Neutral citation [2019] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1299/1/3/18

Victoria House
Bloomsbury Place
London WC1A 2EB

11 July 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
TIM FRAZER
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

ROYAL MAIL PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

WHISTL UK LIMITED

Intervener

Heard at Victoria House on 8 July 2019

RULING (ADJOURNMENT)

APPEARANCES

Mr Daniel Beard QC and Ms Ciar McAndrew (instructed by Ashurst LLP) appeared on behalf of the Appellant.

Mr Josh Holmes QC, Ms Julianne Kerr Morrison and Mr Nikolaus Grubeck (instructed by Ofcom Legal) appeared on behalf of the Respondent.

Mr Jon Turner QC, Mr Alan Bates and Ms Daisy Mackersie (instructed by Towerhouse LLP) appeared on behalf of the Intervener.

A. THE ISSUE

1. In the course of the oral hearing in these proceedings an issue arose of significant importance for the conduct of the case and which affected the interests of all parties. The issue required careful consideration by the Tribunal in the light of written and oral submissions by the parties.

2. One of the experts put forward by the Appellant, Royal Mail plc ("Royal Mail"), Mr Gregory Harman, a distinguished economic and forensic accountancy consultant, was unfortunately taken ill during the course of the hearing but before he was himself due to give oral evidence. Despite efforts made by all concerned to re-arrange the timetable to accommodate Mr Harman's indisposition, it was not possible to do so within the envelope of time allocated by the Tribunal to hear this case, even with an additional three days.

3. The question therefore was whether it was necessary to adjourn the hearing to some future date or to proceed to hear closing arguments without the benefit of the cross and re-examination of Mr Harman. The Respondents, the Office of Communications ("Ofcom"), and the Intervener, Whistl UK Limited ("Whistl"), indicated their willingness, in the interests of expedition and good process, to forego their right to cross-examine Mr Harman.

4. Mr Harman had provided six substantial expert reports, including two specifically prepared for the purposes of this appeal (amounting to 200 pages). He had also contributed to an 80-page Joint Expert Statement in which he and an expert for each of the other parties set out in detail the matters on which the three of them agreed and where they disagreed, together with the reasons for such agreement or disagreement.

5. Ofcom and Whistl said that the hearing should proceed on the basis that Mr Harman's written evidence would stand as not being agreed and that they should be free to make what arguments they felt appropriate about its correctness or otherwise in the course of closing submissions. Royal Mail said this placed them at an unfair disadvantage as Mr Harman, alone of the four experts in this case, would not have had the chance to answer points raised against him in cross

examination, and this contravened what it said was the general principle that a party could not contest the evidence of an expert witness without putting any such adverse points to the expert in person.

6. Royal Mail accordingly proposed an adjournment of the hearing until such time as Mr Harman would have recovered sufficiently to give evidence. This was estimated by Royal Mail to be some time 'after the Summer vacation'. Ofcom and Whistl opposed this application.

7. Having heard the parties at a Case Management Conference on 8 July 2019, we refused Royal Mail's application. This ruling sets out our reasons for doing so.

B. THE FACTUAL BACKGROUND

8. The appeal was filed at the Tribunal on 12 October 2018. On 7 November 2018, the trial was listed for an overall period of five weeks, commencing on 4 June 2019. On 31 January 2019, the start of the trial was deferred by a week, so that it was listed to run from 10 June to 12 July 2019.

9. During the third week of the hearing (on 26 June 2019), Counsel for Royal Mail informed the Tribunal that "*unfortunately yesterday morning, Mr Harman was taken ill.*" He was said to be undergoing medical tests and was "*not going to be available before Friday [28 June] at the earliest.*" It was agreed that another expert witness would be called instead of Mr Harman on 28 June 2019, allowing Mr. Harman's evidence to be heard the following week.

10. On 27 June 2019, Royal Mail sent an email update to the Tribunal, indicating that Mr Harman's medical position would not allow him to give evidence in the week commencing 1 July 2019 but that "*he may be able to give oral evidence in the week commencing 8 July*." Following consultation with the parties, the Tribunal agreed to extend the trial timetable by three sitting days until 17 July 2019. This would allow Mr Harman to give oral evidence on 8-9 July 2019, followed by written and oral closings. The only other remaining expert was called on 1 July 2019.

