IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 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

- and -

OFFICE OF COMMUNICATIONS — Respondent

- and -

WHISTL — Intervener

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HEARING – DAY 15

A P P E A R AN C E S

Mr Daniel Beard QC, Ms Ligia Osepciu 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) 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.

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Monday, 8th July 2019

(2.00 pm)

THE CHAIRMAN: Mr. Beard.

MR BEARD: Mr. Chairman.

THE CHAIRMAN: Would it be helpful if I told you how we intend to run this case management conference?

MR BEARD: Of course.

THE CHAIRMAN: I think we would like to hear counsel for all parties first to add anything to the written submissions received this morning, for which many thanks, then we may have questions and then we will adjourn to deliberate.

MR BEARD: I'm most grateful.

Can I just confirm that the Tribunal should have a bundle for today and in it you have, in addition to the written statements, a witness statement from Mr. Parr at tab 2 that I hope you have seen. I am grateful.

I will try to deal with matters briefly in the circumstances given you have seen the written submissions of the various parties.

THE CHAIRMAN: Obviously we want to come to a view as soon as possible.

Submissions by MR. BEARD

MR BEARD: Yes of course. Obviously if I am going through

too rapidly then perhaps please indicate, but in the light of the fact that the Tribunal has seen all of the written submissions and the exchange of correspondence, I think first of all it is right to emphasise that it is obviously common ground that this Tribunal has broad case management powers and indeed its ability to arrange proceedings in a range of ways is also wide, but the issue that arises in relation to the current proceedings now is whether or not it is fair to move to closings in circumstances where it is clear that Ofcom and Whistl want to challenge the soundness of Mr. Harman's evidence without those matters being put to him orally and in circumstances where the Tribunal has heard from the other expert witnesses dealing with those matters but not Mr. Harman.

We say it is not fair to proceed in those circumstances where the best information available to us is that Mr. Harman is likely to be available to give evidence after the vacation.

Now, it is obviously --

THE CHAIRMAN: We will come back to that, but it is a matter of interest as to what is the best evidence of availability.

MR BEARD: The best evidence of availability?

THE CHAIRMAN: I mean we have read Mr. Parr's statement,

thank you very much for that, but what it boils down to is a statement of opinion by Mr. Harman himself.

MR BEARD: Yes it does. At the moment that is right on the basis that he doesn't have any guaranteed prognosis. He has obviously been signed off work at present and if the concern of the Tribunal was that in fact it wanted to have medical certification as to his condition or evidence from a practitioner in relation to his condition, then obviously we can obtain that material. We have sought not to involve Mr. Harman in these sorts of discussions as far as possible to date in order to avoid involving him in any matters pertaining to the proceedings.

THE CHAIRMAN: We have taken exactly the same view but the fact remains that we have, at some stage, to have some objective basis for coming to a decision.

MR BEARD: Yes, I completely understand and in those circumstances as I say we can go away and ask Mr. Harman, or more exactly those treating him, to provide us with evidence and indeed the Tribunal with evidence as to the likelihood of him being able to provide evidence in September.

I think given the information we have received from Mr. Harman, the likelihood is that we are not going to get a definitive view that he is definitely going to be

available in September and that what Mr. Harman is reporting to us is simply what he is being told by his own doctors.

THE CHAIRMAN: Let's park that issue for now.

MR BEARD: Certainly if that is of concern to the Tribunal we can go away and secure that.

THE CHAIRMAN: Well, it is clearly one of the many factors we have to take into account.

MR BEARD: Of course. As I say, if that is a matter of concern we will go back to Mr. Harman and ask for the details of his doctors and ask for evidence to be provided on that basis, but that is not a step we have taken given the limitation we have tried to impose on interacting with him to date in relation to these proceedings.

To go back to where I was, simply to say that where we say the best information available is that Mr. Harman is likely to be available after the summer and in circumstances where it has been clear throughout, and at least since the pre-trial review, that important evidence provided by experts was contentious and should be the subject of cross-examination -- indeed, the timetable was set to enable that cross-examination -- then we say the fair course is to put in place an adjournment. An adjournment that we all agree is not

the preferred position in any proceedings, we recognise that, but nonetheless is the best way of ensuring the fairness of these proceedings.

Now, in their submissions Ofcom and Whistl now suggest that the normal approach to cross-examination of expert witnesses is not one where there is a general requirement to put your case that where you are challenging a witness' evidence, an expert witness' evidence, you don't need to put the points that you are challenging on the basis of to him or her.

Now, we say that's not right. We say, with respect, that it is clear that the normal manner in which expert cross-examination works is as with fact witnesses, that where matters being dealt with by the experts are of contention, where there is an argument that they are wrong or irrelevant, not to be accepted for various reasons by the Tribunal, then the normal course will be that those points are put in cross-examination to the witness.

Now, of course there may be cases where this Tribunal, or indeed other courts, decide it is not necessary to have any cross-examination. This is not one of those cases. It has clearly been recognised in relation to the matters with which Mr. Harman deals that such an approach wouldn't be appropriate, and with

respect to Ofcom and Whistl, it is clear that if, for example, Royal Mail had not put its case to the witnesses, Mr. Parker and Mr. Matthew in relation to the matters concerning the evidence covered by Mr. Harman, so issues for instance in relation to the relevance of the materiality threshold, how that materiality threshold is to be applied, what sort of objective test is relevant, no doubt, in closing both Mr. Holmes and Mr. Turner would be saying, "Well, you can't impugn the evidence of Mr. Parker or Mr. Matthew in circumstances where you had the opportunity to put those matters to them in cross-examination and you didn't do so."

Indeed, the suggestion that this is somehow anything other than the normal manner in which expert cross-examination is dealt with is surprising in that those sorts of arguments are the meat and drink of many closing submissions in many sorts of trials and the reason is that it is recognised that as an incident of fairness where you are contending that a witness' evidence is wrong, flawed or irrelevant, you do put that matter to him where they are proffered for oral cross-examination.

The position is no different between an expert and a witness of fact. The fact that experts are dealing with matters of opinion, albeit that they can also give

evidence on fact, doesn't render the position different. We have --

THE CHAIRMAN: Is that right, I wonder? I mean, experts have a special status in the Tribunal. They owe obligations to us.

MR BEARD: Absolutely.

THE CHAIRMAN: They are here to -- it may not always appear quite like that, but they are here to help us and we have to decide what weight we attach to what they say.

MR BEARD: Absolutely.

THE CHAIRMAN: We start from the assumption that on these difficult issues there will be a whole range of expert opinions and they may all be right but it doesn't actually enable us to solve the case.

MR BEARD: Yes. That may well be the position in relation to expert evidence, and of course experts do owe duties to the court or Tribunal in this case. That, in circumstances where the evidence is then being challenged by another party, makes it all the more important that that process of challenge and response is undertaken where it has been decided that cross-examination of experts on particular issues is appropriate, and that of course affords the Tribunal the opportunity to hear those experts and hear their accounts in relation to questions, both from parties and

indeed from the Tribunal, in order to form their views about that expert evidence.

So the fact that the experts have these duties to the court we say makes it all the more important that where challenges are being brought by parties to that evidence they should properly be put in the course of cross-examination and the experts should be able to give their account which may assist the Tribunal in relation to these matters.

But what we don't see in any of these processes and we don't see in other trials is the suggestion that you can have an expert witness proffered for cross-examination, you need ask no questions of them, you can merely make submissions as to the relevance et cetera of that evidence and it makes no difference whether or not you put those points to the witness in the course of your opportunity to cross-examine. We say that just isn't the reality of the way that expert testimony is dealt with and, of course, it is precisely why we had three days earmarked for cross-examination of these experts in relation to the matters that are covered by Mr. Harman.

The Tribunal, Mr. Chairman, has raised the particular position of experts giving evidence with duties to the court. Ofcom in their submissions also

refer to the CPR and try and cast a distinction between witnesses of fact and witnesses giving expert evidence. With respect, those different provisions don't assist Ofcom. Of course experts are giving primarily opinion evidence. It is quite right that under the CPR it is necessary to seek to cross-examine witnesses, expert witnesses under CPR35, but, in those circumstances, once cross-examination is being undertaken, the basis on which it should be proceeding is not somehow modified unless there have been specific directions given in that regard. There can be directions given.

If, for instance, you have multiple experts giving identical evidence you can have a court saying well you don't have to cross-examine each of them in relation to the same matters. There may be time limits imposed on cross-examination, which may mean that counsel, at the end of the process of cross-examination, will indicate that they haven't had opportunity to put all the points that they would have wanted to challenge and they reserve their position in closing on those matters. But if cross-examination is going to be permitted and required of experts, then, in those circumstances, the approach that we have articulated is the appropriate one.

The fact that in relation to witnesses of fact under

CPR32.2 there is a specific statement that witnesses of fact give evidence orally is also beside the point. That is a statement that harks back to a position long ago where it was considered that witnesses of fact would always give their evidence orally and it is notable that those provisions are, of course, conditioned by the following provisions of the CPR32, which in particular say witness statements of witnesses of fact stand as their evidence in chief and in those circumstances they don't have to recount all of their primary evidence, their evidence-in-chief orally in order for that to stand.

Therefore, the fact that you have differences between the precise wording of the CPR, between witnesses of fact and experts, simply doesn't solve the issue or shed light on the question of whether or not it is fair to allow an expert witness' evidence to be impugned without those points being put to them in circumstances where cross-examination has not only been accommodated within the timetable of proceedings, but of course, in this case, two of the witnesses dealing with these matters have been the subject of cross-examination in accordance with the normal approach.

THE CHAIRMAN: I'm just trying to understand your position Mr. Beard. Is it that it is not fair because witnesses

for the other side, expert witnesses -- and indeed for your own side -- have been subject to cross-examination, that it is then not fair not to put the remaining witness to cross-examination or is it something that is intrinsic only to this particular witness?

MR BEARD: It is not intrinsic only to this particular witness. We say that where cross-examination is provided for in the course of a trial such as this, which will be the normal course, in those circumstances it is incumbent on those parties who are challenging that evidence to put those points to the witnesses in cross-examination.

In this case, given we understand that Ofcom and Mr. Turner wish to impugn the evidence of Mr. Harman because it is irrelevant or wrong, or for whatever reason, then in those circumstances it is necessary and proper that he is afforded the opportunity to answer those challenges orally and they are required to put those challenges to him.

The position is exacerbated in this case in circumstances where this Tribunal has heard from two of the experts dealing with these matters in circumstances where, applying the normal rules of cross-examination, Royal Mail was putting its case as to the objections it had to their evidence to them and this Tribunal has had

the benefit of hearing from and appraising those experts. In those circumstances it is a particular concern here as to the fairness --

THE CHAIRMAN: So the answer to my question is it is not either/or, it is both?

MR BEARD: It is both.

