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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1166/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 March 2012

Before:
VIVIEN ROSE
(Chairman)
TIMOTHY COWEN
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Claimant

-v-

DŴR CYMRU CYFYNGEDIG

Defendant

_____

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Tom Sharpe QC and Mr. Cook (instructed by Shepherd Wedderburn LLP) appeared on behalf of the Claimant.

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

THE CHAIRMAN: Good morning ladies and gentlemen. We have got a number of matters on the agenda for today's CMC. Listing them, not necessarily in the order in which you are going to address them, is the question of costs, then the matter of the application by Dŵr Cymru for security for costs, and then issues relating to the further conduct of the case. We have read all the submissions and witness statements and correspondence that have been sent to us, from which we gather that Albion accept that their particulars of claim will need to be amended to re-plead the calculation of loss, and we have got some matters that we want to raise about that in due course. That presumably means that Dr. Bryan's main witness statement will need to be revised and various questions about other aspects of that statement have been raised which we might need to rule on. Then there are some issues about disclosure, although we are not at the moment entirely clear whether we are being asked to make any rulings about disclosure. There has been a point raised about background documents for Miss White's statement, or whether it has simply been raised in order for us to take that into account in relation to the timetabling.

We have some points ourselves that have cropped up in our reading of the material that we want to make at some stage about the state of the evidence and how this is going to be carried forward. Then it would be useful to have some idea of when the parties expect that the main hearing of this matter is going to take place and then to set the timetable as far as possible for the next steps in this litigation.

That is where we are, and who is going to go first. Mr. Sharpe?

MR. SHARPE: I have had the benefit of talking to my learned friend and he is going to propose a timetable for the running order for today. In relation to Dr. Bryan's statement, it does not follow necessarily that any amendment would require a redrafting of that statement, or any material redrafting. I just factor that in now because it is in our mind. Indeed, the accusation is that the statement anticipates an amendment, therefore the statement should stand, but we may reserve our right to make modest amendments to it.

THE CHAIRMAN: Let us see where we get to on that.

MR. SHARPE: Yes, but I think it is not a substantive issue for today.

THE CHAIRMAN: We might want to make it a substantive issue. Yes, Mr. Pickford?

MR. PICKFORD: Thank you, madam, members of the Tribunal. Of the items on the agenda, I would propose to take them in this order: firstly, to deal with the discrete matter of our application for security for costs, then to address what we should do about Dr. Bryan's witness statement, then to consider the directions to trial in the light of the second item on the agenda, because we say it has a substantial bearing on it.

In relation to disclosure, Mr. Sharpe has helpfully told us that the only discrete item, which was the issue of the contemporaneous notes which were mentioned in Dr. Bryan's witness statement, they are happy for us to inspect those at Shepherd Weddderburn's premises and take copies as appropriate. That is no longer an item that needs to trouble the Tribunal. Lastly, there is the discrete, and hopefully small, matter about the costs applications in relation to some of the previous applications made in these proceedings. That is the agenda and the order in which I would propose to take those points.

MR. SHARPE: Madam, I had the briefest of exchanges with my friend regarding the diaries. Of course they are available for inspection. Those instructing me will be writing to Hogan Lovells. We want to make it clear that these are diaries which embrace personal and other matters. In the first instance we would prefer them to be inspected by Hogan Lovells and not passed to their client, simply because many of them are quite irrelevant and also contain, as you would expect, commercially sensitive information which would not be available to them in the ordinary way. So they are entitled to that which is relevant, they are not entitled to that which is irrelevant, nor commercially secret. So the most sensible way forward is to go forward as we suggest, which we think is perfectly sensible, but to have a two stage procedure whereby nothing goes to DC until we have had an opportunity to assess them and there is no disagreement in relation to its relevance or commercial sensitivity, and we think that is a perfectly appropriate way forward and will not delay matters unduly.

MR. PICKFORD: Madam, we are very happy to take a two stage process, and obviously we would not propose to provide anything to our client in relation to which confidentiality, for example, is asserted. I think we are content with that.

In terms of bundles, could I just check what the Tribunal has? I have three bundles. I have a very thick bundle entitled "Bundle for the case management conference", which contains everything really to do with the directions and the CMC part of today. I have a further bundle which is Dŵr Cymru's bundle in support of its application for security for costs, which actually contains in addition the submissions made by Albion in relation to that and also Dr. Bryan's evidence. There is then a third bundle which is Dr. Bryan's complete second witness statement together with its exhibits that are not included in Dŵr Cymru's bundle. So those are the bundles I propose to be working from and I hope the Tribunal has the same ones.

There is one small issue actually on the evidence that Albion provided a third witness statement from Dr. Bryan which was not strictly in accordance with any of the directions of the Tribunal. We do not make a big issue about that. We only say in relation to it that we

have not had an opportunity to provide responsive evidence, it was actually our application and our entitlement to effectively have the last word. We did not want to get into an unseemly battle to try and have that last word, but what we do say is that in consequence the Tribunal cannot really place an enormous amount of weight on that final witness statement. In fact, we say it does not matter, it does not need to because the issues canvassed are not relevant to the key issues on the application, so very little follows in consequence from it, but we just wanted to note that in relation to that particular statement.

Turning then to the application for security for costs, I am broadly going to follow the scheme in my skeleton argument, but that is indeed fairly skeletal and so I will be drawing on the points both in the application and also points that I wish to emphasise orally.

There are two issues that the Tribunal needs to consider, first is the jurisdiction to make the order, and the second is whether, in the exercise of its discretion, it is just to make the order.

On jurisdiction happily this is another matter on which agreement has recently broken out between the parties. The Tribunal's powers, as it will be well aware, are contained in Rule 45 and, in particular, Rule 45(5)(c) provides jurisdiction to make an order for security for costs where:

> "the claimant is an undertaking (whether or not it is an incorporated body, and whether or not it is incorporated inside or outside the United Kingdom) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;"

In its skeleton argument at para.26 Albion accepts that that test is satisfied. For the Tribunal's note the costs in issue here we have estimated are likely to be in the region of £1.7 million total for the proceedings.

THE CHAIRMAN: Is that Dŵr Cymru's costs?

MR. PICKFORD: That is Dŵr Cymru's costs, para.33 of Ms. Kim's first witness statement.

There is not actually any debate about whether there is jurisdiction, whether we satisfy the first part of the test, the debate in this case is about whether it will be just for an order to be made. The principles underpinning that issue find most recent guidance from the Tribunal in the Judgment in *2 Travel Group v Cardiff City Transport Services* which is in our bundle for the application at tab D3. I apologise there is a slightly confusingly tabbed bundle. It is divided up firstly into lettered subsections and within those lettered subsections one finds a number of numbered sub-parts.

One sees from para. 1 that the decision in question which led to the follow-on action was that the OFT had found that between certain dates the defendant, Cardiff Bus, had infringed

the prohibition in 18(1) by engaging in predatory conduct. The Tribunal went on at para.6 to explain that this was only the second time at which a contested application had been made for security for costs, and then it referred to the guidance given by the Tribunal in the previous case, the *BCL Old* case. Could I just invite the Tribunal to read para.6.

THE CHAIRMAN: It says there that it is only the second time the Tribunal has ruled on a contested application. I am not sure there has been an uncontested application. I do not think that security is ----

MR. PICKFORD: Madam, I am certainly not aware of one, although I suppose, if it had been uncontested, there is reason why I might not have done.

THE CHAIRMAN: (After a pause) Yes?

MR. PICKFORD: The Tribunal also went on to quote approvingly from *Keary Developments Ltd v. Tarmac Construction Ltd*. Madam, if I may, I would prefer to actually take the Tribunal to the decision itself, because it bears careful scrutiny. It is at tab 5 in the same bundle. This is a decision of the Court of Appeal on a decision from the Registrar. Lord Justice Peter Gibson gave the leading judgment. Can the Tribunal please read the first paragraph of his judgment beginning at p.536C down to just before E. (After a pause) We say that is both the essential principle in relation to costs and the essential problem that obviously that has given rise to it in a situation where, as here, there are reasonable grounds to expect that the claimant will not be able to pay its costs.

In essence, the facts of this case were that there had initially been two unsuccessful applications for security and, as matters went on, the scope of the proceedings appeared to expand requiring amendments to statements of case, perhaps to some extent analogous to what is happening in this case.

Then there was a third application for security for costs made. One sees that referred to at p.538E. It was common ground that there was an amendment to the trial, it was going to go from 20 to 30 days, and then there was a third application for security for costs. In very broad summary, the submissions made by the parties on that application are recorded at J where it is said:

> "… Mr. Willmott said that the plaintiff's claim was now even more substantial than it been before Mr. Recorder Tackaberry and that 'it would be grossly unfair on the plaintiffs if such a claim were stifled now'. In a further affidavit ... Mr. Piggott drew attention to the fact that 'no evidence of the plaintiff's inability to raise funds for security had been provided', but no further evidence was put in by the plaintiff."

Then over the page we see what the Recorder considered to be the essential issue at the forum of first instance, the paragraph beginning, "He then turned to what he regarded as an essential matter", if the Tribunal could please read that. The third application was again denied.

That is the context in which the matter came before the Court of Appeal. At 539H we see the relevant principles that should be applied in considering such an application. Could I invite the Tribunal please to read, first, from H to just below H on the following page, paras.1 through to 6. (After a pause) Have the Tribunal had the opportunity to read that page?

THE CHAIRMAN: Yes.

MR. PICKFORD: I am grateful. There then comes a particularly important passage at the bottom of that page dealing with the issue of a stifling of the claim:

> "However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing litigation."

In that case referring to the *Flender Werft* case.

> "Mr. Justice Saville applied by way of analogy the approach adopted in another context, that of payment into court as a condition of leave to defend."

And then it would be very helpful if the Tribunal were able to read the following page down to "g".

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: Thank you. One of the key points that one sees in that passage is Lord Bingham's approval of the remarks that were made in *Kloeckner* that even where there is a probability that the defendant wrongly caused the plaintiff's impecuniosity, the onus still lies on the party resisting security for costs to satisfy the court that an award would prevent the claim from being pursued.

Moreover, it is not sufficient for the appellant in that case, and the claimant in this, to show that he does not have assets from his own personal resources, one needs to look more generally at the assets that would be available from other resources including directors, shareholders, third parties, etc. Those principles which were approved by this Tribunal in 2 Travel were applied in the present case, and I do not want to take the Tribunal through that

at length, but there are just a couple of small points to note. If one turns over the page to p.543 one sees at "f" one of the criticisms that is made of the Official Referee is that he did not carry out a weighing exercise. It says:

> "He did not weigh the injustice to the defendants if no order for security was made. Once he found that there had been no significant change in circumstances he proceeded to consider the question of whether the plaintiff's claim would be stifled by an order for security and the lateness of the application, but nothing further."

So the point there is even if the conclusion of the claim would or might be stifled there is still then a balancing exercising balancing that potential injustice against the injustice to the party which may have to pay a very large amount of costs that they never get back. That is the point there.

Finally, at letters "h" and "j" we see something of the evidence that was provided on the issue of the resources available to the plaintiff, and the Official Referee inferred that the claim would be stifled and Lord Justice Peter Gibson goes on to consider that, and he says:

> "But I do not understand how he could say, for example, that he had regard to the nature of the directors of the company, when all that he knew was that the directors were two sons of Mr. Keary senior. There was no evidence of their means, apart from the fact that they were the owners of a house which was being let to the plaintiff at an annual rate of £36,000 pa., that house being mortgaged to a bank for £200,000."

He goes on to say:

> "There is no evidence of who is financing the current litigation, nor how it is being financed."

Ultimately his conclusion was that it was appropriate to set aside the decision that there should be no order for security for costs and to impose an order in the sum, in that case, of £100,000. That, compared to the £300,000 that were the estimated total costs of the litigation, and the £300,000 figure we see at p.543 at "b".

We rely on the principle set out in that Judgment just as the Tribunal relied on them in *2 Travel*.

We then come to consider the factors relevant to the determination of this particular application in the light of those general principles.

The first issue which we need to address, and in the order it was addressed in *2 Travel* is the claimant's financial position and whether any impecuniosity can be attributed to Dŵr Cymru's infringement.

It is now common ground that Albion is impecunious and would not be able to pay the costs where they awarded to Dŵr Cymru. Albion says that is our fault and that can be attributed to our infringement.

If one could go please, to paras. 39 and 40 of Albion's submissions for today in response to the application. That should be at tab A2 of the defendant's bundle, and possibly other places too. Do the Tribunal have those?

THE CHAIRMAN: Yes.

MR. PICKFORD: I am grateful. We see under the heading "Albion has a claim with real prospects of success" how it is currently being put that Dŵr Cymru caused loss to the claimant and if the Tribunal could please read paras. 39 and 40. What is being said in essence is that we would have been 3 pence, or nearly 3 pence better off under common carriage than under bulk supply on these assumptions.

There are a number of problems with that. First, it overlooks the other relevant costs including the cost of the back up supply. That is obviously a factual dispute which will be determined at the trial, and I do not invite the Tribunal to determine that matter now.

Secondly, the 9p per m^3 offer which is referred to was subject to conditions by United Utilities, conditions which we say Albion never fulfilled or showed any inclination for fulfilling. One of those was that Albion was going to be required to accept that that price was fair and reasonable.

The third point, and the point that I make for today is that there is an even more fundamental problem with the articulation of the loss here which is that Albion's profits in the real world, for which this is the counterfactual, were not based purely on the bulk supply price, because from October 2002, one sees this from the particulars of claim, and I can take the Tribunal to it in a moment if it would assist but it is not disputed. From October 2002 Albion received a 3p per m^3 margin from Shotton to keep it going, and then from 1st July 2004 that was reduced to 1.5p from Shotton but Dŵr Cymru provided interim relief in the form of 2.05p, so in total there was a 3.55p margin that was being earned during that period. Then from 10th November 2006 until 9th April 2009 the full amount of 3.55p was provided in interim relief by Dŵr Cymru.

So one sees that over the relevant period in fact the margin that Albion was able to earn was, we would say, 3.55p, and that is better than the margin it says it would have earned if it had adopted common carriage on the basis of assumptions at paras.39 and 40. On that basis, we say that even if you assume in Albion's favour that it would have got supply at 9p m^3, and you assume in its favour that it would not have incurred any other costs in

connection with common carriage, it was actually better off in the world that happened when it took bulk supply with the interim relief that was granted than it otherwise would not have been.

THE CHAIRMAN: Is their primary case not that they would only have had to pay 3p m^3 to United Utilities?

MR. PICKFORD: We say that that case is not a credible one. I make it clear, obviously these are the assumptions that are made here. The Tribunal cannot get drawn into the very depths of that because obviously that pre-judges what is going to happen at trial, but it can to some extent consider, given that 3p m^3 was never offered by United Utilities, take an initial view on how likely it really is that that is the right figure on which to base this claim for damages. It may be that the Tribunal feels that there is a limit to how far it can go, but we would say that *prima facie* there certainly is not a strong case of damage being presented by Albion in this matter.

THE CHAIRMAN: You seem to be moving to what I thought was a different factor, namely the likelihood of ultimate success, whereas I thought what we were now talking about was whether the impecuniosity is caused by Dŵr Cymru.

MR. PICKFORD: Madam, that is entirely correct, but we say that the two, in fact, overlap, because of course the reason why it is said that the impecuniosity was caused by us is because it says we have caused them loss and damage. The first point I make in relation to that is that actually the *prima facie* case that we have caused them loss and damage is not a strong one. There is clearly a limit to how far the Tribunal can go in to examine that but that is the way I put it: the *prima facie* case is not a strong one, and therefore the *prima facie* case that their impecuniousness is as a result of our conduct is similarly not a strong one. So there is an overlap there between those two considerations.

We say, consistent with that position, one can see that Albion has, in fact, been doing very well in terms of generating significant cash. If one goes to tab B3 (these are the exhibits to Ms. Kim's first statement) one sees a set of Albion Water Limited's directors' reports and financial statements. Could you go, please, to the very final page, which has administrative expenses for the years 2011 and 2010. One sees there, in the second line down, "Charges from Albion Water Group", so this is the amount of cash that is extracted from the limited company and goes up the chain to the group company that sits on top, and then from the group company it gets paid to the directors, etc. We see that £416,903 was generated to go to Albion Water Group in 2011 and £340,000 odd in 2010. That is approximately £750,000 in the last two years alone.

