Neutral citation [2025] CAT 35

Case No: 1642/12/13/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 June 2025

Before:

HODGE MALEK KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

MR AUBREY WEIS

Appellant

- v -

GREATER MANCHESTER COMBINED AUTHORITY

Respondent

Heard at Salisbury House on 6 June 2025

RULING (ADMISSIBILITY)

APPEARANCES

Mr Joseph Barrett KC (instructed by Walker Morris LLP) appeared on behalf of the Appellant.

Mr Aidan Roberston KC (instructed by DLA Piper UK LLP) appeared on behalf of the Respondent.

A. INTRODUCTION

1. This is an application to determine the admissibility or otherwise of the first witness statement of Mr Walmsley, dated 30 May 2025.

2. The background to these proceedings is already set out in my ruling of 29 April 2025 ([2025] CAT 27) that I gave in relation to the application for Mr Joel Weis to be joined to the confidentiality order in respect of certain documents.

3. The background to the witness statement is that these proceedings are in effect judicial review proceedings, and hence the amount of evidence, or the topics upon which evidence may be given, is circumscribed by the judicial review principles on what evidence is admissible or inadmissible in relation to such decisions.

4. The judicial review test is set out in section 70 of the Subsidy Control Act 2022, and the approach of the Tribunal in relation to evidence in relation to that I set out in *Dye & Durham Ltd v CMA* [2023] CAT 42 at [23] – [28]:

> "23. As set out in the Tribunal's recent admissibility ruling in these proceedings, [2023] CAT 32 (the 'Admissibility Ruling'), there are limited circumstances in which fresh evidence may be admitted in judicial review proceedings and the Tribunal will adopt a restrictive approach. The parties were invited by the Tribunal to address their submissions by reference to the principles set out in that ruling, not least because it is appropriate and fair to adopt a consistent approach to the admission of factual evidence by all parties.
>
> 24. The relevant test for fresh evidence is that set out in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584, subject to the extensions in *Lynch v General Dental Council* [2003] EWHC 2987 (Admin). The case of *R (Law Society) v Lord Chancellor* [2018] EWCA Civ 2094 is also relevant. In short, factual evidence by way of witness statement not before the decision maker will be allowed where it is evidence: (a) showing what material was before or available to the decision maker; (b) relevant to the determination of a question of fact on which the jurisdiction of the decision maker depended; (c) relevant in determining whether a proper procedure was followed; or (d) relied on to prove an allegation of bias or other misconduct on the part of the decision maker: *Powis* at 595G. These categories are not necessarily exhaustive and further categories can be developed: *Law Society* at [38].
>
> 25. The Tribunal will not usually exclude relevant evidence which it considers is necessary to fairly resolve the issues in the proceedings, and in limited10 circumstances this may include witness evidence as to the impact and implications of the decision under challenge and the proportionality of the decision, where they are correctly raised as issues in the challenge. The parties

should avoid witness evidence on collateral matters which do not fall for determination in the proceedings.

26. The Tribunal in *Tobii AB (Publ) v CMA* [2019] CAT 23 ("*Tobii*") explained that the context of Tobii's substantive application brought under s.120 of the Act was important. The Tribunal stated, at [65]:

> 'The principles of judicial review [in a merger application] confine the nature and scope of scrutiny by the Tribunal to the process undertaken in not the merits of the CMA's decision making, and the Tribunal is under an obligation to determine merger appeals as expeditiously as possible. These are key factors that impact on the Tribunal's assessment at the case management stage of the proceedings as to what evidence is required to deal with *Tobii's* s.120 Application justly and at proportionate cost.'

27. The Tribunal's general approach in judicial review cases has been that permission to adduce factual evidence not before the decision maker is not granted unless the *Powis* test is met. Where the party seeking to adduce the factual evidence claims that it is not new in substance, the Tribunal has looked at the content and nature of the evidence to determine whether it is necessary, taking into account that it is a specialist Tribunal.

28. If the factual evidence is not new in substance, the Tribunal will consider its content and nature to decide whether it is necessary to determine the application under s.120: *Tobii* at [23], [68], [76]. Since it is not the function of a factual witness to engage in argument or opinion, evidence containing such matters, or repeating matters already present in other documents, should not be admitted: *Tobii* at [69] – [70], [77]. As explained in paragraph 7.61 of the Competition Appeal Tribunal Guide to Proceedings 2015:

> "As regards witnesses of fact, a witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the case file, to set out quotations from such documents or to engage in matters of argument.""

5. The relevant provisions of the Competition Appeal Tribunal Rules 2015 ("CAT Rules") are as follows:

> "4 — (1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (d) ensuring that it is dealt with expeditiously and fairly.
>
> …
>
> (5) Active case management includes

…

(f) ensuring that the main hearing is conducted within defined time-limits."

…

"19 —

…

(2) The Tribunal may give directions—

…

(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;

…

21 — (1) The Tribunal may give directions as to—

…

(b) the issues on which it requires evidence, and the admission or exclusion from the proceedings of particular evidence;

(c) the nature of the evidence which it requires to decide those issues;

…

(f) the way in which evidence is to be placed before the Tribunal.

…

(2) In deciding whether to admit or exclude evidence, the Tribunal shall have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following factors—

(a) the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal;

(b) whether or not the substance of the evidence was available to the respondent before the disputed decision was taken;

(c) where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time;

(d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded;

(e) whether the evidence is necessary for the Tribunal to determine the case.