THE CHAIRMAN: Just going back to your previous point about whether there is a possible difference of consideration between a witness of fact and an expert witness. What do you say to the point that it is very difficult to impugn, to use your word, the evidence of a factual witness without there being some implication of lies, the truth not being told? Whereas, in the case of an expert witness, there is no necessary implication that the witness is not telling the truth because the truth comes in many forms when we are talking about economic expert opinions. Is that not a distinction?

MR BEARD: I think for the purposes of how cross-examination has to be conducted, no, it isn't a relevant distinction. Obviously the origin of the rule in Brown v Dunne was focused on those particular acute concerns in relation to witnesses of fact being challenged as to their honesty.

THE CHAIRMAN: Did a particular event happen? Did Mr. A do something to Mrs B? That sort of thing.

MR BEARD: Yes, but of course even in relation to witnesses of fact one doesn't move from a situation where a court decides that it doesn't accept particular testimony of a witness of fact and automatically treat them as dishonest or telling untruths. So, of course, in relation to the scrutiny of factual witnesses, as of course one can see in relation to the factual evidence we heard in the course of this hearing, one wouldn't need to reach a conclusion that either Mr. Polglass or Mr. Wells, for example, was actually telling untruths in order to decide that the factual evidence they were providing wasn't necessarily evidence that the Tribunal found persuasive or instructive in the way that they suggest.

THE CHAIRMAN: That is a question of weight. That then becomes a question of the weight the Tribunal attaches.

MR BEARD: Of course, that may well be right. Sir, as I understood the question you were asking whether or not there is a significant distinction to be drawn here which means that the propositions being put forward by Royal Mail in relation to the treatment of experts means that the rules and approach that have been applied to factual witnesses shouldn't be read across in relation to the position of experts and the point I am making is --

THE CHAIRMAN: I was not actually asking that. I was asking whether there was anything in the distinction between factual evidence bearing on the truth of what happened or may have happened and expert evidence, being a matter of opinion about economic matters in this case?

MR BEARD: Of course I recognise that there are differences in relation to matters of fact and in relation to matters of opinion and one can disagree with matters of opinion without necessarily considering the opinions given to be unreasonable or dishonest. But as I say in a similar way one cannot accept particular evidence of fact, or the significance of evidence of fact being put forward without necessarily saying that someone is a liar or somehow had perjured themselves in giving any testimony.

Therefore it isn't a situation where there are bright lines. To go back to what matters in relation to the context of these applications, the question is: even if there are distinctions between the evidence given by witnesses of fact and the evidence given by the experts, which in generic terms we recognise, does that mean that the approach to what is required by way of fairness in cross-examination is saliently different for the purpose of this assessment?

We say not because we say even when you are talking

about questions of opinion, even when you are not suggesting that the expert was dishonest in the way that they presented matters, if you are saying their evidence is misguided or irrelevant or involves some sort of miscalculation, then those are matters that you need to put to that witness and that is the key proposition that we rest on. We recognise the types of evidence are necessarily going to be different. That's why we have the categorisation.

All I was really doing by referring to the CPR is recognising that you do have differences in terms of the Civil Procedure Rules structure in relation to the dealing with witnesses of fact and expert witnesses, but those differences do not suggest that the proposition that I am expounding, that in relation to the cross-examination of experts you still need to challenge matters where you don't accept their evidence and that evidence is key to the case or may be key to the case; none of those differences in the CPR are material.

One sees this, it is worth turning it up if you have the case management conference bundle, the very simple and generalised proposition that is set out in Phipson at tab 21. It is under the heading, "Cross-examination". There you see at 12.12:

"The requirement to challenge evidence.

"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. The rule applies in civil cases as it does in criminal. In general the CPR doesn't alter that position.

"This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

Then it goes on, it recognises how:

"The rule is not an inflexible one, for example if there is a time limit imposed by the judge on cross-examination it may not be practicable to cross-examine on every minor point, particularly where a lengthy witness statement has been served and treated as evidence-in-chief. Thus in practice there is bound to be at least some relaxation of the rule. Failure to put a relevant matter to a witness may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him."

What I would emphasise here is that the approach being discussed by Phipson is that you don't have to be

challenging on the basis of dishonesty, it can simply be the --

THE CHAIRMAN: Have you finished referring to Phipson?

MR BEARD: I have.

THE CHAIRMAN: Were you going to read 12.13 as well?

MR BEARD: Sorry I'm happy to go on:

"CPR provides the courts with an express power to limit cross-examination. A judge may restrict cross-examination where he considers it unduly oppressive or improper. A judge may not allow cross-examination on matters about which the witness could not fairly be expected to have knowledge. A judge may also seek to limit cross-examination if a witness becomes too ill or distressed. However, undue restriction on a party's ability to cross-examine may lead to a re-trial, for example, Hayes v Transco."

So there are a range of potential circumstances in which limitation on cross-examination may be imposed, and yes of course it may well be that if a witness, in the course of cross-examination, is unable to continue, it may be decided that cross-examination cannot occur in relation to that witness. We recognise these possibilities may exist. The question is in the context of this case is the appropriate course to recognise the important function, as Phipson describes it, of the

witness having the opportunity of explaining any contradiction or alleged problem?

We say that is an important function and one that applies in relation to experts who are being cross-examined, as well as witnesses of fact. In circumstances where there would be an undesirable but nonetheless, in the context of all of these proceedings, relatively brief adjournment until after the summer, given that we are talking about events going back to 2014 and earlier, that, in those circumstances considerations of cost, efficiency, those sort of general considerations of proportionality cannot, we say, overcome the fundamental requirements of fairness to allow this process to continue.

THE CHAIRMAN: They are part of the fairness calculation, are they not, because we have to give a judgment and run a process which is fair to everybody, not only to one party.

MR BEARD: Of course, yes. Although there is also the concern that issues as to efficiency, the idea that issues as to efficiency can ever trump considerations --

THE CHAIRMAN: I'm not talking about efficiency, I'm talking about the actual ability, within the context of the trial process, to come to a fair judgment if there is a large interruption in the middle.

MR BEARD: Yes, of course and we recognise -- we are not deprecating the possibility -- the fact that this is far from ideal if there is an adjournment. We are not recognising that. [sic].

THE CHAIRMAN: We can agree on that, I think. Common ground, yes?

MR BEARD: Yes. All things being equal, we don't -- we would not want to have any adjournment. We would want to press on. We would want the closing submissions to go ahead. But all things are not equal here.

Now, if we knew that Mr. Harman was simply not ever going to be able to be available for evidence because of his condition, or we were talking about years, then I think the situation might potentially be different. We recognise that. But that is not the situation with which we are dealing here, and it is in those circumstances --

THE CHAIRMAN: We actually don't know anything very much reliable.

MR BEARD: The best we have at the moment, and as I say that is subject -- if the Tribunal wishes us to go and get more formal medical information. The best evidence we have available and the best information is that which we have from Mr. Harman, yes. But in the light of our attempts to essentially leave Mr. Harman alone during

the course of the hearing we haven't been seeking to get him to provide --

THE CHAIRMAN: No, but we were in a situation, say ten days ago, where we were relying on consultations and the results of those consultations. That seems to have receded into the background. There was talk of a consultation on 17th July. I don't see any reference to that in --

MR BEARD: No, that is still the case.

THE CHAIRMAN: -- Mr. Parr's statement.

MR BEARD: That is still the case that Mr. Harman will be having a consultation on 17th July. That hasn't changed. There is no difference there. But the best information we have from Mr. Harman --

THE CHAIRMAN: You do see our difficulty?

MR BEARD: I understand the difficulty and if the Tribunal, as I say, wishes to have further medical information or evidence in relation to the medical prognosis, as I say, we are more than happy to go and approach Mr. Harman and ask him to approach his doctors to provide that material.

But as I say, given the situation --

THE CHAIRMAN: That might put strain on him and might contribute to further elongation of the process.

MR BEARD: It may well put strain on him and we have sought

to avoid putting any strain on him by waiting until he has contacted us knowing that he had various medical appointments and yesterday we did take the specific step of contacting him to confirm what he understood the position to be in relation to his likely availability, which is how Mr. Parr is in a position to give the statement he has done this morning.

THE CHAIRMAN: I am not sure I would attach much weight to my own prognosis of my own condition to be --

MR BEARD: He is not working on the basis that he is a medical practitioner. I grant that it is only hearsay from Mr. Harman in relation to what he has been told by those treating him, and of course by Mr. Parr providing that evidence we recognise it is also second-hand hearsay, but nonetheless in the circumstances that is clearly the position.

THE CHAIRMAN: Isn't the patient the best judge of the patient's condition?

MR BEARD: Sir, if the concern that the evidence provided is insufficient but that if it were to be the case that the likelihood of Mr. Harman being able to give evidence in September or October meant that this Tribunal considered the fair course was to adjourn until then, then obviously the appropriate course would be for us to go away and seek to obtain formal confirmation such as

would satisfy the Tribunal.

THE CHAIRMAN: I'm not saying that, what I'm saying is that we are, at the moment, being asked to consider an adjournment on the basis of, as you say, double hearsay and in a situation where it may not be actually possible for anybody, however professionally qualified, to help us.

MR BEARD: Whether or not they can help, I would nonetheless 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 that is almost impossible.

THE CHAIRMAN: We have got there before you on that, I think.

MR BEARD: As with so many things, yes.

THE CHAIRMAN: No, just on this one.

MR BEARD: Obviously were we to go away and get further confirmation of the position, I think the highest it will ever be is a likelihood in these circumstances, given that Mr. Harman is currently having treatment and this is a question of the expectation as to his response to that treatment. If that were to be material to the Tribunal's position, then obviously we can seek further evidence in relation to those matters.

What I do want to emphasise however is that that is the best information we have at the moment. In those circumstances we say that the position is one where an adjournment until after the vacation is the fair course and the other materials that are being put forward to seek to qualify the approach to the consideration of cross-examination of experts is simply not instructive.

I have touched on the CPR. Ofcom suggests that the Brown v Dunne principle is somehow now limited to truth and credibility. That is simply not correct for the reasons that I have articulated. It was initially articulated well over 100 years ago in those terms in that case but it is not now limited to those circumstances and it is a more general proposition consistent with the rule in Brown v Dunne that says that experts need to be challenged in relation to evidence which is being -- I put it in the general terms of impugned but as I say, said to be irrelevant, wrong, unnecessary or otherwise not of assistance to the Tribunal.

Whistl seek to place emphasis on a case called Sait. There the specific consideration was much more in the context of a circumstance like Brown v Dunne. We do not accept that the Brown v Dunne principle or the

principles derived from Brown v Dunne are, as Whistl put it, anti-ambush principles. They go much broader than that, and indeed it is somewhat ironic that the Sait case is one in which the court rather emphasises the value and importance to the court in that case of cross-examination. Indeed it goes back to citing Blackstone v Hale on how cross-examination is testing the evidence most effectively. It refers to testing the evidence in the crucible of cross-examination and sifting out the truth. So I do not think anything in Sait is suggesting that cross-examination is not important. That was not a case dealing with --

THE CHAIRMAN: The judge does say that in his view the rule is obsolete.

