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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Case No. 1031/2/4/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

20 November 2006

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)

THE HONOURABLE ANTONY LEWIS  
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**ALBION WATER LIMITED**

-v-

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

**AQUAVITAE (UK) LIMITED**

1045/2/4/04

-v-

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

**ALBION WATER LIMITED**

1046/2/4/04

Supported by

**AQUAVITAE (UK) LIMITED**

-v-

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

Supported by

**DŴR CYMRU CYFYNGEDIG**

and

**UNITED UTILITIES WATER PLC**

—————  
**PROCEEDINGS**

## APPEARANCES

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

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

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

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

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

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

7 MR. ANDERSON: We have.

8 THE PRESIDENT: Good morning, Miss Finn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 MR. VAJDA: Yes.

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

1 MR. VAJDA: Yes, there is nothing confidential about this. If I could start by saying this: it is still  
2 not entirely clear to us whether what Albion wish is effectively a new bulk supply price, or a  
3 common carriage proposal. But, in a sense – and Mr. Thompson will no doubt address the  
4 Tribunal on that later on – this proposal in a sense does not depend on one or the  
5 other ----

6 THE PRESIDENT: Yes, it is not entirely clear to us – the central problem would seem to be the  
7 same, which ever it is, i.e. the price or the cost or the charge for transporting the water remains  
8 the same, whether it is a common carriage price or a bulk supply price I would have thought,  
9 or at least there a number of common elements, put it that way.

10 MR. VAJDA: There may be common elements. As you know in relation to the bulk supply price  
11 that is a determination under ----

12 THE PRESIDENT: They are all signs of procedural differences, of course, we know all that.

13 MR. VAJDA: Yes. What this proposal in short is intended to do is, if I can put it like this, to  
14 maintain the *status quo* as between Dŵr Cymru and Albion, pending a determination of a bulk  
15 supply price by the Authority, and I will come on to in a moment what the position would or  
16 might be if common carriage were required.

17 I should say also this, that so far as the bulk supply price is concerned, that if that is what  
18 Albion wished to have that, of course, falls outside of the scope of the present procedure,  
19 which is in relation to the access price and so this is formulated as an agreement which, in a  
20 sense, falls outside the scope of these proceedings but would seek to address the point that you,  
21 Mr. President, put to me last time about a failsafe mechanism until one gets to the next step.

22 THE PRESIDENT: Well, Mr. Vajda, again, we are not quite sure what one means by “these  
23 proceedings” because we have two sets of proceedings. We have the main Appeal, which we  
24 have all been preoccupied with, but we have also got the order in the interim measures’ case,  
25 and the interim measures’ case order is an order about the bulk supply price, and there is I  
26 think another application to vary that order, and that is a separate set of proceedings altogether,  
27 I think, from the main proceedings.

28 MR. VAJDA: I can deal with the jurisdictional points later; I do not want to get into a debate about  
29 that. We would say that the interim measures that have been granted so far were interim  
30 measures which supported, as it were, the main case. They have to fall within the context of  
31 this Appeal, and they were granted in the context of the Appeal and they were granted on the  
32 basis that because there was not a common carriage proposal that the simplest way of  
33 preserving the *status quo* was to do it in the form of a ----

34 THE PRESIDENT: But it is an order about the bulk supply price?

1 MR. VAJDA: It is. I may need to address the Tribunal later, and I addressed the Tribunal last time -

2 ---

3 THE PRESIDENT: yes.

4 MR. VAJDA: We say that these proceedings are not about the bulk supply price – true it is that the  
5 interim measures took the form of a price cut off the bulk supply price, but that is a convenient  
6 way of preserving the *status quo* in relation to the dispute on common carriage.

7 As I say, the first recital effectively simply indicates that Albion Water continue to acquire  
8 bulk supply agreement. The second recital I think simply recalls the fact that we have seen  
9 that Albion are not happy with the current bulk supply. Of course, you will remember that was  
10 an agreement which, in any event expired in 2003. The third bit is that the Tribunal would  
11 discharge the interim order, and I will explain the reasoning and thinking behind that in a  
12 moment. That would then be replaced by the following agreement between Dŵr Cymru and  
13 Albion - first that Dŵr Cymru shall continue to provide that the bulk supply - in other words,  
14 the supply will go forward; secondly, both parties agree to refer that dispute as to terms which  
15 the bulk supplier is to make to the Authority for determination under the Water Act 1991;  
16 thirdly, the determination made by the Authority will have affect as a bulk supply agreement  
17 from the date of this agreement - in other words, it will be back-dated to the date of this  
18 agreement. Mr. Anderson has informed me this morning that he is not entirely sure that the  
19 Authority has power to make a retrospective order. I do not think that terribly matters because  
20 we would certainly agree as between the parties that it could be backdated to the date of the  
21 agreement. Then, (4) and (5) are the medium terms of preserving the existing position, which  
22 is the Dŵr Cymru would issue no invoices to Albion; the meters would continue to be read.  
23 Then, Albion would be making what are described as payments on account. So far as the price  
24 for the non-potable water is concerned - if one just goes over the page in bold - one sees that  
25 that price is at the same rate that is currently being paid in accordance with the interim order of  
26 the Tribunal, i.e. the 27.63 less the 2.05 discount. Those would be payments on account.

27 THE PRESIDENT: What does this achieve, Mr. Vajda, other than continuing where we are at the  
28 moment?

29 MR. VAJDA: Well, what it achieves is that it ensures that Albion will continue to pay no more  
30 than it is paying at the moment for water to be supplied to Shotton, and that preserves, if you  
31 like, the position until the Authority takes a new decision.

