Neutral Citation Number: 2020] EWHC 2268 (QB)

Case No: Claim No: D28YM263
Appeal Ref: BM90173A

In the High Court of Justice
High Court Appeal Centre Birmingham
On appeal from the County Court of Birmingham
Order of HHJ Truman dated 4 September 2019
County Court case number: D28YM263
Appeal ref: BM90173A

Birmingham Appeal Centre
Priory Courts, 33 Bull Street,
Birmingham B4 6DS

Date: 20/08/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

MR PETER GRIFFITHS	**Claimant/ Appellant**
- and -	
TUI UK LIMITED	**Defendant/ Respondent**

- -
- -

Mr Robert Weir QC and Mr Stephen Cottrell (instructed by **Irwin Mitchell LLP**) for the **Claimant/Appellant**
Mr Howard Stevens QC and Mr Sebastian Clegg (instructed by **Kennedys Law**) for the **Defendant/Respondent**

Hearing dates: 23 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MARTIN SPENCER

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 20 August 2020.

MR JUSTICE MARTIN SPENCER :

Introduction

1. With permission granted by Pepperall J on 31 December 2019, the Claimant appeals against the decision and judgment of Her Honour Judge Truman handed down on 4 September 2019 whereby she dismissed the Claimant's claim for damages arising out of breach of contract in relation to a gastric illness suffered by the Claimant whilst on holiday in Turkey in August 2014. It was the Claimant's case that he had contracted his illness as a result of the consumption of contaminated food or fluid at the hotel.

2. This appeal raises a fundamental question concerning the proper approach of a court towards expert evidence which is "uncontroverted", a term which is more closely defined and elaborated upon in paragraph 10 below. Where such evidence is uncontroverted, is it open to the court nevertheless to examine the contents of the report and the reasoning leading to the expert's conclusions and reject those conclusions if the court is dissatisfied with the reasoning? Or is the court obliged, subject to exceptional circumstances, to accept the expert's conclusions?

Background facts

3. The Claimant purchased from the Defendant an all-inclusive holiday to a hotel in Turkey for the period 2 August 2014 – 16 August 2014. At Birmingham Airport, the Claimant ate a burger purchased from a well-known burger chain. Thereafter, he ate all his meals at the hotel in Turkey save for a single meal at a nearby town on 7 August 2014.

4. The Claimant fell ill on the evening of 4 August 2014 suffering from stomach cramps and diarrhoea. Due to the illness, he spent the next two days in his hotel room whereupon his symptoms began to lessen although they did not settle completely. On 7 August 2014, he spoke to a tour representative about his symptoms and was directed to the local town to visit a pharmacy for medication. He, his wife and their son took the hotel shuttle bus into the town which was about 15 miles away where they visited the pharmacy and he was provided with anti-diarrhoea tablets. Whilst in the town, they visited a local restaurant. The Claimant said that although he ordered a meal, he could not eat much of it as he did not have much of an appetite.

5. Unfortunately, on 10 August 2014, the Claimant again began to feel unwell, suffering from diarrhoea and needing to visit the bathroom approximately every hour. On 13 August 2014, the Claimant spoke to a doctor who advised that he required hospital treatment. He was admitted to Kusadasi Hospital for three days and two nights where he was treated with intravenous fluids and antibiotics. The diagnosis was acute gastroenteritis. A stool sample was taken and analysed which showed multiple pathogens, both parasitic and viral.

6. As a result of this illness, the Claimant lost about 1.5 stone in weight, his appetite was affected for five to six months and by the time of the trial he was still suffering with stomach churning and bubbling, cramping pains in his stomach, increased stomach bloating and increased frequency of bowel movements, including urgency. He suffers from severe explosive diarrhoea about once a month and his continuing problems affect his ability to undertake social outings. The learned judge would have made an

award of £29,000 in relation to general damages for pain, suffering and loss of amenity indicating her view of the seriousness of the condition.

The Claim

7. Proceedings were issued and Particulars of Claim served on 19 July 2017. At that stage, the claim was fairly widely cast and did not commit to any particular cause of the illness although it can be said that the focus was on the food and drink. Thus, it was alleged that the food hygiene standards were low with food being reheated and re-served on numerous days, often being left uncovered and the cutlery and crockery appeared poorly cleaned with no evidence of alcohol hand-gel being used appropriately. The Claimant had obtained a medical report from Dr Linzi Thomas dated 14 July 2015 which had settled upon the food, drink or fluids consumed at the hotel as being the cause of the Claimant's illness.

8. In the defence, the Defendant denied the claim in full and in particular, at paragraph 14, denied that the Claimant's illness had been caused by his consumption of food or drink at the hotel. The Defendant averred:

> "a) The Claimant is required to prove when, where and under what circumstances he fell ill and as to the means by which any such illness was transmitted to him.
>
> b) Gastric illness is a common feature of overseas travel. The possible causes of such illness are numerous, including overindulgence, unfamiliar temperatures, excess sun and viral illness. It is denied that the hotel is implicated in the contraction of any such illness as the Claimant may be able to establish."

9. By an order of Deputy District Judge Parker dated 13 March 2018 the following Orders were made (among others):

> "4a) The defendant has permission to obtain a report of a gastroenterologist, whose identity is to be provided by 27 February 2018. The report is to be served by 29 June 2018.
>
> …
>
> 10) The claimant has permission to obtain a report from Professor Pennington, consultant microbiologist dealing with causation with such report to be served no later than 4pm on 15 August 2018.
>
> 11) The defendant has permission to obtain a report from Dr Gant consultant microbiologist dealing with causation with such report to be served no later than 4pm on 15 August 2018.
>
> 12) The aforementioned gastroenterologist and microbiologists to meet and prepare joint statements of areas of agreement and disagreement by 4pm 19 September 2018."

