IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1166/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 October 2012

Before:

VIVIEN ROSE
(Chairman)
TIM COHEN
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Appellants

– v –

DWR CYMRU CYFYNGEDIG

Respondent

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HEARING (DAY 2)

Note: Excisions in this transcript marked "[…][**C**]" relate to passages excluded.

APPEARANCES

Mr Thomas Sharpe Q.C., Mr Matthew Cook and Mr Medhi Baiou (instructed by Shepherd Wedderburn LLP) appeared on behalf of the Claimant.
Mr Daniel Beard Q.C., Mr Meredith Pickford and Ms Ligia Osepciu (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

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Tuesday, 16 October 2012

(10.30 am)

Opening Submissions by MR PICKFORD

THE CHAIRMAN: Yes, Mr Pickford.

MR PICKFORD: Madam Chairman, members of the Tribunal, this is obviously a follow-on claim, and accordingly, the only findings of infringement upon which Albion is permitted to rely are those made by the Tribunal in the main proceedings. It goes without saying that those findings of infringement are obviously not enough. Even where there has been an infringement of the Competition Provisions, in order to establish first the compensatory damage, Albion must prove, on the balance of probabilities, that the relevant infringements caused Albion loss and it was proved the quantum of that loss.

Similarly, in order to recover exemplary damages the burden falls on Albion to prove, again on the balance of probabilities, that Dwr Cymru's conduct was outrageous or cynical within the meaning of the case law. In the present context that includes a requirement that it must demonstrate that Dwr Cymru knew, definitely or probably, that its actions were unlawful but went on nonetheless to cynically exploit the claimant because it calculated that the gains from doing so outweighed the likely losses that it would suffer.

Now, it's a very serious allegation and it should not be made lightly and the Tribunal should consider the evidence on this point, such as it is, especially critically in deciding whether the civil standard of proof is met and I'll come on to deal with that a bit later.

We say Albion fails to meet the standard of proof on both of its claims. As regards compensation the reason why it falls primarily on causation is because Albion would never have concluded the necessary arrangements to put common carriage in place. It needed a deal from UU and it needed a common carriage deal from us and neither of those would have happened, we say on plausible assumptions of the counterfactual world.

The second reason why it fails is a combination of causation and quantum taken together, which is that even if it had concluded the necessary deals, it would have made less money on that supply via the common carriage arrangements than it was in fact making under the bulk supply arrangements.

Now, pausing there, why is that? Albion might suggest, well it's a bit counter-intuitive is it not that abuse can't lead to any loss. It's obviously all dependent on the factual context, and the key in our case is that there were two ways of making a supply to

Shotton, one via common carriage, one via bulk supply. So the question the Tribunal needs to ask is: did the abuse, which only arose in relation to the common carriage, deprive Albion of the more profitable of the two paths, and we say it didn't, the more profitable of the two paths over the period in which Albion claims damages was in fact bulk supply.

Now, on inspection there are four factors that are particularly relevant, these aren't exhaustive of our case but they are worth drawing to your attention at the outset. It's apparent, we say, that bulk supply reflected a better water resources cost than was ever going to be available to Albion from United Utilities. Bulk supply secondly enabled Albion to avoid a number of other ancillary costs that it would have had to incur if it was going to piece together the constituent elements for a common carriage agreement. Notable they are the potable back-up and the costs concerned with augmentation at Heronbridge.

The third point to draw attention to is that the bulk supply price was held at a particularly low level over the period at which Albion claims damages, whereas an indexed price for the elements of common carriage would have risen at a faster rate.

The final point is that the bulk supply also

embodied interim relief, which would of course have never arisen in the event that Dwr Cymru had offered a lawful common carriage price in the first place so that needs to be deducted, and that's accepted by my learned friend.

So that's a very short overview of our position on compensatory damages. As regards exemplary damages, what we say is that, as expertly as they were put by Mr Sharpe, once the points are stripped of rhetorical device and exposed to the harsh glare of a proper forensic examination, we say Albion doesn't come close to satisfying the relevant test. Dwr Cymru did not set the common carriage access price knowing that it was, or probably was unlawful, but nonetheless went on to cynically calculate that the benefits of doing so would outweigh the damage caused to Albion and indeed any fines it would have to pay.

On the contrary, its conduct was taken on the basis of its understanding of what the expert Regulator was expecting of it, and we say in those circumstances it's extremely unlikely indeed that Dwr Cymru would have acted in the way that's alleged.

So the scheme of my submissions is going to be as follows: you have already read the skeleton arguments and Mr Sharpe has given you Albion's interpretation of

the facts. There is obviously much that we disagree with, but I am not proposing to adopt a counter narrative. The way I propose to deal with matters today is to address you on an issue by issue basis in broadly the way that we have done in our skeleton argument. Insofar as there are key facts upon which Mr Sharpe relies for his case, he will no doubt put those to our witnesses and, insofar as is appropriate for me to comment on them now I will, but I won't be doing so comprehensively in relation to everything that he necessarily said yesterday. Nor am I proposing to give you a lot of bundle references. I will give you some and I will take you to various documents in the bundles.

Obviously a lot of what we say already has the references contained in our skeleton argument and the document appeared to commend itself to the Tribunal, so we would say it's sensible to continue to allow that effectively to be the key written record of our case and where there are other points that supplement what's in the skeleton argument, I will endeavour to draw those to your attention.

So my submissions, naturally enough, will be in two parts, first the compensatory damages claim and then the exemplary damages claim. Most of the law crops up in relation to exemplary damages, there are a few

authorities that I will deal with in relation to compensatory damages, but they, most appropriately and helpfully, are addressed in relation to discrete issues as we go along rather than trying to set out a legal framework at the beginning.

So turning then to the compensatory damages claim. The first point, we say, is that Albion would not have entered into a bulk supply agreement with United Utilities, and there are two questions that the Tribunal needs to answer in this context. Firstly, what bulk supply terms --

THE CHAIRMAN: Would not have entered into a common carriage agreement?

MR PICKFORD: Sorry, I may have misspoken, I do apologise, I meant to say that Albion would not have entered a bulk supply agreement with United Utilities.

THE CHAIRMAN: Oh, I am sorry, yes.

MR PICKFORD: If I misspoke, I apologise.

THE CHAIRMAN: No, no, I misheard.

MR PICKFORD: There are two elements, obviously, to the claim on causation at the beginning. It needed to put in place, as Mr Sharpe fairly emphasised, there are two parts to the deal which is put in place; the bulk supply from United Utilities and the common carriage, and if either of those failed, then the whole agreement

necessarily failed, and so we are back in the land of bulk supply.

So the first element of that, that I am going to address you on is the bulk supply with United Utilities. We say there are two questions that the Tribunal needs to answer in ascertaining whether Albion would or would not have acted in the way that it says. The first is: what bulk supply terms would United Utilities have offered? Secondly, once one has worked out the answer to that question, would Albion have accepted them? So dealing with the first of those, as Albion recognises in its skeleton argument, that's at bundle 11, tab 1, paragraph 75, United Utilities' final offer of a bulk supply price to Albion on 8 February 2001 contained two alternatives. There was the conditional offer at 9p per metres cubed, and there was the unconditional offer at 12.1p per metre cubed.

Now, the principal evidence on the issue of the United Utilities price is obviously provided by Ms Janine White, who at the time was the strategy manager for United Utilities. She was the person who was responsible for deriving the 12.1p per metre cubed price offered to Albion. She explains in her evidence, at bundle 1, tab 1, paragraphs 15 to 17 -- we don't need to go there for the moment -- how she derived the unconditional price of

12.1p per metre cubed, and it was based on a good faith calculation of the regional average long run marginal costs for the abstraction elements of the United Utilities water resource costs, and that was in accordance with United Utilities' policy of setting the bulk supply charges in accordance with relevant Ofwat guidance.

The 9p per metre cubed price was based on an earlier indicative price that was offered to United Utilities -- sorry, by United Utilities to Albion, prior to Ms White's completion of her assessment of long run marginal costs. The situation that we found ourselves in, or rather United Utilities found themselves in, was that, once it had conducted its actual assessment of costs, it found that they were 3.1p higher than the price that admittedly had been suggested as a possible price, but there had been no firm commitment in relation to it.

So one can easily see what was going on here. Having given an indication initially that the price would be in the order of 9p, having then gone away and found out that actually the work supported a price of 12.1p, United Utilities were inevitably concerned that Albion was going to be unhappy about a 3.1p per cubic metre increase in the price. So, to try and head that

off, they come up with a deal. They say: well, the right number is 12.1p but if you are prepared to agree the price that we are giving you is fair and reasonable and you are not going to challenge it, and moreover you enter into a contract straight away, before you have sorted out your common carriage deal, then we will stick to the 9p, otherwise it's the 12.1p.

If one goes to bundle 4, tab 136, we see here some email communications between, amongst others, John Lafon and Dr Bryan. On page 890, the top email, Mr Lafon explains the basis on which they have managed to effectively reconcile their worth of 12.1p per cubic metre with the price they are prepared to offer of 9:

"The LRMC based figures is built up using components which are regional averages. This results in the 12.1p per metre cubed figure. What has then allowed me to reduce this back down to 9p per metre cubed is a review of its application to this particular circumstance. The reduction takes into account that the supply is not a secure one and therefore has a lower level of reliability than our other supplies which are integrated into our network. This one is..."

And I think that last word should say "not", that was not very clear in my copy.

THE CHAIRMAN: I see, there is nothing redacted there?

MR PICKFORD: No, it was previously next to a holepunch, and I've asked --

THE CHAIRMAN: No, no, if it's not --

MR PICKFORD: -- those instructing me to check with the original, and they say it's "not".

In my version I simply had "this one is not", which is in contrast to the previous sentence.

So the situation --

THE CHAIRMAN: It's not a secure one, that means because it was an interruptible supply?

MR PICKFORD: Yes. The point here is that the River Dee is incorporated into UU's integrated network, and as we heard from Mr Sharpe yesterday, water that's taken out at Heronbridge and used by UU is fed into their integrated network which supplies 95 per cent of their entire area, that water can potentially end up all over the place, in the centre of the country.

So to that extent it's integrated, but in one sense it is not integrated, which is that from the point of view of the supply to Shotton that's been provided by United Utilities, the only way that United Utilities can supply Shotton, because it's down this one extra length of pipe, is purely through Heronbridge. So if that fails, then there is no longer any supply to Shotton. That's why, of course, the potable back-up that

Dwr Cymru offers directly from its network is so essential to Shotton Paper, because it's there to step in potentially when there is a problem from Heronbridge. What United Utilities can't do which they can do in the rest of their integrated network is, if there is a failure in relation to Heronbridge, say, "Well, don't worry, the water will come in from somewhere else" --

THE CHAIRMAN: How often does the Heronbridge pumping station fail, then?

MR PICKFORD: Rarely, in my understanding, and there is some documentary evidence on this which we can deal with in due course. I am afraid I don't have the numbers to hand.

THE CHAIRMAN: I expect you will come back to that when you talk about the potable back-up supply?

MR PICKFORD: Yes.

MR COWEN: Can I ask where the risk is there? Maybe I have misunderstood something, but the Dee is before you get to the Ashgrove System.

MR PICKFORD: Yes.

MR COWEN: So the integrated nature of the water supply is before you get to the Ashgrove System.

MR PICKFORD: That's right.

MR COWEN: So in what way does United Utilities take advantage or have a non-secure supply? That's the

Ashgrove System problem. Is that where the issue arises?

MR PICKFORD: Well, it's also, at Heronbridge there is only one way of putting water into the Ashgrove System, which is from the pumps at Heronbridge. So what they are saying is: we have only got this one source to do it, although that source can be used for many other purposes, if it fails, we can't take one of our sources in Liverpool and send it to them, put it into the Ashgrove System.

MR LANDERS: Sorry, isn't Heronbridge owned by Dwr Cymru?

MR PICKFORD: No. Dwr Cymru owns certain pumps. It's owned by United Utilities.

MR COWEN: And the Ashgrove System is owned by?

MR PICKFORD: Dwr Cymru.

MR COWEN: Quite.

THE CHAIRMAN: Yes.

MR PICKFORD: So what Dr Bryan says about this in his evidence at paragraphs --

THE CHAIRMAN: This doesn't say anything about it being conditional on them agreeing that it's fair and reasonable.

MR PICKFORD: No, it doesn't, Madam. That matter is agreed by the claimants, but if one turns back to the email, which is a few pages on, but it's obviously earlier in

time, because these emails are in anti-chronological order. We see the email on the next page:

"Dear Jeremy,

"Alternative supply arrangement for Shotton Paper.

"Thank you for your email received last night in response to the conversation between Malcolm Jefferies and John Lees on Tuesday.

"Our original indicative price range for the bulk supply of up to 9p per metre cubed, based on early LRMC work and specific circumstances. The price was given in good faith, but in advance of detailed LRMC work that has been ongoing for some time relating to our preparations for common carriage et cetera ...

"The new LRMC based price of 12.1p per metre cubed is a product of that detailed work and is relative to the supply at Heronbridge. The price has had Board approval.

"I have carefully considered both the basis of the price and the points you have raised. Whilst I do not agree with your points I am prepared to offer that we revert to the 9p per metre cubed but do so on the following basis:

"9p per metre cubed is the agreed bulk supply price for the bulk supply agreement for NWW and EL.

"That you acknowledge the price is fair and

reasonable.

"That a Bulk Supply Agreement is signed to that effect in advance of your successful negotiations with DCC."

THE CHAIRMAN: Yes. So, but were they then making a loss at 9p per metre cubed? Were they selling the water at a loss?

MR PICKFORD: Madam, it all depends on what measure one applies to costs. Long run marginal costs is a concept which is not the same, and again there are documents that we will go to in due course, during the trial, that explain this as an accounting cost to(?) the share. So one typically thinks of losses or profits on an accounting base, and by reference to a particular set of profits and losses set out in accounts. Now, that is not how long run marginal cost is calculated. Long run marginal cost posits a question which is essentially: in the long run what do we have to do in order to supply an extra unit of water? Then it works out the costs effectively from that, and that is what Ofwat considered over the relevant period and what it still considers to be the right economic concept.

THE CHAIRMAN: Yes, I appreciate that. But you are saying that the price -- well, these are probably questions for Ms White -- saying the price of 12.1 has had board

approval, but they were prepared to offer 9p on these conditions.

MR PICKFORD: I agree, Madam, it probably is most appropriately directed to Ms White. What I would say is that the fact that the price might be less than long run marginal cost does not mean that on a short run basis it's actually losing money.

THE CHAIRMAN: No, no, of course.

MR PICKFORD: What it does mean is it is less than its view of what, in the long run, it needs to invest in order to be able to supply extra units of water.

MR SHARPE: Madam, forgive me for interrupting I was enjoying my friend's giving of evidence in relation to this, but no doubt my friend will be taking you to evidence of the long run marginal cost that he has just been describing.

THE CHAIRMAN: Well, he is answering questions from me at the moment.

MR SHARPE: Yes, and also giving evidence. Now, my question has a point, because there is no evidence in relation to the calculation, nor do we have any copy of any board decision or board minute. So if my friend wishes to carry on giving evidence, I am sure that it will enlighten us.

THE CHAIRMAN: The evidence is from Ms White, which we will

hear in due course.

MR SHARPE: My friend is adopting it and we have no evidence before the court in documentary form. May I, to coin a phrase, point that out? Thank you.

MR PICKFORD: Madam, I was obviously trying to assist the Tribunal, and insofar as the points that I had made are relevant to the matters in this case, I believe that there is sufficient documentary evidence to support the points that I have been trying to assist the Tribunal with. In any event, it's an attempt to provide an answer to a question.

THE CHAIRMAN: Yes. So you say their final offer was this 9p conditional or 12.1p unconditional?

MR PICKFORD: Yes. Now, there is mention made by Dr Bryan of an earlier indicative access price, he says, of 8p per cubic metre rather than 9. Now, we have three points to make in response to that. First, we dispute the factual contention, and that's obviously something I'll be addressing in cross-examination with Dr Bryan, but there are documents I will be taking him to where we say that no 8p offer has been made. Certainly Ms White does not recall discussing an 8p per cubic metre bulk supply price, either internally within United Utilities or with Albion, from her time in the involvement in the matter, which began in October 2000. That's her

evidence at paragraph 35 of her second witness statement.

Now, the second point we make in relation to the 8p per cubic metre is that even if such a price was floated at some point during discussions, what is clear is that the actual offer that was made, following the LRMC work, was the one that I have just described; it was the conditional one and it was 9 or 12.1p per cubic metre.

The third point is that Albion's lack of conviction in their 8p per cubic metre figure, being what UU would have actually offered, can perhaps be seen in its approach to calculation of damages, notwithstanding that it has eight different scenarios for its damages claim, none of them are based on 8p per cubic metre.

In Albion's claim, once it's given up on 3p per cubic metre or a price thereabouts, it goes to 9p. So if we can then turn to address the 3p price, which is based on the Heronbridge Agreement.

This is obviously the primary case that's advanced by Albion in relation to the price that we have, albeit that it does, in some of its scenarios, countenance a high price of 9p per cubic metre. Albion's justification for this suggestion of this price is it says United Utilities would have acted prompted in the knowledge that it would have been unlawful to charge

Dwr Cymru and Albion different prices for the same source, and that such different pricing would have been the subject of a challenge to Ofwat.

Now, this case is inconsistent with the evidence for a number of reasons. The evidence is at Ms White's first statement at paragraph 18 and her second statement at paragraphs 32 to 34.

Now, first, United Utilities was unwilling to depart from its policy of setting bulk supply prices on a base related to long run marginal costs. Although in the view of the specific characteristics of the Heronbridge supply, and one can also see, to some extent presumably, some commercial pragmatism, they were willing to drop to 9p in the circumstances that happened, they were not willing to go any lower, that's her evidence.

The second point is that United Utilities were aiming to revise its bulk supply to Dwr Cymru under the Heronbridge Agreement upwards. It's quite clear, from all of the documentation in this case, that United Utilities were desperate to abandon the Heronbridge Agreement which they thought was a very bad deal for them. So what they were hoping to do was to use the negotiations and agreement with Albion as a means to lever up the price that they would get from Dwr Cymru.

There is no sense at all, and it would be quite

absurd commercially, to ingrain that price that they already didn't like, that they inherited from pre-privatisation, and give it new lifeblood by giving it to Albion under a new post-privatisation agreement.

Indeed, in relation to the threat of a reference to Ofwat, Ms White's evidence is clear that, far from being concerned by the prospect of such a challenge, they would have welcomed it because they believed that Ofwat firmly appointed prices based on LRMC, and therefore Ofwat would have supported their higher 12.1p per cubic metre price.

So they were not at all concerned by the idea that this might ultimately be determined by Ofwat. Indeed, later on they tried to get the Heronbridge Agreement with Dwr Cymru determined by Ofwat. They were unsuccessful in that, but they had no fear of Ofwat stepping into the matter whatsoever.

In relation to the focus on LRMC, it's worth very briefly taking you to a few documents, principally in bundle 2 but also in bundle 3, just to emphasise quite how concerned Ofwat was about ensuring that bulk supplies were based on LRMC.

If the Tribunal please could go firstly to tab 9.

THE CHAIRMAN: Of bundle 4?

MR PICKFORD: Sorry, of bundle 2, I beg your pardon. I am

going to go through these fairly speedily, we may well come back to them in due course but there are a number of them and I just want to give you the overall sense of where Ofwat was coming from.

So we see at tab 9 this is a letter to all managing directors of all water and sewerage companies, and water owning companies. It comes from Sir Ian Byatt and it is entitled, "Water pricing: the importance of long run marginal costs," in bold capital letters. If we turn over to page 184, we see the second sentence into the top paragraph:

"If companies were to develop their tariffs for large users simply by an allocation of accounting costs this could lead to tariffs being offered at a level below the continuing costs of supplying additional water to these users. The report from London Economics [which is attached to the letter] sets out the arguments for using estimates of long run marginal costs as the basis for water pricing. It supports the direction we have generally taken in the development of tariffs particularly for large users."

It goes on in the third paragraph:

"Although the average price of water is likely to remain below long run marginal cost for many years, it is desirable to get as close a relationship as possible

between price and long run marginal costs in areas where customers are concentrating their choices about the volume of water they wish to use."

So if we then turn on to tab 10, we see an RD letter, that's a letter to regulatory directors, and this was effectively a consultation on bulk supply and sewerage connection agreements.

