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IN THE COMPETITION

APPEAL TRIBUNAL

Case No. 1031/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 November 2006

Before:
SIR CHRISTOPHER BELLAMY
(The President)

THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

AQUAVITAE (UK) LIMITED

1045/2/4/04

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

ALBION WATER LIMITED

1046/2/4/04

Supported by

AQUAVITAE (UK) LIMITED

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

Supported by

DŴR CYMRU CYFYNGEDIG

and

UNITED UTILITIES WATER PLC

—————
PROCEEDINGS

APPEARANCES

Mr. Rhodri Thompson QC and Mr. John O'Flaherty appeared on behalf of the Appellant and Aquavitae (UK) Limited.

Mr. Rupert Anderson QC (instructed by the Head of Legal Services, Water Services Regulation Authority) appeared on behalf of the Respondent.

Mr. Christopher Vajda QC and Mr. Meredith Pickford (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of Dŵr Cymru Cyfyngedig.

Mr. Simon Gardiner (of United Utilities) appeared on behalf of United Utilities PLC.

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1 THE PRESIDENT: Good morning, ladies and gentlemen. I first of all must apologise for the late
2 sitting of the Tribunal this morning. You would not think it would take South West Trains two
3 hours to get from Winchester to Basingstoke but it did and, on this morning of all mornings,
4 that is something that was regrettable.

5 Can I just start by seeing who we have here today? I think, Mr. Anderson, you have been kind
6 enough to bring Miss Finn with you?

7 MR. ANDERSON: We have.

8 THE PRESIDENT: Good morning, Miss Finn.

9 MR. ANDERSON: We have, although I have to say the time she has available ----

10 THE PRESIDENT: Yes, I do appreciate that, which is why I am very frustrated that we have already
11 lost the time that we have. I think it might be useful if I just spend a moment trying to sketch
12 out where we are and, in particular, Miss Finn, from your point of view where we – the
13 Tribunal – think this case is. I would like to thank you very much indeed for coming today, we
14 appreciate that you have had to re-arrange your diary and that has been helpful from our point
15 of view. I think our basic thought was that it is sometimes easier when one has responsibility
16 for a case to get a direct feel for what is going on by actually being present in the situation and
17 I think the situation as far as the Tribunal is concerned that we have here is that we still have to
18 give a final Judgment in this case, which we intend to do within the next three weeks and, in
19 that connection, we still have to deal with a number of issues relating to how the Authority
20 handled dominance in the Decision with certain issues relating to abuse, whether we should
21 remit certain matters to the Authority, what final and/or interim orders we should make and so
22 forth, including issues as to costs and permission to appeal and we are already working on
23 those issues and clearly the stewardship of the Authority and its predecessor as regards the
24 legislation in question remains a central issue or feature of this case.

25 On the other hand, there is sometimes in a case a situation where one comes to a certain
26 juncture where it may be possible – commercially speaking – for there to be some chance of an
27 agreed solution and it is part of our remit in this Tribunal to satisfy ourselves that such
28 opportunities as there may or may not be have actually been explored, and that efforts have
29 been made to reach a solution that avoids further litigation if that is possible – it may not be
30 possible, but if it is possible that is something that the Tribunal as a Tribunal is conscious of.
31 So I think why we asked you to come was basically to ensure that that particular possibility of
32 an amicable resolution has not been overlooked – I am sure it has not – and to reassure the
33 Authority, if reassurance be needed, that from the Tribunal's point of view, that there be no
34 criticism if efforts were now made, to reach a solution. Indeed, that would be an entirely

1 responsible approach on the part of the public authority. Exactly how that is, or could be
2 done, if it could be done at all is entirely up to the parties unless and until they seek any
3 indications or assistance from the Tribunal. We did, however, in our letter of Friday suggest
4 one possibility, which is the possibility of some form of mediation as an alternative in this
5 case, which is not a procedural possibility the Tribunal has tried out before, but we have had it
6 in the back of our mind to explore that possibility in a suitable case at a suitable moment. In
7 that regard, all I have done so far is to make contact with a possible mediator – a very
8 distinguished former Judge called Sir David Edward – simply to ascertain whether or not he
9 would be available and willing to undertake such a task and to ascertain whether he had any
10 conflict of interest (which he has not). I have not spoken to him at all about the details of the
11 case, except to say that there is one, and that the Judgments are on the website, but if that was
12 one way of moving forward then again that is another possibility. It depends on the
13 willingness of the parties to reach some sort of solution.

14 That I think was what we really wanted to say as far as the Authority is concerned. Having
15 said that, as far as the Authority is concerned, if I may turn to you, Mr. Vajda, from the point
16 of view of Dŵr Cymru , we have not been able to accept the submissions made on behalf of
17 Dŵr Cymru, but we are not entirely insensitive to the situation in which your company finds
18 itself and a willingness to agree terms in a situation like this does not, in the Tribunal’s view
19 imply any kind of public climb down on the part of your clients but may, on the other hand,
20 involve a sensible commercial decision and a Statesman-like approach, so again from the
21 Tribunal’s point of view, we would find it unfortunate if serious efforts had not been made,
22 and we would be particularly keen to see that if negotiations were to take place it would not be
23 a question of just going through the motions but that something serious might be possible.

24 One sometimes, when reading documents, may or may not get a correct impression.

25 Sometimes, if I may say so, one or two of the documents emanating from Dŵr Cymru may
26 unwittingly give the impression of a certain degree of perhaps playing for time, or even
27 prevarication and that would not be, I am sure, the impression that Dŵr Cymru would wish to
28 create, and I mention it only because that is something you may wish to correct and put us
29 straight on. United Utilities no doubt would have its part to play if there was any negotiation,
30 but if I may now, from your point of view, Mr. Thompson, turn to Albion, if there was any
31 chance of a reasonable settlement in this case then Albion has to compromise as well, and that
32 I think would have to be clearly understood. I think this part of the discussion is apart from the
33 various issues that we actually have to deal with today – we have quite a number of issues to
34 deal with today, but we thought, Miss Finn, it might be useful if you could get a feel from what

1 is going on in this case that may or may not be helpful to you as you discharge the very heavy
2 responsibilities that the Authority has to discharge; so thank you very much for coming. I do
3 not know, Mr. Anderson, whether you – or through you – Miss Finn would like to respond to
4 any of that, or whether we should just let the argument unfold.

5 MISS FINN: Thank you, and thank you for inviting me here at this stage obviously to see what is
6 happening in the proceedings. I am sorry that my time is short. Just to say that from the
7 Authority's point of view, and in the context of what you have just said, we have set out in a
8 letter recently to Albion – and we had a meeting with them, and exchanged further letters – the
9 Authority's suggested way of trying to move this case forward, and precisely the manner that
10 you have talked about in terms of any constructive manner that will assist all of the parties to
11 progress forward, and we hope that that forms a basis for discussions among the parties willing
12 to discuss that further with the Tribunal if there is any desire to do so.

13 THE PRESIDENT: Thank you very much. I do not know whether anyone else would wish to
14 intervene at this stage, or whether it is best just to get on with the arguments that we need to
15 get on with. Mr. Vajda, are you able to give us any indication of what your client's position is?

16 MR. VAJDA: Yes. It may be because of the delays in your journey that you have not yet had an
17 opportunity of yet looking at a draft proposed agreement which has been handed to the
18 Registrar this morning.

19 THE PRESIDENT: The answer to your question is no, we have not; I think the Registrar told me
20 that there had been a document but he was not, until we had had an opportunity to discuss it
21 with you, quite sure what to do with it, so he has not circulated it to the Tribunal.

22 MR. VAJDA: Well I am very happy for the Tribunal either to take five minutes to read it or for me
23 to take the Tribunal through it orally. It is a document that I have handed to the other parties
24 this morning and Mr. Anderson, on behalf of the Authority, has made one or two observations.
25 I do not know what Mr. Thompson's position is on it. I am very much in the Tribunal's hands
26 as to how the Tribunal would like me to take that forward.

27 THE PRESIDENT: Well I think we had better have a look at it.

28 MR. VAJDA: Would the Tribunal like me to take it through it orally, or to rise? It may be helpful if
29 I go through it orally.

30 THE PRESIDENT: I think that probably would be a good idea, Mr. Vajda, if you do not mind doing
31 it – we are in open court, it is a matter for you.

32 MR. VAJDA: Yes.

33 THE PRESIDENT: If you want to put it on the public record, fine.

1 said that they are completely different calculations, because in our submission they are exactly
2 the same.

3 The point that is now raised by the Authority is reference to long run marginal cost and, in
4 particular, two documents RD21/97 which I think the Tribunal requested, and presumably has
5 access to, but more particularly a letter of 21st August 1996 from Dŵr Cymru, which is
6 appended to the offer letter of 15th November.

7 THE PRESIDENT: Yes.

8 MR. THOMPSON: If we start with the letter in August 1996, there is, to our mind, a rather general
9 reference to long run marginal cost, and four figures are given for Deeside, Cardiff, Swansea
10 and South Pembrokeshire, on an assumption of an extra 20 ml per day, and there is a table
11 showing the figures, and again broken down, real water treatment and distribution, so the same
12 split and some very widely varying figures from 16p for Swansea up to 45p for Deeside, and as
13 I understand it these are potable costs' figures.