11. During the hearing on 1 July 2019, Counsel for Royal Mail informed the Tribunal that there was likely to be no further clarity regarding Mr Harman's position until Friday 5 July 2019.

12. On 4 July 2019, Royal Mail wrote to the Tribunal and the parties, informing them that Mr Harman "*is not fit to return to work at present and will therefore be unable to attend to give evidence on Monday 8 July or Tuesday 9 July, as envisaged in the proposed revised timetable.*" It indicated that no further update was likely to be available until a medical assessment on 17 July 2019.

13. Ofcom and Whistl responded by letters to the Tribunal, stating their view that Mr. Harman's written evidence should stand, and should be addressed in written submissions, without the need for oral examination of Mr. Harman.

14. On 5 July 2019, the Tribunal wrote to the parties. It informed them that *"the Tribunal is currently inclined to accept the course proposed by Ofcom and Whistl i.e. that the trial proceed without the cross-examination of Mr Harman, and for his evidence to be the basis for submissions from the parties as part of their written and oral closings."* The Tribunal noted that it had the power, under Rule 21(6) of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648) (the "Tribunal Rules"), to dispense with oral examination, subject to the overall requirement of fairness.

15. Later on 5 July 2019, Royal Mail wrote to the parties and then to the Tribunal. In its letter to the Tribunal it stated that *"Royal Mail very much shares the Parties' and the Tribunal's desire to proceed with the case according to the revised timetable and entirely agrees that the remainder of the hearing should be conducted as expeditiously as the circumstances allow"*, but expressed concerns as to the fairness of proceeding without the opportunity for Mr. Harman to be cross-examined. Royal Mail's letter did not contain any specific proposal as to how the matter should be dealt with.

16. Later still on 5 July 2019, Royal Mail wrote again to the Tribunal and the parties, requesting an "*adjournment over the summer vacation*" to allow for Mr.

Harman to be cross-examined at an unspecified future date; with closing submissions also to be postponed indefinitely.

17. The Tribunal heard the parties on this matter at a Case Management Conference on 8 July 2019.

C. THE TRIBUNAL'S POWERS AND THE LAW

18. The Tribunal Rules provide as follows in relation to case management and the giving of evidence:

> "**Directions**
>
> **19.**— (1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
>
> (2) The Tribunal may give directions—
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> …
>
> (f) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it must be oral or written;
>
> …
>
> (q) for the appointment and instruction of experts, whether by the Tribunal or by the parties and as to the manner in which expert evidence is to be given;
>
> …
>
> **Evidence**
>
> **21.**— (1) The Tribunal may give directions as to—
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> …
>
> (f) the way in which evidence is to be placed before the Tribunal.
>
> …
>
> (6) The Tribunal may dispense with the need to call a witness to give oral evidence if a witness statement or expert report has been submitted in respect of that witness.
>
> (7) The Tribunal may limit cross-examination of witnesses to any extent or in any manner it considers appropriate."

19. From this it can be seen that the Tribunal has specific but flexible powers to deal with situations of this kind. However, the Tribunal must at all times be guided by the governing principles set out in Rule 4, particularly the need to "ensure that each case is dealt with justly and at proportionate cost" (Rule 4(1)) and to "actively manage cases" (Rule 4(4)).

20. Rule 4 goes on to specify that ensuring that each case is dealt with justly and at proportionate cost:

> "includes, so far as is practicable:
>
> (a) Ensuring that the parties are on an equal footing;
>
> (b) Saving expense;
>
> …
>
> (c) ensuring that it is dealt with expeditiously and fairly;".

21. The duty to actively manage cases, includes "ensuring that the main hearing is conducted within defined time limits" (Rule 4(5)(f)).