If one then goes to tab 12, we see a letter of 6 March 1998, RD7 of 1998, and this is the directors' conclusions on that consultation. At point 2, just before the two bullets on the bottom of the page, we see that:

"After considering the responses, the director has decided:

"The principle of LRMC pricing should be used in determining bulk supply and sewer connection agreement prices. Methodology issues have been addressed in PR99, Information Requirement E, Supply/Demand Balance Submission."

If one turns over the page, under point 3, in the third bullet, one sees there --

THE CHAIRMAN: Yes, the next bullet refers expressly to Shotton Paper, but this was a generally issued --

MR PICKFORD: It was generally issued, yes. Shotton Paper was often used as a case study in relation to bulk

supply pricing at this time, because it was an example of an inset appointee seeking bulk supply. So one sees that in a number of these documents there are general policies that are set out, and then the case study of Shotton Paper was used to help explain the approach that the director is proposing to take.

Madam, can I also --

MR COWEN: Can I just understand that a bit more? It says, "The director has decided" and in the first bullet:

"The principle of LRMC pricing should be used to determine bulk supply ..."

And then the next bullet appears to be in contrast to the one above. He sees no reason to change the prices he is minded to determine for Shotton Paper if he is required to make a bulk supply order.

MR PICKFORD: Sir, I don't believe that's in contrast, because my understanding is -- but again these matters can be explored in more detail during the course of the trial -- that the understanding of the director was that the price it was setting for Albion to have a bulk supply was consistent with LRMC.

MR COWEN: We may need to come back to that.

THE CHAIRMAN: When he is talking about the price to Shotton Paper, that's the price that Albion supplies the water to Shotton Paper, not the price at which United

Utilities supplies the water to Albion or to Dwr Cymru.

MR PICKFORD: That's correct, because that matter was not one that the director at that point had jurisdiction (inaudible), he was not dealing with that end of the pipe, as it were.

Then in point 3, the third bullet it is noted that.

"Where companies have regionally averaged charges, LRMC estimates should reflect costs across the whole region. Bulk supply prices will be determined on a regional basis, unless companies choose to de-avergae their tariffs. Any de-averaging must reflect the LRMC in each area and should be managed over time to avoid undue incidence effects."

THE CHAIRMAN: And what's an "incidence effect"?

MR PICKFORD: An incidence effect, well, I have been warned not to give evidence by Mr Sharpe, and I am not sure that there is evidence to that effect in the papers. I infer, and this is simply my personal inference based on my understanding of the matters in the case, that an incidence effect is effectively if one unwinds tariffs quickly, then one finds that if they have previously been averaged, suddenly customers start paying very different types of prices.

Also that can be destabilising in that it allows cherry-picking, because someone can come in and start

trying to attack certain bits of pricing, and the whole pricing structure that had previously been built up can find itself unravelling rather quickly. So it's a warning to say that may happen if you go down this route and therefore you have to tread carefully. I have to say that's simply my construction of this particular document.

Sir, in answer to your question about the use of Shotton -- I don't want to take too much time with this but it may just be helpful for your note -- that the way in which Shotton came into the picture is addressed in the earlier document at tab 10, at 4.6, and it explains there its consideration of Shotton. Indeed, it says, over the page, if one goes to 4.6 and then turns the page to 230 in the bundle, the penultimate paragraph:

"It is appropriate therefore to consider the prices at which Dwr Cymru sells to other non-potable customers of a similar size to Shotton. We have found these prices to be similar to its estimate of LRMC in a narrow range. There is no substantial evidence to suggest that the LRMC for non-potable water is below 26p per cubic metre."

That's on page 230, folder 2, tab 10. So that's why those two paragraphs that were identified are reconcilable with one another; it's precisely because

Ofwat, the director, thought that the 26p was representative of LRMC.

So if we then go on, please, to tab 21, in the same folder, simply to draw attention, this is an MD 148, again to all managing directors, and it's entitled, "Publication of long run marginal cost data. LRMC Information. In MD 123 I set out the importance I attach to the use of long run marginal costs."

Again, there is a further discussion about information that's been provided, but the further point I am emphasising is that the director hasn't given up on reminding companies about the importance of LRMC.

Then if we please take up folder 3, and turn to tab 39, we then see some formal guidance. At tab 39 we see formal guidance issued by Ofwat in conjunction with the OFT, February 2000. My point is just a very short one: again, in this formal guidance, if one turns to paragraph 4.4, which is on page 495, we see that:

"The director's view is that large user tariffs should normally be set with reference to a robust estimate of the long run marginal costs of supply."

That's at paragraph 4.4. Mr Sharpe has asked me to take you to paragraph 4.14, which deals with excessive prices.

So if we could then please turn to tab 42, and this

is the last of the documents I'm taking you to in this particular tour through LRMC. This is MD 159, again to the managing directors, and simply emphasising yet again:

"Previous MD letters ... have explained the importance of long run marginal cost for water pricing and for efficient investment planning. The value of LRMC depends in part upon the quality of companies' estimates, which should be subject to a regular process of re-evaluation. In order to facilitate that re-evaluation, this letter updates Ofwat's advice ..."

And various points in relation to LRMC.

So again, it's understandable in that context why United Utilities were heavily focused on LRMC rather than, for instance, an accounting measure of costs at Heronbridge in relation to the price that they were proposing to supply --

THE CHAIRMAN: There is two different issues, though, isn't there, there is the accounting cost versus the LRMC, and then there is the specific assets, the LRMC of the specific assets, and then LRMC regional averaging?

MR PICKFORD: Yes.

THE CHAIRMAN: What does all this Ofwat material say about using regional average costs rather than specific costs for the particular assets?

MR PICKFORD: One of the documents I took you to -- it was in the context of the question about incidence -- explained that the principle -- primary principle, is that you should take long run regional average costs, but that if you are going to depart from that, you need to adopt an approach which is careful and looks at long run marginal costs across particular areas. That was the, I think it was the third of those documents I took you to.

THE CHAIRMAN: That's okay, I can check.

MR LANDERS: Actually, can we go to it, I thought that the paragraph before that referred to the need to base the LRMC on particular systems, and then went on to say where companies decided to use regional average cost in relation to such and such, I didn't think it actually recommended using LRMC, but maybe I misread the document. I can't remember which one it was.

MR PICKFORD: I think it may be the one at folder 2, tab 12.

MR LANDERS: Yes.

MR PICKFORD: So at the second bullet point, we see that:

"So that competition is based on a level playing field, all companies should set large user tariffs that reflect the LRMC of providing a service."

MR LANDERS: So the definition of "service" is the key element, isn't it?

MR PICKFORD: Well, that is certainly an important element, but here I don't understand it's particularly in dispute, it would be -- the service that's being considered here is the provision of water, so it's the LRMC for water resources, because United Utilities aren't providing common carriage, they are providing the raw material. So it's the water resources, LRMC, that we are concerned with in this particular case, and then regional averaging is dealt with in the third bullet.

MR LANDERS: It talks about differences in the level and service and then said you should do LRMC on particular services. Surely that would imply that you don't use the same LRMC for everything?

MR PICKFORD: Well, it depends on how one defines a service. Obviously if one has defined a particular class of services and you are saying everything falls within that class, then you would use the same LRMC for that type of service. What is being considered by United Utilities is whether they can differentiate this particular service on the basis of particular characteristics, and that's what we saw in Mr Lafon's email.

MR COWEN: Sorry, maybe just because I'm slower at reading, forgive me, in the second bullet down, it then goes through:

"These tariffs should not be unduly preferential or

discriminatory or be set at a level which precludes competition. Furthermore, the use of special agreements must be justified on cost grounds."

You were discussing the special agreement that was potentially being put in place and the difference between the 12p and the 9p, really I am interested in understanding how you get back to the 9p being justified on cost grounds?

MR PICKFORD: Sir, in my submission, it would be most appropriate for Ms White to address that.

MR COWEN: Absolutely. If we can come back to that.

MR PICKFORD: Indeed because I do not want to put words in her mouth. Ultimately, of course the question that we are concerned with here is not actually my construction of these documents, because we are putting ourselves back in time and we are saying: what did United Utilities understand it was supposed to be doing? So I've tried to explain, in generally relatively neutral terms, what we understand today by what is being said then. But the question for the Tribunal is not actually to determine the correct construction of these documents at all. The job of the Tribunal is to work out what United Utilities thought it was doing in the light of these documents.

MR COWEN: I appreciate that. I am just interested in,

perhaps when we do come back to it, one of the points which you made earlier, which I noted -- unfortunately I do not have the reference in the transcript -- you particularly referred to Albion accepting that they were prepared to agree on a no challenge, not to challenge, which potentially could have some cost implications. I would like to understand the evidence behind that, and accept on fair, reasonable -- that it was fair and reasonable to go to the 9p.

MR PICKFORD: Yes.

So, finally, coming back to this issue of the 3p that Albion has been holding out for, there is a fourth point about the 3p, and why it's a red herring in any event. We began to touch on this point with Mr Sharpe yesterday, but I would just like to revisit it, because there were certain aspects that we didn't address. That's to look at the Heronbridge, the relevant agreement itself, which is at folder 2, tab 2. If you could please turn to page 103, which contains clause 4, we see there it emphasised that this is an agreement which is taking on obligations and benefits from a pre-privatisation era, and that explains its somewhat esoteric nature, because obviously pre-privatisation companies didn't need -- weren't expected to act on a purely commercial basis.

Clause 5 that we didn't go to yesterday sets out the agency services to be provided:

"North West Water will provide agency services for DCC comprising the duties specified at 6, 7, 8, 9 and 10 below."

And it is to provide the water, "As specified at 7(b)." That was a clause we did go to yesterday. We looked at clause 7, at least some of it, yesterday. The quantity and reliability of supply. At 7(b), which is key here, read with 7(a), the obligation is that North West Water will undertake the necessary maintenance, et cetera, so as to be able to provide a maximum quantity of supply at the maximum rates referred to at 7(b) below, that being 36 megalitres per day.

We saw in clauses 9 and 10 that there are elements to the price that would need to be paid by Dwr Cymru that are not reflected in the charge under clause 11, for instance if there was capital investment that was required to be made for Dwr Cymru, Dwr Cymru would have to pay for it. So that's in addition to the much touted 3p per cubic metre.

THE CHAIRMAN: Yes, well, that's the point, isn't it, that the 3p per metre cubed is not a long run marginal cost price because they deal differently with the sharing of the expense of future capital improvement and

replacement?

MR PICKFORD: Indeed, Madam, it's nowhere near a long run marginal cost price, it's an element of some accounting costs. So it could barely be farther from an LRMC approach.

We also see a clause that Mr Sharpe didn't take you to yesterday, clause 14. There was another cost for Dwr Cymru under this agreement, that Dwr Cymru have assumed, from 1 July 1986, North West Water's obligations in respect of outstanding loans associated with the assets in accordance with, I think it says schedule 3 prepared by NWW and attached hereto.

Now, there is no schedule 3 that reflects clause 14. The schedule 3 is the worked example. So obviously something went a little wrong in the drafting here. But we do know what the amounts that were transferred were, and we know that if we go back to the first tab, this is an internal analysis by Dwr Cymru of the relevant supply in the Heronbridge Agreement. If one turns, please, to bundle 2, tab 1, page 100, under 15, "Costs", the second paragraph says:

"In addition to the above, the outstanding debt of £165,000 on the assets acquired is to be taken over by Welsh Water."

This is a document that appears to emanate from around 1986, I believe, given the code on the front page on the top right-hand side. It's certainly dated 1986

in the description in the index.

MR COWEN: I am sorry, we are not quite with you.

MR PICKFORD: I do apologise. So in folder 2, tab 1, page 100, towards the bottom there is a subtitle "Costs", and then it's the second paragraph within "Costs". There is reference to the outstanding debt taken on, and that's obviously back in 1986, so that's quite a substantial sum given inflation that was seen over the period.

So we say for all those reasons it really is wholly unrealistic for Albion to suggest that it was ever going to get a price that was simply the price charged in clause 11, which was for certain elements of cost. That doesn't even begin to address all of the money transfers in this agreement. As I have explained this agreement is in any event not the basis on which United Utilities calculated this LRMC.

MR SHARPE: Madam, forgive me, but as a point of information, is my friend saying that the total debt was assumed by Welsh Water? Because financing examples suggest that 22 per cent of it was taken over, and there seems to be some contradiction between the two, which no doubt my friend will be able to explain. If we go to page 117, we see financing charges, and yesterday I took you to the 22 per cent figure, and we will see here the

financing charges are factored in.

MR PICKFORD: Mr Sharpe can obviously make his submissions on this in due course, but I am very grateful for him to alert me to the point that he would like to make.

THE CHAIRMAN: Well, as you say, £165,000 is a lot of money, and what he is saying is well is actually only 22 per cent of the £165,000?

MR SHARPE: It's simply a genuine point of information.

MR PICKFORD: That's not my case, Madam. My case is that it's the full amount, because the financing costs referred to in schedule 3, they refer back to the costs in clause 11, because you will recall in clause 11 the ongoing charging arrangements say that they are in respect of capital financing charges, including any works initially funded by DCC under 10(b) above.

So our understanding of this is that separately and additionally to that, there was £165,000 worth of debt taken on. You can still obviously have a nominal financing charge in relation to capital even if there is no debt in respect of it. There are many, if there is an item that has a value --

THE CHAIRMAN: So debt that United Utilities owed to somebody else --

MR PICKFORD: Yes. Say it had a --

THE CHAIRMAN: -- now Dwr Cymru undertakes to pay that off?

MR PICKFORD: Indeed. So we can imagine that there was a £165,000 loan from Barclay's and part of the deal was that we take over that loan. That does not mean that that extinguishes all of the assets on which a return is required. Of course if there are assets here there will be expected to be a return, and our construction is that that --

THE CHAIRMAN: Is it your case that actually that £165,000 was paid off by Dwr Cymru?

MR PICKFORD: Whether it was paid off, I would have to take instructions on that, we would say it doesn't really matter whether it was paid off or simply assumed by them as their own debt. The point is it was taken on, it was taken off North West Water's shoulders and put on to Dwr Cymru's.

So a point that Albion makes in relation to the 3p issue is that United Utilities was ultimately unsuccessful in its attempts to persuade Ofwat to open up the price. We say that has no bearing on United Utilities' views in 2001 about the correct price that it should be offering. As I have explained, Ms White's evidence is quite clear that she welcomed the reference to Ofwat. Insofar as peering into the future and wondering, speculating about what Ofwat might or might not do can be of any assistance, the best evidence we

have by far is contained in folder 8, tab 304.

I say 304, I think it's now moved to 9, it was 8.

Mr Sharpe referred to this yesterday. This is the final determination of a bulk supply between Dwr Cymru and Albion in respect of Shotton. It was decided in October 2011. Mr Sharpe explained how Albion had sought judicial review in relation to this, and suggested that I had given him a run for his money but he got permission. Just to be precise, he got permission on one out of his six grounds.

THE CHAIRMAN: Yes, I think we have read the Edwards-Stuart judgment.

MR PICKFORD: The point, for my purposes today, is that if one goes, to paragraph 6.123 at page 2744, there is a long analysis preceding this of what the correct approach should be for the water resources element of the supply to Shotton. So this is the same water that we are talking about here, but this is in the context of it being supplied via Dwr Cymru to Shotton, rather than in the context of a separate bulk supply agreement.

But in relation to that water resources cost, what the Regulator decided was that the non-potable supply should be 15.3p per metre cubed in 2008/9 prices. I believe that that is 12.2p in 2000/2001 prices. One thing we might perhaps helpfully do when we are

attempting to provide the spreadsheet to the Tribunal is perhaps we can provide some RPI receipts(?) as well so that the Tribunal can see how these various different prices at different prices compare to that.

By my calculations that's 12.2p per metres cubed in 2000/2001 prices.

MR SHARPE: Madam, I am sure you don't need reminding that the one point I got permission for is precisely this point. I don't think it was entirely clear.

MR PICKFORD: So we say, when one looks at the evidence properly, it's quite clear that the price that would have been provided by United Utilities was one of two prices, it was an unconditional offer of 12.1p or a conditional offer of 9p. So the second question that the Tribunal then needs to ask against that is: would Albion have accepted such a price? We can deal with that very shortly indeed, because Albion gives the answer in its own skeleton argument, and if one just takes it up, it's folder 11, tab 1. If one goes, please, to paragraph 76, page 3440, one sees that the following question is posed:

"Welsh Water's case is that Albion would have accepted United Utilities' offer.

"However, that is clearly unsustainable."

At paragraph 80:

"It is difficult to see any logical reason why Albion would have accepted a price three times higher than that being paid by Welsh Water for water which United Utilities acknowledged it put no value upon given that it had excess water, in circumstances in which Albion had the ability to obtain a proper price by applying to Ofwat for a section 40 Determination or by making a competition law complaint against United Utilities."

Then at 85:

"There is, therefore, no reason to think that Albion would simply have accepted United Utilities' proposal in circumstances in which it would mean that Albion would be paying three times the price paid by Welsh Water."

So it's quite clear what their position is.

So I can then turn, on that basis, to the second element of the deal, which is the common carriage arrangements. Again, we need to pose the same questions. Sorry, not quite the same questions, actually. They are slightly different. The first question is: what would a lawful price have been? Of course, we can't ask the question what would have been charged because we know that doesn't make any sense; what was charged was, we accept, an unlawful price.

So the question that has to be asked by the Tribunal

is: let's assume there wasn't an unlawful price, what would a lawful price have been? And that's obviously the highest lawful price that it would have been allowed to charge.

THE CHAIRMAN: Well, that's something we will have to hear submissions about.

MR PICKFORD: And I am about to at least explain the beginnings of our case on that, if not the end of it.

The second point is: would Albion have accepted such an offer, had it been made?

So the first question is: what would a lawful price have been? If we could please take up folder 13, tab 21, this is the Unfair Pricing Judgment.

THE CHAIRMAN: Really your question is -- is this fair -- what would the maximum lawful price have been?

MR PICKFORD: Yes, because obviously Albion would like to say well, perhaps 10p would have been a lawful price, so let's have 10p, or maybe 8p would have been a lawful price. We say the question that needs to be asked is: what could Dwr Cymru have charged? And that's the price at which the cut-off between abusive and non-abusive has to be set.

THE CHAIRMAN: Well, that's the question. Whether that is the question, or whether in the counterfactual we have to assume that Dwr Cymru charges a reasonable price, not

the maximum price that it could lawfully charge.

MR PICKFORD: Madam, we say that as a matter of law that would be wrong.

THE CHAIRMAN: Well, then you will need to make submissions as to that.

MR PICKFORD: And in due course we will make that good, over the course of the trial.

THE CHAIRMAN: Yes, you were going to take us to the Unfair Pricing Judgment.

MR PICKFORD: Yes, so if you could please go to paragraph 38, which is below the title, "The questions referred back to the authority". If you could please read paragraph 38.

(Pause)

Sir, we are in folder 13, tab 21, I do apologise. I can see your pages have also done what some of mine have.

THE CHAIRMAN: The pages come out and also the metal thing becomes detached from the ...

MR PICKFORD: Madam, if it would be of assistance, at some later point I am sure that we could provide some spare bundles that aren't suffering from the same defects, if that would be helpful. It may not.

(Pause)

THE CHAIRMAN: Yes.

MR PICKFORD: So we see at paragraph 38 the questions that referred back to the Authority for further work prior to the decision on unfair pricing.

You will see that the Authority provided a report to the Tribunal, and at paragraph 41 there is an explanation that:

"In order to make a comparison between the First Access Price and the costs reasonably attributable to the services which are assumed to be included in the First Access Price, the Authority used three methodologies to calculate relevant costs: an average accounting cost plus, (AAC+) approach; a long-run incremental cost (LRIC) approach; and a local accounting costs (LAC) approach ..."

Then the Tribunal then goes on to discuss those at paragraphs 43 and following. You probably then need to read all of those paragraphs, but just to note that in discussing the AAC+ methodology at paragraph 44 the judgment says that:

"The Tribunal found that if access prices are arrived at on an AAC basis it should nonetheless be possible to verify the costs in question or at least identify the components of costs on an estimated basis."

Then at paragraph 45:

"For its further work the Authority took the pure

AAC methodology and adapted it and this average accounting plus approach sought to obtain a “greater level of granularity for costs associated with common carriage."