32 THE PRESIDENT: That is just where we are at the moment. It does not take things any further  
33 forward, does it?

1 MR. VAJDA: Well, it does, with respect, because if Albion say that what they wish to have is a  
2 bulk supply price, these proceedings come to an end, and the concern of the Tribunal, as  
3 expressed to me on a couple of occasions last time, was that there is a sort of failsafe  
4 mechanism prior to ----- There has to be a new determination, and the new determination  
5 either has to be in relation to an access price if common carriage is the way forward, or a new  
6 bulk supply price. So far as the bulk supply price is concerned, the only person who can  
7 determine that is, according to statute, OFWAT - there is nobody else and this is not  
8 something that is ----

9 THE PRESIDENT: But you could agree it, Mr. Vajda, you could agree it?

10 MR. VAJDA: No, it has to be determined ----

11 THE PRESIDENT: You can agree between the two?

12 MR. VAJDA: We could have, we are in dispute and so the appropriate Body to determine this is  
13 OFWAT under the powers of s.40.

14 THE PRESIDENT: Yes, of course.

15 MR. VAJDA: But the purpose of this proposal is to ensure that Albion is in exactly the same  
16 position so far as payment is concerned as it is under the interim order which was granted in  
17 the context of an appeal in relation to whether or not the first access price was excessive, so it  
18 bridges the gap between the position today and the date on which OFWAT make the  
19 determination.

20 THE PRESIDENT: But it is not facing up to or really advancing at all the question whether there is  
21 a commercial settlement that could be made in this case – maybe there is not, in which case the  
22 whole thing takes its course, but simply to say we will go on where we are at the moment does  
23 not really convey to the Tribunal any serious willingness to examine whether there is a  
24 commercial solution in sight. It is not a criticism; it is just a statement of fact.

25 MR. VAJDA: Yes, say well the bulk supply price ----

26 THE PRESIDENT: Maybe it is a statement of fact.

27 MR. VAJDA: -- as the Tribunal knows is calculated by a reference to a number of factors including  
28 LRMC, and there is obviously a question and the question for the Authority to determine is to  
29 what extent, if at all, there is a read across between what the Tribunal has said in relation to the  
30 access price and bulk supply. Insofar as my clients are concerned, as you know, we have an  
31 application to appeal the decision of the Tribunal but this is wholly without prejudice to our  
32 appeal and is intended to preserve the price that Albion have got under the interim order of the  
33 Tribunal.

1 THE PRESIDENT: You told me last time that that would go on anyway, you were not making any  
2 application to change that, that would carry on in any event.

3 MR. VAJDA: It would carry on in any event, but that was obviously in the course of the Tribunal's  
4 proceedings had not ended last time, and obviously when the Tribunal's proceedings end the  
5 interim order will inevitably end.

6 THE PRESIDENT: They will not, if the Appeal goes on – or even if it does not go on – unless the  
7 proceedings come to a complete stop and nothing is remitted and nothing is appealed, which  
8 may be a different situation, of course we shall make interim orders if there is an Appeal and if  
9 there is something to be remitted; we cannot just leave it, leave the company to go to the wall  
10 in the meantime. The proceedings are still on foot, if you appeal to the Court of Appeal, the  
11 Court of Appeal may send it back to us as the Tribunal is still prospectively seized of the case.

12 MR. VAJDA: Yes, but in my respectful submission if the Tribunal were to grant permission to grant  
13 permission to appeal and that goes to the Court of Appeal the proceedings in front of the  
14 Tribunal have come to an end.

15 THE PRESIDENT: Not as far as interim relief is concerned.

16 MR. VAJDA: Well we may have to have a debate, but certainly ----

17 THE PRESIDENT: We would have to examine whether there was still a case for interim relief, you  
18 told me last time that the order would carry on?

19 MR. VAJDA: The order would carry on pending the determination of matters before the Tribunal. I  
20 was not suggesting that the order would carry on until an appeal was heard by the Court of  
21 Appeal.

22 THE PRESIDENT: I think you have to assume that we are not going to allow, even if we gave you  
23 permission to appeal, we would take a lot of persuading that the interim order fell way pending  
24 the appeal.

25 MR. VAJDA: Well obviously if I get into that I may need to address the Tribunal on that. What we  
26 are saying is that this proposed agreement would, in our view, obviate the need for any interim  
27 relief because, as I say, Albion would simply be paying what it is paying at the moment and its  
28 position would be preserved. The advantage also is that any determination that the Authority  
29 make we would agree to be backdated to today's date – the Authority have some doubt  
30 whether they can backdate – and we would be willing to live with that.

31 So with respect, this proposal does in our view carry things forward in the sense that it  
32 preserves the position of Albion pending a determination of the bulk supply, if that is what  
33 Albion wish, by the Authority and the only person who can determine that where there is a  
34 dispute is the Authority – that is what is set out.

1 THE PRESIDENT: The message I am getting at the moment is that your clients are not prepared to  
2 reach an agreement on the bulk supply price, they want a determination.

3 MR. VAJDA: Yes.

4 THE PRESIDENT: And that is where we are.

5 MR. VAJDA: Yes, that is correct and we are putting forward this agreement as, I think the President  
6 was looking for, as a form of safety net pending that determination.

7 THE PRESIDENT: Does it follow from that that they would not be prepared to participate in a  
8 mediation to settle this case?

9 MR. VAJDA: Yes, it does, we would say the appropriate Body to determine the bulk supply price  
10 under Statute is OFWAT, it cannot be done by somebody else.

11 THE PRESIDENT: But it could be done by agreement.

12 MR. VAJDA: It could be done by agreement, but in the absence of agreement the appropriate body  
13 is OFWAT, not a mediator, in our respectful submission.

14 THE PRESIDENT: The mediation would be with a view to reaching an agreement, but if your  
15 clients are not prepared to negotiate or mediate, then there is no alternative but for legal  
16 proceedings to take their course.

17 MR. VAJDA: Well, the person who is going to settle this dispute is OFWAT, and we respectfully  
18 suggest that OFWAT is in a much better position to settle this than a mediator.

