Civil Evidence: Missing Witnesses and Adverse Inferences

6 December 2021

Introduction

The question of which witnesses to call, and the scope of the evidence they will give, is key to the preparation and presentation of a successful case. With the increasing focus on the production and content of trial witness statements brought about by the CPR Practice Direction 57AC reforms, it is hardly surprising that various related issues have, in recent months, fallen to be considered by the Court.

One such issue is the extent to which the Court is willing, and able, to draw adverse inferences from a party's failure to call a particular witness to give evidence, or from a witness's failure to deal with a certain issue in their evidence. Both issues have recently been considered by the High Court in *Ahuja Investments Ltd v Victorygame Ltd* & *Anor* [2021] EWHC 2382 (Ch) ("*Ahuja Investments*") and in *Active Media v Burmeister* [2021] EWHC 232 (Comm) ("*Active Media*"), and by the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 ("*Efobi*").

Adverse Inferences: Applicable Principles

Wisniewski v Central Manchester Health Authority [1998] Civ 596 has traditionally been cited as the leading authority on the approach to be taken to the drawing of adverse inferences. There, in the context of a medical negligence action, the Court established four key principles:

- *Firstly*, the Court may, in certain circumstances, draw adverse inferences from "*the absence or silence of a witness who might be expected to have material evidence to give on an issue*";

- *Secondly*, where the Court does draw an adverse inference, it may serve to either (i) strengthen the evidence adduced on that issue by the other party; or (ii) weaken the evidence adduced by the party against whom the adverse inference is drawn;

- *Thirdly*, the Court will only be entitled to draw an adverse inference on an issue on which the party inviting it to do so has itself adduced some evidence, however weak that evidence may be. In other words, "*there must be a case to answer*" on the relevant issue.

- If the reason for the absence or silence of the witness satisfies the Court, then no adverse inference may be drawn. If some credible explanation is given, then this may serve to reduce or nullify the detrimental effect of the absence or silence.

That approach was endorsed in a later Supreme Court authority, in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, and followed by the Court of Appeal in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882, which clarified the discretionary nature of the Court's power to draw such inferences.

The principles established in *Wisniewski* fell for further consideration by the High Court in *Magdeev v Tsvetkov* [2020] EWHC 887, in which both parties sought adverse inferences being drawn against the other. Drawing on *Wisniewski* and *Manzi*, Cockerill J observed that the "*tendency to rely on [the Wisniewski principles] in increasing numbers of cases*", stating that it should be "*deprecated*" and that the applicability of those principles is "*likely to genuinely arise in relatively small numbers of cases.*" The Judge went on to find that:

- The rule as to adverse inferences was "*fairly narrow*" and the exercise not one which should be "*lightly undertaken*".

- Where a party seeks to rely on it, it is necessary for that party to set out:

    - The point on which the inference is sought;

    - The reasons why it is said that the "missing" witness would have material evidence to give on that issue; and

    - Why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

- The Court will then exercise its discretion in light of the principles above, and also with regard to the overriding objective and "*an understanding that it arises against the*

background of an evidential world which shifts—both as to burden and as to the development of the case—during trial".

Ahuja Investments—Background

The Court in *Ahuja Investments* rejected a claim for misrepresentation on the basis that, though a fraudulent misrepresentation had been made, it had not induced the claimant to enter into the transaction. The Court's finding on inducement was, to a significant extent, attributable to the claimant's failure to call its former solicitor to give evidence, despite the solicitor having played a key role in the series of events giving rise to the claim.

The dispute arose from the claimant's purchase of a shopping centre from the defendant, with that purchase funded in part by a loan advanced by the defendant to the claimant. The sale contract for the shopping centre incorporated a schedule stating that all of the leaseholders of the retail units in the centre had "*signed a 15 years lease from the 20/2/15.*" In fact, the majority of the leases were for shorter terms and/or did not run from the stated date.

Although the defendants accepted that this amounted to an innocent misrepresentation, they denied that the representation had induced the claimant to enter into the transaction, contending that the claimant had known the true terms of the leases prior to the exchange of contracts, namely because the original leases had been provided to the claimant's selling agent, Mr Sohal of Monarch Commercial Property Consultants, who had passed it on to the claimant's solicitor, Mr Jandu of Stradbrooks. The leases had then been scanned and returned to the defendant's solicitor, Mr Fagbemi of Chhokar & Co. None of Mr Sohal, Mr Jandu or Mr Fagbemi were called to give evidence.

The defendants submitted that the Court should infer from the failure to call Mr Jandu in particular that his evidence would be "*unhelpful from Ahuja's perspective*". Specifically, the Court was invited to infer that, prior to the exchange of contracts, Mr Jandu had either "*read the ground floor leases and told Mr Singh about them or he had told Mr Singh that he did not know about the ground floor lease terms and that Mr Singh told him to proceed to exchange in any event*".

The Court held that, before the discretion to draw an adverse inference could arise, the party inviting the Court to draw the adverse inference (in this case, Victorygame) must first:

- Establish (a) that the counter-party might have called a particular person as a witness and (b) that that person had material evidence to give on that issue;
- Identify the particular inference which the Court is invited to draw; and
- Explain why the inference is justified on the basis of other evidence that is before the court.

In particular, the Court highlighted the need to show that the absent witness had material, *i.e.*, significant evidence to give.

The Court accepted that this was a case in which it would be appropriate to draw the inference sought, noting that there was no evidence or explanation from the claimant as to why the Court had not heard from Mr Jandu, and that it was open to the Claimant to waive litigation privilege between itself and Mr Jandu. The Court had also rejected the evidence put forth by Mr Singh as to reliance on the representation.

