

# Dubai Court of Cassation Judgment 402 of 2020: evaluating evidence and discharging the evidential burden

**Nasser Yahia** - Senior Counsel - Litigation

ny.yahia@tamimi.com - Sharjah

Sara Omer Ali - Associate - Litigation

- Sharjah

## Introduction

The UAE law of evidence regulates, among other things, the burden of proof and the admissibility of evidence in court cases. In a recent judgment, the Dubai Court of Cassation (Judgment 402 of 2020), considered the application of these general rules and the judge's role in evaluating evidence.

## Background

One of the largest UAE-based insurance companies (the 'Claimant') brought a claim against a leading yacht builder (the 'Defendant') in the Dubai Courts seeking compensation for the loss and damage it suffered (when it paid the insured the insured sum and expert fees for the loss assessment). The total amount sought was AED 36,845,857.48 plus interest. A fire broke out on board the insured yacht and as a result, the Claimant paid the insured sum to the yacht owner pursuant to an insurance policy. Upon investigating the cause of the fire, reports produced by the Dubai Police and marine surveyors concluded that the likely cause of the fire was a short circuit in the upper deck of the yacht. Consequently, the Claimant filed its statement of claim (attaching a supporting letter from the yacht owner) with the Dubai Court of First Instance requesting the court to declare the Defendant liable for the incident.

In its statement of defence, the Defendant argued that the reports submitted by the Claimant were inconsistent with, and contradicted, each other. It asserted that none of the reports specified the cause of the fire with any certainty nor did they identify where the fire started.

The Dubai Court of First Instance weighed up the evidence and considered whether the Claimant had discharged the burden of proving the cause of the fire. The court dismissed the Claimant's claim based on its finding that the Claimant had failed to adduce adequate evidence in support of his case.

## Court of Appeal

The Claimant filed an appeal with the Dubai Court of Appeal. The Dubai Court of Appeal appointed an expert to investigate the likely cause and location of the fire. The expert concluded that the cause of the fire could have been a defect in the electrical works. Based on this expert report, the Claimant argued that the Defendant should be held liable for the loss because the yacht was still under the manufacturer's warranty, which included a warranty against latent defects. However, the Defendant argued that the expert concluded in his report that it was not possible to make a definitive determination as to the location

or cause of the fire. The Court of Appeal found in favour of the Defendant. The Court of Appeal held that liability, whether arising in contract or in tort, rests not on conjecture or speculation but on certainty. The case against the Defendant was dismissed.

## **Court of Cassation judgment**

The Dubai Court of Appeal's judgment was upheld by the Dubai Court of Cassation. More interesting is the Court's careful analysis of the rules governing the burden of proof and the judge's role in evaluating evidence.

## **Evaluation of evidence by the trial court**

The Court of Cassation recalled it is well established by its previous judgments that three elements are necessary to engage liability, whether arising in contract or in tort: fault; damage; and a causal link between fault and damage. The absence of any of those elements negates liability. The existence, or otherwise, of fault and damage and a causal link between them, is a question of fact for the trial court to decide based on: (i) the evidence before it, including the court-appointed expert's report; and (ii) the application of substantive presumptions based on the facts. The trial court's decision will not be subject to review by the Court of Cassation as long as it is based on sound and evidence-supported reasoning that leads to the conclusions reached. The trial court has full discretion to: (a) find and interpret facts; and (b) examine and consider the evidentiary record, adopting such evidence as it sees fit, and explain writings and contracts, without departing from their substance, adopting and discarding expert findings as it sees fit, as long as its decision is based on sound and evidence-supported reasoning.

The Court of Cassation noted that it is further settled that the trial court enjoys discretion to evaluate expert proceedings and follow the opinion it finds satisfactory amongst the reports of multiple experts, including a consultative expert, adopting such report in whole or in part if viewed as adequate as to its inquiry and sound as to its underlying basis. Thereafter, the trial court is not required to respond, with special reasons, to the parties' objections and challenges to the expert's report as long as it found, in the court-appointed expert's report, sufficient material to form an opinion and make a decision.

Furthermore, the trial court is under no obligation, either, to respond to all of the parties' submissions or address every non-legal presumption raised by the parties or follow entire courses of argumentation and submission and reply independently to each submission, argument and request as long as the truth of which it is convinced and has explained on the basis of evidence constitutes an implicit and categorical reply to every contrary argument and submission.

### ***Burden of proof***

The Court also noted that it is further settled that the claimant has the burden of proving his case and bringing evidence to support his allegations.

In the case, the Claimant pursued a claim under both the strict liability provisions and the sale agreement whereby the Defendant has a warranty obligation in respect of the yacht's equipment and machinery. In the report on which the Claimant relied upon, the fire expert appointed by the loss adjustors concluded that it was not possible to make a definitive determination as to the location or cause of the fire, given the damage to the yacht. The expert held the view that the fire was probably caused by a fault in the electrical

circuit wires running through the area. However, the opinion was based on speculation and conjecture, not certainty and none of the reports mention any fault attributable to the Defendant.

Significantly, the Claimant, in its statement of claim, and the supporting exhibits, confirmed that the Defendant had complied with the sale agreement in terms of providing periodic maintenance support for the yacht's machinery and equipment. In addition, the record did not find any fault attributable to the Defendant or identify any evidence against the Defendant, whether under Article 316 of the Civil Transactions Code, (which the Claimant cited in support of the Defendant's liability), or pursuant to the Defendant's warranty obligation in respect of the electrical equipment which was not definitively established as being the cause of the fire. Liability, whether arising in contract or in tort, rests not on conjecture and speculation but on certainty. The Court of Appeal therefore dismissed the action against the Defendant.

The court also noted that the results of a survey that was carried out long after the fire, indicated that the superstructure of the yacht above the main deck was completely burnt out and had collapsed. Since the yacht had overturned during sinking, the debris was spread out and picked up from the sea bed, hence could not be correlated with the actual location on the yacht.

## Conclusion

The key to obtaining a favourable court judgment is substantiating a claim well. Most lawyers will focus on the legal basis of a case when preparing for litigation and will rely on expert opinions in order to substantiate their claim. However, in the event a party to litigation is relying on one expert opinion to support their claim, there is a risk it can be used against that party if the expert opinion does not provide a definitive conclusion. A court will most likely appoint an expert to assist the court's understanding of a complex or technical matter and if the court appointed expert's conclusion differs from a party's expert's conclusion then the basis of a party's case can collapse.

The Defendant, in this case, relied on the discrepancies between the expert opinions in order to prove that the facts of the matter were uncertain. Although both experts concluded that the fire was caused by latent defects, (which would prove that the Defendant was liable) they disagreed on the actual defect that caused the fire. The burden of proof was on the Claimant and he failed to discharge it. He was not successful in proving that the Defendant was the cause of the fire and therefore a judgment was issued in the Defendant's favour.

***For further information, please contact [Nasser Yahia \(n.yahia@tamimi.com\)](mailto:n.yahia@tamimi.com).***