If you then go to tab 4 , which is the group accounts, on the last page we can see effectively what was happening to that money. The last page of tab 4 should have "Albion Water Group Limited – Detailed trading profit and loss account and expenses schedule". We see at the top, "Sales, Albion Water", the £416,903 figure, which is the same figure that was passed up to the group from Albion Water Limited, £416,903. Then we see how the administrative expenses tot up. The first two categories, wages and salaries and directors' remuneration, account for the vast bulk of the cash that was generated by the limited company.

What one sees is that Albion, as a limited company, has generated cash. It has not kept that cash in the business. There is no point taken here that there is anything improper about that. It passes up to the group company and then it goes principally, the largest single sum goes in directors' remuneration.

There has been a bit of a spat between the parties about how generous or ungenerous is that remuneration in the light of the relatively limited activities that Albion carries out. The Tribunal does not need to get drawn into that. You will see that there is obviously a difference of evidence on it between the parties. In my submissions all I place reliance on is that, as I said previously, Albion's case that it suffered a *prima facie* loss is weak. Albion itself generates substantial cash. It has not been building that up as net current assets, but the main place where a lot of that cash goes is to Dr. Bryan and his fellow directors. The payment of £191,800 is the directors' payments for last year. On that basis, we say that there is no reason to say that Albion's impecuniousness is attributable to any kind of infringement by Dŵr Cymru.

THE CHAIRMAN: So what is it attributable to?

MR. PICKFORD: It would appear to be attributable to the fact that it is a small company and the way in which it arranges affairs is that it pays out quite large sums. Whether they are sums which are appropriate in the circumstances or not we do not take issue with.

THE CHAIRMAN: Are you saying that if one looks at the group it is not impecunious?

MR. PICKFORD: No, we are not saying that if one looks at the group it is not impecunious. One of our original points before we were given full disclosure, including of a "keep well" ** agreement, is that there was a problem in that the only entity that was in front of the Tribunal is the limited company, Albion Water Limited, and not the group company.

The situation would be better if the group company were also a claimant here because the group company has some net assets of its own. It has some cash reserves of its own. If one took account of that there still would be some greater amount of cash in the event that there

was a costs order made. It is not in dispute between us that, in fact, Albion is impecunious, and if a costs order were made it could not pay it, and even if one takes account of the group, it still could not pay it.

THE CHAIRMAN: Do you accept that even if one takes account of the group it still would be impecunious as a group?

MR. PICKFORD: Yes.

THE CHAIRMAN: So what is the point about whether the money is in Albion or in Albion Water Group?

MR. PICKFORD: The main point is that from Albion Water Group it then goes to the directors. So most of the money that is generated ultimately ends up in payments to the directors, albeit through the group. The group is, to some extent, a red herring.

THE CHAIRMAN: I still do not see what point you are making then. Is this a point that because it pays its directors it is not then impecunious, or you accept that it is impecunious - what is your point about payment of the directors?

MR. PICKFORD: The point is, we accept it is impecunious. We are simply saying that it seems, on its face, to generate quite a lot of cash. So it is not like the underlying business is not capable of generating cash. If the underlying business were not capable of generating cash, as it is said that we had prevented it from doing so, then you would not expect even to see the directors being able to take nearly £200,000 per annum from the business. We are not criticising them for doing that.

THE CHAIRMAN: If you are not criticising them for doing it, why are you raising it?

MR. PICKFORD: What it goes to illustrate is that it is all part of demonstrating that we, Dŵr Cymru, have not caused impecuniosity. In so far as the business itself is impecunious, it is because it chooses to pay the large amounts of cash it generates out to its directors. It could instead – it is not a value judgment being made here – it could objectively keep lots of that cash in the limited company or in the group company. In that case it might not be impecunious.

THE CHAIRMAN: Yes, but then it would not have the services of its directors?

MR. PICKFORD: Quite. We are not making a value judgment about it, we are simply saying that it is a company where its business model is capable of creating cash and it enables it to pay its directors apparently fairly well. That is all we are saying. It may be that there is really nothing more to it. Therefore, when one looks at Albion, one cannot say, particularly in the light of the other points that I have made, that Dŵr Cymru has somehow caused it to be impecunious. It does not have much in the way of cash and that is because it decides that

most of its cash goes to its directors. That is fine, we are not criticising it for doing it, we are just saying ----

THE CHAIRMAN: If it had much more business then it would not be impecunious. I think their point is a wider point, that their growth overall has been stunted over the years because of the earlier proceedings and the inability to focus on building up their business.

MR. PICKFORD: We would point to the fact that it is accepted that there has certainly been no abuse at all since 2008 when a new access price was offered, and nothing very much has changed in relation to Albion's business in the last four years.

THE CHAIRMAN: Yes.

MR. PICKFORD: It could, of course, be the case that if Albion had more business below its directors got paid more and therefore the company itself, the vehicle that is in issue here, did not have any more cash than it does today. We do not really know.

So that is what I have to say on that first point and I apologise if I have not explained it sufficiently well to the Tribunal but the Tribunal thought I was making more of where the cash goes than I am. I am simply explaining that insofar as there is a problem of impecuniosity it is not caused, we say, by us.

The next issue is the likely outcome of the proceedings and the relative strength of the parties' cases, and I have already addressed you on this in relation to the claim in relation to Shotton Paper, and so I do not need to rehearse those points again.

In relation to Corus at Shotton, that claim was described by the Tribunal in its ruling in 2010 CAT 30 at para.25 as "somewhat tenuous as currently drafted". Albion did subsequently amend that claim but we say it is as tenuous now as it was then.

Then there is the claim for exemplary damages. That, we say, is without precedent, and it is speculative. It is true enough that the Tribunal has not decided to strike out that claim. However, the circumstances are these: first, the competition authority ruled that there was no infringement; and secondly, although the Tribunal disagreed and found that there was an infringement, it did not impose a fine, despite having the power to do so and despite it having been suggested at one point that it should consider doing so. We say in the light of that very strong facts indeed would be needed to justify the imposition of such a punitive sanction as exemplary damages and that those facts are wholly absent in the present context.

We say that we have at all times sought to act openly and fully in accordance with what we understood to be the views and the policies of the Regulator, so one has to remember that this action was defended by the Regulator as well; we both thought that we were doing the right thing, the Tribunal ultimately decided that there was a different answer.

Albion makes a virtue of the fact that it is pursuing a claim for exemplary damages which is without precedent, and it says it is a pioneer. Well, if it were a pioneer with a prima facie very strong case, that might be one thing, but we say it is a pioneer with a case that has a significant likelihood of failing, and that there is no good policy reason for expecting Dŵr Cymru to face the entire cost risk in relation to the so-called "pioneering" case. It is also worth remembering that had there been a fine in this case that fine would have gone to the public purse and it would have acted as a bar to the current claim for exemplary damages; that is the double jeopardy *Devenish* point. In the present case Albion seeks to take advantage of the fact that there has not been a fine yet, and it effectively wants the fine itself.

If it succeeds it will have obviously won the lottery, that is very good news for Albion; it is not such good news for every other customer of Dŵr Cymru, given that Dŵr Cymru is part of a non-profit making organisation that simply re-invests all of its profits in the business for its customers. But if Albion fails and does not succeed on that claim, we say there is no good reason why the cost of that failure, actually the price of the lottery ticket, should fall in cost terms entirely on Dŵr Cymru.

The next heading to consider is the stage of the proceedings at which the application is made and the costs incurred by the claimant. The first point is that this application was first mooted and then made promptly on receipt of key relevant information which underpins it. If I could please refer the Tribunal to the witness statement of Ms. Kim, which is at tab B. In fact, whilst we are here the Tribunal might as well first read para.6, which actually relates to a later point, but if you could read para.6 and then paras. 7 through to 15 which are relevant to the matter coming under consideration.

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: So one sees there that our concerns were raised as a result of some parallel proceedings concerning the current bulk supply price which Albion has subsequently sought to judicially review, and statements that it was making that it might not be able to pay all of the sums that were owed by it and, as a result of that, obviously the matter was pursued by Dŵr Cymru's solicitors, and at around the same time also at the end of December and January we had the disclosure of Albion's financial statements, and we see from para. 20 of Ms. Kim's statement that:

> "Albion files only abbreviated accounts at Companies House, which do not include (inter alia) its detailed trading profit and loss account and expenses schedule."

THE CHAIRMAN: So just to be clear, the documents that we looked at at tab 4, was it at tab 4 that we had both the Albion Water Group and Albion itself.

MR. PICKFORD: It is at tab 3 that we have Albion Water, and at tab 4 that we have the group company.

THE CHAIRMAN: So is Ms. Kim's evidence then that those documents were disclosed for the first time to Dŵr Cymru as a result of the correspondence that was triggered by the fact that now Albion looked as if it was going to have to find the £800,000 for the back payments on the bulk supply price?

MR. PICKFORD: No, madam, those documents were disclosed as part of the general disclosure process that at that stage was in full flow.

THE CHAIRMAN: In these proceedings?

MR. PICKFORD: In these proceedings, yes.

THE CHAIRMAN: But these are more detailed, what we have at 3 and 4 are a lot more detailed, are they, than what is filed at Companies House?

MR. PICKFORD: That is correct, yes, so there are two simultaneous things going on. First we have noises from Albion about it saying "We do not think we can pay the kind of sums now being requested of us."

THE CHAIRMAN: Under the determination?

MR. PICKFORD: Under the bulk supply determination, that is correct, that is one issue. At around the same time a separate issue, we now get more detailed disclosure of accounts that we did not previously have in such detailed form and we now get a better understanding of how Albion's financial arrangements are organised.

In the light of those, but particularly the former, we sought to raise the possibility of making an application. You will see there was correspondence between the parties as there ordinarily would be in relation to such an application and ultimately it became the application that I am now making to you today.

We say that was perfectly properly brought in relation to when it first became clear that there might be this particular problem.

The second point to make is that actually at this stage of the proceedings we are also now beginning to get a sharper focus on the shape of the ultimate case. There is the issue that we obviously have to go on to deal with about Dr. Bryan's evidence, but subject to that there have been a number of applications which have narrowed substantially some of the points in issue, so at this stage we now have a much better idea of the likely scope of what is required and therefore the costs that are likely to be incurred, and that is obviously an important

factor to be taken into account when providing any order for security for costs, what are the costs being sought in relation to the likely overall costs. That is our second point on the stage at which the application is being made.

The third point is that we have incurred approximately 50 per cent of our total anticipated costs – one sees that in the evidence of Ms. Kim – by comparison in the *BCL Old* case that was considered by the Tribunal, the third and fourth defendants who were applying for security for costs had incurred approximately 80 per cent of their anticipated costs by the time of the application. If the Tribunal would like I can take you to the parts of the Judgment which demonstrate that, but I do not think it should be in contention that that is the case.

So we say on that measure we are actually making this application in a sense earlier on a cost basis when the application was made in *BCL Old.* The application was turned down, but not on the basis that it was too late, there was no criticism made in relation to those defendants that they were too late in relation to that application.

The other point to say about the 50 per cent figure is ----

THE CHAIRMAN: If security is ordered, then if it is triggered, namely, if the claimant loses and there is an order for costs made, does the security only secure those costs which were incurred after the application was made or do they secure all the costs? I am not quite sure why this point about what percentage of costs has already been incurred ----

MR. PICKFORD: It secures all the costs over which the order is made, so if the order is made for security for costs in the claim then it secures all of those costs and that is the order that we are seeking. In this case it is likely to be pretty academic, which ever set of costs is under discussion because we are only seeking as a maximum £350,000 and, of course, we make it clear that we will accept a lesser sum, and our total costs are likely to be £1.7 million of which we have incurred roughly 50 per cent. So which ever tranche of those costs you take, unfortunately for us, £350,000 is not a drop in the ocean, but it is going to be obviously a significant amount, but it is not going to offer us in any shape or form full coverage. Whilst we are on that subject of the amount the reason for that is because we do understand that we do not wish to seek a sum such as £1.4 million which potentially could have the effect of stifling the claim; that is not our intention. We are trying to seek a compromise position bearing in mind the competing factors which the Tribunal will ultimately have to weigh.

Coming back to the issue of 50 per cent, it is said by Albion that 50 per cent is not realistic and really we should be much further through in cost terms than that in any event. The problem with that submission is that they do not reveal any of their own costs information

on which to make a comparison, so one does not know how much has been spent compared to how much is expected to be spent.

I understand that Mr. Sharpe has some figures in relation to that, he handed some figures to me just before I stood up. I do not propose to speak to those now, but obviously if they have any bearing on it and the Tribunal is willing to consider those figures then I will address them in reply.

We also go on to say that the proceedings are at a stage where disclosure is not quite complete. Dr. Bryan's witness statement raises significant issues which I will come to address the Tribunal on shortly. On any view, and this is not disputed, I think, by anybody, Dr. Bryan's first witness statement calls for very extensive reply evidence by Dŵr Cymru, potentially embracing more people than we provided witness statements from in our first round of evidence, and then there will need to be preparation for a lengthy trial, we say two weeks if the trial is constrained to what we say are the core issues. If it gets widened the time expands accordingly.

The fourth point to make about the timing of the application is to address a point that is raised by Albion in Dr. Bryan's second witness statement at para. 43 where he says:

> "In addition, the Defendant's treatment of the damages claim as a wholly fresh action for the purpose of its security for costs application is either disingenuous or misleading. As the Tribunal is aware, this damages claim is a follow-on action, whereby Albion is seeking to collect the damages that it believes is due to it following on from ten years' worth of litigation and abusive behaviour by Dŵr Cymru. It is hard to see why at this stage in the litigation war between the parties, security for costs suddenly becomes of relevance."

We say there is a very short answer to that and it is an obvious one: there is no power for the Tribunal to make an order for security for costs except in a follow-on damages action, so to suggest that we should have made this application ten years ago – the litigation had not even started ten years ago, but seven years ago – we would say is misconceived.

The fifth point on timing is this: even if this application was said to be late, which we do not accept for the reasons I have already given, Albion has failed to provide any evidence on what prejudice it suffered as a result, because we do not see Dr. Bryan in his witness statement saying, "If I had only known that I might have to pay some limited proportion of Dŵr Cymru's costs in an order for security, I would have never embarked upon this endeavour at all". Whether or not that would be an attractive submission is another issue. The key point is that he does not say that. We say there is no prejudice.

Those are my submissions on the issue of timing.

The next issue which is plainly key and really is at the heart of the debate between the parties is, is the application made with the purpose of stifling a genuine claim or would it have that effect? This is always ultimately the issue that lies at the heart of what the Tribunal is grappling with in balancing the various considerations in which to order security for costs. I propose to address the purpose and the effect points in turn. I hope I can be very short on purpose.

You have seen at para.6 of Ms. Kim's witness statement what is said about the purpose of this application.:

> "Mr. Peter Michael Davis, currently Director of Planning and Regulation at Dŵr Cymru, who has held various posts in regulation and finance at Dŵr Cymru, including that of Financial Controller, has confirmed to me that Dŵr Cymru is making the current application in order to protect the interests of its customers (in general), by taking reasonable and proportionate steps to reduce the bad debt to which it may be exposed were costs to be awarded in its favour against Albion."

Now, Dŵr Cymru is part of Glas Cymru, which is a non-profit making entity, and its directors obviously have a fiduciary responsibility to ensure that they fulfil the objectives of the company. Our concern is simply to do our best to protect our position in the event that a costs order is made and to avoid bad debts.

As I said previously, that is supported by the amount that we are seeking. We are seeking a substantial sum, we accept that, but it could be larger, and we are already trying to engage in some of that balancing ourselves because we understand that the Tribunal will, legitimately, be concerned about a stifling effect. Also, of course, it is a maximum, and the Tribunal has the power to order any amount up to what we have sought, as long as it is not a mere nominal amount.