(3) Unless the Tribunal otherwise directs, no witness of fact or expert witness maybe heard unless the relevant witness statement or expert report has been submitted in advance of the hearing and in accordance with any directions of the Tribunal."

6. The proceedings have taken what I would say is a truncated course since the last hearing in relation to the confidentiality ring order. The amended notice of appeal, as well as the statements of Joel Weis and Mr Murray Lloyd, were filed relatively recently, on 6 and 9 May 2025. The substantive hearing started on 27 May 2025 and continued on 29 May 2025, when the hearing concluded. In the course of the submissions on behalf of the Appellant, various criticisms were being made of the Respondent, and various points raised in argument had not been foreshadowed in the amended Notice of Appeal dated 6 May 2025, so at the hearing Mr Robertson KC did address certain points on the basis of instructions.

7. At the end of the hearing, it was agreed and Mr Barrett KC on behalf of the Appellant in fact invited that the Greater Manchester Combined Authority (the "GMCA") would file a witness statement specifically covering the points upon which Mr Robertson had made submissions on instructions. Those two points were in relation to the matters which are, firstly, those which are covered by the statement of Mr Walmsley at paragraphs 16 and 17. Those paragraphs read as follows:

> "16. I did not attend the gateway panel meeting held on 22 February 2024 as I was on holiday. I did however, in advance of the meeting, prepare the gateway paper (or 'investment proposal') which was presented to the gateway panel at that meeting. Following the meeting, I also received the presentation slides presented by Renaker to the panel.
>
> 17. I did attend the credit committee meeting on 7 March 2024. While I am not a member of the credit committee, as transaction manager for the proposed loans I delivered a presentation to the committee. During the credit committee meeting, the committee was presented with the gateway paper as well as the 'GM Housing Fund – Credit Paper' which Catherine Edwards drafted."

8. I have decided that those paragraphs are admissible and should be in evidence before the Tribunal.

9. The second point upon which specific instructions needed to be given was in relation to the interest rate setting paper, of which the first draft appears to have been typed relatively shortly after a letter on behalf of Mr Weis. At the hearing, Mr Barrett on behalf of Mr Weis asserted that the paper was a response to that letter. At the hearing, Mr Robertson on instructions said it was not, it was a standard form process, and it was not influenced by the letter effectively challenging the loan process.

10. Accordingly, this is covered in paragraphs 25, 26 and 28 of the witness statement, which read as follows:

> "25. To reiterate, I would like to stress that the IRSP is a standard part of the GMCA's loan approval process. The IRSP is drafted for each loan that is approved at a GMCA public meeting. The IRSP provides a consistent point of reference for each transaction to document that we have considered all the relevant matters and have tested all the information / assumptions which were used to present the development and terms of the loans in the relevant investment proposals and that these all remain valid or have been amended. The IRSP therefore reflects the information that has gone through the rigorous approval process (namely the Gateway Panel, Credit committee and the public meeting). Ultimately this serves the purpose of showing whether the development proposal and loans stand up to assessment and diligence and therefore whether the pricing proposed is still appropriate.
>
> 26. As stated, when I am acting as the transaction manager on a loan I will normally start to prepare the IRSP at some point following the public meeting which has approved the loans and delegated authority to start the due diligence process.
>
> …
>
> 28. When I started to draft the IRSP in April, this was simply me following the typical process that I adopt as transaction manager on a loan. I did not alter my process as a result of Mr Weis threatening to bring and then bringing a claim."

11. I determine that that material is admissible and falls precisely within what the Tribunal wanted further evidence from, to confirm instructions given to Mr Robertson and repeated before the Tribunal at the hearing.

12. The other part of the witness statement which deals with Mr Walmsley's background, which is effectively explaining who he is and how he fits in, to give the context to those passages, is set out in paragraphs 1 to 10, and Mr Barrett sensibly does not object to that.

13. I should clarify that in relation to paragraph 28 of the witness statement, Mr Barrett made the point that this simply does not have enough detail, it does not explain, for example, whether or not Mr Walmsley had seen the letter from Mr Weis's solicitors, and Mr Robertson said that he will give a fuller answer in relation to that question in the next version of the witness statement. So accordingly, he is given leave to answer the points made today by Mr Barrett.

14. As regards the remainder of the statement, this largely deals with allegations which were made during the course of the proceedings, including some material that is referred to in the skeleton argument of Mr Barrett in support of an argument that there was a lack of candour on the part of the GMCA. I do not consider that the Tribunal needs to have this additional material. There is sufficient material before the Tribunal to deal with the duty of candour point to the extent that it is relevant to the issues in the action, and Mr Robertson has provided separate submissions in relation to the allegations of breach of candour, alleged particularly against Ms Blakey's fifth witness statement. We do not need further evidence to deal with that.

15. I would like to point out that in relation to judicial review proceedings, the approach of the Tribunal can be quite strict, and ordinarily admissibility of a statement like Mr Walmsley's, had it been served prior to a CMC or prior to a hearing, I would have been prepared and indeed it would be my normal practice to consider the admissibility of the witness statement, or parts of it, and make a ruling prior to or at the commencement the hearing. We are in an unusual situation here, because I am being provided with a witness statement post hearing, and it is not really satisfactory to have to deal with issues of admissibility at this stage.

16. Accordingly, the GMCA has liberty to file a witness statement of Mr Walmsley covering the specific paragraphs I have indicated from the first witness statement, with the additional clarification in relation to the allegation that the interest rate setting paper was a reaction to effectively the letter before action on behalf of Mr Weis.

Hodge Malek KC
Chair

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 6 June 2025