

Decision No. 22/85
BRO/ADM-31

Before the Broadcasting Tribunal

IN THE MATTER of the Broadcasting Act 1976, and in the matter of applications for television warrants and television programme warrants:

Chairman: B. H. Slane.

Members: A. E. Wilson, and R. Boyd-Bell.

PROCEDURAL RULING

The 12th Day of December 1985

1. On 10 December Mr Thomas applied to recall both Mr Frankham and Mr Fernyhough in relation to two topics which for convenience, but not by way of accurate description, have been labelled "Corporate Structure" and "Subsidy" question.

(a) *Corporate Structure*

Mr Thomas wished to recall Mr Fernyhough to give further evidence to show that the operating companies will have the same work as any regional television company discretely owned or otherwise and to establish that the differences highlighted by Professor Schmitt are differences without a distinction or meaning.

In support he says that after Mr Frankham's cross-examination and re-examination had been completed, Professor Schmitt "asserted during the course of his questioning of Mr Fernyhough that ITV's corporate structure was a sham."

He claimed that no other applicants had made this sweeping assertion in evidence in opposition and there was no opportunity to prepare for the point in advance, that there was no opportunity to re-examine Mr Fernyhough on this point; that Mr Frankham had immediately followed Mr Fernyhough into the witness box and that there was no opportunity to learn the extent of Mr Frankham's experience in this respect and so enable counsel to ask him a question about it.

As far as that latter point is concerned, Mr Frankham did not directly follow Mr Fernyhough's presenting of his evidence in chief. Mr Frankham was introduced as a director of a number of public and private companies.

Mr Thomas asserted that the structure was not uncommon and that questions had been directed towards a number of topics, which he set out.

He stressed that the line of questioning emanated from the Tribunal and did not arise in evidence in opposition or in cross-examination.

He desires to call Mr Frankham to give evidence as to what is common in commerce and its application in the context of the present hearing which he describes as a narrow point.

The Tribunal has carefully considered the point and does not consider it appropriate for Mr Fernyhough or Mr Frankham to be recalled to give evidence as requested.

The reasons for this are:

- (i) Mr Thomas made the structure of critical importance in his opening and should have expected questioning on it. It was described as a "major plank" in the general introduction of the ITV application.
- (ii) Indications in opposition evidence from other applicants using such expressions as "pretence", gave fair warning of the type of comment that might be made.
- (iii) Mr Thomas was indeed aware of the problem since his first question in re-examination of Mr Fernyhough was, "During the cross-examination, I think by Mr Baragwanath, Mr Fernyhough, you referred to the regional companies being effective working companies with effective working boards. Are you able to consider, or compare, the structure between the ITV holding company and the subsidiary companies with the structure existing outside the broadcasting industry where there is a holding company and operating companies?" It will be recalled that Mr Fernyhough answered that question and in doing so referred to most large companies pushing out responsibility into their operating units and giving responsibility to operating boards and suggested it was conventional wisdom in business circles these days.

The Tribunal also heard evidence from Mr Fernyhough at another stage, in which he described the use of local companies and boards with local identification in the liquor industry from his own knowledge.

Mr Thomas now seeks to reinforce that evidence and to expand on it, but had ample opportunity through Messrs Silvester and Clarke, who were also named by Mr Thomas as witnesses relating to the structure, and he took the opportunity with Mr Silvester (and also with Mr Milnes). Furthermore, they were the witnesses who put together the structure as both Mr Frankham and Mr Fernyhough became associated with the application only after the application had been filed. We do not accept therefore that Mr Frankham and Mr Fernyhough are the only witnesses to deal with points which Mr Thomas wishes to raise, insofar as they relate to ITV itself.

Mr Fernyhough admitted he could not comment on overseas television structures in detail.

We do not need the assistance of Mr Frankham on what the position is in commerce. This Tribunal is not a jury; it is deemed to have a little commercial knowledge.

Finally, the whole point is misconceived by the applicant which has misunderstood that nature of the questions that led to the word sham. It arose out of the so-called subsidies question which Professor Schmitt had been discussing with Mr Fernyhough.

Any suggestion that Mr Fernyhough was unable to cope with questions about structure or was caught out of hand, hardly stands in line with his experience as a company director and former member of the Securities Commission.

This Tribunal has been hearing the case of ITV for 22 sitting days. It is bordering on the incredible that the applicant should claim that, as a result of some questions from the Tribunal, it has been caught unawares and now has to recall the chairman of the company to give evidence to show how the companies will actually work compared with how other regional television companies would work and to "refute" what it thinks Professor Schmitt was saying.

Professor Schmitt was putting a proposition, not expressing a concluded view. Because he is not a lawyer he may not have put his views in a form which would be used by a lawyer to indicate clearly that he was putting a proposition to the witness. That should not be construed as any sort of prejudgment.

As far as Mr Frankham is concerned, Mr Thomas has already sought to have Mr Frankham's evidence given on two occasions. Mr Frankham gave evidence for a lengthy time and it was Mr Thomas's choice, in view of his introduction of Mr Frankham as a director of public companies, to have re-examined him on the kind of structure which he had commended.

(b) *"Subsidy" Question*

Mr Thomas sought to recall Mr Frankham and Mr Fernyhough because he said, "Professor Schmitt indicated that he was satisfied that it was not necessary for region one to "subsidise" region four (or any other region)." This followed a lengthy exercise which Mr Wall was invited to undertake in the witness box, in which region four was hypothetically omitted from the network.

Mr Thomas's memory is incomplete. Mr Wall was given, at the end of a week's sitting, details of some information which Professor Schmitt requested that he prepare to present the following week. There were two questions.

One involved some calculations and Mr Wall was invited to prepare the information which Professor Schmitt explained to him, as well as giving him the two questions in writing.

Professor Schmitt also gave him notice of a possible second question which may or may not have been asked, depending on the information supplied and the answers to questions arising from that information when Mr Wall appeared the next week. Mr Wall therefore had every opportunity to think about the question which related to the so-called subsidy question.

In fact, Professor Schmitt was referring to the interdependence of the regions leading to an invitation to comment on a proposition that, given interdependence, the concept of subsidisation might not be the most relevant one. Indeed it was a topic that he had fully explored with Mr Fernyhough in a slightly different way which, instead of assuming there was no service in the South Island, rather assumed that it was conducted by a separate company. The matter therefore should have come as no surprise to Mr Wall.

Mr Thomas indicated the structure was related to the need for subsidies to flow from one region to another. ITV selected the issue. We see no reason to recall Mr Frankham to produce some further exercises which could be undertaken, or to criticise the previous approach, seeing in essence it had been put to Mr Fernyhough already.

As far as calling Mr Fernyhough is concerned, he has already been asked questions by Professor Schmitt exactly on this point, they ran to several pages and the Tribunal had the benefit of Mr Fernyhough's views. It was that discussion which led to the use of the word "sham", not a discussion of corporate structure simpliciter. The matter was fully explored and some of Mr Fernyhough's answers are lengthy and he firmly put the case for ITV's point of view. It will also be remembered that Professor Schmitt gave Mr Fernyhough an opportunity to think about the matter overnight and flagged the fact that he intended to ask other applicants about the alternative method of recognising the fundamentals of the networking situation.