That then brings me to certain allegations that have been made about our true motivation. I hope I can deal with these very briefly. The Tribunal will have received a letter from us last night in relation to some of these allegations. These are raised not only in the substantive claim, but it is also said that these go to explaining our true motivation in relation to this particular application. We do not accept them for the moment. For the record we consider that they strain credulity. We also say that ultimately they have no bearing on the issues that the Tribunal has to decide, either in the proceedings generally or in relation to this application. The one particular issue that is the frontispiece to the submissions in relation to

the security for costs application is said to have occurred in 2004, and we say is utterly irrelevant to this application being made in 2012 and the underlying motivation for it now. That is all we need to say on that.

So that is the issue of what is our purpose, why are we doing this. The next question is, putting that aside, what would the effect be were there to be an order? I have already shown you the principle in the *Keary* case that even where there is a probability that the defendant wrongly caused the claimant's impecuniosity, and we say there is no good case that it did, the onus is still on the party resisting the order for security for costs to demonstrate that it would be prevented from pursuing its claim were that order made.

So in this case Albion needs to demonstrate that, given the resources available to it, to its parent, its directors, its shareholders, any interested third parties, that an award of security in the sum of either £350,000 or in any material amount, would lead to Albion withdrawing its claim. What does that mean in practice? That means evidence as to Dr. Bryan's means, Mr. Knaggs' means, Mr. Jeffery's means, what assets do they hold, what security could they get if they asked a bank or financier to provide it? What other income or potential resources do they have? It also requires evidence on the resources available from third parties. What third parties might provide resources to fund this litigation or to provide sufficient security for an order for security for costs? Would Shotton, for example, who gets a share of the proceedings if the action is successful, be willing to contribute? Has it been asked, what was its reaction? All of these are issues that we would have expected to have seen canvassed in Dr. Bryan's evidence and none of them have been.

So we say the evidence on this issue is singularly lacking. Indeed, it is, in fact, more modest than the evidence that Lord Justice Peter Gibson considered were inadequate in the *Keary* case. In that case the vehicle which was pursuing the claim was a limited company. He was concerned about the resources available to its directors, and he had some information, but very limited information, about that. He had, we saw, some information about their assets, a particular house that gave rise to a certain level of income and having a mortgage of £200,000.

Would you like me to take you to that?

THE CHAIRMAN: Keary Developments Company did seem to be a family owned and run company with Mr. Keary senior and his two sons. It says at p.536G that it was a £100 company. Really it was a vehicle for the limited liability of the Keary family carrying out this tarmac business.

MR. PICKFORD: Similarly, in the present case, we have a vehicle which has, I think, about £100 in paid up share capital, £118, and it has three directors, Dr. Bryan, Mr. Knaggs and Mr. Jeffery. I do not think it is particular to the facts of the *Keary* case that one needs to take into account the resources that are available to not only the company itself, because clearly the company is going to have relatively limited resources as a limited company, otherwise you are not in the situation of arguing about security for costs at all. If it has, itself, good resources there is not a problem. Immediately one has to expand the sphere of consideration to those that stand ultimately to benefit from the claim and would be able to support the claim if an order for security for costs were made.

It is not particular to the facts of the *Keary* case. Could I take the Tribunal back to p.541 of that case, tab 5 of section D of the authorities. We saw reference to the *Flender Werft* case and the comments of Mr. Justice Saville, and he said:

> "The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."

Then it goes to quote approvingly the comments in the *Kloeckner* case which were, themselves, approved by Lord Bingham that the approach – this is about half way through the quote at D-E:

> "The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources. As in the *Yorke Motors* case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from anywhere else."

Madam, there are other authorities that I could take you to that equally deal with ----

THE CHAIRMAN: What is the priority that you say Albion should give to this particular element of monies potentially due from Albion? We have seen in Dŵr Cymru's own evidence that there are a number of financial claims currently being made by Dŵr Cymru against Albion in the determination issues. Are you saying that the directors should be required or expected to stump up for all that out of their personal monies, or that if there were potential for some third party to come in as a white knight, that this is what they should be asked to stump up for rather than a number of the other demands that might be

made on Albion over time? Do you say this should be their absolute priority in terms of trying to get support from directors or third parties?

MR. PICKFORD: Madam, could I answer that in this way: in relation to this application we do put considerable emphasis on the fact that Albion needs to demonstrate that it does not have resources from the likes of Dr. Bryan or other directors or other third parties that could provide any security for costs in this particular action. So we do place emphasis on those directors and third parties needing to be considered and their assets and ability to pay being considered, and there is no real evidence on that.

In relation to the point about the other demands on Albion's finances, I am afraid I would have to take instructions about what Dŵr Cymru's particular position is in relation to those other claims. Obviously I am making an application for security for costs ----

THE CHAIRMAN: I am not asking that. I am asking, as a matter of this case law that you are relying on, does the case law say anything about what the position is as regards the need to call upon directors or third parties in a situation where there may be a number of claims outstanding against a plaintiff from whom security is being sought.

MR. PICKFORD: Madam, it would be likely in most cases that there a number of competing financial claims that an impecunious limited entity has to consider. It is unlikely to be unique to these circumstances that the vehicle in question has a number of other claims being made on it.

What the *Keary* authority is very clear on, and it may also be helpful just to go back to p.540J, and this is under general principles, so this is not specific to the facts of the *Keary* case, these are general principles which Lord Justice Peter Gibson said should apply. He makes very clear that the court should consider (at "j")

> "… not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing litigation."

Now, what we know from the facts in this case is that there are potentially quite a large number of claims being made on Albion, but we do not know anything, really, about the ultimate resources from the various parties that are mentioned in that part of the Judgment to be able to meet them, or in particular – and this is the point that I am pursuing here – to

meet the application for security for costs. I am not asking the Tribunal to make any orders in relation to other matters, but obviously I am outside this jurisdiction.

The best I can probably offer in terms of guidance when there are competing demands on an entity is possibly in fact in the *Chemistree* case – there are two *Chemistree* cases, one is the *Chemistree Homecare v Teva*, and also *Chemistree Homecare v Roche* in respectively tabs 2 and 1 of the authorities bundle. Do the Tribunal have that?

THE CHAIRMAN: Yes.

MR. PICKFORD: If the Tribunal could just take note that there was an earlier decision in June 2011 involving the same claimant company, and that is at tab 1, there the application for security for costs was being pursued by Roche products and that application was successful. There was a subsequent litigation by Teva Pharmaceuticals Ltd and that is the second of these. If one turns, please, to para. 31 we see the claimant's principal submissions, and then at 33 there was debate about whether the claim would be stifled in that particular case. One of the issues there was that this claimant was already having money sucked out of its business, because it already had to pay security in another case, and if there was further security that had to be paid in that particular case, then it would effectively have to abandon its business because too much cash would be being sucked out of it. So there one can see that there were to some extent competing demands, and what was said by Mr. Justice Kitchin in that case was that we should look at what happened in the first case. In the first case you, Teva, said that you could not pay but an order for security for costs was made and, indeed, you were able to pay as it turns out, and so in the light of that I am not taking a lot of notice of the claim that you are going to be stifled this time, because actually you have managed to do it once already, and so the many demands point effectively failed.

In terms of its consideration in the case law I think that is probably the best that I can find in terms of an explicit consideration of many demands, but I would come back to the point that I made that actually most companies have many demands placed on them, but the general principles articulated by Lord Justice Peter Gibson are not particular to the circumstances of the *Keary* case, albeit obviously his application of them subsequently was.

Just to draw those strands together, we say that the burden is very much on Albion to demonstrate that security in the sum of either £350,000 or a lesser sum could not be provided from its directors or third party funding, or other interested parties such as Shotton, and we simply do not have sufficient evidence on that for the Tribunal to be able to conclude that Albion has discharged the burden placed upon it.

What evidence we do have is in the second witness statement of Dr. Bryan which is at tab F, para.35. There is reference to payment of £172k in legal fees in that month alone.

THE CHAIRMAN: Is this his third witness statement?

MR. PICKFORD: It is actually his third witness statement. My only point is that he refers to having demands to pay legal fees of £172,000 of which £139,000 are in connection with judicial review proceedings. Albion therefore evidently recognises that these kind of large sums of money are the price of litigation, litigation is an expensive business, this company has no less than three experienced counsel representing it in this action alone. We say that if Albion is willing to continue to pay its own legal team those kinds of sums of money it should be willing to find some means of providing security in a similar order of magnitude of sums as a price of continuing its claim. We say that if such an order were made we would expect Albion to find some way of finding the security in order to enable it to continue this particular action.

The final point I would make on this issue is ----

THE CHAIRMAN: There is paragraph 39 of Dr. Bryan's statement, do you challenge that as being true?

MR. PICKFORD: We do not challenge it as being true, we just say it is not adequate. He says he has contributed large amounts of money. He agreed to forgo contractual redundancy. He talks about critical health insurance, that I think related to April 2003. We have not seen any primary evidence in relation to that so we do not say we accept it, but we do not challenge it here and now, we are not asking the Tribunal to rule and say it is incorrect, because we are not in a position to scrutinise any of that information, because there is nothing to underpin it.

What we do say is that this paragraph is not sufficient, it does not deal in any real detail with what in 2012 the financial resources of the directors, shareholders and third parties that either could be commercially interested in funding the claim, or have an interest in funding it, for instance Shotton, combined are able to provide as security. We simply do not know.

The final point on this aspect of the application, namely the effect of stifling a claim, comes back to the comments of Lord Justice Peter Gibson that even if the Tribunal is concerned that the claim may be stifled there is still a weighing exercise to be done, and obviously one of the things that it can do in relation to that is to reduce the amount that is provided to a level where it considers that the matter on the risk is effectively a tolerable one.

The only other consideration that is listed in the items to be addressed in *2 Travel* is the issue of the cost jurisdiction of the Tribunal and we say that there is nothing really further

that one can add in relation to this case arising out of that cost jurisdiction. The main point obviously is that we say it is not a strong case and there is therefore a fair chance that we would ultimately find an order for costs in our favour.

In conclusion on the security for costs application we say in recent months it has become very clear that there is reason to believe that Albion will be unable to pay Dŵr Cymru's costs and that is not any longer contested. In those circumstances Dŵr Cymru has a duty to protect the interests of its other commercial and residential customers from bad debt and to take reasonable steps to try to minimise that exposure. We say critically Albion has failed to discharge the burden which lies on it to demonstrate the grant of an order would stifle a genuine claim, and that in all the circumstances the order sought is justified and proportionate. So on that issue those are my submissions.

THE CHAIRMAN: Thank you.

MR. PICKFORD: Shall I continue to deal with Dr. Bryan's witness statement, or would the Tribunal like to hear as it is a discrete issue, Mr. Sharpe first on the security for costs application?

THE CHAIRMAN: What are you going to cover in relation to Dr. Bryan's witness statement?

MR. PICKFORD: In relation to Dr. Bryan's witness statement, it is the matters set out in the written submissions that we provided on Wednesday of last week. There are two broad strands. First, we say that there are aspects of the statement that are ----

THE CHAIRMAN: Sorry to interrupt, but what are you actually asking us to do because it seems, having listed all the paragraphs to which you take exception that it is not sensible for us to go through sentence by sentence ----

MR. PICKFORD: No, it would be infeasible in the circumstances.

THE CHAIRMAN: -- dealing with those parts to which you take objection. We have some comments of our own in relation to the witness statement, which I must say we did find rather indigestible, if I can put it like that. Perhaps we will take a break for five minutes and consider where we want to go to from here.

MR. PICKFORD: I am grateful.

(Short break)

THE CHAIRMAN: On the security for costs points we will hear from Mr. Sharpe in due course. We want to hear from you, Mr. Sharpe, on this point about whether an order for security in a substantial sum, if I can leave it open like that, would have the effect of stifling the claim, and perhaps you could limit then your submissions to that point.

On the question of Dr. Bryan's witness statement we have read your submissions and the witness statements served by Dŵr Cymru and we do not at the moment see the value of going through them now. Where we are, as regards the witness statement, is as follows: it seems to contain some material which could properly be described as evidence, namely it is Dr. Bryan's own experience of what happened at various periods relevant to the proceedings. It also contains quite a lot of submission which is not appropriate to be in a witness statement, and our experience with that kind of witness statement is that it then leads to problems later on as to how much of that submission needs to be challenged in cross-examination when we get to the trial of these matters, and it is best to try and separate proper evidence in a witness statement from submissions on other matters.

It also, as both parties have acknowledged, contains a 'revised' – if I can put it that way – way of calculating the loss which Albion accepts should be included in the pleading and, as we understood the submission, it might be slightly different again once it is gone through with sufficient thoroughness to include it in an amended particulars of claim.

The other substantial amount of the witness statement comprises Dr. Bryan's commentary on the documents that have been disclosed by Dŵr Cymru in the course of these proceedings, and those are documents which he exhibits to his witness statement, although they are not of course documents to which he is a party, either as author or recipient, because they are either internal Dŵr Cymru documents, or correspondence between Dŵr Cymru and Ofwat or other third parties. Again, that is not material that should really be in his evidence. It is a matter of submission albeit that we recognise that in cases such as this it is useful to know in advance what the parties say about the documents that have been disclosed and what inferences they are going to invite us to draw from those documents.

The documents that have been disclosed by Dŵr Cymru and which have found their way into the exhibits to Dr. Bryan's statement, some of those are also exhibited to Mr. Edwards' witness statement on behalf of Dŵr Cymru and some of those he has commented upon in Mr. Edwards' witness statement, but I have not yet gone through to find out whether there are any internal Dŵr Cymru documents that are exhibited to Dr. Bryan's statement and commented upon by him which have not been put in evidence by Dŵr Cymru and which are not commented upon by Mr. Edwards, and if there are such documents then we are at risk of getting into a tangle later on in working out what documents are whose evidence, and who can comment on them and give evidence about them when they are being cross-examined. So we have thought about what the best way to proceed is.

There are also the points that Dŵr Cymru have made in their submissions today about the allegations of misconduct on the part of Dŵr Cymru or other people after 2001, and we are concerned that the claim for exemplary damages should not become a hook on which can be hung all sorts of contentious allegations about supposed wrongdoing which cannot really be relevant to the state of mind of Dŵr Cymru when putting together and presenting to Albion the first access price which was found to be abusive.

Finally, there is a concern that Dr. Bryan's witness statement refers to witness statements that were served in the earlier proceedings before the Tribunal and I think there are some Dŵr Cymru references to those as well, and I am not clear what the status of those witness statements are in these proceedings, and what is going to happen if the material in those witness statements is contested and those deponents are not presented for cross-examination in these proceedings.

What we propose therefore is that Dr. Bryan's main witness statement should be withdrawn for the time being. We should then go through the process of re-amending or the application to re-amend the particulars of claim to re-plead the way in which quantum is calculated. We would envisage that some of the material which is currently in Dr. Bryan's witness statement would be moved from there to such narrative or annexes or whatever as there need to be to make sure that the method of calculation is comprehensible to Dŵr Cymru and to the Tribunal. Dr. Bryan's statement would then be re-served, limited to what is really evidence, and I will come back to that in a minute, and such commentary as Albion wish to put forward on the disclosure that has been made by Dŵr Cymru in relation to documents to which nobody in Albion can actually give evidence, but may want to comment on in so far as it is useful for everybody, to have that before the trial of this action actually starts so that everybody knows in advance what documents are considered particularly significant for both sides' cases. There can be some commentary drawn up and exchanged and then responded to by Dŵr Cymru either in the form of a witness statement or otherwise, so that we can be sure that by the time we get to the trial all the documents that anybody wants to rely on have been identified, that they are properly before the Tribunal and we know who is going to speak to those documents and who can be questioned about them if there are contentious matters. It is not appropriate for that to be in Dr. Bryan's witness statement.

As regards what it is appropriate to have in Dr. Bryan's witness statement, there are various points which Dŵr Cymru have made objecting to various matters as being contrary to the earlier rulings of the Tribunal, as we understand it. What those rulings said as regards the

exemplary damages claim was that it is not the case only documents prior to March 2001 can be relevant to the question of the state of mind of Dŵr Cymru at the time they formulated and put forward the first access price, there may be subsequent documents that cast light on what the state of mind was. What we made clear was that allegations relating to conduct after 2001 are not relevant, or not sufficiently relevant, to the question of what the state of mind was in 2001 for it to be proportionate for the Tribunal to hear evidence and determine those contentious matters in order to decide at the end of the day whether the exemplary damages is made out. The re-draft of Dr. Bryan's statement must take that ruling on board.

