Admissibility of evidence in civil proceedings: An overview and case law update

The Supreme Court, in the case of *Shagang Shipping Company Ltd v HNA Group Company Ltd* [2020] UKSC 34, has recently given guidance on the admissibility of evidence in civil proceedings. Although the factual matrix of this case was in the commercial context of international cargo vessels, the guidance is likely to beneficial to practitioners in all areas of civil litigation.

Overview

The general rule in civil proceedings is that if evidence is relevant, it will be admissible, unless:

a) It falls within the scope of an exclusionary rule prescribed in law; or

b) The court exercises its discretion to exclude it.

It should be noted that the rules of evidence in civil proceedings have been relaxed over time. This is somewhat negated by a wide discretionary power of the court, under Civil Procedure Rule 32.1, to control the evidence and exclude otherwise admissible evidence. Civil Procedure Rule 32.1 reads as follows:

"(1) The court may control the evidence by giving directions as to –

a) The issues on which it requires evidence;

b) The nature of the evidence which it requires to decide those issues; and

c) The way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may limit cross-examination."

What amounts to relevance?

In determining relevance, as a pre-cursor of admissibility, the court should consider that:

"Relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable…" (*Director of Public Prosecutions v Kilbourne* [1973] AC 729, 756)

In order to be relevant, a piece of evidence does not have to actually prove or disprove a fact in issue; it merely has to have an effect upon the probability of proving a relevant matter.

Does the evidence fall within the scope of an exclusionary rule?

If evidence is deemed relevant, it must then be asked if there are any rules that make it inadmissible.

Although by no means an exhaustive list, the following categories of evidence may be deemed inadmissible:

a) Opinion evidence;

b) Evidence subject to legal professional privilege;

c) Evidence subject to without prejudice privilege;

d) Evidence excluded under the ground of public interest immunity; and

e) Evidence obtained by torture.

It should be noted that that as a result of *section 1(1) of the Civil Evidence Act 1995*, evidence is no longer inadmissible purely upon the basis that it amounts to hearsay. Hearsay evidence does, however, remain inadmissible if it is irrelevant or falls within the scope of another exclusionary rule. It should be noted that a number of factors are listed at *section 4 of the Civil Evidence act 1995* which should be considered in assessing the weight to be attached to hearsay evidence:

"(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard may be had, in particular, to the following –

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

The court's discretion to exclude admissible evidence

As detailed above, the court has the power under Civil Procedure Rule 32.1 to control evidence. This includes the power to exclude evidence that would otherwise be admissible. This power is supplemented by Civil Procedure Rule 32.2(3):

"The court may give directions –

a) Identifying or limiting the issues to which factual evidence may be directed;

b) Identifying the witnesses who may be called or whose evidence may be read; or

c) Limiting the length or format of witness statements."

There are no prescribed limitations to this case management power, but as with all of the court's decisions, it must give effect to the overriding objective of the Civil Procedure Rules.

Practical guidance as to the admissibility of evidence

The Chancery Guide (2016, amended February 2020), paragraph 19.5 states as follows:

"Any party on whom a witness statement is served who objects to the relevance or admissibility of material contained in a witness statement should notify the other party of their objection within 28 days after service of the witness statement in question and the parties concerned should attempt to resolve the matter as soon as possible. If it is not possible to resolve the matter, the party who objects should make an appropriate application, normally at the pre-trial review ("PTR"), if there is one, or otherwise at trial."

The guidance appears to stress the need to raise the admissibility of evidence at an early stage. If this cannot be resolved between the parties, an application should be made. The Court of Appeal in the case of *Stroude v Beazer Homes Ltd* [2005] EWCA Civ 265 suggested that disputes about the admissibility of evidence are best addressed by the judge hearing the substantive application.

In a judgment given on 5th August 2020, the Supreme Court considered a number of difficult issues of admissibility in the case of *Shagang Shipping Company Ltd v HNA Group Company Ltd* [2020]. The guidance given is likely to be of assistance.

***Shagang Shipping Company Ltd v HNA Group Company Ltd [2020]* UKSC 34**

The Supreme Court in the case of *Shagang Shipping Company Ltd v HNA Group Company Ltd* [2020] gave a great deal of useful guidance in relation to the admissibility and weight of hearsay evidence.

The factual matrix of the case is not particularly significant to the judicial guidance on the admissibility of evidence in civil proceedings, however are set out for context. Grand China Shipping Company Ltd contracted to charter a vessel owned by Shagang Shipping Company Ltd ("the Appellant"). Grand China Shipping Company Ltd was a new company. Its ultimate parent company, HNA Group Company Ltd ("the Respondent") guaranteed Grand China Shipping Company Ltd's obligations. This guarantee was governed by English law and provided that the English courts' have exclusive jurisdiction over any dispute arising from the guarantee. Following the financial crisis in 2008, Grand China Shipping Ltd defaulted on some of

the payments that were due. On 17th January 2012, the Appellant terminated the charterparty on the basis of Grand China Shipping Company Ltd's default in paying the hire charges and consequential repudiatory breach. The Appellant sought damages and commenced proceedings against the Respondent under the guarantee.