MR BEARD: Yes, he does. He says that and of course it is also cited in other cases. I mean the truth is that Brown v Dunne was a blunt articulation of a principle which has been much developed since then.

Of course in its strict terms he may well be right it is obsolete because in most cases the requirement that you provide your witness evidence in writing means that the precise terms of Brown v Dunne are not normally directly applicable. But what of course is instructive is that the fact that we have those changes, both in relation to factual witnesses and of course in relation

to the growth in the use of expert evidence in a whole range of proceedings beyond that that probably occurred at the time when Brown v Dunne was heard, does not lessen the fact that in all of these proceedings that we now see, there is a requirement, an obligation on parties to challenge evidence from the other side which is put forward if they want to suggest in closing to the court, to the jury, that that material should not be accepted or should not be relied upon.

So we say the initial starting point which is articulating a broad principle of fairness, it started with Brown but, as I have taken you in Phipson, the proposition in fairness terms is much broader than that.

As I say, the suggestion from Ofcom and Whistl that cross-examination is really only needed where someone is being disbelieved but not where their evidence is not accepted or it is suggested that there is a problem with it or it is wrong, we don't accept that.

Indeed, one can see relatively swiftly how the distinction that Ofcom and Whistl are seeking to develop will collapse. In many cases the difference between, "I disbelieve what you are saying", and, "What you are saying is wrong", may well be almost interchangeable because if you reformulate it as, "I don't believe what you say is correct", that is very much akin to saying,

"What you are saying is wrong". It doesn't require any impugning of honesty or credibility in those circumstances.

THE CHAIRMAN: Well, it depends what you mean by wrong.

MR BEARD: Of course it depends on what you mean by wrong, but it may mean irrelevant in the circumstances, wrong to be relied upon. Those are the sorts of matters that may well be relevant here in the context of experts but trying to delineate what propositions are required to be put to expert witnesses by formulation as to the nature of the wrongness is something we say is not part of this doctrine.

THE CHAIRMAN: You have used the word "impugn".

MR BEARD: Yes.

THE CHAIRMAN: I think we will need to be clear what is meant by that and whether that is indeed what Ofcom and Whistl wish to do.

MR BEARD: When I say "impugn" I don't mean to suggest that they are saying that someone lied, was dishonest or indeed was a wholly incredible witness. What I'm saying there is the evidence that is put forward by, in this case, an expert is irrelevant, incorrect, maybe mathematically incorrect, or not fit for the purpose for which it is designed. It may also be that the propositions put forward, such as in this case by

Mr. Harman on the basis of his experience, that using a materiality test is untethered and unfettered and therefore uncertain, is not the correct analysis of a materiality test. All of those are ways in which his evidence might be impugned or challenged by the other side and we say those are all the sorts of propositions that need to be put to him.

If that assists, whether or not it is the term "challenge" or the term "impugn", I'm agnostic, but it is those sorts of objections to the evidence that I am referring to here.

As I say, the CPR doesn't assist. The case law distinction of Brown v Dunne is missing the point as to what Brown v Dunne was articulating, and as I think has been said in all of the correspondence from Royal Mail's solicitors it is not simply a reliance on the ruling in Brown v Dunne, it is an approach to fairness which is consistent with the rule that was put forward in Brown v Dunne, and of course, as we have set out, has been rearticulated in subsequent case law in particular the Ng v Chen case we cited in our submissions.

When we look to the other cases upon which Ofcom has sought to rely, at paragraph 31 in its submissions it seeks to rely on the MacDonald case, but of course that case is actually authority for the proposition that

where a witness cannot attend to give evidence due to ill health the court is not bound to accept that evidence word for word.

We say that's obviously correct. We don't have any issue with it. I think, as has been touched on previously, where a witness can't give evidence due to ill health but has submitted a statement, the issue will become one of weight and that's dealt with in paragraphs 13 and 14 of MacDonald.

But that is a different situation from here, where we are considering the fair process to follow in relation to a witness who is unable, at this point, to provide evidence. Because in MacDonald it was common ground that witness attendance and thus cross-examination was simply impracticable. So it is a different case and doesn't assist in those circumstances.

The case they cited at paragraph 37, the AB Sudan and UK Trucks case, that is a case dealing with questions of case management discretion in deciding whether or not to grant an adjournment. Again, we recognise that this Tribunal does have a broad discretion in relation to when it grants an adjournment and of course we recognise that the starting point for the consideration of any adjournment in relation to

a trial timetable that's set down is no we shouldn't adjourn. We recognise that.

THE CHAIRMAN: But you quarrel with the broad statement there at 37?

MR BEARD: The broad statement in Ofcom's submissions?

THE CHAIRMAN: That we have to stand back and take a view of what is sensible and proportionate in the interests of justice to all parties.

MR BEARD: We, of course, don't quibble with the fact that fairness is an multi-centred consideration, we recognise that, of course. We don't say it is only the defendant who should benefit from considerations of fairness, but it must be said that the considerations of fairness are particularly acute in relation to the position of a defendant who is facing the imposition of what I think is accepted on all sides as being a criminal sanction.

THE CHAIRMAN: Appellant.

MR BEARD: Sorry?

THE CHAIRMAN: Appellant, you are. I suppose you are the defendant also. These labels seem to hop around a bit.

MR BEARD: Yes.

THE CHAIRMAN: But would you also not agree that the requirement and the benefit of a fair overall process is as much for the appellant as it is for the respondent?

MR BEARD: Well, of course the appellant and respondent both

have an interest in there being a fair process, and of course the appellant acutely has an interest in there being a fair process. I do not think there is any demurral in relation to that proposition. The question is in particular circumstances where you are talking about an appellant or defendant being subject to a criminal sanction, in those circumstances when you are talking about what is, in the scheme of this case, a relatively short potential adjournment, is it unfair on the other parties to afford that adjournment? We say it is not -- the detriments that are identified, which I will come on to, obviously concern the difficulties for the Tribunal in preparing a judgment in relation to these matters, and we understand that. But, of course, the process that we would be contemplating is a process of re-engaging with these proceedings with the hearing of Mr. Harman's evidence and then closings being made.

So, of course, the Tribunal would be refreshed in relation to these matters by the closings process, both written and oral, in relation to these matters. Of course we also have transcripts of all that has gone on. We recognise it is less desirable than if the Tribunal can move to preparing a judgment immediately after the envisaged trial timetable or the extended trial timetable, but what we are talking about is how

significantly unfair is that to the parties in particular -- this is put by Ofcom and indeed the intervenor -- for such a pause to occur in circumstances where it is equally not desirable for the defendant in relation to these matters?

So I think that with respect those issues which affect all of the parties, and of course do affect the Tribunal in relation to the practicalities, don't tell us that there is some significant unfairness on the other side that needs to be balanced here.

We do not think that these matters undermine the overall fairness of the process, that there would necessarily be a delay in the provision of the judgment.

THE CHAIRMAN: I understand that is what you are saying, yes.

MR BEARD: So I think in relation to those contentions, we say yes, we recognise it is far from ideal, no that is not sufficient in the circumstances given the obvious unfairness in the other direction.

If I may, before I deal with the remainder of Ofcom's and Whistl's points, could I just touch on a couple of the other cases that have been put forward. I have dealt with MacDonald. I have touched on Sudan Trucks. Matthews, paragraph 42. To be clear, Ofcom there are rather putting forward a straw man. No one is

contending that the unavailability of an expert necessarily requires an adjournment. We recognise that this has to be considered through the overall assessment of fairness. We are articulating why it is that those fairness considerations mean that, in this case, it is plainly the fair course to deal with an adjournment.

In relation to paragraph 44 and Robshaw, in that case it was critical to the judge's decision that the party in question was unable to cross-examine the expert and would be as a result in an even worse position.

So what we had in Robshaw was a party unable to cross-examine an expert being actually -- I'm saying not being placed in a worse position than the party who had been able to put forward a witness for cross-examination. So, in those circumstances it was considered perfectly fair and appropriate in that balancing exercise for the process to continue.

It is notable that in relation to Robshaw what was being considered was a position in relation to a witness who would not be able to give evidence at all, and indeed the question was whether or not a new expert should be commissioned to give evidence. So, it wasn't a suggestion that somehow the expert evidence was irrelevant or the cross-examination of expert evidence could be effectively set to one side. The Robshaw case

is at tab 32 in the bundle. You may have it loose.

THE CHAIRMAN: What's your timing Mr. Beard?

MR BEARD: I think I shall be just under 10 minutes more.

THE CHAIRMAN: I think in fairness there is only a limited amount of time.

MR BEARD: Yes, understood.

THE CHAIRMAN: We need to allocate it and you are --

MR BEARD: Look, I'm very happy to move through Robshaw very quickly. The question there was where a claimant had sought to rely on a witness who wasn't going to be available but was actually placed -- the difficulty was whether or not that placed the defendant in a worse position. The judge considered it didn't place the defendant in a worse position and therefore in those circumstances, where the claimant was willing to proceed and not obtain a replacement, he was content to proceed in those circumstances.

So where the claimant wasn't concerned about the lack of his own expert, then matters proceeded. I won't take you to Duffy, which is a case which also considered the same expert but in fact resulted, in those circumstances, in an adjournment being granted.

So the position in relation to all of this was whether or not it is fair to continue in the circumstances where an adjournment could cure, we say,

the risk of unfairness or may be likely to cure that risk of unfairness and we say it is plainly fair to do so.

In paragraph 41 of the Ofcom statement of submissions it is said:

"Where an adjournment application is based on an expert witness being unavailable the general position summarised in The White Book at paragraph 35.02~..."

Which is in tab 22 in this bundle. With respect to those who prepared these submissions, the quote that is provided in the submissions is not a fair representation of the position as set out in 35.02. You will see in the submissions it says:

"Since April 1999 the Court of Appeal has made it clear that the unavailability of parties' chosen experts for the trial window or fixed trial date will only very rarely be sufficient grounds to grant an adjournment."

If one actually goes to 35.02, which is page 1141 in this tab, it says:

"Since April 1999 the Court of Appeal has made it clear that attempts to introduce expert evidence late in the timetable or the unavailability of the parties' chosen experts for the trial window or fixed trial date will only very rarely be sufficient grounds to vary case management directions or trial dates to grant

an adjournment."

What is being said there is very different. What is being said there is you are not going to be able to shift timings just because your expert is off doing something else. But none of this cuts across the basic principle of fairness.