14 THE PRESIDENT: They appear to relate by implication – it is not actually said – to potable
15 supplies.

16 MR. THOMPSON: Then in RD21/97, which was sent to Mr. Dhanowa on 7th November, there is a
17 general introduction and there is an analysis of Shotton Paper at p.5 and following of the
18 document, and in particular the third subparagraph of 4.6 indicates that for potable water the
19 starting point for the price was an estimate of the LRMC of water divided by Dŵr Cymru and
20 then based on work OFWAT has done, and some of the more robust information provided by
21 companies, presumably the other companies on LRMC, it is seen that this estimate was
22 relatively low. So it seems that the use of this material related to potable water. But then there
23 is a reference in the third paragraph of 6 to the estimate of LRMC being again used but not
24 really any explanation of how it was used, and then reference to the special agreements with a
25 variety of different companies.

26 Then in the penultimate paragraph it says “There is no substantial evidence to suggest the
27 LRMC of non-potable water is below 26p.” So that does go slightly further than before and
28 there is a read across to LRMC but that seems to be the extent of the reasoning that was used
29 and certainly, when it came to 2001, Dŵr Cymru was informing OFWAT that essentially the
30 bulk supply and common carriage prices were exactly the same, subject to reduction of the
31 resource cost where one was dealing with common carriage rather than bulk supply.

32 THE PRESIDENT: This document, Mr. Thompson, appears to be about a year after the Director's
33 provisional determination of bulk supply price, which I think from memory was by letter of
34 12th December 1996.

1 MR. THOMPSON: I think that is right. That appears to be the explanation that was given then,
2 although in December 1996 the suggestion had been that, at least in relation to non-potable the
3 decisive factor had been comparisons with other companies, as the Tribunal will recall. So the
4 main point we take from that is that although it appears that LRMC had some sort of
5 background role in 1996 certainly Dŵr Cymru's understanding by 2001 was that it was
6 following exactly the same methodology in calculating its common carriage as it had done in
7 relation to the bulk supply, and so far as I am aware there was no dissent from the Authority in
8 relation to that. It is against that background that we say the approach reflected in our draft
9 order is simple and fair, because it reflects the underlying substance of the issues before the
10 Tribunal. Obviously, it would not be necessary if the Tribunal intends to resolve everything,
11 as it were, finally in December, but if there are matters still outstanding then it appears to us to
12 be a reasonable way of holding the ring, subject of course to the views of the Tribunal or any
13 further guidance from the Tribunal as to how far it is prepared to go ----

14 THE PRESIDENT: In relation to that and the Tribunal resolving matters as far as it can, what are
15 you asking us to do? What is your position?

16 MR. THOMPSON: I think that was reflected in our submissions for 24th October hearing.

17 THE PRESIDENT: Your position then was that we should find as much as we can and I think you
18 went so far as to suggest that if we made certain findings in relation to dominance we should
19 also make certain findings in relation to abuse?

20 MR. THOMPSON: Certainly in relation to margin squeeze it appears to us that on the balance of
21 probabilities and the tests that are applied that there is certainly before the Tribunal sufficient
22 to make a finding of a margin squeeze, and we would say the evidence before the Tribunal is
23 essentially all one way for Mr. Jeffrey and therefore the level of that margin squeeze could also
24 be found.

25 In relation to excessive pricing, again evidence is before the Tribunal based on the detailed
26 analyses of Dr. Bryan, and the Tribunal has made its findings about the lack of, as it were,
27 competing detailed information although it has expressed some reservations about the extent to
28 which one could simply read across from Dr. Bryan's findings and make findings of fact, given
29 the uncertainties that there are in this area. But, it is obviously a matter for the Tribunal - how
30 far it is prepared to go, both on the law and, if it is with us on the law, in relation to actual
31 numbers. Clearly, our case is as set out in the statements of Mr. Jeffrey and Dr. Bryan.

32 THE PRESIDENT: Yes.

33 MR. THOMPSON: I think that that probably takes me to the issue of costs. The outline position -
34 at least between ourselves and the Authority - is, I think, reasonably clear. We seek our costs

1 as we have evidenced them. The Authority, as I understand it, concedes that we are entitled to
2 85 percent of our costs, subject to some form of discount to reflect what it says is the lack of
3 commercial significance of the case. We say that there should not be any such discount in
4 relation to the substance and the question of the 15 percent discount that the Authority
5 suggests. We would say that in the round we have won on both the principle points and,
6 indeed, on the ECPR point which has emerged, and that any failings in our case really reflect
7 the peculiar circumstances and the lack of information available to us - information which has
8 essentially been under the control of Dŵr Cymru and/or the Authority throughout, and the fact
9 that we have bumped into the furniture from time to time is because we have been blundering
10 around in the dark, and if the Authority or Dŵr Cymru had put the lights on we would have
11 avoided tripping over.

12 In relation to the significance of the case, we say that this is being treated as a test case by the
13 Authority itself in a number of cases. The scope of the case has expanded to reflect its
14 significance for the industry, and that there is no reason why Albion Water should fund a
15 regulatory investigation which will have significance for the wider industry. So, we would say
16 that there should not be a discount.

17 The question then arises as to what is recoverable, which broadly comes under two heads: first
18 of all, counsels' fees. Perhaps I should put it the other way round. Counsels' fees is one
19 element. Albion Water's internal costs is the other. We would say in relation to counsels'
20 fees that the arrangement in outline is a very straightforward one - an hourly rate at an agreed
21 rate - and that we have provided sufficient information to the Treasury Solicitor to understand
22 what the arrangement has been. But, obviously, if more specific information is required we are
23 happy to provide it, and it may be that that will be sufficient either for some form of agreement
24 or to be forthcoming between now and the end of December. I do not know. But, I do not
25 understand there to be a huge issue of principle, although some issues are raised about the role
26 of our solicitors and whether either they, or possibly we, have cut corners, given the particular
27 circumstances of this case. But, that is an issue which perhaps Mr. Anderson will want to
28 make some comments on. But, I do not understand there to be major issues of principle.

29 THE PRESIDENT: I do not know how you would like to handle this, Mr. Thompson. As far as I
30 can see, the suggestion is that there may have been a conditional fee agreement which should
31 have been disclosed, but was not disclosed. But, quite how the argument runs I am not
32 completely clear at the moment. You seem to be submitting that there is an agreement for
33 payment by instalments, and even if, on one unfolding of events, it would take rather a long

1 time to pay off the outstanding, that was nonetheless the agreement and is not a conditional
2 agreement in terms of the rules.

3 MR. THOMPSON: Indeed. I think probably the Tribunal will anticipate that when we entered into
4 this agreement, we perhaps did not anticipate that we would have been still arguing about quite
5 so many matters over two years later. I think it has obviously been a case which has expanded
6 beyond certainly our anticipated scope, and as it has done there have obviously been
7 commercial implications. But, in substance the agreement has remained as it always was. It
8 becomes more onerous for both sides with the passage of time, but in my submission it is not a
9 contingency fee or a conditional arrangement. It is an unusual ----

10 THE PRESIDENT: Well, a contingency fee, in very crude terms, would be a sort of no win/no fee
11 type arrangement. A conditional fee arrangement, at least in some cases, would be an
12 agreement whereby in the event of success there would be an uplift of some kind within
13 permitted limits on the fees ultimately chargeable. Is that right?

14 MR. THOMPSON: Yes - and it is neither of those things. What it is is what has been revealed in
15 evidence whereby we were paid a relatively modest lump sum and we have been paid monthly
16 payments thereafter. As fees have mounted up so the backlog has mounted up, but the
17 arrangement has never been changed. Therefore you now have a small and relatively
18 impecunious company with a relatively large outstanding debt which we would like
19 indemnified.

20 The position in relation to Albion Water's internal costs - the Tribunal has indicated that it
21 would like information in relation to work done as a solicitor and as an expert, and other, at
22 least in relation to Bathhouse. As we understand the quite complex submissions of the
23 Authority - not all of which I am in a position to necessarily deal with in great detail today -
24 and where I would be grateful to deal with them in writing by the end of the week - is first of
25 all the scope of Litigation In Person Act, and in outline our submission would be that the costs
26 jurisdiction of the Tribunal derives from Section 15 of the Enterprise Act 2002, and Schedule
27 4(2)(1)(h), and also from Section 55(1) of the CAT Rules ----

28 THE PRESIDENT: Sorry. Just let me go back to the main statute. You said ----?

29 MR. THOMPSON: Section 15 of the Enterprise Act.. The Tribunal Rules. That makes provision
30 about the Tribunal Rules. Are you working on the purple book?