The Respondent contended that the guarantee of the charterparty was unenforceable as it had been obtained by bribery. This allegation of bribery was based upon confessions made during an investigation by the Chinese Public Security Bureau. The Appellant alleged that these confessions were inadmissible as they had been obtained by torture. It should be noted that the evidence was somewhat limited; "no one with first-hand knowledge of the alleged bribery or torture gave evidence and the documentation available at the trial was substantially incomplete" (Paragraph 2).

By the time of the trial of first instance, it was agreed between the parties that the Appellant was entitled to judgment on its claim under the terms of the guarantee, unless the Respondent succeeded in its defence that the charterparty was obtained as a consequence of bribery (Paragraph 30). At first instance, the Jude concluded that torture could not be eliminated as a reason for the confessions (Paragraph 44). The allegations of bribery were, however, considered to be unproved (Paragraph 41). As such the guarantee was deemed to be enforceable and, as such, judgment was entered in the agreed principal sum of US$68,597,049.59 (Paragraph 45).

The Court of Appeal allowed an appeal from that decision. It was determined that the trial Judge failed to ask the correct legal question as to the weight that should be attached to the confession evidence (Paragraph 48). In doing so, the trial Judge failed to take all of the appropriate matters into account and failed to exclude irrelevant matters. The Court of Appeal was of the view that the finding that torture may be the reason for the confession was an irrelevant matter (Paragraph 49). The Court of Appeal decided that:

"… if an allegation that a statement was made as a result of torture has not been proved on the balance of probabilities, a court when estimating the weight to be given to the statement as hearsay evidence in

civil proceedings must entirely disregard the possibility that the statement was obtained by torture, even if on the evidence given at trial the court considers this to be a serious possibility which it cannot rule out." (Paragraph 3).

The Supreme Court was of the view that the Court of Appeal was wrong to interfere in the factual findings made by the trial Judge and was wrong in its approach to the question of if torture had led to the evidence being obtained.

The Supreme Court endorsed the approach advocated by the Court of Appeal in considering the admissibility of hearsay evidence before determining its weight and impact upon the substantive issues in the case. The Supreme Court was, however, clear that such an approach is not "mandatory, either generally or in this particular case" (Paragraph 57). As a matter of practicality, the Supreme Court suggested that in some cases, difficult questions of admissibility can be side-stepped by adopting the following approach:

"… issues of admissibility can be dealt with efficiently by admitting the evidence de bene esse. This means taking the evidence into account on the assumption, without deciding, that the evidence is admissible. Unless the evidence turns out to be critical to the decision to be reached, the issue of admissibility may never need to be determined. This is often a convenient approach to adopt, as resolving issues of admissibility can be complex and time consuming" (Paragraph 59).

The Supreme Court considered that when assessing the potential weight that could be attached to hearsay evidence, the court's discretion is not exclusively limited exclusively to matters that are found to be proved:

"it is of course true that, as Lord Hoffman observed in re B, if a legal rule requires a fact to be proved, the law operates a binary system. So where it is necessary to prove a fact for the purpose of a rule governing the admissibility of evidence, there are only two possibilities: either the evidence is admissible or it is not,

which depends on whether the facts has been proved or not… But not all legal rules do require relevant facts to be proved in this binary way. In particular, the rule governing the assessment of the weight to be given to hearsay in civil proceedings does not. It requires the court to have regard to "any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence"; see section 4(1) of the Civil Evidence Act 1995." (Paragraph 96).

A distinction was drawn between "facts in issue", which as a matter of law are necessary to prove in order to establish either a claim or a defence, and other facts (Paragraph 98). Facts in issue require the discharge of the legal burden of proof; this operates in a binary way with a fact either being found proven or not. This binary approach does not, however, apply to facts which make a fact in issue more or less probable (Paragraph 99). Assessments of relevance and weight is not a matter of 'all or nothing' (Paragraph 99).

A distinction also exists between finding of preliminary facts and findings of facts in issue. In criminal proceedings, this contrast manifests with findings of preliminary facts falling into the jurisdiction of the Judge, whereas findings of facts in issue is a matter for the jury. In civil proceedings, although both functions are performed by the Judge, this conceptual distinction is equally important (Paragraph 101). However, unlike in criminal proceedings, there is a need for a consistency in preforming these two tasks. It would be illogical to reach a factual conclusion on the preliminary issue of admissibility and then, on the same evidence, reach a different factual conclusion when determining the fact in issue (Paragraph 103).

Conclusions

The approach of admitting evidence *de bene esse* may be beneficial in a number of cases. This allows difficult questions of admissibility to be side-stepped in the event that it is not critical to the court's determination even if this evidence were to be admitted. Once deemed admissible, the court has a far-reaching discretion as to the respective weight to be attached to it. There must, however, be a logical consistency between the preliminary issue of admissibility and the use that is made of the evidence at a substantive hearing. Although these are largely questions of judicial discretion, to be mindful of the

general principles outlined above, is likely to be of benefit to all practitioners. The guidance above is likely to serve as a useful framework in cases when admissibility is contested, both for discussions between the parties and in formulating arguments to be presented before the court.

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Law is correct as at 1st September 2020

Whilst every effort has been taken to ensure these notes are as correct, they are intended to give a general overview of the law. Delegates are respectfully reminded that they are not intended to be a substitute for specific legal advice. No liability is accepted for an error or omission contained herein.

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Law is correct as at 13 July 2020

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