Finishing then, running through the points that Ofcom set out in their application to the present case submissions from page 12 onwards. First they talk about the fact that this is a specialist Tribunal that has had lots of material before it. There have been numerous reports provided by Mr. Harman and a joint statement summarising the position. Yes, all of that is true but it goes back to the point I have already made that neither Ofcom nor Whistl have had to put their case to him and the Tribunal has not heard responses to their challenges.

As we have set out in our written submissions just in outline at paragraph 14 the evidence that Mr. Harman provides is core 2, part of Royal Mail's critique of Ofcom's case, and in particular its materiality analysis. It demonstrates why an assessment in materiality, as conducted by Ofcom, necessarily involves a subjective and untethered approach as well as why the particular metrics used are flawed and uninformative.

He also explains that in order accurately to assess the economic impact using his experience it would be necessary to consider the extent to which the announcement of the price differential had impacted on Whistl as well as the likelihood of implementation. He considers the business plans and of course in addition, although it is not critical perhaps in relation to the present matters, he has also of course implemented the AECT design.

It is in relation to those first three points in particular that these issues arise in relation to this case. The fact of joint statements and multiple reports does not solve that difficulty.

Now, the further comments made by Ofcom, second third, and indeed eighth, talk more about the specific evidence as to how likely it would be that Mr. Harman would be able to give evidence in the autumn. Obviously we have provided Mr. Parr's statement and I have dealt with those matters as to further evidence if the Tribunal so wants to have us make those enquiries.

Their fourth point is highlighting the diary difficulties both of the panel members and the parties. We don't in any way deprecate the logistics difficulties of adjournments, but nonetheless in these circumstances if issues of fairness are at stake we will need to seek

to find convenient dates.

The fifth point refers to questions of prejudice. I have touched on some of these issues already. We recognise of course that adjournments are not desirable. I have referred to the issue concerning the preparation of the judgment. One of the points made by Ofcom is that the Tribunal, whilst it has the benefits of transcripts, cannot replace the immediacy of having heard the relevant evidence live and the impressions of the members of the Tribunal that they would have formed of the witnesses.

I must say that in circumstances where we are talking about whether or not this witness should be able to appear before the Tribunal and provide evidence orally so that an impression can be gained, that proposition seems to me to work against Ofcom rather than in support of its position.

THE CHAIRMAN: Is there any question of somebody being substituted for Mr. Harman; perhaps one of the people who helped him compile his evidence? Have you considered that?

MR BEARD: We haven't, at this stage, considered whether any of the assistants would be in a position. Certainly my understanding of their role in the preparation of the report meant that none of them, certainly at this stage,

would be in a position to substitute for Mr. Harman, who obviously had prepared previous reports and had been very heavily involved in the preparation of the reports before this Tribunal.

I can, of course, make enquiries but I am fairly confident that the assistant team that we are talking about at FTI would not be able to do that.

THE CHAIRMAN: I rather assumed you would already have made such enquiries.

MR BEARD: I will confirm with those behind me as to whether or not enquiries have been made, but not by me.

THE CHAIRMAN: Are you saying otherwise that Mr. Harman's evidence is unique to Mr. Harman and cannot easily be replicated by another expert of similar standing if there be such?

MR BEARD: I'm not saying that is not possible. I think the question was more directed to whether or not those assisting him in the preparation of reports would be in a position to step into his shoes.

THE CHAIRMAN: So there isn't somebody readily available to step into his shoes?

MR BEARD: My understanding is not, but I will confirm with those behind me. I'm not suggesting that it would be impossible, that there couldn't be someone of the standing of Mr. Harman who could speak to the report.

But in order for that to be the case such a person would need to familiarise themselves with the material and I think that process is likely to be more involved than any adjournment we are potentially contemplating at the moment.

The sixth point is about costs. Yes, we can see that there may be incremental increases in costs but with respect at this stage in proceedings the incremental increase in costs in terms of adjourning, waiting, re-engaging for the purposes of this particular piece of cross-examination and finalising in closing, I think would be limited.

The seventh point they raise is about the congestion of the CAT's timetable. Obviously that is a matter for the Tribunal but having looked at the website it was not clear that that was necessarily likely to be a significant consideration.

The eighth consideration is obviously concern for Mr. Harman, for which we are grateful to Ofcom. Mr. Harman has emphasised repeatedly when he has been in contact that he is keen, once well, to provide evidence to the Tribunal in relation to the extensive work that he has done in the course of these proceedings. As I say, none of this is ideal but we say fairness says that in these circumstances an adjournment is the

appropriate course and that the Tribunal should exercise its discretion accordingly.

Unless I can assist the Tribunal those are the submissions of Royal Mail.

THE CHAIRMAN: Thank you Mr. Beard.

Mr. Holmes?

Submissions by MR HOLMES

MR HOLMES: Sir, you obviously have very extensive written submissions from me and I will be as brief as possible and I propose to divide my oral submissions into three broad topics. The first is briefly to draw the Tribunal's attention to the case management powers which it possesses in this regard and that Ofcom would invite the Tribunal to exercise.

The second is to consider whether there is a requirement for a witness to be cross-examined if their evidence is not agreed. We had understood Royal Mail to posit a general rule that where the evidence of a witness is challenged that must be put to the witness in cross-examination.

At the start of his oral submissions today, Mr. Beard put a proposition that resembled that submission. He said that:

"Where cross-examination is provided for in the course of a trial such as this, which will be the normal

course, in those circumstances it is incumbent on those parties who are challenging that evidence to put those points to the witness in cross-examination."

We say that that submission is incorrect as a general matter. It is incorrect in relation to factual witnesses and it is also incorrect correct in relation to expert witnesses. There are pertinent differences between two and there are additional considerations in the case of expert witnesses which mean that it may be more appropriate in the case of experts to dispense with oral cross-examination.

THE CHAIRMAN: So your proposition is that it can be proper to dispense with oral cross-examination of expert witnesses in particular circumstances where fairness requires it; is that it?

MR HOLMES: That is a fair summary, sir. This is a familiar problem of case management, which the Tribunal will not be surprised to hear has arisen before courts and Tribunals before now.

THE CHAIRMAN: I suspect this precise formulation has not arisen --

MR HOLMES: Each case turns on its specific facts.

THE CHAIRMAN: -- because if it had it would have been provided to us, I am confident.

MR HOLMES: Indeed, but a situation in which an expert or

a factual witness is unavailable at a trial does arise with relative frequency and what the cases make clear is that one needs to consider the circumstances, one needs to bear in mind the need to do fairness between the parties, but ultimately this is a question of case management and there are various considerations weighing either way which need to be considered in the round in order to arrive at a solution which accords with the overriding objective of doing fairness at proportionate cost.

THE CHAIRMAN: Your third proposition?

MR HOLMES: The third proposition, sir, is that in the particular circumstances of this case Royal Mail's application for an adjournment is not well founded and should be refused. There are just -- I shall come to the points in detail but there are three points to note immediately at the outset.

First, this is not a case where prior to the trial a problem arose as to the availability of a witness. We are here at the final stages of a heavy and lengthy piece of commercial litigation, where all of the other factual and expert witnesses have been heard and the parties are prepared and primed to proceed on written and oral closing submissions. In those circumstances, in my submission, compelling reasons would be needed to

stop the juggernaut and to place a pause on the proceedings.

The second consideration is that while Mr. Beard suggested hopefully that any adjournment would be relatively brief, we have no such confidence that that would be the case.

THE CHAIRMAN: It depends on what you mean by relatively, doesn't it?

MR HOLMES: It does. Much turns on that word, sir.

To note two points, first the Tribunal has not a shred of particularised evidence before it that would enable it to assess the likelihood or otherwise that Mr. Harman will indeed, as he hopes and expects, be in a position to give evidence by the middle of September.

The second point is, and this is an equally important point, that we have three busy members of a multi-member Tribunal whose diaries will need to be considered and we have also a number of members of the Bar appearing before the Tribunal whose diaries will need to be considered and I can tell the Tribunal immediately that I believe all three of leading counsel in this case are involved in a matter that will be heard in October over five weeks. By the middle of September we will be in the final preparation for that --

THE CHAIRMAN: We know about that matter.

MR HOLMES: I'm grateful sir. The consequence of that will be the trial will not be heard in October, the remainder of this trial, nor, for other reasons of availability, in November. So we are looking at earliest December. In all possibility later than that.

So these are considerations that weigh heavily against an adjournment and one needs to consider whether fairness can be done to the parties without the need for such an adjournment. In that context we would emphasise that this is an expert Tribunal with an expert economist that sits on that Tribunal. It has a significant volume of material from Mr. Harman already, including six reports, one of which was prepared during the course of the trial responding to points that had arisen. He has had the last word. In addition, there is a lengthy joint expert memorandum covering -- I forget how many pages but nearly 100 from recollection, in which the experts minutely analyse their respective positions.

THE CHAIRMAN: 80 I think.

MR HOLMES: Thank you, sir I'm grateful.

Moreover, he is not the only expert for Royal Mail in these proceedings. At least a portion of his evidence overlaps and implements matters that have already been considered in the course of the concurrent evidence of the experts who have given oral evidence.

There you have an overview of my submission.

I can turn and deal very briefly with the Tribunal's powers to dispense with cross-examination which are clear and I did not understand Mr. Beard to suggest otherwise.

If I may take the Tribunal to tab 18 one finds parts 1 and 2 of the Competition Appeal Tribunal rules.

Let me show you first the provisions relating specifically to evidence. I know the Tribunal has them well in mind, but given that I will be inviting the Tribunal to exercise these powers I should take you to them. At page 16 there is a provision dealing with evidence. This falls under the heading, "Case management", which one sees on page 14.

You will see that rule 21 provides in the first paragraph that the Tribunal may give directions as to F, the way in which evidence is to be placed before the Tribunal. Then casting your eye down the page you see at paragraphs 6 and 7 that:

"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."

And also:

"The Tribunal may limit the cross-examination of

witnesses to any extent or in any manner it considers appropriate."

So broad powers of case management that plainly encompass the power to dispense with Mr. Harman's oral evidence in this case.

Turning back to the general powers to make directions. You see at paragraph 19 that:

"The Tribunal may at any time, on the request of a party or on its own initiative, 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."

That is a reference sir, the "justly and at proportionate cost" is a reference, sir, to the governing principles of the Tribunal which I won't take you to, I am sure you are well familiar with them, but one sees them at rule 4.

THE CHAIRMAN: I have them by my bed every night, don't worry.

MR HOLMES: Particular powers that are relevant under 19.2 are:

"(a) The power to give directions as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the

oral hearing~...

"... (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."

So pursuant to these various case management powers our request is for the Tribunal to give a direction that the oral evidence of Mr. Harman be dispensed with and that the parties proceed to make submissions based on the extensive written materials which the Tribunal has before it.

THE CHAIRMAN: I think Mr. Beard would say that's all very well, we have the power, but that's all subject to what's loosely called "rights of defence", in a quasi-criminal situation.