31 THE PRESIDENT: I am working on the purple book. It happens to be the eleventh edition that I
32 have in front of me.

33 MR. THOMPSON: Yes, that is the same one as I have. Schedule 4 to the Act is at p.293 (in the
34 bottom right-hand corner). Paragraph 17(1)(h) has provision for the award of costs or

1 expenses, including allowances payable to persons in connection with attendance before the
2 Tribunal ---- Then, when one comes to Rule 55 of the Tribunal Rules, the costs jurisdiction is
3 based on costs and expenses recoverable before the Supreme Court of England & Wales, the
4 Court of Session, or the Supreme Court in Northern Ireland. I think it is common ground that
5 the Litigation In Person Act does apply to such proceedings.

6 THE PRESIDENT: Part of the argument, as I have understood it, is that there should have been
7 some statutory instrument relating to the Tribunal.

8 MR. THOMPSON: The difference between the parties is whether or not that is necessary, or
9 whether the costs jurisdiction of the CAT is, as it were, freestanding, and is simply defined by
10 reference to the costs jurisdiction of the Supreme Court. We would say that the Authority's
11 submission would require one to read in the words something like, "-- but Rule 55(1) shall not
12 entitled a person to claim costs, in particular as a litigant in person, pursuant to the 1975 Act
13 unless that person was entitled to recover such costs independently of the provisions of this
14 rule" - something like that. It does not make any such derogation. So, we do not see why it
15 should not be freestanding and have the same scope as the Supreme Court Act. But, that is a
16 fairly refined point.

17 So far as the substance of the issue goes, I think probably the easiest way in is by reference to
18 the *Nossen* principle and the question of expert evidence. I think this is a matter for
19 assessment by the Tribunal. But, we would say that at least some of Albion Water's evidence
20 is expert in nature, and we have tried to indicate it in a schedule. In particular, Dr. Bryan's
21 evidence, in our submission, is not to be equated to trade witnesses (as I think the Authority
22 tries to put it), but is in fact technical evidence about the water industry, which few people are
23 in a better position to address than Dr. Bryan, and where the Tribunal will have formed its own
24 views, and will be aware that Dr. Bryan has long experience and academic qualifications which
25 suit him to make such evidence - for what it is worth, indeed the same is true of Mr. Jeffrey in
26 relation to his accountancy evidence. So, that is the position we make in relation to expert
27 evidence.

28 In relation to other costs and disbursements, our primary position is, I think, that Albion is not
29 to be regarded as a litigant in person because of the role of Palmers, but rather that the Tribunal
30 should take a realistic view of the role of Palmers in this case and should therefore take a
31 relatively generous approach to the position in relation to costs and disbursements incurred by
32 Albion Water, and should bear in mind potentially, in addition, that both United and, as I
33 understand it, OFWAT, at least until the costs issue arose, had effectively dealt with this case
34 in-house, and have simply instructed counsel to supplement them, but have not instructed

1 solicitors. So, the only reason why this issue arises is because Albion Water is too
2 impecunious to have an in-house legal team, but in substance it has been doing very much the
3 same activities itself as United and OFWAT have been doing with their various administrative
4 resources.

5 THE PRESIDENT: So, you are inviting us to focus on what kind of costs you would allow to an
6 in-house legal team in relation to a litigation in Albion's position - just as we would focus on
7 that question if we were giving costs to the Authority, or the OFT, or anybody of that kind.

8 MR. THOMPSON: Yes. I think it is fair to say that there may be an issue as between
9 disbursements and costs as against the internal staff costs - but, at least in relation to
10 disbursements and costs there is no reason why we should be in any different position than we
11 would be if those same costs had been incurred by a solicitor. There may be a further question
12 about whether the internal staff costs are as readily recoverable, but we, in principle, at least,
13 would seek at least a contribution towards those costs as well in the particular circumstances of
14 this case. So, effectively, there have been no solicitors' costs incurred at all.

15 THE PRESIDENT: Can you just help me, just going back: did I hear you correctly a moment ago
16 that you do not see Albion as a litigant in person because of the role of Palmers?

17 MR. THOMPSON: I think we have some difficulty in describing them. There was a case that the
18 Authority refers to as the Agassi case, where Andre Agassi, the tennis player, had instructed
19 counsel via an experienced tax consultant, but who was not a solicitor. We seem to be rather
20 in the opposite position of somebody who is not an experienced competition solicitor, but is a
21 solicitor. In those circumstances it seems to us that technically we are not litigants in person
22 because of the role of the solicitor, but obviously if the Tribunal took the view that Mr. Perry,
23 of Palmers, was to be discounted, then we would be in essentially the same position as Mr.
24 Agassi.

25 THE PRESIDENT: On your case the issue as to the effect of the 1975 Act - the Litigants In Person
26 - Costs & Expenses Act - that is simply in relation to the period before you and Mr. Palmer
27 came on the scene; is that right?

28 MR. THOMPSON: Yes, and I think that we have referred to it as given that this is such an odd
29 situation we have referred to it effectively by analogy in relation to Albion's costs as a relevant
30 factor that the Tribunal should be aware of, I think that is how we put it in Bathhouse, and how
31 we have also put it in this case.

32 THE PRESIDENT: Right, I see.

33 MR. THOMPSON: I think those were the points, as it were, in outline in relation to Albion. The
34 only other point is the question of whether Albion Water is actually liable for any of these

1 costs. So far as we are concerned our relationship I think has always been with Albion, I have
2 never really been aware of any possibility of a relationship with water levels, so I think it is
3 straight forward so far as that goes. In relation to the internal costs my understanding is that
4 there is a substantial payment between Albion and Water Level on a monthly basis and so
5 therefore in substance the costs that have been incurred in this litigation have been borne by
6 Albion as part of that payment made to Water Level, so that Albion has in fact been bearing
7 the costs of this litigation both in relation to staff costs and in relation to disbursements.

8 THE PRESIDENT: Do we need, as a precaution, technically to join Water Level as a party for the
9 purposes of costs?

10 MR. THOMPSON: It would put an end to the technical questions – it is not something that had
11 occurred to me, but I do not think Dr. Bryan has any objection.

12 THE PRESIDENT: We have occasionally joined parties simply for the purposes of costs.

13 MR. THOMPSON: Yes, that would obviously shoot one fox that is currently running around. I
14 cannot see any particular downside, I do not know whether the Authority would have a trouble
15 with it.

16 THE PRESIDENT: Well, we will see whether it is necessary.

17 MR. THOMPSON: I think that probably addresses the Tribunal's shopping list – I am sorry, I quite
18 forgot that I am also instructed by Aquavitae in this ----

19 THE PRESIDENT: Yes.

20 MR. THOMPSON: I think there are two issues: on the question of costs as I understand it there is no
21 dispute between the Authority and Aquavitae in relation to Dr. Marshall's expert costs, and I
22 believe a schedule has been provided.

23 THE PRESIDENT: Yes, there is a further claim for the person who helped assemble information to
24 assist Dr. Marshall.

25 MR. THOMPSON: Indeed, and I do not know what the position is in relation to that.

26 THE PRESIDENT: I do not think that is agreed at the moment – at least I am making that
27 assumption.

28 MR. THOMPSON: I think it is a matter that may or may not be subject to agreement, but it is the
29 claim that is made, and it is a cost that flowed from the requirements, and the Tribunal will
30 have seen the case law in relation to this and whether or not such a cost is recoverable.

31 THE PRESIDENT: Yes.

32 MR. THOMPSON: The other costs' issue is really a falling on the mercy of the Tribunal which at
33 the last hearing I was not aware of what Mr. O'Reilly had said at the hearing in January – I am
34 not sure that my clients were aware of that, so they simply raised the question of whether it is

1 fair in all the circumstances they should bear all the costs, I cannot put it any higher than that,
2 and you may well say “yes”. But it is, as it were, a plea for mercy. So that is that.

3 The only other issue is that Aquavitae did have an outstanding question for Miss Finn about
4 what the implications of the Judgment would be for the Authority going forwards, but since
5 she is not here I do not think I do any more than note that that obviously is an issue between
6 Aquavitae and the Authority in the light of the Judgment, but I do not think there is probably
7 any need for any further ruling from the Tribunal on that issue.

8 THE PRESIDENT: There was a time when, in addition to costs, Aquavitae were seeking some sort
9 of relief of some kind but I rather gather that that is no longer pursued?

10 MR. THOMPSON: I think it is essentially a matter for discussion between the parties.

11 THE PRESIDENT: Sorry, Mr. Lewis is just drawing my attention to Aquavitae’s letter ----

12 MR. THOMPSON: It is p.312, I think we were inviting the Tribunal to ask Miss Finn about what
13 was going on in relation to the access code guidance and any assurance it could give in relation
14 to the new regime in the light of the Judgment, I think that was essentially as part of the
15 general negotiation. I think that was the issue that obviously is of paramount significance as far
16 as Aquavitae is concerned, but whether that is something that really can fall within the scope of
17 the Tribunal is I think a matter for the Tribunal.

18 THE PRESIDENT: I think probably the best course as far as those points in para.3 of the letter are
19 concerned is to invite the Authority to respond directly to Aquavitae in writing.