The Defendant did not, however, serve a report from a gastroenterologist within the time specified, nor did it serve a report from its nominated microbiologist, Dr Gant. On 5 September 2018, the Defendant's solicitors, Kennedys, wrote to the Claimant's solicitors, Irwin Mitchell, in the following terms:

> "We confirm we do not intend to rely on expert evidence from a microbiologist in this case."

Irwin Mitchell immediately served the report of Professor Pennington on the Defendant. On 29 October 2018, upon the Defendant's application for permission to rely on a report from a gastroenterologist, and for relief from sanction, that application was refused with the result that the Defendant was left without any expert evidence for the purposes of the trial.

The evidence before HHJ Truman

10. At the trial, the learned judge heard oral evidence only from the Claimant and his wife, although there was also admitted into evidence statements submitted by the Defendant from Dr Ibrahim Kocaoglu, a medical doctor at the Aqua Fantasy Aqua Park Hotel, Izmir, where the Claimant was staying and Ms Kathy Nys, the Head of Guest Relations and Executive Assistant to the General Manager at the hotel. Additionally, the learned judge had the Defendant's disclosed documents. These documents, together with the witness statements, were all material which Professor Pennington confirmed he had considered in reaching his opinion, as stated at paragraph 16 of Judge Truman's judgment. Importantly, the evidence of the Claimant and his wife was accepted in full. Thus the learned judge found that the Claimant was indeed ill as he had described, and that he had proved the problems he had suffered from then and since. She accepted the evidence of the Claimant and his wife as to what they ate and the dates the Claimant fell ill. So far as the Claimant's expert evidence is concerned, counsel for the Claimant relied on the reports of Dr Thomas only for the purposes of condition and prognosis, but not for causation of the Claimant's illness. For that, reliance was placed on the report of Professor Pennington together with his answers to questions put to him by the Defendant under part 35 CPR. However, Professor Pennington was not required to be called or cross-examined: it would appear that no application was made for him to attend for cross-examination. Thus, on the issue of causation, the only expert evidence before the learned judge was the report and the part 35 answers of Professor Pennington. These were uncontroverted in the sense that the Defendant 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 by the Defendant to undermine the factual basis for the report through cross-examination of the Claimant and his wife, nor by cross-examination of Professor Pennington. In this sense, and unusually, the evidence of Professor Pennington was truly "uncontroverted".

11. Without doubt, the report of Professor Pennington was short, indeed one could describe it as "minimalist". Having set out his professional credentials, he referred to the documents which he had used in preparing the report: the letter of claim, a medical report for Peter Griffiths, his witness statement, a local standard report, defendant's witness statement, defendant's disclosure, Particulars of Claim and contemporaneous evidence. He set out his instructions, namely:

1) To comment on the chronology of events,

2) To provide a detailed commentary on the issue of gastric illness and any breaches in the health and safety procedures in place at the hotel,

3) Confirm as to whether on the balance of probabilities the illnesses in question were caused as a result of staying at the hotel in question and a breakdown in the health and hygiene practises at the hotel.

12. It is relevant and appropriate to cite the rest of the report in full:

> "2. Peter Griffiths stayed at the Aqua Fantasy Aquapark Hotel, Turkey, on an all-inclusive basis from 2 August – 16 August 2014. He fell ill on the night of 4 August with diarrhoea. His symptoms were severe for 48 hours. They eased but returned after seven days. He was admitted to hospital on 13 August. His blood pressure was high and he was dehydrated. He was discharged on 15 August. His stools were tested in the Turkish hospital, Ada Private Hospital. According to the discharge report of 16 August 2014 by Dr Yusuf Tuna, entamoeba histolytica cysts and Giardia intestinalis was said to be seen on microscopy, and rotavirus, adenovirus, E. histolytica and Giardia antigen tests were positive. …
>
> 3. I do not think that Peter Griffiths had amoebic dysentery caused by Entamoeba histolytica. Entamoeba cysts (which were found in his stools) are not diagnostic on their own because they cannot be distinguished routinely from the far commoner cysts of the harmless Entamoeba dispar. The onset of amoebic dysentery is usually gradual or intermittent; acute colitis is uncommon. Vomiting is not a feature and the diarrhoea is almost always bloody. Cases of amoebic dysentery most commonly have an incubation period of two to four weeks. None of these features lend support to a diagnosis of amoebic dysentery contracted in Turkey in Peter Griffiths' case. I consider it to be statistically improbable that he had been infected simultaneously with Giardia, adenovirus and rotavirus. I note that a microscopic diagnosis of Giardia is not straightforward. However it is much more likely as a cause of gastroenteritis in this case then any of the other pathogens.
>
> 4. The possibility cannot be ruled out that Peter Griffiths had two infections, one starting on 4 August and a second starting on 11 August.
>
> It is not possible to make an accurate aetiological diagnosis in cases of gastroenteritis from symptoms alone. On the balance of probabilities the absence of vomiting as a symptom make a viral cause much less likely than a bacterial one. The commonest recorded bacterial causes of acute gastroenteritis in places like Turkey are Campylobacter, Shigella and

> Salmonella. Giardia is considered to be reasonably common. Campylobacter is more commonly recorded in travellers returning to the UK from holidays abroad than Salmonella or Shigella. Enterotoxigenic E.coli (ETEC) and its relatives are considered to be common causes of diarrhoea in countries such as Turkey. For technical reasons they are not routinely tested for in the UK.
>
> The incubation period for Giardia ranges from one to fourteen days. It averages seven days. Peter Griffiths had been at the hotel for two days before he fell ill, and nine days before his diarrhoea returned. Campylobacter has an average incubation period of three days. For ETEC it ranges from 12 to 72 hours. On the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel."

