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Court of Appeal clarifies law on expert evidence

By Malcolm Sheehan

On 13 March 2014 the Court of Appeal handed down judgment in the case of *Rogers & Rogers v Hoyle.* The appeal deals with two significant issues that can arise in any area of civil practice: the status and admissibility of opinion evidence outside of CPR Part 35 and the extent of the long-standing rule in *Hollington v Hewthorn.*

THE APPEAL

1. The appeal concerned a report prepared by the Air Accident Investigation Branch (AAIB) into a fatal light aircraft accident. A passenger in the aircraft died and the pilot was seriously injured. The AAIB, like the Rail and Maritime Accident Investigation Branches, are under a statutory obligation to investigate accidents and serious incidents. The AAIB prepares reports that contain a mixture of statements of fact and statements of opinion.

2. The Appeal considered whether the AAIB report into the accident was admissible in evidence and, if so, whether it should none the less be excluded as a matter of discretion. The trial judge, Leggatt J, held that the AAIB report was admissible in evidence and declined to use his discretion to exclude it. The Court of Appeal agreed, [2014] EWCA CIV 257, and dismissed the appeal.

EXPERT EVIDENCE OUTSIDE PART 35

3. The Appellant argued that the familiar provisions of CPR 35 and section 3 of the Civil Evidence Act 1972 form a comprehensive code governing the use

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of expert evidence in civil proceedings. Expert evidence should only be admitted if it complies with Part 35 or the court orders otherwise.

4. The AAIB report was argued to be inadmissible as it did not comply with a number of the requirements of CPR 35. In particular, the author was not identified, no permission to be adduce the AAIB report as expert evidence had been sought or given, the Part 35 requirements for the instruction of experts had not been observed and there was no expert's statement.

5. The Court of Appeal did not accept the premise of the Appellant's argument. Christopher Clarke LJ held that Part 35 is *"not a comprehensive and exclusive code regulating the admission of expert evidence."* Part 35 only regulates expert evidence where the expert concerned has *"been instructed to give or prepare expert evidence for the purpose of the proceedings"*.

6. Expert evidence which is prepared for another purpose is not regulated by Part 35 and the common law continues to apply to this category of expert evidence. For this category of evidence compliance with the requirements of Part 35 is unnecessary. Although at common law all expert evidence had to be given orally documentary hearsay evidence is now admitted by statute and this includes documentary hearsay evidence of expert opinion.

THE RULE IN *HOLLINGTON V HEWTHORN*

7. The long-standing rule in *Hollington v Hewthorn* [1943] KB 857 is that factual findings made by other tribunals are not admissible as evidence in subsequent civil proceedings as proof of facts in issue in the proceedings. Although parliament has intervened to allow criminal convictions to be

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admitted in civil proceedings, the Court of Appeal confirmed that the rule in *Hollington v Hewthorn* continues to apply to other applicable findings of fact.

8. The Court of Appeal used this appeal to clarify the current basis of the rule. Although previous cases explained the rule in *Hollington v Hewthorn* as an example of the best evidence requirement, there is no longer a best evidence rule in civil proceedings.

9. The justification for the rule in *Hollington v Hewthorn* is now the requirement to hold a fair trial. It is fundamental to a fair trial that *"the decision at that trial is to be made by the judge appointed to hear it … and not another"*. Admitting evidence of findings of fact made by another Tribunal, however distinguished, would risk the decision being based on the findings of someone who *"is neither the relevant decision maker nor an expert in any relevant discipline"*. The non-expert opinion of someone who is not the trial judge is irrelevant and therefore inadmissible.

10. The Appellant argued that the AAIB report was inadmissible by reason of the rule in *Hollington v Hewthorn*. It was argued that the scope of the rule was not confined to judicial findings, as Leggatt J had found, but was wide enough to include investigation reports such as the AAIB report.

11. The Court of Appeal held that the AAIB report was admissible. The parts of the report which consisted of statements or reported statements of fact were admissible per se as hearsay evidence of fact. The parts of the report which contained statements of opinion on matters which were informed by or reflected relevant expertise were also admissible as expert evidence was held to be outside of the rule in *Hollington v Hewthorn*.

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12. Christopher Clarke LJ accepted that where a report, such as an AAIB report, includes statements of opinion concerning facts which do not require expertise to determine, those statements are inadmissible. However, except in very clear cases, it is not appropriate to exclude an entire report from evidence on this basis or to go through the exercise of excising inadmissible material from the report. The correct approach was for the trial judge to *"see the whole report and leave out of account any part of it that was inadmissible"*.

13. The Court of Appeal did not accept that an AAIB report or similar report was comparable with Lord Bingham's report on BCCI which was held to be inadmissible by the House of Lords in *Three Rivers District Council v Governor of the Bank of England (No3)* [2003] 2 AC 1. Lord Bingham was not acting as an expert but in a *"judicial or quasi-judicial role"*.

DISCRETION

14. The Court of Appeal accepted that there was a discretion to exclude the AAIB report from evidence but declined to exercise this discretion. The Court of Appeal considered that the AAIB report would be of *"particular potential value"* to the trial judge and that the admission of AAIB reports in civil proceedings would not significantly reduce co-operation with AAIB investigations.

PRACTICE POINTS

15. The appeal is likely to be of particular relevance to cases where there has been a prior investigation, pursuant to statute or otherwise, of issues which

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form the subject matter of subsequent civil litigation and the investigator has some form of relevant expertise.

16. The following points should be kept in mind:

    a. This appeal clarifies that expert evidence outside of Part 35 is admissible. This may be particularly important in cases where the court uses its case management powers to restrict Part 35 expert evidence on the grounds of proportionality.

    b. This decision is another example of the contemporary approach to admit rather than exclude evidence and regard objections as merely going to weight.

    c. The admissibility of non-Part 35 expert evidence must give rise to a risk that parties will use witness summonses to try to bring non-Part 35 experts before the court to support or challenge their opinion.

    d. There is also scope for disputes where parties disagree over whether opinion evidence was obtained for the purposes of the proceedings or for another purpose.

    e. Christopher Clarke LJ's statement that *"the bar to be surmounted in order to count as an expert is not particulary high"* is likely to be deployed in contested applications concerning the suitabilty of a witness as an expert.

    f. The Court of Appeal appeared to accept that it could decide to admit new evidence from an intervener on appeal even if the new evidence test in *Ladd v Marshall* was not satisfied.

Malcolm Sheehan appeared in the appeal for the First Intervener, the Secretary of State for Transport, instructed by the Treasury Solicitor

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