That was what the Authority considered provided a basis for testing the fairness of the first access price. If we then go on, please, to the section beginning "Methodology", we have the evidence in relation to costs which is just before paragraph 75, and then you see a description of methodology that follows. Then the Tribunal's analysis of the competing submissions on methodology is at paragraph 88, and it says that:

"Despite the various cases in this area, no consensus has emerged as to what, if any, is the most appropriate method of measuring cost in excessive pricing cases."

Then it goes on at paragraph 92:

"It is clear from paragraphs 280 to 281 of the further judgment that the further investigation of the costs was, in the first instance, a matter for the Authority, while taking appropriate account of the Tribunal's analysis in its main and further judgments, and the parties' observations. That being so, once the Authority had chosen the three

methodologies, there was no need for it to address various alternatives proposed by the parties. The Tribunal has not found it necessary to address any further alternative methodologies.

"Because there may be times when a competition authority or court needs the flexibility to examine more than one measure of cost in order to evaluate an allegedly excessive price, we do not prescribe a cost measure that would apply in all cases. In our view the use of more than one credible methodology, even if only as a cross-check, helps to minimise the risk of false positives and assure confidence in results obtained.

"For its further work, the Authority's preferred methodology was AAC+ which it said was closest to that used in regulatory context in 2000/01."

There is no disapproval of that by the Tribunal, it is simply explaining what the Authority chose to do. Then it explains at 99:

"The Tribunal has sought, so far as possible, to verify whether the regional average costs have been allocated to non-potable users generally on a justifiable basis."

So that's starting from that methodology and checking that it's been done properly. Then one comes, after having addressed LRIC briefly, at paragraphs 102

to 106, we see the Tribunal's conclusion. It's probably sensible for the Tribunal to read that, paragraph 107.

(Pause)

So there in fact they have gone one step further and they are endorsing the use of AAC+ as the main methodology, they are saying that that is reasonable.

So if we then move on, section X is the first United brands question. It's above paragraph 190. This is the key question for our purposes: was the first access price excessive? It's probably sensible, because the Tribunal will need to review this, if the Tribunal could briefly read to itself paragraphs 190 through to 200.

(Pause)

THE CHAIRMAN: Yes.

MR PICKFORD: Thank you, Madam. The key point on which I would like to place emphasis is in paragraph 199, where the Tribunal is dealing with the issue of what is excessive. It says over the page, three lines down:

"While we are prepared to accept that a material difference between price and cost must be shown [so that's the first point the material difficulty in price and costs] we see no need to specify in this case when a particular difference is sufficiently large to be deemed excessive. In our judgment a price of at least 46.8 per cent above

costs, reasonably attributable to the supply of non-potable water to non-potable users generally is material and excessive."

Now, there it's referring to the calculation one sees in the table on paragraph 197. That refers to the AAC+ approach, the result of that 15.8p per cubic metre. We have already seen, the Tribunal has accepted, that that was a reasonable methodology on which to focus. It's saying you are 46.8 per cent above that, and therefore we consider that that is enough.

Now, why did the Tribunal stop there and not decide what the precise cut-off was? We say for the very sensible reason that all good courts only decide the matters that are properly in issue before them at that particular time. All the Tribunal needed to decide then was: had there been an infringement, and it could see that the gap was sufficiently large that there had been an infringement.

What it didn't attempt to grapple with, quite clearly, is where the precise dividing line would have been. We say that, had the price been quoted by Dwr Cymru of 15.8p per cubic metre, the Tribunal couldn't have come to the conclusion that it did, that it was clearly excessive, because by the preferred methodology it would have been equal to the costs

outcome.

So we say that 15.8p per cubic metre clearly would not have been an unlawful price. But the matter doesn't end there, because, as I pointed out, there has to be a material difference between price and cost in order to demonstrate that it's excessive and therefore satisfy the first element of the test of unlawfulness. Obviously there is another one that comes after that which is, even if you have established that it's excessive, is it unfair of itself? We are not going there today, that's not part of my submissions to you at all. I am simply concentrating on the first part of the test, which is: is it materially excessive?

Now, clearly material is a word that's commonly used by lawyers. They tend to hate to actually have to define it when they are put on the spot to say what is material and what is not material. What we say is that in the context of a pricing exercise where the Tribunal has recognised, in paragraph 198 of the judgment, that there are unavoidable uncertainties in the cost calculation, that 5 per cent is a very conservative band of materiality. We say we could have gone higher. We could have said it's 20 per cent, and if you are below 20 per cent that's still within a material band. We don't put our case that high, we put it, we say, very

conservatively, and we have taken 5 per cent as really what we say is the lowest sensible figure one can have for that margin of appreciation, as it were.

So if one adds the further 5 per cent on to 15.8, that would have meant that, had we charged a price of 16.5p, which is actually below the 5 per cent band, we say the Tribunal would not have been able to find that we had been acting unlawfully. Clearly we didn't charge that, we charged a substantially higher price, and that's why we are where we are today, but it is necessary now at this juncture to determine the cut-off between unlawful and lawful in a way that it wasn't, we say, at the time of this particular judgment.

THE CHAIRMAN: And you say there is authority for the fact that that's the exercise we have to undertake?

MR PICKFORD: Well, that's where -- to the best of my knowledge, this is not an issue that has arisen on point as yet. So we will endeavour, in the light of that, the Tribunal has focused on it as a particular issue that it is particularly keen to get to the bottom of. We will endeavour to go away and see if there is anything else, that may assist the Tribunal on this point. For the time, my knowledge shows that there is nothing in particular on point.

THE CHAIRMAN: It does crop up in a number of the issues on

the counterfactual, which is what, when we are constructing the counterfactual, we have to assume about how reasonably or unreasonably various people, companies, would have behaved in the counterfactual world.

MR PICKFORD: Yes.

THE CHAIRMAN: Would they have behaved reasonably or would they have behaved as unreasonably as they possibly can, short of acting unlawfully?

MR PICKFORD: Madam, our case, to be clear, is not that the test that I have posited in relation to this element of the counterfactual is to be applied across the board. We say that the question that the Tribunal needs to ask itself in relation to the activities of third parties is: what, on the evidence, on the balance of probabilities, would they have done? We don't say that they should be permitted to say, well, the highest that we could have charged is X and so therefore that's what they would have done. We say that that's not the right examination. We say that the Tribunal should assess, as it indeed said in its earlier ruling, the question is: what would, for instance, United Utilities have done on the balance of probabilities? They might have been feeling quite generous, they might have been feeling a bit mean. To be honest, it doesn't really matter

either way. The question is: what would they have done?

Now, the reason why we say that doesn't work for this aspect of the counterfactual and this aspect only, is because we accept, as we must, that we transgressed. The price that we offered was, looked at in the cold light of day, following many, many years of analysis, not an appropriate price. Therefore, one cannot simply ask the question: what would Dwr Cymru have done? Because the answer to that is: well, we would have offered 23.2p. On the balance of probabilities that's what we would have done, because that's what we did do.

So you have to take away the unlawfulness, and in the counterfactual world say: we will now assume that there was no unlawfulness, what would have happened absent the unlawful behaviour? So that's the only bit that you take it away in relation to. Because that's the only thing that has been found to be unlawful and that is the jurisdictional basis for why we are here today.

THE CHAIRMAN: So what is the relevance, then, of the fact that in November 2008 you actually offered Albion 14.4p rather than 16.5p?

MR PICKFORD: We say none. Well, there is no relevance to be attached to that particular issue in the context of what I am discussing now. There is some relevance to be

attached to it, but in the context of a different issue which is --

THE CHAIRMAN: Breaking the chain of causation.

MR PICKFORD: Yes, or what would Albion actually have done had it been offered the price it says was the lawful price. So it's relevant to certain questions, but it is not relevant for the question that we are addressing now.

Madam, as I said, I don't have authority that I can point you to, at the moment, that precisely articulates that difference of question, and we will endeavour to ensure that before we close, if we can find any, we will --

THE CHAIRMAN: Yes, and there are other areas of the law in which counterfactuals have to be constructed. For example in personal injuries cases, where the courts have to try and guess what would have happened, had a certain tortious conduct not taken place, and there they must have to assess both, well, how would the defendant have conducted himself non-tortiously, and what effect would that have had? And also what does the court do about building into the counterfactual things that we know later happened, like, say, the premature unexpected death of the person who was injured?

There is also case law about restrictive covenants

in employer/employee situations, where the courts have not been prepared to give the employer the benefit of the longest possible clause they could have imposed when it finds that they imposed an unlawful duration for what seemed to be policy reasons, that then there is no downside for the transgressor imposing an excessive clause or excessive price, because they know, well, even if they are caught out, the court will assess damages on the basis of the maximum that they could have charged or the maximum restrictive covenant they could have imposed without going across that border between lawful and unlawful conduct. So that perhaps gives you some food for thought on both sides of the bench as to how we should approach this issue.

MR PICKFORD: It does, Madam. Just to briefly respond, in relation to the restrictive covenants case, of course what happens there is that the clause is then struck out altogether. If you don't get it right in the first place, you don't get the benefit of it at all. As you rightly identified, that's for a very sensible policy reason. We can't apply that approach here, because if we did, it would be to say, well, if you price unlawfully, you then don't get to charge a price at all so we would be down to zero.

THE CHAIRMAN: No-one is arguing that.

MR PICKFORD: Obviously that's not their case. We say that that particular area of the law has limitations in terms of how it can assist us in this particular case. Similarly in relation to PI, the critical issue that we are concerned with here is: what would the party acting unlawfully have done in the absence of their particular unlawfulness?

Again, that's not generally an issue that comes up in relation to personal injury, because there is a fairly binary thing that happens in personal injury claims, someone does something bad or they fail to do something that they should have done and that causes injury. You don't then have to say: how could we lawfully have caused you an injury? And where does the dividing line lie in that context?

Again, we will endeavour obviously to go away and see what we can glean, but we have given it some thought as to where we might find the suspense in it, and we have not found it particularly easy but we will continue and do what we can.

THE CHAIRMAN: Let's take a short break at that point. How are you getting on?

MR PICKFORD: So far a little slow, but obviously we have engaged in some very helpful debates, which has probably knocked me off my time schedule a little bit.

THE CHAIRMAN: We will take a ten minute break and come back at ten past 12.

(12 noon)

(A short break)

(12.10 pm)

THE CHAIRMAN: Yes, Mr Pickford.

MR PICKFORD: Madam. So to pick up the story, we then go on to the next tab, which is 22, and this is the judgment on remedy and costs [The Remedies Judgment]. We see at paragraph 9 the order that the Tribunal was asked to make by Albion. That included an order setting what the common carriage access price should be or what it shall be, they wanted it to be 14.4p per cubic metre.

Then we see at paragraph 15 the Tribunal's understanding of that, that Albion wanted the Tribunal to:

" set the first access price for the treatment and distribution of non-potable water through the Ashgrove System at no more than 14.4p per metres cubed at 2000/2001 prices."

In paragraph 20, it records where the 14.4p figure comes from, and it was, as Mr Sharpe showed you yesterday, the product of simply an offer by Dwr Cymru which averaged out the three prices, no reason for doing so from the Tribunal's judgment, it just decided that that was a way of effectively splitting the difference

and seeking agreement. Initially turned down, but the next day accepted by Albion.

Then in a ruling at paragraph 21, again consistent with the previous decision. There is no suggestion that 14.4p is the very maximum that could be charged. They say, about nine lines down:

"In our judgment a common carriage access price offered by Dwr Cymru to Albion not exceeding 14.4p per metres cubed (in 2000/2001 prices) would not constitute conduct having the same or equivalent effect as the infringement identified in the Tribunal's earlier judgments."

So they are not doing what was asked by Albion, they wanted to set the price at 14.4p, they are making a declaration that if it is at 14.4p that's not going to be abusive. We see that reflected in paragraph 22, which refers to debate between the parties about indexing. We see that it's proposed by Albion that it should be indexed by PPI and by Dwr Cymru says it should be indexed by RPI, and the Tribunal says we are not going to get involved in that, that's a commercial matter for the parties.

Then finally the order at the end of the ruling, paragraph 64, paragraph 3 of the order, you see again it's expressed in the negative that If it's “not exceeding 14.4p per metres cubed it

shall not be conduct having the same effect.

So the Tribunal is not saying 14.5p is an infringement, it's saying that 14.4p would not be.

So that then takes us to the second question, which is: would Albion have accepted a lawful price had one been offered to it at the time? There is certainly no evidence before the Tribunal that Albion would have even countenanced accepting a price of 16.5p or 15.8p. So if we are right about either of those prices then we say that we succeed.

In relation to the 14.4p, the evidence before the Tribunal, contemporaneous evidence, is that Albion thought that the price should be no higher than 7p per metre cubed. There is no suggestion anywhere that it thought that a price above 7p per metre cubed was an appropriate price.

Albion say: aha, but it would be irrational for us not to have accepted 14.4, but of course that rationality depends on a number of factors, it depends on all the other costs that go into that matrix, and there is a big debate between us about that. It also depends on what Albion actually knew at that time. Because it's very easy to say now, with the benefit of hindsight: ah, it would have been irrational not to take this price because, given what I now know, I would have

done half a pence better out of that deal than the other deal.

But if you rewind and put yourself in Albion's shoes at the time it was making the decision, it believes that the right price is no higher than 7p per metre cubed. It's been offered 14.4p per metre cubed and it has to decide at that point, without knowing what Ofwat will say about the price or what the Tribunal will say about the price: do we accept that or do we not? If it thought it was over twice what it felt was the right price, we say the rational thing for it to do might well have been to hold out for a better price.

What is particularly telling in all of this is that, even since 2008, when it has had an offer of a lawful price, still Albion has not sought to put common carriage arrangements in place.

There is obviously more to say about this issue but it's a matter which we will be exploring with Dr Bryan in due course.

Similarly, in relation to the second access price that was provided on 17 March 2004, that was 17.74p per metres cubed, and when that was provided to Albion, it still didn't seek to engage again with Dwr Cymru about the possibility of common carriage. That's notwithstanding that taking account of the effects of

inflation, that 17.4p(sic) was equivalent to 16.2p in 2000/2001 prices. I am sorry, that's wrong. I mis-stated. 14.4p per metres cubed, which is what Albion say the lawful price was, which is in 2000/2001 prices. If that is inflated to 2004 prices it is 16.2p per metres cubed.

So they say they have accepted 14.4 and taking account of inflation that would have been 16.2 some three years later. That's only 1.5p away from the 17.7 that they were being offered at that point, and we say again if they were really seriously interested, rather than simply ignoring it at all, they would have come and engaged and looked to see whether, given there was only 1.5p between the parties, a deal might have been struck.

It is instructive to see what Albion did in fact do over this period in 2003/2004, and one can see that from a letter which is at folder 5, tab 194. It's a letter dated 14 April 2003 to Mike Brooker from Dr Bryan, and the important part, for my purposes, is the fifth paragraph down, which begins:

"We also received your scheme of charges 2003/2004 last week. I was very interested to note that the difference between your raw water and partially treated tariffs is 3.88p per cubic metre. I assume this covers the treatment costs."

Then it goes on to infer from that that the bulk supply price it's being charged is too high, because it sees that treatment costs have come down in the new tariff, so it asks for a reduction in its bulk supply price.

What it doesn't do at all is translate that across into common carriage and say: given that, and we now know your treatment costs have come down you should also be offering us a new common carriage price because common carriage doesn't come into it at this time.

There are a number of documents that I am going to go to later with Dr Bryan. Although we say that the Tribunal does not need to decide precisely what was in Albion's mind to decide this action for damages, what we suggest is that its focus all along has really been on bulk supply and not common carriage. It's not crucial, you don't need to determine the matter for this appeal, but that's what we say is the reality of the situation.

So in conclusion on that issue, we say the reality is that Albion would have never accepted a price that was three times higher than what it thought was appropriate for raw water, and it would have never accepted a price that was over two times as high as what it thought was appropriate for common carriage.

Therefore no deal would have been done twice over, as it were.

So if I am wrong on that, we then turn to my alternative case, which is that we say even if a deal had been done in both respects Albion would have made a lower profit under common carriage than bulk supply.

There are a large number of points where we are at odds with the claimant in relation to the correct approach to be taken to the calculation of the quantum. They fall broadly into two categories. Firstly, there are adjustments to the counterfactual assumptions, and then there are a whole host of other points that arise which I am going to explain in just a moment.

So the first category is that there are five adjustments that we say should be made to the counterfactual. The first of those we have already covered, essentially, it's that a non-abusive price would have been 16.5p, alternatively 15.8p, and I don't need to detain the Tribunal any further on that, because my submissions that I have just made transfer across in relation to this issue as well.

The second adjustment is that United Utilities would not have offered the 3p per cubic metre as suggested, they would have offered 12.1p per cubic metre. Alternatively the deal would have been at 9p if Albion

had been willing to live with the no challenge clause, which we say its evidence is that it wouldn't, so actually it would have to fall back on the 12.1p. I have dealt with the facts in relation to that but that is our second point on the adjustment to the price.

Our third adjustment, which I'll be addressing, is in relation to the indexation measure. The fourth one is in relation to the additional or ancillary costs that Albion would have incurred. The fifth is in relation to a point about the UU benefit share agreement where we say that Albion has awarded itself a £50(sic) sign-off bonus but it has got that wrong, it should only be £25,000.

So those are the five points on the, effectively, on the counterfactual.

There are then a further five problems, we say, with Albion's approach, and I will be dealing with these in terms, just to list them out so that you know what I am going to address you on. They are: firstly, the benefit share with Shotton and the implications of that; secondly, the grossing up issue, this claim that the amount of damages should be grossed up in order to give some on to Shotton; the voluntary uplift point, which is about the 1.5 and 3p that was paid by Shotton Paper to Albion by way of support; the fourth is how one

addresses interim relief; the fifth is the time period over which damages should be assessed.

So, as I say, I have dealt with the first two adjustments in my first category, so I can go straight to the third, which is the indexation issue. Now, options 3 and 3(a) of Albion's quantum calculations, and you will recall that there are eight of them in total, assume that in the counterfactual scenario the United Utilities bulk supply price would not have been subject to any kind of indexation. Now, there is no evidence, we say, for that assumption whatsoever. The documentary evidence quite clearly shows that a bulk supply agreement between Albion and United Utilities would have been subject to RPI indexation. We see that from the various heads of agreement between the parties, and this is a matter that I will address with Dr Bryan in cross-examination. But that's our case in relation to that, it was clearly going to be RPI.

Moreover, we say that that adds very considerable weight, indeed ultimately leads one to knock out another four of the options that are presented by Albion, namely it's options 1, 1(a), 2 and 2(a). These options don't have any explicit indexation arrangements at all. These are the options that are based on the Heronbridge Agreement and saying that we would have just had the

benefit of that. That's what Albion say.

We say it's inconsistent with all the negotiations between parties that clearly envisaged RPI indexation that they would have adopted this other pricing arrangement that didn't require explicit indexation and that the indexation was effectively built in because it was cost sharing. So again, we say that the clear evidence that indexation would have been RPI effectively knocks out those other scenarios as well, or at least it adds very considerable weight to the points that I have already made.

THE CHAIRMAN: Are you talking about the heads of agreement, are we talking about the United Utilities/Albion arrangement or the Albion/Dwr Cymru arrangement?

MR PICKFORD: We are talking about the United Utilities/Albion arrangement. I can take you to them now. I am conscious that in the time it may be most sensible of me to simply say that the Tribunal knows where I will be going on that.

So that's what we say about indexation in relation to United Utilities. In relation to the Dwr Cymru common carriage price and how that would have been indexed, again Albion's primary position is that there would have been no indexation whatsoever. Now, we say that that is as fanciful as it is in relation to the

same proposition for United Utilities. The evidence, clearly, from Mr Edwards is that he would have sought indexation; that Dwr Cymru simply would not have countenanced entering into an indefinite long-term supply agreement without there being indexation provisions in it.

His principal evidence on this is at paragraphs 8 to 23 of his second witness statement. Again, for the sake of time, I will not ask the Tribunal to go to it, I will briefly summarise some of the key points that one can draw from it.

So the first of the points is that Dr Bryan's analysis, which he conducts, of pricing developments between 2001 and 2009 we say is simply irrelevant. We don't accept that it's right, but we don't need to go into it because ultimately it post-dates what we are concerned with, which is what would Dwr Cymru have been focused on, given what it knew in 2001. So that's the only thing we need to ask ourselves, what would it have been willing to agree to at that point in time?

The second point is that one sees that Albion itself acknowledged on a number of occasions that some sort of price indexation would be appropriate, and I have taken you to one of those in passing in The Remedies Judgment at tab 22 of bundle 13 where Albion was saying that

there should be indexation but it should be PPI, not RPI.