MR HOLMES: We do not dissent from the requirement to consider fairness. The governing principle requires a consideration of fairness, proportionality and the need to proceed expeditiously. Those matters need to be considered.

THE CHAIRMAN: I think he says his fairness overrides your fairness, I think.

MR HOLMES: Sir, if that was his submission we disagree. The Tribunal must do fairness between the parties considering the situation in which we find ourselves. This is by definition a suboptimal situation, to put it mildly.

THE CHAIRMAN: "A suboptimal situation, to put it mildly."

I will cherish that phrase, Mr. Holmes. Thank you. Seriously suboptimal.

MR HOLMES: Seriously suboptimal. The Tribunal must do the best it can and we say the best it can is not an open-ended adjournment.

If I can turn then to the requirements of fairness and what the case law says about how to proceed in a situation where witnesses are unavailable.

I should take you first to the specific guidance on this point, which one finds in the Tribunal's guide to proceedings. That is at tab 19. If I could take you, sir, to the specific considerations relating to evidence, which one finds in section 7 relating to case management, beginning at page 107. You have the point at 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."

Turning onto 7.54 you see the proposition which Mr. Beard places heavy reliance upon, that:

"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."

Pausing there. Do you have that sir?

THE CHAIRMAN: Mm.

MR HOLMES: In our submission, this is a nod to the well established principle in Brown v Dunne to which Mr. Beard has drawn the Tribunal's attention, but it relates specifically to concerns about the truthfulness of the evidence of the witness. That is a matter for factual witnesses, very, very rarely will an expert witness' evidence be impugned on the basis that his or her credibility is to be put in question. If that were something that any of the parties were suggesting, the complexion of this application might be different. But for our part, sir, we do not intend to impugn the credibility of Mr. Harman.

THE CHAIRMAN: Can we be clear what that means?

MR HOLMES: We do not tend to cast doubt on the indication that he gives that the opinions are his true and honest opinions and are based on his true and honest understanding of the facts. We accept that entirely. We do not suggest that he is not an appropriate person to give expert evidence. We do take issue with propositions of opinion contained in his evidence but we say that they can be dealt with on the basis of submission and that the Tribunal is well placed to consider that evidence and to weigh that evidence and to reach its own view.

THE CHAIRMAN: So you mean by "impugning" disagreeing with?

MR HOLMES: With propositions of fact. Impugning does not include a disagreement as to the correctness of the expert opinions advanced by an expert witness.

THE CHAIRMAN: So you are not picking holes in his calculations or his addition or subtraction, that sort of thing; you are reserving the right to disagree with Mr. Harman's opinion?

MR HOLMES: Yes.

THE CHAIRMAN: Is that correct?

MR HOLMES: That is correct. So far as I'm aware there is no point taken in relation to the correctness of his calculations.

THE CHAIRMAN: Because that is sometimes the case with

cross-examination of expert witnesses.

MR HOLMES: It is indeed sir, but that is not the cross-examination that we would have engaged in and these are not the submissions that we will --

THE CHAIRMAN: That is an attempt to damage the credibility of the expert so that his or her opinion on a matter within his speciality is given less weight. So we are clear on that, are we, because that is quite important?

MR HOLMES: I believe that's absolutely clear. I will take instruction so there is no room for doubt.

THE CHAIRMAN: I think Professor Ulph wishes to clarify what I was asking.

PROFESSOR ULPH: Can I just clarify that in some circumstances the calculations that were carried out were based on certain assumptions that were made in the model that's been used. So one could perfectly believe that all the calculations, conditional on the assumptions, are correct but still challenge the assumptions.

MR HOLMES: Yes.

PROFESSOR ULPH: How would you regard that, are you actually questioning the assumptions?

MR HOLMES: The assumptions reflect opinions on which experts can reasonably differ and the parties may well wish to make written and oral closings in relation to

those assumptions, but we do not suggest that any calculation has been incorrectly conducted by Mr. Harman.

PROFESSOR ULPH: Thank you.

MR HOLMES: To finish on 7.54 you will see that the proposition outlined there is subject to a caveat. Reading on. The sentence that I was reading you concludes with the words:

"... unless the witness is deceased or too ill to give evidence."

So, even in relation to an allegation of untruth the formulation here at 7.54 recognises that case management situations may arise in which a witness cannot give oral evidence.

Just a final point on the calculation discussion we have just been having. In large part Mr. Harman's modelling was done pursuant to a framework that was set by Mr. Dryden and of course that framework has been covered by this Tribunal in the course of concurrent evidence and has also been traversed to some extent in cross-examination of Mr. Dryden.

THE CHAIRMAN: Is this a good moment to break?

MR HOLMES: I am happy to do so now.

THE CHAIRMAN: I realise you are in mid-breath.

MR HOLMES: This is as good a moment as any other.

THE CHAIRMAN: We will pause for 10 minutes.

(3.16 pm)

(A short break)

(3.30 pm)

MR HOLMES: Sir, I have now concluded the first part of my submissions today and I'm moving on to the second; whether there is a requirement for cross-examination of a witness in all cases.

The general rule in relation to factual witnesses is given in CPR 32.21 (a). You have the part, I think, already in the bundle but I would like to take you to The White Book commentary as well and so I have just handed up the relevant page.

You see, sir, that -- 32.21 (a) states that:

"The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public."

Do you see in the fourth paragraph of the ensuing commentary at paragraph 32.2.1 of the White Book the following:

"Traditionally the law applicable in England and Wales has placed greatest weight on evidence given by witnesses in open court under oath or affirmation under examination of the parties."

Rule 32.21 (a) restates the general principle:

"The rule applies only to evidence as to matters of fact."

So you see that that rule is a specific rule in relation to factual evidence, and even in relation to witnesses of fact there is no strict rule requiring that they be challenged on their evidence in cross-examination. One sees that from the MacDonald case which is at tab 30, which is a Court of Appeal authority from 2013 in which Lord Dyson, Lord Justice McCombe and Lady Justice Gloster were sitting and it was Lord Justice McCombe who gave the leading judgment. And at paragraph 4 you see the difficulty which had arisen. This was a personal injury case and Mr. MacDonald, the claimant, gave evidence which was received by way of his three witness statements. It had been envisaged throughout the proceedings, until a very late stage before trial, that he would attend the trial and give his evidence orally. Unfortunately, by the time of the trial, and only shortly before it -- two days before it in fact -- it became apparent that his health would not permit him to do this. He was not therefore cross-examined on the statements, either before the judge or before an examiner of the court prior to trial. However, his statements were admitted at trial before the judge as

his evidence in the case.

You see at paragraph 10 a point was taken on behalf of Mr. MacDonald in relation to the judge's findings and the submission that was made was that:

"In the absence of cross-examination, his evidence should have been taken by the judge as uncontroversial and that the judge should not therefore have reached a conclusion as to the nature of Mr. MacDonald's exposure to asbestos as other than that alleged in his witness statements."

You see the responsive submissions at paragraph 11 by counsel for the second respondent, who submitted that the respondents had not waived their right to contest the underlying facts of the case simply because cross-examination of Mr. MacDonald proved to be impracticable. This, he argues, was a trial brought to an expedited hearing because of Mr. MacDonald's health and until two days before trial it was thought that he would be attending to give live evidence.

You see at paragraph 14 a conclusion of the Court of Appeal:

"In my judgment, the respondents approached to the assessment of the factual background is correct. The judge was not bound to take Mr. MacDonald's witness statement as word-for-word accurate. The judge was

entitled to have regard to the full procedural circumstances with which he was well familiar in which the evidence had been admitted and to assess its weight in accordance with section 4 of the 1995 Act and having regard to the inherent probabilities in the case in the light of submissions made to him. I do not therefore accept the criticism of the judge's factual findings advanced on behalf of Mr. MacDonald."

There you see in relation to factual evidence an acceptance that where a witness is unavailable to give evidence, the court can proceed on the basis of submissions and can decide what weight to give to the evidence.

I don't propose to take you to Brown v Dunne or to Chen unless you would find that helpful sir, but there is one passage from Chen to which I would draw your attention. It is set out in our skeleton argument and if we could I will take it from there.

It is at paragraph 32(b)(ii). You will see an important point made by the Privy Council at the outset of its discussion that:

"In a perfect world any ground for doubting the evidence of a witness ought to be put to him and a judge 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 mind of cross-examiners and trial judges, they cannot be absolute requirements in every case."

So we say, sir, that even in relation to the cases relied upon by the appellant, which all relate to factual evidence, the position is clearly not one that admits absolutes, and we say that's well illustrated by the MacDonald case to which I have taken you.

Turning to the position in relation to expert evidence, this is set out in part 35 and you find part 35 at tab 22 of the bundle. This is again a series of White Book extracts. First, there is part 3. I don't need to detain you with that but behind that sits part 35, beginning at page 1141. If I could ask the Tribunal to turn to that.

So you see that part 35 concerns experts and assessors and the first point to note is the commentary to which Mr. Beard returned at 35.0.2 under the heading, "Expert availability and the trial timetable."

Now, he was concerned at the omissis from the quotation that we provided in our skeleton argument. But in my submission, sir, that was entirely justified because there are two points included in the first sentence of 35.0.2 and it is the latter which is

applicable in this case. So that:

"Since April 1999 the Court of Appeal has made it clear that attempts to introduce expert evidence late in the timetable or the unavailability of the party's chosen experts for the trial window or fixed trial date will only very rarely be sufficient grounds to vary case management directions or trial dates or grant an adjournment."

So among other matters this gloss makes clear, in the view of those commenting in The White Book, that the Court of Appeal has made it clear that unavailability of the parties' chosen experts for the trial window will only very rarely be sufficient grounds to vary case management directions or grant an adjournment and we say that that does apply in the circumstances of this case.

Turning on to --

MR BEARD: The Tribunal may just want to read the next sentence, which is the Court of Appeal judgment being summarised.

MR HOLMES: Well sir, the following --

THE CHAIRMAN: We have read it several times.

MR HOLMES: There is a discussion of a number of cases, some of which relate to applications to adjourn. Indeed Mr. Beard took you to one of those, the Robshaw case, and it is quite clear that the discussion does encompass

adjournment applications and that the principle stated is a general one.

I will take you to the Matthews case, if I may, but first there are a couple more points I would like to make by reference to part 35. The first is that if one turns on to 35.4, which is found on page 1148, that reference is made there to the court's power to restrict expert evidence and at 35.41 it is made clear that:

"No party may call an expert or put in evidence an expert's report without a court's permission."

There is discussion of the effect of this rule over page. You see under, "Effect of the rule", at 35.4.1 that the court has total control over the use of evidence, including expert evidence, subject to concerns about the rights to a fair trial and the court must restrict expert evidence to that which is necessary to resolve the proceedings justly and the court may direct the manner in which the evidence is given.

