Neutral citation [2011] CAT 44

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1178/5/7/11

Victoria House
Bloomsbury Place
London WC1A 2EB

20 December 2011

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)
PETER FREEMAN QC
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

2 TRAVEL GROUP PLC (IN LIQUIDATION)

Claimant

- and -

CARDIFF CITY TRANSPORT SERVICES LIMITED

Defendant

Heard at Victoria House on 16 December 2011

RULING (ADMISSIBILITY OF EVIDENCE)

APPEARANCES

Mr. Michael Bowsher QC, Mr. Adam Aldred and Miss Anneliese Blackwood (instructed by or of Addleshaw Goddard LLP) appeared for the Claimant.

Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

INTRODUCTION

1. This is a claim brought by 2 Travel Group plc (in liquidation) ("2 Travel") against Cardiff City Transport Services Limited, trading as Cardiff Bus ("Cardiff Bus"), for damages pursuant to section 47A of the Competition Act 1998. The claim is a "follow-on" action arising out of a decision of the Office of Fair Trading in which it was found that Cardiff Bus committed an infringement of the Chapter II prohibition (section 18 of the Competition Act 1998).

2. In support of its claim, 2 Travel relies upon the evidence of Mr Stephen Harrison, which is contained in a written witness statement. This statement substantially addresses the circumstances in which reports considering 2 Travel's business came to be written by PricewaterhouseCoopers ("PwC"). For the reasons which we describe more fully below, Cardiff Bus objects to the admissibility of Mr Harrison's statement.

3. Mr Harrison is put forward by 2 Travel as a witness of fact, and not as an expert witness. He is a chartered accountant, who comments on issues including accountancy matters. To that extent, his evidence traverses points that an expert witness might cover. It is inherent in his statement that he formed a contemporary view regarding 2 Travel's business that an expert, considering matters after the event, might also consider. On this basis, 2 Travel say that Mr Harrison is not an expert because he was a participant in the factual matrix giving rise to this claim. 2 Travel have, therefore tendered Mr Harrison as a factual witness, albeit a witness who is speaking to questions of fact that involve a substantial expert input.

4. Before us, Cardiff Bus contended that Mr Harrison's evidence was expert, and not factual. Because this distinction between factual and expert evidence formed a key part of Mr West's submissions on behalf of Cardiff Bus as to why Mr Harrison's evidence should not be admitted, or only admitted with substantial redactions, we have had to consider first the precise nature of the evidence in Mr Harrison's statement and, thereafter, the force of Cardiff Bus's objections to that evidence.

THE NATURE OF MR HARRISON'S EVIDENCE

5. In *Expert Evidence: Law and Practice* by Hodgkinson and James (3rd ed (2010)), the following passage at paragraph 1-036 is of assistance:

> "The distinction between fact and opinion, however, as has been judicially recognised, is not a particularly clear one. In one way, all evidence by individuals of "facts" which they have perceived by means of their senses is really no more than evidence of opinion. It is an attempt at recollection of matters which, in their opinion, they believe they have perceived. And this is no less the case because they feel certain they are right and other witnesses have shared and corroborated that perception. English law has not favoured this viewpoint. An alternative view would be to draw a distinction between facts perceived by witnesses (through their senses) and inferences (or opinions) based on previously acquired knowledge and experience that the witnesses (often sub-consciously) draw from those "facts". On this analysis, a witness's assessment of the speed of a car in which he was travelling as a passenger at the time of an accident would be his opinion (assuming it was not based on him looking at the speedometer), but would be based on "facts" such as the witness's perception of how long it took the car to pass between objects on the roadside (such as parked cars and lamp posts) and his general experience as a car driver or car passenger of knowing what it is like to travel in a car at, say, 30 mph (when perhaps he has looked at the speedometer).
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> A similar analysis could be applied to the passenger witness's assessment of distance (eg how far away the car was when the pedestrian stepped onto the road). English law has not adopted this viewpoint. The English approach is to treat such "opinions" as matters of the "fact". In 1970 the Law Reform Committee explained the position as follows:
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> > "The witness's skill and experience in estimating speeds and distances may be shown by cross-examination to be minimal; but this goes to the probative value of his opinion, not to its admissibility. For the witness has knowledge essential to the formation of an opinion on each of these matters which the judge can never possess – his recollection of what he himself perceived by his own physical senses at the time of the event he is attempting to describe. Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence [as] if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."