19 THE PRESIDENT: A mediator does not settle anything, Mr. Vajda, a mediator simply helps the  
20 parties reach agreement.

21 MR. VAJDA: Yes. The parties are a long way apart and as the Tribunal knows we have an appeal  
22 pending, there are a number of matters in the proposal we do not accept. We are willing to  
23 have OFWAT determine the dispute and we are willing in the interim to offer this agreement  
24 to ensure that Albion maintain the benefit of the price that they have under the interim order,  
25 because what we say – and it may be that I will need to address the Tribunal when these  
26 proceedings come to an end – there is no jurisdiction for the Tribunal to continue any form of  
27 interim relief. We would say that the Tribunal’s concerns, which were expressed last time, as  
28 to what would then happen to Albion would be met by this proposed agreement, and that is the  
29 purpose. I accept that this agreement is not a settlement of the final issue but it is intended to  
30 act as the safety net in the interim between now and, if that is what Albion want, a new bulk  
31 supply price.

32 THE PRESIDENT: How long would it be envisaged that it would take this determination to be  
33 made?

1 MR. VAJDA: Well perhaps I could ask Mr. Anderson to address you on that because that is really a  
2 matter for him. I should say we are very happy for this formula to apply even if it is the case  
3 that Albion say they do not want a bulk supply price, they want a new access price. It is  
4 formulated on the basis of a new bulk supply price, because we think that is really what Albion  
5 want, but this could work equally well if Albion say “No”, they are not really interested in a  
6 new bulk supply price, what they really want is a revised access price.

7 THE PRESIDENT: So this can go ahead anyway?

8 MR. VAJDA: Yes, exactly, yes.

9 MR. ANDERSON: Could I just explain very briefly before Mr. Thompson responds to that the  
10 position as the Authority sees it and then I will ask Miss Finn to make one or two observations on  
11 timing, because I appreciate the time is running.

12 THE PRESIDENT: Yes.

13 MR. ANDERSON: There are two aspects to the case, the common access price is what we have  
14 been fighting about in front of the Tribunal. The Tribunal has reached its view and our  
15 interpretation of the view of the Tribunal is that we did not investigate that adequately, and  
16 before one could take a view on whether the price was excessive, whether there was a margin  
17 squeeze, there would be further work that would need to be done either by you, or by us until  
18 one reached that view. There is nothing we can do at the moment in relation to access price –  
19 you could refer matters to us under 19(2)(j) and we could look at it. It is, however, quite clear  
20 from the correspondence with Albion that there would be another solution to their problem,  
21 that would avoid problems of dominance and market definition and that would be a second  
22 bulk supply price determination. Now, that is something we can do and that is why we  
23 indicated in our letter that we would be prepared to look at any request that was made by the  
24 parties to determine a bulk supply price between them. Now, that is an exercise that happens  
25 outside these proceedings because – I say “these proceedings” I mean both sets of proceedings,  
26 because the interim measure is merely interim the determination of the main proceedings  
27 which is whether our Decision, which was a decision on the access price stands or falls. So we  
28 would be prepared to undertake a determination of the second bulk supply price, having  
29 regard, of course, to the Tribunal’s judgment and, of course, having regard to the Tribunal’s  
30 Judgment and, of course, having regard to the other matters we have identified in our letter.  
31 We saw a problem in that way forward in this sense - that the second bulk supply price  
32 determination on Section 40 - which would be happening outside the scope of these  
33 proceedings - did not lend itself immediately to any ongoing interim relief. We cannot grant

1 any, and, as it is a process that is acting, if you like, outside the scope of these proceedings, we  
2 saw difficulties in the Tribunal awarding interim relief.

3 So, we suggested in our letter that one way forward might be for Welsh to apply their minds  
4 to the possibility of some kind of interim arrangement pending that determination by the  
5 Authority. This proposal which Mr. Vajda has raised this morning is, as we understand it, a  
6 response to that suggestion. Now, how long a determination would take I am not able to say.  
7 But, perhaps Miss Finn could enlighten the Tribunal on how long that process could take.

8 MISS FINN: It is difficult to say exactly how long an individual determination would take. What  
9 we have tried to do is have a look at how long previous determinations have taken. They have  
10 varied depending on the level of information and the type of information supplied. They have  
11 taken, in the past, between four and a half and ten months. So, the longer one took twice as  
12 long as the shorter one. We do have a requirement to consult with the Environment Agency. I  
13 can say that the Authority would be committed to undertaking any such determination as  
14 quickly as we reasonably could, but unfortunately I cannot be any more precise than that. I am  
15 sorry.

16 THE PRESIDENT: The jurisdictional, Mr. Anderson, is surely affected by whether we send  
17 anything back under 19(2)(j) or not, is it not? I mean, if we simply remit something for further  
18 investigation, we are still seized with the case.

19 MR. ANDERSON: Of course, if you set aside the decision, then that of course would be one way  
20 of disposing of the proceedings because we say the decision of the Director was directed to the  
21 common access price. If it is the case that because no exemption is forthcoming from the  
22 Welsh Assembly government, or no deal is done between Albion and United Utilities that  
23 makes that a viable way forward, then it seems to us that it would be not a useful use of either  
24 the Tribunal's resources or our resources to be investigating the matters arising out of your  
25 decision.

26 THE PRESIDENT: We are not quite there yet, are we?

27 MR. ANDERSON: We do not know. This solution, though - the second bulk supply agreement  
28 solution - does give rise to an element of finality in the sense that we know that Albion would  
29 be happy with a bulk supply agreement, subject to price, and if no deal can be done between  
30 Welsh and Albion as to that price, there is a statutory mechanism for determining that, and we  
31 will undertake, as I say, that determination in as short a period as we reasonably can with, in  
32 the light of the suggestion that Welsh has now put forward, an interim arrangement that  
33 preserves the status quo until that determination is resolved. That, therefore, avoids the need  
34 for further investigation into matters arising out of a common access price, which, as we stand

1 here today, we are not at all clear is ever going to be a viable solution practically to the  
2 position Albion is in. That is why we have suggested the way forward that we have suggested.

