Hearsay notices: Expert evidence through the back door? (Illumina Inc v TDL Genetics Limited)

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Dispute Resolution analysis: An expert's report in earlier proceedings could be relied on in later proceedings under a hearsay notice, without requiring the permission of the court. In particular, CPR Part 35 was not engaged where the expert had not been instructed by one of the parties and was not instructed for the purposes of those later proceedings. However, little weight is likely to be given to such hearsay evidence and (given the court's power to exclude evidence) parties should not assume they have 'carte blanche' to introduce such evidence as they wish. Written by Danielle Carr, partner at Rosenblatt.

Illumina, Inc & Anor v TDL Genetics Limited & others [2019] EWHC 1159 (Pat)

What are the practical implications of this case?

The case clarifies the scope and purpose CPR 35, in examining the use of expert evidence obtained otherwise than by a party for the purposes of the proceedings.

In particular, Carr J explained that CPR 35 is 'forward looking': it seeks to regulate and control expert evidence which has not yet been adduced by a party to the proceedings. Accordingly, it was not necessary for a party to obtain the court's permission to rely on a hearsay notice in respect of an expert's report obtained in prior proceedings. However, Carr J cautioned against any assumption that parties have 'carte blanche' to rely on whatever evidence they wish (as adduced in prior proceedings), under hearsay notices. The court retains power to exclude evidence under CPR 32.1, and will exercise this mindful of the overriding objective and having regard to whether its admission will involve disproportionate cost.

Accordingly, while practitioners will wish to consider the use which may be made of relevant expert evidence not commissioned for the purposes of the proceedings, in a claim, this must be balanced against the risk of it being excluded, and the fact that little weight is likely to be attached to it.

What was the background?

In the proceedings, the claimants (Illumina) alleged that the defendants (Ariosa) infringed their patent entitled 'Non-invasive detection of fetal genetic traits.' Ariosa denies infringement and counterclaims for invalidity.

The technical subject matter of the patent related to patents which were the subject of a previous claim. As such, in these proceedings Illumina served a hearsay notice, seeking to rely on part of the report of an expert (who had been called by other defendants, but not by Ariosa) served in the previous claim. Illumina alleged that Ariosa had adopted the expert's evidence in relevant respects, but now seeks to put forward contradictory evidence in the present proceedings.

At the pre-trial review the court considered whether Illumina is required, under CPR 35, to obtain the court's permission to adduce the expert's evidence pursuant to a hearsay notice. Relevantly, while an expert is no longer required to be called to give evidence orally (Civil Evidence Act 1995, CEA 1995), under CPR 35.4(1) the court's permission is required to put in evidence an expert's report. Expert is defined as a person who has been instructed to give or prepare expert evidence for the purpose of proceedings (CPR 35.2(1)).

What did the court decide?

The court held that permission to rely on the specified parts of the expert's report from the prior proceedings, was not required.

Carr J rejected an 'overly literal analysis' of the rule in CPR 35.1(1), pointing instead to the purpose of CPR 35 as explained in *Rogers & Anor v Hoyle* [2014] EWCA Civ 257 (namely, to regulate the evidence of experts instructed by the parties to ensure they acted as experts, and to regulate the use and content of their reports). Indeed, CPR 35 is 'forward-looking' and seeks to regulate and control expert evidence which has not yet been adduced by a party to the proceedings.

Further, a party seeking to adduce evidence where permission has already been obtained under CPR 35 in prior proceedings and where the expert has already been cross-examined (as in this case), should not be in a worse position than a party seeking to adduce such evidence where permission has not previously been obtained.

Accordingly, Carr J found that since the expert was not instructed by Ariosa or Illumina, and was not instructed in these proceedings, his report does not fall within CPR 35.2(1), such that CPR 35 does not apply and permission to rely on the hearsay notice was not necessary.

However, this does not mean that the court is powerless to exclude expert evidence, where appropriate. Carr J cautioned parties against assuming 'that they have carte blanche' to rely upon whatever evidence they wish under hearsay notices, which has been adduced in previous proceedings. The court may exercise its power to exclude evidence under CPR 32.1 if (for example) it is duplicative of evidence that is already being adduced by one of the parties. In this context, the court will have regard to the overriding objective, and whether admitting the evidence will give rise to disproportionate cost.

Further, parties would have nothing to gain by trying to avoid cross-examination of an expert by serving a report under a hearsay notice, as the factors in section 4 of the Civil Evidence Act 1995 indicate that little weight is likely to be attached to such hearsay evidence. As such, Carr J did not consider that his judgment would give rise to a flood of hearsay notices in respect of experts' reports in patent cases. There was no question of disproportionate cost resulting from the hearsay notice in this case. Indeed, Carr J noted the objection to the notice 'has probably taken longer to resolve than the time required at trial to explore the alleged inconsistency.'

Case details

- Court: High Court, Business and Property Courts, Intellectual Property List (ChD)
- Judge: Mr Justice Carr
- Date of judgment: 07/05/19

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