Similarly, the points about the personal toll on the directors of the company, subject to what Mr. Sharpe may say in due course, we see some force in what Dŵr Cymru has said, that those points are not relevant to any issues currently in the case.

That then is how we would propose that we proceed. As I say, there should now be a re-drafting of the particulars of claim to deal with the revised method of calculation and then Dr. Bryan's statement re-sworn and re-served, drafted to take account of the points that we have just made, bearing in mind that it is more conducive to the orderly conduct of the case if matters can be expressed in temperate terms both in submissions by the parties and in the evidence which is served.

I am not sure where that leaves you as regards your submissions, Mr. Pickford?

MR. PICKFORD: Madam, it leaves me with quite a substantial number of the submissions that I was going to make no longer needing to be made, because obviously, subject to anything Mr. Sharpe says in order to try to dissuade you from the process that you have just articulated, that deals with the biggest issue that we had, which was the relationship between Dr. Bryan's witness statement and the ruling of 16th December 2011.

There are, however, nonetheless still some further issues that we had articulated in our submissions. In particular, the other two categories were a problem with the way in which Dr. Bryan was putting his claim in relation to the price that would provided by United Utilities and what has already been said about that by the Tribunal in an earlier ruling. So that is one issue.

Then there is a further category of effectively either unpleaded or, we would say, inadmissible allegations of various forms. They are a bit of miscellany but there are, for example, other allegations of margin squeeze or abuse of dominance by failing to do something sufficiently quickly, etc. Again, those are points that I could elaborate on.

THE CHAIRMAN: I regarded those as rather wrapped up in the point that I made about allegations of misconduct after 2001 in so far as they are said to cast light on what the motivation of Dŵr Cymru in putting forward the first access price. When those matters are contentious we do not regard it as proportionate for the Tribunal to explore those on the basis that they might in some way be relevant to the exemplary damages claim.

MR. PICKFORD: In the light of that I think the other categories, the other headings, just to let the Tribunal know what they were, there was a further issue about the extent to which allegations were made against Ofwat, because it was said that Ofwat had a very low level of technical skill and it was wedded to its decisions merely for face saving reasons. Our concern with that is that the allegation said that because of Ofwat's limited competence and intransigence that helped us in committing the crimes which are alleged in relation to exemplary damages. We obviously dispute that. We imagine Ofwat would dispute that. We say it raises exactly the same kind of peripheral satellite issues that should not be introduced into these proceedings because it would potentially require directors from Ofwat to come and ----

THE CHAIRMAN: On the other hand, your argument against the claim for exemplary damages, as you said first thing this morning, is how can it be said that we deliberately committed this infringement when we had all along the approval and support of the Regulator. My understanding was that that evidence was directed at saying to the Tribunal the support of Ofwat does not entirely rule out the possibility that this was a sufficiently egregious infringement to merit a claim for exemplary damages because of the way Ofwat conducted its investigations. That, I understood, is the relevance of it. It is not really a point about subsequent misconduct.

MR. PICKFORD: It is certainly not a point about subsequent misconduct. We would say that effectively our case is that Dŵr Cymru did rely on what the Regulator thought to be the correct position. We would say it is a substantial step removed from that issue whether the Regulator was competent in coming to that decision or incompetent. The fact is, that was the Regulator's view and we approached the matter in what we understood to be the way the Regulator considered these matters should be approached. It is going to, we say, raise a substantial satellite issue if we now have to consider the extent to which the Regulator was a competent Regulator or a Regulator which was determined simply to defend a decision that it knew to be wrong.

If the Tribunal takes the view that those are sufficiently germane to the central issues in the case, which we say they are not, then there will need to be directions in relation to that,

because we are obviously not content to allow the situation simply to lie with Dr. Bryan's evidence on those issues. We would be inviting Ofwat to participate in the proceedings to explain to the Tribunal why, I would imagine it will say, it was competent and it was not simply the intransigence and trying to save face. If Ofwat did not want to be here because it considered it was too peripheral to what it does on a daily basis then we would have to ask for witnesses to be summonsed to appear before the Tribunal, if the Tribunal thought it was a substantial matter. It does raise quite a spectre of substantially increasing the nature and extent of the litigation. It will certainly slow things down in terms of getting to the trial, because it will mean bringing in a whole third party, and we will need to hear evidence from that third party.

That is effectively all I had to say on that. I said I was just going to give you the broad summary, but we have now canvassed the essence of the issues.

The other points that are not, I think, wrapped up in the comments that the Tribunal very helpfully gave are those points going to Dŵr Cymru allegedly having concealed the truth or misrepresented the position in relation to prices and costs prior to March 2001. We accept that they do not fall within the scope of the Tribunal's ruling about matters after March 2001. Our concern about those allegations is that they were not actually pleaded previously. We are not saying that could have no relevance to Albion's claim, and if the Tribunal were to permit Albion to amend its pleading so that it was clear exactly what allegations were being made rather than us having to infer from Dr. Bryan's witness statement, then we would deal with and respond to those. There are steps that need to be gone through in order to have clearly articulated cases to enable us to do that properly rather than for the matter to be addressed through ----

THE CHAIRMAN: That is allegations about misleading information provided to Ofwat?

MR. PICKFORD: I think just in general terms prior to March 2001. So the allegation is that in the build up to offering the price we were trying to mislead Albion in particular, because at that point Ofwat were not so substantially in play, although they did obviously have a role. A large number of allegations are made. The paragraphs are listed at para.28 of my written submissions. If they are to be introduced we would need to know precisely what is being said in relation to that and we would obviously have to plead our case accordingly and provide evidence on it. That was another category.

Then there was a final, final residual category which is a relatively small point, but a new allegation being made about Dŵr Cymru and United Utilities having a vested interest in not antagonising one another. That is said to have influenced United Utilities' approach in

relation to negotiations over Heronbridge. It is not a point that is claimed anywhere and therefore, if it is to be pursued, it needs to be properly pleaded and we need to respond to it accordingly.

THE CHAIRMAN: United Utilities' points, you say that they are trespassing into the territory of investigating how Ofwat would have determined a s.40 application in relation to the supply of water from ----

MR. PICKFORD: Madam, sorry, there were two United Utilities' points. The one that I have just addressed concerns an allegation which is made, for your note, at 456 of Dr. Bryan's witness statement – I am not asking you to go to it. There was it is said that there were strong vested interests ----

THE CHAIRMAN: No, I understand that point, but they mentioned a point slightly earlier than that.

MR. PICKFORD: Yes, that is one point which they have not pleaded, it needs to be pleaded so that we can address it properly. The other one concerns trespassing on the Tribunal's ruling of 9th June 2011. That, I think, is the last of these issues. If the Tribunal would like me to do so, I could simply take you through that point in substance, it is relatively short.

It is the ruling of 9th June, which should be at tab 19 of the bundle for the CMC. I think one of the points that was being addressed in this ruling was whether the claim relies on any allegation of abuse in relation to United Utilities because, of course, if it did that would not be admissible because the Tribunal, which is obviously well aware of its jurisdiction, is limited only to the particular infringements found in the decision forming the basis part of an action. The Tribunal addressed that issue at paras.10 and 11 of its ruling, and perhaps I can I can invite the Tribunal, please, to read those paragraphs.

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: Thank you, madam. The point being made there by the Tribunal was in particular that what was in issue was what was in United Utilities' mind and therefore what price would it have offered? Plainly, if it was in United Utilities' mind that there were considerations about compliance with the Competition Act then that may have influenced the price that it offered. We accept that. We say that is the correct position.

What is now being said, however, is as follows: if one goes to Dr. Bryan's witness statement, which is at tab 12, and turns to para.494, we see the following:

> "Therefore, if Albion had received a proper common carriage price from Dŵr Cymru, we would have immediately made a section 40 application to Ofwat to determine the terms for a bulk supply of water by United Utilities.

> The normal approach in such circumstances is for supply to start in the interim with the price backdated once Ofwat has determined it, allowing common carriage to start immediately.
>
> It is clear that the outcome of any such section 40 application would have been for Ofwat to require United Utilities to supply Albion at the same price as it charges Dŵr Cymru. This follows from the fact that Ofwat was sufficiently comfortable with the basis for the prevailing Heronbridge Agreement between United Utilities and Dŵr Cymru to reject two s.40A applications by United Utilities."

So what is now being said is that we are not basing the price on what United Utilities would have charged, we are saying instead that we do not like the price that United Utilities were offering, and instead we have gone off to Ofwat and asked Ofwat to determine a dispute. That gives rise to a whole number of issues. Firstly, the question is, would Ofwat have accepted the dispute? That is factual issue number one.

Let us suppose that Ofwat did accept the dispute and sought to determine it under s.40A, there were then two possibilities to how that matter is to be resolved. The first, and what actually appears to be being pleaded, is that it requires the Tribunal to decide what Ofwat would have decided in relation to the dispute. That can only obviously be done by evidence from Ofwat on the hypothetical question, had a dispute been referred to you, what price would you have set? That, in itself, is a major satellite issue.

The alternative trespasses on the Tribunal's judgment already, because the alternative is to say, "We do not need to worry about what Ofwat would have said because we simply need to know what Ofwat should have decided, applying all of the law correctly, the law in relation to s.40, which is about non-discrimination, potentially applicability of the Competition Act." Therefore, we know what Ofwat should have decided and we rely on that. Of course, that trespasses on exactly what the Tribunal said we should not be entertaining. So whichever way you look at it, there is now a substantial problem with the way that Albion is putting its case in terms of creating an entire new further aspect of satellite litigation. That is effectively what we have to say about that.

There is a subsidiary point that obviously in so far as they are relying on the second approach and saying what Ofwat should have decided, in so far as that also relies on the Competition Act, that brings back into play the jurisdictional problem that the Tribunal has already addressed.

THE CHAIRMAN: Just a propos of this, there is the point that Albion have made that Miss White's witness statement does not disclose any background information from United Utilities as to how they would have decided what ultimately to charge.

MR. PICKFORD: That is correct. We say that is quite appropriate because the issue is not what are the costs underlying that service and what price should United Utilities properly have charged, the issue is what was United Utilities offering? It is what would United Utilities have, in fact, charged?

THE CHAIRMAN: Does that not depend in part on what they saw – this is what the effect of the earlier ruling was – as their obligations or risks that they would have incurred if they had tried to charge Albion a rate different from the rate that they were charging Dŵr Cymru?

MR. PICKFORD: We know without any further disclosure being required that Dŵr Cymru was being charged a very different rate. We have the explanations and the evidence in relation to that. We say it is because there was effectively a quirk of history in relation to the way that the supply was taken over. Albion dispute that and say it is not. That is a factual issue on which there is evidence, namely what price were we paying? The only issue then is, did United Utilities consider that it needed to offer the same price as that or a different price? We have the evidence on that. It did not offer the same price. The precise make-up of the costs underpinning that supply at Heronbridge is irrelevant to that discrimination issue. We know that the prices were different. We have Miss White's evidence on the price that, notwithstanding that difference, United Utilities considered that it was appropriate for it to seek.

In addition to the points made by the Tribunal, which we heartily endorse, about Dr. Bryan's witness statement, which obviously mean that I do not have to go through a number of the points that I raised in my skeleton argument, those are the additional issues which are not entirely wrapped up in the observations that the Tribunal has already helpfully made.

Shall I sit down now and allow Mr. Sharpe to deal with that aspect of the proceedings or shall I continue and deal with the other ones.

THE CHAIRMAN: If you can deal with the costs point before the break then it might be convenient.

MR. PICKFORD: Certainly. I think on timetabling it is obviously premature to get drawn into a lot of the timetabling issues, because they depend on and are highly influenced by the comments that the Tribunal has already made.

Costs remain a live issue in relation to two of the interlocutory rulings of the Tribunal. There is the ruling of 9th June 2011 in respect of which the Tribunal ordered that costs be reserved, and then there is the ruling of 16th December 2011. Albion also points to the issue of consequential amendments to pleadings and the costs in relation to those. Albion says that those be costs in the case; we say costs to lie where they fall. Neither party is making an application for costs now in relation to those consequential amendments.

Turning to the June 2011 ruling, that is at tab 19, that is to be found, in so far as it is necessary to consider it, at tab 19 of the CMC bundle. We see at para.3 that there were various proposed amendments to the particulars of claim and we see at para.4 that

> "Dŵr Cymru does not object to most of the amendments proposed in category (a) or (b). Its main objections are to those parts of the existing or proposed pleading which set out Albion's claim for compensatory damages arising from the Shotton Paper business and the Corus Shotton business."

So there was a series of points. We objected to some, we did not object to others. Ultimately, the ruling of the Tribunal – and one sees this from paras.18 and following, is that certain amendments were accepted and certain amendments were rejected. For example, at para.18 we see that the Tribunal refused permission for the proposed para.93(2) on certain grounds. At para.21, it observed that there were other aspects of Albion's pleading that called for comment and various matters were addressed there, and the Tribunal considered that certain points should not be advanced by Albion in relation to those.

At para.27 it set out, as part of the conclusion and further directions, that permission is granted for certain further amendments except in relation to certain words in parentheses – granted for certain words, but not for other words in other paragraphs. It was a very mixed picture.

As part of this mixed picture there was also an application from us. It was made on the papers as well. We said that certain parts should actually be struck out altogether and the Tribunal rejected that as well.

We say, taking all of those matters in the round, the proper order is that there should be no order for costs.

One point we would make is in relation to authority, in so far as it is helpful on this issue, is that typically, certainly in High Court litigation, a usual order to be made if one party seeks to amend its claim is that the party seeking to amend, effectively as the price for doing so, pays the costs of and caused by the application. That is a very usual order. I can hand a

part of the **White Book** to provide the authority but, unless that is disputed, I do not think I probably need to.

THE CHAIRMAN: What is the reference in the **White Book**?

MR. PICKFORD: It is in the current version of the **White Book** at p.508, it is 17.3.10, and it says:

> "Applicants who obtain permission to amend are often ordered to pay the other party's costs of and caused by the application."

It goes on to say:

> "However, parties ought to consent to amendments that they cannot reasonably oppose because, if they do not, they may be penalised in costs."

We say that our refusal to consent in general terms was justified in this case because a number of the contentious amendments were denied. Ordinarily, we would get our costs of and caused by the application. We recognise that we lost on certain points so we say costs should lie where they fall is the fair order in those circumstances.

That then takes me to the 16th December ruling. Obviously we have already considered that to some extent and the Tribunal must have considered it also in giving its helpful observations previously because much of the problem with the witness statement currently is it conflicts with that previous ruling.

In essence, what happened in that ruling is that Albion was saying that it was entitled to argue both for its main damages claim and for exemplary damages that there was an ongoing abuse. We said that there was no jurisdiction for that and in any event the alleged behaviour post-dating the abuse was too peripheral. The Tribunal will know that it agreed with us on both of those issues. The first issue was addressed at paras.6 to 7, the next issue was addressed at paras.11 to 13. Those were the central matters in that application: is there jurisdiction? No. Do these matters in any event have sufficient bearing? No.

There was one point which follows at paras.9 and 10 of the judgment concerning Dŵr Cymru's disclosure. The Tribunal noted at para.9 that it had seen the disclosure statement made by Dŵr Cymru's in-house legal adviser, and perhaps the Tribunal might read from there to the end of para.9 and also the first two sentences of para.10 down to, "I do not see why July 2004 is or should be the logical cut-off".

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: One sees there the concern was that the Tribunal thought that we severed our search effectively in 2004, and we were not looking for the documents thereafter. What there was, we submit, in this case is a miscommunication between us and the Tribunal,

because we had not severed our search in July 2004, we had looked for all discloseable documents, but what we had done is said that after 2004 there is obviously a very, very large category of documents that bear directly on the litigation – litigation documents – which we believe will be documents that should be withheld for reasons of legal professional privilege. What we did not do was go through the painstaking process of looking at each document, firstly, to identify whether it was relevant, whether it would be a disclosable document, then only to say, "This could be disclosable but however you are not going to see it because it is subject to legal professional privilege". We understood that the Tribunal accepted that it would have been disproportionate ----

THE CHAIRMAN: What I was talking about in para.10 was internal Dŵr Cymru documents discussing or looking at the potential price for common carriage. I do not see how those could be privileged.