6. Exactly the same is true of very sophisticated areas of expertise. Take the example of a brain surgeon accused of negligence, giving evidence in his defence. Such

evidence, justifying sophisticated conduct alleged to have been negligent, will in content often be indistinguishable from "expert" evidence. But it will not *be* expert evidence, because the witness will be explaining, as a matter of fact, precisely what he did during the course of a particular operation, drawing on his expertise to give that factual explanation. This distinction between "expert" evidence given by a witness of fact, and genuine expert evidence, is one which is regularly drawn by the Tribunal (see, for example, *British Telecommunications plc v Office of Communications* [2010] CAT 17 at paragraphs 109 to 113) and is one which is expressly recognised in section 3(1) of the Civil Evidence Act 1972, which provides:

> "Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence."

7. We have concluded that the evidence of Mr Harrison is factual evidence, and not expert evidence and (but for the objection made by Cardiff Bus, and to which we now turn) is admissible. Naturally, we say nothing about the weight that should be attached to such evidence.

THE OBJECTION TO MR HARRISON'S EVIDENCE

8. On 7 January 2011, it was announced that Mr Harrison was one of 14 new members of the Tribunal's panel of ordinary members.

9. On 18 January 2011, 2 Travel's Claim for Damages was served. The evidence of Mr Harrison (albeit not his statement, which came later), and the points that it went to, was specifically adverted to in 2 Travel's Claim for Damages dated 18 January 2011. This stated in paragraph 3.4:

> "2 Travel also relies on the following:
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> ...
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> (c) The evidence of Mr Stephen Harrison, formerly a partner of PwC (and others), who will speak to:
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> (i) the PwC Report (at Appendix 4), which he still regards as reasonable;

(ii) the failure of 2 Travel being caused by 2 Travel's inability to grow in accordance with its business plan (which 2 Travel says was caused by the predation of Cardiff Bus);

(iii)the fact that the Cardiff operation was fundamental to the success of 2 Travel's business plan and its expansion; and

(iv)the impact the continuing predation by Cardiff Bus was having on the management and operation of 2 Travel."

2 Travel's intended reliance on the evidence of Mr Harrison was, therefore, flagged at the earliest possible stage in the proceedings.

10. The Registrar and the President of the Tribunal took steps to ensure that Mr Harrison's status as both a witness in these proceedings and as an ordinary member of the Tribunal did not give rise to difficulties. The Chairman was able to confirm that he did not know nor, so far as he was aware, had he ever met Mr Harrison. Thereafter, steps were taken to ensure that, for the future, Mr Harrison and the Chairman did not meet. The two other members of this Tribunal (Mr Freeman QC and Mr Smith QC) were selected because they, too, were able to confirm that they did not know nor, so far as they were aware, had they ever met Mr Harrison. Thereafter, as with the Chairman, steps were taken to ensure that Mr Harrison and the other Tribunal members did not meet.

11. When, at the case management conference on 16 December 2011, Cardiff Bus objected to the evidence of Mr Harrison, on the grounds that his position as an ordinary member of the Tribunal gave rise to an appearance of bias, these matters were explained to counsel for 2 Travel and Cardiff Bus. Nevertheless, despite the steps that had been taken within the Competition Appeal Tribunal to ensure that Mr Harrison was not known to the Tribunal as here constituted, it was contended by Mr West that a fair minded and informed observer would conclude that there existed a real possibility that this Tribunal would be biased in favour of the evidence of Mr Harrison, and that for this reason the evidence of Mr Harrison should not be admitted.

12. The law in this area is very clear, and has most recently been stated in the decision of the Court of Appeal in *Competition Commission v BAA Limited* [2010] EWCA

Civ 1097, [2011] UKCLR 1. Mr West also relied on the decision of the Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 which decision, although articulating exactly the same test as that used in the *BAA* case, was (in terms of its facts) a helpful authority to bear in mind.

