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Cross my Heart

Rachel Mumby (Bristows) · Tuesday, April 3rd, 2018

Wise readers will know that when it comes to matters of the heart, it is often best not to interfere. Indeed, the Court of Appeal in its recent judgment in **Edwards Lifesciences v Boston Scientific** [2018] EWCA Civ 673, decided not to interfere with HHJ Hacon's judgment that of the two patents in suit relating to replacement heart valves, one was valid and infringed (EP'766) and the other invalid (EP'254). (See the judgment here)

Of interest is the criticism levelled by the patentee (Boston) on appeal, at the way that the judge declined to accept evidence from one of Boston's expert witnesses in relation to EP'254, despite particular aspects of his evidence not having been challenged in cross-examination at trial. In essence, the Court of Appeal had to determine whether Edwards' decision not to cross-examine one of Boston's witnesses on these points had led to unfairness to the extent that the judge's decision was thereby undermined.

Cross-examination is a key feature of trials in the English Patents Court and one of which many English litigators are particularly proud. Unlike in cases run by our continental colleagues, English advocates have the opportunity to put the other side's witness on the spot to test their evidence, with the aim ultimately of identifying holes in, and therefore undermining, the other side's case. Indeed, this is not just an optional extra of English litigation, but "*In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point*." (Phipps on Evidence 19th Edn. 2016 para. 12-12).

In this case, the patentee had called two experts, Prof Lutter (a cardiologist) and Prof Moore (a bio-medical engineer), reflecting the identity of the skilled team. Both Professors had provided reasons in their written evidence for why the invention of EP'254 was not obvious over the cited prior art, but these points had only been explored in Prof Moore's cross-examination, not Prof Lutter's.

Floyd LJ, giving the leading judgment (with which McCombe and Kitchin LJJ agreed) noted that procedural rules such as the one noted above from **Phipps on Evidence** are important, but not inflexible. He agreed with Boston that where there is overlapping evidence, the Judge should be asked to give directions on cross-examination, in order to ensure fairness to the parties, whilst avoiding trial becoming overly long with unnecessary and repetitive cross-examination. However, Floyd LJ also noted that a judge should not be compelled to accept unchallenged evidence just because this has not happened.

Floyd LJ also agreed with statements made by Jacob LJ in **Markem v Zipher** [2005] EWCA Civ

267 that cross-examination on key evidence is important for procedural fairness, not just from the perspective of the parties, but also the witnesses. This is because it gives the witness the opportunity to respond to challenges made to his/her evidence. Having said that, in this case there were three rounds of evidence, so both experts had had ample opportunity to comment on the views of the others.

In his conclusions Floyd LJ held that he was "wholly unpersuaded" that the judge's decision was in any way unsafe as a result of the particulars of the cross-examination. In particular, he noted that Prof Lutter had seen the written evidence and cross-examination of the other side's expert before being cross-examined himself. He therefore had had a fair opportunity to comment on conflicting evidence of the other side's expert and to expand on his own if he had felt it necessary to do so. Further, Prof Lutter's evidence had been undermined in cross-examination on two different points – this entitled the judge to prefer the other side's expert witness' overall reasoning.

Boston had argued at trial that if an invention was not obvious to one member of the skilled team (i.e. the skilled interventional cardiologist as per Prof Lutter), the invention was not obvious. The judge had held that this did not apply in this case as there was in fact an overlap between the expertise of the members of the skilled team and this particular issue was not one which fell only within the expertise of the cardiologist. Floyd LJ noted that whilst Prof Moore and Prof Lutter had different expertise, they both held themselves out as being qualified to give evidence on how a collaborative skilled team would have undertaken the hypothetical design projects. Indeed, Boston had not identified any point which was exclusively for the clinician (i.e. Prof Lutter) and the judge was justified in thinking that they would not be able to do so. In fact, the contentious issues were principally within the expertise of the biomedical engineer (i.e. Prof Moore, not Prof Lutter). Therefore, even if counsel for Edwards had sought directions on cross-examination of Boston's two experts, the judge would have been correct to direct that only Prof Moore should be cross-examined on the relevant points.

Finally, Floyd LJ noted that it was not determinative that Edwards' counsel had stated whilst cross-examining Prof Moore that a particular point would be pursued with Prof Lutter (which never happened). If Boston had wanted Prof Lutter to adduce evidence on this point, they could have led evidence from him in chief, or applied to have Prof Lutter recalled before closing speeches.

This case illustrates that cross-examination is a very important tool in identifying and exploring the heart of a dispute, but as Floyd LJ notes, procedural rules are the servants of justice and not the other way round. Honest.

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This entry was posted on Tuesday, April 3rd, 2018 at 4:15 pm and is filed under Case Law, Litigation, Procedure, United Kingdom, Validity
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