MR. PICKFORD: No, quite. We looked for those. In the statement what we said, and this may be where the problem arose, was that we were unable to conceive of any material that would not be subject to legal professional privilege, save for the documents which specifically were identified. We did, in fact, identify a number of internal documents that fell within the scope of what we considered to be disclosable, which was any document bearing on our motivations in relation to offering the 2001 price. We have actually done what the Tribunal was asking us to do in any event. Conscientiously, we did it again because we were ordered to do it. Just in case there had been a mistake we went through the process again but it did not reveal any new documents. One sees that in the letter of 13th January 2012, which is at tab 32. We were writing pursuant to the Tribunal's order requiring disclosure. We set out the order and we say that we have looked and we say what documents fall within the categories, and we explain on each occasion that we have identified those documents, but we had already identified them previously and so there is nothing further that we can give.

So, in relation to that, we say we have won the application save in this minor respect which was essentially a miscommunication on our part and led to the Tribunal's ruling on that, and therefore we are entitled to our costs of that application. Those costs total £49,624.26. We have set out a full costs schedule which obviously has been provided to my opponents, and we say that those costs are proportionate in all the circumstances. There were two full written sets of submissions that we had to provide on these issues, the way that the matter was dealt with on paper. It was vigorously contested by Albion, and those costs are suitable for summary determination.

THE CHAIRMAN: I think that sum includes VAT?

MR. PICKFORD: Yes, it does include VAT. As I very much suspected, we do not claim our costs inclusive of VAT. That would be the normal case because obviously we are able to claim back VAT. When I wrote my submissions I did not have firm instructions in relation to that. We were just checking the point that there was not some idiosyncrasy given the particular nature of our business and its status that altered that, but there is no such idiosyncrasy, so it is the standard that we claim ex-VAT.

Madam, those are my submissions on costs.

THE CHAIRMAN: Thank you, Mr. Pickford. Just a couple of points before we break. On this question of the internal documentation that has been disclosed and who is going to speak to that documentation at the trial, whether the combined Mr. Edwards/Mr. Williams are going to be in a position to speak to all the documents which are commented on and what the most convenient way of gathering together the parties' comments on the documents before the trial starts. That is one point.

Also do I understand that you said this morning that you are not seeking from us any particular ruling on disclosure other than that there should be a further stage in the timetable for such further disclosure?

Also this point – I do not know whether you have given any thought to the question of the status of the witness statements in the earlier proceedings and what we do about those in these proceedings? I do not know whether you want to think about those over the short adjournment and come back to us.

MR. PICKFORD: Madam, I am certainly very happy to address you on some of them now to use up a minute, and perhaps I could come back after the adjournment on the other ones. On disclosure, in the light of the very helpful indication given by Mr. Sharpe there is no longer any specific application, save that we do want a date by which Albion are required to respond to the outstanding disclosure requests. Obviously at that point we take stock, and if there is anything further we put in an application. We hope, as we have done so far, that we may be able to address those matters between the parties without resort to that. That is the situation on disclosure.

On the issue of who will speak to the internal documentation, we will obviously, in the light of the Tribunal's helpful observations, go away and review precisely who it is that appears to be speaking to each matters already. If there are gaps then we will consider who is best placed to do and in our further round of evidence we will obviously seek to address that.

In relation to the question of the best method of approaching what is going to be said about those documents, we would agree with the Tribunal's suggestion that it may be helpful for Albion, as it is its claim, to produce a document where it says what it is going to say, and we can respond to that accordingly.

On the status of earlier witness statements, that is the trickiest one and I should take a few moments to consider it over the short adjournment.

THE CHAIRMAN: We are not necessarily going to make a decision about it but it is something that cropped up in our reading of the documents, which we thought was right to bring to the parties' attention.

We will come back at two o'clock. Thank you very much.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Pickford?

MR. PICKFORD: Madam, there was one remaining issue which you canvassed with me before the short adjournment concerning what we do about witness statements from the previous proceedings. It may be that the most appropriate course for the Tribunal to take in relation to that is to adopt the approach that the High Court would take in relation to witness statements used in other proceedings, which is that except with permission those witness statements should only be used for the purpose of the particular proceedings for which they were adduced. Obviously, there is the potential for overlap with the issues in this case, but what we do not want to do is via the previous witness statements that were adduced in these proceedings, lead ourselves into precisely the same difficulties the Tribunal was concerned with prior to lunch, namely raking over exactly what did or did not go on in earlier proceedings, so therefore what we suggest ----

THE CHAIRMAN: Well I think Mr. Edwards at some point referred to a witness in the previous ----

MR. PICKFORD: He does, he refers to Malcolm Jeffrey's statement which is referred to also by Albion, and what we are going to suggest is that there should be permission for parties to rely on parts of previous evidence, but they need the permission of the Tribunal to do so, to avoid there being a wholesale raking over all of the evidence previously, the grounds need to be established that justify reliance on a particular party's statement, and then it can be determined whether someone needs to give evidence on them now directly or not. That is what we would suggest as a pragmatic way forward which would reflect effectively the situation where it to arise in the High Court.

THE CHAIRMAN: You were reading something ----

MR. PICKFORD: I beg your pardon, madam, I was reading from Rule 32.12 of the Civil Procedure Rules, which deals with the use of witness statements for purposes other than the particular proceedings for which they were produced and it reads as follows:

"(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that -

(a) the witness gives consent in writing to some other use of it;

(b) the court gives permission for some other use; or

(c) the witness statement has been put in evidence at a hearing held in public."

In relation to (c) it depends which parts, in many ways, of the witness statement were put in evidence in the previous hearing in public as to the extent to which that rule would apply in these proceedings. But, in any event, I am not seeking to apply the CPR precisely, we are not in the High Court, I am suggesting a pragmatic way through in relation to these proceedings given the concerns that have been raised by the Tribunal about how we might deal with matters here, so it is by analogy to those Rules rather than strict application of them in this context.

THE CHAIRMAN: So what you are envisaging is that the parties should let us know which witness statements in the earlier proceedings they may wish to rely on and then the other party may then decide whether that part of the evidence is contested or not, and then we will have to decide if it is contested, whether the deponent of that witness statement is going to need to appear before the Tribunal in these proceedings.

MR. PICKFORD: We effectively take it in stages.

THE CHAIRMAN: Yes, thank you.

MR. PICKFORD: Subject to obviously replying on anything further raised by Mr. Sharpe, unless I can be of any further assistance.

THE CHAIRMAN: No, thank you very much, Mr. Pickford. Yes, Mr. Sharpe?

MR. SHARPE: Madam, I will be brief. I have been asked first to deal with the question of stifling in relation to my friend's security application.

I rise with some relief because we spent a lot of time and effort diffusing some of the accusations about accurate retail costs and the role of Veolia ** in all of this, which I am sure you have enjoyed reading, and none of which my friend seems to be relying on today, wisely.

In relation to stifling, may I take you immediately to Dr. Bryan's second witness statement and may we go immediately to para.24.

THE CHAIRMAN: Is your microphone on?

MR. SHARPE: It should be, yes.

THE CHAIRMAN: Which paragraph should we be on?

MR. SHARPE: If we can pick it up at para. 24, which is p.6 of the witness statement itself, in my bundle it is the second witness statement of Jeremy Bryan.

The first point I want to draw to your attention, not in relation to the magnitude of the directors' fees and salaries, you see that in the table. You have seen this before and by any standards they are reasonable we submit, so that is an additional point. I ask you to draw a perfectly reasonable inference from the modesty of these directors' fees, certainly in relation to Mr. Jeffrey, and then latterly Mr. Knaggs and perhaps Dr. Bryan less so. These are not people who have on the face of this salary track record, at least from their salary, accumulated vast cash reserves.

You see in para. 25 they were increased as a result of the Remedies Judgment, and we will gloss over the comparison with Dŵr Cymru. But you will note they have already taken a 10 per cent cut in salary from these numbers.

So we begin with that by way of background. You will also recall Dr. Bryan's witness statement at para. 602 onward. I am not inclined to take you to that, not only in view of your earlier comments but you may recall his description of the fact that he paid his redundancy payment in 2002, that he drew upon his wife's insurance, and his clear statement that he had exhausted the limits of his financial resources in 2002/03. As you know, he has been the full time executive chairman of the company existing on the salary scale that you can see in the table.

I ask you to draw a perfectly reasonable inference, this is not a man of means such that a claim of £350,000 could readily be met, and I believe the same is so of Mr. Jeffery and Mr. Knaggs. These are people who have been all but ruined as a result, they say, of the defendant's actions.

Paragraph 31 onwards deals more specifically with the question of stifling, and what I would like to do is instantly take you to tabs 9 and 11 of the witness statement attached to this. The first represents a series of cash flow statements going up to and including April, May, June 2012, effectively it is the last page which offers a photograph of the financial health of the company. My Junior has quite properly asked me to confirm that the first figure on p.1 is April 2011, so what you are seeing here is a month by month, 2011, 2012 picture.

The income lines are clear enough, Shotton and Knowle. You will recall Knowle is the sewage inset appointment in Hampshire, which falls under the umbrella of Albion Water. We are inclined to think of Albion solely as Shotton, it is not, and I am asked to say this, the complexity of the Knowle sewerage scheme – it is a complete novelty insofar as they took over from the existing appointee, it is not a new build site or anything like that, and consists of 700 private residences. I need hardly emphasise how important the management of sewage for a private resident can be, which explains why Ofwat insist there should be adequate financial reserves to meet any eventuality, any leakage, any unfortunate series of events which would discommode consumers. The point of interest here, of course, is the deteriorating pattern in the cash flow.

My friend made much of the relationship between AWG and AWL. We have attempted in our evidence in reply to Ms. Kim to explain that actually there is nothing particularly sinister about the group's subsidiary arrangements and AWG bore all the management and staff costs of AWL, and so the money hived up to the parent was in respect of those obligations to pay its employees who worked on behalf of either Shotton or Knowle.

As you can see if you go to the last double page – it is not as clear as I would have liked, actually – the February position we see there Albion was showing a loss of £106,000 against the budgeted profit of £221,000.

THE CHAIRMAN: Where am I looking, Mr. Sharpe? What is the paginated page?

MR. SHARPE: Page 186.

THE CHAIRMAN: We are now in the P&L account?

MR. SHARPE: I am sorry, I misled you. You need the second page of that, over the page at 187 to see the deterioration in the cash flow position. All this is described at paras.32 and 33 onward of Dr. Bryan's statement. It may assist you at this point, having acquainted yourself with the exhibit to go back to para.33 of the statement earlier on, and may I ask you to read paras. 33 to 36.

THE CHAIRMAN: (After a pause) Yes.

MR. SHARPE: So in terms of cash flow one sees the position rapidly falling into the red, admittedly the lawyers have taken their role in that, but that is in addition to over £320,000 in legal fees which Albion has paid prior to these proceedings the application was made to my distinguished predecessors. So there is a big hole in relation to past legal fees, and future legal fees will dig even deeper into that.

In addition, moving away from the P&L and not necessarily taking you to any asset statement, it is common ground that as a result of the Ofwat determination there is a very

substantial compensation award amounting to in excess of £800,000 and in addition to that there is a claim I think the previous year or so in relation to a dispute which arose prior to the s.40A process.

My understanding is that both claims are open insofar as Dŵr Cymru is seeking their money, and both will involve some procedure to exhaust any difficulties which arise as a result of the determination itself. The determination laid down a procedure which will be exhausted soon or later, possibly going to arbitration. But the liability facing Albion is probably in the order of £1.7 million. So both in terms of cash flow and P&L and in terms of balance sheet one can see that this is not a company in a healthy position, and I ask you to infer from that that it is in no position to meet any order for security for costs at this stage in the proceedings. It would stifle this action; it may even stifle Albion, so that is the position.

My friend asks about other sources of funds and we deal with that in part in para. 37 onward. You will be familiar with third party litigation funding. That step has been taken. An application has been made precipitated by the application for security for costs. I am instructed that no decision will be made until, at the earliest, the beginning of May and we do not quite know whether the decision will be positive or negative, or whether they will require further time to deal with it; that will be a major achievement for Albion to secure that.

It is the nature of third party funding, I am instructed, that such funding is typically given in relation to damages claims, I suppose for obvious reasons because the funders can take a share of the damages. It is by no means clear that such funding would be available to finance the judicial review claim which is ongoing – perhaps I could have a word about that. It is 'Noises off' as far as this action is concerned, but as you know Ofwat made a determination which Albion believes to be profoundly unsatisfactory, wrong in law and will have a major impact on its future profitability.

It could do nothing, in which case it has to pay the £1.7 million which, in one form or another, will depend upon the determination itself, or it can challenge that determination, and it will be no surprise to you that is exactly what Albion is doing. That process, an application has been made in the interests of full disclosure I will tell you that the judge on the papers refused permission. I have to say that is not an unusual situation – I am tempted to say "for me" – but we have renewed the application for permission, we will secure an oral hearing which we would not be doing if we were not confident of success. For what it is worth, I think it is within your own knowledge, it is not uncommon for permission to be

refused on the papers, and it is not uncommon for such refusals to lead to a successful judicial review.

Of course, if that happens the economics of Albion will be transformed, Ofwat will have to go back and do a better job of it, we hope, and for the time being at least Albion will be relieved of any compensation payment and any other payment dependent upon the determination. So it is money that has to be spent in order to secure Albion's future. So one sees here the fragility both on cash flow, profit and loss and the balance sheet, and the possibility how in the future that may be recovered but not in the timescale of this litigation.

So third party funding is an option, and it is also raised: what about third party investors? Of course, Dr. Bryan has made every effort to secure third party funding, third party investors. It does not need Dŵr Cymru to force him to do that. The difficulty he has faced, and I think it is an obvious one that when a company is faced with an adverse Ofwat determination, with liabilities of £1.7 million and a limited margin to go forward into the future, securing investors on any terms, let alone any satisfactory terms, is correspondingly very, very difficult, with the result that that is not an avenue that he can go down, at least until the Ofwat determination has been successfully reviewed.

What I have tried to do is tick the boxes. The directors have limited resources, and the evidence shows that they have all but exhausted those resources in terms of salary and borrowings and everything else. You will see that at para.39 where he states in terms, repeating his earlier evidence about his personal financial resources, and a history of salary sacrifices to keep the company going during that period leading up to the success in the earlier proceedings.

THE CHAIRMAN: So just to be clear what the evidence is, in para.39 he refers to the situation in mid-April 2003, which is some time ago.

MR. SHARPE: Yes.

THE CHAIRMAN: And as regards the current situation you ask us then to look at the salary that he has drawn, set out at para.24, he is working full-time for Albion so that is it as far as his income is concerned, is that it?

MR. SHARPE: Income and assets. His financial resources were exhausted in 2003, and the inference I ask you to draw is on the salary he has been drawing, it has only recently become a six figure salary, and with a family it is a little difficult to accumulate substantial reserves, and certainly nothing like the claims that are being made on him, coupled with of course the fact, as he deposes, here that he is taking a pay cut not for the first time. It may well have been the case that what we should have had was a sort of income and wealth

statement from each of the directors. In my submission that would be wholly intrusive. There is no reason to believe these are men of means, who have offshore accounts, or Dr. Bryan has found oil or gold in his Teddington garden; there is nothing of the sort. These are people who founded a business in the expectation that they could make money and innovate in water supply. Their efforts were applauded by this Tribunal in earlier proceedings. They were frustrated in the beginning by the defendants in this action.

THE CHAIRMAN: The litigation funding and the after event insurance, and the fact that we do not know what the outcome of that is puts us in a slight cleft stick in the sense that I am sure you would say it would not be proper for us to assume that that is going to be successful. Nonetheless, if we assume that it is not going to be successful, and if that were to lead us not to order security is then that application withdrawn by Albion, or does Albion then continue to seek ----

MR. SHARPE: The sums of money involved here to prosecute this action in the manner in which it needs to be in order to win will consume very significant resources, and Albion on its own may have difficulty in funding that, so it is actually extremely important that that application proceeds and is successful.

