible. I concur with the conclusion of Carr J in *Geldof* at [4] that the "ultimate message" from *Rogers v Hoyle* is that it is much preferable for the court, rather than picking through expert reports, seeking to excise individual sentences and engaging in an editing exercise, to allow the trial judge to consider the report in its entirety. I accept that Carr J did in *Geldof* determine the question of admissibility insofar as it related to the reliance by the expert on the opinions of two musicians, however as to the "ultimate conclusion" of the expert, namely whether it was more likely that the first defendant or the claimant composed the relevant music, Carr J stated at [8]:

> "…it might have been preferable if he had said that his conclusions were based on whether a pianist or guitarist composed the music. However, I do not think that it is appropriate or necessary for me at this stage, or at all, to exclude this evidence. It is Mr Protheroe's opinion, no doubt sincerely held, and it seems to me appropriate that he should express himself as he wishes to do so. What weight is to be attached to it, as I have said, is a matter for the trial.."

28. In my view in the circumstances of this case the defendant has not established any real prejudice to the defendant which would result from the reports going in their entirety to the judge at the March hearing. The defendant seeks an order requiring Professor Gaillard to reissue his report with the relevant paragraphs removed. This would be contrary to the approach stated in *Rogers v Hoyle* that 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.

29. Further this is a case where the experts have produced a joint report which addresses the individual reports and in which M. Honlet has stated his position in response to the opinions expressed by Professor Gaillard. For example, to the conclusion of Professor Gaillard at para 49 of his report, M. Honlet states in the joint report that this cannot be reached without a complete understanding of the facts and M Honlet further states this is a question of the application of the law to the facts.

30. Whilst therefore the defendant seeks to remove certain passages of the joint report in which M. Honlet makes these observations (paras 22, 27, 28 and 29) as a consequence of its application to remove paragraphs from the underlying report of Professor Gaillard, it seems to me that the experts have been able to produce a joint report and the more appropriate course is to allow the joint report to stand in its entirety and allow the court at the March hearing to consider the expert reports including the joint report. Given the fact that these areas are addressed expressly by M Honlet in the joint report is difficult to see any real prejudice which would arise from this course and why the experts should be put to the time and expense of reissuing the joint report.

31. Insofar as there are matters in the report of Professor Gaillard which the claimant submits have a bearing on the determination of the adjournment application, the judge at the March hearing will have the advantage of being addressed on the merits of the application for the adjournment in its entirety. It seems to me unnecessary and undesirable for this court to pre-empt that decision in any way by considering the submissions on behalf of the claimant as to the absence of direct authority as a matter of French law on the position under French law and thus the relevance of the evidence of Professor Gaillard in this regard.

32. It was submitted for the defendant that as in *Geldof*, having heard the submissions on admissibility, this court should rule on the question. To the extent that any argument is advanced on wasted costs if the matter is not determined now, it seems to me that the defendant chose to bring its application, it was opposed by the claimant on the basis that it was premature and contrary to the authorities and the defendant nevertheless chose to pursue the application. In any event as noted above it is open to the defendant to deploy the same arguments at the March hearing as it has made before this court so any work in preparation for the hearing of the application will not be lost. Further on the question of costs any order to excise sections of the report would itself have costs as the defendant's application would, if granted, require both the report and the joint report to be amended and the defendant has not shown why such costs need to be incurred.

33. Finally as to the submission on behalf of the defendant that the evidence of Professor Gaillard is prejudicial. It was submitted for the defendant that the opinions expressed by Professor Gaillard in relation to the interpretation of Article V of the New York Convention (paras 18-24 of his report) cut across the submissions that counsel would

intend to make at the March hearing, in particular whether there can be said to be an implied choice of law. Counsel for the defendant submitted that the report of Professor Gaillard was a prejudicial opinion from a jurist known in the area which was being used in an inadmissible and prejudicial way to try and support the other side's case.

34. However in my view, even if the relevant passages are not excised from the report, the defendant is not precluded from advancing its submissions in March and to the extent counsel is successful in persuading the judge at that hearing that the opinions of Professor Gaillard in this regard are inadmissible, that judge is well able to disregard such opinions in reaching his conclusion. To infer that the defendant is prejudiced by the inclusion of these particular opinions would be to infer that the judge at the March hearing was unable to put such opinions on one side and disregard them if in fact they are held to be inadmissible. There is no basis for this court to conclude that a judge in the Commercial Court cannot form a view on the evidence, having heard submissions and in so doing, disregard inadmissible evidence.

Conclusion

35. For all these reasons therefore the defendant's application is dismissed.