20 MR. THOMPSON: I think that may well be the only way forward. It obviously reflects the nature
21 of this case as a test case for the industry, as there are various loose ends left for all of us as to
22 what happens next.

23 THE PRESIDENT: Yes.

24 MR. THOMPSON: I think those were the points I had unless there is anything else I can assist the
25 Tribunal with.

26 PROFESSOR PICKERING: Could I just ask you about the witness statement of Dr. Bryan.

27 MR. THOMPSON: There are a number, which one in particular.

28 PROFESSOR PICKERING: This is the most recent one in response to the request from the Tribunal
29 of 1st November, which on pp. 2 and 3 gives some financial details in relation to Albion Water
30 and Water Level – it came in to us on 15th November or thereabouts.

31 THE PRESIDENT: It has the report and accounts appended to it.

32 MR. THOMPSON: Yes.

33 PROFESSOR PICKERING: Could you tell me where the salary paid to Mr. Turner is included in
34 these figures, please?

1 MR. THOMPSON: I am told it is in the Albion Water Management fees. It is under “salaries”
2 under “Opex”.

3 PROFESSOR PICKERING: “Opex salaries”, right, so it is not shown separately on the Albion
4 Water financial statements which, given that Mr. Turner, as I understand it, is 100 per cent.
5 engaged in the delivery of a service to Dŵr Cymru I am slightly surprised. Thank you. Now, I
6 had assumed that the salaries under “Opex” in Water Level were, in fact, the fees to the
7 Directors, that is wrong? Are the Directors’ fees shown ----

8 DR. BRYAN: With permission, Sir, we have not split out – I do apologise, with your permission ----

9 THE PRESIDENT: Carry on, Dr. Bryan.

10 DR. BRYAN: We have not split out the Directors’ fees, Directors’ salaries from the totality, so the
11 total in the Water Level account includes the Directors and Mr. Turner.

12 PROFESSOR PICKERING: Thank you, right, that is all four of you then under that one heading
13 which presumably grosses up to about £168 to £170,000 a year?

14 DR. BRYAN: It does, yes.

15 PROFESSOR PICKERING: The income to Albion Water, the fee income, which is total sales’
16 income, the same figure, that is all from Dŵr Cymru – sorry, from the sale of Water to
17 Shotton?

18 MR. THOMPSON: Yes.

19 PROFESSOR PICKERING: Thank you. And Water Level has no income other than the
20 management fee it takes from Albion?

21 DR. BRYAN: In that period, no, Sir. In the previous financial year there was a small amount of
22 consultancy income.

23 PROFESSOR PICKERING: Because what I am wondering is why there is not some other income,
24 given your avowed intent to generate consultancy fees, and whether you are holding costs that
25 you ought not to be holding on to and therefore making the Albion financial position look
26 worse than it would otherwise appear, if you were not swinging this hefty management fee on
27 to them?

28 MR. THOMPSON: I suspect this is really material for either Mr. Jeffrey or Dr. Bryan. I think that is
29 probably a matter to put to him. I am happy to ----

30 PROFESSOR PICKERING: Yes, I understand, Mr. Thompson, and maybe it is half rhetorical, but I
31 think Dr. Bryan, from his reaction, recognises the point that I am putting. Is the situation
32 improving in terms of other income to Water Level?

33 DR. BRYAN: The situation, Professor Pickering, is potentially very attractive indeed. We have
34 indeed spent as much time as we are able, as much resources as we are able, pursuing a range

1 of projects which we think have particular relevance to the UK water industry, and particular
2 relevance to the findings in the Judgment. Bringing those projects to fruition, by which I mean
3 generating revenues in excess of the costs that we are incurring is very problematic for us, not
4 least because our credibility as a genuine alternative to the established income of all the
5 companies depends very heavily on whether the results of this appeal have practical benefit for
6 competitors. I would be delighted to provide written details of what we have been doing, but I
7 would be less than happy to copy those to others in the room.

8 PROFESSOR PICKERING: I understand that. Thank you very much. Thank you, Mr. Thompson.

9 THE PRESIDENT: I need to ask Mr. Thompson one final question: how do you want to leave the
10 request for permission to appeal, Mr. Thompson?

11 MR. THOMPSON: Well we were hoping to deal with it briefly in writing by the end of the week.

12 THE PRESIDENT: Yes, fine.

13 MR. THOMPSON: I suspect you will not be surprised -----

14 THE PRESIDENT: To hear that you oppose it, yes.

15 MR. THOMPSON: I do not think you will be surprised to see the reasons why.

16 THE PRESIDENT: Yes. Mr. Anderson?

17 MR. ANDERSON: If I could deal very briefly with the last point first, which is costs, because
18 essentially we had suggested to the Tribunal that the matter of costs was a matter that could be
19 dealt with on paper in front of the Tribunal which is why we have put in very detailed
20 submissions on costs to which I do not wish to add anything, subject to seeing what my learned
21 friend produces in writing on the few points that he has raised. We make the points that we
22 have made about litigants in person, about experts however knowledgeable and experienced.

23 THE PRESIDENT: Quite.

24 MR. ANDERSON: We have made those points. So far as counsels' fees are concerned, I do not, if I
25 may, want to get into the detail of it. It is just as a public authority we wanted to be satisfied
26 that everything was in accordance with rules that would give rise to a liability to meet those
27 costs, so it may well be that it is just a question of clarification that can be taken up between
28 the parties, and we have made our "concerns" if I can use as neutral a word as I can on it, and
29 that is a matter that we hope can be resolved through further clarification on the part of ----

30 THE PRESIDENT: It would be convenient to the Tribunal if we could be told as soon as possible
31 whether or not that matter has been clarified because it is one less thing to rule on.

32 MR. ANDERSON: Certainly, but as you can see, there are a number of points, and it does get a bit
33 technical, and, to be perfectly honestly, my contribution to those written submissions was little
34 more than to try and keep it simple.

1 THE PRESIDENT: Whether one has succeeded in that wholly worthwhile endeavour I am not
2 sure.

3 MR. ANDERSON: Simple. Not 'sure'.

4 THE PRESIDENT: If the Tribunal could know within seven days whether we have to write a
5 Judgment on all those points I would be very grateful.

6 MR. ANDERSON: Certainly. I think we have made all the points we wish to make on Aquavitae.
7 As far as Dr. Marshall is concerned, I am quite sure that the figures can be agreed as well as
8 the principle.

9 THE PRESIDENT: Do I infer from that that assuming counsel's fees are a matter of clarification,
10 we are still left with issues as to experts, litigants in person, and all that? We have got to
11 decide all that.

12 MR. ANDERSON: Our position in relation to that is that Albion recovers nothing - for the reasons
13 ----

14 THE PRESIDENT: Yes, but that is clearly your position. It is not a question of clarification. It is
15 something we have to rule on. I just want to know what we have to rule on, and what we do
16 not.

17 MR. ANDERSON: That is something you do have to rule on. The question of counsels' fees - it
18 may not be just a matter of clarification. We simply want to get to the bottom ----

19 THE PRESIDENT: If you want us to rule on it, we will rule on it, but I would just like to know in
20 seven days whether that is so, or not.

21 MR. ANDERSON: Certainly, sir. Now, moving back to what I hope is the agenda, the first point,
22 as I understand it, is the question of whether anything should be remitted - either set aside and
23 remitted or under Rule 19(1)(j). Our position, for the reasons we have set out and as was
24 debated last time, is the same - we are still not that much clearer as to whether the common
25 carriage access price route is a sensible or commercially viable route, and in those
26 circumstances our position remains that it would be inappropriate to remit anything ---- or, for
27 the Tribunal to spend further time on those matters, and the appropriate course is simply to set
28 aside a decision.

29 Now, recognising that, of course, that is not in itself an entirely attractive proposition from the
30 point of view of Albion or possibly the Tribunal, it the reason we have proposed this
31 alternative that we would undertake a Section 40 determination. Now, it is, as I explained
32 briefly before the short adjournment, and as we have set out at some length in a letter to Dr.
33 Bryan, and copied to the Tribunal under cover of a separate letter to the Tribunal, why we say
34 they are not precisely the same exercises. We will, of course, have regard to your Judgment.

1 We will, of course, have regard to submissions made to us. But, it is a distinct exercise. It is an
2 exercise that exists outside the scope of this appeal because this appeal is against our decision,
3 and our decision was in relation to the access price. It is for that reason that we expressed the
4 view that it was not an appropriate matter for determination under Section 40 ---- an
5 appropriate matter for interim relief to be granted because it is not a matter in respect of which
6 the Tribunal could grant any final relief. If all that was interim ---- all that was outstanding
7 was that Section 40 determination, there would be nothing that any order the Tribunal could
8 make that could be interim too - because any interim order must, in our submission, be interim
9 to an order of final determination by the Tribunal.