THE CHAIRMAN: In relation to paying Albion's own fees is what you are saying. So the litigation funding, if it is granted it covers both Albion's fees and the risk ----

MR. SHARPE: Yes.

THE CHAIRMAN: I see.

MR. SHARPE: I am sorry, that is the essence of it. My friend in his skeleton, respectfully, misunderstands how it works.

THE CHAIRMAN: Maybe I have also misunderstood.

MR. SHARPE: Well it was explained to me that essentially the after the event insurance is there to meet the obligations of Dŵr Cymru. So if it is granted they are secure, they do not need to make any further applications at all. They do not need to be notified. I am reliably informed under 1930 legislation they would have a claim as beneficiaries of the insurance policy without more.

However, if it is not granted, then plainly they will not be paid, but if it is granted they will, so there are no further steps they need to take.

THE CHAIRMAN: What I am trying to get at is if we were not to order security how that affects the not yet determined application for litigation funding and after the event insurance.

MR. SHARPE: It should not have any effect at all. Albion first of all will proceed with its application because it needs to; and secondly, if you were not to grant security we would

still go ahead with it and the after event insurance would then secure the interests of Dŵr Cymru, so that is the situation. If we do not secure it then there is inadequate funds and we have held our hands up to impecuniosity and the position is no worse than it would be today.

(After a pause) Can I put it in a sentence? If we get third party funding they certainly do not need security because they will have obtained the equivalent through the after the event insurance, no doubt about that. If we do not get it then we are in no worse position than we are today, we do not have the money. So they can only be better off if we get it. So we do not actually respectfully see that as a material factor in your decision making today in relation to security because if we get it down the line, get protected -----

THE CHAIRMAN: I see, so it is not that obtaining that enables you to put up security for costs now, it means that their costs will be covered at the end of the day?

MR. SHARPE: Yes.

THE CHAIRMAN: And the after event insurance which covers Dŵr Cymru's costs and the litigation funding which covers Albion's costs always go hand in hand, do they? Or will they in this case at least go hand in hand?

MR. SHARPE: My understanding is that they will in this case. It is a dual application. Forgive me, I am not familiar with it but that is the way it works. My solicitors have made a dual application, they are seeking both, third party funding and after the event insurance. I am not privy to the precise terms, and the basis on which that application was made, but it will be made and has been made with due regard to a reasonable estimate of what the likely costs are to be, which I know is a legitimate concern of Dŵr Cymru. But to repeat it is respectfully a neutral factor for your decision making today, because it can be no worse off, they can only be better off if we get it, and if we do not get it, as I said, we do not have the money to meet these obligations, and that will be the end of the story – the sad story.

Perhaps I might make a final observation in relation to an unrelated matter, if I may. So much has been said that it is only as a result of disclosure that Dŵr Cymru became aware of Albion's present financial position. Bluntly that is a somewhat economic proposition and one I have difficulty in accepting. Dŵr Cymru has been aware of Albion's position, its management is essentially Dr. Bryan and its scale of operations for over eleven years. It is privy to – quite literally privy to – the volumes of water it takes, it is pretty much aware, it is a matter of public record, of the prices it charges and so forth. It may not have total visibility as to its cost structure, but it is a very big and experienced, and I would guess an

extremely well managed company. It knows as much about the economics of Albion as it needs to know.

It is said repeatedly – suspiciously repeatedly – that it was only until they secured via disclosure the detailed management accounts and some of the other accounts that they became aware of Albion's position. It would have been open to them to go to the public statutory accounts which, of course, paint a very small picture necessarily in small company accounting, but there would have been total visibility of Albion's net asset position which, as you know, is about £33,000 which has hardly changed since the beginning of this action if not before.

You may say that is irrelevant, they can bring their proceedings for security at any time. You have been taken to the case law and we brought it to your attention in our skeleton. It is an element of a just outcome that parties, when they are put on notice, should have allowed themselves to make inquiries that they bring such actions as this well before companies such as Albion commit themselves to hundreds of thousands of pounds of legal fees, and I have already mentioned to you that the sums of money that we have already deployed for my distinguished predecessors, well over £300,000 in this action to date, I do not know what Dr. Bryan would have done if such an action had been brought two years ago, but I do know that Dŵr Cymru would have had the information on which to base such an application at that time, and it really is most unsatisfactory to say they relied upon disclosure before they generated some suspicion as to Albion's "fragile financial status", and I conclude. Unless I can assist you further in relation to security, those are my submissions.

You also invited me now to comment on Dr. Bryan's first witness statement. We will, of course, do as you say, we will recast the witness statement and we will subject it to a certain amount of surgery along the lines that you have indicated. We will also reapportion those bits which properly belong to a witness statement, as you guided us, and those things which ought properly to be before the court but not necessarily in that form. We will do that. That said, there is little more that I can add. As you have gathered, the case is essentially under new management and we will deal with that expeditiously.

There is a point that my friend raised about so-called satellite litigation in relation to Ofwat, and I want to try and clarify what our position is on that. We have no intention of bringing in Ofwat into this action, nor would we welcome it, and nor should Dŵr Cymru do so. It totally misrepresents and misunderstands how we are dealing with that element of our case.

The only party at the moment relying upon Ofwat, and we heard Mr. Pickford's submission this morning, is his client. They are saying they followed (albeit three years before) Ofwat's determination 2004. They were doing no more than following Ofwat guidance or lead, or where Ofwat subsequently went. As a result, as that was a perfectly innocent act, then our claim for exemplary damages is totally misconstrued. That, I think, is the way in which this argument is being run. It is not us who brought Ofwat into the equation, it is Dŵr Cymru.

It is not necessary to call Ofwat to determine that issue. There is enough evidence in the disclosed material, indeed, there is a super abundance of evidence to show that Ofwat was not furnished with the complete picture of Dŵr Cymru's activities.

Today I am going to make no comment as to why that was so. The evidence suggests it is a fact that Dŵr Cymru were highly selective in what they told Ofwat on at least one occasion, which you have seen in our skeleton argument in relation to sludge – misleading – not just to Ofwat but to Albion.

That is the basis on which we are concerned about Ofwat. We are not making any particular criticism, although I admit that Dr. Bryan may have let himself go a little bit; he is an angry man and arguably he has quite a lot to be angry about, but I concede it is not his place in a statement to vent that anger. But the fact remains that the disclosure does reveal significant questions about the information that passed to Ofwat which makes some of Ofwat's actions more intelligible.

THE CHAIRMAN: There are two aspects of that it seems to me. The one is Dŵr Cymru's evidence that when they were working out how to devise this novel idea of a common carriage price they took into account all these circulars that Ofwat were sending round to managing directors and so that is indications or contact that Dŵr Cymru had with Ofwat which Dŵr Cymru say led them to think Ofwat would be happy in a regulatory way with the first access price, so that is one period of time and one set of communications. There is another point which is Ofwat ultimately in 2004 decided that this was not an abusive price and what comfort can be drawn from that by Dŵr Cymru to cast that back to say: "How then could it be said that this must have been a deliberately egregious abuse when we committed it in 2001." It seems to me that what you have just been describing goes to that second period which seems to me much less likely to be helpful or relevant to any issue that we have to decide, either on the part of Dŵr Cymru or on the part of Albion, given that we know that there are cases where conduct has been held to be an abuse by the European Commission and substantial fines have been imposed, even when a domestic regulator

appears to have given it the stamp of approval. So I think it is that kind of retrospective justification that I think causes us concern about: does that involve a re-examination of everything that took place during the original Ofwat investigation between 2001 and 2004, which is maybe a disproportionate exercise for whatever relevance it may have, which is different from what went on in the compilation of the 2001 price, which is more a kind of National Grid type argument.

MR. SHARPE: Respectfully, your first remarks would not have comforted my friend because he is using that as a defence to exemplary damages.

THE CHAIRMAN: Yes.

MR. SHARPE: But on one level we have a sword here. If we can show, and the disclosed evidence does seem to suggest this, and I put it no higher than that at the moment, that there was a policy of not only misleading Albion (we have this in documentary form) but misleading the Regulator, we would be asking you to draw an inference they had something to hide. The volume of disclosure would suggest this. We have already seen episodes in the disclosure, and we drew one of them to your attention in the skeleton, this might be looked at by the Competition Authorities, I have re-written it in terms, the thing is we have not seen the final version of that document, I do not know why, it has not been disclosed. But we are seeing people within Dŵr Cymru taking active steps to cover their tracks.

In my submission that is highly relevant evidence to Albion's core case about cynical disregard. They knew what the odds were and they maximised the chances of not being detected by covering their tracks. In a nutshell, those are our submissions, and therefore respectfully we should be free to pursue that evidence, and those who did the covering of the tracks, and not be confined respectfully artificially to the 2001 date, but actually to pursue them and not be told in the witness box "I am not going to answer that" Mr. Pickford has been telling us this "because it is after 2004", or "after 2001".

We will exercise that right, if it be so, with restraint and we will anchor it to the evidence that has now been revealed.

THE CHAIRMAN: But to make good that point, if we were to consider that is an avenue that you should be permitted to go down, do we have to look at how Ofwat responded to that information or is your point made simply by the making of the provision of the material, or the making of the submission by Dŵr Cymru to Ofwat. What seems to open up a whole different area which would be problematic, is any kind of investigation as to whether Ofwat accepted that information, whether it was influenced about that information about sludge or not, or how that affected its ultimate decision that this was not an abusive price ----

MR. SHARPE: No.

THE CHAIRMAN: -- because that seems to raise a whole range of other points.

MR. SHARPE: It does, and it is really not our intention to do that.

MR. SHARPE: To a very large extent what Ofwat did is a matter of public record and so we have the end product as a decision. So we are content, I think, to rely on that, but it is my friend's case; he is saying there is a coalescence between Dŵr Cymru and Ofwat, and unless he wants to go into the inner workings of Ofwat I would not encourage him to do it, and I do not think it is necessary, we certainly will not. What I am interested in demonstrating to the Tribunal is there was a policy beginning before 2001 and extending beyond that of misleading Albion and misleading the Regulator, that is what emerges on disclosure - it is quite remarkable. I want to have the freedom to be able to lead that evidence and to ask questions about it from those responsible, that is all. I am not interested in asking Ofwat what they did because it is really irrelevant in a way what they did post-2001, I am interested what was going on in the minds of Dŵr Cymru prior to the first access price determination, which I think we would share as the right approach. If they approached that with a cynical disregard for Albion and the truth and they continue to do so then I think that is pretty powerful evidence of justifying an exemplary award, a severe exemplary award, especially as it relates to misleading the Regulator.

So we see the case emerging on exemplary damages four square, wrapped around the evidence as to how we will proceed. We do not want to be cut off on the basis of some, frankly, rather artificial argument that was somehow going to bring in Ofwat. I do not care what Ofwat did, nor does Albion, we know what Ofwat did, and you know as a Tribunal what Ofwat did, so we are not interested in going down that road at all. We might be interested in why they did it but actually that is not central to the case either. I am interested in what Dŵr Cymru did and that comes through the evidence and it will come through from the witnesses when I cross-examine them.

THE CHAIRMAN: So your argument is not so much you want to adduce this evidence to rebut any inference that Dŵr Cymru asks us to draw from Ofwat's decision in 2004 that their price albeit as it turned out abusive was not deliberately abusive, it is not that argument it is more a look at the attempts that they made to mislead Ofwat indicate that in 2001 they cannot properly have thought that this was a reasonable common carriage price?

MR. SHARPE: Yes, subject to one minor qualification, we ought to look - and they ought to be able to look - at the pre-2001 Ofwat policies and things, which I think they will try and do.

THE CHAIRMAN: Yes.

MR. SHARPE: That seems to me to be uncontroversial, but apart from that absolutely right. I think it goes four square with exemplary damages, you have to have two decisions in the end, namely should exemplary damages be awarded and, secondly, how much? You may take the view that if it can be shown that if it can be shown that in the course of cynically disregarding the law and harming Albion they also misled Regulators, and wilfully misled Albion, then the award of exemplary damages should be appropriately higher. It will come as no surprise to you I will probably make that submission in due course and it will be the right submission in my view.

One issue which is, as it were, tangential to that relates to the evidence of Miss White from United Utilities. Our submissions on this are very sharp really. It is simply not enough for her to say: "I did some calculations and they came out as X", we want to know the basis on which she did those calculations, what is so special? Why is it not disclosed? In any other witness statement no party giving a witness statement would get away with that. If somebody says they did the calculation we would like to know the basis on which that calculation was done. Did it include local costs, etc?

My friend said this morning that it is utterly irrelevant because all I am trying to do is to transform a case with what she should have done as to what she would have done. What she would have done is not as simple a concept as my friends would like to submit. We are perfectly entitled to assume that a company of the status of United Utilities with the expertise at its disposal - and it is plain that Miss White does have expertise, particularly in the field of competition - should conduct themselves in accordance with the competition laws, and in the shadow of what Ofwat probably would have done under s.40A. That does not mean to say it is free range to decide what Ofwat would have done, we are not interested in that, we know Ofwat would be obliged to have regard to those matters in s.40A; we want to know did she actually have regard to those matters? In other words, was she having regard to the expenses defrayed, and all the other issues which we find in s.40A. At the moment we do not have a clue and it is simply not good enough. We would ask, if my friend is not prepared to volunteer this information we would be making an application to secure it. It is not enough to say we do not have it in our custody and control. United Utilities are in this Tribunal to support Dŵr Cymru and if they do not have it on their premises, or at Hogan Lovells they must take every step to ensure that they do get it and hand it over by way of disclosure - I am tempted, if I can be perhaps more confrontational than I normally am - forthwith, because we really want that information as soon as possible.

THE CHAIRMAN: So if there were United Utilities' internal documents in which, for example, they discussed whether it was appropriate for them to charge a different price to Albion from the price they were charging to Dŵr Cymru, that would be useful material for the Tribunal.

MR. SHARPE: It would be highly relevant and I think would materially assist you which is, after all, actually what we are here for. I want to know what was going on in United Utilities, and what was going on between United Utilities and Dŵr Cymru. There are inferences in the disclosure document but we naturally only see one side of the story and not much of it at that.

She has put her head on the block, she was not obliged to come before the court, she is not a defendant, but if she does that then she should expect to make good some of the statements in her witness statement and respectfully I think that is something that we can legitimately insist upon.

Unless I can assist you further those are my submissions on disclosure.

May I take you finally to the question of costs?

THE CHAIRMAN: Wait a minute. Is that all you are going to say on Dr. Bryan's witness statement, because there was not only the point about Ofwat's competence, which I think is the point that you have dealt with, there was also the point the passage in Dr. Bryan's witness statement where he deals with this United Utilities Ofwat determination point where you may say it is not terribly clearly drafted at the moment, but it should steer away from raising issues as to what Ofwat would have decided.

MR. SHARPE: I would not have dreamed of saying it is not clearly drafted, not in present company. May I take instructions, just briefly?

THE CHAIRMAN: Well it should be drafted in terms of what United Utilities would have taken into account. It may be that it is not appropriate for Dr. Bryan to give evidence on that really given that it was not something that was in his knowledge at the time, it is more a point that arises out of Miss White's evidence.

MR. SHARPE: Can I undertake to look at that with great care, along with everything else you have said this morning, and then we will be returning in writing on that, rather than make a decision on the hoof. Can I say, respectfully, I know your mind on this and I have a fair idea where we should go on it. There may be other instances of where a similar issue arises, and I think we can assume that the final draft will be significantly shorter and will be confined to those matters on which Dr. Bryan can opine.

THE CHAIRMAN: Can I also slot in here, just so you can read this when it appears in the transcript, in relation to the calculation of the quantum to go into the application for re-amending the particulars of claim. We have all worked through that calculation and a number of points have arisen, which you might like to take into account when considering how to cast it in the pleading. First, it would be helpful for us to have a narrative explanation of the tables that are currently in tab 116 of JB1 as to how the different columns in the tables are derived. So, for example, on what is currently p.1201 we have just about worked out that column E equals B x D +C, and N must be derived from the other columns as well, and it would be useful to have annotations below the table saying how we get to each of the columns.