22. These requirements are discussed and explained in the Tribunal's Guide to Proceedings (2015). Section 7 on Evidence includes the following:

> "7.51 The Tribunal may control the evidence in particular cases by giving directions as to the issues on which it requires evidence; the nature of the evidence which it requires to decide those issues; the admission or exclusion of evidence from the proceedings; permission to provide expert evidence; and the way in which the evidence is to be placed before the Tribunal.
>
> …
>
> 7.54 If a party intends to submit to the Tribunal that something stated by another party's witness is not true, the Tribunal can only decide whether to accept that submission if the witness has had an opportunity in the witness box to respond to the allegation, unless the witness is deceased or too ill to give evidence. A party seeking to challenge anything in the statement of a witness put forward by another party must therefore give reasonable notice to that other party that it intends to contest that statement or identified passages in that statement. If the party putting forward the witness does not call the witness to give oral evidence, the Tribunal will determine, after hearing submissions from the parties, what weight, if any, should be given to the statement. A very significant factor for this determination is the reason why the witness is not available for cross-examination, either in person or by video-link. Normally, where a witness whose evidence is contested is in the United Kingdom, the Tribunal would expect him or her to attend the hearing."

23. The Tribunal may also, where necessary to inform the application of its own rules, have regard to the corresponding rules in the High Court and the relevant legal principles underlying the provision of evidence in general.

24. In terms of the law on when and whether cross-examination is necessary in a civil trial, the starting point is the 1893 House of Lords case *Browne v Dunn* (1893) 6 R 67 HL, which contains the following statement by Lord Herschell LC:

> "My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice of a case, but is essential to fair play and fair dealing with witnesses... it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted". (pp 71-2).

25. This proposition, elevated over time into a 'rule', has been referred to in many subsequent cases. In 2017, in the case of *Chen v Ng (British Virgin Islands)* [2017] UKPC 27, the Privy Council referred to the 'rule', which Lords Neuberger and Mance paraphrased at para 53 as:

> "…In other words, where it is not made clear during (or before) a trial that the evidence or a significant aspect of the evidence, of a witness, […], is challenged as inaccurate, it is not appropriate, at least in the absence of relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment…".

26. Their Lordships referred to the Court of Appeal case of *Markem Corpn v Zipher Ltd* [2005] RPC 31, concerning a patent dispute, where the trial judge had based his findings in part on an adverse view of the defendant's witness evidence despite the plaintiff's counsel not having challenged its veracity. The Court of Appeal found the situation fell "squarely within" the rule in *Browne and Dunn* and quoted with approval an Australian case (*Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607) in which Mr Justice Hunt discussed the rule extensively, in turn paraphrasing it (at p.634) as:

> "…unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings."

27. There are similar formulations in Halsbury's Laws of England (see *Markem Corpn* at para 58) and in *Phipson on Evidence* (19th Ed., 2017, §12-12), to the latter of which our attention was drawn.

28. We note that in *Chen* Lords Neuberger and Mance suggested, at para 52, that the 'rule' could not be inflexible:

> "In a perfect world, any ground for doubting the evidence of a witness should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and while both points remain ideals which should always be in the minds of cross-examiners and judges, they cannot be absolute requirements in every case…".

29. We also note that in *Williams v Solicitors Regulation Authority* [2017] EWHC 1478 (Admin) Mrs Justice Carr stated at para 73:

> "The rule is not an absolute or inflexible one. It is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of written statement served in advance, and then verified on oath in the witness box".

30. Moreover, in *Sait v The General Medical Council* [2018] EWHC 3160 (Admin) Mr Justice Mostyn explained at para 41:

> "…it is my view that the rule, as originally expressed, is in fact now obsolete having regard to the advances made in the conduct of civil procedure since the laissez-faire Victorian era in which that case was decided…".

31. Taken together, these cases all suggest that the underlying basis of the 'rule' in *Browne v Dunn* remains an important consideration in ensuring a fair trial but its application in any particular situation will depend on the overall assessment of fairness. We return to this question below.

32. On the question of whether witnesses of fact should be considered differently from experts, we were referred to a number of cases, in addition to those mentioned above, in which a witness of fact's credibility was put in doubt and where cross examination at the hearing might not have been possible. These included *Howlett v Davies* [2017] EWCA Civ 1696 and *McDonald v Department for Communities and Local Government* [2013] EWCA Civ 1346. On the other hand, *Hatton v Connew* [2013] EWCA Civ 1560 concerned the

failure to cross examine the experts of all parties. The distinction, if any, would appear to rest less on the categorisation of the witness as factual or expert, but in the nature of the challenge to evidence given, that is to say whether any adverse point taken against his or her evidence goes to the truth of what is said or to the validity or otherwise of any opinion expressed.