So we say to suggest that there should be no indexation really is not a sustainable position, and Albion, perhaps sensibly enough, falls back on -- has an alternative, where it says if there would have been it would have been PPI, it says, not RPI.

Now, Mr Edwards has explained in his evidence why Dwr Cymru would have held out for RPI. In essence the reasons are as follows: price regulation in the water industry is based on RPI plus K, that's the formula. Dwr Cymru's standard tariffs for domestic and smaller commercial industrial customers are required to move in tariff baskets under their overall RPI plus K cap. As Mr Sharpe said, K can be both positive and negative and indeed has been both positive and negative over different periods, depending on the balance of efficiency that is expected and the amount of investment which is required in the water industry during that period.

Now, in order to minimise risks of discrimination between different classes of customer, Dwr Cymru's preference is to ensure that its agreements with larger customers are also based on changes in RPI, so that all of those agreements move together, and the majority of

the special pricing agreements that it has entered into with large industrial customers also contained provisions that are based on either RPI expressly or RPI indirectly, because they are tied back to the baskets, which are again RPI plus K.

Putting aside pre-privatisation agreements, which it seems both parties are willing to accept aren't a very helpful benchmark, because they reflect a very different era and approach in the water industry, there are four supplies where Dwr Cymru has agreed to indexation based on PPI, aside from the replacement for the Shotton agreement, which is -- what happened there is that there was an agreement with Shotton which contained a special clause that included PPI as an alternative, Mr Sharpe took you to that yesterday. That was then imposed on Dwr Cymru by the Regulator as the terms on which it had to offer bulk supply to Albion at the time of the original inset appointment. And that was against Dwr Cymru's wishes.

From late 1996 onwards, that's the only example of an agreement containing PPI provisions.

The other point that Mr Edwards makes in his evidence is that Dwr Cymru would have obviously been concerned about a precedent which allowed costs to diverge, but it would have been less concerned in the

period up to 1996 because he shows a graph in his evidence that shows that the PPI and RPI run relatively closely together and it's from 1996 that they begin to diverge.

One can see that although its preference would have been for RPI, it might in various circumstances have potentially agreed to other forms of indexation where it didn't really appear to matter very much. But from 1996 onwards it mattered and it mattered increasingly, so it became less and less likely that Dwr Cymru would ever have been willing to agree to some alternative indexation arrangement and, as I say, the only one that occurred is one that was imposed on it by Ofwat.

So we say that to suggest that Dwr Cymru would have accepted anything other than RPI is again fanciful. There is no suggestion anywhere that RPI would have been unlawful, it is the essential basis on which prices are generally indexed in the industry. So given that we say that the reasonable inference is in the counterfactual world, that's what Dwr Cymru would have held out for, and if there had been an agreement, that is what Albion would have had to have accepted. Obviously if Albion hadn't accepted that, there wouldn't have been an agreement and I am back into the first part of my case.

So if I can then turn to the fourth adjustment, which concerns the additional or ancillary costs. There are two points to make here. One concerns back-up supply, and the other concerns capacity augmentation.

Now, the Tribunal will recall that in the Unfair Pricing Judgment, the Tribunal explicitly excluded the costs of any backup supply from its assessments of costs that were attributed to partial treatment and distribution via the Ashgrove System. There was quite a big debate about this, whether it should be in or out, and the Tribunal said that's not part of the specific service of partial treatment and distribution and so therefore it's out.

Now, the second bulk supply agreement provided for Dwr Cymru to ensure that there was both a potable back-up, and it's not in contention that a potable back-up was in fact required, so we say it follows naturally that there would have had to have been some separate price to be paid in relation to it. Again, this is something that I will be canvassing with Dr Bryan in due course.

THE CHAIRMAN: Just to be clear, do you say that there is a price to be paid for having available the back-up facility, even if in the event it's not actually used?

MR PICKFORD: We do, Madam. Our case is it's quite clear

from the bulk supply agreement that if back-up potable water is taken, it is charged at the potable rate, which is about two and a half times higher than is the standard rate. Over the course of a year typically, that does not generate any substantial revenues at all, because it's taken relatively rarely, because the Heronbridge supply, as I said, is a relatively stable one, and it's rarely required.

When it's taken, the days when it is taken, very, very large quantities are required, and so our position is that there are substantial fixed costs that are associated with being able to make available huge quantities of water at very short notice, and that that somehow has to be reflected in the price to be paid.

Now, what happened originally under the bulk supply agreement is that those costs were effectively smeared across the overall costs that are paid for non-potable water. So there is no explicit provision made for a back-up supply in terms of fixed costs. They simply feature effectively in the price that's paid for non-potable water, because that is what is taken on a day-to-day basis, and so they are spread into that.

But what we say would never have occurred is an agreement where there is this very large set of fixed costs that don't get attributed at all because you are

simply paying the normal potable price as if you were effectively a normal industrial customer taking a small potable supply rather than having a very large volume reserved for you.

The Tribunal refers to the volume as sufficient to supply a small town, I believe of 60,000 people. So this is a very substantial supply that needs to be provided.

We are assisted by the work that Ofwat did in its referred work on quantifying what the cost of that bulk supply to Dwr Cymru is. They calculated effectively what the fixed costs of it were, and then they turned that into a volumetric measure based on the volumes of water that were -- the volumes of non-potable water that were on average taken by Shotton. Of course the reason why it was doing that is because originally the debate was about: should there be effectively a premium in this access price, which was based on the amount of non-potable water taken, to reflect the potable supply? So the way that the Authority tried to do that was therefore to take the costs of it and then work out what that would have meant in terms of an excess on that price.

For your reference, but again given the timing considerations, that's at folder 7, tab 274, pages 2464

to 2465, where we see the calculation of the price of the ... I am sorry, apparently that's now moved to folder 8. It was originally in folder 7 and someone has moved it out to provide more space.

So that's the first point on the additional costs.

The second one concerns the costs of expanding pumping capacity at Heronbridge, and also making a new connection. We saw yesterday that under the Heronbridge Agreement Dwr Cymru was entitled, as a right, to 36 megalitres per day of raw water, and it's not in dispute that in order to satisfy the demand for non-potable water at Shotton Paper, Dwr Cymru required 22 megalitres per day from the Heronbridge extraction point.

If you could go, please to folder 4, tab 143, you see a response to, I believe it's Paul Edwards from John Lees at North West Water about a query about the implications of Albion taking over the supply to Shotton. If the Tribunal could please read the second paragraph beginning:

"You are correct ..."

(Pause)

Have you had time to read that second paragraph?

(Pause)

THE CHAIRMAN: Yes.

MR PICKFORD: Now, we see from the first substantive

paragraph, the second one, that if Dwr Cymru was going to continue with its rights to 36, and now there was going to be 22 provided to Albion, there would need to be some capital investment at Heronbridge. What North West Water go on to say is they think if that's going to happen they will need to renegotiate the contracts, but there is a debate obviously between North West Water and Dwr Cymru about whether that was going to happen. That's what North West Water wanted to happen, they were desperate to get rid of the Heronbridge Agreement that didn't suit them. Conversely Dwr Cymru were not desperate to get rid of the Heronbridge Agreement because it gave them a supply of water at a very low cost.

So in order to accommodate Albion's requirement, if Albion took over, there were effectively two possibilities, and this is set out in the statement of Mr Edwards, I think it's Mr Edwards, although I have a note here saying Mr Williams, but I think it's Mr Edwards, his first witness statement, at paragraphs 28 to 31.

He explains how the two possibilities are that either United Utilities would have had to expand its pumping capacity at Heronbridge, as is being potentially contemplated here, or Albion, Dwr Cymru and United

Utilities would have had to reach an agreement somehow reducing Dwr Cymru's entitlement. Those are the two ways through this potential bottleneck. As explained in Mr Edwards' evidence, he would not have been, and Dwr Cymru would not have been willing to simply give up its rights to valuable water, and therefore if there was going to be some sort of agreement it would need to be at a substantial price.

Now, in terms of the price, it's very difficult, obviously, to go back in time and work out what price might have been done if any deal could have been done at all. But as far as Albion's alternative position was, if there was going to be capacity augmentation, he estimates that it would have cost in the region of £3 million in 2000/2001 prices. That's at paragraphs 28 to 30 of his second witness statement.

So against that, what we say is that there would have been a very substantial additional cost for Albion in obtaining the capacity that was required to take over, given that Dwr Cymru had existing rights.

Now, what's said against us is: well, there was no alternative for this water, you haven't demonstrated what you were going to do with this water if you simply held on to those rights. The obvious reason for that is because this never happened. We are in a hypothetical

world, so we never actually had to find an alternative for water, an alternative use for it. But our clear evidence is that we would, had we been put in that position, look for alternatives, and of course what water companies do is they find sources of water in one place and they build pipes and supply them to other places. The fact we didn't actually carry out that exercise we say doesn't demonstrate that we wouldn't have done it, had we been required to do it, because we simply never entered into that world.

So in relation to that, we say therefore there would have been a substantial additional cost, admittedly quite hard to quantify exactly, but in the region of about £3 million that would have been involved in terms of capacity augmentation or finding some alternative solution.

There is then by comparison a much smaller cost which Albion hasn't yet taken into account in its calculations, which if it was going to take over and be the provider to Shotton, but we at Dwr Cymru were going to keep our rights and our connections, it would have needed to have made a connection to Dwr Cymru's main. That would have been at a cost of about £75,000, and that's in Mr Edwards' evidence at paragraph 74.

THE CHAIRMAN: What's that? Connecting to what?

MR PICKFORD: That's connecting, because currently we own, as I understand it, all the pipes effectively that come out of the Heronbridge works and that then form the Ashgrove System. We would have wanted to -- if Albion was going to come in and effectively replace us in relation to the assets that we owned and the metering, et cetera, that enables us to supply to Shotton, then it would have had to put that in itself and connect it up to our main.

THE CHAIRMAN: Don't you need the metering to charge them -- work out what the common carriage charge is?

MR PICKFORD: We do, yes, but certainly Mr Edwards' evidence is quite clear that he says there would have been a need for a further pipe, and if there are doubts about that. Again, I think the appropriate thing would be for my learned friend to test that in cross-examination with Mr Edwards, so he can explain the position.

My earlier reference, when I said that there were two different possibilities for what would have happened at Heronbridge, it was Janine White's evidence. I said it was Mr Edwards at paragraphs 28 to 31, I have helpfully been corrected, it's paragraphs 28 to 31 of Ms Janine White's first statement.

So the fifth adjustment we say that's required for the counterfactual concerns the benefit share with

United Utilities, and the fact that Albion has awarded itself £50,000 as a result of the agreement that it says it would have entered into. We say that that's wrong and the figure should be £25,000. If you could briefly go to bundle 10, tab 1, please, page 3339. This is an example of one of Albion's various scenarios in which it claims damages. Now, we don't have the benefit of any real explanation of these numbers, either in the particulars of claim or in Dr Bryan's evidence or indeed in opening from Mr Sharpe, so we do have to, to some extent, infer what we think is going on.

If one takes the example I have suggested on page 3339 and looks at Albion's benefit share from enhancing United Utilities' revenue, you see in column L a fee of £50,000. Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR PICKFORD: So what it appears to be is Albion saying, as part of its benefit share, it would have got these £50,000 fees, had it struck the deal.

THE CHAIRMAN: And you say that's wrong, because they also seem to be assuming that the DC price remains the same as it was under the Heronbridge Agreement and the second £25,000 is only on the basis that that was renegotiated.

MR PICKFORD: Yes. Yes. That's right.

MR SHARPE: If it will make my friend's journey any easier,

I think we are prepared to accept that this is a mistake, but of course if the assumption of no amendment to the Heronbridge Agreement is sound, then on the basis of the benefit sharing I described to you yesterday, that would result in incremental revenue to United Utilities because they would then be receiving their original contractual entitlement, plus whatever they were receiving from Albion. That being the case, of course, United would then receive half of the difference, and the effective cost to Albion too, it would also receive half of the difference.

Our calculation suggests that we may well be sacrificing £25,000 by virtue of my concession, but the corresponding gain is of the order of £95,000. So if my friend is seeking to suggest that the damages claim should be reduced as a result of this, he ought to look at the net figure on both sides of the equation. I am very happy to address you on more detail on this if it's required, but it's really a very simple point. Thank you.

MR PICKFORD: Madam, the difficulty with my learned friend's submission is that of course Albion say that no capacity augmentation or anything would have been required, and it's not consistent for them to both say that United Utilities could have sold the water effectively twice

over, once under the original deal to Dwr Cymru and then again to Shotton, without investment being required to enable that to occur. Because if Dwr Cymru kept its 36 megalitres per day entitlement and therefore had to pay 36 megalitres per day in respect of that entitlement, if that were the case, then it's accepted by United Utilities that there would have needed to be some capacity augmentation in order to have another 22.

THE CHAIRMAN: Well it depends on whether by, "Entitlement to it", you actually mean that you would have insisted on taking the 36 megalitres even if it meant spilling it on to the ground, because you couldn't find anything else to do with it. That's the question.

MR PICKFORD: Well, as I explained, the evidence is that we would have sought to do something else with it, particularly because if we were having to pay for it, it would be economic nonsense not to do something with it, and to try and build a pipe and use it productively. So if we were being required to pay for that amount of water, then we would have found, we say, naturally, something to do with it. We don't think it would have been particularly acceptable to the Environment Agency simply to spill it on to the surrounding area.

Madam, I am about to go on to my second category of points which are not adjustments to the counterfactual

but various other issues which we say need to be taken into account. I am doing slightly better with time, because I have deliberately abbreviated some of my submissions.

THE CHAIRMAN: Yes. Perhaps you can just deal with duration, because that's a discrete point, and probably can be taken fairly quickly.

MR PICKFORD: Certainly.

So we have two points on duration. The first of those concerns the start date, and funnily enough the second of those concerns the end date. Now, in relation to the start date we say that it is unrealistic that, as Albion claims, common carriage would have begun. Indeed in their claim it would have begun the day before they even got the price. That's obviously unrealistic, but our point goes slightly wider than that. We say that there were a large number of matters that were still to be resolved. They are set out in Mr Edwards' second witness statement at paragraphs 48 to 52, and to summarise, the other things that would need to have been done would be concluding other terms of common carriage with Dwr Cymru, notably in relation to issues such as ancillary services and potentially thorny issues such as the potable back-up, which we have seen has caused much consternation since.

Then there is the necessity to also negotiate a bulk supply price with United Utilities. So that's something that would also have had to have been done, because at this stage no bulk supply had been accepted by Albion, and indeed the rest of the terms of that agreement would also have had to have been settled.

Thirdly, we say, again on our case, there would have needed to have been augmentation of the capacity at Heronbridge in order to make the supply, or alternatively some very detailed and difficult tripartite negotiation whereby the various rights and entitlements are altered. But failing that, and there is no evidence that that would have actually happened, there would have needed to have been capacity augmentation.

Taking all of those together, we say that, at the best, it would have probably taken until about, say, 1 October that year to actually put in place the arrangements, and actually Mr Edwards' evidence is that he thinks that it is more likely that it would have taken at least a year. So he suggests the date of 1 April 2002 as the most likely date.

Again, these are obviously slightly arbitrary figures, there is no particular magic in sort of one day of the month versus the next, these are rough estimates

of how long. Someone experienced in that world --

THE CHAIRMAN: On the assumption that everybody comes to the negotiations in good faith and acting reasonably, or on the assumption that everyone is as obstructive and difficult as they can be, short of actually breaking the law?

MR PICKFORD: Again, on the assumption that everyone approaches the matter in the way in which, on the evidence, they would have approached it. So we are not saying that you have to assume they would have been very difficult, and would have been as difficult as they could be within the constraints of the law, because the issue of agreeing these other points was not part of the abuse. The only abuse related to the price. So that's the only point in relation to that particular test that we discussed before.

In relation to these other issues, what we say is that the Tribunal has to examine the evidence, they have to see what would have been the likely result. Now, we are not suggesting that we would have been obstructive, so we are not suggesting the Tribunal has to approach it on the basis we would have been obstructive. What we do say is that these were difficult commercial issues to be resolved, and that they would have necessarily, in the ordinary course of events, with undertakings acting

perhaps reasonably, but not necessarily falling over backwards to accommodate each other, just acting in a normal commercial manner, that that's how long they would have taken.

That's really as much as we can say.

THE CHAIRMAN: We can assume that people would have acted in a normal commercial manner?

MR PICKFORD: Yes, in a normal commercial way. As I said, on the basis of that, Mr Edwards says that a best case scenario is about six months, but actually more realistically it would be a good year. So there is an error in our skeleton that requires correction here, because we have used the 1 October figure, but actually that doesn't properly reflect Mr Edward' evidence that was that was a best case and more likely was a year. So that's in fact what our principal case is, alternatively it would be six months.

MR LANDERS: Can I just check what your starting point is then? Your starting point is you would have offered a lawful price on the date that an unlawful price was offered and not earlier?

MR PICKFORD: Yes.

MR LANDERS: Okay.

MR PICKFORD: Because there has never been any finding of illegality in relation to the date on which it was

offered. Indeed, that was a matter that was raised by Albion, it made a complaint about it, and Ofwat decided that there hadn't been any unlawful delay in relation to the provision of the price.

THE CHAIRMAN: Did they really decide that, or was it overtaken by the actual offer of the price?

MR PICKFORD: It was decided, indeed it was also in The Interim Judgment, which is the first of the Tribunal's substantial judgments, upheld that it was not appropriate to unpick Ofwat's decision in that regard. I can give you the reference, but certainly there are paragraphs in that judgment where it makes it quite clear that, despite Albion's complaints, it was satisfied that Ofwat had been reasonable in being satisfied that the price and the delay in the provision of the price was not unreasonable in all the circumstances.

THE CHAIRMAN: Well, we will come to the end date point, then, or else you can choose to go back to the first of your five additional points, as you wish, at five past 2. Thank you.

(1.05 pm)

(The short adjournment)

(2.05 pm)

THE CHAIRMAN: Yes.

MR PICKFORD: Madam, I was dealing with the issue of the start date and had almost concluded on that point. Just to pick up on something in our skeleton argument, there is a slight correction required. At paragraph 137 of our skeleton we say that the first document disclosed by Albion, in relation to its subsequent negotiations with UU that took place in 2007, was a draft for a bulk supply agreement sent by UU to Albion on 13 April 2007. In fact, there are documents pre-dating that which suggest that Albion re-engaged with UU on 25 October 2006, and those documents -- I will not go to them now -- are at bundle 7, tab 253, and bundle 7, tab 254.

So just as an illustration of the difficulties of negotiating these kind of agreements, we see re-engagement in 2007, or indeed at the end of 2006, by Albion and United Utilities, and yet they still haven't come to any agreement, and nor, in the last four years, have Albion and Dwr Cymru come to any agreement.

So even if the Tribunal comes to the view that there would have been agreement, which is obviously contrary to my primary case, we say that the kind of timescales that are involved here demonstrate very clearly the difficulties inherent in actually getting these parties to come to terms. There is no suggestion that in any of

these other periods since we offered a lawful price, or since United Utilities and Albion began to negotiate again, that anyone has been acting unlawfully. It's simply that these are difficult commercial negotiations.

There was a question, Madam, from you about whether the Authority had rejected the point on delay. Just to pick up on that, if we go, please, to folder 12, tab 11, I said that I would give you the reference To The Interim Judgment, and we might as well go there briefly. It's at page 3909, paragraph 425.

If the Tribunal could just read paragraphs 425 and 426, it's clear the issue was raised and rejected by the Tribunal. Sorry, it was raised by Albion and rejected by the Tribunal.

(Pause)

THE CHAIRMAN: Yes, thank you.

MR PICKFORD: So if we then move on to the second element on the timing point, and then I'll go back and start my other points in order, that's our proposition that the second access price broke the chain of causation. We know that, and this is from a letter of 30 March 2004 from Albion to Dwr Cymru at bundle 5, tab 221, referring to an earlier letter from Dwr Cymru to Ofwat at bundle 5, tab 217, which was the letter where Dwr Cymru were setting out to Ofwat what the terms of a second

access price would be. Mr Sharpe took us to that yesterday; that Dwr Cymru were prepared to offer 17.74p per metre cubed as a second access price.

What is said by Albion in connection with this is that it was not sufficiently certain to break the chain of causation because it was too hedged. They made effectively two points in relation to it. The first of those was that there was a complaint that the second access price was expressed to exclude other costs such as administrative costs.

