Neutral citation [2023] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

24 March 2023

Before:

SIR MARCUS SMITH
(President)
EAMONN DORAN
PROFESSOR DAVID ULPH

Sitting as a Tribunal in England and Wales

BETWEEN:

DAVID COURTNEY BOYLE

Class Representative

– and –

(1) GOVIA THAMESLINK RAILWAY LIMITED
(2) THE GO AHEAD GROUP PLC
(3) KEOLIS (UK) LIMITED

Defendants

– and –

SECRETARY OF STATE FOR TRANSPORT

Intervener

Heard at Salisbury Square House on 17 March 2023

JUDGMENT (ADJOURNMENT AND CASE MANAGEMENT)

APPEARANCES

Mr Charles Hollander, KC and Mr David Went (instructed by Maitland Walker LLP) appeared on behalf of the Class Representative.

Mr Paul Harris, KC, Ms Anneliese Blackwood and Ms Cliodhna Kelleher (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

Ms Anneli Howard, KC and Mr Brendan McGurk (instructed by Linklaters LLP) appeared on behalf of the Intervener.

1. By our Judgment dated 25 July 2022 ([2022] CAT 35), this Tribunal[1] granted Mr Boyle's application to be certified as the class representative in these proceedings. A collective proceedings order was made on 5 October 2022. This order contained some limited directions for the filing of pleadings, but no other directions.[2]

2. A case management conference took place on 14 October 2022. The main matter for consideration at this hearing was the structure of the trial of the Class Representative's claim. Mr Hollander, KC, for the Class Representative, contended for a split trial on traditional liability/quantum lines, whereas Mr Harris, KC, for the Defendants (supported by Ms Howard, KC, for the Intervener), contended for a more complex, three-stage, trial-structure. For the reasons given in our Ruling of 14 October 2022 ([2022] CAT 46) (the "October 2022 Ruling"), we preferred the Class Representative's split trial proposal, separating quantum from liability, but doing no more than that.

3. We diarised a four-week hearing to take place in the October to December 2023 period. Our Ruling concluded:

> "34. We would only say one final thing. As has been repeatedly stated in the course of this ruling, we are at the early stages of these proceedings. It is important that one gets a grip of a case quickly at these early stages so as to give the pre-trial steps shape and to ensure that the trial or trials are brought on as swiftly as possible. But we readily acknowledge that we are in the early stages of a steep learning curve. If there were to be a material change in the way the issues are parsed, such that a reorganisation of the trial structure is something that ought to be mooted again, then that is something that we would be minded to hear. It seems to us that Mr Harris was making a series of points intended to assist; and we have rejected those points. But we have done so because, in all frankness, the risk/benefit analysis did not favour his articulation of those points at this stage. However, as we have said, we are in the early foothills and it seems to us that it is far easier to split a two-stage trial into three, than to reassemble a three-stage trial into two. That, too, is a factor that we have borne in mind.
>
> 35. So, if there is a material change in the understanding of the parties as to how the trial should be structured, then there is a liberty to apply to re-frame matters. We expect that liberty to be exercised responsibly, as we are sure it would be, but the Tribunal wants to make it clear that the material change that would justify further application lies less in a

[1] Professor John Cubbin has since retired as an ordinary member of the Competition Appeal Tribunal, and has been replaced as a member of this Tribunal by Professor David Ulph.
[2] See paragraphs 12 to 14 of the 5 October 2022 order.

> factual development and more in a greater understanding of the nature of the issues that fall to be determined in this case, which, as we hope is tolerably apparent from this ruling, is more than averagely complex in terms of the competition law issues it raises, in particular the questions of public competition law as opposed to the more usual fare of private competition law.
>
> 36. So for those reasons we are going to direct a two-stage trial at this stage of the proceedings."

4. The October 2022 Ruling did not deal in terms with steps going beyond those ordered in the order of 5 October 2022. However, such steps were considered at the conclusion of the case management conference on 14 October 2022. Although no formal orders were made, the Tribunal was clear both in what it expected the parties to do in the period before the end of 2022 and in offering a facility for the parties to come back – on short notice and before the President alone, if necessary – if the assistance or further direction of the Tribunal were required. Towards the end of the hearing, the following was said:[3]

> "…what I have in mind – and again, I am not making any orders, what I am doing is a sort of informal structuring of efforts up to the end of the year – and if that doesn't work, all of the parties can expect the informal structuring to end and a somewhat more brutal formal structuring to begin. So we will see how it works."