10 So, the debates about what my learned friend call 'read-across' and the questions of substance
11 - how similar the two exercises may be - do not in fact arise. It is an exercise that the
12 Authority would be undertaking pursuant to Section 40. You heard Miss Finn this morning say
13 that we would do it as quickly as we reasonably can. Of course, what we now have is an
14 arrangement proposed by Welsh that would circumvent any problems that might arise about
15 the jurisdiction of the Tribunal to issue interim relief because that has now been resolved, and
16 is capable of being resolved, subject to some points in the context of this agreement.

17 We would submit that in those circumstances that is the more appropriate course than to remit
18 matters for us to investigate that may prove to be wholly academic because the common
19 carriage proposal may never get off the ground.

20 THE PRESIDENT: Mr. Anderson, can I just explore once more - I promise you that as far as I am,
21 concerned I hope this is the last time - this jurisdiction point, and just go back to the course of
22 events which gave rise to the existing interim order? The Tribunal, among other things, has
23 jurisdiction to hear an appeal against a refusal by the Authority to grant interim measures.
24 That is Section 47(1)(e), I think. The original basis for the earlier interim order, if I remember
25 rightly (and I am very ready to be put right if I have mis-remembered it) was that Albion had
26 asked the then Director to take action in relation to the bulk supply price in relation to an
27 interim measure under the 1998 Act. That is what they had asked. The subsequent request for
28 the Tribunal to take interim measures was in the context of a prospective appeal against that
29 refusal to grant interim measures.

30 MR. ANDERSON: Interim measures, of course in respect of the bulk supply agreement - because
31 that is the only agreement that was between the parties ---- There was only a bulk supply of
32 water; there was no common carriage. But, what it was interim to is what is critical. What it
33 was interim to was a determination of the complaint brought to the Director, and ultimately
34 appealed to this Tribunal.

1 THE PRESIDENT: What I am grappling with at the moment - and just asking for your help - is the
2 proposition - and I suspect is how it was originally conceived, conceptually speaking - the
3 proposition that the bulk supply price, which was reached by agreement, is itself at least
4 potentially fixed at an abusive level; that Albion was asked for an interim measure to be taken
5 in relation to that, pending some resolution of that issue - the compatibility of the bulk supply
6 price with the 1998 Act - and that that was the conceptual basis upon which the original order
7 was made. Why is it not impossible to say that we can simply go on with that interim measure
8 pending something, and one of the things it could be pending was the Authority's intention to
9 re-determine the bulk supply price.

10 MR. ANDERSON: If it is the case that it was an interim application in the context of the second
11 bulk supply agreement and I have to say I would need to check that because that is not my
12 understanding of it ---- My understanding is that the only complaint that we ever investigated,
13 and in respect of which we ever took a decision that was appealed to this Tribunal was in
14 relation to the first access price.

15 THE PRESIDENT: We will have to go back to the interim measures case, because the interim
16 measures case started before anybody was instructed, when we were still at a very, very early
17 stage in this Tribunal. We are not talking about Case 1045 at all. We are talking about Cases
18 1031 and 1034. My recollection is that something along the lines I have just indicated was the
19 original conceptual basis for the original order.

20 MR. ANDERSON: That will certainly need to be explored, but the logical consequence of that
21 line of argument, sir, is that it is possible to launch a substantive appeal against some non-
22 determination in relation to a bulk supply price to found jurisdiction in front of a Tribunal to
23 make a substantive finding in relation to the second bulk supply agreement. In my submission,
24 an application for interim relief cannot conceivably launch an appeal against the second bulk
25 supply agreement itself.

26 THE PRESIDENT: You said yourself that there is no provision for the Director to give any interim
27 relief in relation to a bulk supply price. As it happens, this price was not actually determined.
28 It is an agreed price, and I am having difficulty at the moment seeing why, conceptually
29 speaking, an agreed bulk supply price could not potentially be in contravention of the 1998
30 Act - it is simply an agreement between the parties - and that pending some kind of regulatory
31 remedy, the Tribunal could, if necessary, and all the conditions were satisfied and so forth,
32 give some kind of interim relief as a matter of jurisdiction.

33 MR. ANDERSON: I accept that, sir. My understanding all along has been that the challenge to the
34 basis of the interim award ---- the interim order in respect of the second bulk supply price was

1 to hold the line pending determination of the substantive complaint. It was a substantive
2 complaint against the ----

3 THE PRESIDENT: That was, at the time, the reasoning for giving the order. In order to give the
4 order there has to be some jurisdiction to do it in the first place. That was the jurisdiction.

5 MR. ANDERSON: The jurisdiction is the jurisdiction under the rules for the Tribunal to make an
6 interim award ----- an interim order in the context of the substantive appeal.

7 THE PRESIDENT: Well, it is a wider jurisdiction than that, because you keep submitting to us that
8 we have no jurisdiction in relation to the bulk supply price. It could not have been that. The
9 jurisdiction was the parallel jurisdiction of the refusal to grant an interim measure.

10 MR. ANDERSON: My submission is that you have no jurisdiction under 61(c) to make an interim
11 order in relation to the second bulk supply agreement because in the context of this appeal - the
12 substantive appeal - this Tribunal could make no final order in respect of the second bulk
13 supply agreement. There is provision under 61(2) to make an order with a wider jurisdiction ---
14 - to make an order in circumstances where it is necessary for the purposes of urgency and to
15 prevent irreparable harm. So, so long as this Tribunal is seized of an appeal, it has jurisdiction
16 to make an interim order, and that interim order could take the form of an order in respect of
17 the second bulk supply agreement. That is what the position has been. The only point I am
18 now making is that if we get to the point where this Tribunal is no longer seized of the
19 substantive appeal, there is no matter for any interim award now to attach - because the
20 Tribunal is, at that stage, *functus*, and any outstanding determination under Section 40 is not a
21 matter that is arising out of the Tribunal making any direction, or making an order. It is a
22 matter that arises out of the Authority undertaking its statutory functions under Section 40
23 following a request ----

24 THE PRESIDENT: Let us not flog it any more, Mr. Anderson. We need to go back over the
25 papers, but my impression was - and still is, though I can no doubt be dis-abused of it - that in
26 technical terms, of the three cases we have before the Tribunal in the Albion matters, the main
27 case in which we have given Judgment - No. 1046 - is an appeal under Section 47(1)(a) of the
28 Act.

29 MR. ANDERSON: Yes.

30 THE PRESIDENT: However, in 10131 and 10134 we have a quite separate appeal under Section
31 47(1)(e) of the Act, which is a quite different matter.

32 MR. ANDERSON: I may not be able to actually help you this afternoon because I had not
33 appreciated there was this particular problem. If that is the case, then that interim relief appeal
34 must be an appeal against a refusal by the Director to provide interim relief that he could never

1 have provided, because he has no power in the context of a second bulk supply determination,
2 to grant any interim relief. That would have been a complete answer to that case - which is
3 why I have always understood the position to be that the interim relief in that action was
4 interim pending the determination of the substantive appeal in this case.

5 THE PRESIDENT: It is probably not fruitful to pursue that point any further. I think we have
6 flogged it sufficiently -----

7 ***

8termination of the substantive appeal in this case.

9 THE PRESIDENT: It is probably not fruitful to pursue that point any further; I think we have
10 flogged it sufficiently for the time being.

11 MR. ANDERSON: Well we will investigate it and respond in writing by the end of the week.

12 THE PRESIDENT: If you want to put anything in we need to have it by the end of the week.

13 MR. ANDERSON: Yes. Finishing off on the questions of remittal, for the reasons we explained in
14 our submissions last time round, we submit that the Tribunal is not in a position to take a
15 substantive finding on either the questions of excessive price or margin squeeze, for the
16 reasons that we explained ----

17 THE PRESIDENT: Can I just ask you about margin squeeze for a moment, because I think they are
18 different. In your Decision you came to the view that the accounting cost element in the access
19 price could be reasonably justified at 19.6 or thereabouts (I may not have the decimal right)
20 pence per cubic metre. Let us assume for argument's sake in favour of everybody that you
21 were completely right about that – it is not what the Judgment says, but even making that
22 assumption – the first access price was actually 23.2 pence per cubic metre, and the difference
23 between the two is accounted for by the ECPR calculation which we have said in our Judgment
24 is not a safe basis for arriving at the conclusion of the decision arrived at. So we are left with
25 the gap between 23.2 and 19.6, the latter figure being, as I understand it, the best that could be
26 arrived at on the accounting approach taken in the Decision. Why is the difference between
27 those two figures not capable of being a margin squeeze?

28 MR. ANDERSON: Our position, as we have explained in our submissions is, that on our reading of
29 your Judgment you have come to the conclusion that the Director erred and inadequately
30 investigated the question of margin squeeze, because firstly you had serious doubts about
31 whether the starting price was excessive or not, but you did not find that it was excessive, and
32 similarly you concluded that we had failed to investigate adequately the so-called efficiency
33 savings that had been undertaken. You therefore stopped short of finding that there was a
34 margin squeeze, just as you stopped short of finding that there was an excessive price, and in

1 those circumstances, and the basis upon which we have taken the view that we are not minded
2 to apply for permission to appeal is that you did stop short of making those findings.

3 THE PRESIDENT: We paused to see what final orders we should make, but Albion is asking us to
4 make a final order in particular on the margin squeeze issue.