If we could go back, please, and look at the first access price, which is in bundle 4, tab 132, we see there in the first paragraph on this issue that:

"The price does not include charges pertaining to the application. Whilst we have made no charge up to this point for the administration and the other costs associated with this application, if we envisage significant costs being incurred in the future, then these would be at the expense of the entrant in accordance with Ofwat's directives."

So there are administration and other costs being excluded from the price, the first access price, and also we see that the price is said to be something that it is minded to charge Albion Water.

THE CHAIRMAN: What does it mean, "Charges pertaining to the

application"?

MR PICKFORD: Well, there are obviously legal and administrative costs that require to be incurred in dealing with -- negotiating out a contract such as this. We have seen that there were various negotiations between the parties, and there would have been costs associated with drawing up contract and just the costs of generally engaging.

THE CHAIRMAN: So it's not talking about the sort of management on-cost type of element that we were looking at in the costs?

MR PICKFORD: No, it's not.

THE CHAIRMAN: It's not the administration charges attributed or allocated to the service, it's the cost of actually processing the application?

MR PICKFORD: That's right, which, in my submission, could be material --

THE CHAIRMAN: Yes.

MR PICKFORD: -- given the difficulties of arriving at an agreement.

So it's saying that administration and other costs associated with the application are not included. It is also saying that it's a price that they are minded to charge at. It doesn't say that it is unequivocally the price, it's a minded to charge price.

When we pointed these matters out in relation to first access price in the original proceedings, it was held -- and we don't dispute this finding by the Tribunal -- that notwithstanding these kind of qualifications, excluding certain other costs and it being minded to charge, it was sufficiently certain to enable it to be a price about which an abuse could be found and to trigger all of the effects that Albion say flow from it, in terms of their damages and their claim for exemplary damages.

Now, if that is right, the very same types of qualifications that we saw in the letter that Mr Sharpe took you to yesterday about there being -- it excluding administrative and other costs and it being at the price which is the basis for the price that we would be looking to charge, they can't lead to that second price being too uncertain when the first price was certain enough.

What's good enough to basically cause a finding of infringement can be sufficient to bring it to an end if, obviously, the key element, the key price that's in the letter, changes.

In relation to that issue, the price, the Tribunal made no findings in the main proceedings that the second access price was unlawful. We say it follows from that

that there is no jurisdiction for this Tribunal to award damages on the basis of an allegedly unlawful second access price. It hasn't been shown that the price is unlawful, and there is certainly no --

THE CHAIRMAN: I don't know if it's alleged that the price is unlawful.

MR PICKFORD: It is not even alleged, certainly as I understand it, that the price is unlawful. So we say that the most the Tribunal can really do in these proceedings is to say, and this is the most, that it would remain open whether or not that price was unlawful. But we say it was a lawful price, and there certainly isn't any basis for a continuing damages claim after that price was given. If Albion wanted damages post the second access price, what it would need to do is go away and establish that the second access price was unlawful and that the damages continued even after it was offered an appropriate -- even after it was offered that price. We are not in that situation here, this is strictly a follow-on in claim. It is follow on in relation to the first access price.

It's been drawn to my attention in relation to the question about charging for processing applications, I am not going to take you to it, but the Tribunal may like to go at its leisure, as if there were any leisure

in this case, to folder 3, tab 54, page 569F. That's part of MD162, and it's explaining the views of the director on charging for processing applications.

Now, while we are dealing with the issue of people allegedly taking too much time to do things or that the length of time it takes to negotiate, it was said against us yesterday that we never responded to Albion in relation to the question of indexation in 2008. Mr Sharpe said there was Albion writing saying, "We want PPI", and we just never bothered to get back to them. The letter he was referring to I believe was in November 2008. Bundle 8, tab 284. In any event, there is no real need to go there, because my point is that we did respond in relation to PPI. It is a letter which isn't in the bundle but it is part of Albion's disclosure. Obviously it didn't make it into the bundle because no-one knew this point was going to be taken.

If I might hand up a letter of 24 November 2008 (Handed). There seemed to be a suggestion that it was us that effectively caused things to stall in 2008 for failing to respond on RPI. The letter from Dr Bryan was a letter of 19 November 2008 addressed to Lynnette Cross, and that's referred to in paragraph one.

If one turns over to paragraph 5, you see that it deals with the issue of indexation and sets out

Dwr Cymru's position on indexation; that the prices should be indexed by reference to RPI and explains why they think the use of the PPI index would be inappropriate.

So, Madam, that deals with that point. We will need to find a home for this in due course, and those behind me can obviously suggest an appropriate place, and we will ensure that it's put into the additional bundle in due course.

So having dealt with those points, I now need to return to my other collection of points concerning our criticisms of the approach that Albion has taken to the calculation of its loss.

So the first of those concerns what's called the Shotton Paper benefit share, and this is the point that Mr Sharpe took you to yesterday concerning the operation of clause 7.4 of the agreement between Albion and Shotton. It probably helps if we just go back to it briefly, so we can see what it says. So it's best found in bundle 10, tab 1. That's page 3352. (Pause). If the Tribunal could re-familiarise themselves with clause 7.4, which is the clause relied upon by my learned friend.

The first point we make in relation to it is that there is nothing in the clause to suggest that it would

only operate if water was being supplied via common carriage, but not under bulk supply. It's about savings, however they may or may not occur. But it's not set up as if it were merely to apply to a common carriage arrangement.

Madam, I can see from your expression that you are thinking keenly about the implications of what this clause does or doesn't say.

THE CHAIRMAN: I am just looking for the definitions of the terms which are written in the clause with capital letters.

MR PICKFORD: Yes. If I could explain that. Mr Sharpe obviously dealt with this yesterday but we didn't go back to those definitions. The first part of the clause is saying that:

"Albion Water shall use all reasonable endeavours to provide the customer with the most cost-effective source of water."

And in particular:

"Cost to the customer lower than the non-potable source of supply for the alternative non-potable source of supply."

Now, that's irrelevant here because if one goes back to the definitions, one sees that the alternative non-potable source of supply -- and that's in

clause 1 -- means water taken from any source other than the non-potable source of supply and delivered to premises by Albion Water, and the non-potable source of supply means water which may be extracted from the River Dee at Heronbridge.

So what that's envisaging is if a totally new source can be found, and savings flow from it, then the clause will take effect. But that's not what we are concerned with here, because obviously it's the same source, it's just different contractual arrangements by which the source finds its way to Shotton Paper.

So that part of the clause is not relevant here, and I didn't hear my learned friend suggest otherwise.

What we say is if bulk supply led to precisely the same water costs as common carriage, whatever this clause does or doesn't mean, it wouldn't matter because Albion's claim wouldn't have succeeded because it wouldn't have proved that it had done any better under common carriage than bulk supply. Similarly, if common carriage would have yielded a worse price, again, whatever this clause means doesn't matter, because again it wouldn't have succeeded on the essential part of its claim, which is that it needs to demonstrate that common carriage would have been better.

So this clause is only relevant when we are in the

territory that Albion have established. We assume that there would have been a positive benefit associated with common carriage as opposed to bulk supply, and then we have to see how that feeds through into the apportionment of those benefits between Shotton Paper and Albion.

What we see from this is that the clause actually operates to reduce Albion's claim rather than to increase it, as Albion suggest, because Albion don't get to keep all of the benefits of any reduction in input price to themselves, they have to give 70 per cent to Shotton. Insofar as that is a loss, that is Shotton's loss, not Albion's. So we would say that the operation of this clause is in fact to -- because it apportions benefits, and we are hypothesising that there are benefits that have been lost out on, between Shotton and Albion, it makes clear the claim that Shotton would have, if there were such benefits in the first place that had been lost out on, and the claim that Albion would have in relation to them. And Albion only gets 30 per cent of them.

Now, to understand --

THE CHAIRMAN: Do we know what were the initiatives agreed between the parties?

MR PICKFORD: We don't have evidence on that, no, Madam.

So this is one of the difficulties that we have struggled with in relation to this part of the claim and the reliance on the clause: it isn't really sufficiently explained by the claimant. I am obviously doing my best to interpret the clause on the face of the clause, but there is a gap in the evidence from the claimant as to how they say this really probably should have led to the conclusion that they claim.

Because what they do in their calculations, and this is a matter which obviously will have to be tested with Dr Bryan, and I am slightly hesitant to try to take the Tribunal through Dr Bryan's calculation before Dr Bryan has had a chance to explain it to you, because he has not explained it anywhere in his witness evidence, and no doubt Mr Sharpe may jump up and down and say I have explained it incorrectly. But so you understand the essence of our point, what we say he has done, and the mistake he has made in relation to this part of the claim is he has said, "Well, there would have been a big benefit occurring in relation to this supply because I've looked at the Dwr Cymru retail price and the Dwr Cymru retail price was going up and up, and as compared to the price that I could have got the water for under common carriage, there would have been a really tasty margin between the two. Therefore, under

this benefit share I should get part of that margin". That's the essence of how he derives his numbers.

We say the flaw in that, the problem is that because he is making the comparison by reference to Dwr Cymru's retail price, because he says that's the best that Shotton would otherwise have been able to get. What he ignores is that even under bulk supply there was still a margin between the bulk supply price and the retail price that would have been charged by Dwr Cymru.

If I could show you that, it may be best to show it graphically. It's in the skeleton argument at -- it's an illustration above paragraph 122, so if one picks up folder 11 and goes to tab 2, and it's on internal page 35, which is external page 3488II, you should have a graph which should be at least a green triangle effectively on top of a yellow parallelogram. Has the Tribunal located that?

THE CHAIRMAN: Yes.

MR PICKFORD: Thank you. The first point to note is that when the updated version of the skeleton argument was produced, which put in some of the missing references, because we didn't have a complete bundle at that point, that caused the labelling on the right-hand side to shift downwards. So the DC retail tariff should apply to the red line which is supposed to be identifying the

top line. Albion's costs under bulk supply should apply to the middle line, and Albion's costs under common carriage should apply to the bottom line.

This is obviously a highly stylised graph, it's not meant to represent the actual numbers, but it is intended to represent the essence of what is going on in terms of the claim.

What Albion has done is it has said: look at my costs under common carriage, that is the bottom line, look at the price Shotton would have to pay under the DC retail tariff, that's the top line. I get 30 per cent of all of that. So it claims for that as part of its damages claim.

We say the problem with that is that if its construction of the clause is correct and it would have been entitled to that, and that's a separate matter, but let's assume that it's correct, that the clause operates by reference to Dwr Cymru's retail tariff and what would otherwise have been available, in the real world Albion's costs under bulk supply were also, although they started off the same, ended up considerably below Dwr Cymru's retail tariff. So the clause would also have operated in the real world. So you can't attribute the benefits in relation to that top green triangle to the damages that it says it's lost in this case, because

it should have had those anyway in the real world if the clause operated in the way that it says it operated.

THE CHAIRMAN: Unless it only operates on the basis of common carriage.

MR PICKFORD: Unless it only operates on the basis of common carriage, but we don't find those words anywhere in the clause. Obviously it's a little confusing because you don't actually have a full explanation from Albion as to how they say they get to their numbers. But that in essence is our understanding of how they get to the numbers and our explanation of why there is a flaw there.

So that's the first point on the operation of the so-called benefit sharing clause. I should just add on that, obviously it's for Albion to prove, its Albion's case on this aspect because they claim that it works in this way. It is for Albion to prove that the clause did in fact work as they say it worked, and we would have to explore that. All I have said is on the assumption that they are effectively right about the essence of it being by reference to the retail price, and I am saying if that is right, then they are nonetheless wrong about assuming it only applies to common carriage.

The next point is the grossing up issue, as it was described by Albion. Now, it points out that it has

entered into an agreement with Shotton such that it's required to account for 30 per cent of any damages award that it receives to Shotton. The key clause here, if you still have bundle 10 open, is at page 3361. Again, you were taken to it yesterday by Mr Sharpe. It's clause 2 of the letter of 24 October 2002. We see:

"Apportionment of the remaining net benefit relating to historic overpayment and associated damages to Shotton Paper and to Albion Water in the proportion 30/70 respectively. For the avoidance of doubt this reverses the proportions in the original agreement."

So they are saying here: in relation to any award that we get out of this litigation, we keep 70 per cent but we will give you, Shotton, 30.

Then what Albion says, and this is the bit that we would suggest is one of the most ambitious elements of its claim, albeit there are many bits obviously it would challenge, it is says the Tribunal should then gross up the award of damages to Albion to reflect the fact that it's going to have to transfer part of that damages award to Shotton Paper so that it leaves it in the position it effectively would have been in had it not had to pass on some of those damages to Shotton.

Now, our response to that is very simple. The claimant in these proceedings is Albion, and damages can

only properly be awarded to reflect the loss that Albion has suffered, if any, as a result of the unlawful first access price.

Shotton Paper could have brought its own follow-on claim in respect of its own loss stemming from the first access price, but it chose not to do so. So Albion's loss is only that putative profit that it would have obtained and retained, had common carriage arrangements been concluded and been more profitable than bulk supply.

So it can retain its share of the benefits under clause 7.4 if it could demonstrate that there are any. What it can't do is then claim for Shotton's claim to gross up its award. Albion itself recognises, it says in relation to this letter of 24 October, that any modification of the arrangements that Albion has reached as to how it distributes the proceeds of its litigation with a third party are irrelevant to the correct award of damages. That's what they say, it's at skeleton argument 116. So they say you don't have to worry about this letter from the point of view of calculating the damages in the first place.

We agree with that, but we say that recognition is actually fatal to the whole claim here in relation to grossing up. Not only is a change in the apportionment

irrelevant, any apportionment with a third party of how you deal with your damages claim must be irrelevant to the calculation of the damages in the first place. We say it can't possibly logically lead to an increase in the damages that you in fact suffered.

There are two steps. You work out what you suffered in loss, and then, if you want, you can have any number of different arrangements with any number of third parties as to how you distribute those damages afterwards. They may be litigation funders, subject to laws on comity(?) and maintenance, there are all sorts of things you might do with your damages. That can't possibly affect the calculation of damages in the first place.

Just to illustrate that point, suppose it were otherwise, Albion would have invented a potential money tree, because it could say to a third party, perhaps to Shotton: I am going to give you 99.9 per cent of my awarded damages. It turns round to the Tribunal and says: I lost £1 million, in order to leave me in the place that I would be -- to compensate me for that £1 million, given that I have agreed with this third party to give them 99.9 per cent of my damages, I actually need an award of £1 billion, and I am going to give £999 million to the third party, and I get to

keep £1 million.

That's an extreme example, but it just goes to illustrate that you can't calculate the damages on the basis of an agreement with a third party who then do with them, and gross up in the way that Albion suggests.

Just to add insult to injury in relation to that last example, of course, it wouldn't necessarily prevent Shotton from coming along and claiming for its own loss. It says you have to gross up because I've said that I am going to give Shotton 30 per cent of my award, but what would we then do if Shotton came along and said, "I have my own claim, it is very nice that Albion said that they would give me 30 per cent of their claim, but I have my own issues with what you did, and I am going to pursue my own claim as well". The whole thing is, we say, just a legal nonsense.

So that's our point on grossing up, it doesn't work, and there is no authority cited by Albion to suggest that this is something that is appropriate in these circumstances or indeed in any others.

The third point is the voluntary uplift issue, to use the jargon. Now, it's common ground that Albion has had the benefit of what's called -- had been called the voluntary uplift from Shotton Paper, and this was a sum of firstly 3p and then 1.5p per cubic metre that was

paid by Shotton Paper to enable it to continue to exist during the main proceedings against Ofwat, when Albion said it didn't have enough margin to do so unless effectively Shotton Paper accepted a higher price. So effectively it was accepting that it would pay 3p more than the price that would otherwise have prevailed between the parties in order to give Albion a margin.

So what we say in relation to that is that, to the extent there was any loss caused by us to Albion, the voluntary uplift element was passed on to Shotton, and insofar as it was a loss in the first place, it became Shotton's loss. Therefore, again it would be for Shotton to claim that against us in its own action, if it considered that it had lost out as a result of being required to pay 3p then 1.5p because of our unlawful actions.

THE CHAIRMAN: That must be in the alternative to your other point about 70 per cent being passed on to them.

MR PICKFORD: No, Madam, there are two different issues here. One is the issue --

THE CHAIRMAN: Because they only had to give that uplift because there wasn't, in the events which in fact happened, rather than in the counterfactual world, a sufficient margin. So this, the 30/70 split in the original clause 7.4 never came into effect. Now, if

that split had become operational because there was a sufficient benefit to divvy up between them, there wouldn't then have been a need for the voluntary uplift, would there?

MR PICKFORD: I think it's true to say that we are only in this world at all in the event that Albion can, in the first place, demonstrate that there was some loss associated with not pursuing common carriage arrangements. Yes, so therefore if there was loss, then there would have been an apportionment under the 30/70 split in clause 7.4.

We don't disagree with whether -- we don't say, subject obviously to hearing Dr Bryan explain why he says it works in the way it does, we don't say that there was no benefit share. There are two issues in relation to that, the first issue is: is the benefit share by reference to the retail price rather than the prevailing price that Albion was actually paying? And that is a point that they will have to prove.

The second issue, and the one that I focused on in my submissions, was that there is a mistake, we say, by Albion --

THE CHAIRMAN: Yes, you showed us the graph.

MR PICKFORD: Yes, in that it's attributing all of that benefit to the damages scenario, whereas in fact the top

triangle of its benefit would have happened in any event.

THE CHAIRMAN: Yes.

MR PICKFORD: So we are not disputing that if it's right that common carriage was below bulk supply. We are not disputing that effectively there is the yellow parallelogram there, and we accept that if it gets that far, it is entitled to 30 per cent of that.

All I am saying here is that, insofar as there is this other agreement with Shotton, what happens is it has passed on effectively 3p and then 1.5p of any putative loss to Shotton, because, putting all other matters aside, it was actually 3p and then 1.5p better off in the world as it happens, because it got that extra margin from --

THE CHAIRMAN: Yes, but are you saying that you should deduct that 3p and then 1.5p as well as deducting the 70 per cent under clause 7.4? Because at the moment I don't see how those two can operate in tandem, because the voluntary uplift only arose because the agreement wasn't operating in the way that they thought it was going to be operating.

MR PICKFORD: I think precisely why the voluntary uplift arose is obviously a matter that will need to be determined by evidence.

THE CHAIRMAN: Because it was to do with what actually has happened --

MR PICKFORD: Yes.

THE CHAIRMAN: -- rather than what would have happened if everything had gone smoothly?

MR PICKFORD: That's correct, we would accept that.

THE CHAIRMAN: Just bear in mind that we need to think about the relationship between that voluntary uplift point and the pass through of the 70 per cent point. Because at the moment I think they must be -- I may be wrong, but it makes me -- at the moment I think they must be alternatives rather than cumulative.

MR PICKFORD: Madam, I'm very grateful for that indication. Our case as it stands is that they are cumulative but we will reflect on it, and obviously if there is further assistance we can provide, we will provide it.

In any event, putting aside that particular issue, again in common with the submissions that I just made, insofar as that was Shotton's loss, it was effectively equivalent to the loss of an indirect purchaser. It paid 3p too much effectively because of the abuse, and therefore if there is a claim to be made in relation to it, it should be Shotton, it's here as effectively the indirect purchaser saying: as a result of your bad behaviour, Dwr Cymru, I paid 3p more than I would

otherwise have had to, and I would like my 3p per cubic metre back on the supplies over that period.

That's the way the claim should be made. It can't be for Albion to claim it on Shotton's behalf, because that is not, we say, how indirect and direct purchaser claims properly proceed.

THE CHAIRMAN: My question is that if Shotton came and said, "We want that 3p and also we want 70 per cent of the difference because we would have got that under clause 7.3", would it be your case to say, "Well, yes, you are entitled to both of those", or would you say to Shotton, "No, you have to choose which of those you want to treat as your loss"? That's just another way perhaps of formulating the question which you are going to have to think about.

MR PICKFORD: Yes. That's a very good question, and luckily it's one I don't actually currently have to think about in reality, but obviously as a hypothetical we will take it away.

That really is it in relation to the Shotton claim. It is theirs and they should be here if they want to claim it.

The next point concerns the calculation of interim relief, and hopefully this is quite a small issue, because there is not actually anything between the

parties on the principle that Albion needs to give credit for the fact that during the period at which they allege abuse they received interim relief. The small point is that the interim relief that they continued to receive continued after 7 November, which is the date that they have now said the abuse ended, up until 9 April 2009. You may recall Madam that the case as originally put had a longer duration of abuse and that was later narrowed back to 7 November.