13. Essentially, the question before us is this: is this a case where a fair-minded observer would consider – notwithstanding any explanation advanced – that there is a real danger of bias on the part of the presently constituted Tribunal as regards the evidence of Mr Harrison. It is our conclusion that there is not, for the following reasons:

(a) Given the steps taken by the Registrar and the President, as described in paragraph 10 above, we consider that a fair-minded observer would not take the view that there was a real danger of bias on the part of the presently constituted Tribunal as regards the evidence of Mr Harrison. To the contrary, we consider that such a fair-minded observer would take the view that the difficulties of Mr Harrison's dual status as both a witness and an ordinary member had been squarely addressed and fairly resolved.

(b) Moreover, we consider that a fair-minded observer would (to say the least) be perturbed to have this Tribunal *exclude* evidence on which one party was relying simply because of Mr Harrison's status as a ordinary member of the Tribunal. Such a course would involve the risk of real and genuine injustice to 2 Travel which has, from the outset, made clear its reliance on the evidence of Mr Harrison.

(c) It is not as if 2 Travel can select another witness, in place of Mr Harrison. Mr Harrison is, as we have noted, a witness of fact. His past involvement in 2 Travel's affairs is undisputed, and 2 Travel cannot simply pick-and-choose their factual witnesses. This, of course, explains Cardiff Bus's insistence that Mr Harrison was not a factual witness, but an expert. An expert, by definition, is giving opinion evidence after the event. Had 2 Travel sought to adduce true expert evidence from Mr Harrison after his appointment as an ordinary member, then *(i)* we have no doubt that he would have refused to

act or to continue to act; and *(ii)* had he not done so, the outcome of this application might have been different. However, Mr Harrison is, as we have found, not an expert witness, but a witness of fact.

(d) Equally, it is not clear what more the Tribunal could have done to present an unbiased appearance. Cardiff Bus's objection applies howsoever the Tribunal hearing the case is constituted. Indeed, although this point was not put in argument, the objection would still persist even if the services of three High Court Judges of the Chancery Division (who are all also Chairmen of Competition Appeal Tribunal) were enlisted to constitute the Tribunal hearing this case.

(e) Significantly, Cardiff Bus's application was confined to seeking an order refusing to admit all or part of the evidence Mr Harrison. During the case management conference on 16 December 2011, we invited Cardiff Bus to consider whether it was minded to make an application to transfer this case to the Chancery Division of the High Court pursuant to rule 48 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372). We stated that if Cardiff Bus was minded to do so, it had to do so in writing by 1pm on 19 December 2011. Cardiff Bus confirmed to the Tribunal Registry by that deadline that it did not intend to make such an application.

(f) We consider that, *if* this was a case where there *was* a real danger of the appearance of bias on the part of this Tribunal, then the appropriate course would be to transfer this case out of the Competition Appeal Tribunal. Such an application should have been made by the concerned party (ie Cardiff Bus) as soon as Mr Harrison's dual status became apparent, in January 2011. Notwithstanding the lateness of Cardiff Bus's present application, and Cardiff Bus's recent decision not to apply to transfer this case out of the Competition Appeal Tribunal, we have nevertheless considered whether Cardiff Bus's objections to Mr Harrison's evidence make this a case appropriate for transfer to the Chancery Division on our own initiative. We have concluded that these objections are not sufficient to justify such an order. We reach this conclusion principally because of our conclusion that

there is no risk of the appearance of bias. More practically speaking, we are very conscious that this case involves a claimant that has (as has already been adverted to in other applications before the Tribunal) real financial difficulties in bringing this claim. Transfer to the Chancery Division would very likely involve an adjournment of the case, and we consider that an adjournment of these proceedings ought only to be contemplated where there is good reason. We consider that Cardiff Bus's objections (which could, of course, have been articulated much earlier than December 2011) fall very far short of such a good reason.

CONCLUSION

14. For the reasons we have given, we refuse Cardiff Bus's application to exclude the evidence of Mr Harrison.

Lord Carlile of Berriew QC Peter Freeman QC Marcus Smith QC

Charles Dhanowa
Registrar Date: 20 December 2011