33. On the question of when an adjournment is necessary or appropriate, there is a wealth of case law, covering a range of different situations. Ofcom referred us to the Tribunal's own ruling in *UK Trucks Claim Limited v Fiat Chrysler and others* [2019] CAT 15, where, in the context of a possible adjournment of multi-party litigation, the Tribunal's President said, at para 22, referring to the Court of Appeal case of *AB Sudan v Secretary of State for the Home Department* [2013] EWCA Civ 921:

> "We have to stand back and take a view of what is sensible and proportionate and in the interests of justice to all parties, and also to other litigants before the CAT."

34. We were also referred to various cases where an adjournment was refused on grounds of witness unavailability, including *Albon v Naza Motor Trading* [2007] EWHC 2613 Ch per Lightman J, and *Matthews v Tarmac Bricks and Tiles* [1999] CPLR 463, per Woolf and Clarke LJJs as well as two judgments by Foskett J, *Robshaw v United Lincolnshire Hospital* [2015] EWHC 247 and *Duffy v Secretary of State for Health* [2015] EWHC 867. These cases provide interesting and useful guidance but they all tend to confirm the principle that subject to an overall requirement of fairness, each situation has to be judged on its own facts.

35. As to the medical basis for a witness being unfit to give oral evidence, the cases indicate that something more than an assurance or statement in court is needed to establish unfitness. Thus, in *General Medical Council v Hyatt* [2018] EWCA Civ 2796 the Court of Appeal, having summarised the relevant authorities, concluded that evidence of unfitness was needed and cited Dyson MR in *Mohun Smith v TBO Investments* [2016] EWCA Civ 403:

> "Generally, the court should adopt a rigorous approach to scrutinising the evidence adduced in support of an application for an adjournment on the grounds that a party or witness is unfit on medical grounds to attend the trial."

We would find it hard to argue with such a sound proposition.

36. The cases cited to us have all involved situations slightly different from that with which we are confronted, and none is on 'all fours' with it. It is therefore necessary for us to consider the overall context of fairness, whether derived from our own rules or from the general law, to enable us to conduct a fair trial which gives appropriate respect to the interests of all parties. In this context we have not overlooked the fact that Royal Mail is the Appellant (and was the subject of the adverse decision by Ofcom) and in this connection note that in *Chen* their Lordships also said, at para 55:

> "At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, and the even more important principle of a fair trial, on the other…".

37. Again, we would not venture to disagree with such a sensible statement, but we would observe that the benefits of a fair trial apply to all parties and are not only applicable to the Appellant.

D. THE PARTIES' SUBMISSIONS

(1) Royal Mail

38. Royal Mail applied for an adjournment of the hearing until Mr Harman was again able to give evidence, albeit with reluctance as it shared the general wish to proceed quickly. It relied heavily on the claim that Ofcom's position (not allowing Mr Harman to be cross-examined, whilst still reserving the right to 'impugn' his evidence) was fundamentally unfair. This was contrary not only to the rule in *Browne v Dunn* but to the basic idea of a fair trial. It was irrelevant that he was an expert rather than a witness of fact; the same principles applied. Counsel for Royal Mail emphasised that Ofcom's and Whistl's experts had been subject to cross-examination and if Mr Harman was denied the same opportunity, the Tribunal would hear only half the story.

39. Royal Mail also emphasised the importance of Mr Harman's evidence to its case, on the assessment of materiality, on the significance of the Contract

Change Notices ("CCNs") announcement, and on the contribution of the CCNs to Whistl's decision to suspend its rollout. Taken together with his implementation of Mr Dryden's 'As Efficient Competitor' test, Mr Harman's evidence 'spanned the breadth' of the case.

40. Royal Mail considered cross-examination would be possible at a later date, based on Mr Harman's own reported expectation that he would be fit by the 'end of the summer vacation'. If Ofcom and Whistl did not wish to cross-examine him, they should accept his evidence as successfully maintained. If they did not, they were contravening the basic principle of fairness. In Royal Mail's submission, the Joint Expert Statement was no adequate substitute. Furthermore, Royal Mail would not have Mr Harman's advice in dealing with any adverse points raised against his evidence in closing or in the remaining stages of the case.