There is a reference forward on to 35.5. Turning to 35.5 on page 1153 you see that there is a general requirement for expert evidence to be given in a written report. 35.1, paragraph 1:

"Expert evidence is to be given in a written report unless the court directs otherwise."

Then at 2:

"If a claim is on the small claims track or the fast-track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice."

So, what this makes clear is that it is not an invariable requirement to hear oral evidence from an expert or experts. The default position in relation to certain types of cases is that there will not be oral evidence and we say that even in other cases the position is to be read in the light of part 35.0.2 which I showed you and that expert unavailability may well mean that in any type of case it will be appropriate to dispense with expert cross-examination. That is pre-eminently a question of case management for which there is no one size fits all solution.

THE CHAIRMAN: Mr. Beard's point, I think, was that this has come up during the hearing, other experts have been cross-examined and in addition to general unfairness it is also particularly unfair that only one expert is denied the benefit of cross-examination if it is a benefit.

MR HOLMES: Yes, sir. I do need to deal with that point and in fact the next case I think addresses it square -- full square. If I could take you now to Matthews v Tarmac Bricks and Tiles. You will remember that was one

of the cases mentioned in 35.0.2. It is a 1999 authority and it can be found at tab 25.

It is a Court of Appeal judgment given by Lord Woolf, the Master of the Rolls, Lord Justice Clarke and Lord Justice Mance. It is a personal injury case and you see from the second paragraph of Lord Woolf's judgment that the claimant's expert was a consultant orthopaedic surgeon, Mr. Osbourne. Do you see that sir, the penultimate line?

Turning on you see in the second two paragraphs of the page that the defendant relied on two experts, a consultant orthopaedic surgeon, Mr. Dunkerley, referred to in the second paragraph and then further on in that paragraph a Dr. Calin, who was a rheumatologist.

Now the trial was listed on dates that neither of the defendant's experts, Mr. Dunkerley nor Dr. Kaylin could accommodate. The Master of Rolls considered that notwithstanding that fact, the trial should proceed.

If you turn to page 6 you see the following in the third complete paragraph on the page:

"I accept that in this case it would be preferable for the defendants to be able to call their doctors. However, I am far from satisfied that this case cannot be tried justly without that happening. The reports of Mr. Dunkerley and Dr. Calin would have to be placed

before the judge if they cannot give evidence orally."

What we say should happen in this case with Mr. Harman's multiple reports:

"So far as the claimant's doctor, Mr. Osbourne, is concerned, the defendants would like him to be present as he is now able to be, having made himself available, so he can be cross-examined. If the reports of Dr. Kaylin and Mr. Dunkerly are put before the court without their being present they cannot be cross-examined. However, this is very much the sort of case where a judge could properly form a judgment as to the right result without those doctors being called if he had those reports before him. In addition, because of the course they have taken, and further water that has flowed under the bridge, it would be much more difficult for the defendants to obtain another doctor. But I do not consider this court is beyond the scope of possibilities, that doctor could have all the records available and as neither of the defendant's doctors saw the claimants within the short period of the matters of which he complains, the defendants will not be prejudiced because of that doctor's inability to examine the claimants until now."

Pausing there, the point I would like to emphasise is that in this case neither of the defendant's

witnesses, experts, was able to attend. The claimants' expert was, however, able to attend and it was anticipated that he would be cross-examined.

The conclusion of Lord Woolf, the Master of the Rolls, was that that circumstance did not result in unfairness which prevented the trial from proceeding and we say that that meets the point which Mr. Beard makes, which is that there would be unfairness in this case by reason of the fact that other experts of the parties were cross-examined but not one of the appellant's experts.

Then, turning onto page 8 you see the point is also addressed by Lord Justice Clarke. In the penultimate paragraph on page 8 he states:

"The essential requirement of any trial is that it should be fair and such as to yield a just result. I am not persuaded that it is not possible to have a fair trial on 15 July. There is no evidence before the judge -- this is not uncommon in applications of this kind -- that we have seen. The reports which have been exchanged between the parties. If it proves not to be possible to call one or both of the doctors to give oral evidence on behalf of the defendants like my Lords I would expect the court to admit their reports as part of the evidence in the case. There is a plethora of

material in those reports and indeed the documents referred to in them. In these circumstances, even if it proves impossible for the defendant to call oral evidence in the trial, I am confident that it would be possible for the judge to try the matter fairly on 15 July. If it should appear that for some reason that is not so, he or she retains the power to adjourn the trial as appropriate."

So as matters stood before the Court of Appeal the view of their Lordships was that the matter could proceed notwithstanding the unavailability of the defendant's experts.

Sir, I can now turn and deal very briefly with the application to adjourn. We have set out the factors in our skeleton argument which we say weigh decisively against the adjournment which is sought. The first point is that dispensing with Mr. Harman's oral examination and indeed dealing with his evidence on the basis of the written material and submissions by the parties would not, we say, entail unfairness or material prejudice to Royal Mail.

We rely on the following matters: the Tribunal is a specialist body which has particular expertise in the field in which these experts have given evidence and it is well placed to assess the written materials.

There is extensive written material, a plethora of material, to use the terminology of Lord Justice Clarke, and the Tribunal will also have further assistance in the form of written and oral closing submissions from all of the parties. Mr. Harman has already had significant opportunities to respond to challenges to his evidence. There are six reports and there is also the joint expert joint memorandum. As such, while in a perfect world Mr. Harman would be able to give oral evidence and it would be preferable not to dispense with this, we say the case can be tried justly without that happening.

The second point is that, as you sir have alluded to during the course of Mr. Beard's submissions, the Tribunal does not have evidence before it that would enable it to assess how likely it is that Mr. Harman would in fact be able to give evidence in autumn, what date might be a realistic target, whether scheduling his evidence for a specific future date might impede his recovery by placing pressure on him, or if any alternative measures might have been considered to allow him to give oral evidence.

Mr. Beard candidly accepted during his opening submissions today that even if evidence were now obtained it would be unlikely to be able to provide the

Tribunal with greater clarity as to the ability for the trial to progress even in September.

We say that this is profoundly unsatisfactory and it weighs strongly against the open ended adjournment that the Tribunal would have to be willing to give.

Thirdly, and relatedly, in the absence of such evidence it is unclear whether the adjournment would even serve a purpose. There have already been several failed attempts to reschedule Mr. Harman's evidence and there is at least a real risk that he would still be unfit to give evidence at any future date the hearing was adjourned to.

THE CHAIRMAN: To be fair those attempts were limited to a delay of a few days and we now appear to be talking about a significantly longer adjournment --

MR HOLMES: That is correct sir.

THE CHAIRMAN: -- reschedule or whatever you want to call it.

MR HOLMES: That's true but I think the point still holds, that we really do not know whether he would be available in the future. We have the evidence of Mr. Parr, which is based on the expert in question's own expectations, but nothing stronger than that on which to base ourselves.

THE CHAIRMAN: I think what I'm saying is we have done our

very best within the allotted envelope to flex the timetable to accommodate this unfortunate event.

MR HOLMES: That's quite true sir.

THE CHAIRMAN: What we are talking about now is getting outside the envelope into something completely different.

MR HOLMES: Yes, which is a much more --

THE CHAIRMAN: It is not just a further extension.

MR HOLMES: Yes. I'm grateful sir.

Fourthly, the adjournment would be lengthy on any view given the availability of the parties' counsel. You have that point.

Fifthly, a lengthy adjournment is liable to prejudice the Tribunal's ability to write its judgment. Mr. Beard prayed in aid the submission we made, that the Tribunal has heard the relevant evidence live and the impressions that the members of the Tribunal would have formed of witnesses and their evidence in that context. We say, sir, that the Tribunal has heard live evidence from all of the other factual witnesses and all of the other experts and the immediacy of that evidence would be lost for a gain in immediacy in relation to only the one outstanding witness and that is our point. That would, we say, be very far from satisfactory in this case.

THE CHAIRMAN: So it is a balance of liveness; is that right?

MR HOLMES: Yes, sir.

Sixthly, a further adjournment of such a major trial would cause significant additional costs and Mr. Beard didn't dissent from that.

Seventhly, there is the consideration of other Tribunal users. Mr. Beard referred to the current diary of the Tribunal but of course none of us can know what urgent matters the Tribunal may have to grapple with in the autumn.

THE CHAIRMAN: That is for us to consider, isn't it?

MR HOLMES: Indeed it is sir, and I leave that in your hands.

THE CHAIRMAN: I'm grateful for all the help we get, but actually it is for us to parse that one.

MR HOLMES: The eighth and final point is that I think we have all been aware of the need not to place Mr. Harman under pressure and that has clearly informed the approach that the appellant and its legal team has taken in preparing evidence for today.

But in the absence of any available evidence there is a concern which it is appropriate to take into account that the prospect of having to give oral evidence will inevitably be stressful and may well be

detrimental to Mr. Harman's health and an adjournment -- an open ended adjournment of the kind sought may thus impede his recovery.

So for all these reasons we do resist the application for an adjournment and would urge the Tribunal to proceed with closing submissions.

I also have submissions, sir, insofar as the Tribunal is minded to reject the application for an adjournment, in relation to the proper approach to be taken in relation to any application for permission to appeal.

THE CHAIRMAN: As I said, we will take these things stage by stage if that's all right.

MR HOLMES: I'm grateful.

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.

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 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?

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.

THE CHAIRMAN: You are telling us that?

MR HOLMES: Yes. Unless there are any further questions those are my submissions.

THE CHAIRMAN: That is very helpful Mr. Holmes, thank you.

Mr. Turner.

Submissions by MR TURNER

MR TURNER: Sir, I adopt Ofcom's submissions. I hope I can be concise. I will begin with the structure for your analysis of this application. There are three issues.

Issue 1: is Royal Mail right that there's a general rule that if the evidence of any witness is challenged the point must be put to the witness in cross-examination? That's in their skeleton, paragraphs 3 and 5 and Mr. Beard said it again this afternoon.

Issue 2: if there's no general rule and if the issue is in truth case-specific, is this a case where the cross-examination of Mr. Harman on points which the other parties challenge is needed for Royal Mail to receive a fair hearing?

We say the answer is plainly no. That alone should be the primary basis for a ruling that the trial should continue to its scheduled conclusion.

The third issue: to the extent it is relevant to take into account wider consequences of an adjournment, and we say it must be relevant, this further factor confirms the correctness of dismissing Royal Mail's application. A resumed hearing can't be arranged until

December at the soonest in view of the availability of the parties' leading counsel alone. It is most likely a hearing won't be possible to arrange until early 2020.

Counsel have discussed what would be required, and it is along the lines of what is now envisaged if this hearing continues to the 17th July, that it would need another eight days, broken down as follows: it is envisaged, as you have heard, two days cross-examination and re-examination should be allowed. After that a break, even a short break for producing written closings. Then a little break for the oral closings and then three days of oral closings as is currently envisaged, although Royal Mail have said that they are still pushing for four days. So that is the burden of what would be adjourned.