The way in which Dr Bryan models the interim relief is he uses it as a deduction from the price that he says he was paying under his bulk supply. That's fine for the period up to 7 November 2008. You can do it that way. The problem is he then overlooks that there was a further period of interim relief paid all the way up until 9 April 2009, for which we should also obviously receive credit.

THE CHAIRMAN: And why should you receive credit for that?

MR PICKFORD: Because it is a function, the payment of the interim relief was a function, effectively, of our wrongdoing, so it was something that was received by Albion in toto, caused by our abuse. Full credit should be given for that, because otherwise one comes to -- if it were otherwise, it would be a very formalistic approach that you could say: well, if you didn't get

paid that relief until -- sorry, or rather we are going to apportion the relief out.

So we assume that if the relief was in respect of a later period, no credit should be made for it, whereas if the same total relief had been given to Albion but it had been condensed into a shorter period, when it could have been, exactly when it came to an end was to some extent slightly arbitrary, it depended on obviously the timing of the Tribunal proceedings. But for some reason we don't get the full benefit of the relief that Albion took.

In essence what we say is although it is permissible, to some extent, to try and deduct it off the bulk supply price, ultimately the interim relief is something that should come in at the end of the equation. You work out what loss Albion has otherwise suffered, and then you say, after that, well -- let's say it was for the sake of argument £200,000, and then you look at the interim relief that was paid and you see actually in the real world they got £200,000 out of Dwr Cymru. We say necessarily that should be deducted, and therefore overall, on those hypothetical numbers, we would be quits. Because although we caused them £200,000 worth of loss, we actually gave them £200,000 worth of relief. So they have already had it. I mean,

that's the essence of interim relief, it's relief you get pending a substantive determination. So if they had already got £200,000 out of us, and what they prove is that that's what their claim is worth, it's a bit like a sentence when you have already spent time in jail. If you have already spent six months in jail and your sentence is six months, you then get let out.

So, Madam, I have dealt with the timing points. So unless there is anything else that those behind me and next to me suggest that I have missed on compensation, that's it for the Shotton element of the compensation claim, and we can then move on to the Corus claim.

Now, I don't need to remind the Tribunal, but gratuitously I will, that it describes this part of the claim initially as somewhat tenuous as currently drafted. We say that is how it remains.

My preliminary observation in relation to the Corus claim is that there was of course no finding of abuse in relation to Corus, so it follows that the Tribunal must assume that, had a price been sought from Dwr Cymru in respect of Corus, a lawful one would have been granted, as a matter of assumption.

So we say Albion's case in effect therefore needs to be, must be, that the first access price in some way caused Albion not to be in a position to seek an access

price from Dwr Cymru three years later in order to supply Corus, and that it thereby suffered some loss. We say Albion is unable to establish that for three main reasons.

Firstly, the lost profit that it claims it suffered in respect of supply to Shotton, we say, did not prevent it in any way from being able to tender for the Corus business or from seeking access price in respect of supply to Shotton. I'll enumerate these and then I'll expand upon them. So that's the first point.

The second point is that we say on analysis that Albion wasn't in fact in a position to bid for the Corus business for reasons that were unconnected with the first access price.

Thirdly, Corus would not have given Albion the business even if Albion had in fact sought a price and then bid for it.

So addressing those in turn, we say the fact, the assumed fact -- because of course we dispute the premise that Albion made less under bulk supply than it did under common carriage -- didn't cause it to be unable to tender for the Corus business. That's for the following reasons: firstly, there was no serious capital investment or cashflow that was required to tender for the Corus business. So, even if Albion wasn't making

substantial cash sums at the time due to some abuse by us, it wasn't prevented from those modest profits, from, if there was a profitable opportunity out there, and it suggests Corus was profitable, from going for it.

In any event, if capital really was an issue, at the relevant time in July 2003, Corus was -- Albion was owned by the Pennon group, which was at the time a FTSE 100 company and I believe still is in the FTSE 100, although it bobs in and out, it's about number 100.

So we say that any claim, if it's made, of being unable to bid for Corus through lack of funds, would be hopeless. So that's the first point.

We say that, secondly, Albion can't claim it was prevented from tendering because it knew that Dwr Cymru would have offered it an unlawful price. So it was simply pointless to do so, because firstly, we say, that's in conflict with the legal assumption that we say should be made, which is that had a price been sought it would have been a lawful one, because there is no finding otherwise.

THE CHAIRMAN: If they say "We didn't ask for a price for Corus because we assumed, now we realise wrongly, that you would have quoted us the same price for supply to Corus as you had quoted us for supply to Shotton Paper,

and that's what prevented us from asking you for a price to Corus", where does that get us? Even if we assume that they had in fact asked for a price from Corus, you would have said, "Yes, it's 14.4p or 16.5p rather than the 23.2p". If we make that assumption --

MR PICKFORD: Yes, on my primary case, on that point I have just made, we say their failure to actually ask for a price and therefore to discover that they would have got a lawful price by assumption is fatal to the claim. That's the first point I make. That's not my only point.

THE CHAIRMAN: Even if the reason why they didn't ask was because of the abusive price that you had offered in relation to Shotton Paper?

MR PICKFORD: Well, Madam, my first point would be yes, as a matter of law, but my second in relation to that would be as a -- if one then descends to the facts and tries to ascertain whether it could be said to be caused by the facts, I have dealt with the first point that there was no sense in which their lack of funds caused them to be able to bid for the business. I am about to deal with the second point factually, which is that it's, we would say, also factually unsustainable.

So by April 2003, Albion was aware that Dwr Cymru's new non-potable tariffs had implications for treatment

costs. And I took you to that letter this morning, where we saw Dr Bryan writing to Mike Brooker, and saying, "I see that you have been fiddling around with your tariffs, and what I would like to draw to your attention is that I am now owed 3 or 4p off my bulk supply price".

So it was already well aware in April 2003 that there had been a material development in relation to pricing, and it was asking for refunds on the basis of it. So it would have known necessarily that had it sought a new access price in 2003, post or any time after April 2003, after that new tariff had been published by Dwr Cymru, that Dwr Cymru would have had to go back and recalculate a new tariff, as indeed it did. It wasn't being asked to at the time, but ultimately Ofwat asked it to do so, and that is why we then ended up with the second access price.

Notwithstanding that knowledge, Albion made no enquiries of Dwr Cymru as regards a price for common carriage. Indeed, as far as we are aware it didn't make any enquiries of United Utilities over that period in terms of a price for bulk supply, although that latter point is not strictly relevant to what we are considering here.

Therefore it can't, on any sensible measure, be said

that the first access price did cause them to be unable to even ask the question: what price would we get? We don't see that Dr Bryan was generally shy about challenging Dwr Cymru when he felt it was appropriate to do so. There was a lot of correspondence, and all it would have required would have been one letter.

So that's the first point; that there was nothing in relation to the provision of the first access price which actually caused Albion not to be able to ask at least for a price.

THE CHAIRMAN: What was the date of that letter from Dr Bryan?

MR PICKFORD: That was Albion's letter of 15 April 2003. The bundle reference is bundle 5, tab 195, and it's --

THE CHAIRMAN: That was asking for a reduction in the bulk supply price?

MR PICKFORD: That's right.

THE CHAIRMAN: Was there a reduction in the bulk supply price?

MR PICKFORD: I am instructed there was not.

We need to remember that in relation to common carriage there was a sustained argument about how one built up the elements of that, and so it doesn't necessarily follow that just because the bulk supply price wasn't reduced, that where there had been 4 or 3p

opening up in relation to treatment costs, there wasn't an opportunity for Albion to go back and explore that.

Indeed, as we saw, what actually happened was the access price was reduced, it was reduced to 17.74p. So as a direct indication of that original work, there was a reduction in the access price, notwithstanding that the bulk supply price didn't change.

So the second point we make in relation to the Corus claim is that Albion was never realistically in contention to supply Corus. The first point in support of that is that, as Albion itself recognises, Corus required supply across three sites. I don't need to take you to it, but the reference in the bundle is bundle 5, tab 204, and there is a letter of 11 July 2003 where Corus is inviting Albion to bid for the supply of water to three of its larger plants situated in Wales, namely Llanwern, Trostre and Shotton.

So that was what it was being asked to do, and Albion hasn't submitted any evidence about how, absent a fact which it says was the impediment, it would have gone about supplying Corus at Trostre and Llanwern. So that's the first impediment.

The second difficulty is that, certainly as far as the Welsh assembly Government were concerned there would need to have been -- and indeed as far as Albion was

concerned there would need to have been a special exemption from sections 66I and J of the Water Industry Act 1991 as amended by the Water Act 2000, in order to supply Corus.

If we could go, please, to bundle 7, tab 270. So this is a letter of 19 March 2007 responding to letters from, it says here Mr Bryan, but Dr Bryan, of 29 October and 6 November 2006, asking whether the assembly:

"... would consider making an order under section 66K of the Water Industry Act 1991, granting exemption to Albion Water from section 66I and possibly 66J of the 1991 Act, for the purpose of supplying water to Shotton Paper Mill, Shotton."

So because we are now in 2007, and the relevant provisions of the Water Industry Act 1991 have now come into effect, but there still isn't a common carriage agreement in place in relation to Shotton. Dr Bryan, Albion, faced the additional hurdle at this stage of securing an exemption. Because, notwithstanding that the whole thing began prior to these requirements coming into effect, because they were brought in, brought about by the Water Act 2003, and obviously the things that we are concerned with primarily focus on the early part of 2001, it's the case that because there was no common carriage at that point and Albion was still

investigating common carriage, according to this letter then, that it needs to enquire about whether it can satisfy these further provisions.

What one sees over the page is an explanation in the first substantive paragraph on the second page of the letter that:

"The general policy is that all common carriage arrangements should normally be regulated consistently under the new water supply licensing provisions. However, as highlighted in the Water Act 2003, there may be exceptions."

What they focus on in this letter is the fact that Albion has been seeking this arrangement since as early as 2000, any progress having been stalled by pending litigation before the Competition Appeal Tribunal. So they go on to conclude that, although they are not committing themselves firmly one way or the other, in view of the fact that the Shotton supply -- Shotton Paper supply -- the proposals are historic and go all the way back to 2000 -- that they are minded to grant the appropriate exemptions in respect of Shotton. The two exemptions they then discuss are the exemptions from 66I, second paragraph from the bottom, and an exemption from 66J on page 3.

THE CHAIRMAN: Why would this arrangement be prohibited?

What was wrong with it as far as this legislation was concerned?

MR PICKFORD: Because it was effectively putting water into another party's -- undertaker's network, and that was prohibited under the provisions that the Welsh Assembly Government are here considering.

Those provisions aren't actually in the bundle at the moment, although we can obviously have them inserted. The key fact in any event here is that certainly all of -- it's the factual position as to whether, in the view of the body that was required it consider these matters, there was potential impediment if an exemption wasn't granted.

My point in relation to this letter is that, although there is evidence here of the Welsh Assembly Government being willing to grant an exemption in relation to Shotton, what we don't have is any evidence that the same kind of considerations would apply in relation to Corus or that any enquiries had even been made in relation to Corus.

Now, the provisions of the Act, it has to be said, as I understand it, came into effect in 2005. So at the time that Corus was actually being bid for, they would not strictly have applied. However, because they came in, in the 2003 Act, and we were looking at a supply

from 2004, the parties would have been aware that these provisions were going to come into effect. And plainly it would have been necessary for Corus to have been satisfied that this was all going to be possible. What we don't have is evidence -- this is quite a technical issue -- on this at all.

THE CHAIRMAN: I would just like to put down a marker, as people seem to be saying, that I don't really understand this point, and if someone is going to pursue this point then it needs to be explained in a note what this prohibition was, how it would have affected Shotton and Corus, whether it was to do with bulk supply or common carriage, what these exceptions were. I can't glean that just by reading this letter. So if you want to rely on some point about this, then you will have to explain it a bit more clearly.

MR PICKFORD: I understand that.

THE CHAIRMAN: Don't do it now, though.

MR PICKFORD: I am instructed that now in bundle 17 we do actually have these. But because it's quite a technical point, and the purpose of this opening is to explain to you the broad picture, I think it would be best if we take this technical point away and we will provide you with some more discrete submissions on it. I am told they have made it into our new bundle 17, so we can at

least refer to the relevant provisions in that.

The third and final point in relation to Corus is that even if Corus had allowed Albion to bid just for Shotton, Albion hasn't demonstrated that it had any realistic chance of winning that contract. In annex 1 of its quantum calculations -- which we don't need to go to quite yet -- Albion assumed that Corus was paying the published Dwr Cymru non-potable tariff, and that's how it's calculated its claim in relation to Corus.

But that assumption is wrong, because Dr Bryan knew, and this is at paragraph 327 of his witness statement, from the end of a special agreement between Corus and Dwr Cymru which finished on 31 March 2004. Dwr Cymru and Corus were in dispute as to the correct price for water, and in fact Corus was only paying in accordance with the special agreement applicable to Shotton dated 1 December 2000. We know that from a letter from Corus to Dwr Cymru of 24 May 2004, which is at 226 in bundle 5.

MR LANDERS: Did you say how much they were paying?

MR PICKFORD: It says the basis on which they were going to pay, and I am going to come on to the figures shortly, but the basis on which they were going to pay was that it was pursuant to Corus' understanding of the continuation of the relevant terms.

Now, if we go to -- to try to understand the way in which Albion puts its claim, it probably is helpful at this stage to go to its scenario for Corus, one of its scenarios for Corus, at 10, tab 1, 3346.

(Pause)

So what we see here is the analysis of the Corus quantum. Again, we don't really have a lot of explanation for this, so insofar as the Tribunal has difficulty with it, I will obviously do my best, but it's not ultimately my document.

If we look at scenario 4, so that's the one entitled "14.4p CC, indexed PPI and 9p indexed RPI", we see there that the AW tariff, which is the sixth column along, in 2004/2005 they are proposing that they would have offered a price of 26.43p, and that would be per metres cubed. Does the Tribunal have that figure?

THE CHAIRMAN: Yes.

MR PICKFORD: Now, there is then an issue, and this is quite a complex issue and one that we will then have to canvass in cross-examination, about what price Albion knew that Corus was actually paying. But our case, and we will obviously develop this during the trial, is that at 26.43p Albion would not have been able to ever win the Corus contract, and indeed it knew that. We had Mr Sharpe emphasising yesterday that Corus was only

paying 14p back in the earlier days of the contract. Even allowing for inflation, it was never going to get anywhere near the 26p that Albion Water are positing they would have won the contract at.

So that's an explanation of what we will be submitting in relation to that part of the claim.

So, Madam, that takes me -- it's quarter past 3 -- to exemplary damages, so I don't know if that would be a convenient moment for the transcript writers?

THE CHAIRMAN: Yes. We will come back at 25 past.

(3.15 pm)

(A short break)

(3.25 pm)

MR PICKFORD: So we turn to exemplary damages, and Albion said that the Tribunal should award it exemplary damages in this case because Dwr Cymru issued the first access price in the knowledge that the first access price was, or was probably excessive and therefore abusive, bringing it within category 2 in Rookes v Barnard.

We say that claim is without any proper basis, and the scheme of my submissions on exemplary damages are going to be as follows: firstly I am going to look at the law, I didn't do that yesterday. Secondly, I am going to summarise what Albion must establish in the light of that. Thirdly, I am going to look at

Dwr Cymru's essential position in relation to the whole of these allegations, which is simply that it arrived at the first access price in good faith. Fourthly, I am going to look at the regulatory context. Fifthly I am going to address the pleaded case. Sixth, I am going to look, necessarily briefly, at the new and unpleaded case, and it's largely going to be appropriate to deal with those issues after we have heard cross-examination, subject obviously to the Tribunal's ruling in relation to the admissibility or otherwise of those points. Finally, I am going to look at the issue of quantum.

So that's the scheme. So turning, then, to the legal background, if we could firstly go, please, to folder 15, and take up tab 17, paragraph 94. This is the Durkan case with which, Madam, you will obviously be very familiar.

A key point I wanted to emphasise from this paragraph is the Tribunal's comment:

"The seriousness of the infringement of a Chapter I prohibition, involving (as here) the imposition of penalties, is a factor to be taken into account when considering the probability of an infringement having occurred."

The Tribunal then goes on to refer to the famous comments of Lord Hoffmann in Rehman and also the

comments of Lady Hale In Re B, which are in essence to the effect that -- well, the example is the coming across Alsatians and lions in Regent's Park. And even though lions are generally unusual, if you happen to be in the zoo part of Regent's Park it wouldn't be so unusual to see one there.

So obviously in this, as in many areas, and one hates to use the cliche, but the context is all important. But it remains the case that the seriousness of the prohibition is a factor, the seriousness of what's being alleged is a factor to be taken into account when assessing whether or not it's likely to have occurred, or not, albeit it is not, by any means, determinative.

I don't think I probably need to go to the Rehman or Re B. I think the essential proposition is fairly clear.

So applying that in the present case, we start from the basic proposition that it is reasonably common for people to make decisions that others, with the benefit of later scrutiny, consider are wrong. It's also reasonably common for people to make mistakes. Both of those things, either making a mistake, or not necessarily making a mistake but just taking a view which, when subjected to forensic examination, another

body decides is not the correct view, can both lead to findings of infringement.

Now, what is not commonplace, we say, however, is for someone to act in an outrageous and contumelious fashion, seeking to exploit another. That is not only unusual in itself, but it's even more unlikely when there is no evidence that the particular actors involved are alleged to have had any personal incentive to act in that way. It's also unlikely and unusual where the company itself doesn't have a company incentive to act that way. Moreover, it's particularly unusual in a context where the Regulator was scrutinising the very issues that were at stake and making it very clear that it would do so.

Now, I am going to come on to deal with the regulatory context and deal with that point in due course. But my essential starting point is that, given the context in which we find ourselves, there needs to be really very compelling evidence that we were doing as alleged by Albion, because all of the contextual indications would suggest that that sort of behaviour was very unlikely.

So if I could turn, then, please, to 2 Travel, which, as the Tribunal will know, was relatively recently decided. It's in tab 30 of bundle 13, I hope.

It stayed where it was put. There are obviously quite a lot of authorities dealing with the development and history of awards of exemplary damages, and they are very helpfully digested in this particular context in 2 Travel. So all I intend to do is take the Tribunal through the relevant part of the judgment in 2 Travel rather than going to the individual authorities, because that should be a more efficient and convenient way of doing it.

So if you could turn, please, to paragraph 448, and if you could read, please, paragraphs 448 to 452, which set out the introduction.

(Pause)

So some points to emphasise from paragraph 448. The exemplary damages have been described as an undesirable anomaly, and then the reason why they are there is to vindicate the strength of the law, to teach a wrongdoer that tort doesn't pay. They are a remedy of last resort for that purpose, and indeed they are not to be encouraged.

We see that we are in, in this case, the second of the categories identified in Rookes v Barnard; that is conduct calculated to make a profit which may well exceed the compensation payable to the claimant.

If you could then turn on to paragraph 461 and read

paragraph 461.

(Pause)

We see going into 462 that the early cases for exemplary damages mainly arose in the context of claims for libel. One can well see the reason in that context why the award of exemplary damages was developed as a means of punishing newspapers that were prepared to say things they knew to be untrue when they knew that the compensation they would have to pay was relatively light relative to the enormous sales they would get from their papers from publishing the lies.

Then if one goes to 472, they then deal there with the fact that the profit motive is not enough, and the defendant's unlawful conduct must have been:

"...motivated by mercenary considerations. [And] An inference of cynical calculation of mercenary advantage should not be lightly drawn."

Then if you could continue, please, to read from 473 to 478, that's the next two pages.

(Pause)

So, Madam, the points of emphasis from this passage are that it's not simply about intentional wrongdoing, the development of the law has been clear, that exemplary damages should be payable where the disregard of the plaintiff's rights is so contumelious and so

outrageous that it's appropriate that the court effectively marks its disapproval and upholds the law in relation to those breaches. There is discussion of the notion of outrage, and it's not simply intentional wrongdoing:

"It needs an additional element of flagrancy or cynicism or oppression. Something additional rendering the wrongdoing or the manner or circumstance in which it was committed particularly appalling."

Those are the words of Lord Nicholls in the Botrill case.