5. To that end, the parties did do a considerable amount of work. There was considerable disclosure (from the Defendants), work on the list of issues by both parties, and an attempt to agree an order containing detailed directions to trial.

6. On 28 November 2022, the Class Representative's expert economist, Mr James Harvey, notified the solicitors retained by the Class Representative (Maitland Walker LLP) that he had decided to withdraw from the case.[4] This came as a "complete shock to me, my firm and Mr Boyle",[5] and was essentially unexplained by Mr Harvey:[6]

> "Upon Mr Harvey's notification that he was withdrawing, I immediately discussed the issue with colleagues and arranged a telephone call with Mr Harvey which took place on 29 November 2022. The call was unsatisfactory. Mr Harvey told us that he had decided that he would take a six-month

[3] Page 55 of the transcript.
[4] Third witness statement of Mr Julian Maitland-Walker ("Maitland-Walker 3") at paragraph 7.
[5] Maitland-Walker 3 at paragraph 7.
[6] Maitland-Walker 3 at paragraph 8.

> sabbatical for the whole of the second half of 2023, obviously rendering his ongoing participation in these proceedings impossible. He said he had taken the decision for personal reasons but was unwilling to provide any further explanation."

7. We have not heard from Mr Harvey, and so we should refrain from saying more than Mr Maitland-Walker has done. But the following propositions are obvious:

   (1) In any case, the loss of an expert retained by a party is problematic.

   (2) That is particularly so in competition cases, where expert economists are usually central to the evidence adduced by the parties. For claimants, in particular, the problems can be acute. Claimants often do not have factual evidence to adduce themselves: the only way of advancing a positive case is through the expert. That, as Mr Hollander, KC reminded us, was the case here.

   (3) Collective proceedings represent an even more acute case, when (as here) it is the class representative who is left without an expert. Unlike individual litigation, where the court's role is to manage the litigation to trial, but where it is for the parties to make their own dispositions as to how the case is to be progressed, collective proceedings impose particular responsibilities on the Tribunal, both in terms of initial certification and in terms of on-going supervision. That is because – particularly where (as here) the proceedings are opt-out – the Tribunal has a responsibility to the class and to the defendants to ensure that this unusual and important jurisdiction is exercised properly. That responsibility has yet to be fully articulated in the case law, but it is being articulated. The recent decisions of the Court of Appeal in *MOL (Europe Africa) Ltd v. Mark McLaren Class Representative Ltd*, [2022] EWCA Civ 1701 and of this Tribunal in *Gormsen v. Meta Platforms Inc*, [2023] CAT 10 clearly demonstrate this.

8. Mr Harvey appears not to have made very much effort to ameliorate the problems occasioned by his withdrawal from the case. Whilst his failure to provide an explanation for his withdrawal may well have its reasons which

cannot be explored further, we consider that his consultancy's failure to make his associate, Ms Mantri, available to the new expert so as to explain the acquired understanding of the team that had assisted Mr Harvey to be most unhelpful.[7] As a result, the Class Representative had to retain a new expert, who had to approach the case from a standing-start without the benefit of any assistance from Mr Harvey's team. The new expert, instructed in place of Mr Harvey, is a Dr Peter Davis, a principal at the Brattle Group, another economic consulting firm.

