Decision No. 21/85
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.

TRIBUNAL COMMENTS ON LENGTH OF HEARINGS

The 12th Day of December 1985

THE Tribunal observes that it spent a day hearing the legal arguments in support of these applications made by ITV, and the responses from all the counsel involved. It does not suggest for a minute that any of the submissions were presented in such a way that they took longer than necessary. But it does illustrate how time can be consumed in such a hearing. Fortunately there have not been a lot of these situations.

We would hope that the parties will be mature enough by now to know that it is unnecessary to make applications to produce further evidence from witnesses in respect of matters that have already been raised and dealt with. It is understandable that counsel will be put under pressure by parties to keep on answering other people's positions or to respond to press reports of the hearing, or to continue the backwards and forwards of the ball across the table-tennis net.

The Tribunal is satisfied that there is a complete misunderstanding of the value of cross-examination in this hearing in which a great deal of evidence has been filed, evidence in opposition has been filed and opportunity has been given to reply to any evidence filed in opposition to an application.

Cross-examination should be short, should be specific and yet it has taken a great deal of time. The length of that cross-examination can be shortened on the instructions of the clients to the counsel concerned and by instructions to witnesses by counsel to listen carefully to the questions and to answer concisely.

The length of cross-examination has probably added to what Mr Thomas has described as the obsessiveness, which is contagious and which leads to paranoia.

There is a desire to produce further refutation to rebuttal that has already been given in response to a reply that was given in evidence by another witness who was not the one who originally filed the evidence in reply to the opposition evidence that was put forward against the evidence in support.

The Tribunal has already told counsel in private in no uncertain terms, that the blame for the length of these proceedings falls squarely on the shoulders of the parties and their counsel. It is not for us to apportion the blame, but we are satisfied that far too much value has been placed on cross-examination, on the desire to be seen to "win" the cross-examination and a lack of appreciation of the real purpose of it.

If counsel need any assistance in explaining it to their clients, the Tribunal will supply a reference to cross-examination in "Handy Hints on Legal Practice" by Gordon Lewis, the famous Australian author.

It is hoped the New Year will give a sense of urgency, which will not disadvantage any party, but will enable the pace of the Tribunal's sittings to increase and real progress to be made in relation to issues that matter.

The Tribunal accepts that there is a good deal in what Mr Thomas says about it appearing to the parties that what is going on in the hearing room—largely cross-examination—is the most important part. But that is not the reality.

The substance of the cases, the criticisms and opposition and the answers in reply are important. They are already known.

The tussle between a witness who is committed to his application and who may be unable to accept a criticism being put several ways, several times over an extended period.

The Tribunal has set out a procedure and if reference is made to the initial procedural direction, you will see that we gave due warning to the parties and their advisers of the dangers of such a hearing becoming a trial by ordeal.

I wish to refer to the matters raised previously with counsel.

When the Tribunal first gave its first procedural direction, it quoted extensively from some remarks made at the Australian Broadcasting Tribunal on 3 April 1985 during the Perth television inquiry.

Some of those remarks are worthy of repetition.

I quote again:

> "The applicants obviously require, for the duration of the hearing, the presence of a range of directors, managers and experts whose services would clearly be in demand for other projects. The applications should be the subject of testing on their merits, but not subject to trial by ordeal. The ability to survive a protracted inquiry before an administrative tribunal is a poor test of ability to operate a television station. It is not among the public interests contemplated by the Act that the resources of a licence applicant or of interest groups who seek to take part in the inquiry, should be depleted by days or weeks of unnecessary or irrelevant evidence."

and

> "To summarise this landscape of issues having some relevance to the inquiry is a very broad one. It would be an impossible task for the Tribunal at the behest of the parties, to beat every bush and drag every pond in that landscape. Licensing inquiries would take so long that new broadcasting services would rarely, if ever, have the opportunity to commence. . ."

The Tribunal is concerned that the comments it made are appearing now to be predictive rather than regarded as a solemn warning as they were intended.

We have asked the parties to have some sense of proportion in the adducing of evidence, the volume of material and the extent of cross-examination. That has had some response but we are concerned about cross-examination. We believe it has been used to engage in lengthy attempts to deal with comparatively minor matters which are in dispute and we have observed counsel, on occasion, going slowly though a number of exploratory questions which add nothing to the body of knowledge, the impression of the witness, the credibility of the application or anything of particular benefit to the case of the client on whose behalf—and perhaps at whose behest—the cross-examination has been undertaken. We gave that warning but we regret it has not always been heeded.

The parties have chose to draw on extensive volumes of evidence, to file, as was their right, evidence in opposition to other applications and to reply to that opposition evidence which has been filed by others. This has given an ample opportunity for the Tribunal to sum up the points for and against each of the applications.

The task of cross-examination should be comparatively short. We appreciate very much the difficulty that the broadcasters and others who are cross-examined are, in very many cases, verbose but the skill of the cross-examiner consists to a large extent in confining the question to the answer required and the Tribunal can only assist in restricting the length of the responses when the question has been framed to require a comparatively short response.

Counsel should brief their witnesses to respond to the question given and not to endeavour to anticipate what it is leading to or what arguments can be raised in answer to the point. Their own counsel can, in re-examination, obtain further information in response from them and many of the matters traversed are unfortunately matters which would be better dealt with by argument. The Tribunal considers that the parties have their own solution. They can confine this hearing to a reasonable length or they can persist in the course of action which leads to enormous cost, tedious and lengthy cross-examination and the introduction of a needlessly large volume of material.

While the Tribunal cannot, in any sense, change the rules half way through the match, the Tribunal can however, point out to the parties and remind both counsel and their clients, that the pursuit of some of these matters is not only of little use to the Tribunal in arriving at its decision, but may be masking the real issues from the combatants.

We are not convinced and nor are most of the parties, that an increase in the number of days of hearing each week will progress the matter any faster.

Because the hearings are taking longer than expected, the Tribunal will have to pause in order to deal with some other business and therefore the Tribunal will not sit on the television hearings in January when it is dealing with other matters.

We reiterate that it is for the parties to decide the length of these hearings. The law forbids the Tribunal from imposing arbitrary limits and to endeavour to provide flexible limits is more likely to lead to procedural wrangles which are themselves time consuming.

In many respects the points we raised with counsel have been taken on board by the parties, or some of them. But we have no doubt that the length of the hearings could be at least halved and possibly reduced by two-thirds by a careful pruning of irrelevancy wrapped up as relevance and of argument presented as cross-examination.

Signed for the Tribunal:

B. H. SLANE, Chairman.