So what we then find in the 2 Travel case is a discussion of the implications of fines. First, a consideration of whether exemplary damages can be imposed where the wrong in question is infringement of competition law, and that's what we find from 480. Then there is, further after that, consideration of the implications of the fining regime.

The Tribunal can probably skip relatively lightly over the first of those sections, where it's quite clear that the Tribunal thought it was appropriate that it was possible to have exemplary damages in competition claims, and move on to deal briefly with the issue of punishment in parallel. That begins at tab 491(sic). Again, would you please read for yourselves

paragraphs 491 through to 496.

(Pause)

THE CHAIRMAN: Yes.

MR PICKFORD: So what we see here in this discussion is, firstly, there is consideration of the non bis in idem issue and they are saying that doesn't apply because there has been no fine levelled. There is also a discussion of how to rule out the possibility of a fine, why it conflicts with whistle-blowing. Sorry, I beg your pardon: why it was appropriate in ensuring that there was no conflict with the whistle-blowing regime, to ensure that you couldn't be effectively punished twice for the same point. Once you had had your penalty commuted, that should be the end of the matter and there shouldn't be an exemplary damages award imposed on top of that.

Then one of the points that it goes on to note at 495 is why Cardiff Buses is different. One of the points that it notes in 495 is that there were limits on the OFT's ability to fine, because of course it needed to remove the immunity that would otherwise apply to fining, and it noted that it could only do that in exceptional circumstances. It says in 495:

"It is by no means clear whether the OFT could have withdrawn immunity and could have imposed a penalty in

Cardiff Buses."

So, whether there even could have been a penalty in that case. Then it goes on to explain how in the circumstances of that case it was appropriate for the Tribunal to be able to award damages and that just because the OFT might not be able to impose a fine, that's no reason for the Tribunal not to do so, as was seeming to be argued before it.

We say that's entirely correct and that one can indeed go further. We say it's precisely where there either are or there may be serious impediments to fining that there is plainly a role for exemplary damages to step in as the remedy of last resort to impose punishment. Indeed, we would make the observation that, although it didn't appear to be argued by the claimant in this case, it would have been open to the claimant to have argued that one of the reasons why it was very important to impose a fine in this case is that it wasn't merely the case that there were doubts about whether the OFT could have fined.

We would say that section 40, properly analysed, doesn't permit the removal of immunity with effect to enable a fine for past infringement. We say that section 40 removal of immunity works prospectively and we can develop that point later if it becomes

an essential one.

So what happened, in fact, in 2 Travel is that the Tribunal did impose exemplary damages, as we will come on to, ultimately, in circumstances where it voiced concerns about the OFT's ability to impose a fine. In fact, those concerns, we say, were entirely justified because we say, on analysis, it's quite right the OFT couldn't have imposed a fine.

Our case is not on all fours with 2 Travel, it is distinct in a number of ways. The first point to make is that there is no dispute in this case that the Authority could have imposed a fine, once a finding of infringement had been made, if it had wanted to. There is also no question that the Tribunal could have imposed a fine if it had wanted to; the Tribunal has the very same powers that the Authority possesses.

Indeed, Albion even raised the possibility of a fine before the Tribunal, and invited it to consider what to do in this regard. If we could go, please, to folder 7, tab 245, page 2053BBB. So you should have the final page of a pleading signed by Rhodri Thompson, Queen's Counsel, and John O'Flaherty. This was the remedies hearing following one of the judgments in the main case and we see at paragraph 155:

"The only outstanding issue of which Albion is aware

is the question of penalty. Albion makes no submissions in this regard, save to invite the Tribunal that it consider whether it is appropriate to remit this matter to the Authority on the subject of penalty, or whether it wishes to reserve the future of this case to itself."

So there was Albion saying you can either send it back to the Authority for the Authority to deal with the issue of penalty or if you want, Tribunal, you can consider the issue of penalty yourselves.

I shouldn't have been putting it away, I was encouraging the Tribunal to do the same by way of actions, but in the same tab if we then go on to 20530000, you should have a page of the transcript, and it says at the bottom, "The hearing adjourned at 1 pm and resumed at 2 pm". Do you have that?

THE CHAIRMAN: Yes.

MR PICKFORD: A few lines up, and this is the only time, to the best of my knowledge, that the point in Albion's skeleton was then pursued, we see Mr Anderson saying, "We have nothing to say on this question of penalty." And the president's response is, "We do not think that arises."

What we infer from that is that the president was of such a clear view that it was not going to get drawn into imposing a penalty, or remitting it to the

Authority for a penalty; that he did not even consider that the issue of penalty arose.

THE CHAIRMAN: Mr Anderson was acting on behalf of the regulator?

MR PICKFORD: That's correct. So it's relatively sparse, but what we see is there is the submission made in the skeleton, then the Regulator is making its submissions orally, it's seen what's been said in the skeleton, Mr Anderson addresses or begins to address, raises the issue of penalty with the Tribunal and the Tribunal says it's really not interested in it.

So where all this takes us is this: we obviously must accept that we failed on the strikeout application because we sought to contend that there wasn't jurisdiction to impose exemplary damages here. Obviously subject to issues of appeal which are not relevant at all now, we must accept that there is power for the Tribunal to award exemplary damages in cases where the double jeopardy rule doesn't apply. That's obviously the starting premise for my submissions, at least now.

What we do say is in the circumstances that I've outlined, where the Tribunal itself had the power to impose a fine, or to require Ofwat to impose one, and did, albeit in not many words, exercise its discretion

not to go down that route, there would need to be highly exceptional circumstances to justify stepping back into the arena of punishment that had been looked over when fines were considered and to engage in an exercise of punishment via exemplary damages instead.

Why is that? I say that because, as we saw from paragraph 448 of 2 Travel, exemplary damages are a remedy of last resort; they are an undesirable anomaly and they are essentially there to fill a gap when there is no better means of punishment and vindicating the strength of the law. In the present case, unlike in 2 Travel, there was a better means, it was the fining regime. Therefore it needs to be a very exceptional case in order to now invoke that jurisdiction, even though there may be the power.

Because if we are wrong, there are a number of counterintuitive results. For example it means firstly that the less inclined the Tribunal is to engage in fining -- so where, as we say, the president exercised the Tribunal's discretion against such a course, so if it considered it really wasn't an appropriate case to get drawn into that -- the more likely it is that the Tribunal should then award exemplary damages instead. Because as soon as the fine has been imposed, that prevents all exemplary damages. So given the

extreme associations that go with exemplary damages in terms of its outrageous and contumelious conduct, we say that would be a somewhat odd state of affairs. Again, it also means that the more that the claimant steers the Tribunal away from the public options available to it, the greater its chances are of obtaining the punitive award and keeping that for itself. Again, we say that doesn't strike quite the right note.

So those are our main points on that case. It may be helpful, before we put it away entirely, although if you have put it away we can revisit it later, they then go on to deal with the issue of quantum, and I am happy -- do you still have the case out?

THE CHAIRMAN: I have closed the bundle but I have not put the bundle back on the shelf.

MR PICKFORD: If we go back, whilst it's not back on the shelf, to paragraph 593, we see the conclusions of the Tribunal, and essentially they found that Mr Brown, who was the key actor in that case, was lying to them. On the basis of the finding that he was a liar, they ultimately awarded exemplary damages.

Then on quantum, we see at 596 that:

"Cardiff Bus urged us to measure any award of exemplary damages by reference to the sort of penalty that the OFT has jurisdiction to impose for breaches of

the Chapter II prohibition."

They go on:

"We decline to assess the level of exemplary damages in this way: the OFT has a statutory jurisdiction to punish and deter in this way, and although exemplary damages also have as their object punishment and deterrence, our jurisdiction derives from section 47A of the 1998 Act and the line of cases beginning with Rookes v Barnard."

Then it goes on to set out three factors, of which they are very conscious, and if I could ask you please to read subparagraphs 1, 2 and 3.

(Pause)

Sir, would it assist if I --

THE CHAIRMAN: I think we have now lost it, so we will have to look at those later. I don't want to take up time going to them.

MR PICKFORD: Of course. I can explain for the Tribunal's benefit what they are, but the principle is -- obviously the Tribunal can revisit them, but it is relevant to my further submissions. They are that exemplary damages needs to bear some relation to the compensatory damages. There was also discussion about the amount of exemplary damages with regard to the economic size of the defendant and the economic implications of it. Also

that an association -- on the second hand, an association with the local authority would need to take very full account of the judgment and even when exemplary damages were low, they could be quite sufficient to punish and deter that type of undertaking. Ultimately they imposed £60,000.

So against that we say that the test to be applied is -- the Tribunal needs to ask itself the following two questions: are the circumstances so unusual that its right to bring to bear the armoury of exemplary damages instead of relying on the fining regime that the Tribunal itself could have used and plainly would have been available? And if the circumstances are so unusual and the behaviour is so outrageous, then is the relevant test satisfied?

That test, in the present context, requires us to look at the following issues. It's said that we are in the second category of Rookes v Barnard, and on that basis we say that the claimants need to demonstrate that Dwr Cymru knew, or probably knew, that its conduct was unlawful, but nonetheless cynically calculated that the benefits from such conduct outweighed the likely damages that would be payable. Indeed, in this case we would add that they not only had to do that, arguably they also had to consider that the benefits outweighed the

fines that would be payable by them as well. Because of course the test is developed in a context where there is not a fining regime, but here Dwr Cymru would have been aware that it could have been fined, and that overall the judgment -- judged in the round, the conduct needs to be so contumelious, so disgraceful and outrageous that the law steps in with an award of exemplary damages.

So what is Dwr Cymru's essential position on this allegation? Our answer is very simple: Mr Edwards and Mr Williams are quite unequivocal that Dwr Cymru was acting in good faith, whatever mistakes it may have made or whatever decisions that had been made later -- that had been decided that the Tribunal didn't agree with the way they approached things, they were acting entirely in good faith.

We see that at first Williams, paragraphs 15 to 16, and first Edwards at paragraph 50. I am not going to go to those now, but that's where one finds the points being made.

In his first witness statement, Mr Edwards explains how the first access price was calculated at an operational level. He explains how it was also supervised within the company, and in summary what he says is as follows: that Ofwat only actively began to

encourage common carriage in 1999. That was following the enactment of the Competition Act 1998, and it began to issue guidance letters to managing directors requiring them to put in place pricing policies, and we have seen some of those already, in fact Mr Sharpe took you to some yesterday.

In line with Ofwat guidance, Dwr Cymru duly prepared and published its statement of principles for common carriage. It did that in March 2000. And it prepared an access code, which it did in August 2000. Mr Edwards then goes on to explain how he went about the modelling exercise. He explains that it was an unprecedented exercise, he explains how he based his calculation on Dwr Cymru's regional average costs for each component of the service that was required by Albion, and he explains how the regional average approach to deriving the price on carriage was consistent with Dwr Cymru's post-privatisation methodology generally for derivation of large industrial tariffs, the LITs. And that that had been approved by Ofwat.

Mr Edwards explains how he kept Dwr Cymru's board and its licensed company executive, the LCE, informed of what he was up to, and that Dwr Cymru as an organisation sought to keep Ofwat informed as to what it was up to. Due to the novelty of the exercise it did take some time

to complete, Mr Edwards also had other jobs and it required refinements and developments of his methodology.

Mr Edwards also sought a second opinion on the pricing calculations from an expert in economics, Mr Jeremy Liesner, from the economic consultancy NERA, and he took on board Mr Liesner's suggestions. Ultimately in February 2001 Dwr Cymru's LCE agreed that the FAP of 23.2p per metres cubed, as derived by Mr Edwards, could be released to Ofwat for approval. It didn't formally approve the first access price itself, and the board didn't, because it was anticipated at that point, he explains, that there would have been further negotiations with Albion leading to an agreed price, and that that then would be signed off by the board thereafter.

The indication that was provided to Ofwat, the "minded to" price, which then became the focus of this case, approval for that was sought from the LCE, but that was an informal decision and, to the best of his knowledge, he doesn't recall there being a minute in relation to it.

So that's the background to how the price was derived, and we are quite clear that it was derived in good faith.

Now, if I could then turn to my next category of points, which is regulatory context. We say against the evidence that I have just gone through, the Tribunal needs to ask itself which of these is more probable. Option A is that the reason why Dwr Cymru issued a "minded to" price, which was ultimately found to be unlawful, was because the issues were new, it was trying to comply with Ofwat's policy, including things like regional averaging. And ultimately the question of the rights price is actually a difficult one on which highly expert bodies, including in this case the Authority on the one hand and the Tribunal on the other, can reach very different views.

So that's option A, and obviously that's the essence of our case.

Option B is that Mr Edwards and Mr Williams, when they say they were acting in good faith, are lying, and that the reason why Dwr Cymru quoted a price which was an infringement of competition law, is because they had cynically calculated that the benefits that Dwr Cymru would obtain for acting unlawfully would outweigh any other compensation, save for exemplary damages, or punishment that it would have to pay.

Obviously we say it's the former of those two options, and that regulatory context is important here

because one has to bear in mind that Dwr Cymru operates in a highly regulated field. We know that the 1998 Act had just come into force prior to the provision of this price. We know that the Regulator was very concerned about the Act and ensuring that everyone complied with it. Dwr Cymru knew that it was exposed, not only to compensation if it breached the Act, but to very sizeable fines, and Dwr Cymru itself was conscious of its obligations under the Act. Indeed, it sought to involve the Regulator in the very pricing decision about which we are concerned, asking them to approve the prices before they were submitted to Albion.

Now, we say that no organisation deliberately disregarding the law in this cynical fashion that's suggested would be likely to act in this way and involve the very undertaking responsible for scrutinising its conduct in the way that it did. We say that it doesn't really ring true. Then one asks oneself: well, what did the regulator think? Well, at the time, contemporaneously, it was not prepared to approve the price, it said to Dwr Cymru: that's up to you, you have to do it, we will look at it afterwards but we are not going to sign it off. So that was fair enough.

But when it was asked to bring its expertise to bear on the issue, it didn't think that what Dwr Cymru was

doing was unlawful. Indeed, in relation to the critical issue of the relationship between cost and price, and that's the essence of the case that one heard yesterday; various criticisms of how we went about assessing that relationship. Even after numerous hearings, numerous judgments of the Tribunal, the specialist regulator still found that the price that was quoted wasn't unfair relative to its view of the underlying costs.

Ultimately the Tribunal disagreed with it, took the referred work, changed some of the numbers in a way that it felt was appropriate and came to a different view. We say it is highly material that the expert body, even at that late stage, did not consider that what we had done was wrong, let alone so wrong that the only reasonable inference you can draw is that this was a deliberate act of outrageous conduct on our part.

A small point we add in relation to this is: during the Tribunal proceedings, in its first notice of appeal -- and I don't need to take you there, but it's not in dispute that Albion submitted that the right price was somewhere between 0.8p per metres cubed and 2.1p per metre cubed. That's at folder 5, tab 230, at paragraph 19 of its notice of appeal.

Now, those submissions were no doubt advanced in good faith. We are not saying there was anything wrong

in Albion advancing those submissions, but they turned out to be hopelessly wrong. They were far more wrong than we were. I am not making any point in relation to the specifics of balancing one set of wrongness against the other. What they do demonstrate is that even a company such as Albion, of which there is no suggestion that they had any nefarious intent in relation to their figures, came up with totally different figures from the figures that you ultimately judged to be lawful. One can't infer that there is anything bad that that they were doing, one can't infer that because our numbers are different that we were acting inappropriately.

So against that I'll then turn to the pleaded case, which is set out in the particulars of claim at folder 10, tab 1. One begins at paragraph 63 with the law on exemplary damages, I don't need to detain you with that, obviously I've taken you to the 2 Travel case, but that's how their pleading begins. Then paragraphs 72 through to 78 contain the substantive allegations that are made against us, and they appear to be, in essence, that we calculated that the benefits of our unlawful conduct would be greater than any loss to Albion. One finds that at paragraph 77. And that our unlawful conduct in this regard was that we tried to exploit

Albion. One sees that at paragraph 72. Presumably what exploit means here is we tried to charge a price that would provide us with supernormal profits, and that also we tried to drive Albion from the market. That's also at 72. Then there is a further point made at paragraph 78 about the extreme disparity in size between the parties. Now, the last of those points is plainly not a single basis for granting damages and that has not been pursued, so I am not going to address that issue further.

As regards the primary case that is set out here in the particulars of claim, that's one of a cynical calculation of the sort I've described, we say there is no evidence before this Tribunal that Dwr Cymru thought that the benefits of its conduct, now said to be unlawful, would outweigh any loss accruing to Albion or indeed any fine they would have to pay on top.

We say it's simply not sustainable when you consider what was actually going on at the time. We had the regulatory context, to which I have already referred you. We have also got the fact that Dwr Cymru didn't have a sufficient profit motive to engage in the alleged behaviour. What Albion says about this is they say that our profit motive was particularly intense at the time of March 2001 because there was a sale to

Western Power -- sorry, by Western Power Distribution of Dwr Cymru to the holding company, Glas. But that's wrong, it's addressed by Mr Edwards at paragraphs 38 to 40 of his second witness statement, and he makes the following points, and I am just going to go through them rather than take you to the evidence.

Western Power sold Dwr Cymru to Glas, its parent, with completion in 2001. However, the sale to Glas Cymru was announced in November 2000 and from that point it was known that Glas was going to be on a not for profit basis, and Western Power therefore had rather limited incentive to try to increase Dwr Cymru's profits as it was not at all clear that this was going to improve the sale price. But it became even clearer after early February 2001 when the price was finally fixed for the sale. So having secured a particular fixed price, at that point there was no further incentive for, even if there had been one in the first place, which we say there wasn't, for Western Power to continue to seek to secure excessive profits for its successor business, this ethical non-profit making company. So in that context again we say that adds weight, we are not saying it's decisive, to the circumstances that need to be taken into account.

The third point, and this is probably the smallest

of the three, but it's worth just noting: it would be unusual, we would say, for a company that was cynically striving to drive another out of business to voluntarily agree to pay interim relief. The initial interim relief that was paid was paid voluntarily, there was no order made by the Tribunal requiring it, the president, as I understand it, encouraged the parties to reach some agreement and an agreement was reached.

Now, again, it's not a point on which I place a lot of emphasis, the earlier points are the more important ones. Again, it is not behaviour consistent with the kinds of conduct that's levelled against us.

Now, concern has been raised by Albion about the fact that we engaged -- Mr Edwards, rather, engaged in a number of refinements to his analysis. I have addressed Mr Edwards' evidence explaining why he says he was acting in good faith, and again it's the case that there are multiple different methods that one could potentially employ in a case such as this. Albion, for its part -- and one sees this from The Interim Judgment, I'm not going to take you there, but just for your note, folder 12, tab 11, page 3790 -- at that point in the proceedings Albion was advancing six different methods to the Tribunal as to how one should go about calculating prices, and even after multiple hearings and

judgments Ofwat was using three different methods in its referred work. The Tribunal, having reviewed that referred work, also used three different methods.

So we say reasonable parties acting in good faith can disagree on appropriate methodologies. Indeed, the Tribunal recognised expressly in the Unfair Pricing Judgment, and I'll just quote it to you, it's paragraph 103, folder 13, tab 21:

"There is no single correct or completely straightforward way in which to calculate costs in the water industry. There will always be a degree of judgment involved in choosing which cost methodologies to apply when assessing the lawfulness of an access price."

Madam Chairman, you don't need me to tell you that anyone who has had the pleasure of being involved in a pricing reference, for example, under Section 193 of the Communications Act will know that reasonable parties can disagree intensely in relation to issues of cost allocation, without engaging in any nefarious conduct whatsoever, but they manage to have very different views about the process of allocating costs. It is in the nature of the beast.

So what do we find is advanced by Albion coming out of their particulars of claim? We have seen the particulars of claim and the essential claim which is

being advanced there is of cynical disregard, we say there is no evidence for that. What we have instead, to fill that evidential vacuum, is a series of new allegations made about discrete issues that they say illustrate that one can infer from these particular different points that we were ultimately up to no good.

There are points that we have heard Mr Beard explain but none of these are pleaded. Firstly, that Mr Holton said misleading things about sludge and the basis of our charges to non-potable customers; that's one of them. It's also alleged that we tricked Ofwat in 1996 to recommend a "minded to" price of 26p per metre cubed, and it's alleged that we engaged in a process of sanitisation of the documentary record. None of those has been pleaded.