9. The (inevitable) need to instruct a new expert had certain consequences:

(1) *A potential change in method or analysis.* The decisions that we have already referred to (*MOL (Europe Africa) Ltd v. Mark McLaren Class Representative Ltd*, [2022] EWCA Civ 1701; *Gormsen v. Meta Platforms Inc*, [2023] CAT 10) stress the importance of a "blueprint" to trial in collective proceedings. Self-evidently, the articulated approach of the proposed class representative's expert – which will be before the Tribunal on the application for certification – matters when considering whether a sufficiently clear "blueprint" has been articulated. Dr Davis has filed a report dated 2 February 2023 ("Davis 1"), in which he reviews the reports previously filed by Mr Harvey in these proceedings ("Harvey 1", "Harvey 2" and "Harvey 3"). Broadly speaking, in his report Dr Davis evinces no violent disagreement with Mr Harvey's approach, and Mr Hollander, KC sought to present Dr Davis' report as essentially confirmatory of Mr Harvey's approach and work. The message was that these proceedings would, so far as the expert evidence was concerned, now proceed more-or-less seamlessly in line with the direction set by Mr Harvey. We do not accept this rosy view, much as we might like to. There is enough in Davis 1 to demonstrate that Dr Davis is taking a

[7] See Maitland-Walker 3 at paragraphs 11 and 12. Mr Harvey had an associate, Ms Aastha Mantri, who was assisting him. Mr Harvey proposed that she take over his role. Ms Mantri is undoubtedly very well qualified, but she had not given evidence in court before, and was very much Mr Harvey's junior. The question of who should take over from Mr Harvey was obviously a key question for the Class Representative and his solicitors. We are not going to second-guess their decision not to use Ms Mantri as the "lead" expert. That represents no reflection on Ms Mantri at all, but is just the sort of difficult exercise of judgment that no court should second guess.

careful and critical look at what Mr Harvey has done, and that unequivocal agreement (whilst not impossible) cannot be taken for granted. We want to stress that this is absolutely not a criticism of Dr Davis: we would expect any expert worth the name to take such an approach, given an expert's duties in this sort of litigation. Paragraph 61 of Davis 1 says this:

> "In preparing this report, I should make clear that I am only very recently instructed by solicitors for the Class Representative. Since I have not yet had the opportunity to read and digest all – or indeed many – of the documents in the case record, this is necessarily my provisional opinion. I should also make clear that I would want to reserve the right – indeed believe I would have a duty to the CAT – to move away from aspects of Mr Harvey's proposed methodology in due course, should my review of the case record or evidence (particularly that available following disclosure) suggest doing so would be appropriate."

We would, frankly, expect nothing less from an expert. We consider that, going forward, it is necessary to have a plan for the future management of these proceedings that can withstand the possibility of a material change in expert approach on the part of Dr Davis, away from that articulated by Mr Harvey. Whilst we have no desire to commit Dr Davis to taking a different course to that of Mr Harvey, some of the correspondence from him suggests that his thinking may not be as aligned to that of Mr Harvey as was submitted. In his letter of 7 March 2023 to Maitland Walker LLP, Dr Davis describes a counterfactual analysis that he contemplates undertaking in such wide-ranging terms as to lead us to question how it relates to what was envisaged in Mr Harvey's various reports. There is no need for us to reach any view on this – and we do not do so. We would only say that the process to trial needs to be robust enough to withstand such divergences. In paragraphs 12 and 13 of the October 2022 Ruling we referred to the need for careful risk management at the early stages of this type of litigation; on that occasion we were considering trial structure. Such case management considerations apply with greater force when managing the potential for changes to the nature of the economic report which, quite properly, might arise from the appointment of a new expert in all the circumstances we refer to above.

(2) *Delay.* The possibility of a change in expert approach, and the inevitable need for Dr Davis to ensure that he is content with the methodology articulated by Mr Harvey and the "blueprint" to trial articulated by him, inevitably imports delay. At the very least, Dr Davis needs time to remove the caveat at paragraph 61 of Davis 1. Looking at the draft directions order that was in discussion between the parties, it is obvious that certain dates have now not been met because of Mr Harvey's departure from the litigation (and because of the manner in which that departure was handled, to which we will come) and that all future dates in that draft directions order will need to have at least two months added to them. That is on the basis of a best-case scenario, where Dr Davis reports that he is substantially happy with the Harvey methodology. So, even taking an over-optimistic view of where we now stand, a four-week trial in October 2023 is impossible. It might be possible – if all of the risks that trouble us did not emerge – to have a trial in December 2023. But we are not prepared to manage litigation on a wing and a prayer.