3 THE PRESIDENT: We had better see what Mr. Thompson thinks.

4 MR. THOMPSON: I am grateful, sir. We only received this at about twenty-five past ten. So, we  
5 have had a limited amount of time to think about this. I think our immediate reaction is that it  
6 is not a particularly attractive proposal in that the main effect, as we see it, is to sign away all  
7 our Competition Act rights without any protection, either in relation to the margin that we  
8 would be offered, or in relation to the excessive pricing of which we have been complaining  
9 for approximately a decade, because the only reference to the Competition Act is a power in  
10 relation to interim orders - though it is not entirely clear on what basis such an order would be  
11 made, and there is no reference to the Competition Act, either under para. 2 or under any other  
12 part of the agreement, as far as I can understand it. So, the suggestion appears to be that we  
13 would effectively give up on the competition side of it and simply put our faith in the Director  
14 under the Water Act. In a sense, that would be a regulatory snake and ladder of a familiar kind  
15 in that the Section 40 determination, I think, was made in 1996 and effectively we would be  
16 invited to go back to the beginning - only without the Competition Act protections which are  
17 given to us by the Act and by the Tribunal.

18 So, that is the first reservation we have about it, but it is obviously quite a significant one,  
19 given where we are in these proceedings. As we understand it, Dŵr Cymru and the Director,  
20 or the Authority, are inviting us, after these proceedings, and this appeal, essentially to give up  
21 with no guarantee beyond the fact of the Judgment that anything would have changed. So, that  
22 is one concern.

23 The second concern is that financially although the status quo would be preserved vis-à-vis  
24 Dŵr Cymru, the Tribunal will be aware of the fact that the interim position, since 2004, has  
25 had two elements: one, a voluntary uplift given by Shotton Paper of 1.5p per meter cubed (  
26 which is approximately, I think, £100,000 per year) and that has obviously been a valuable  
27 source of funds for Albion Water ---- But, the Tribunal will be aware that that is intended to  
28 come to an end with immediate effect. So, the position here would be that in fact under this  
29 agreement Albion Water would be significantly worse off than under the current arrangements,  
30 and the effect of that on Albion Water's continued operations has been explained in Dr.  
31 Brown's recent witness statement.

32 The third issue - and I think it may be a technical issue - is that currently, as we understand it,  
33 Shotton Paper pays 27.63p plus 1.5p into effectively a form of joint account from which Dŵr  
34 Cymru takes 25.58p per metre cubed, and Albion Water takes 3.55p. As we understand it, the

1 suggestion under this agreement is that Albion Water should receive the money from Shotton  
2 Paper, but then would have to make payments within forty-five days. So, as we understand it,  
3 the effect of that would be to transfer the credit risk on to Albion Water so that if, for any  
4 reason, Shotton Paper did not pay within forty-five days, Albion Water would nonetheless  
5 have to come up with the sums for Dŵr Cymru, and so there is an element of disadvantage in  
6 that.

7 But, those are the three immediate points. Obviously, the most significant are the first two -  
8 the concern that this would effectively bring these proceedings to an end without the  
9 Competition Act being in play in relation to a further future determination, although that may  
10 not be something that is actually possible, but it does appear on the face of this agreement; the  
11 second would be that the effect would be that Albion Water would actually be worse off than it  
12 is under the current arrangements. So, the Tribunal is aware that we have made an alternative  
13 proposal to hold the ring going forward, which we think reflects the Judgment more accurately,  
14 and protects Albion Water going forward.

15 THE PRESIDENT: So, you have made alternative proposal?

16 MR. THOMPSON: In terms of the draft order that we have appended to our submissions, which is  
17 intended to cover both the level of price and to protect margin while giving an opportunity for  
18 the Authority to come to a position on the correct price, both in 2001 and 2004, and 2006,  
19 which we consider to be relevant for the future conduct of these proceedings and any related  
20 proceedings that may arise. So, that was our alternative proposal, but we do not see Dŵr  
21 Cymru agreeing to it. The flavour of Mr. Vajda's remarks does not suggest that they are  
22 going to agree to anything in terms of concrete outcomes. So, we think it is likely that the  
23 Tribunal in that situation will need to make a ruling of some kind - probably today, and  
24 certainly in due course.

25 So far as mediation is concerned, the Tribunal will be aware that we have made quite vigorous  
26 attempts to approach United Utilities, the Welsh Assembly, Dŵr Cymru and the Authority. We  
27 have written a number of letters and participated in meetings. We would be only too delighted  
28 to reach an agreement on this matter, but obviously we have certain rights, and we have made  
29 certain progress in these proceedings, and we cannot be expected simply to sign away all those  
30 rights. So far, the responses we have had do not make us very confident of a negotiated  
31 settlement. But, we, for our part, stand ready to take part in any sensible discussions, even at  
32 this late hour, if Dŵr Cymru showed some signs of wishing to meet us at least half-way or  
33 even one-tenth of the way in our direction. But, so far as we are concerned, we stand ready to  
34 take part in any agreement, but clearly we do not want to waste Sir David Edwards' time, or

1 anybody else's time, if there is no real prospect of an agreement. But, we would be very happy  
2 to take part in them. Is that helpful, sir?

3 THE PRESIDENT: I am still struggling a little bit with where this proposed agreement ---- how  
4 this proposed agreement advances us from where we are at the moment. Surely, the statutory  
5 procedures for resolving the bulk supply agreement price are there. They could be used at any  
6 time, or an agreement could be reached at any time presumably.