41. Counsel for Royal Mail also submitted that the envisaged delay was relatively short given the time that had elapsed since the start of Ofcom's investigation.

(2) Ofcom

42. Ofcom opposed the application to adjourn and wished to proceed by relying on Mr Harman's extensive written evidence, which it reserved the right to contest in its written and oral closings. Ofcom placed emphasis on the Tribunal's rules and practice and on the danger of a lengthy adjournment to a fair trial and said that it would incur cost and delay. It stressed the open-ended nature of the situation and the absence of, and impossibility of obtaining, any reliable indication of Mr Harman's future availability. Ofcom said that proceeding now was both feasible and fair within the Tribunal's own context of fairness.

43. Ofcom disagreed with the absolute nature of the unfairness rule as propounded by Royal Mail, arguing that there was a general tendency in civil litigation against adjournments on grounds of witness unavailability. On the question of fairness, in the case of an expert the issue was not so much the credibility of the witness, which was the subject of the rule in *Browne v Dunn*, but the correctness or otherwise of the opinions expressed. Expert opinions were accepted as

matters on which other experts might disagree and no untruthfulness or impropriety need be imputed.

44. Ofcom said that, in this case, the process of providing Mr Harman's written expert reports had already given him the opportunity to answer criticisms made by other experts and the Joint Expert Statement set out in great detail and explored the points of agreement and disagreement. Mr Harman's most recent report had been "the last word" from the experts. The Tribunal was sufficiently informed on this also. Moreover, the Tribunal's ability to write a judgment would be threatened by a lengthy adjournment. The evidence of other witnesses was still 'live' and this would be lost over time. Ofcom also pointed to the resulting cost, effect on other cases, and possible further harm to Mr Harman from the pressure of having to make himself available to give evidence in the future.

(3) Whistl

45. Whistl generally endorsed Ofcom's arguments. It said Royal Mail had overstated the generality of the unfairness rule on which it relied, which was in essence a rule against 'ambushes' either of witnesses or evidence, which was far removed from the situation in the present case. Whistl pointed to the lack of specificity of Royal Mail's application, either in terms of duration of the adjournment sought or its justification, and the impracticability, because of other commitments, of the parties resuming the trial until well into the autumn and possibly into 2020.

46. Whistl said the overall threat to the integrity of the trial process outweighed any disadvantage to Royal Mail which was in any case minimal and counter-intuitive, in that it was Whistl and Ofcom who were foregoing their right to question Mr Harman.

47. The ambit of disagreement between the experts had been worked out by the process of successive written reports and pleadings, given in responsive sequence, culminating in the Joint Expert Statement and the scope of Mr Harman's evidence was more limited than Royal Mail claimed. Whistl argued

that the Tribunal would be fully able to assess the relevance and validity of Mr Harman's evidence without any need for an adjournment.

E. THE CASE MANAGEMENT CONFERENCE OF 8 JULY 2019

48. The case management conference, convened at short notice by the Tribunal as part of its active case management duty, offered an opportunity for the parties to reconsider their positions in the light of the arguments submitted.

49. As to practicalities, Royal Mail provided a witness statement from Mr Parr of Ashurst LLP on Mr Harman's condition but the information it gave was not in substance any more than had already been seen from correspondence. Contact with Mr Harman had been by email only, there was no medical evidence as to his condition, and the suggested date when Mr Harman might be again able to give oral evidence derived from his own opinion and expectation. Counsel for Royal Mail confirmed, in response to a question about possible medical advice, that:

> "Whether or not they can help, I would nevertheless concur that I think it is unlikely, given what Mr Harman has communicated to Mr Parr, that at this stage we would have certainty in relation to these matters. I think by the nature of the condition I think (sic) that is almost impossible." (Transcript page 22, lines 8-13).

50. Counsel for Royal Mail offered to obtain further evidence if the Tribunal required it, but with no guarantee of any greater certainty. It was also established in the course of the case management conference that none of Mr Harman's colleagues who had assisted in preparing his written expert reports could be offered in substitution for him and that the question of substituting another expert for Mr Harman had not so far been considered.