5 MR. ANDERSON: In our submission the orders must follow what is in the Judgment, and on the
6 basis of what is in your Judgment we would submit that it is not open to you to make those
7 final orders. If what is being proposed is that the Tribunal issues a further Judgment in which it
8 finds, not that there is evidence strongly suggesting the price is excessive, but wishes to go
9 further and find that the prices were excessive, and that we submit is a further Judgment, and
10 that is not what we would submit the position we are in. We are in a position where, having
11 had an interim Judgment we now have a final Judgment. In that final Judgment you have not
12 decided the price was excessive, you have not decided there is a margin squeeze, and therefore
13 the question of what orders the Tribunal should make should flow from that Judgment, and in
14 our submission the options open to you are either to set aside the Judgment or to adjourn the
15 matter and remit further matters to be investigated with a view to taking a further final
16 decision. But, in our submission, in the light of your Judgment it is not open to you to make the
17 final orders that Albion is inviting you to make.

18 THE PRESIDENT: So what do we do, if anything, about the difference between the 23.2 and the
19 19.6?

20 MR. ANDERSON: Nothing.

21 THE PRESIDENT: Yes.

22 MR. ANDERSON: On the question of remittal and margin squeeze you have asked not to be
23 addressed on the question of market definition and dominance, but you have our written
24 submissions. That then brings us to the question of interim remedy and the first question then
25 is interim to what?

26 THE PRESIDENT: I think we have now been over all this, have we not?

27 MR. ANDERSON: I think we probably have, in which case, subject to anything those behind me
28 who are carefully looking down at the desk, I am not sure there is anything more I can say to
29 assist you this afternoon.

30 THE PRESIDENT: Thank you very much.

31 PROFESSOR PICKERING: Mr. Anderson, just as I am turning up the paper I particularly want to
32 ask you about, you make some powerful legal observations, the Authority has a commitment
33 presumably to seek to retrieve a degree of competition in the water industry. Is there any
34 consideration going on, apart from the s.40 investigation offer, as to how the Authority may

1 actually be able to take matters forward to assist a reasonable degree of competition to enter in
2 to this industry?

3 MR. ANDERSON: Are you talking about generally or this particular instance?

4 PROFESSOR PICKERING: I imagine that the particular is an example of the general, but it may be
5 that the two are separate.

6 MR. ANDERSON: So far as the general is concerned, I rather wish you had asked that question first
7 thing this morning ----

8 PROFESSOR PICKERING: I am sorry.

9 MR. ANDERSON: -- because the lady best placed to answer that is no longer present.

10 PROFESSOR PICKERING: Yes.

11 MR. ANDERSON: My understanding is, as I said to you I believe last time, we are monitoring the
12 position and considering how successful the new licensing regime is being in the context of
13 promotion of competition. As far as this case is concerned our hands are to some extent tied
14 because we are in this position where the Tribunal has issued its Judgment and the Tribunal
15 has not yet issued its final order in relation to the common carriage side of the matter. We
16 have indicated where we think we can help in the particular instance, or have a role to play in
17 the particular instance of Albion, it is in the context of a s.40 determination and as we have
18 indicated in our letter to you and to Albion, having regard to our statutory duties in relation to
19 competition will form part of any consideration of an bulk supply price, along with other
20 considerations. Of course, we have not yet been asked to consider the second or new bulk
21 supply agreement, so we have not decided upon, or received submissions on how best that
22 should be approached, but certainly in the context of Albion that is the forum or the medium
23 through which we think we may have a role to play.

24 As far as matters more generally are concerned, of course, it is as I said last time relatively
25 early days in the context of the new licensing regime, but it is of course a matter that we take
26 very seriously, and are constantly monitoring and evaluating.

27 PROFESSOR PICKERING: Thank you, and I am sure Miss Finn will notice in the transcript your
28 eloquent response to that question although she was not here to give an answer herself. The
29 point I particularly wanted to raise with you is about LRMC and we have been referred to
30 those very limited figures for potable water in four different regions. Mr. Anderson, my
31 experience and expectation would lead me to envisage that when there was going to be a
32 discussion about long run marginal costs that would reflect a series of points on a graph
33 indicating the long run marginal costs as defined and understood of different volume outputs,
34 yet we have a lot of comment about this has taken into account LRMC, but apart from these

1 very few single observation figures, which give us no indication about output volumes, or
2 indeed changes in volume, then we really have nothing that I would consider to be indicative
3 of long run marginal costs.

4 I also comment, and this is now 10 years old, but the letter from Mr. Taylor, the head of
5 economic regulation at Dŵr Cymru (at least at that time) talks about expecting tariffs to be
6 significantly higher than LRMC - “when management costs and the costs of existing
7 infrastructure are added”. Of course, the concept of the long run is specifically a period of
8 time in which raw costs are variable, so I do not see how existing infrastructure would actually
9 go into that analysis. Now, we do not need, at a distance of 10 years perhaps, to debate the
10 detail of the letter, but I wonder whether you would care to comment as to whether I am
11 justified in being surprised and, indeed, a bit concerned at the fact that we really do not have
12 empirical data relating to LRMC although we are told that it has been taken into account so
13 many times.

14 MR. ANDERSON: The short answer, Professor, to your question is that long run marginal costs in
15 the context of the second bulk supply price was not the issue for this Tribunal, which his why it
16 was not gone into in detail in this Tribunal. We have set out in annex A to our letter that we
17 sent on the 15th a long chronology on the role of LRMC in the context of the second bulk
18 supply price, which was determined or indicatively determined back in 1996, which is why the
19 relevant documentation dates from that long ago, and we have not been asked to look at it
20 again, and we have not looked at it again. Had it been an issue, and it would not have been an
21 issue – as I said this morning – because appeals against determinations under s.40 are not for
22 this Tribunal, but had the second bulk supply price agreement been the focus, the principal
23 focus of any investigation, then you might well have had more on long run marginal cost than
24 in fact you do have. The main reason you do not have it before this Tribunal is that it was not
25 a relevant issue in these proceedings.

26 PROFESSOR PICKERING: But the references that have been put together for our benefit again do
27 not suggest that there is any quantitative information that lays behind the statements.

28 MR. ANDERSON: Oh that I could not answer, but certainly if we are looking at bulk supply
29 agreement now, we are requested to under s.40, and if we are looking at long run marginal
30 costs in that context, we say in our letter it is still appropriate to do so, no doubt we will be
31 looking at it more detail, but it just simply has not arisen over the last 10 year period.

32 PROFESSOR PICKERING: Thank you.

33 THE PRESIDENT: Thank you, Mr. Anderson. Yes, Mr. Vajda?

1 MR. VAJDA: I am going to address the Tribunal, I hope shortly given the time, on relief, and I think
2 it is important if one focuses on two time periods. The first time period is what I call the “three
3 week time period” which is effectively between now and final Judgment, where conceptually I
4 accept there may be some form of interim relief, I will explain ----

5 THE PRESIDENT: Yes, I think as present advised we would be minded to meet an application for
6 interim relief for that three week period, Mr. Vajda.

7 MR. VAJDA: And then the second, which is conceptually different, is what happens when final
8 orders are made. My submission in relation to that is that interim relief is conceptually not
9 permissible at that stage, but I am going to concentrate really this afternoon on the three week
10 stage.

11 THE PRESIDENT: Yes.

12 MR. VAJDA: So far as the three week stage is concerned, we adopt the written submissions of the
13 Authority, which are at paragraph 16 to 26 of their submissions for this hearing and, in short,
14 what they say in relation to the bulk supply price is that it is not a remedy that can be offered
15 by way of final relief. It is therefore not a remedy that can be offered or can be granted
16 pursuant to Rule 61 and they point out that Rule 61(2) on its face is wider than 61. We went
17 through some of this material last time, and the Tribunal will recall that my submissions in
18 relation to 61(2) last time was, and it may be helpful if one just reminds oneself of the power
19 under 61(2) at p.380 of **Butterworth**. “Without prejudice to the generality of the foregoing, if
20 the Tribunal considers it is necessary, as a matter of urgency, for the purpose (a) of preventing
21 serious irreparable damage to a particular person or category of persons ----“ That is really the
22 provision we are looking at. “-- the Tribunal may give such directions as it considers
23 appropriate for this purpose”. I accept that on its face that gives the Tribunal wider power than
24 the power under 61(1) which is effectively limited to grant by way of interim relief what it can
25 grant by way of final relief.

26 Now, as the Tribunal ----

27 THE PRESIDENT: Which case are you in? Are you in 131 or are you in 146?

28 MR. VAJDA: I was going to come to 1034 first. Case 1034, as the Tribunal will recall, was the
29 appeal that was launched on 28 May, 2004. Very usefully I have a quote here, which is the
30 Tribunal’s own latest interim Judgment. The Tribunal might wish to have it open. It is quite
31 conveniently set out ----

32 THE PRESIDENT: We may need to go back to it all and work out what happened.

33 MR. VAJDA: Yes. It is certainly a good starting point. Pages 72 to 73 of your most recent
34 Judgment.

1 THE PRESIDENT: You tell us what it says.

2 MR. VAJDA: What it says is that the interim relief that was granted by the Tribunal was under
3 1034. The President may recall better than myself - because I was not present ---- It is both
4 cases - 1031 and 1034.