THE CHAIRMAN: We had assumed ten, but if you say eight --

MR TURNER: That would be a minimum. That is what is involved and that's the third factor to consider.

So I deal with these issues sequentially. Issue 1. Is there a general rule requiring cross-examination? I will briefly, if I may, turn up two of the cases. If you could please pick up the bundle and go to tab 38. I know from your comment earlier sir you have already looked at Sait. Sait is at tab 38, on page 12, paragraph 42. Without the need to read it, you have

there set out Lord Hershel's principle, which he calls, "The classic anti-ambush principle". You will see from what's said three lines down in the quotation from Lord Herschell that:

"The general rule applies where it is going to be said that a witness is not speaking the truth and that he or she is unworthy of credit."

That's about six lines from the bottom. "Unworthy of credit" means, in common language, "Is not believable".

If you turn over the page, at paragraph 45, the judge cites Mrs. Justice Carr in the Williams case and he quotes her as saying that:

"Civil litigation procedures have of course moved on considerably since the 19th century."

THE CHAIRMAN: Glad to hear it.

MR TURNER: Yes, even despite the best endeavours of Royal Mail.

Paragraph 46 --

THE CHAIRMAN: Your words not mine, Mr. Turner.

MR TURNER: At this point. At paragraph 46:

"It is impossible to conceive that the modern system, where so much has to be put in writing, allows scope for an ambush of the kind that was of concern in Brown v Dunne."

Then paragraph 47 is a short distillation of the point in Chen. Essentially, that in the modern era there isn't an absolute rule, the issue is essentially case-specific.

Then if you would kindly turn to Chen, it confirms that and it is important to look at its terms because this is the main authority on which Royal Mail has relied.

Chen is at tab 34. If you go in it directly to paragraph 53. Paragraph 53 is where the Privy Council describe the Brown v Dunne rule. It concerns credibility. A case where the believability or credibility of a witness is attacked on the matter where that witness hasn't had the chance to give an explanation.

If it is really a question of raising objections to the correctness of a witness' evidence on some particular point which hasn't been put to them in oral cross-examination, that is different and you are in the territory described by their Lordships in paragraph 54.

If you read from five lines down:

"Indeed, Mr. Ng was cross-examined on the basis that he wasn't telling the truth about this issue."

So that is the Brown v Dunne area. And their Lordships say:

"The challenge is therefore more nuanced than if it were based on the general rule~..."

That wasn't the point being raised in this case:

"... it is based on the objections to the grounds for rejecting Mr. Ng's evidence rather than an objection to the rejection itself."

Then they go on to say:

"It appears to the board that an appellate court's decision whether to uphold the trial judge's decision to reject a witness' evidence on grounds which weren't put to the witness must depend on the facts of the particular case."

The principle is simply that one looks at the facts of the particular case to see if there is unfairness. That's it. I will turn to that in a moment. The last point that I should make is this: Mr. Beard did today refer to the Phipson extract in the textbook edited by Mr. Hodge Malek. Without needing to go back to that the footnote to the proposition he relied on takes you to a case which is in the bundle as Markham v Cipher(?) which is at tab 26.

That footnote refers to paragraphs 50 to 61. I don't need to read it all but I will show you these two points. In paragraph 52 -- this case was about the disbelieving of a factual witness, that was the context.

After reciting the Lord Herschell statement, if you go to 61, directly at the end of the section referred to in Phipson, the court says:

"It is not necessary to explore the limits of the rule in Brown v Dunne for this case falls squarely within it."

So Phipson takes you no further, that's an end to it.

THE CHAIRMAN: Can we just go back to Chen just for a moment?

MR TURNER: Yes.

THE CHAIRMAN: Paragraph 55. I think Mr. Beard referred to this.

MR TURNER: Yes, paragraph 55 sets out specific factors to take into account on the issue of fairness.

THE CHAIRMAN: At a relatively high level of generality:

"In such a case the court should have in mind two conflicting principles, the need for finality and minimising costs and the even more important requirement of a fair trial."

MR TURNER: Yes.

THE CHAIRMAN: Are you putting your arguments all into the fair trial basket?

MR TURNER: Yes. We say this Tribunal can confidently conclude that there is no deprival of a fair trial.

THE CHAIRMAN: So you are not suggesting that we put the need for finality and cost reductions above the need for a fair trial?

MR TURNER: No, and the way I sought to explain it in the initial structure is on the question of fairness of the trial itself, this Tribunal can and should decide that there is no unfairness and that is an end of it. You then move on to the wider considerations --

THE CHAIRMAN: Those are in your third area?

MR TURNER: Yes. That is the right approach to lead the structure of the analysis. Issue 2 then I come to that directly. Our case, do the circumstances in our case mean it will be unfair to Royal Mail if Mr. Harman isn't cross-examined on the points where we and Ofcom challenge his opinions and the assumptions that he makes underpinning his opinions?

The first point is that the ambit of this evidence needs to be firmly put in context. You will have seen that in our skeleton, and in Royal Mail's, we both talk about what his evidence covers and we are pretty well in the same place. You have our skeleton which I will go to. It is in paragraph 15 at (c) to (e) and that is very similar to Royal Mail's own account in paragraph 14 of its skeleton.

It doesn't particularly matter which you go to but

if you go into ours, the first point that he covers concerns the implementation of the price cost test of Mr. Dryden, mechanical. The mechanics are not in dispute. Neither we nor Ofcom are going to be saying the mathematics have been got wrong or anything of that kind.

The second area is Mr. Harman's opinions about what led Whistl in fact to delay and suspend its roll out of the delivery service and what led LDC to suspend its investment and we have made clear our position on that. These are largely matters of fact and he is not a judge. What does it leave? Even on the basis set out in Royal Mail's skeleton you see clearly that Mr. Harman gives an opinion as an economist and an accountant on two main points.

The first is Ofcom's assessment of the competitive significance of Royal Mail notifying the price differential to the market if it had been implemented.

We know that Mr. Harman's view, his evidence, is that the correct way to assess the competitive significance of the price differential is to estimate its financial impact on an IRR, which has been derived by him from Whistl's pre-existing business plan. What he does is to take it and to add in a new line-item cost beginning in 2015.

He says that that's the right way to assess competitive impact and that Ofcom's approach in the decision was too subjective to be meaningful.

That's his first area. The second is that in his reply report, he develops another point. He suggests that Whistl's pre-existing expectation of what would happen, what Royal Mail would do, and how it would be treated by Ofcom, mean that you can be confident the competitive impact of notifying the price differential was insignificant or immaterial.

Those are the areas and we agree with Royal Mail about it. While we would relish the chance to cross-examine Mr. Harman on those points, it is plain and obvious that there is no reason why those points cannot be dealt with by way of rival submissions on all the printed material in view of Mr. Harman's indisposition.

The experts have very fully engaged with those points in the joint statement. It has been talked about in general terms, but if I can give you one reference to it. It is in bundle C3 at tab 2.

THE CHAIRMAN: This is the joint expert opinion.

MR TURNER: This is the joint statement of Mr. Harman, Mr. Parker and Mr. Matthew. If you go in it directly to page 57. This is broken down into a series of issues

that they deal with. That is where they discuss --

MR FRAZER: Sorry 57 internal or external?

MR TURNER: 57 of the red numbering. I have to hold mine in landscape, bottom right. You then have, from all three of the experts, if you look down each of the columns, their own potted discussion of their position and their answer to each other on these points. If you go to page 59 and look halfway down at Mr. Matthew's points that he will have raised with Mr. Harman in the discussion that they had. Look under the bullets, there are two of them. This is halfway down the second column page 59:

"Mr. Harman claims that this approach is an objective basis to assess materiality."

Then Mr. Matthew discusses it. You will see on page 60 at the top at the end of the first paragraph he makes the point that his:

"... IRR estimates~..."

Four or five lines from the end of that paragraph:

"... don't capture all of the risks and challenges that an entrant faced, in particular the zonal tilt, thus Mr. Harman's analysis does not properly implement that approach."

Then he goes on:

"Second, I agree with Mr. Parker that evidence of

actual behaviour is relevant in this regard. Whistl didn't in fact proceed with entry, it suggested that it is implausible that Whistl would have an expected IRR of the confidential amount and been highly profitable. The evidence of actual market development suggests that price differential would not in reality have had an immaterial impact."

THE CHAIRMAN: I think Mr. Beard's point is that he may have the chance to come back to you on that but Mr. Harman won't.

MR TURNER: I will come to that in just a moment. 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.

THE CHAIRMAN: To form its own opinion, or is that not available to us?

MR TURNER: Yes, you can form your own opinion and that has been done in prior cases too, where this Tribunal has decided that it doesn't fully accept the evidence of any expert in the case, and particularly where a Tribunal does have the benefit of expertise of its own, that's certainly open to it. We would say however that our

expertise is indeed what the Tribunal should follow and can follow confidently.

THE CHAIRMAN: I am sure you would.

MR TURNER: Now, Mr. Matthew's point, which I have just shown you, the Ofcom expert, is that evidence of actual behaviour is relevant and corrects a point that Royal Mail have made, the decision, Ofcom's decision does not hinge on a profitability assessment at all, something that Mr. Beard's skeleton says or suggests at paragraph 14. It is wrong because Ofcom also judges the impact of the price differential in a different way, considers the difficult market conditions for a new entrant, 7.162, and then it has a whole section making factual findings that the actual impact of this measure was that it led to the delay and suspension of Whistl's roll out plans. 7.234 through to 7.238 of the decision.

This therefore places in context the nature of Mr. Harman's evidence and the submission that it is in fact central to the decision that you will have to make.

Now, two other things did arise from Mr. Beard's oral submissions today. The first is that he said at an early stage, it has been decided in this case, you can decide in a case that you won't have cross-examination but you did decide here that there would be cross-examination of experts and that's that.

That's wrong. The Tribunal is naturally free to consider fairness if there are material developments in a case.

The fact that there has now been the indisposition of an expert does not mean that you have committed yourself to a course that there must be cross-examination at all.

Then we come to the other point that Mr. Beard made, which, sir, you have just put to me. He says the fact that there has been cross-examination of Mr. Parker and Mr. Matthews means that there must now be cross-examination of Mr. Harman on the opinions in Mr. Harman's report. That is puzzling as to its logic and it is also wrong.

What specifically is Mr. Beard pointing to in the oral examination that you have heard from Mr. Matthews or Mr. Parker which has the implication that Mr. Harman must now give oral evidence?

The submissions that have been put to you are in abstraction. If you focus on practicability what Mr. Beard says collapses instantly like a soufflé.

THE CHAIRMAN: I think Mr. Beard was talking about a general principle of even-handedness. Doesn't sound implausible when put like that.