The second point: it needs to be clear whether the new way of dealing with the quantum claim is replacing the original way and also where elements are pleaded in the alternative (making it clear that that is so) and what is the primary case? For example, one of the things Dŵr Cymru raises is this question now about whether the common carriage costs should be RPI indexed, in which case the loss of profit goes down or not, and whether it is Albion's primary case that the loss should be assessed on the basis of the original agreement with Shotton Paper with the 70:30 split, or whether it should be on the basis of the revised agreement of the 30:70 split, or whether your primary case is first that you take no notice of the Shotton agreement and award Albion all its loss and then it is up to Albion to divvy it up between itself and Shotton, or how those three alternatives are being painted.

Thirdly, it would be useful to see which of the columns is affected by the United Utilities water price. Somewhere in those columns that 3p per m^3 must be included and it would be useful to know so that one could re-run the model quite straightforwardly with 9p or 12.4p or however many pence seem to crop up during the course of the proceedings as being potential amounts to see how that feeds through then into the ultimate calculation.

Fourthly, in para. 511 of his main statement Dr. Bryan has steps 9 and 10, which are to work out what the moneys actually earned by Albion over the 2001 to November 2008 period were and what the difference then is between those moneys and the amounts claimed. Now, I cannot see where that was done in the statement, it may be that it is incorporated somewhere in those tab 116 calculations, but we together could not fathom that out. I am not asking you to comment now you will be pleased to hear! (Laughter) I am just indicating that it would be helpful for us for these points to be taken into account as you come to redraft.

MR. SHARPE: I am very grateful on all counts. We will take them, we are most grateful, genuinely very grateful indeed. We will go back and look at all of these points and see if we can actually do some of this in a more user friendly way.

May I now address you lastly on the question of costs?

THE CHAIRMAN: Yes.

MR. SHARPE: You already have our submissions in relation to the application of 9th June 2001, the one that was on the papers, and I listened, as always, with great interest - and, on this occasion, even greater admiration - to my friend trying to confect an answer that having wrongly opposed the admission they should nevertheless receive costs in relation to it. I have no further wish to expand on that, you have our submissions. It seems to us fairly obvious that we put forward an amendment, there is no reason at all why you should follow the White Book in this Tribunal, you do not have to. They opposed it quite strongly, we were put to cost by way of written responses, everything was done relatively economically, we were entitled to our costs, it seems to follow. I can think of no compelling reason why not.

THE CHAIRMAN: I do not think we have had a note from you as to what those costs are, if you are asking for summary assessment.

MR. SHARPE: We were not, perhaps we should have done. We do not have anything here. They will be miniscule compared to the scale of costs which ----

THE CHAIRMAN: Well we will perhaps decide the matter of principle, and then we can deal with that ----

MR. SHARPE: Yes, I would like to approach it on this basis, and I hope my friend will agree. If you should, I hope, give us our costs of that, we will write to the other side suggesting a figure and the basis for it and hope there will be agreement without bothering you at all again, and obviously we will inform you what it is.

If I may turn to perhaps a more substantial issue, which is the application of 28th October? Will you please go to the bundle for the CMC at tab 3 and go to para.18 - it is the big bundle. I should perhaps preface my submissions by saying that I was not at the hearing, my friend was, so all I can do is look at the written submissions that were put in to you and form a judgment as to the submissions. It is at tab 3, entitled "Application by Dŵr Cymru arising out of the Tribunal's Order on Disclosure". Do you have it?

THE CHAIRMAN: Yes.

MR. SHARPE: If you go to para, 18 - all I can do is look and see. I do not need to remind you of the basis of the application and what you actually determined. I am looking at Dŵr Cymru's

submissions on disclosure. We see here at 18, we are dealing here with conduct following March 2001 - substantial widening of disclosure up to 2008, seven and a half years of further documents. Then we have at 3 Dŵr Cymru's position on disclosure described in its disclosure statement of today's date without prejudice to its position in this application it is a search for documents relating to Dŵr Cymru's state of mind in offering the first access price up to the commencement of proceedings before the Tribunal on 27th July 2004 as described in the statement.

I take that to be at face value. They searched up to 27th July 2004 ----

MR. PICKFORD: Could Mr. Sharpe read on, because it goes ----

MR. SHARPE: I will, I intend to.

MR. PICKFORD: Thank you.

MR. SHARPE:

> "Dŵr Cymru takes the view that thereafter it is unable to conceive of relevant material on this issue that would not be subject to legal professional privilege, save for particular documents of which it is specifically aware and has identified. Consequently Dŵr Cymru submits that to search through all documents relating to the litigation since 2004 simply for the purpose of identifying ... would be out of all proportion to the contributions it could possibly make to Albion's claim, given the onerous nature of the task."

So here we have them resolutely opposed to taking any further steps other than the ones they did in fact take, they are essentially saying it is a lost cause. It is full of privileged documents, waste of time and disproportionate.

Just to complete it I go on to their reply which you will find at tab 5, p.3. Perhaps it might be sensible if you would care just to read 7(a), (b) and (c).

THE CHAIRMAN: (After a pause): Yes.

MR. SHARPE: So two bites of the cherry and in both they were resolutely opposed to the application that Albion was making in relation to disclosure in the post-2004 situation. Now, admittedly they said they had done some work, and if we go to your own judgment, and of course it goes back to tab 20, p. 4, par. 10. This is, I think, very familiar to you - my friend took you to it and I am not going to labour the point. You were faced with submissions that it would have been onerous, disproportionate, unhelpful, and you rejected all of them, indeed, you made the point that there could actually be something quite helpful in this documentation. You queried why July 2004 would be a logical cut off date, it would not be onerous, there must have been something which is not legally privileged. You might

even have looked at re-assessing the first access price - if it is any comfort there is not the slightest evidence they gave it any thought in the disclosure, they had done their job.

It does not stand at all to say that somehow or other because my friend, in two written submissions with Leading and Junior counsel before you, arguing as best they can, with my unfeigned admiration, which can be very formidable, that they somehow misled themselves and misled you.

If that is the case and they are honest enough to admit it, that is fine. It is unfortunate, but it does not matter, the right answer came out in the end at para.10. What they are seeking to do is to come to this Tribunal and say we should pay for the consequences of their mistake. I respectfully reject that submission. To the extent that they admit to making a mistake, to have been less than clear on two occasions and orally before the Tribunal, they cannot expect the consequences of that mistake to fall upon the shoulders of Albion, still less to the tune of £41,000 for a bit of paper and some time in the Tribunal.

I will not labour the point, those are my submissions in relation to that. It is true, of course, that Albion made submissions which were not accepted, but some were. On balance, it seems to me one of those cases where it is probably best to let the costs lie where they fall and there should be no order at all. We think that is the sensible and right answer.

I do not think I can properly press for a more severe order because we were misled, just as much as the Tribunal was, but I do not think that is appropriate, there should be no order and we will leave it at that.

Unless I can assist you on anything else, those are my submissions this afternoon.

THE CHAIRMAN: Thank you very much. Anything in reply, Mr. Pickford?

MR. PICKFORD: Yes, madam. Madam, I propose to go through the points in the same order that Mr. Sharpe has addressed you on them.

The first is on what is said about the limited resources of Albion's directors. You have been invited by Mr. Sharpe to draw a reasonable inference that they have no more resources than the income that is articulated in the table showing the directors' income. That is precisely the approach that Lord Justice Peter Gibson warned against. He said that you need to have proper evidence on these issues and we simply do not know what the true evidence is in relation to Dr. Bryan's means, or the means of the directors, either their assets or their income, and one cannot infer it merely from a table that addresses the income that Dr. Bryan receives from Albion. We do not know whether he has other income. Submission is made that that is all it is but there is no evidence whatsoever to back that up and that is, we say, unsatisfactory and therefore you cannot safely assume that is the only income that is

available. Essentially it is said they have so little income and so little assets that they could give no order for security of any substantial amount at all, and we say that is not evidenced. Madam, you noted in relation to the other aspect of Dr. Bryan's witness statement (para.24 was adverted to) that that dealt with the situation 2002/2003, that was some nine years ago and we do not know what has happened in between, so that is rather out of date evidence on Dr. Bryan's current financial affairs.

The third point that Mr. Sharpe directed your attention to was the deteriorating cash flow of Albion itself. He said the company is not healthy. We know that, and we accepted their submission in relation to that. That is one of the bases on which we bring the application for security for costs. That is not in dispute. We are not asking for the security to be met by Albion's own resources. We recognise that they are not there. That would be the case in almost any application for security for costs because, by its very nature, they tend to be brought against impecunious companies.

The next issue is that attention was drawn to the after the event insurance and it was suggested that I do not understand what after the event insurance is. The situation here is that we do not accept that the after the event insurance provides us with comfort in the current state of affairs that we are in. Obviously it is not currently in place. Even if an offer were made to Albion, Albion could ultimately choose not to pursue it or it might decide to discontinue paying the premiums and not be able to avail itself of it at some point in the future. There is no evidence as to the amount of the after the event insurance. We have not been approached as policy holders for the insurance to ensure that our interests are protected if it were the case that it were granted and we were called upon to rely upon it.

What I say in relation to the after the event insurance is that one option that is available to the Tribunal is to adjourn this application until we find out what happens about the after the event insurance. It is true that the after the event insurance may be some way through this difficulty, the parties finding themselves in a situation where one party is concerned that it is not going to get back its costs at the end of litigation, the other party is concerned that it may stifle its claim if it is required to put up substantial security. If an application for after the event insurance is successful and if, for instance, we can be shown its terms and are satisfied that we would indeed find that the funds were made available in the event of a successful costs award, then that may indeed make the application otiose. We do not know because we do not know what is going to happen about that. We say if the after the event insurance is an issue in the Tribunal's mind the appropriate course is to adjourn this application over until we find out the consequences of the application. That also obviously

gives Albion a particularly strong incentive to continue with it. If it is said that the only purpose of the insurance is to cover our costs at the end of the day Albion may decide that the premiums in relation to that outweigh the benefits, because it may not ultimately matter to Albion that much whether our costs get paid or not. That is we say about the ATE.

There of course is an alternative that is available to the Tribunal in relation to our application if it is concerned about the possibility of stifling, which is to grant an award in a smaller amount. We have said that we are open to any amount up to the maximum that we have sought. We refuse to believe that it can be the case that, from the combined resources available to the directors of Albion and third parties, no sum, no material sum, could be given by way of security. One of the advantages of security, even if it is in a relatively modest sum, is that it may only give us relatively small comfort in relation to our costs at the end of the day, but it does impose a discipline on the party bringing the claim if it knows that it forfeits something to the other side in cost terms if ultimately it is to lose. That is a sensible and appropriate commercial discipline that parties to litigation ordinarily face.

Indeed, I took you to the opening words of Lord Bingham in the *Keary* judgment, where he set out the principle that it is generally a good idea that parties face the cost consequences of their actions. So we say that even a more modest award of security for costs would serve a sensible purpose in terms of ensuring that there is not quite the same asymmetry of risk and incentives as there is in the present case.

THE CHAIRMAN: What form do you say that security would properly take in this case? Are we paying a sum of money into an escrow account or providing a bank guarantee, or something that is going to tie up quite a lot of Albion's cash flow from a certain period?

MR. PICKFORD: It may be able to secure a guarantee which would not actually tie up its cash flow that relies on collateral - for instance, Albion recently, I believe, in the last year purchased a very large amount of land. There is the possibility of a bank providing a guarantee, whether with collateral to back it or not. There is a possibility of a payment into court, again of a more modest amount if the Tribunal were concerned that a larger amount would stifle the claim, notwithstanding my submissions that we simply do not have enough evidence about the true position in relation to that.

There are a number of alternatives. It could be payment into court, it could be by way of a bank guarantee. We are not particular about either. Indeed, as we say, if there is a satisfactory solution waiting round the corner in terms of after the event insurance, but we do not yet know what the answer is then we would also consider the possibility of being entitled to be a policy holder in relation to that. That was the next point.

It is then said against me that I said to the Tribunal that disclosure was the only reason for us becoming aware of Albion's circumstances in making the application. That is a mischaracterisation of the submissions that I made to the Tribunal, and it is a straw man to seek to knock it down. What I submitted was that the primary driving factor was the correspondence that was passing between the parties as a result of Ofwat's determination of the bulk supply price.

It is also the case that the more detailed financial evidence that was provided than Albion has published in its financial statements did to some extent assist us, and I made that point, but I did not put my application on the basis that that was the cause of it.

Also, as we have seen in these proceedings only this morning, we now see very large sums of money being paid in legal fees. That is one of the reasons why Albion says that they are in the particularly precarious situation that they currently are in. We had no sight of any of that prior to today. The first time that we got an inkling that there was going to be a serious problem was in that correspondence, and that was what really jolted us into action when we were told that they might not even be paying the monies that we are owed under the bulk supply determination.

We then turn to Dr. Bryan's witness statement and the issue of Ofwat and satellite litigation. I am slightly confused as to the position that is now adopted by Albion in relation to this. It seems to be suggested that they are not intending to bring in Ofwat, and no doubt they do not wish to bring in Ofwat. They do not want Ofwat to be here to be able to rebut what is said about Ofwat, but it does remain the case that in Dr. Bryan's witness statement, as it is currently drafted, there are allegations made about Ofwat which are used to justify the wider allegation that we were able to act in the way we did because of a combination of "a low level of technical skill at Ofwat" - that is made at 54 and 63 - and also that Ofwat is wedded to its earlier decisions purely for face saving reasons and it was using staff that had a conflict of interest. All of those are relied upon currently, unless my learned friend advises his client that they should be deleted, as the basis for explaining why we were able to act with impunity, it is said, in the way that we did.

If those allegations are to be maintained they do open up, I am afraid, a satellite in relation to Ofwat, because whilst Mr. Sharpe might be quite content to leave the matter purely at Dr. Bryan's evidence and the inferences that they draw from it, we will not be. We will need Ofwat to attend to be able to defend itself and explain why it is not the case that it has the low level of technical competence that it is accused of. We say that that remains an

issue liable to create substantial satellite litigation if it is permitted to be opened up, and nothing that has been said by Mr. Sharpe deflects from that.

Turning to the post 2001 conduct issue, at one point it did appear to be suggested that this was just about Ofwat, just about bringing in Ofwat, but of course it is not, it is much wider than that. It is said that we not only misled Ofwat, but we misled the Tribunal as well, and that we generally misled everyone that came across our path.

THE CHAIRMAN: Where we are with this, as I understand it, Mr. Pickford, is that the Tribunal made comments this morning indicating that we did not regard evidence as to what happened after 2001 as relevant to Dŵr Cymru's state of mind before March 2001, or as at March 2001, unless there were some documents post-dating March 2001 which expressly referred to its earlier state of mind. As I understand Mr. Sharpe's submissions, he has attempted to claw back a part of that, that part being that in so far as he can show from the documents already disclosed by Dŵr Cymru that in seeking to justify that first access price in the Ofwat abuse investigation, Dŵr Cymru put forward misleading information. That is an indication that they realised then, and by inference must have realised in 2001, that there was no reasonable costs justification for the first access price. To that extent he has sought to persuade us that our general ruling that nothing that happened post 2001, other than stuff that directly relates to their state of mind as at 2001, is relevant or should be allowed to be pursued in these proceedings.

We will have to decide in due course whether we accept that small carve-out from the general prohibition on raising alleged misconduct after March 2001. As I understood it, he was not contesting that, generally speaking, allegations of misconduct more generally by anybody after March 2001, any exploration of those incidents is disproportionate in terms of cost and time in relation to its potential relevant to any issue that the Tribunal have to decide.

MR. PICKFORD: Therein, madam, lies the problem. It was in the use of the words "the small carve-out". As I set out in my skeleton argument, para.12, I listed a very large number of paragraphs which bring in post-2001 events. Substantial numbers of those paragraphs relate to alleged conduct on Dŵr Cymru's behalf in relation to the administrative stages, even if Mr. Sharpe is willing to give an assurance, which he has not given expressly, that he does not want to bring anything into play in relation to the subsequent judicial proceedings. I do not know whether they are even willing to go that far, whether they simply put their case in relation to Ofwat. Even if they did, even if it is only about the administrative proceedings, that is a very large proportion of what we say is the wholly irrelevant material that the

Tribunal correctly recognised in its earlier ruling was irrelevant and should not be permitted. So Mr. Sharpe is inviting the Tribunal to effectively re-write its earlier ruling on this matter.

