Neutral citation [2010] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1166/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2EB

8 December 2010

Before:

VIVIEN ROSE
(Chairman)
SHEILA HEWITT
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

JUDGMENT (RULE 40 APPLICATION)

APPEARANCES

Mr. Rhodri Thompson QC and Mr. Christopher Brown (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Claimant.

Mr. Christopher Vajda QC and Mr. Meredith Pickford (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

1. The Defendant ("Dŵr Cymru") has applied to strike out sections of the Particulars of Claim lodged on 18 June 2010 by the Claimant ("Albion"). The claim is brought under section 47A of the Competition Act 1998 ("section 47A") and seeks compensation for loss allegedly arising from Dŵr Cymru's infringement of the Chapter II prohibition. That infringement was the subject of a long running appeal before the Tribunal (Case 1046/2/4/04) culminating in a series of judgments. The infringements on which Albion relies to found its claim under section 47A are the Margin Squeeze Judgment and the Unfair Pricing Judgment. A glossary of relevant terms is provided as an annex to this Judgment.

2. The relief sought at the end of Albion's Particulars of Claim lists three kinds of damages: compensatory damages and/or restitution (valued at £4,600,301), aggravated damages (valued at £1 million) and exemplary damages (valued at £10.32 million). The strike out application relates to much (if not all) of the claim for compensation/restitution and to the whole of the claim for exemplary damages. The Tribunal's powers to strike out all or part of a claim under section 47A is conferred by rule 40 of the Tribunal's Rules. This provides that the Tribunal may reject a claim for damages in whole or in part at any stage of the proceedings if it considers that there are no reasonable grounds for making the claim.

3. The claim for compensatory damages is itself made up of two elements. The first arises from alleged loss of profits in respect of the supply of water by Albion to Shotton Paper. The second element is a loss of profit arising from Albion's inability to enter into a contract to supply the Corus steel works at Shotton with water also carried by Dŵr Cymru through the Ashgrove System.

Challenge to the claim for compensation/restitution relating to supply to Shotton Paper

4. Since March 1999, Albion has supplied water on a retail basis to Shotton Paper. It has acquired that water from Dŵr Cymru at the price set by Dŵr Cymru under a contract which we refer to as the Second Bulk Supply Agreement. Since 2001, Albion has wished to replace this arrangement with a different arrangement whereby Albion would buy the water directly from United Utilities (who currently

supplies it wholesale to Dŵr Cymru), have that water partially treated and distributed by Dŵr Cymru through the Ashgrove System, and then sell it at a retail price to Shotton Paper.

5. The dispute before the Tribunal in the earlier proceedings concerned the price at which Dŵr Cymru offered, on 2 March 2001, to provide Albion with a common carriage service for partially treating and distributing the water through the Ashgrove System. That price has been referred to in these and in the earlier proceedings as "the First Access Price". The Tribunal found that the First Access Price gave rise to a margin squeeze, having regard to the retail price at which Dŵr Cymru was itself offering to supply water to Shotton Paper. This finding was set out in the Margin Squeeze Judgment: see paragraphs [312] and [360(iv)]. The Tribunal further found that the First Access Price was abusive because it was an excessive price and was unfair in itself: see the Unfair Pricing Judgment at paragraphs [275] onwards. The scope of the remedy that was appropriate as a result of the Tribunal's findings of infringement was the subject of a hearing before the Tribunal some time later, giving rise to the Remedies Judgment in April 2009. The remedies granted by the Tribunal comprised a declaration as to the scope of the infringement and a series of orders as to Dŵr Cymru's future conduct. The declaration granted was in the following terms:

> "[Dŵr Cymru] abused its dominant position in the market for the partial treatment and transportation, via the Ashgrove system, of non-potable water abstracted from the Heronbridge abstraction point for supply to Shotton Paper within the meaning of section 18 of the Competition Act 1998, by proposing (in March 2001) to charge a price for the provision of such partial treatment and transportation which:
>
> (1) was both excessive and unfair in itself; and
>
> (2) imposed a margin squeeze."

6. The orders made included an order that Dŵr Cymru refrain from any conduct having the same or equivalent effect and further stated that any common carriage access price offered by Dŵr Cymru to Albion not exceeding 14.4p/m^3 in 2000/2001 prices shall not be conduct having the same or equivalent effect as the infringement identified in the declaration.