MR TURNER: If you leave it as a matter of abstraction, and

say there has been cross-examination of the other side's witnesses and now there must be cross-examination of my witness, one must drill into that and say: tell us why that would deprive you if that is not done of a fair trial?

If you focus on the circumstances of this case, if you ask yourself was there something in what Mr. Matthews said or what Mr. Parker said which means that now Mr. Harman must take the stand too, there's nothing there and nothing has been suggested.

THE CHAIRMAN: You are saying that is an abstraction that has no real substance to it?

MR TURNER: None has been given to you. Nothing has been suggested. So then we finally come to the third issue. The ground has been ably covered by Mr. Holmes. Mr. Harman's position is today, even now, unclear. Royal Mail should have made his position clear so that the Tribunal can plan.

It is not sufficient to face the Tribunal with wide eyes and say: well, if that's what's wanted we can go away and cause further delay. Royal Mail has spoken to Mr. Harman. It is unclear why they couldn't and didn't ask if they could obtain information about his condition even from his medical practitioner. But that hasn't been done and it is by no means out of place or uncalled

for for this Tribunal to be able to plan by relying on that sort of information. It wasn't made available.

The second point I have already covered to an extent; the matter can't realistically be got on until December or early next spring. Mr. Beard did say in his oral submissions September or October. We must be very clear that neither of those is at all possible.

Finally, one point that remains is that on the issue of the advantages of assessing Mr. Harman's demeanour as a witness in the witness box. He is not a witness of fact where his believability on some event and his story is being assessed by this Tribunal. In dealing with his evidence you are not, essentially, a finder of fact and therefore we do not see a need to have him give evidence so that there is, sir, what you referred to earlier with Mr. Holmes as a balance of liveness. This is not that sort of case. It is not necessary here.

I'm just asked by Mr. Bates to point out, and I don't need to go back to it, but in the section I took you to in the joint statement, Mr. Harman in the first column himself does cover those issues and gives his own views on the very points that Whistl and Ofcom are making. Perhaps I should have made that clear.

Sir, those are my submissions.

PROFESSOR ULPH: Can you just clarify why September and

October are completely ruled out?

MR TURNER: Yes. 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.

THE CHAIRMAN: And changing counsel would be a further aspect of unfairness, presumably?

MR TURNER: We are not going to dissent to discussing it in those terms and we will see if Royal Mail wishes to make that submission.

THE CHAIRMAN: Nobody has raised it. Mr. Beard is there anything quickly you want to come back on? It has to be brief I think.

Reply submissions by MR BEARD

MR BEARD: It will be brief. I'm not going to deal with

Mr. Holmes' various points on the broad powers. Fairness is the key here.

We have heard very little in terms of what the actual countervailing unfairness to Ofcom and/or Whistl would be. Delay in relation to the judgment, yes. I think I dealt with that in submissions.

Mr. Holmes, I think, put this point about the balance of liveness. Mr. Turner then tries to dismiss this because we are dealing with experts. That is not fair or right. It is clearly important that this Tribunal, having heard two of the experts on the relevant topics and reached a view as to their position on these matters, should hear Mr. Harman in relation to these issues.

There is a plain concern in relation to asymmetry of consideration of the relevant evidence. That goes to all of the reports and indeed to joint statement. You have heard from Mr. Matthew and Mr. Parker in relation to those matters.

We, because of Mr. Harman's position, as we have indicated in our submissions, won't even have Mr. Harman's input in relation to our closings or in relation to the matters raised by Mr. Matthew and Mr. Parker in their cross-examination.

THE CHAIRMAN: That is not a point that is relevant to

whether you can cross-examine.

MR BEARD: It is not. It is a further aspect of asymmetry that we raised in our submissions.

THE CHAIRMAN: We have not talked about that.

MR BEARD: But we raised it in our submissions but I focused on the cross-examination point. In relation to the question that was raised about consideration having been given to someone within the team stepping in, consideration had been given to that, none of the members of the team at FTI are across the material as a whole that Mr. Harman is dealing with and none of them would be suitable to step in. So we would be looking at somebody else in relation to these issues. We cannot see that that would be in any way efficient.

So the asymmetry issue is significant and cannot be dismissed in terms of the overall fairness of this process. Mr. Turner valiantly seeks to suggest that you can draw from the authorities the proposition that you do not need to put your case to an expert where you are challenging them on being mistaken, not having an opinion that is relevant, misconceiving the relevance of the submission or the opinion that's being provided and the analysis.

That is simply wrong. That is not the correct approach. None of the authorities suggest that. The

various cases that we have been taken to, in particular Chen and MacDonald, do not suggest that in the slightest. Mr. Holmes placed great weight on Matthews. Matthews does not suggest that it is appropriate to have some sort of asymmetric consideration of expert witnesses. When one goes back to page 6 of Matthews what you see is that the defendant couldn't have their own experts but the defendant wanted the claimants' expert to give evidence notwithstanding.

In those circumstances no issue arose as to a contention of unfairness in that regard. The claims in question were personal injury claims and therefore the court said that they were simple and could be dealt with. The reasons for the absence of the consultancy in that case were very different because it was prior to the trial and it is clear that the court wasn't considering whether or not there might be a need to be an adjournment.

Indeed, as the final sentence on the paragraph on page 8 to which Mr. Holmes took you indicates, what the court was there saying was the trial judge can re-visit these matters and if there is a concern as to fairness, as they approach the detailed consideration of these matters, you can still consider an adjournment.

In other words, it was not suggesting some sort of

general principle as Mr. Holmes averted to. So the two points on fairness that we have emphasised, the fact that it would be enabling Mr. Turner and Mr. Holmes to put forward criticisms of Mr. Harman's evidence without the general requirement to put those points to him and offer him the opportunity to comment on those, that is unfair, the asymmetry is unfair, and the evidence that Mr. Harman gives is important, particularly if this Tribunal is minded to consider that an AEC test is not relevant and can be rejected; his evidence critically goes to whether or not the materiality threshold is appropriate, drawing on his overall experience and expertise.

He then considers whether or not the profitability metric that is actually used is correct, sound and valuable, again drawing on his experience. Those are important issues. We do not have someone else that can step in, and contrary to what Mr. Holmes suggested, we do not consider that there would be significant additional costs in a delay. There would be some additional costs, undoubtedly; there would not be additional significant costs in delay.

We are surprised that it isn't possible to fit matters round in September on the basis of what Mr. Turner says. Even if instead of having ten days

continuously, there might have been a longer gap between the initial evidence and then the closings. If that is the case, however, and even if we are thinking pessimistically about December, in the overall consideration of this case, when we are talking about events going back to 2013 and 2014, that is undoubtedly the proportionate approach as well as, we say, being the fair approach in this case.

THE CHAIRMAN: So because Ofcom took a long time to come to a decision it doesn't matter if we do, is that right Mr. Beard?

MR BEARD: I'm not saying it doesn't matter but I think in terms of consideration of all of the matters of delay and proportionality that have been raised by Ofcom and by Whistl, one has to have in mind the duration of this case overall and that is all I say.

It would be better if these matters were adjourned more briefly, but if it has to be through to December, so be it. Just one point that has been noted. Although we do not place weight on the fact or we have not emphasised the fact that Mr. Harman deals with the application of the AEC analysis and the consideration of how the modelling works, it is worth noting that, in relation to questions that were posed in the course of the hot tub concurrent evidence process, Mr. Dryden

actually noted that there were various points that he would not be able to answer and in fact Mr. Harman would be the appropriate person to do so. Those matters would go to issues as to the calculation and as to the basis for the assumptions underlying that modelling and indeed other modelling that was carried out.

Unless I can assist the Tribunal further, those are the reply submissions of Royal Mail.

THE CHAIRMAN: We will adjourn and we will come back so please don't go away.

(4.26 pm)

(The panel retired)

(4.45 pm)

Decision

THE CHAIRMAN: We have unanimously decided that in the particular circumstances of this case an adjournment would not be appropriate. We would like to proceed with the written and oral closings as soon as possible and within the agreed timetable envelope.

MR BEARD: I'm grateful to the Tribunal. On that basis we will be proceeding to provide closing submissions on the current timetable close of business on Thursday, I believe.

THE CHAIRMAN: That is the position in our latest letter. It would be appreciated if that could be met. I won't

say we have given you an extra day, that would be misleading, but this exercise can start now instead of Wednesday. That would certainly help us, it would give us a day, an official day, to read the written closings, which we will read with great attention.

MR BEARD: I'm grateful.

MR HOLMES: I'm grateful sir. Two brief matters to canvass with the Tribunal, if I may. The first is that we would propose costs of this application be reserved and should not be in the case so that they can be considered separately from the outcome of the main proceedings.

THE CHAIRMAN: We will give consideration to that.

MR HOLMES: I'm grateful, sir. The other point concerns any applications for permission to appeal. I obviously don't expect Mr. Beard to give any immediate indication in that regard, but we would respectfully request, if it is possible, for the Tribunal to provide any further reasons in support of its decision as soon as possible and also to consider abridging time for applying for permission to appeal both to the Tribunal and to the Court of Appeal, so that any application could be considered and dealt with in advance of written and oral closing submissions.

THE CHAIRMAN: All I can say to that is that we will endeavour to provide our reasons for the decision

I referred to as quickly as possible but it is most unlikely to be tomorrow morning.

MR HOLMES: That's understood, sir.

MR BEARD: I think as presently advised it is not going to be the case that we seek permission to appeal in any event, in relation to these matters. In those circumstances that might alleviate the concerns Mr. Holmes has and indeed any pressure the Tribunal feels in relation to the provision of reasoning.

In relation to costs, it seems to us that these are matters that have arisen by dint of the unfortunate circumstances of Mr. Harman. It has been necessary to consider the question of how proceedings should be dealt with as a case management matter. The normal course would be for costs to be in the case. If, however, the Tribunal wishes to reserve these costs for separate discussion then that is understood.

THE CHAIRMAN: We will take account of that.

MR TURNER: Just to add, we would support the application for costs reserved. We will say that this is an application which was misconceived both in its content and in the way in which it has been brought and it's put us to costs which we should not have been put to.

MR BEARD: Before we go any further I do want to put down

a brief marker. Mr. Turner is an intervenor in these proceedings and how costs are dealt with in relation to intervenors in proceedings will be a matter for submissions in due course.

THE CHAIRMAN: I think you can rely on us to come to our own view on costs.

MR BEARD: I'm grateful.

THE CHAIRMAN: Is that it for today then? In which case I'm grateful to everybody and we will reconvene on Monday morning. If you wish us to sit earlier than 10.30, please would you in touch with the referendaire to arrange that.

We could probably accommodate that if that is thought to be helpful. We are very concerned to finish by the close of business on Wednesday.

MR BEARD: Understood.

THE CHAIRMAN: Thank you.

(4.51 pm)

(The court adjourned until Monday, 15th July 2019)

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