51. As to a possible adjourned date, it appeared that a period of 8-10 days would be needed, and other commitments made this unlikely before at the very earliest November and more likely December or January. The idea of a resumption in 'late September' appeared to have no substance to it. As Counsel for Whistl, stated:

> "… Mr. Beard I think is unavailable until the second week in September. I and Mr. Bates have a hearing in Luxembourg in the European Court on 13 September. We are talking about the last two weeks and those are two weeks before a very large trial that all three of us are involved in, which begins on 2nd October and goes through to the end of the month. Effectively, it is not therefore practicable to envisage that this case can come on before then. Then we have difficulties in November, Mr. Holmes in particular, and I myself have a floating two week commitment in the High Court. So we are essentially looking at December at the earliest for resumption of this hearing." (Transcript, page 86, lines 2-15).

52. The Tribunal was concerned to know what Ofcom (and Whistl) meant by their wish to 'contest' Mr Harman's evidence in their closing submissions. The following exchange took place between the Chairman and Counsel for Ofcom:

> "THE CHAIRMAN: Can I take you back to paragraph 46(c)(ii) of your submissions this morning which was the significance of the 80-page joint expert statement.
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> MR HOLMES: Yes.
>
> THE CHAIRMAN: Top of page 13. I think you are saying there that it explores the points on which the experts agree and disagree, that's very clear, and it is a valuable source for the Tribunal. Are we to take it, would we be (right) to take it as giving us an indication of what points of disagreement might arise -- might have arisen -- in the cross-examination which now cannot take place within the agreed timetable, is that -- would that be a fair assumption?
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> MR HOLMES: Yes, sir we say this is a weighty consideration. The parties have taken -- the parties' experts have taken very seriously the approach that is required to engage with one another and they not only set out, as is sometimes the correct approach, in summary or telegraphic form the points on which they agree and disagree, they have given quite extensive commentary on one another's positions and that is a guide for the Tribunal to points of difference between them.
>
> THE CHAIRMAN: Can we take it that there won't be some – if we were to reject this application for an adjournment -- are we to take it that there would not be a sudden ambush new point which Mr. Beard would only learn about during the closings stage?
>
> MR HOLMES: The soil in this case, sir, has been very well tilled in written submission and I find it unthinkable that the defendant would be placed -- the appellant I should say -- in the position where they were taken by surprise by any of the submissions in relation to Mr. Harman's evidence that will be made in closings." (Transcript, pages 69-70, lines 15-25 and 1-22).

53. Counsel for Whistl similarly confirmed that any areas of further argument would derive from the sequence of expert evidence already provided and the matters set out in the Joint Expert Statement:

> "…My point at the moment is that these are matters of opinion where the ground has been traversed very fully ahead of the hearing with input from Mr. Harman on them and on which this Tribunal, when it gives judgment, is entitled to disagree robustly with Mr. Harman's opinion and agree with the other experts." (Transcript, page 81, lines 11-17).

F. THE TRIBUNAL'S ASSESSMENT

54. It is important not to exaggerate the extent of the difference between the parties on this issue. All accept the need for and desirability of proceeding as soon as possible to a sensible conclusion and avoiding unnecessary delay and expense. The difference is confined to the question of whether an adjournment is needed to allow for the possibility, if not the likelihood, that Mr Harman will again be able to give oral evidence. Equally, all sides accept that the over-riding requirement is for there to be a fair trial. But they disagree as to how this can best be achieved in what they agree is a "seriously sub-optimal" situation.

55. We have approached the issue from that fundamental viewpoint – how best to ensure that there can be a fair trial given that an important expert is suddenly unable to appear in the witness box. We have very much in mind the basic right of a party appealing against a serious finding of infringement to defend itself but also the rights of all parties to have their voices heard. Above all, we have to ensure that the trial process as a whole, and in particular the main hearing in the case, is conducted in a coherent, efficient and effective manner. Only in this way can the mass of complex evidence and argument be properly marshalled to enable a sensible judgment on the substance of the case to be made, in the interests of all. That is in the nature of the task of a specialist tribunal such as ours and it cannot lightly be set aside.

56. Against that background we have considered the following sets of issues.

(1) *First,* what is the nature of the difficulty arising from Mr Harman's indisposition; does that difficulty cause unfairness to Royal Mail or any other party, and if so how serious is it; and are there practical steps that can be taken to minimise that difficulty?