13. So far as Professor Pennington's answers to the part 35 questions are concerned, the relevant questions and answers are as follows:

> "4) You offer opinion that the claimant suffered gastric illness caused by consumption of contaminated food or fluid from the hotel. In relation to your opinion on causation, to what extent do you consider that there would be:
>
> a) A range of opinion on causation amongst appropriate experts?
>
> b) If there is a range, what is it?
>
> c) What is your position within that range?
>
> d) What facts and matters have you relied upon in adopting your position within that range?
>
> Answer
>
> a)-d) Regarding causation etc the appropriate experts would consider the gastroenteritis symptoms, their possible infective cause, the commonness of possible microbial causes in Turkey and their modes of transmission, their incubation periods and the length of time the claimant had been at the hotel. I did the same.
>
> 5) To what extent were you able to identify the *exact* source of contaminated food or fluid which caused the illness? If so, please state what exactly was contaminated and provide supporting evidence of the contamination.
>
> Answer
>
> In single cases of infective gastroenteritis it is usually not possible (as in this case) to determine the exact source of contaminated food that led to the infection. To determine the exact source under these

circumstances it would be necessary for suspect foods to be tested for the possible pathogens: this is usually impossible because the suspected food would have been consumed. It is highly unlikely that any will have been retained in a condition suitable for microbiological testing.

6) If the court finds as a fact that the claimant ate outside of the hotel in the days/weeks leading to onset of illness, to what extent would that impact on the opinions you express in relation to causation?

Answer

If the claimant had eaten outside the hotel the nature of the food and the date(s) of its consumption and the frequency of its consumption would be taken into account in assessing the probability that such food was more or less likely than hotel food to have been the source of the pathogen that caused the gastroenteritis.

7) If the court finds as fact that others on this holiday who had consumed the food provided by the hotel were not similarly afflicted, to what extent would that impact on the opinions you express in relation to causation?

Answer

The great majority of cases of food-borne infective gastroenteritis are sporadic and do not occur in outbreaks. So if no other cases similarly affected had been reported, this would not affect my conclusions regarding causation.

8) If the court finds as fact that the hotel was applying high standards in relation to hygiene and monitoring of food, to what extent would that impact on the opinions you express in relation to causation?

Answer

I would expect the court to take into account the hotel HACCP plan and its implementation with all its associated documentation in determining its food hygiene standards; if high quality I would take it into account regarding causation. I would put much less weight on food monitoring itself as a food safety measure because of its inherent statistical limitations."

The Judgment of HHJ Truman

14. At paragraph 12 of her judgment, Judge Truman referred to the decision of the Court of Appeal in *Wood v TUI Travel Plc* [2018] QB 927 which concerned a claim for damages against this same defendant, TUI, for acute gastroenteritis suffered by the claimant whilst staying at a hotel in the Dominican Republic in 2011 on an all-inclusive holiday. Judge Worster sitting in the County Court at Birmingham, allowed the claim on the basis that there was an implied condition in the contract that the food and drink being supplied would be of satisfactory quality pursuant to section 4(2) of the Supply of Goods and Services Act 1982. The defendant's appeal was dismissed

but, in the course of their judgments, Burnett LJ (as he then was) and Sir Brian Leveson P commented, in *obiter dicta*, on the proof of causation in cases such as these. This led Judge Truman in the present case to say as follows:

"12. The fact that the claimant was ill is, of course, not enough by itself for the claimant to succeed. He must satisfy the test in Wood v TUI. In that case, Burnett LJ commented that:

> 'The judge was satisfied on the evidence that Mr and Mrs Wood suffered an illness as a result of contamination of the food or drink they had consumed. Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and the food was not "satisfactory". It is well known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an acceptable hazard of travel. Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted. Additionally other potential causes of the illness would have to be considered such as a vomiting virus. The evidence deployed in the trial below shows that the hotel was applying established standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary.'

Sir Brian Leveson P commented:

> 'I agree that it will always be difficult (indeed very difficult) to prove that an illness is a consequence of food or drink which was not of satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded.'"

15. I would comment that it seems unlikely that Sir Brian Leveson P had in mind a case such as the present where the Claimant has been admitted to hospital, has provided stool samples, those samples have been analysed and shown to contain certain pathogens and those pathogens have then been considered by an expert microbiologist in the process of an investigation into causation by the Claimant's solicitors. Those words are, though, particularly apt where a person has suffered gastroenteritis whilst on an all-inclusive holiday and relies on that alone as proving causation: that would not be enough in the absence of evidence of an "outbreak", that is others being similarly affected in such numbers as to lead to the conclusion, on the balance of probabilities that the food or drink supplied by the hotel was to blame.

16. Having set out the terms of Professor Pennington's report the learned judge then endorsed the submissions of counsel for the Defendant which included a fundamental

critique of the Professor's report, his reasoning and the basis for his conclusions. Thus, she said:

> "18. Counsel for the defendant was unhappy about a number of matters within the report. The Professor thought it unlikely that the claimant had been simultaneously infected with Giardia, adenovirus and rotavirus. That on the face of it would appear to suggest that the claimant had been infected on at least two separate occasions. The claimant's history of being ill, recovering somewhat and then being ill again, might also suggest two separate infections, and indeed the report says that the possibility of there being two separate infections cannot be ruled out. Nothing further is then said about that. There is no explanation as to why the meal eaten on 7 August might not be at fault for the possible second illness and why the conclusion is that the claimant acquired his illness following the consumption of contaminated food or fluid from the hotel.
>
> 19. Further, counsel points to the lack of reasoning between setting out the incubation periods (one to fourteen days for Giardia, average seven), the claimant falling ill after two and then nine days after arrival at the hotel, and then saying that the illness is due to the hotel, with again nothing to say why this is so. The report makes no specific mention of the food the claimant ate at the airport before reaching the hotel (which falls within the incubation periods given), nor what he ate in the local town, and why those potential sources should be discounted. Counsel notes that, despite the Professor being asked to comment on possible breaches in health and hygiene procedures and having been provided with the hotel's documentation on their procedures etc, nowhere is any breach, causative or otherwise, actually listed and no comments on any perceived breaches were made. Counsel submits that the court might consider that this lack of comment is because the Professor found no breaches.
>
> 20. I also note that whilst the Professor says that a viral cause is much less likely than a bacterial one due to the fact that the claimant did not suffer from vomiting, that doesn't explain how it was that adenovirus and rotavirus were found in the claimant. If they had no effect, or could otherwise be discounted, I would have expected the report to say in more detail why that was so, in the same way that it provided a reasoned explanation for why the claimant was not likely to be suffering from amoebic dysentery. The fact that viral infections more usually cause vomiting on the face of it means that sometimes you can have a viral infection without vomiting. Further, whilst a viral cause is apparently less likely than a bacterial one due to the lack of vomiting, I'm not clear how this fits in with the fact that only parasites and viruses were isolated in the sample, not bacteria,

