

Neutral Citation Number: [2018] EWHC 893 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

CHANCERY DIVISION

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

Wednesday, 14th March 2018

Before:

MR JUSTICE CARR

B E T W E E N :

MOYLETT

Claimant

- and -

GELDOF & ANOR

Defendants

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This transcript has been approved by the Judge

MR R. TAGER QC appeared on behalf of the Claimant.

MR I. MILL QC appeared on behalf of the First Defendant.

JUDGMENT

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MR JUSTICE CARR:

1 I am going to give a short judgment on the question of the admissibility of parts of the Claimant's expert report, the report of Mr Guy Protheroe, which are objected to on behalf of the First Defendant.

2 Mr Mill, on behalf of the First Defendant, says that there are two fundamental objections to parts of the report. The first is that the report contains opinions from two leading professional guitarists in addition to the opinion of Mr Protheroe himself in respect of which permission had not been granted, permission in this case only having been granted to adduce the evidence of one expert. Secondly, it is said that the report goes beyond what is permissible for an expert by expressing an opinion on the ultimate question in the proceedings.

3 In approaching this question, I have taken into account the decision of Leggatt J which was approved by the Court of Appeal in the judgment of Christopher Clarke LJ in the case of *Hoyle v Rogers & Anor* [2014] EWCA Civ 257::

“52 It is not, however, the function of an expert to express opinions on disputed issues of fact which do not require any expert knowledge to evaluate. However, as the judge observed, it is common to find in many expert's reports opinions of that character, which are not helpful and to which the court would not have regard. As to those he thought it preferable:

‘...to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions.’

53 Insofar 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:

‘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* [2008] EWCA Civ 1146 at 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’.

- 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.
- 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.”
- 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.
- 5 In the present case I consider that in so far as Mr Protheroe has referred to demonstrations by two guitarists, he was not only entitled to do so but he was obliged to set out the fact that he had done this. In so far as he has formed his own opinions based on those demonstrations, he is entitled to do so. There is one passage in Mr Protheroe’s report at paragraph 11.3.8 which, in my view, is on the margins of admissibility. He has said that:
- “Each one of my guitar colleagues, quite independently of each other, said that if one wanted to play this sequence on a guitar, the natural thing would be to play it in a semitone higher in the key of C major which is easy on the guitar and involves no contortions.”
- 6 I should say that the issue to which the expert is addressing himself is whether or not this particular piece of music was composed on a guitar, in which case that would support the First Defendant’s account, or on a piano which would support, if correct, the Claimant’s account. In that particular section, Mr Protheroe does not express his opinion at all. However, read in the context of the whole report, I believe, as he has repeatedly said, he is forming his own view based on what was demonstrated to him. He would have been obliged to say what the guitarists said to him in case Mr Mill wished to cross-examine him on what he was told.

- 7 My view is that the Claimant is not entitled to rely upon anything that the two guitarists said as expert opinion evidence and Mr Tager has said that he is not intending to do so. Otherwise, I consider that this report, in so far as it deals with the two guitarists, is admissible. What weight is to be attached to that is a matter for the trial.
- 8 Similarly, in respect of issues as to Mr Protheroe expressing the ultimate conclusion, namely whether it is more likely that the First Defendant or the Claimant composed the relevant music, 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.
- 9 Mr Mill expressed a concern that he did not know whether his expert should reply or not to this. The answer is that, in so far as this report deals with whether this music was more likely to be composed on a guitar or on a piano, I consider that it is admissible and relevant expert evidence which may well be the subject of a reply. In so far as it expresses what Mr Protheroe was told by the two guitarists, it is not relied on as expert evidence and does not need an expert reply.
- 10 Those are my conclusions.