7. In the Particulars of Claim Albion calculates its loss relying on the findings of the Tribunal as to the amount by which the First Access Price exceeded what would have been the reasonable price for common carriage through the Ashgrove System. In the table set out at paragraph 197 of the Unfair Pricing Judgment the Tribunal used three different methods to calculate by how much the First Access Price was excessive, finding that it was between 7.4p/m^3 and 9.6p/m^3 too high.

8. Albion calculates the average of the amounts derived from those three different methods as being 8.8 p/m^3, (hereafter referred to as the "abuse differential"). It calculates its loss by multiplying the volume of water that it has supplied to Shotton Paper in a given year by that abuse differential. The calculation is set out in an Annex to the Particulars of Claim. Thus, in the first period following the offer of the abusive First Access Price, that is 8 March 2001 to 31 March 2002, Albion calculates its loss by taking the volume of water supplied to Shotton Paper in that period, namely 7,164,490m^3, and multiplying it by 8.8 pence arriving at a loss of £630,475. It makes the same calculation for subsequent years (with some adjustments in particular to take account of the interim relief granted by the Tribunal pending the resolution of the appeal) arriving at a total loss of £4,328,696 on the supply of water to Shotton Paper.

9. Dŵr Cymru argues that Albion cannot base its claim for loss of profit on the abuse differential because Albion has never at any stage paid the First Access Price to Dŵr Cymru. Albion never accepted the offer of the First Access Price and never entered into a common carriage arrangement with Dŵr Cymru. All along Albion has acquired water under the Second Bulk Supply Agreement. Dŵr Cymru therefore argues that a claim put on this basis must be predicated on the Second Bulk Supply Price being abusive. The claim must thus be struck out because since there has been no finding of abuse in relation to the Second Bulk Supply Price, there can be no follow-on damages claim in respect of any such alleged infringement under section 47A.

10. Albion argues that it can base its claim on the abuse differential because the Tribunal's infringement findings should be read as finding that the charges set by Dŵr Cymru for the two elements which comprise the common carriage service,

namely partial treatment and distribution, were abusive. Those same charges are incorporated in the Second Bulk Supply Price because what Dŵr Cymru provides under the Second Bulk Supply Agreement includes not only the water but also the services of partial treatment and distribution. Dŵr Cymru has stated in the past that the sums it has incorporated in the Second Bulk Supply Price for partial treatment and distribution are precisely the same as the charges which make up the First Access Price. Thus the First Access Price was made up of a charge of 7.2p/m^3 for partial treatment and of 16.0p/m^3 for distribution (see paragraph 267 of the Main Judgment). The Second Bulk Supply Price was made up of a charge of 7.2p/m^3 for partial treatment, 16.0p/m^3 for distribution and 3.9 p/m^3 for the actual water.

11. Albion asserts that we can and should transpose the Tribunal's finding that the First Access Price offered to Albion was excessive to the extent of 8.8p/m^3 to the Second Bulk Supply Price and conclude that the Second Bulk Supply Price was also on average 8.8p/m^3 higher than it should have been. Since Albion has in fact paid the Second Bulk Supply Price over the years, it has, it asserts, been overpaying by 8.8p/m^3 just as it would have done had it accepted the First Access Price offered in March 2001.

12. On this point we agree with Dŵr Cymru that this is not a method of calculating loss that is available to Albion in the context of an action which follows on from the earlier findings of infringement made by the Tribunal. That method of calculating loss relies on an assertion in effect that the Second Bulk Supply Price was abusive because it incorporated excessive prices for two of the three elements which went to make up the overall price (namely partial treatment and distribution). We are satisfied that the Tribunal's finding that the First Access Price was abusively high does not equate, expressly or impliedly, to a finding that the Second Bulk Supply Price was abusive.

13. On the contrary, Mr Vajda QC for Dŵr Cymru showed us that in the Remedies Judgment the Tribunal declined Albion's invitation to include any reference to the Bulk Supply Price in the declaration made. Albion had asked the Tribunal to make an order that the bulk supply agreement between Dŵr Cymru and Albion should remain in place and that the price should be based on 14.4p/m^3 (that is the price that

the Tribunal had found would have been a reasonable common carriage price) plus the cost of the water as invoiced by United Utilities to Dŵr Cymru. The Tribunal hearing the arguments on remedies rejected Albion's submissions that the finding of abuse in relation to the First Access Price must mean that the Second Bulk Supply Price was also abusive because the charges for partial treatment and distribution were carried across from the one price to the other. The Tribunal said:

> "At no point did the Tribunal find that the Bulk Supply Price constituted an infringement of the Chapter II prohibition. Moreover, Albion rightly acknowledged… that the Bulk Supply Price 'was not the direct subject-matter of its complaint to the Authority or its appeal to the Tribunal'."