> and the pathogens which were found were known to cause stomach upsets.
>
> 21. The defence had set out a number of non-food related methods of transmission for the claimant's illness from the identified pathogens. The report does not say why any of those should be discounted in this particular case. Similarly the report does not say why the possible routes for infection listed in the Particulars of Claim (air conditioning, leakage from a baby's nappy in the swimming pool etc) are less likely to be applicable, or, if they might be relevant, what the breaches were in the health and hygiene procedures which led to the claimant falling ill."

17. The learned judge also referred to Professor Pennington's part 35 answers and in particular his failure to respond, in answer to question 4), to whether there is a range of opinion and, if so, where his opinion might fall within that range.

18. Having set out briefly the closing submissions of counsel for each side, the learned judge expressed her decision as follows:

> "28. It is trite law that the burden of proof is on the claimant. It is open to a defendant to sit back and do nothing save make submissions, and if the evidence is not sufficient to satisfy a court on the balance of probabilities, a claimant will not succeed. In this case, I am not satisfied that the medical evidence shows, following *Wood v TUI*, that it is more likely than not that the claimant's illness was caused by ingesting contaminated food or drink supplied by the hotel. I accept counsel for the defendant's submissions that a number of the assertions made are bare *ipse dixit*. There is sometimes a huge gap in reasoning between undoubted factual matters (such as incubation periods) and the conclusion that the hotel was at fault. The court is not a rubber stamp to just accept what someone has said. When causation is clearly in issue, I do consider it incumbent on the medical experts to provide some reasoning for their conclusions. I consider that is what *Kennedy v Cordia* advises is required. I consider that it is necessary in this case to say why, at the least, it is considered that the pre-flight meal or the local town meal should be excluded. When both sets of pleadings raise a number of possible causes and transmission methods, it might also be thought that the expert report would set out why they would be considered less likely in this particular case. I consider that *Wood v TUI* has clearly said that the court cannot just draw an inference from the fact that someone was ill, and that other potential causes have to be considered and excluded. Where the report does not mention a number of the raised other possible causes, I do not think it would be appropriate, without more, to assume those other causes have been considered and discounted for some good but unspecified reason.

> 29. Dr Thomas and Professor Pennington are undoubtedly experienced practitioners. They may both well consider, with their years of experience, that the claimant had infective gastroenteritis caused by eating hotel food, but it seems to me that reports prepared after the *Wood v TUI* need to deal with those matters the Court of Appeal specified. These reports do not do that. In some instances, they do not comply with CPR 35 (the failure to supply a range of opinion). They certainly do not provide me with sufficient information to be able to say that there is a clear train or logic between, for example, the incubation periods and the onset of illness, so that the pre-flight meal can be excluded or that the hotel food is a more likely cause; similarly for the 'second' illness – it is not said why it is more likely to be a relapse rather than a second infection, especially where the expert has said that it would be unlikely to have all the identified pathogens from one episode of eating contaminated food. It is thus not clear why the eating out in the local town can be discounted.
>
> 30. In the circumstances, I find the claimant has not proven his case and I dismiss the claim."

The Claimant's arguments on appeal

19. On this appeal, Mr Weir QC and Mr Cottrell for the Claimant submit that Judge Truman erred in rejecting the expert evidence of Professor Pennington in the absence of any evidence, whether expert or otherwise, challenging or contradicting his conclusion. Mr Weir refers the court to the judgment of Clarke LJ (as he then was) in *Coopers Payen Limited v Southampton Container Terminal Limited* [2004] Lloyds Rep 331 at page 338. There, Clarke LJ, with whom the other judges agreed, contrasted the position where an expert, for example a single joint expert, is the only witness on a particular topic with the position where the expert's opinion is only part of the evidence. He said:

> "40. Mr Russell submits that it should be the rare case indeed in which it is appropriate for the Court to disregard the evidence of the single joint expert, and such a case will be limited to circumstances where the witness has failed to comply with his `overriding duty to the Court or has plainly erred. He further submits that where such evidence is disregarded the judge must give clear and cogent reasons for doing so. There is force in those submissions.
>
> 41. Mr Buckingham by contrast, summarised his relevant submissions in this regard as follows:
>
> > i) Generally the expert's report will be his evidence, without the need for amplification or cross-examination.

> ii) However, in some circumstances it will be appropriate for the parties to have the opportunity to cross-examine the expert; for instance, in this case, where the report was produced very late and the expert has not considered all the written questions that had been put to him.
>
> iii) The report and the expert's oral evidence, if applicable, is then the evidence of the expert.
>
> iv) This evidence must then be weighed in the balance with the other evidence in the case and the judge will come to a conclusion based upon all the evidence.
>
> v) The principles set out by Lord Wolfe in *Peet v Mid-Kent Care Healthcare Trust* are directed at the first three of those points. The case does not establish that the evidence of the expert must then be accepted by the Court. The Court must take its own view of the expert evidence in the light of all the other evidence.

I would accept those submissions, as I think Mr Russell did, in the course of his oral argument. I would add these further observations.

42. All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. **In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong**. More often, however, the expert's opinion will be only part of the evidence in the case. For example the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the Court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the Court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate.