Yesterday we heard Mr Sharpe emphasise various other, and again, I say in passing, unpleaded claims. Those included that we started from our regulated price for potable water which used the costs for bulk distribution of potable water, knowing that that was in some sense an absurd methodology, he effectively suggested. Another complaint was made that we used the 30 per cent figure for the proportion of treatment costs attributable to partial treatment as compared to full treatment, and when that had been based on talking to

managers, and he said that later on we saw that the true figure was 15 per cent, and that was another of the points that he relied upon.

He also relied upon the fact that the price paid was higher than that to Corus. There were two points, finally, at the end of yesterday, that were also canvassed, and the Tribunal, in my respectful submission, very rightly indicated its approach in relation to those; they were the legal advice point, alleging we didn't seek legal advice, and also that we misled Ofwat in relation to a section 26. The Tribunal indicated yesterday it was not inclined to hear further on those, and I don't propose in the remaining few minutes this afternoon to deal with those any further.

Mr Beard is going to be addressing you in general on the unpleaded issues point at some point obviously before we hear from our witnesses. So what I say now is without prejudice obviously to that. But to take the points that were emphasised by Mr Sharpe yesterday, the first is the use of potable bulk distribution costs, and it's suggested that we must have known this was a totally absurd way about calculating a price for non-potable bulk distribution.

If you could please go to folder 8, tab 274, page 2399. Now, there has been -- this is the -- if we

turn back, and one looks at the front page, this is the final report to the CAT, so this is the referred work report. There has been a substantial discussion in it of how to go about approaching the cost of the bulk non-potable mains. One sees the conclusion of that at paragraph 7.83, where the Authority concludes that it is:

"... therefore of the view that bulk potable mains greater than 600 mm is the best comparator for bulk non-potable mains, and for this referred work the Authority considers the bulk potable comparator, if expanded to include some smaller 300 to 600 mm diameter pipes is also relevant for non-potable mains.

"This would mean that the bulk potable comparator is not strictly based on equivalent pipe size but on equivalent pipe function, ie moving water from bulk from water source to large centres of demand. This bulk distributions function would embrace all pipes that are greater than 600 mm in diameter and some pipes that are between 300 and 600 mm in diameter."

So, far from endorsing the point made by Mr Sharpe, this is the expert regulator who considers it is quite fair and appropriate to start from potable bulk distribution as a means of deriving a price for non-potable bulk distribution, and that the two -- one

is a good proxy of the other.

Now, in the Unfair Pricing Judgment, which I have already taken you to previously, there is no criticism of that approach by the Tribunal. The question is: well, why does one start with potable if what you are aiming to do is calculate a price for non-potable? The reason is because this is a business that is highly regulated and is regulated down to cost, in respect of its potable supplies, and so that's where it has the most robust information about costs that's been looked at and analysed by the Regulator. So that's an obvious starting place, so you would want something that's a robust audited cost basis for working out the costs, and that's what was done and that was what was accepted by the Authority here.

So we say Dr Bryan may well disagree with the Authority's approach. He no doubt has a number of arguments to say: well, they are wrong to do that, they should have adopted a different approach. But we say it can't be said that what we did is so obviously wrong, that it's demonstration of an outrageous and contumelious approach, because it's precisely the approach that the Regulator adopted in its own referred work.

Just for your note, a question was raised by

the Tribunal yesterday about the issue of starting from a price to ultimately end up at costs, and I don't want to take up too much time with it now, but for your note, in folder 5, tab 227, page 1498, paragraph 258, there is an explanation there in the decision about how one starts with revenues and a price based measure and comes ultimately to findings about costs.

The reason for that was, it was very fairly put by Mr Sharpe yesterday, that this is a regulated business and the starting figures that we have -- that the Authority was focused upon were figures that were regulated and included in each of the various measures that were building up. They included a return on capital, and that's all you get. Because it's regulated business, you don't get a further profit margin, as long as there is a cap on each of those elements. That's how one constructs a price that's why one can do it, subject to certain adjustments making sure that in fact you do exclude sources of revenue that relate to other services and things. There are subtleties to it, but the essence is you can move from price to cost and vice versa as long as you are taking account of the return on the applicable assets.

Another criticism on which particular emphasis was placed yesterday was Dwr Cymru's use of the 30 per cent

figure for treatment costs, and again it was suggested that one can infer from that that was so out of the park that it must have indicated that we were acting in the way alleged. If one goes, please, to bundle 5, and indeed this is tab 227, so this is in fact the same reference as I just gave you, but this is the part I would like to actually show you, and go to page 1506, one sees here an explanation at paragraph 294, the bottom of 1506, through to 296, as to how the 30 per cent figure came to be revised downwards to 15.2 per cent.

The key point to take from this is that this was in the context of the Authority's assessment of whether there had been an abuse. So what we are looking at here is the Authority's decision that is subsequently challenged. In that context, that occurred after Dwr Cymru had done some further work on treatment costs, and Dwr Cymru brought it to the Authority's attention, notwithstanding obviously it was harmful to its case, that the 30 per cent figure, at that point it took it the view that was no longer the appropriate figure and in fact on the basis of more robust new evidence it should be 15.2 per cent.

So this is Dwr Cymru being entirely candid, and itself driving the figures down. If one then goes on to

the referred work, which is some years later, we see that the approach had become somewhat more sophisticated again. Initially we started with the relatively unsophisticated 30 per cent based on talking to managers. There was then a further analysis which then gave us this 15.2 per cent figure. Then in the referred work there was yet more drilling down and the figure was then split out into CAPEX and OPEX. If you could please briefly go to folder 8, tab 274, paragraph 7.36, I don't have a page number. It's page 2389. Whilst you are looking for that page, I notice that we are approaching 4.30. I think in common with Mr Sharpe, I think I have about the same amount further to go as he did yesterday so I will be overrunning by about 15 minutes, maybe less.

THE CHAIRMAN: Yes. Let's have a five minute break, then, for the transcript writers, and then we will complete your submissions this evening.

MR PICKFORD: Of course.

THE CHAIRMAN: We will come back in five minutes.

(4.30 pm)

(A short break)

(4.35 pm)

MR PICKFORD: Madam, members of the Tribunal, I'm very grateful for the indulgence, and I will endeavour to

move swiftly through.

The point I was on was the 36 per cent treatment cost figure, and we have already gone some way through that, and we have seen the reason why the figure came down was that Dwr Cymru drew attention to the fact that it had done some new analysis. Then we are now at referred work stage, so this is some years later, and Dwr Cymru has done more analysis by this point in time, and so we see you should be on page 2389 under, "Water treatment". So you can see we are dealing with the same subject.

At 7.37 there is a reprisal of what has happened previously. So we see Dwr Cymru had used a single weight of 30 per cent, and in the decision the director adopted 15.2 per cent for non-potable water treatment weight, but noted it was surprised at the scale of treatment weighting factor reduction. The Tribunal had stated that Mr Jones had queried the figures of 3.2p per metre cubed used by the director, and explained that that may be an understatement since it is based on a comparison of the relevant CCC values of selected treatment works. So there is quite an technical explanation there as to what may potentially have gone wrong.

We see at 7.39 that Dwr Cymru has updated its

analysis on non-potable treatment cost weights, and it now splits out into two different categories, it splits it out into capital costs and operating expenditure.

For capital costs it gets a figure of 33.6 per cent and for operating expenditure it gets a figure of 20.8 per cent. Then the Authority goes on to analyse those figures, and in paragraph 7.42 it concludes in relation to capital cost that, after analysis, the increased capital cost weight should move to 40.3 per cent, and if one turns over the page and looks at paragraph 7.45, we see that the Authority increases the operating cost weight by 10 per cent to 22.9 per cent.

Now, I'm not purporting to explain to you the details of this highly technical operation. My point is simply that what we find in fact is that Dwr Cymru actually went rather too far against itself in the work that it provided for the decision, and when it provided the figure of 15.2 per cent, the Authority was surprised at how low that was. In fact it turns out it was too low, because they then arrive at different figures, when we finally get to referred work, when our exercise has been done in a yet more sophisticated way.

For your note, but I am not proposing to take you there, there is further explanation of why there was

an error leading to the 15 per cent figure contained in the witness statement of Mr Jones. It's the third witness statement, and the reference is bundle 6, tab 244, page 2052B. So that's what we have to say on the 30 per cent figure. Again, nothing to see here in terms of outrageous conduct.

The next point that was emphasised by Mr Sharpe yesterday was in relation to the Corus price, and it was said: look, the Corus price is much less than was being charged to Albion, and that must show that there was something very inappropriate going on here. This was dealt with in The Interim Judgment, which is at tab 11 of folder 12, and the page is 3908.

At paragraph 420 under the title, "F. Price discrimination", the Tribunal is here considering allegations that were made by Albion about price discrimination. It's the second of those. There were three of those one concerning the Elan Valley supply agreement, two to Corus and three to various other companies, and it is the second of those that we are concerned with here. That's dealt with at paragraph 422.

What in essence is being said here is that there were factors which justified a difference in price to Corus, in particular that the Corus lagoons perform

a flow balancing function and it was accepted that that could justify a price difference. Ultimately what the Tribunal said about this allegation, which was raised by Albion in its notice of appeal, is it did not consider it necessary to make further findings on the question of price discrimination as a separate hill(?) of abuse or to consider setting aside the decision on that self-standing ground, and the decision had decided that there was no price discrimination abuse.

So this issue has already been canvassed and rejected by the Tribunal as a ground for a finding of abuse, let alone a finding of exemplary damages.

Madam, I've tried to focus in that discussion on what we took from yesterday being some of the key points on which Mr Sharpe was focusing his submissions. Obviously throughout yesterday there are a number of points that cropped up here and there, and to some extent whether he is allowed to pursue those is yet to be determined. So that's all I have to say on those aspects of the claim. So in conclusion in relation to exemplary damages, and I am -- in relation to causation of exemplary damages, and I am nearly done but not quite, we say that not withstanding the very serious nature of the plea, Albion's exemplary damages claim is far-fetched and it does not have proper evidence in

support. When one takes account of regulatory context, the complexity of the issues, the difficulties that different expert bodies have with them, and the fact that they come to different views, that really reinforces, we say, the hollowness of this claim which has been built out of nothing. So we say this is not a case, unlike in 2 Travel, where exemplary damages are appropriate.

Just very briefly, there are two final topics, one is quantum on exemplary damages if I am wrong, and the other is interest. I can be quick on the first and probably even quicker on the second.

In relation to quantum, what is said by the claimant in this case is that penalties should be set by reference to the penalty that the OFT would normally impose in the event of a single infringement of the chapter 2 prohibition. I apologise if this was some confusion in relation to the final part of going through the 2 Travel case, but I nonetheless read out the relevant extracts from that case which make quite clear that is not the right approach. That was certainly the approach suggested to the Tribunal by the claimant, unsurprisingly, because that generates very large sums of money, and the Tribunal said: no, this is a different jurisdiction, we are not going to apply the approach

that we would apply if we were fining and the monies were going to the public purse. Different jurisdiction, different principles. So we don't understand why they are making that submission in the light of 2 Travel. It seems to us to be totally contrary to authority.

The second point that they make, and this is obviously only in the alternative if I am wrong on the submission I have just made, they say that not only should the Tribunal approach this in the way that the OFT would for a fine, but moreover you should apply a 1.5 per cent minimum deterrent on the basis that they say that's what the OFT has done in a decision concerning cover pricing, and they refer in pricing to makers. Again the Tribunal may well be familiar, certainly, Madam, you are of course familiar, with the minimum deterrence threshold that was adopted by the OFT in its 2004 decisions concerning collusive tendering for flat roofing surfaces in various parts of the United Kingdom. Again, later in a further decision concerning bid rigging in the construction industry.

The Tribunal will be well aware that in a series of appeals against the construction decision, of which, Madam Chairman, you decided a number, it was roundly rejected that the imposition of the minimum deterrents threshold by reference to a uniform percentage turnover

was an appropriate means of establishing a fine. What the Tribunal said in a number of cases is that that approach is disproportionate and contrary to the OFT's own fining evidence which says that any deterrence has to be proportionate and that one can't simply take a figure from one case, which turned out that it was a 1.5 per cent threshold, and then read that across and say: there you go, that's the answer in this case.

That has been found to be wrong, and that is precisely the point that seems to be advanced by Albion as to how the Tribunal should go about calculating the fine -- sorry, calculating the exemplary damages, a Freudian slip, but a relevant one nonetheless in this cases. So that it the second point, it is obviously in the alternative to my primary submission, is that all of the fining guidance is simply not the right way to go.

Finally, what is the right approach if the fining approach is wrong? Well, there were three factors that were mentioned in 2 Travel, and we say there are three analogous points to make here. The first is that exemplary damages need to bear some relation to compensatory damages, as Madam Chairman, you averted to yesterday when considering the issue of developing a model for the compensation part of the case, and for the reasons that I have explained this morning we say

that that should be very low, for obvious reasons.

Secondly, we say that the Tribunal should take account of the very serious nature that any signal of exemplary damages would send, even in a very, very small nominal amount, and the reputational damage that that would cause. Therefore, in order to punish and deter, exemplary damages do not need to be set at a substantial level, because not only are they generally considered to be indicative of outrageous conduct, but here we have an ethical, non-profit making organisation which one can infer would treat any award of exemplary damages even of a very small sort very seriously.

The third point to make is that, and it follows from the second point I have just made, that the Tribunal should also bear in mind the harm that would be caused by any substantial award for exemplary damages, because where does it come from? In a non-profit making organisation, it comes ultimately from the customers who have transferred to a private undertaking. We say that that should also be weighed in the balance in determining in the alternative to my primary submission that there should be none at all, what kind of award it would be appropriate to make. This is not a fine going to the public purse, it is almost the opposite, this is ultimately customers of a non-profit making organisation

ultimately having to pay money through the company to another private company.

So in the light of all those considerations we say in the Tribunal were minded to award damages they should be very low.

THE CHAIRMAN: The first point needs to bear some relation to compensation. Doesn't that work as a sort of inverse proportion, that if the compensation turns out to be very low, then you need more exemplary damages than you would if the compensation damages turn out to be high? Isn't that --

MR PICKFORD: No, Madam, that's certainly not the principle that was explained in 2 Travel. I am happy to take the Tribunal back to it, but you may feel in the circumstances of time it's not suitable to do so now. In that case, the compensatory award was, from recollection, around £30,000 to £40,000, and the exemplary award was £60,000. So they were close together, it was not -- the suggestion was not being made that there is a seesaw and that when one is small the other has to be big. It's clear in 2 Travel that they are saying there needs to be a positive correlation between the two, and that if the damage that's actually been caused really is quite small, then that is a factor leading you to the conclusion.

THE CHAIRMAN: All right, we will need to check that.

MR PICKFORD: Thank you.

Yes, the words used by the Tribunal is that.

"They have to bear some relation to the compensatory damages being awarded," which in this case are low, "Some relation to". We say that implies a positive relationship. If the Tribunal had meant an inverse relationship that would have been much clearer but that's not the natural meaning to be ascribed to those words.

So turning very briefly to interest, our position on this is simple: in relation to the compensatory damages claim we say if interest is to be awarded at all it should be simple interest, following the approach in Cardiff Bus, which awarded simple interest. In that case the Bank of England base rate plus 2 per cent. We say that, in accordance with ordinary commercial practice, the Bank of England base rate plus 1 per cent would be entirely sufficient. But in the alternative we would fall back on the 2 Travel approach of the same rate but plus 2.

We say that there is no good reason to set a wholly different rate such as 8 per cent, which is what the claimant asks for, which is not ordinarily used in commercial litigation.

So that's simple interest.

The next issue is compound interest, there is also a claim for compound interest by the claimants, and they have provided, we say, no good reason for a radical departure from the normal approach to interest that would ordinarily be applied. They refer, in passing, to the case of Sempra Metals v Commissioners of the Inland Revenue, and that was a fairly unusual case, it involved the early payment of tax, and the use of money between the time of payment and the time when payment actually lawfully fell due. It's considered in a Government response on the issue of compound interest, and whether the Government should act to change, develop the law in this regard, and that's in folder 15, at tab 18.

This is the last document I am proposing to take you to. If the Tribunal please could find page 6342C, what we see there is in the paragraph at the bottom of the page on compound interest, the Law Commission has been recommending that the Government should consider introducing the awards of compound interest, and the Government's also noting the decision of the House of Lords in Sempra Metals where compound interest was awarded in that particular case, and that was a restitutionary case. It says that:

"We don't think the case has been made to introduce compound interest as the norm for the generality of larger cases as recommended in the report. This would be a major step that would require further consultation and a more detailed and quantified impact assessment than the Commission was able to provide. We also think that it would be necessary first to develop a readily accessible web based programme to make the necessary calculations."

Now, that effectively records where we have got to, the state of the law. There are isolated examples such as in Sempra Metals, but there is certainly no general approach that it's appropriate to award compound interest.

The final point in relation to compound interest is that even if there were, it would certainly need to be properly pleaded. One would need to set out the basis on which it is said that it is appropriate to award interest because it would need -- what the claimant would need to do is demonstrate that they have in fact lost out on the use of money at a particular rate, because where -- in the case where it has been awarded, it's been awarded as damages, not as the interest rate to then be applied to take your damages up to a current value. It's damages in its own right, and we don't see

that anywhere in the claimant's pleading at all. So we say that compound interest is a non-starter.

Finally on exemplary damages, the position is correctly set out in Cardiff Bus at paragraph 597, where the Tribunal says that it's not appropriate to award compound interest in relation to exemplary damages, indeed any interest in relation to exemplary damages because, as a matter of, they say, of logic and principle, it's a punitive award that is being judged now, and so interest does not apply.

So, Madam, that is an explanation of our position on this fairly complex case. For the reasons that I have given, we say that the claim fails in both its parts, and unless I can be of any further assistance?

THE CHAIRMAN: No, thank you, no further questions from us. Thank you very much. It's been a long day, Mr Pickford, but you have coped admirably, if I may say so, in the absence of your leader.

Yes, Mr Sharpe.

Housekeeping

MR SHARPE: At the risk of elongating the day, housekeeping.

My understanding is that Dr Bryan will be cross-examined tomorrow morning for up to two days. my friend has intimated that he will then -- or Mr Beard perhaps -- make his application to exclude certain

matters to debar me from cross-examining various witnesses on various matters. That is likely to take place on Friday morning.

It crossed my mind in considering this that some of the matters raised by my friend in his skeleton -- and in particular in relation to the new quantum element, 14, 15, 16p -- was never pleaded in the defence and we were ambushed, as it were, in the skeleton itself.

The point that came to the surface today, once again floated for the first time in the skeleton in relation to the so-called exemption matter, that too was never pleaded as a defence.

Now, for my part I regard this type of skirmishing as a complete and utter waste of time. The evidence has been put forward, it's been revealed, disclosed, and it's considered relevant by all the parties. What I am looking forward to is an opportunity to cross-examine the witnesses on the veracity of their evidence and for them to explain to you what they did and why they did it, and for you, the Tribunal, to make up your own minds on the basis of what you hear.

Therefore it seems to me this type of cross skirmishing on pleadings is really a waste of time. I will endeavour to persuade my learned friends that they should share my view and not make their

application.

If I should fail, may I, in the jargon of this case, lay a marker that it is likely we will be making a cross-application and occupy you usefully in relation to those matters. "Usefully" perhaps ironically, for the benefit of the transcript.

MR PICKFORD: Madam, I can assist Mr Sharpe in relation to one of his putative applications, that it perhaps wouldn't be advisable for him to make, which is that we didn't plead the point about alternative prices, it's pleaded at paragraph 147 of our defence. So that's perhaps one application he will not need to make.

MR SHARPE: I will consider that, thank you.

THE CHAIRMAN: So we start tomorrow morning at 10.30 with Dr Bryan, is that right? Is there any reason why we should start earlier? We seem to be on track at the moment.

MR PICKFORD: Madam, we have quite a lot to get through with Dr Bryan, but I am obviously conscious that days with the witnesses are quite tough ones, as indeed today has been in terms of canvassing issues. We do of course have one day towards the end of this period and if we overrun we could potentially use it. We agree that it would be preferable, if we can, to allow the counsel in this case, and those behind, instructing solicitors, to

prepare written submissions for that. That was something we decided upon at the last moment. Originally as programmed we were going to use all of the days for live evidence and submissions, and so we would suggest that if we do overrun, at least there is some buffer already in the timetable.

THE CHAIRMAN: So we will reconvene at 10.30 tomorrow morning.

MR PICKFORD: I am grateful, Madam.

(5.00 pm)

(The court adjourned until 10.30 am on Wednesday, 17 October 2012)

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