7 MR. THOMPSON: As I understand it, there is a quid pro quo for getting the Tribunal off Dŵr  
8 Cymru's back, as I understand it ---- as a quid pro quo for bringing the interim order to an end  
9 and -----

10 THE PRESIDENT: That is where we are heading with it. If we gave you permission to appeal, or  
11 even if we did not, Mr. Vajda, of course, you could still go the Court of Appeal. We would  
12 have to continue the interim order. I cannot get my mind around the idea that we have  
13 suddenly lost jurisdiction to make the interim order.

14 MR. THOMPSON: Could I simply say that as far as I understand it, Mr. Vajda has not yet got  
15 permission to appeal. Even if he did get permission, he would not be guaranteed success. The  
16 suggestion that in two years' time, for example, when the Court of Appeal gave permission and  
17 refused, that Albion Water would have been unprotected for the two years, in my submission  
18 that would be quite an outrageous submission and I have not heard it yet from Dŵr Cymru ,  
19 although it appeared to be implicit in some of the indications from Mr. Vajda half an hour ago.  
20 But, I would be surprised if that is his submission. We obviously oppose it if that is the  
21 submission he in due course intends to make. It seems to us quite a bizarre one.

22 MR. ANDERSON: Is this a convenient moment for Miss Finn to depart?

23 THE PRESIDENT: Yes. Thank you very much for coming, Miss Finn. If you are going to use your  
24 good offices to bring the two parties together you are going to have to be fairly vigorous if  
25 there is any sign of anything approaching a resolution of this matter, and it may be that we  
26 shall just have to rule on all outstanding points, but that is no particular reason to give up on  
27 the possibility of seeing whether the possibility of seeing whether the matter can be resolved.  
28 So thank you very much indeed for coming today, we appreciate it.

29 Yes, Mr. Vajda?

30 MR. VAJDA: I hope there is some common ground between me and Mr. Thompson. The problem  
31 with the determination of the bulk supply price is, as I understand it, there is no power for the  
32 Director, as it were, to grant interim relief, so one has a hiatus, so that if the Tribunal were  
33 simply now to bring these proceedings to an end and set aside the Decision the Director has, as  
34 far as I understand it, no power to order any power of interim relief as regards bulk supply.

1 The purpose of this arrangement is to provide some form of holding of the ring pending the  
2 determination of the bulk supply price which, as we know, is not going to happen next week.  
3 The advantage for both parties is that the agreement would be back dated to the date of the  
4 agreement – say, today – so that if effectively OFWAT determined the bulk supply price  
5 should be 15p that is something that Albion will get the benefit of from today.

6 Now, dealing with Mr. Thompson's points and I think he made three points. In my respectful  
7 submission they can all be met – I have not taken instructions on this but I do not think we  
8 would have any difficulty if there was a recital or a provision in this agreement which said that  
9 this was without prejudice to any party's rights under the Competition Act 1998, and I  
10 certainly cannot see a difficulty with that.

11 So far as the mechanics are concerned in relation to para.6 as to who has access to the money  
12 and who the credit risk is on, again, I am sure I can take instructions on that and we can resolve  
13 that.

14 That leaves the one outstanding matter, which is the fact that Shotton have indicated that they  
15 are going to withdraw the 1.5, and Mr. Thompson says – I think the logic of his submission on  
16 that is that we would wish to have another 1.5p off the 25.58p.

17 THE PRESIDENT: Yes.

18 MR. VAJDA: In relation to that, this may be something that the Tribunal may wish to give an  
19 indication to the parties, and I do not myself think that that would be a deal breaker – perhaps  
20 if I could just ask the Tribunal to look at our submissions very briefly, just on this very point,  
21 it is a small passage which starts at p.20, but the critical paragraph really is at para.52?

22 THE PRESIDENT: I am sorry, we are on?

23 MR. VAJDA: Dŵr Cymru's submissions for the hearing today, and if goes to p.22 of those  
24 submissions at para.52.

25 THE PRESIDENT: Yes.

26 MR. VAJDA: Now, I think it is common ground that the support from Shotton Paper is running at  
27 just over £100,000 a year, I think that was the figure, Mr. Thompson may have given a slightly  
28 lower figure but we have put in £110,000 and I do not think that is in dispute. What we have  
29 said, and this is really responding to the latest witness statement of Dr. Bryan, is that  
30 effectively the loss of that support is more than offset by effectively no longer having to incur  
31 either counsels' fees, or indeed the internal cost, and therefore we say that in practical terms,  
32 although I fully recognise what Mr. Thompson says, one also has to look at the cost saving on  
33 the other side, and so that is why we propose the same price which equates to the discount of  
34 2.05p per cubic metre. The Tribunal may wish to form a view on that, but we say that this

1 would still ensure Albion's ability to service Shotton as its customer pending a determination  
2 of the bulk supply price by OFWAT.

3 THE PRESIDENT: Do you want an indication on that point, Mr. Vajda, or not? I can tell you what  
4 I think the underlying principles are.

5 MR. VAJDA: Yes.

6 THE PRESIDENT: Taking up what Mr. Thompson has just said we are effectively invited to make  
7 an order today that would at least take us up to any Judgment of the Tribunal as envisaged in  
8 three weeks' time, and/or up to when we rule on your permission to appeal or in some way  
9 while the outstanding things are still going to be resolved. We have so far taken the view that,  
10 among other things – not necessarily limited to this – it is important that Albion remains in  
11 business so that this Appeal can be determined.

12 MR. VAJDA: That is over the next three weeks?

13 THE PRESIDENT: Well that is the first stage. Albion it appears is now in a worse position than  
14 they were before Shotton Paper withdrew their support and therefore we would need to  
15 examine whether this alteration of the existing interim order was justified, but in principle  
16 there is at least a strong prima facie case that an interim order to correct what has happened, in  
17 relation to the 1.5 is the kind of order the Tribunal might well be minded to make.