We say that the only issue that properly supports the claim for exemplary damages is what was in Dŵr Cymru's state of mind in offering the first access price.

They have plenty of submissions, and plenty of what they say is evidence about us being misleading in relation to that. If it is pleaded we are willing to grapple with that on the merits because we understand that leading up to 2001 that can sensibly go to our state of mind in offering the price in 2001. The issue is, did we offer that price calculating cynically at the time of offering it that the profits that we were likely to make as a result would outweigh the damages we would ultimately be liable to pay? That is the test that one finds in the case law. It is articulated at para.68 and 69 of Albion's own statement of case. We accept that our state of mind and conduct leading up to that decision is relevant to that.

Let us suppose for the sake of argument - obviously we do not accept it for a moment, but let us suppose it is correct - that at some point during the administrative proceedings we made some submission which it is then demonstrated in these proceedings was a misleading submission. That does not demonstrate that in 2001, when we offered the first access price, we did so cynically believing that we were going to be able to make more money from that abuse than we would ever have to pay in damages. It simply does not prove that point. That is the test. It is not a wider test about whether we were good or bad people or whether, for some reason, we are considered to have acted properly or improperly. It is a very specific test in relation to exemplary damages, the second head in *Rookes v. Barnard* on which they put it, and it is the one that I have articulated.

The Tribunal will recall that a number of allegations post-dating 2001 were set out in 8th July 2011 letter which sought to particularise the matters on which Albion relied in support of exemplary damages. The Tribunal addressed that letter in its ruling, and it expressly ruled that post-2001 matters were irrelevant on the basis that it struck out all of the paragraphs relating to post-2001 events. We would say that that was the right approach and it should continue with it.

In relation to Ms. White and the request for the calculations, we maintain the position that it is irrelevant how precisely that number was calculated. The fact is that that was the number that was offered. I would also say this: in so far as it is suggested that we want to now examine the particular derivation of that number, whether it was the right number to offer based on the costs that underpin it, the particular litigation that gave rise to this follow on

damages action led the Tribunal to issue a very lengthy preliminary judgment, a main judgment, it made a referral to Ofwat under Rule 19(2)(j), and then a final decision on the excessive pricing issues. It took a very large number of years and an enormous amount of detailed scrutiny for the Tribunal ultimately to decide what the appropriate price was for the services that were being offered by Dŵr Cymru. I would question seriously whether we, in these proceedings, want to open up the same issue in relation to United Utilities trying to ascertain what particular ----

THE CHAIRMAN: The point is that we will never know what price United Utilities would have agreed with Albion for the supply of the water to go to Shotton, and possibly Corus, because they never entered into a common carriage arrangement with Dŵr Cymru so they were never in a position to say to United Utilities, "Right, we are now the common carriers, we have signed up Dŵr Cymru, we have signed up Shotton, what is the price of the water? You were selling it to Dŵr Cymru at 3p, we want it for 3p", and what we have to assess is whether United Utilities would have sold it to them for 3p. As far as negotiations got, they were talking about 9p. There may be some document within United Utilities which Ms. White knows about which says one to the other, "Well, let us stick with 9p as long we can, but of course if they enter into a common carriage arrangement with Dŵr Cymru we will have to charge them 3p or risk being taken to Ofwat for a s.40 investigation, and we have to weigh up what the risks are if we go down that route and whether it is worth digging in our heels or not". If there were such evidence, and you have put forward Ms. White as a witness and we need to know what the background of that is, then that is helpful for the Tribunal to know to decide what is undoubtedly one of key elements in this case.

MR. PICKFORD: Madam, it may be that I have misunderstood what is being sought. We do not object to that type of document ourselves, but there is a point I want to come to about the fact that this involves a third party. What also seems to be being said is not simply we want disclosure of whether there were documents discussing whether they would still hold out at 9p but be prepared to go down to 3p - we would, of course, accept the likely relevance of such documents and if a request for disclosure is made we and United Utilities would be prepared to consider it - what would appear to be being requested was not merely that, but a detailed explanation as to how one gets to 12p. That is the same kind of exercise that, as I said, sounds as though it might be fairly straightforward on its face but how we got to 14.4 in the Tribunal took us many years of hard litigation. That is the issue that we say is irrelevant. It does not matter how one constructs the particular costs that give you to 12p. It might be the case - just hypothetically, I am obviously not accepting this - let us hypothesise

and suppose that Albion is right and the costs demonstrate that a cost price would be justified of 7p. If the documents that we accept could potentially be disclosed reveal, "We are prepared to go down to 8p, but that is the bottom line, we are never going down below 8p", the fact that Dr. Bryan can demonstrate that a cost based price would be 7p is irrelevant. They are not going to get a cost price if the answer is that United Utilities would never have gone below 8p.

THE CHAIRMAN: That would be a point that Mr. Sharpe would no doubt want to put to Ms. White, "Why would she not have gone to 7p, given that you must have realised that if there if there had been a s.40A determination, that was likely to be the answer that Ofwat would come to, so why would you not charge us that and avoid the expense of a determination?" We are all just speculating because we have not got the whole picture as far as this element is concerned. We are not looking at how a s.40 determination would have been conducted or what would have been the result. What we need to know is what calculations, mathematical, pragmatic, whatever, United Utilities were likely to have made. It is not good enough to say, "We offered 9p and therefore that shows what the price would have been struck at", because the negotiations never proceeded to their conclusion because they could not agree a common carriage price.

MR. PICKFORD: Madam, so long as what we would not be doing is seeking to replicate effectively what we did in relation to ----

THE CHAIRMAN: No one is suggesting we replicate that. What we are saying is that we need some more information from Ms. White to back up what her evidence appears to be, which is to say, "We would not have gone below 9p based on my calculations", and at the moment there is no material before the Tribunal for us to assess whether that is likely to be correct or not, or for Mr. Sharpe to cross-examine her on.

MR. PICKFORD: In relation to that there is the issue that this is United Utilities and its information that we are talking about. We do not control those documents, so we cannot actually say ourselves, "We need disclosure". Obviously we can talk to United Utilities and we can ask United Utilities to provide everything that they have, and they may agree to that, they may not. The Tribunal cannot properly rule on this issue. If it were the case that United Utilities said, "No, we are sorry, we are not prepared to agree with that", then obviously United Utilities would have to come back and there would have to be an application for third party disclosure. We are not there yet because we have not asked.

THE CHAIRMAN: You would have to decide whether you can then rely on Ms. White's evidence.

MR. PICKFORD: We would, yes, and we might be in a position ourselves of seeking disclosure from United Utilities, if that is the case. As I said, we have not got there, but it is important to remember that there is a third party involved here. United Utilities in particular may say, "There is commercially confidential information at stake here about how we arrived at that price, and we are still negotiating in relation to it", and therefore we may want that information, if it is to be disclosed, to be disclosed into a confidentiality ring.

THE CHAIRMAN: We are talking about what it was in March 2001, which is now a good deal more than ten years ago, but I think now that we have clarified, I hope, the kinds of information that the Tribunal thinks would be helpful, and I hope closed off some avenues which you may have thought we were going down, which we certainly have no intention of going down, we will need to decide whether, if you are going to rely on Ms. White's evidence, it needs to be supplemented by back-up evidence which enables Mr. Sharpe to test it properly and the Tribunal to come to a well informed conclusion about what she has to say.

MR. PICKFORD: Thank you, and we quite understand the Tribunal's position in relation to that. On the next point concerning the Ofwat determination of the United Utilities bulk supply price, in Dr. Bryan's witness statement he says, "It does not matter what United Utilities said because I was going to go and ask for a s.40 determination". Mr. Sharpe says, "We are going to return in writing", I think he said, "in relation to that". We would invite the Tribunal to rule on the issue. You have heard my submissions. They were pre-figured in writing to Albion, so it had a chance to respond. We would invite the Tribunal to make its position clear so that when Albion do return to this issue and they consider what to do in their witness statement about it, they have very clear guidance from the Tribunal as to what the Tribunal considers is the appropriate approach.

Turning to costs, it was suggested that I made a very ambitious application for costs in relation to the first of the applications that was considered. To be clear, I did not make an application for costs. I said that, ordinarily, costs were paid by the party seeking to apply to amend, both of the application and occasioned by it. That is the ordinary rule. I said that in the light of the toing and froing, the fact that some points we lost on and some points we won on, there should be no order for costs. That is my position in relation to it and I maintain that that is the appropriate order because Albion was not wholly successful, even in relation to the points that were addressed by the Tribunal. There were a number, and I took the Tribunal through them, where the Tribunal considered that Albion should not be permitted to amend in the terms that it wished to, and that therefore justified us in our

reluctance to give *carte blanche* in terms of assenting to the amendments. We did assent to many of them and so many did not have to form the subject of argument.

On the second application we would suggest that Albion have not given a fair summary of what actually occurred during the application. I took the Tribunal to tab 20, the Tribunal's ruling, and Mr. Sharpe did not touch at all on the first issue which was the jurisdictional issue about whether there could be an ongoing abuse. The Tribunal said in terms at para.6 - if the Tribunal could turn up tab 20:

> "Albion's main reason for opposing Dŵr Cymru's application is its submission that the Tribunal has not ruled on the temporal aspect of the abuse in the remedies judgment or any of the interlocutory rulings in the current claim. The temporal scope of the abuse is found in 1046 is, Albion asserts, a live issue in these proceedings."

So that was its main reason for resisting the application. Madam, you will obviously recall that you went on to address that and indeed reading the first sentence of para.7:

> "I do not agree with that analysis."

There was then a trenchant, if I may say so, explanation as to why it was wrong.

So that was the main point and we won on that. There was then the subsidiary point, the second point, about the possible relevance of our conduct post-2001, and we won on that, because what was ruled to be appropriate was then turned into a formal order. All of those aspects, as I explained, of the particulars that related to post-2001 were struck out.

Then there was the other element to disclosure, and I explained that that arose in relation to a miscommunication. It was by far the smallest part of the issues that were dealt with.

I did not say that we misled the Tribunal, I said that there was a miscommunication. It was a matter that was only dealt with on the papers, it was not dealt with at a hearing, so it is the kind of application where sometimes a miscommunication might arise because you do not have the advantage of oral argument to clarify precisely what it was we were saying about the search that we had undertaken. We did undertake a search post-2004. As I explained previously, what we were not going to do was go to all of the boxes that were held by Hogan Lovells in relation to the litigation itself that we knew were going to be privileged documents, or we felt that there was a 99.99 per cent chance of them being privileged, save for if one could argue that there was something in it that was not relevant, effectively, where we could not assert privilege, and go through each of those documents and classifying it and saying whether it was or was not relevant and then saying but it is already privileged. That was what we were saying we would not do.

THE CHAIRMAN: In so far as the documents in those boxes at Hogan Lovells were copies of internal Dŵr Cymru emails or board minutes or committee notes or whatever, those would presumably also be in the premises of Dŵr Cymru and there would not be a problem of ----

MR. PICKFORD: Madam, could I just take instructions for one moment, I just want to clarify something. (After a pause) I am instructed that Dŵr Cymru itself had a complete set of everything. There was nothing that Hogan Lovells held that they did not hold, and they did a total search of their internal documents to make sure that they identified anything that was relevant. They did identify a few documents and they disclosed them. So that is the position in relation to that.

Madam, unless I can be of any further assistance, those are my submissions in reply.

THE CHAIRMAN: No, thank you very much, Mr. Pickford. As far as what now is going to happen is concerned, we will probably deliver a composite ruling on the points that have been raised. The question is what we can usefully do now or at the end of that ruling to set some dates by which things should be done, and get some idea of when the parties envisage this matter is going to come on to trial. I do not know whether you have had any discussions between you as to when it is likely to be ready for a hearing. Mr. Sharpe?

MR. SHARPE: Madam, we have the benefit of Dŵr Cymru's first thoughts on the timetable. We have responded to that, which I think is in the bundle. Working back, I think it would be quite possible for us to be on in October - I have not consulted my friend, but that seems to be appropriate - which gives us the summer to prepare. If we work back from that I think the timetable that is being proposed is good. Where we would take issue with the timetable, it is a fairly minor point and we will need some guidance here, there is some suggestion that we should lodge skeletons a month or so before the hearing. I think it is a very unattractive idea and it does not work in the Court of Appeal. If you put it in a month before and you have forgotten what it is all about. If you read it, you have forgotten - I would anyway - and if I write it and go back to it, I have to read it again. I think two weeks and a week would be about right, and if we add a couple of days for reading - it is in your gift, of course - that would be a useful exercise if you gave yourself some time to do it.

I think that is about the only thing on which we differed.

THE CHAIRMAN: Yes. As far as the dates are concerned, it would suit the Tribunal best to start in the week commencing 15th October and ten days thereafter. As far as skeletons are concerned, it is often useful, if there are going to be a lot of legal submissions, to have those in advance.

Then we have also been discussing in the course of today this idea of having some kind of commentary anyway about the relevance of the disclosed documents, which is the kind of thing that you often ----

MR. SHARPE: I think what sometimes works in the High Court and in the Commercial Court in particular, we divide the skeletons into two. We can do the legal submissions and then we have an analysis of the evidence. So it really essentially a concordance both in terms of description and in terms of critique. It is an advance for the cross-examination in part, but it gives the Tribunal a flavour of where we are going, and then you have a document which you can trust as reducing what would be a fairly substantial body of evidence. If you favour that I would certainly be most willing to go forward on that basis.

MR. PICKFORD: Madam, if I might just add in relation to dates, obviously we recognise it is sensible, if we can, to try to get a date in people's diaries to ensure that there is a ultimately a trial of these matters. The only note of caution we would sound is that obviously Dr. Bryan's first attempt at a witness statement was quite a long way from how a witness statement should look in these proceedings now. Obviously, as Mr. Sharpe said, they are under new management now, and I am confident that they will take the Tribunal's ruling well on board and to heart. Given that we have not yet seen the new statement, we cannot absolutely preclude that there will not be problems with it. We very much hope there will not be. We would like to get on and deal with this matter, but there were problems with the first one and we will have to proceed with some degree of caution to make sure that we are still on track for a trial in the autumn.

What we need next is the amended pleading, because we are now being told that the quantum, the key issue in the case, is being put on a wholly different basis, so that is something we need to see and to respond to.

There is an entirely new witness statement to come and then there is the document that is contemplated by the Tribunal in relation to a commentary on documents.

We need all of those from Albion before we can then put in our responses in relation to them. We may be running a little ahead of ourselves if we try to set a date without being quite clear on all the various steps that we have got to get through. The Tribunal has not actually yet granted permission for the proposed amendments, so we need to proceed with some degree of caution.

THE CHAIRMAN: I understand all that, it was just useful for us to get some idea of what the parties' expectations were in that regard.

On this point of the litigation funding and the after the event insurance, do you know, Mr. Sharpe, when Albion is likely to hear the result of that?

MR. SHARPE: No. As I submitted earlier, the best information we have got is probably in the first two weeks of May - we do not know, is the answer. I think, respectfully, we would submit that it has no relevance for today.

THE CHAIRMAN: We have your submissions on that.

MR. SHARPE: As for my friend's concerns about how it would be structured, I think he misunderstands, they will never become policy holders. I do not think it works quite like that, they will become beneficiaries and they will be sole beneficiaries and they will statutory rights to claim against it. In so far as there are issues about maintaining premiums, I do not think we would have any difficulty in giving an undertaking to that effect.

The point is this: there is no case for adjournment. That is simply not on. If you are against on security then you must demand security now. If you are for us on security, then we all live in hope that we will get insurance, in which case Dŵr Cymru's interests will be preserved. If we do not get it and you find against us that is the end of the action as far as we are concerned, and we do get it then we will proceed. It really has no relevance.

THE CHAIRMAN: Thank you all very much indeed.