43. In the instant case the judge did not disregard the evidence of the joint expert. On the contrary in some respects she accepted it. A judge should very rarely disregard such evidence. He or she must evaluate it and reach appropriate conclusions with regard to it. Appropriate reasons for any

> conclusions reached should of course be given." [Emphasis added]

Giving a concurring judgment, Mr Justice Lightman said:

> "64. I agree with the judgment of my Lord, Lord Justice Clarke and will only add a few words of my own. The issue on this appeal is whether it was open to the trial judge to accept the evidence of the defendants' witness, Mr Strange, and to reject the evidence of Mr Krabbendam, the single joint expert appointed in the case, on the issue of the speed at which the trailer was travelling when it toppled over.
>
> …
>
> 67. Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain. But if his evidence is on an issue of fact on which direct evidence is given, for example the speed at which a vehicle was travelling at a particular time, the situation is somewhat different. If the evidence of a witness of fact on the issue is credible, the judge may be faced with what, if they stood alone, may be the compelling evidence of two witnesses in favour of two opposing and conflicting conclusions. There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact."

Mr Weir QC submits that the judge in this case was in the position referred to by Lord Justice Clarke in the first part of paragraph 42 and by Mr Justice Lightman in the first part of paragraph 67, namely the expert being the only witness on a particular topic or, per Lightman J, a single expert giving evidence on an issue of fact on which no direct evidence is called and where there was no need for his evidence to be evaluated in the light of his answers in cross-examination because the defendant did not call for him to be cross-examined. Mr Weir submits that Professor Pennington's evidence was, in every sense, uncontroverted. The position was to be contrasted with *Coopers Payen* itself where, although there was a single joint expert, his evidence was controverted by that of Mr Strange, the witness called for the defendant, thus leading to the necessity for the learned judge in that case to make an assessment of the weight and value of the evidence of the respective witnesses. Here, there was no other evidence against which to weigh the evidence of Professor Pennington and it should therefore have been accepted.

20. Mr Weir pointed to other examples of factual evidence being preferred to that of an expert: *Kingley Developments Limited v Brudenell* [2016] EWCA Civ 980 where the evidence of a single joint handwriting expert that the signatures on a document were not authentic but were forged conflicted with the evidence of a witness that he witnessed the signatures at the time that the document was signed, the judge preferring the evidence of the witness of fact to that of the expert; and *Armstrong v First York Limited* [2005] 1 WLR 2751 where HHJ Stewart QC (as he then was) had

preferred the evidence of the claimants, respectively the driver and passenger in a motor car which was involved in a collision, to the evidence of a jointly instructed forensic motor vehicle engineer, an expert in accident reconstruction and biomechanics, whose opinion was that the collision could not have caused displacement of the claimants in the car and any injury of the type alleged. The Court of Appeal upheld the learned judge's decision, Brooke LJ saying:

> "27. In my judgment there is no principle of law that an expert's evidence in an unusual field, doing his best, with his great experience, to reconstruct what happened to the parties based on the second-hand material he received in this case – must be dispositive of liability in such a case and that a judge must be compelled to find that, in his view, two palpably honest witnesses have come to court to deceive in order to obtain damages, in this case a small amount of damages, for a case they know to be a false one."

21. Furthermore, it was submitted on behalf of the claimant that Judge Truman wrongly took into account the *obiter dicta* in *Wood v TUI*, wrongly considering those *dicta* to set a "test" which artificially (and wrongly) raised the threshold for proving causation. Mr Weir submitted that, in cases of alleged gastroenteritis resulting from contaminated food consumed whilst on holiday, one can envisage two ways in which a claimant might seek to prove their claim. First, they could show that the claimant was one of many people who sustained "food poisoning", all of whom had eaten either the same meal or at the same establishment, the number of people afflicted providing compelling evidence that the fact they all fell ill was no coincidence but rather the result of consuming contaminated food. He submitted that this was the kind of case to which the Court of Appeal was referring in *Wood v TUI* whereby, as Sir Brian Leveson P said, it will be very difficult to prove that an illness is a consequence of food or drink which was not of a satisfactory quality unless there is cogent evidence that others have been similarly affected and alternative explanations have been excluded. This might be termed the "quantitative" approach. However, secondly, an alternative approach is that adopted in the present case, a "qualitative" approach, whereby the Claimant seeks to prove causation by calling appropriate expert evidence. In such a case, as here, the expert may have sufficient evidence – in this case by way of the laboratory testing results of stool samples – which, combined with the evidence of the Claimant and his wife as to where he ate and the nature of his illness, enables the expert to conclude that the food provided by the hotel was implicated in the illness and thus proving causation. Mr Weir submitted that where this approach is taken, it is unnecessary to show that others had been similarly affected. He submitted that in so far as Burnett LJ was purporting, in *Wood's* case, to provide guidance that a claimant, armed with supportive expert evidence, may well not succeed unless there were others who also fell ill at the hotel, he was wrong to do so, although this was not his reading of Burnett LJ's judgment. This is particularly so where, as Professor Pennington said in reply 7) to the part 35 questions, the great majority of cases of food-borne infective gastroenteritis do not occur in outbreaks.

22. So far as Professor Pennington's report and opinion was concerned, Mr Weir submitted that it could not be described as unreasoned. He relied upon reply 4) to the

part 35 questions where the Professor set out how he approached causation, this being based upon

- The gastroenteritis symptoms
- Their possible infective cause
- The commonness of possible microbial causes in Turkey and their modes of transmission
- Their incubation periods
- The length of time the Claimant had been at the hotel.