18 MR. VAJDA: I see that, but ----

19 THE PRESIDENT: If one then takes that on to the question of an appeal from the Tribunal, at the  
20 moment I think we would need a lot of persuading that the same underlying idea did not still  
21 apply while appeal proceedings were in train. There is the same idea, and that is leaving aside  
22 perhaps the interim point as to whether we are going to send anything back or not, which may  
23 in turn affect the timing of an appeal, all of which we have not explored yet. So I do not know  
24 whether that helps you or not.

25 MR. VAJDA: The one material change in the position really since we were last here is the  
26 withdrawal of the 1.5p, and that is plainly a matter the Tribunal needs to take into account.  
27 What we say is obviously the Tribunal also needs to take account of the submissions we make  
28 ----

29 THE PRESIDENT: Well we would have to go into all this because I have not understood it fully  
30 yet, I must say.

31 MR. VAJDA: I can certainly take instructions in relation to the 1.5p some sort of compromise might  
32 be reached, in relation to the proposal that I have put forward. I have indicated before that this  
33 proposal is completely independent of whether or not the Tribunal gives my client permission

1 to appeal. It is done by way of agreement to avoid what we say are real jurisdictional  
2 difficulties that would face the Tribunal in making any form ----

3 THE PRESIDENT: So your position is, this is a way of dealing with the interim position?

4 MR. VAJDA: Precisely, it is a way of dealing with the interim position because there is no power in  
5 the Director to order “an interim bulk supply price”, we would if necessary have to address the  
6 Tribunal, we say there are real difficulties about the Tribunal ordering that as well, and this is a  
7 way of doing it by agreement. As I say, certainly we can write into this that this is without  
8 prejudice to the parties’ rights under the Competition Act. I say that without instructions, but I  
9 cannot imagine that is going to preclude us entering ----

10 THE PRESIDENT: So if some sort of agreement could be reached on this, what then happens? We  
11 have a number of things we have to rule on anyway? That just carries on presumably?

12 MR. VAJDA: Yes, there is obviously the question of dominance – the Tribunal can rule on  
13 dominance and not rule on – this would not affect what the Tribunal does.

14 THE PRESIDENT: So this simply deals with the interim position.

15 MR. VAJDA: Precisely, and there is then there is obviously the question of costs which the Tribunal  
16 will have to rule on as well, there is the question of permission and then the only thing that this  
17 may impact is that the Tribunal then, when it determines its proceedings obviously has to  
18 make orders, and obviously order no.1 (which all parties are agreed in) is that the Decision  
19 should be set aside – that is not controversial. What is then more controversial and more  
20 difficult is effectively should the Tribunal make any other orders, and we explored last time the  
21 question of, for example, should the Tribunal remit this question to the Authority, and of  
22 course the Authority have said – and in a sense they have reinforced that in their written  
23 submissions – that they do not want to do the work unless an exemption has been granted, and  
24 that is obviously a matter the Tribunal may wish to take into account in deciding what to  
25 happen. But if the Tribunal then takes the view that we are not going to refer back anything to  
26 the Authority on access price, and we are simply going to set aside the Decision, this would  
27 ensure, we would hope, the minds of the Tribunal that even though the proceedings here have  
28 come to an end Albion would be still able to obtain the bulk supply price at price X, pending  
29 the determination of the bulk supply price by the Authority under s.40, so it is a consensual  
30 interim relief.

31 I stress this again, that if in fact there is a strong read across – if I can put it like that – between  
32 what the Tribunal have said and the determination that OFWAT make, and the bulk supply  
33 price comes down very considerably, Albion will get the full benefit of that backdated to the  
34 date of the agreement. So it does those two things, it effectively gives them – if they win, as it

1 were, on the 10p price cut, if I can put like that – they will achieve that through this, and they  
2 will also in the meantime be able to continue to service Shotton.

3 THE PRESIDENT: On the sending back question, we have these two unknowns, and no doubt we  
4 are going to hear some submissions about it, but I think we are a bit reluctant to give up on  
5 either of those until we know what the answer is, which would either mean deferring a final  
6 ruling by the Tribunal or remitting what we need to remit back, but subject to clarity emerging  
7 on those two points.

8 MR. VAJDA: It may be also, I have read the correspondence between the Authority and Albion, it  
9 would assist if we knew whether Albion really wanted a bulk supply or common carriage.  
10 Certainly at the moment they have written to us to say that they want to have common carriage  
11 and the Authority is saying in relation to that we do not want to do any work until we see that  
12 this is a feasible proposal, and obviously the Tribunal then have to take a view as to whether to  
13 let go of it altogether or to hold on to it in the sort of way that you, Mr. President, have just  
14 indicated.

15 THE PRESIDENT: I think that is quite independent of this.

16 MR. VAJDA: It is, absolutely, yes.

17 PROFESSOR PICKERING: Mr. Vajda, when we last met in this court, we had an exchange  
18 between us about the distinction between the long and the short run.

19 MR. VAJDA: Yes.

20 PROFESSOR PICKERING: Would I be right in assuming, from what you are saying, that you are  
21 still working on the basis that the short run continues indefinitely so far as Albion is concerned,  
22 and that you assume that the commercial terms on which it has been supplying Shotton would  
23 continue, but less the 1.5p contribution that Shotton were making. So in other words, your  
24 implicit argument is that as this time rolls on and on and on, Albion does not need any more  
25 financial basis to be able to remain in business?