(3) *Expense.* We are not going to say very much about this, but it is clear from the papers that we have seen that the litigation budget of the Class Representative has increased significantly. Several million pounds of that increase is due to the change in expert. We want to say nothing more about this, save that we considered the litigation budget quite carefully on certification, and we consider that it would be inappropriate not to require what is in effect a new budget to be reviewed and revisited by us.

10. At the outset of this case management conference, we indicated a provisional view that the trial fixed for later this year would have to be adjourned. Mr Hollander, KC, accepted that this was the case; and, indeed, advocated for it. Mr Harris, KC, for the Defendants, urged that we do not adjourn and we heard him carefully. But Mr Harris, KC's submissions were flawed in two respects:

(1) First, his submissions assumed what we must not assume, namely that Dr Davis' substitution for Mr Harvey would have no material implications going forward.

(2) Secondly, his submissions were in a sense counterfactual, in that they assumed that the Class Representative had acted, as he should have done, in bringing the problem of Mr Harvey's withdrawal from the case before the Tribunal at the earliest opportunity. That is to say, before the end of 2022. Had that happened – and this is a matter we will be coming to – we would have been in a position to consider the very difficult question of "Where do we go from here?" some three months sooner. Those three months are lost and the opportunities for case management that they provided are lost also. That loss moved the question of adjournment from being "on the cards" to "inevitable".

11. We are grateful to Mr Harris, KC, for his helpful submissions on the question of adjournment. Trials should not be adjourned lightly, and it was important in these proceedings that the case against adjournment be made as eloquently and as forcefully as it could. But, in this case, Mr Harris, KC's advocacy only served to confirm our provisional view – namely, that the trial should be adjourned.

12. We turn to what <u>should</u> have happened when Mr Harvey made clear he was withdrawing from the case:

(1) As we have noted, Mr Harvey made clear his intention to withdraw on 28 November 2022.[8] On 1 December 2022, Maitland Walker LLP wrote to the Tribunal in the following terms:[9]

> "1. We write on behalf of the Class Representative to the Proceedings.
>
> 2. We enclose for filing the Class Representative's Reply and draft List of Issues to be determined at the Stage 1 Trial.
>
> 3. In keeping with the indications provided by the Tribunal in its letter to the parties dated 17 October 2022, we are providing today to the Defendants' solicitors the Class Representative's preliminary views as to the scope of the factual and expert evidence. We do not currently anticipate needing to rely on any factual witnesses but are seeking to agree with the Defendants that factual evidence be dealt with by way of a statement of agreed facts.
>
> 4. As to expert evidence, our preliminary view is that that Class Representative will seek to rely only on expert economic evidence

[8] Paragraph 6 above.
[9] Emphasis supplied.

and that the expert's initial evidence will cover items 9, 10, and 11c of the draft List of Issues served today, while our expert evidence in reply will also address (as needed) items 11.b(2) and 12. The Class Representative's view as to the scope of expert evidence **is necessarily tentative at this stage in part because of the issue that has arisen in relation to his expert economist as explained immediately below** and also owing to the Class Representative requiring further information on certain of the defences raised by the Defendants in their Defence in respect of which the Class Representative is requesting further information.

5. As the Tribunal will be aware, the Class Representative had instructed Mr Harvey as the expert economist in these proceedings. **Although Mr Harvey was informed of the dates of the Stage 1 Trial after the CMC on 14 October 2022 and contrary to previous indications, Mr Harvey informed us without warning on 28 November 2022 that he intends to take a 6-month sabbatical from July 2023 for family/personal reasons and will therefore be unable to continue as the expert economist in these proceedings on behalf of the Class Representative.**

6. **While this is obviously unfortunate, this has necessitated the Class Representative unexpectedly needing to replace Mr Harvey and to find an alternative expert in short order. We hope that this will not cause any delay to the proposed timetable for the Stage 1 Trial** but we will inform the Tribunal at the earliest possibility in case adjustments might need to be made.