(2) *Alternatively,* if we were to consider an adjournment, what reliable basis is there for fixing its duration or for thinking that Mr Harman's indisposition will be rectified in a realistic time*;* what would be the consequences of an adjournment in terms of conducting a fair and effective trial process?

(3) *Finally,* what does the overall assessment of fairness lead us to conclude?

(1) The nature of the difficulty, its seriousness and what can be done about it

57. The immediate problem is that, unlike all other individuals giving evidence in this case (apart from Mr Simpson, whom Royal Mail did not call to give oral evidence, and to which no party objected), Mr Harman would be the only person, and clearly the only expert, whose written evidence would not be subject to oral verification. This would appear to cause difficulty for Ofcom and Whistl, who were denied the chance to cross-examine, but given that they gave up their opportunity to do this, the disadvantage passes to Royal Mail who would be denied the opportunity to have their expert cross-examined and for him to explain or rebut any point put to him against his evidence. This in turn brings into play the 'rights of defence', in this case the right of a party appealing against a finding of serious infringement of competition law properly to defend itself. It also raises the question of the parties to the case being on an equal footing, as provided by the Tribunal Rules, although it could be argued that both sides suffer a disadvantage from this situation, Ofcom and Whistl being unable to cross-examine, Royal Mail being unable to respond.

58. We established earlier that if Ofcom and Whistl agreed for Mr Harman's evidence to stand uncontested, Royal Mail would not have a grievance. The problem lies in their wish to contest or argue against that evidence, based on their own experts' views. The question then arises whether this is a reasonable wish, or whether it is, in Royal Mail's words, 'fundamentally unfair'. The answer to us lies in the nature of the evidence at issue and what is involved in Ofcom and Whistl not 'accepting' that evidence.

59. As to the nature of the evidence, Mr Harman is put forward as an economic and accountancy expert. His written evidence is very much of that nature and goes to some of the economic and financial issues in the case. Where he asserts facts, this is not the purpose of his evidence and it is not clear that the Tribunal would or should accept his evidence as to the truth or otherwise of any asserted facts. He is there to give an expert opinion on what conclusions may be drawn as to the significance of the facts and other data that the Tribunal may wish to consider in its judgment.

60. With such opinion evidence, it is perfectly possible to disagree, either as to its correctness in terms of its technical quality, or as to its relevance to the case, without any imputation of dishonesty or falsehood. Such disagreements are common, indeed almost inevitable in competition law disputes. The most that could be impugned is professional competence, qualifications and judgement.

61. The inherent tendency for such disagreement is one reason why the Tribunal operates case management procedures to attempt to separate areas of genuine disagreement from the common ground of economic and financial principle on which some measure of agreement might be expected. Progress can normally be made by the practice of one side's expert responding to the written evidence of the other. The so called 'hot tub' process is another example; the joint written statement by experts yet another. Although Mr Harman was not asked to participate in a 'hot tub', he did provide sequenced written expert reports and also contributed to a joint expert meeting which resulted in a long and detailed Joint Expert Statement.

62. Having carefully considered both sides' claims in this respect, we have come to the view that the disadvantage claimed by Royal Mail, whilst not to be dismissed entirely, should equally not be exaggerated.

63. Mr Harman's written evidence is plain to see and substantial; not only has he answered the several points made against him by other experts but the remaining (substantial) areas of disagreement have been crystallised in the Joint Expert Statement. It is hard to see that any new point of attack could be raised at this stage on the basis of the material covered by the case.

64. As a further reassurance, Counsel for Ofcom and Whistl have each confirmed to the Tribunal that the scope of any cross-examination that they would have undertaken, and that they have given up, would have been derived exclusively from the material already raised in the case, primarily in the expert reports. There would be no suggestion of falsehood, dishonesty or bad faith and the factual truth or otherwise of his evidence would not arise. As Counsel for Ofcom put it: "The soil in this case…has been very well tilled". We take these statements at their face value and will be vigilant in the closing stages of the trial to ensure that they are adhered to.