26 MR. VAJDA: Yes, but this is not an indefinite, “never, never”, this would be on the basis of what  
27 we have hear Miss Finn saying that the Authority would produce a decision for determination  
28 on bulk supply price. I think she said ----

29 PROFESSOR PICKERING: Four and a half to ten months.

30 MR. VAJDA: It is a limited period, and what we say – subject to the 1.5p – that the appropriate  
31 basis is to maintain the existing position because that enables Albion to continue to supply  
32 Shotton, which is what this case is all about. So we would say that it is ring holding and we  
33 would hope that the bulk supply price would be determined sooner rather than later, but the  
34 window is obviously somewhat elastic.

1 PROFESSOR PICKERING: Okay, I hear what you say, and note that even if it was as quick as six  
2 months, subject to what Albion might want to say later, they may well say, “Well, you know,  
3 one cannot go on and on indefinitely at this very thin margin”. That is one point. The second  
4 point I would just like to ask you about is this - and forgive me if it is inappropriate, but, as you  
5 know, I am not a lawyer - so perhaps a little bit of elasticity can be given to me from time to  
6 time ---- I just wonder what your client’s overall strategic position is in relation to the supply to  
7 Shotton, because it seems to me that there are two possible interpretations - the first of which is  
8 that Dŵr Cymru accepts that it has lost the business of supplying Shotton, and therefore is  
9 simply interested in the terms on which it either supplies water or provides the common  
10 carriage service for Albion. That is one thing. The alternative is to say, “Well, actually, Dŵr  
11 Cymru would love to be able to get back to being in a position where it was restored as the  
12 supplier to Shotton. If that was still the background thought process then I think it would be  
13 useful to know because it does have some bearing on the way in which we would analyse the  
14 likely implications.

15 MR. VAJDA: Can I give you one answer, and then state something else? So far as the formulation  
16 of this proposal is concerned, it is simply concerned with the former, which is effectively to  
17 maintain the position vis-à-vis Albion so that Albion can discharge its obligations towards  
18 Shotton. It is not designed - and nobody has suggested to me - with some view that it is our  
19 strategic aim to seek to re-capture, if I can put it like this, Shotton. But, in relation to that  
20 second point, I will obviously take instructions, but certainly for the purpose of working this  
21 out as the legal team and with Dŵr Cymru, the target for this is very much the first and really  
22 was generated by the remarks of the President that he made to me last time, which is that what  
23 the Tribunal is looking for is some failsafe mechanism between now and final determination -  
24 if it is bulk supply price, this is what we put forward as such a proposal.

25 PROFESSOR PICKERING: What are the implications if Albion were forced to withdraw from the  
26 market? Presumably Dŵr Cymru would graciously offer to re-supply UPM, would it?

27 MR. VAJDA: Yes, I think they would probably to.

28 PROFESSOR PICKERING: An obligation. Thank you very much, Mr. Vajda.

29 THE PRESIDENT: I am just wondering where we should take this, Mr. Thompson, at the moment.  
30 It does not sound to me as if there is much common ground.

31 MR. THOMPSON: No, sir. I am not quite sure whether anybody, except for Albion, has actually  
32 responded to the Tribunal’s invitation in relation to mediation - except for Mr. Vajda who I  
33 think has said, “No”.

1 THE PRESIDENT: Mediation is a way of cracking disputes that does not involve arbitration or  
2 judicial proceedings, but seeks to find out whether there is common ground. But, if someone is  
3 not prepared to even contemplate it, then it cannot get off the ground. It is extremely  
4 regrettable, but I get the impression from Mr. Vajda that Dŵr Cymru is not prepared to  
5 contemplate that.

6 MR. THOMPSON: We have not called on Mr. James. I do not know whether he has authority to  
7 express a final view or whether Mr. Vajda has been delegated with that final view. Given the  
8 indication from the Tribunal, obviously it may be appropriate simply to confirm with everyone  
9 what their stance is. But, so far as Albion is concerned, we would obviously have a number of  
10 issues, both to the past and the future, that we would bring to the table, that we would be happy  
11 to take the Tribunal's indications forward. I do not know whether the other parties would  
12 indicate whether they are in the same position as Mr. Vajda, or in the same position as Albion.

13 THE PRESIDENT: Do you just want to check with Mr. James what the position is?

14 MR. VAJDA: Certainly this proposal has the approval of Mr. Jones. We discussed this on Friday  
15 and over the weekend. I can certainly put the observation that you, sir, put to me to Mr. Jones.

16 THE PRESIDENT: Let me try and sort everything out because it is quite complicated ---- There  
17 are still the ongoing things that we have to decide. Are you with me?

18 MR. VAJDA: Yes.

19 THE PRESIDENT: Those concern dominance. Those concern what orders we need to make.  
20 Subject to this, there is the question of interim relief. We may need to look in argument, in  
21 detail, at things like margin squeeze, and so forth, and so on. We have got costs, permission to  
22 appeal, and all that. Those are all things we have got to decide. In any situation where parties  
23 are waiting for a court to decide something, they may, or may not, be better off if those things  
24 are not decided. It is one of the things that people have to take into account when they  
25 consider what their position is. The whole object of a settlement is to avoid having everything  
26 fought out all the way through, both as regards what is left to decide in this Tribunal and as  
27 regards the Court of Appeal and as regards whatever further proceedings follow after the Court  
28 of Appeal, if there are any further proceedings.

29 So, there are still various considerations that point in favour of considering whether or not this  
30 is a good moment to settle, or not. That is one set of things. Perhaps in relation to that ----  
31 and, indeed, in relation to the interim order.

32 It is not at all clear to me that it would be desirable at any point for the Tribunal to, in some  
33 sense, forego jurisdiction, because the idea of having a failsafe mechanism is that there is a  
34 failsafe mechanism, and if things go wrong then people can come back to the Tribunal as

1 necessary. So, I would have thought, from everybody's point of view, there is still  
2 considerable merit in thinking very hard about what their position is. But, there is also a limit  
3 to how far the Tribunal can go in encouraging people to resolve their differences if, for one  
4 reason or other, they are not prepared to do so.