7. We will write to the Tribunal and to the parties with the details of Mr Harvey's replacement as soon as possible."

(2) As a counsel of perfection, and with the benefit of hindsight, the Tribunal should of its own motion have listed a case management conference – if necessary before the President alone[10] – to consider the implications of Mr Harvey's departure. For the reasons we have given, we do not consider the departure of the Class Representative's lead expert economist is something that can be regarded as of little moment.[11]

(3) We also consider that the Class Representative should, of his own motion, have informed the Tribunal that a case management conference in December 2022 was highly desirable, even necessary. We consider that in collective actions, class representatives need to regard themselves as under a somewhat greater responsibility with regard to the conduct of

[10] Because of Professor Cubbin's retirement, there would have been issues in constituting a three-person Tribunal.
[11] See paragraph 7 above.

those proceedings than a claimant in individual litigation. A claimant in individual litigation generally has no choice – if litigation is necessary – but to act as claimant. But that is not so with a class representative. Class representatives put themselves forward and, where given the responsibility of conducting the litigation if certified as an appropriate class representative, must act in a manner appropriate to that responsibility. We recognise, of course, that this is an area of procedure where the law is still being articulated, and we do not wish to be too critical of either the Class Representative or Maitland Walker LLP in this case. But, for the future, we want to be clear: where this kind of problem emerges – and we recognise that the problem was not of the Class Representative's making – it needs to be brought to the Tribunal's attention in stark and realistic terms at once.

(4) The problems that Mr Harvey's withdrawal occasioned are well-illustrated in the letter written by the Defendants' solicitors, Freshfields Bruckhaus Deringer LLP, on 6 December 2022. We will not set out the terms of this letter, but the issues raised by it made absolutely clear that Mr Harvey's withdrawal had caused and would continue to cause real problems in terms of the orderly conduct of the proceedings. We do not propose to set out in any greater detail the *inter partes* correspondence, save to say that it shows a regrettable reluctance on the part of the Class Representative to "grasp the nettle".

13. Hindsight is a wonderful thing, but it does not enable the clock to be reversed. We must deal with the proceedings as they stand as of now. We make the following directions, which the parties should seek to draw up in an order for the Tribunal's approval:

(1) The trial listed for the last quarter of 2023 is vacated.

(2) Subject to a limited number of exceptions – which we will proceed to articulate – these proceedings are stayed pursuant to Rule 85 of the Competition Appeal Tribunal Rules 2015.

(3) Notwithstanding this stay, the Class Representative shall, by no later than 19 May 2023, submit a revised and amended collective proceedings claim form (the "Revised Claim Form"). The revisions to the Revised Claim Form may be as extensive or as minimal as the Class Representative is advised to make them, but:

(i) There must be a report from Dr Davis that sets out – in line with the jurisprudence in *MOL (Europe Africa) Ltd v. Mark McLaren Class Representative Ltd*, [2022] EWCA Civ 1701 and *Gormsen v. Meta Platforms Inc*, [2023] CAT 10 – a "blueprint" to trial.

(ii) The pleadings must be amended in line with any such report, as appropriate.

(iii) There must be a fresh budget, setting out how the proceedings are to be brought to trial.

(4) The costs of the Revised Claim Form are to be the Class Representative's in any event. We say this in part because we consider that the problems generated by Mr Harvey could have been handled better, and would have been less severe had they been handled better. But, mainly, this is the usual order where pleadings are amended. The costs of and arising out of the amendment are for the amending party. How far this regime will apply as regards the Defendants' past and future costs is not a matter for this Judgment, but is something we will want to consider on a later occasion, when we have seen the Revised Claim Form. In this regard, we consider all options to be open.

(5) There should be a case management conference (provisionally, two days, to include one day reading) in June or July 2023. We do not, at this stage, set out an agenda for that case management conference, but the following items will have to be considered:

(i) Whether, in light of the Revised Claim Form, certification should be revoked.

(ii) The future conduct of the proceedings, including shape of trial, preliminary issues, and timetable to any future hearing.

(6) The stay we are imposing applies to the Defendants (and the Intervener) until the Revised Claim Form has been served on them. We see no point in either the Defendants or the Intervener incurring any costs until then. If that is too swingeing a stay, then we would certainly consider revising the stay, because the one thing that can be said is that the problems grappled with in this Judgment are not of the Defendants' or of the Intervener's making.

14. This Judgment is unanimous.

Sir Marcus Smith
President

Eamonn Doran

Professor David Ulph

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 24 March 2023