5 THE PRESIDENT: I think 1031 became 1034R.

6 MR. VAJDA: Yes. The 1034R order that was made on the ... was an order by consent. So, I do
7 not know whether the issue of jurisdiction came in. But, the Tribunal will recall that that order
8 was then varied on 11 May, 2005, and that variation is still in force. Again, although I was not
9 present at the time, it seems to me that there was not a jurisdictional problem because the
10 Tribunal could have said, "Well, we're doing this under 61(2)".

11 THE PRESIDENT: The Notice of Appeal in Case 1031, which became 1034R, originally came in
12 just before the Director had even taken a decision. But, it was an application under
13 47(1)(1)(e). Let us remind ourselves of the sequence, and if we really need to re-trace it all,
14 we will have to re-trace it all in a Judgment. But, that original application - 1031 - was based
15 on the contention that Dŵr Cymru's continuing behaviour (and I am reading now from para. 4
16 of the Notice of Appeal in that case - not in the present case) and particularly its unreasonable
17 ... price constitute a continuing abuse of dominance. That was the allegation in that case.
18 There was then an application in that case for interim measures which was refused by a
19 decision of the Director ---- I am doing this on the hoof, which one probably should not do ----

20 MR. VAJDA: Is that 25 May, 2004?

21 THE PRESIDENT: I think that may well be right. That may well be right. There was then an
22 application for interim measures under 61(2) on 28 May, 2004. In general terms ---- This is
23 the original procedural context of the interim measures.

24 MR. VAJDA: Yes. As I said, the first order was made by consent, but the basic concern of the
25 Tribunal in that case was to ensure ----

26 THE PRESIDENT: -- to ensure the viability of the appeal.

27 MR. VAJDA: Exactly. Now, as I say, we are not taking a jurisdiction point now, in November
28 2006, about an order made in 2004/2005. The question that one has to address today is
29 whether there should be any variation of that existing order for a period of, say, three weeks.

30 THE PRESIDENT: It is not going to be more than three weeks for various external reasons.

31 MR. VAJDA: Right. Now, in our submission the conditions in 61(2) are not met for a variation. If
32 I can explain that briefly ---- For reasons that I will explain in a moment, the existing interim
33 order - that is to say, the order of 2004 - will protect Albion for the next three weeks.
34 Secondly, there is, in any event - because obviously one has to look at the question of necessity

1 - 61(2). There is also on the table - and I will come to it ---- Mr. Thompson had two comments
2 on our proposed agreement, but there is also the proposed agreement on the table which we
3 would say precludes the necessity for any variation under 61(2).

4 THE PRESIDENT: In terms of price you are happy to have a reduction on the basis that they enter
5 into this agreement.

6 MR. VAJDA: Exactly. There is a question on the 1.5p, but the agreement has the price of 25p
7 which we are happy to ---- I will deal in a moment with Mr. Thompson's ---- As I understand
8 it, his position has helpfully shifted since this morning because he says he had three concerns
9 this morning which he accepts can now be dealt with. He has two further concerns which he
10 raised after lunch, and I will deal with those two further concerns in a moment. But, the one,
11 if you like, material change in position since we have been here last is the decision of Shotton
12 to remove the support. That is obviously a matter that the Tribunal needs to consider. Now, if
13 I can just repeat the submission that I made this morning, we have dealt with that point at
14 paras. 46 to 52 of our skeleton.

15 THE PRESIDENT: Can you go over for us what that point is because I have not got it yet.

16 MR. VAJDA: Could I ask the Tribunal just to turn those paragraphs up? It starts at p.20 of our
17 submissions for today. I am very much in the Tribunal's hands. The Tribunal might wish to
18 just read paras. 48 to 52 quickly to itself ----

19 THE PRESIDENT: We have already read them, but just give us in a nutshell what the point is.

20 MR. VAJDA: The point is this: there is, if you like, a swings and roundabouts - the loss of support
21 from Shotton is equivalent to about £9,000 per month - £110,000 per year. So, for a three
22 week period we are talking of a figure of about, say, £7,000 to £8,000. Now, we say that
23 against that one has to bear in mind the savings that will be made in relation to both internal
24 costs and counsels' fees (which we have dealt with at paras. 49 to 51) We say that when this
25 was not predicated on the three week period (because the three week period has, in a sense,
26 emerged today, but the principle, we submit is still correct) we submit that Albion is now
27 looking forward - and this is going more than just the three weeks - to being considerably
28 better off than it was while conducting this litigation. None of this has been challenged by
29 Mr. Thompson today. That is important because in my respectful submission it would be
30 wholly inappropriate for the Tribunal therefore to seek to vary the order to increase the
31 discount by 1.5 percent in the light of submissions which have not been challenged by Mr.
32 Thompson.

1 THE PRESIDENT: Mr. Vajda, they are not going to save much money over the next three weeks
2 because they have still got quite a lot of legal, and other, things to do. It seems a bit
3 regrettable that we should be spending time arguing over £7,000 to £8,000.

4 MR. VAJDA: Yes. Well, my basic position is that there is absolutely no need to vary this for a
5 period of three to four weeks. As I say, we have set out why we say that is the position.
6 So far as the proposed agreement is concerned, as I understand it, Mr. Thompson accepts that
7 the three points he raised before lunch - which is the without prejudice to competition rights,
8 the 1.5, and the escrow point - can be sorted out, and I am sure that is right. As I understood
9 him, he raised two (as he put it) more conceptually difficult points this afternoon ---- two, as he
10 put it, caveats. If I can deal with those two points briefly ---- The first point is that he
11 mentioned that he wanted to have something built in ---- My note is ‘more substantively that
12 any agreement needs to be subject to the ruling of this Tribunal on margin squeeze’, and then
13 there was a discussion between you, Mr. President, and Mr. Thompson. In my respectful
14 submission, it would be inappropriate to build that into this agreement, because that is
15 effectively final relief, and we are not at that stage.

16 So far as the second caveat that Mr. Thompson proposed, which is that the agreement should
17 perhaps have a recital to it: “-- and subject t to the findings of the Tribunal, matters of
18 dominance, excessive pricing ----“ and so on ---- The Tribunal will immediately see the
19 difficulty with that because obviously this agreement is intended to preserve the position on an
20 interim basis, whereas also preserving the position of my clients on appeal, and therefore
21 plainly we cannot agree that ---- I mean, this is an interim arrangement which we are very
22 happy to enter into, but we cannot, as it were, tie our hands, and say, “Well, we consent to the
23 findings of the Tribunal”.

24 So, in our submission the two new points that Mr. Thompson had put forward are not ---- I
25 mean, they are points that we cannot agree to, but I would say that they are not points that are
26 necessary for the agreement to work. The agreement can work for a period of three weeks, or it
27 can work for a longer period, depending on when the bulk supply price is finally determined by
28 OFWAT, by the Authority.

29 So, those are effectively the submissions on 61(2) that, to conclude, there is no basis, we would
30 say, for varying the order for a three week period bearing in mind the points I have made at
31 paras. 46 to 52 of our skeleton, and also bearing in mind the offer that we have made in
32 relation to the agreement.

33 THE PRESIDENT: Mr. Vajda, if this agreement, or something along these lines, dealing with the
34 first three points that Albion make, was incorporated in a schedule to an order of the Tribunal

1 which recited that it was not going to make any order in the light of the annexed agreement,
2 whether liberty to apply ---- Would that be a mechanism that would be acceptable?

3 MR. VAJDA: In fact we discussed this point at lunch-time. What would be difficult for my clients
4 to accept would be for this to be done by way of consent because in our view there is a
5 jurisdictional issue as to whether or not one could have liberty to apply to the Tribunal in the
6 result that there was some dispute in relation to the agreement. But, having said that, we
7 would be willing to sign up to an agreement, and the fact that it might be appended to the order
8 would not preclude us from doing that. But, it would have to be then an order made by the
9 Tribunal which was ---- It would be an order, but not by consent.

10 THE PRESIDENT: Conceptually speaking ---

11 MR. VAJDA: Yes. Yes.

12 THE PRESIDENT: In other words, you are not prepared to consent to the jurisdiction ---- but, if
13 we assume it, then we assume it.

14 MR. VAJDA: Yes, and, as I say, this is a point that we have discussed and we would not take the
15 view, "Well, if the Tribunal had it in mind that it might append it to an order, we would refuse
16 to enter into the agreement" ---- We would not take that point. We would simply enter into the
17 agreement, and if there was then some dispute which came back to the Tribunal, there might be
18 an issue as to jurisdiction. That is as far as we can go to seek to resolve that position. Of
19 course, the beauty of the agreement approach is that it covers not just the three week period,
20 but also covers the period up to when OFWAT make a determination on the bulk supply price.
21 As I say, we are willing to meet the concerns in relation to the three points made before the
22 adjournment.