14. The Tribunal hearing the remedies arguments held that it had no jurisdiction to give a direction in respect of the Second Bulk Supply Price because there had been no finding expressly or by necessary implication as to whether that price was an abuse of a dominant position.

15. It may be that Albion could establish that the Second Bulk Supply Price was also abusive. But there has as yet been no such decision to that effect capable of being relied on by Albion for the purposes of proceedings under section 47A. We bear in mind the comments of Patten LJ in *Enron Coal Services v English Welsh and Scottish Railway Ltd* [2009] EWCA Civ 647 ("*Enron*"):

> "31. …The use of the word "decision" makes it clear that 47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and the determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant … to seek to recover damages through the medium of section 47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined... The corollary to this is that the tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of 47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue."

16. We therefore find that in so far as the claim for damages as currently pleaded by Albion relies on a finding that the sums paid by Albion under the Second Bulk Supply Agreement were excessive because the costs attributed to providing partial treatment and distribution under that Agreement were the same as those which

generated the First Access Price, there are no grounds for Albion to pursue that claim in the context of these proceedings.

17. Dŵr Cymru raised a second objection to the claim for damages said to arise out of the abusive nature of the First Access Price. This objection was based on what was referred to as the "temporal" aspect of the abuse. Dŵr Cymru pointed to the fact that the Remedies Judgment records that Albion proposed that the Tribunal should declare that in March 2001 "and thereafter" Dŵr Cymru abused its dominant position by offering the First Access Price. The Tribunal however decided to omit any temporal aspect from the declaration which reads simply that "in March 2001" Dŵr Cymru abused its dominant position. Dŵr Cymru argued that by claiming loss of profits covering the period March 2001 to April 2009, Albion is alleging that the infringement lasted for that period whereas the Tribunal has made no such finding.

18. We do not consider that Albion's claim for loss of profits over an extended period necessarily depends on the infringement itself being of any particular duration. Some infringements of the competition rules have the character of continuing infringements, for example a price fixing cartel may last for a number of years. Some infringements have the character of a "one off" event; for example the abusive cessation of supply by a dominant undertaking or a refusal by a dominant undertaking in certain circumstances to grant a patent licence or allow access to its essential facilities. In each case, the issue for the court considering a follow-on claim for damages is for how long did the claimant suffer loss as a result of the infringement. The duration of the loss is not the same as the duration of the infringement. The victim of a cartel may not suffer loss for the whole life of the cartel if he, for example, manages after a while to secure a reasonably priced supply of product from a company outside the cartel or if, for reasons unconnected with the cartel, he decides to exit the business which used the cartelised product. The two issues may be linked if the period of loss comes to an end because, for example, the cartel collapses and prices gradually fall to a competitive level or because the dominant undertaking relents and grants a patent licence or allows access to its essential facilities. But the question in each case is for how long did the losses arising from the infringement endure rather than for how long did the infringement itself endure.

19. In the present case Albion has pleaded that its losses arising from the abusive offer made in March 2001 lasted until April 2009: as Mr Thompson QC on behalf of Albion put it: "this whole unhappy saga was triggered by the offer that was made in March 2001 and the complaint was made on the basis of that and defended on the basis of that. All the causation and everything that has happened since then essentially flowed from that event." (see Transcript, 26 November 2010, page 66). We do not read the Remedies Judgment as concluding that the effects of the offer made on 2 March 2001 did not extend beyond the end of that month. Dŵr Cymru may, in its defence, point to some event during that period which it can claim broke the chain of causation and brought the period of Albion's losses to an end earlier. Adjudicating on such an issue does not involve the Tribunal in finding the existence of any infringement different from or additional to the infringement set out in the declaration in the Remedies Judgment. We have to consider rather what loss flowed from that infringement and over what period it was suffered.

20. We therefore reject Dŵr Cymru's challenge to the Particulars of Claim based on the alleged "temporal" aspect of the infringement.