Professor Pennington set out in his report the relevant evidence he had taken into account including, in particular, the evidence of the Claimant contained in his witness statement, evidence which the judge eventually wholly accepted as true and accurate. He also considered the alternative potential causes for the Claimant's illness and was of the opinion that, in this case, the cause was the parasite Giardia, this being more likely than any of the other pathogens. He then recognised the commonness of Giardia in Turkey which he identified as the fifth most likely country for travel associated Giardia. Mr Weir submitted that the report and opinion of Professor Pennington was accordingly far away from a bare "*ipse dixit"* as found by the learned judge at paragraph 28 of the judgment.

Submissions on behalf of the Defendant

23. For the Defendant, Mr Stevens QC and Mr Clegg submitted that there is no rule of law to the effect that expert evidence adduced by one party must be accepted in the absence of expert evidence challenging or contradicting it. For example, an expert's opinion may prove to be wrong, or be irrelevant by reference to the court's findings as to the underlying facts (as to which experts often make assumptions), as in the *Coopers Payen case*. Alternatively, the court may prefer factual evidence to that of an expert, as in *Kingley Developments Ltd v Brudenell*. Thus far, there was no disagreement between the parties. However, the Defendant submitted a much narrower, more restrictive test, for the situation where the court was, in effect, forced to accept the expert evidence, setting out three sub-conditions:

> "It is accepted that if agreed or unopposed expert evidence is: (a) complete, in the sense that it addresses all relevant issues which require to be considered, (b) sufficiently reasoned so that its conclusions can be understood, and (c) there is no factual evidence which contradicts or undermines the basis of it, there would need to be good reason for not accepting it."

For the Claimant, Mr Weir accepted the third condition, namely that there should be no contradictory or undermining factual evidence; but he submitted that the first two conditions were an unwarranted gloss on Clarke LJ's statement of the law in *Coopers Payen* and had no foundation in law.

24. Thus, Mr Stevens effectively submitted that, before expert evidence can be accepted at all, it must pass a certain threshold, it must reach a certain standard which, he

submitted, Professor Pennington's evidence palpably failed to do as clearly found by the learned judge. He submitted that the judge was wholly entitled, and indeed right, to reject Professor Pennington's evidence where it was both incomplete in various respects and unsupported by sufficient reasoning – i.e. it did not satisfy requirements (a) and (b) above. He submitted that none of the cases cited were authority for the proposition that unopposed or uncontroverted expert evidence must be accepted, or only rarely rejected, regardless of its quality. The *dicta* in the cases relating to the court's approach to unopposed (or agreed) expert evidence do not apply, he submitted, where, as in this case, the expert's evidence was both incomplete and insufficiently reasoned, as the judge found, and was therefore incapable of establishing that which is required to be proved.

25. So far as *Wood v TUI* is concerned, Mr Stevens submitted that a proper, and careful, reading of Judge Truman's judgment shows that she did not misinterpret the judgments of Burnett LJ and Sir Brian Leveson P, or elevate those judgments into a "test" which the Claimant here had failed to satisfy. Although she did refer to the "test" in *Wood's* case, by this she meant no more than Burnett LJ's statement of what a Claimant has to prove in a case such as this, namely:

> " that food or drink provided was the cause of their troubles and that the food was not 'satisfactory' … Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved…"

Mr Stevens submitted that if this was all that the judge meant by the "test" in *Wood's case*, it is uncontentious. There is a distinction between what must be proved, and the difficulty faced by any Claimant in proving it by satisfactory evidence. That the approach of the judge was the right one is, it was submitted, shown by paragraph 28 of her judgment where she held, among other things:

> "In this case, I am not satisfied that the medical evidence shows, following *Wood v TUI*, that it is more likely than not that the Claimant's illness was caused by ingesting contaminated food or drink supplied by the hotel."

This was no more than a statement that the Claimant had failed to satisfy the burden of proof by relying on the evidence of Professor Pennington.

26. The Defendant submitted that it is clear that the judge did not place over-reliance on what was said by the Court of Appeal about other possible causes; rather, she understood it for what is was, namely sensible practical guidance as to what might (or would) be required to discharge the burden of proof in such a case. Thus, addressing the suggestion by counsel for the Appellant that 'it would be a nonsense if the expert had to consider every item of food (or other cause) and rule it out', she observed (paragraph 26 of her judgment):

> "I do not take the Court of Appeal's views as meaning that every possible minute cause (or every single item of food) there might be should be considered and ruled out, but I do consider

> that it was intended that common likely causes should be considered and excluded."

This was, Mr Stevens submitted, no more than a sensible observation as to the burden of proof at work.

27. Ground 4 of the Grounds of Appeal is that the learned judge misunderstood the expert evidence of Professor Pennington and misconstrued his reasoning. This, submitted Mr Stevens, is not borne out by the judgment. The judge analysed Professor Pennington's evidence with meticulous care and clearly identified various deficiencies and lacunae in his reasoning. The suggestion, for example, that the judge did not consider it necessary to address (a) whether the Appellant had been infected from food or drink consumed at home before going on holiday, or (b) other potential sources of infection, other than food and drink, is a clear misreading of the judgment. It was precisely the failure on the part of Professor Pennington to consider these possibilities, and other failures, which caused the judge to find that causation was not made out – see paragraph 28 of the judgment.

28. Mr Stevens submitted that, once it is accepted that the court is entitled to examine the quality of the expert evidence, even where it is uncontroverted, then the criticisms of Professor Pennington's evidence in the judgment were amply borne out. Take, for example, the fact that Professor Pennington thought it unlikely that the Appellant had been simultaneously infected with Giardia, adenovirus and rotavirus – a point which, on the face of it, suggested that the Appellant had been infected on at least two separate occasions; a possibility which, moreover, was consistent with the Appellant's history of being ill, recovering somewhat, and then becoming ill again. Professor Pennington's report acknowledged that the possibility could not be ruled out that the Appellant suffered two infections, the first starting on 4 August and the second on 11 August. But nothing further was said about this possibility one way or the other in the report – a clear example of a point which Professor Pennington himself effectively acknowledged needed to be dealt with, but which he then conspicuously failed to deal with, so that his report remained incomplete. Mr Stevens submitted that this was potentially very significant, bearing in mind the meal eaten by the Appellant outside the hotel on 7 August, which raised the possibility of a source of infection (potentially responsible for all the Appellant's symptoms thereafter) which was nothing to do with the hotel or the Respondent; yet, there was no explanation as to why, despite this possibility, Professor Pennington concluded that the Appellant acquired his illness after consuming contaminated food or fluid from the hotel. This was, it was submitted, a clear example of the report lacking in reasoning and/or a conclusion amounting to little more than bare *ipse dixit*.