65. In the light of these considerations we do not consider that Royal Mail's claim that it is subject to basic unfairness, whether under the 'rule' in *Browne v Dunn* or on some other basis, from Mr Harman's absence and Ofcom's and Whistl's reactions to it, has any real substance. It is certainly a less desirable position than if Mr Harman were fit and well, but in the particular circumstances of this case, even with Ofcom and Whistl not 'accepting' his evidence, his absence does not disadvantage Royal Mail to any significant degree.

66. We emphasise that this conclusion is not dependent on any assessment of the substance of Mr Harman's evidence, its significance for the case, or its relevance to any issue. We are concerned solely with the issue of fairness.

(2) Adjournment and associated issues

67. Whilst our conclusion above on the absence of significant harm in one sense disposes of the matter, we nonetheless have given very careful consideration to what would be involved with ordering an adjournment of the hearing.

68. Our first difficulty is in the lack of any reliable basis for assessing what is involved in terms of time and availability. We do not have any medical evidence as to Mr Harman's condition. We only have his hope and expectation, as passed to us by Royal Mail's legal representatives, that he will be well enough to give evidence after the Summer vacation. We have every sympathy for the situation in which Mr Harman finds himself and above all have no wish to add to his difficulties. That points strongly against setting any fixed deadline for

resumption, even if such were possible for Counsel and the Tribunal itself and would point instead to a more indefinite adjournment.

69. Against that must be set the need to preserve the integrity of the trial process and the inherent undesirability of the main hearing being interrupted without any certainty as to when it could be resumed. That is not only a matter of efficiency, cost and 'tidiness', important as these matters are for the conduct of competition cases, and on which the Tribunal Rules place considerable emphasis. They also have a direct bearing on the efficacy, and thus indirectly on the fairness, of the Tribunal's deliberations and on its ability to make a comprehensive and just assessment of the case. As may be seen from the factual background (Part B above), the Tribunal has already done its utmost to accommodate the unfolding situation within the time allotted to the main hearing in this case.

70. We were told that in practice November, and more likely December or even January 2020, would be the first time when all Counsel could be available for the requisite 8-10 day period. We find such a prospect unattractive. It is not simply, as was discussed before us, of whether interest in the issues that are no longer 'live' can somehow be rekindled by means of closing submissions and, presumably, Mr Harman's oral evidence. It is instead a question of all the evidence being broadly accessible to the Tribunal to the same degree within a reasonable time frame to enable it to give a fair consideration to the totality of the case.

71. We are also not persuaded by Royal Mail's claim that such a delay would be relatively insignificant given the length of time that had elapsed since Ofcom began its investigation. What matters is the effect of any delay on the trial process now.

72. We therefore see the difficulties associated with adjournment as substantial and constituting a real risk to the Tribunal's ability to operate a fair and effective process and deliver a fair judgment.

(3) The balance of fairness

73. That leads to the final consideration, consistent with our overall approach, which is to consider where the balance of fairness lies and how it should be assessed. In substance, all the different considerations in relation to the application to adjourn the case can be seen as aspects of fairness. In other words, we do not see the case as a balance between the interests of efficiency, cost and speed of process on the one hand and a fair trial on the other. On that basis the dictum in *Chen* which we noted earlier is not applicable here. We would instead see the issue as being whether any possible unfairness arising from one of Royal Mail's experts being unable to respond to cross-examination was or was not outweighed by any possible unfairness that would follow for all parties from impairment to the quality of the trial process and to the Tribunal's ability properly to judge the appeal, because the main hearing had been suspended for a prolonged and indefinite period.

74. Consequently, if we had concluded that there was real substance in Royal Mail's claims of unfairness and inequality of treatment, we would have weighed it against any possible more general unfairness arising from the suspension of the process. Had we done so, we would have found that the risk to the overall fairness of the process outweighed the risk of possible unfairness to Royal Mail. As it is, we have in this particular instance concluded that the risk of harm to Royal Mail is not sufficiently significant to give rise to the need to weigh different elements of possible unfairness in the balance.

G. CONCLUSION

75. For these reasons, Royal Mail's application to adjourn is rejected, and the hearing should proceed to closing submissions as planned. This ruling represents our unanimous view.

Peter Freeman CBE QC (Hon) Tim Frazer Prof. David Ulph CBE
Chairman

Charles Dhanowa OBE QC (Hon) Date: 11 July 2019
Registrar