Challenge to the compensation/restitution claim in respect of Corus

21. In paragraph 108 of the Particulars of Claim Albion asserts that the consequence of Dŵr Cymru's abusive conduct was to deny Albion the opportunity to earn a reasonable margin or indeed any margin at all. In paragraph 109, Albion goes on to allege that that effect extended to the potential supply to the Corus steel making plant on an adjoining site, also supplied with water through the Ashgrove System. Paragraph 109 reads as follows:

> "This effect… extends, on a conservative basis, to the entire Ashgrove system, including supply to Corus on the adjoining site. The Claimant attached to its original notice of appeal a letter dated 11 July 2003 (…) in which Corus indicated that it was highly dissatisfied with the lack of competition in the water industry and invited the Claimant to tender for its business with effect from 1 April 2004. The Claimant was in the event unable to do so as a result of the ongoing dispute with the Defendant and the weak regulatory response of the Authority. As such, the Claimant lost the opportunity substantially to expand its business not only at Shotton but at the other Corus sites at Llanwern and Trostre…"

22. Dŵr Cymru's challenge to this aspect of Albion's claim was based on similar grounds to its challenge to the Shotton Paper claim. First it argued that there was no finding of abuse in relation to any offer of a common carriage service made to Albion in respect of the Corus works at Shotton; Albion never asked for a price for common carriage and it cannot be assumed that, if Albion had asked in March 2004, Dŵr Cymru would have quoted the First Access Price. Again, Mr Vajda pointed to the fact that before the hearing about remedies, there was an exchange of correspondence setting out draft orders, one of which incorporated a reference to Corus in the draft declaration which the Tribunal would be invited to make. In the event, as we have seen, there was no reference to Corus in the declaration setting out the scope of the infringement.

23. We agree that Albion cannot, in these proceedings, base a claim for loss on any alleged abuse in relation to Dŵr Cymru's price for common carriage for supply to Corus. Although it may be able to establish on the facts that Dŵr Cymru would have quoted the First Access Price and that that price would have been abusive, there has been no finding of infringement in that regard. In so far as the claim for loss of profit arising from being unable to supply Corus, Shotton relies on an assumption that Dŵr Cymru would only have quoted an abusive common carriage price for that supply, we agree that the claim must be struck out.

24. However, paragraph 109 may not be based entirely on such an allegation. The pleading may be intended to be read as a more general claim for loss of opportunity in that if Albion had been able to build up its business on a profitable supply to Shotton Paper (using a reasonable common carriage arrangement with Dŵr Cymru) then it would have been in a sufficiently strong and healthy position to expand its business to supply other customers, in particular the Corus plant at Shotton.

25. In so far as Albion is relying on a more general claim along those lines, it could properly be regarded as flowing from the offer by Dŵr Cymru of an abusive price for common carriage of water to Shotton Paper. Although the claim may be somewhat tenuous as currently drafted, we do not consider that it is unarguable. We would therefore reject the application to strike out the claim for damages in respect of supply to Corus, Shotton to that extent.

26. Dŵr Cymru also challenged the claim for loss of profit arising from an inability to supply Corus Shotton on the same "temporal" ground as it did in relation to the supply to Shotton Paper. We reject that argument for the reasons set out in paragraphs 18 and 19 above.

Challenge to the claim for exemplary damages

27. In the Particulars of Claim at paragraphs 73 onwards Albion sets out a claim for exemplary damages. This is based on the two well-known cases in the House of Lords: *Rookes v Barnard* [1964] AC 1129 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] AC 122. In short, Albion alleges that Dŵr Cymru refused to offer a reasonable price for common carriage "in cynical disregard for the interests of [Albion] or its customer Shotton Paper".

28. Dŵr Cymru invites the Tribunal to strike out the claim for exemplary damages on the basis that it is precluded as a matter of law by the judgment of Lewison J in *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 (Ch) ("*Devenish*").[1]

29. In *Devenish* Lewison J considered the availability of exemplary damages under both European and domestic law. As to the first, he referred to judgment of the Court of Justice in Cases C-295/04 etc *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619 which held that in accordance with the principle of equivalence, it must be possible for a national court to award exemplary or punitive damages in claims founded on the EU competition rules, if such damages may be awarded that national court in similar actions founded on domestic law. Lewison J held however that there were two aspects of EU law that ruled out the award of exemplary damages to Devenish. Both aspects arose from the fact that the damages claim in *Devenish* relied on a finding of infringement made by the European Commission in the *Vitamins* cartels decision. Lewison J held (paragraph 48) that "…in anti-trust cases the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anti-competitive behaviour". He therefore concluded that the principle of *non bis in idem* precluded the award of exemplary damages where the Commission had already imposed a fine for the infringement.

[1] The point on exemplary damages was not challenged on appeal: *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086.