Discussion

29. In general, where an expert's opinion is disputed, that opinion will carry little weight if, on proper analysis, the opinion is little more than assertion on the part of the expert. That this is so was made clear by the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] 1WLR 597 where Lords Reed and Hodge said:

> "48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or bare ipse dixit carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of*

> *Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA352, 371:
>
> > "An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."
>
> As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

30. In the present case, Professor Pennington's conclusion is said by the Defendant to come so abruptly, and with so little reasoning, and with so many issues left in the air and unresolved, that his opinion contained within that conclusion amounts to no more than bare *ipse dixit*. In those circumstances, it is contended that the conclusion is worthless. If that is correct, it would mean that the evidence adduced by the Claimant was never capable of proving his case on causation: before the matter ever came to trial, the Defendant could have applied for summary judgment on the basis that the Claimant's case, taken at its highest, could not succeed. The Defendant did not do so but chose instead to allow the matter to come to trial, perhaps in the hope that cross-examination of the Claimant or his wife would undermine the factual basis for Professor Pennington's report and conclusion. If, so, that gamble did not pay off, the learned judge saying:

> "In closing, Counsel did not seek to cast aspersions on their characters. This was eminently sensible in my view as the Claimant and his wife patently came across as honest and straightforward witnesses. Counsel submitted that they might be mistaken about certain matters, but having heard from the Claimant and his wife and having considered the Defendant's documents, I accept the evidence of the Claimant and his wife. I find that the Claimant was indeed ill and that he has proven the problems he suffered then and since. In particular, I accept the evidence of the Claimant and his wife with regard to what they ate and when, and the dates the Claimant fell ill."

Thus, it seems to me that the factual basis for Professor Pennington's report and the factual findings made by the judge were identical. Having thus failed to challenge the factual basis for the report, the Defendant was thrown back onto its attack on the substance of the report and its assertion that the Professor's opinions were bare *ipse dixit*.

31. In relation to her evaluation of the judgments in *Wood v TUI*, it seems to me that Mr Stevens QC is right when he submitted that Judge Truman was not elevating those judgments to some special test which has no basis in law, and which she found that the Claimant had failed to satisfy, but rather, the test she was applying was no more

than Burnett LJ's dictum that, in a case such as this, the Claimant has the burden of proving that his illness was caused by eating food supplied by the hotel which was not fit for consumption, and that this is a difficult test to satisfy when there are competing causes (as there always are when the illness is contracted when on a foreign holiday) and cannot be satisfied simply by proof of the illness. However, as I commented at paragraph 15 above, it seems to me that Burnett LJ and Sir Brian Leveson P had in mind, when they stated their *dicta*, cases where the Claimant was seeking to prove his case from the mere fact of illness, not cases where, as here, stool samples gave evidence of the potential pathogens at work and expert evidence gave an opinion as to which of those pathogens was the actual culprit, and the most likely source of infection. Thus, I endorse the distinction between the *quantitative* case and the *qualitative* case referred to in paragraph 21 above, and in a qualitative case such as the present, where an expert says that the great majority of cases of food-borne infective gastroenteritis do not occur in outbreaks, the absence of evidence of large numbers of other guests similarly affected may be of less significance whilst, in a quantitative case, such absence of evidence will be fatal to the case's success. In those circumstances, in my judgment there are two questions to be answered: first whether a court is obliged to accept an expert's uncontroverted opinion even if that opinion can properly be characterised as bare *ipse dixit* and, if not, what are the circumstances in which a court is justified in rejecting such evidence; and, second, whether, in any event, Professor Pennington's report could in fact properly be described as no more than bare *ipse dixit* entitling the learned judge to reject it despite being uncontroverted.

1. When or in what circumstances can a court reject an uncontroverted expert report?

32. In the extract from the judgment of Lords Reed and Hodge in Kennedy v Cordia quoted at paragraph 29 above, there is an internal inconsistency or ambiguity. On the one hand, their Lordships suggest that an unsubstantiated *ipse dixit* is worthless. On the other hand, they cite, with approval, Wessels JA in the South African Coopers case where he said that an expert's bald statement of his opinion is not of any real assistance except possibly where it is not controverted. So, where it is not controverted, is it worthless or not? In my judgment, the answer is to be found, as submitted by the Claimant, in the judgment of Clarke LJ in *Coopers Payen Limited v Southampton Container Terminal Limited* [2004] Lloyds Rep 331 at paragraph 42 where he said:

> "… the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong."

If Mr Stevens' test is correct, namely that, to be accepted, the expert report must be (a) complete, in the sense that it addresses all relevant issues which require to be considered, (b) sufficiently reasoned so that its conclusions can be understood, then it would be all too easy to envisage a case in which it would be appropriate to decide the case on the basis that the expert's opinion was wrong. It seems to me that Clarke LJ must have had in mind a narrower test than this and I cannot think that, in so stating, Clarke LJ was assuming that the report would satisfy Mr Stevens' test. Indeed, that test would mean the court rejecting Wessels JA's proviso "except possibly where it is

not controverted" in the case of a report which is a bare *ipse dixit*, despite the Supreme Court's apparent approval of Wessel JA's dictum.

33. In the absence of direct authority on the issue, I take the view that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare *ipse dixit*, for example if Professor Pennington had produced a one sentence report which simply stated: "In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel." This would qualify within Clarke LJ's "difficult to imagine" because, in these days of CPR Part 35 and the well-publicised duties of experts, it is difficult to imagine an expert producing such a report. However, 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 had 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.