The Court therefore found that, whilst Victorygame had made the lease term representation fraudulently, it had successfully "*discharged the heavy burden of rebutting the presumption of reliance and inducement*", meaning that there was no actionable misrepresentation.

The Court did, however, find that the representation amounted to a contractual term and that its falsity constituted a breach of a contractual warranty. Given that the appropriate measure of damages in such a case was the difference between the price paid and the value of the property had the warranties been true, and the Court found that Ahuja (i) had not paid more for the property than it was worth; and (ii) had failed to prove that the property would have been worth more if the representation were true, it followed that no actual damage had been suffered as a result of that breach.

Though an adverse inference was only sought in relation to Mr Jandu's evidence, the Court also issued the reminder that the parties had "*failed to assist the court by calling evidence from three highly relevant potential witnesses, in breach of their duty under CPR 1.3 to help the court to further the overriding objective to deal with the case justly and at proportionate cost*".

Ahuja Investments—Part of a Growing Trend?

The drawing of adverse inferences by the English courts has resurfaced several times in the last year, indicating that the findings in *Ahuja Investments* may be part of a growing trend.

Some months earlier, in February 2021, adverse inferences had been drawn in *Active Media v Burmeister* [2021] EWHC 232 (Comm), a case which concerned the financing, completion and delivery of an animated Christmas film. Active Media, an investor in the film, brought a claim under a completion guarantee when the film was not completed and delivered on time. The key issue was whether Active Media knew that the film had not been completed and delivered by 28 August 2017 and was thereby estopped from claiming under the completion guarantee or, alternatively, had waived its right to do so. There, the Judge accepted the invitation to draw adverse inferences against Active Media on the basis that (i) Mr Quinn, the "*main protagonist*" on behalf of Active Media, had deliberately destroyed documents immediately before the trial; and (ii) certain witnesses had not been called by Active Media to give evidence, despite them having a "*central role*" in the relevant events. Broadly speaking, the Court inferred from this that the destroyed documents would have shown, and/or the relevant witnesses would have said, that Active Media was in fact aware of the delayed completion, and that it was only when it became aware that it would not be compensated for that delay that it sought to call upon the completion guarantee.

Similarly, in July 2021 (after the Ahuja trial but before judgment being handed down), the Supreme Court handed down its decision in *Efobi v Royal Mail Group Limited* [2021] UKSC 33. In this instance, an employee of the Royal Mail group brought a claim alleging direct and indirect discrimination. The claimant, despite having the relevant qualifications, had applied unsuccessfully for over 30 internal posts in the managerial/IT service area. The issue before the Supreme Court was whether the employment tribunal was mistaken in not drawing any adverse inference from the fact that Royal Mail adduced no evidence from anyone who actually dealt with any of the claimant's job applications.

Although the Supreme Court held that, in this case, there was nothing to suggest that the employment tribunal could be criticised for not drawing an adverse inference, the Supreme Court did caution against Courts making an "*overly legal and technical*" determination, when in fact it should be a matter of "*ordinary rationality*". It held that relevant considerations when deciding whether to draw an adverse inference could include:

- whether the witness was available to give evidence;

- what relevant evidence it would be reasonable to expect that the witness would have been able to give;
- what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence; and
- the significance of those points in the context of the case as a whole.

Lessons Learnt

It is clear from these cases that the Courts will not lightly exercise their discretion to draw adverse inferences in respect of a failure to adduce evidence from particular witnesses. They may, however, be willing to do so in circumstances where:

- the witness is available to give evidence and there is no credible explanation for the failure to call them;
- the Court believes that the witness could provide *material* evidence to the court *i.e.* evidence which the court believes to be crucial to the claim;
- documents have been destroyed and are unaccounted for, in which case witness evidence will assume increased importance[1]; and/or
- the Court believes that failure to call a witness may hinder the ability of the court to deal with a case justly and at proportionate cost under CPR 1.3.

Ahuja Investments and the other recent cases detailed above set out some important lessons for practitioners and their clients when preparing witness evidence:

- Consider carefully in advance what the court is likely to view as the *material* evidence needed to deal with the issues in dispute in the claim. Although this is a simple point, the cases above demonstrate that this is one which may be neglected by practitioners.
- Crucial witnesses may not be willing to give evidence, or may otherwise be unavailable. If this is the case, practitioners should consider whether an alternative witness will be able to give evidence on the issues, or whether there is documentary

[1] The default position in commercial claims being that set out in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2021] EWHC 3560 (Comm): *"the best approach for a judge to adopt… is to place little if any reliance at all on witnesses' recollections of what was said in meeting and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."*

evidence available to deal with those points. If there are no alternatives, a credible explanation must be given as to why.

- Where gaps in documentary evidence have been identified, thorough investigation of the reason for that is required. Whilst there is often straightforward explanation (such as the passage of time, deletion in accordance with standard data retention policies before a hold notice had been sent out, or technical issues with the collection process) the absence of such explanation, and a lack of supporting witness evidence, may result in the Court being invited to draw adverse inferences.

The process of identifying material witnesses may now be helped by the introduction of PD57AC. PD57AC emphasises the importance of parties using trial witness statements as a means of not only informing the Court (and the other side) of the evidence that a party will rely on at trial, but of furthering the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost. The lessons above are consistent with how parties should conduct themselves under PD57AC (and, for that matter, the Disclosure Pilot Scheme rules under PD51U).

LONDON

Christopher Boyne
cboyne@debevoise.com

Patrick Swain
pswain@debevoise.com

Emma Laurie-Rhodes
elaurierhodes@debevoise.com

Emily Lodge
elodge@debevoise.com

Lily Barrett (Trainee Associate)
ebarrett@debevoise.com