23 I think that is all, subject to anything the Tribunal wishes to say, that I want to say on interim.

24 I can be very brief in relation now to final remedy, because essentially I adopt what Mr.

25 Anderson says - and, as I have said before, setting aside the decision plainly is required in the
26 light of the Tribunal's Judgment. On the question of remission, I do not think I have got
27 anything other to do than to adopt what Mr. Anderson has said.

28 THE PRESIDENT: Do you want to comment on the point that I made to Mr. Anderson about the
29 difference between the 19.6 and the 23.2?

30 MR. VAJDA: Not particularly. The Tribunal had my fuller submissions last time in terms of what
31 needs to be done. Although, obviously, the Tribunal has given a strong hint - if I can put it in
32 non-legal language - as to what view it takes, in our submission it has not made any findings
33 on excessive price.

1 The only other point that I want to make - and this is simply a point that we observed this
2 morning - and I simply raise this - this is on the question of costs - is that if one looks at the
3 Albion and Water Level accounts, which Professor Pickering has obviously studied more
4 closely than most of us, we could not find any provision ---- Indeed, although Dr. Bryan talks
5 about these accounts as being audited accounts, we understand (and if we are wrong, Mr.
6 Thompson will correct us) that these are in fact draft accounts because they have not been
7 signed ---- There is no provision that we could see for provision of legal costs . That obviously
8 is of some significance in relation to whether or not this is a contingency arrangement, or not.
9 Perhaps if we look at Dr. Bryan's witness statement, just looking at the current position, and
10 the financial position of Albion, we see 'cost of sales, legal and professional - £000' and then,
11 going over the page, we have Water Level and we have legal and professional running at
12 around £3,000, which we take to be the monthly retainer which seems to be being paid by
13 Water Level as opposed to Albion. Then if one looks at the accounts, we could not find
14 anything in either the Albion or the Water Level accounts to indicate where there is a liability
15 to pay legal fees which one would have expected if this was a liability that was not contingent
16 on a particular outcome. It may be that we have missed something, and this is something ----

17 THE PRESIDENT: Well I think they are saying that the liability is to continue to pay the £1,000 a
18 month indefinitely until the debt is extinguished.

19 MR. VAJDA: Then in that case it should be on the balance sheet I would have thought. I see
20 Professor Pickering nodding.

21 THE PRESIDENT: We would have to think about ----

22 PROFESSOR PICKERING: Not on the quarterly P&L statement is it, you would be looking further
23 on.

24 MR. VAJDA: No, I am looking at both the balance sheet of Albion Water, and this is for the year
25 ending 31st March 2006, and also the balance sheet for Water Level.

26 THE PRESIDENT: We would have to think about what your accounting obligation was in
27 accountancy terms in relation to accounting for debts before the due date of the debt falling
28 due.

29 MR. VAJDA: This is not in a sense a submission it is simply a point ----

30 THE PRESIDENT: A comment.

31 MR. VAJDA: A comment, and is a matter that there may be an answer to because we raised this
32 question as to whether or not this is a disguise contingency arrangement and I have made my
33 point on that and, subject to anything the Tribunal has to say, those are my submissions.

1 THE PRESIDENT: Yes, thank you. I think the point that is in my mind, and I think we ought to rise
2 for a moment, Mr. Thompson, is whether you are seeking an interim relief order tonight, or
3 whether something along the lines of the agreement that was being suggested, but
4 accompanied by an order of the Tribunal, which included a liberty to apply, would – as it were
5 – suffice for interim relief, or whether it is sensible for everyone to take a day or two just to
6 consider what the right position is bearing in mind we are going to have to rule on quite a lot of
7 these things anyway in two or three weeks' time.

8 MR. THOMPSON: I suppose what I was thinking listening to Mr. Vajda was what exactly the point
9 of embarking on this agreement, which inevitably we have not had much time to think about it
10 because we have been in court all day and it was only given to us at 25 past 10, as against
11 varying the interim order to reflect the substance of the matter for three weeks during which
12 time we can all think about it and sort the thing out. It would obviously be much easier simply
13 for the Tribunal to sort it out by order for these three weeks and for us then to sort it out finally
14 in December. That was the thought that was running in my mind because the interaction of the
15 agreement and the order is not entirely straightforward and I do not think it is disputed that the
16 Tribunal has jurisdiction, at least for these three weeks, to hold the ring. So that was my
17 thought just listening as to quite why we need to go down this complicated route, apart from
18 the fact that Dŵr Cymru thought of it this morning. It seemed to me simpler just to do it by
19 order, and possibly order by consent, I am not sure.

20 THE PRESIDENT: But you would like us to deal with it, if not today, at least in the next day or
21 two?

22 MR. THOMPSON: I am aware that relative to the number of lawyers who are sitting here the sum
23 of £9,000 a month is possibly two payments, 1st November and 1st December, may not be
24 significant, but it is still £18,000 and Albion Water would like it.

25 THE PRESIDENT: Very well, I think we had better retire and consider that point.

26 (Short break)

27 [For the Tribunal's ruling, see separate transcript]

28 THE PRESIDENT: There are certain outstanding matters – various people have offered to provide
29 various things for us, can we please receive those as soon as possible and, subject to that, we
30 will produce our Judgment as soon as we can.

31 MR. THOMPSON: I think it was indicated I would give you a piece of paper with a number on it?

32 THE PRESIDENT: Yes, I think that is ----

33 MR. THOMPSON: It is here.

1 THE PRESIDENT: Just hand it up and we will have a look at it and hand it back again. (Document
2 handed to the Tribunal). Yes. (Document returned to Mr. Thompson).

3 MR. VAJDA: Procedurally the Tribunal envisages handing down Judgment and then in relation
4 final and interim orders, how does the Tribunal intend proceeding?

5 THE PRESIDENT: Well what I think we envisage, and we will need perhaps to liaise with the
6 parties as to exactly what the mechanics are, we probably need to arrive at such conclusions as
7 we can with all the outstanding issues that have been debated, and try to make rulings as far as
8 we can in one document. We will do that as soon as we can. The practical effect of the
9 timetable to which we are now working is probably that for various reasons it will then be
10 necessary to abridge the time for seeking permission to appeal and/or orders for costs in
11 relation to that last stage. We will do it all as fast as we can, but we would, if we may, invite
12 the co-operation of the parties to see that that final, final, final stage - i.e. any stage of request
13 for permission or costs - is indeed completed by no later than the middle of December if we
14 possibly can.

15 MR. VAJDA: Yes. Obviously I would have an application on final Judgment for the order that has
16 just been made to be lifted ----

17 THE PRESIDENT: And that is another matter we will have to deal with. So, we will have to build
18 into the timetable a time to try to deal with these things, but it is likely to be the case that we
19 will have to deal with them, as best we can, within a timetable that is constrained by external
20 factors.

21 MR. VAJDA: Could I just ask the Tribunal whether the Tribunal envisage dealing with all this now
22 on paper, or, dare I say, another hearing with counsel - because obviously if the Tribunal
23 envisages another hearing ---- not that I am encouraging it, but obviously there is a question of
24 diaries, and so on, and so forth ----

25 THE PRESIDENT: We are not envisaging another hearing at the moment, Mr. Vajda. It
26 sometimes happen as one comes across something that one thinks, "Oh gosh! We'd better
27 pause here, and see what they've got to say". I hope that will not arise, but if it does, it does.

28 MR. VAJDA: Certainly in relation to what I have just mentioned - interim relief - we could
29 obviously make our argument in writing. But, if there is to be a hearing, I suspect not just me
30 ---- we would be grateful for some sort of logistics.

31 THE PRESIDENT: Well, I will discuss it with the Registrar. We might, if it is acceptable, identify
32 a reserve date of some kind which would help everybody with diary matters. In the meantime,
33 of course, if there is any sign of any agreement between the parties, so much the better.

1 MR. ANDERSON: Could I raise one small logistical point? I indicated earlier the basis upon
2 which we were currently not minded to seek permission to appeal. In relation to your final
3 Judgment and the orders arising out of it, our position is, of course, that the Authority would
4 not lightly take a decision to seek permission. It is a matter, indeed, that would go to the
5 board. I understand that might present some logistical difficulties if the time for seeking
6 permission were abridged by too much. I understand the relevant board meeting would be 13
7 December on the indication that ----

8 THE PRESIDENT: If there is a board meeting on 13 December ---- I hope we shall have been in a
9 position to give a Judgment before that date, in time to enable the board to have a sensible
10 discussion about it on that date.

11 MR. ANDERSON: Then, whatever the outcome of that discussion, to prepare a request, if that is
12 what is ----

13 THE PRESIDENT: If the board then decided to seek permission to appeal, that is something the
14 Tribunal would have to deal with in the two or three days following that.

15 MR. ANDERSON: That may present difficulties.

16 THE PRESIDENT: Well, let us see if we can cross these various bridges when we get to them.
17 That is our position. Very well. Thank you all very much.

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