Secondly he referred to the obligation imposed on the Member States by article 16 of Regulation 1/2003[2] not to take a decision which runs counter to a decision taken by the European Commission. He held that the Commission had decided on the adequacy of punitive measures for the defendants as a result of their participation in the vitamin cartels. If the national court were to award exemplary damages, that could only be because the national court had concluded that the fines imposed by the Commission were insufficient to punish and deter. The national court is not in a position to reach such a conclusion, because that would "run counter" to the decision already adopted by the Commission.

30. Lewison J then went on to consider whether exemplary damages were available as a matter of domestic law, having regard to the rule against double jeopardy. He noted that it was common ground between the parties in that case that as a result of the decision of the House of Lords in *Kuddus*, there is no longer a cause of action test for the award of exemplary damages. In other words the mere fact that a claim is brought under Article 101 TFEU does not of itself rule out an award of exemplary damages. He then considered the cases of *Archer v Brown* [1985] QB 401 and *Borders (UK) Ltd v Metropolitan Police Commissioner* [2005] EWCA Civ 197. In the former case, Peter Pain J relied on the double jeopardy rule in refusing to award exemplary damages against a defendant who was serving a prison sentence for the conduct from which the claim of damages arose. However, in the *Borders (UK)* case the Court of Appeal held that a claim for exemplary damages was not ruled out either by the imposition of a term of imprisonment for the relevant conduct or by the fact that criminal confiscation proceedings were pending against the defendant. The Court of Appeal held that an award of exemplary damages would necessarily be taken into account in any later confiscation proceedings because the defendant's assets would have been depleted by that amount. What appears to have been decisive for the members of the Court of Appeal in *Borders (UK)* was that there was no possibility *in practice* that there would be double counting by the imposition of both a confiscation order and an award of exemplary damages.

31. The conclusion drawn by Lewison J in *Devenish* was expressed as follows:

[2] *Official Journal* 2003 L1 page 1.

> "62. I draw from *Borders* that the fact that a person has been imprisoned for an offence is not, in itself, enough to bring the principle against double jeopardy into play; but that so far as financial remedies are concerned, the principle is still a good one *to the extent that there should be no practical danger of double counting or duplication of penalty*." (emphasis added)

32. Dŵr Cymru seeks to rely on *Devenish* even though it has not been fined for its infringement by the European Commission, by the Office of Trading or by the Tribunal. Mr Vajda argued that Lewison J's judgment in the *Devenish* case is authority for the proposition that no court (that is neither the Tribunal nor the High Court) has power to award exemplary damages in a follow-on claim for damages. He relies on a passage in *Devenish* where Lewison J dealt with the question whether exemplary damages could be claimed against a cartel member whose fine had been commuted by the European Commission under its leniency programme:[3]

> "51. Mr Layton [Counsel for the claimants] also argued that in the case of the Aventis companies the fines had been commuted to zero as a result of the application of the Leniency Notice. Thus he said that these companies, at least, had not been sanctioned for the unlawful conduct at all. I do not accept this submission. The Commission decided in principle that fines should be imposed on the Aventis companies. It is true that by the application of the Leniency Notice, those fines were commuted to zero as a result of Aventis' conduct as whistleblower; but the starting point for the application of the Leniency Notice was the finding of unlawful conduct coupled with the imposition, in principle, of a fine. The application of the Leniency Notice serves the important policy aim that it is of even more importance to encourage whistleblowers than to punish participants in a cartel. In my judgment the national court should not undermine that policy by an award of exemplary damages against a person who has had his fine commuted as a result of the application of the Leniency Notice. If Mr Layton's submission were correct, then a more guilty wrongdoer would escape liability for exemplary damages, while a less guilty wrongdoer, whose fines had been commuted would not. This seems to me to be wrong in principle.
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> 52. In my judgment, therefore, the principle of *non bis in idem* precludes the award of exemplary damages in a case in which the defendants have already been fined (or had fines imposed and then reduced or commuted) by the European Commission."

33. Mr Vajda emphasised the last two sentences of paragraph 51 and argued that if it is right that exemplary damages cannot be awarded against a cartel member which has had its fine commuted because it is a "less guilty wrongdoer" then it must follow

[3] The leniency programme is the scheme under which the European Commission commutes the fine imposed on the first cartel member who comes forward to provide information to the Commission about the existence and extent of the cartel: see the Commission Notice on immunity from fines and reduction of fines in cartel cases, *Official Journal* (2006) C298 page 17 which is the current version.

that where no fine has been imposed at all, the wrongdoer must be even less guilty and hence even less susceptible to a claim for exemplary damages.