34. What are those minimum standards? In this regard, it is unnecessary to look further than the Practice Direction accompanying CPR Part 35. Paragraph 3 addresses the form and content of an expert's report, and provides:

> "**Form and Content of an Expert's Report**
>
> 3.1
>
> An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.
>
> 3.2
>
> An expert's report must—
>
> (1) give details of the expert's qualifications;
>
> (2) give details of any literature or other material which has been relied on in making the report;
>
> (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;
>
> (4) make clear which of the facts stated in the report are within the expert's own knowledge;
>
> (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(6) where there is a range of opinion on the matters dealt with in the report—

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give an opinion without qualification, state the qualification; and

(9) contain a statement that the expert—

(a) understands their duty to the court, and has complied with that duty; and

(b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

3.3

An expert's report must be verified by a statement of truth in the following form —

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

35. In my judgment, for an expert report to pass the threshold for acceptance as evidence in the case, it must substantially comply with the above Practice Direction. Judged against this standard, it seems clear to me that Professor Pennington's report did comply and, indeed, the Professor may well have had the Practice Direction at the forefront of his mind when he wrote his report. Thus:

(i) The report was addressed to the court;

(ii) The report started by giving the Professor's professional credentials;

(iii) The report set out the material he had used in compiling the report, including the Letter of Claim, the Claimant's witness statement etc;

(iv) The report set out the nature of the expert's instructions;

(v) The report set out the salient facts, incorporating the contents of the Discharge Report provided by Kusadasi Hospital and the test results from the stool sample;

(vi) The report considered other potential causes for the illnesses such as amoebic dysentery and viral infections before concluding that Giardia was "much more likely as a cause of gastroenteritis in this case than any of the other pathogens";

(vii) The report considered the incubation period for Giardia, compared this to the facts, and concluded that the Claimant's gastric illness followed the consumption of contaminated food or fluid from the hotel.

(viii) The report ended with the endorsement enjoined by Paragraph 3.2(9) of the Practice Direction;

(ix) The report contained the statement of truth in appropriate terms;

(x) Although the report did not identify in terms a range of opinion on the matters dealt with in the report, this was the subject of a Part 35 question which the Professor answered as indicated in paragraph 13 above in this judgment. Mr Stevens complained, in his submissions, that the answer to question 4) provided by the Professor was not an answer to the question at all, but I disagree and, in any event, if dissatisfied by the answer, the Defendant could have made an application to the court seeking an Order that the Professor provide an answer, but chose not to do so.

36. It is, in my judgment, of significance that the Practice Direction goes not just to the form, but also the content, of an expert's report. Despite this, it is no part of the Practice Direction that an expert, in providing a summary of the conclusions reached, must set out the reasons for those conclusions and it would be harsh indeed for a court to find that, despite the terms of the Practice Direction, a report failed to meet the minimum standards required for the report to be accepted in evidence because it did not set out the reasoning leading to the conclusions. In my judgment, the law does not so require. Of course, a failure to set out the reasoning might diminish the weight to be attached to the report but, as I have stated, at this stage the weight to be attached to the report is not a consideration: that only arises once the report is controverted. It may be that, had the Defendant served controverting evidence, Professor Pennington would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement. As it turned out, that step never became necessary because the evidence of Professor Pennington stood alone. Nor did the Defendant seek to challenge the reasoning that might have lain behind Professor Pennington's conclusions by calling for him to be cross-examined, as it had every right to do. In those circumstances, the court must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged.

37. For the above reasons, in my judgment the learned judge was not entitled to reject the report and evidence of Professor Pennington for the reasons that she did. However strong the criticisms of Professor Pennington's report, and I accept that those criticisms were strong, they went to an issue with which the learned judge was not concerned, namely the weight to be ascribed to the report, that being an issue which would only have arisen if the report had been controverted in the sense set out in paragraph 10 above. By ascribing, effectively nil weight to the report, the learned judge was ruling that the report did not meet the minimum requirements for it to be accepted as evidence in the case, and in that respect I take the view that she was wrong.

2. Was Professor Pennington's report bare *ipse dixit* or otherwise so deficient as to have entitled the court to reject it in this case?

38. This question does not strictly need to be answered given my ruling in relation to the first question: it is clear from that ruling that I take the view that the court below was not entitled to reject the report because of its perceived deficiencies. However, in any event, although I accept that there were serious deficiencies in Professor Pennington's report as identified by the learned judge which might well have caused the Professor serious embarrassment had the report been controverted, it was not fair to characterise the opinion of the expert as bare *ipse dixit*. In particular, the Professor identified the pathogen which, in his opinion, was causative of the Claimant's illness, he considered other potential causes which he excluded, he considered the incubation period, he considered the meals which the Claimant said he had eaten, and, on the back of that, he concluded that the hotel food and drink were to blame. It is true that he did not set out his full reasoning, nor explain how he was able to reach that conclusion when he could not exclude the possibility of there having been two infections, and I am conscious of what the Supreme Court said in *Kennedy v Cordia* (see paragraph 29 above). But, in that dictum, their Lordships referred to the opinion being a bare or unsubstantiated one, thus amounting to an *ipse dixit*. In my judgment, Professor Pennington went a long way towards substantiating his opinion by his consideration of the matters referred to above and his opinion was not a bare *ipse dixit* as it would have been had it been a single sentence as envisaged in paragraph 33 above. In fact, I doubt whether any report and opinion from an expert which substantially complies with the Practice Direction to CPR Part 35 could ever justifiably be characterised a mere *ipse dixit*.

39. In view of my findings above, this appeal must be allowed and there shall be judgment for the Claimant.

40. On the application of the Defendant, the time to apply to the Court of Appeal for permission to appeal against this judgment is extended to 21 September 2020.