34. We do not agree that the *Devenish* judgment is authority for any such broad proposition. It is clear from the judgment read as a whole that Lewison J's conclusion that exemplary damages were ruled out as a matter of EU law was limited to the case where the Commission had imposed a fine or had commuted the fine for the specific policy reasons underlying the Leniency Notice. A principle that the mere availability of the domestic power to fine for a competition law infringement precludes a claim for exemplary damages does not follow from what Lewison J said in his analysis of EU law and appears to be entirely inconsistent with his findings as to domestic law.

35. Where the Office of Fair Trading or the Tribunal expressly decides not to impose a fine, for example because the infringement was not committed negligently or intentionally, a claimant is unlikely to be able to establish the "cynical disregard" element that is necessary for exemplary damages to be awarded. But that is not what has happened here.

36. Clearly no question of "running counter" to a decision of the European Commission arises in this case. So far as domestic law is concerned, we consider that the position is as described in paragraph 62 of Lewison J's judgment. A claim for exemplary damages may be maintained in respect of a breach of the Competition Act 1998 provided that there is no practical danger of double counting or duplication of penalty. In the present case, no fine has been imposed on Dŵr Cymru and there is no practical possibility of any fine being imposed by any enforcement body in the future. There is no danger of double jeopardy and the exemplary damages claim should not be struck out.

37. We also find, in rejecting Mr Vajda's subsidiary points, that the wording of section 47A makes clear that the heads of damage available in a follow-on damages claim before the Tribunal are intended to be the same as the heads of damage available in the High Court, at least where the claimant has suffered loss or damage as a result of the infringement. The earlier domestic cases cited in *Devenish* also refute Mr

Vajda's suggestion that exemplary damages are only available where there is a "lacuna" because of the absence of any public law power to punish the alleged egregious conduct. Finally we reject the suggestion that no award of exemplary damages can be made in a follow-on action because that would require the Tribunal to find facts relating to the presence or absence of "cynical disregard" on the part of Dŵr Cymru and that would not be a finding in relation to causation or quantum. We do not read the judgment of Patten LJ in *Enron* as restricting the scope of the Tribunal's factual enquiry in so far as that enquiry is necessary to resolve issues as to the kinds of damages which can be claimed and the quantum of those damages, provided the inquiry does not involve finding other infringements.

38. We therefore reject Dŵr Cymru's application to strike out the claim for exemplary damages in this case.

Conclusion

39. All the decisions set out in this ruling are the unanimous decisions of the Tribunal. The parties asked us to issue our ruling on the matters of contention between them without determining which parts of the Particulars of Claim survive and which should be struck out. We therefore invite the parties to submit, as soon as possible, a draft order consequent on our findings. We will then set a timetable for the future conduct of the case.

Vivien Rose Sheila Hewitt Graham Mather

Charles Dhanowa
Registrar Date: 8 December 2010

GLOSSARY OF TERMS

The Tribunal judgments in the infringement proceedings: Case 1046/2/4/04	
The Main Judgment	*Albion Water Ltd v Water Services Regulation Authority* [2006] CAT 23 (6 October 2006)
The Margin Squeeze Judgment	*Albion Water Ltd v Water Services Regulation Authority* [2006] CAT 36 (18 December 2006)
The Unfair Pricing Judgment	*Albion Water Ltd v Water Services Regulation Authority* [2008] CAT 31 (7 November 2008)
The Remedies Judgment	*Albion Water Ltd v Water Services Regulation Authority* [2009] CAT 12 (9 April 2009)
Other Terms	
The Tribunal's Rules	The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372)
The Chapter II prohibition	The prohibition of the abuse of a dominant position contained in section 18(1) of the Competition Act 1998
First Access Price	The price offered by Dŵr Cymru for common carriage in March 2001, namely 23.2p/m^3
Second Bulk Supply Agreement	The agreement entered into between Albion and Dŵr Cymru on 10 March 1999 for the supply of non-potable water via the Ashgrove System
Second Bulk Supply Price	The price payable by Albion under the Second Bulk Supply Agreement, namely 26p/m^3
Ashgrove System	The system of pipes owned and operated by Dŵr Cymru through which water is supplied to Shotton Paper and Corus Shotton
Shotton Paper	A paper-making plant situated on Deeside supplied with non-potable water via the Ashgrove System
Corus Shotton	A steel producer supplied with non-potable water via the Ashgrove System
United Utilities	A water undertaker and supplier of non-potable water from the River Dee at Heronbridge to Dŵr Cymru
p/m^3	Pence per cubic metre