5 MR. VAJDA: This is an industry, as the Tribunal is aware, which is subject to heavy regulation,  
6 and the position of my client is that in relation to a bulk supply price which would have  
7 implication beyond this case, the appropriate person to determine that is the Regulator.

8 THE PRESIDENT: We understand that, Mr. Vajda. That is another way of saying, "We don't  
9 want to settle". That is their position. Fine. That is their position. We carry on. What Mr.  
10 Thompson asks is just to see whether that really is ----

11 MR. VAJDA: That was certainly the position before I came into court this morning, but I am very  
12 happy to speak to Mr. Jones and relay what you have said, to see if there has been a change.  
13 But, I would not wish to be too optimistic because this has been discussed at some length, and,  
14 as I say, the point is that for the bulk supply price there is a dispute resolution procedure set up  
15 under the Act, and the appropriate body is OFWAT and the board of Dŵr Cymru take the  
16 view that that is the body which should determine the price if there is a dispute.

17 THE PRESIDENT: I think Mr. Lewis is suggesting that we rise for a few minutes, just to enable  
18 you to do that, and let everyone reflect on discussions.

19  
20 (Short break)  
21

22 MR. VAJDA: I am grateful for the time given to us. We have spoken to Mr. Jones. The position  
23 remains that which I indicated. If I could just say this: the board of Dŵr Cymru has  
24 determined that its policy is that all company pricing should be in accordance with consistent  
25 principles which they themselves are fully compliant with the company's regulatory  
26 obligations, and in those circumstances, not able to accept any invitation to enter into a  
27 settlement that is not demonstrably consistent with that position. Similarly, it is not in a  
28 position to agree a mediation of bulk supply price since that process would take place outside  
29 and without regard to the relevant regulatory considerations. Putting it this way, what my  
30 clients require is a reasoned decision by the Regulator as to what the bulk supply price is; what  
31 regulatory consequences follow in relation to the other aspects of my client's business based  
32 on the potable and non-potable side. The Tribunal will be aware that there is an issue in  
33 relation to Corus. There may be a bulk supply dispute there, and that is one of the reasons - the  
34 most important reason - why this has to be determined by the Regulator.

1 If I could just say this before sitting down, I did not detect in anything that Mr. Thompson said  
2 to the proposed agreement which could not be resolved. As I said, we have no difficulty with  
3 putting in something about 'without prejudice to competition rights'. The issue of 1.5p, I am  
4 sure, is not going to preclude an agreement; nor are his points in relation to payment. We  
5 remain of the view that the proposed agreement would preserve the position pending a  
6 determination by the Regulator of a new bulk supply price. As I say, we are willing to address  
7 the points that Mr. Thompson made in relation to those, and I did not detect anything other  
8 than those three points which I have already dealt with.

9 Unless I can assist the Tribunal further at this stage, those are my submissions as to the  
10 approach of my client's, both to the question of what happens in the interim in a determination  
11 of the bulk supply price, and also in relation to the President's suggestion of a mediation.

12 PROFESSOR PICKERING: Mr. Vajda, just before you sit down, may I just check with you: are you  
13 telling us that your client's board believes that the Regulator should set all prices? That is  
14 how I heard what you were saying. I mean, there are two models, are there not? One is that  
15 the Regulator holds the ring; is the point of appeal, of advice, but subject to holding that ring,  
16 then flexibility, commercial considerations, bilateral negotiations take place. But, I  
17 understood you to be supporting a slightly different, and really quite critical view of your  
18 board - that, you know, the Regulator must decide the price, in which case what is the role of  
19 senior management if you are not actually taking pricing decisions?

20 MR. VAJDA: The words that I used are that the pricing should be consistent with regulatory  
21 principles - that is to say, we are not saying that every price is to be fixed by the Regulator, but  
22 in relation to the bulk supply price there is a specific mechanism which gives the Regulator the  
23 power actually to fix the price. The reason for that is because it is important because it has a  
24 massive impact on a water company's business, and therefore one wants to see the process of  
25 reasoning that the Regulator looks at ... the Regulator fixing the price he is going to have a  
26 look at the wider picture. So, in relation to the bulk supply price that is why the view has been  
27 taken that in the absence of agreement the appropriate person to determine what that price is is  
28 the Regulator and not an arbitrator, or that this is something that can be mediated.

29 PROFESSOR PICKERING: In that context you are still seeing the Regulator as a point of appeal or  
30 a point of reference, as a last resort and not the starting point for a commercial decision on  
31 price.

32 MR. VAJDA: In relation to the BSP, yes, because the Regulator does not have, for example ----  
33 The Regulator has no power to fix an access price. The access price is a price that is fixed, and  
34 then there is obviously competition law that comes in. But, the Regulator has a specific power

1 in the context of a dispute - and he was about to exercise that in 1999 in relation to the first  
2 bulk supply price - and he is the point of reference for bulk supply prices.

3 PROFESSOR PICKERING: In the event of a failure to agree.

4 MR. VAJDA: Yes.

5 PROFESSOR PICKERING: That is simply what your client's board is saying.

6 MR. VAJDA: Yes.

7 PROFESSOR PICKERING: Thank you.

8 THE PRESIDENT: Mr. Vajda, I think on the question of the interim situation, and in relation to  
9 this proposed agreement, as we are looking at it at the moment, we do find it very difficult to  
10 accept - and maybe you will persuade us to the contrary - that the Tribunal is without  
11 jurisdiction to preserve the status quo either pending the Tribunal's forthcoming Judgment or  
12 pending the determination of an appeal, if there is one (and there may not be one - either  
13 because we refuse permission, or the Court of Appeal refuses permission), or, even without  
14 either of those things, pending a determination by the Authority of the bulk supply price. We  
15 are in a situation here where there does not seem to be any mechanism for the Authority to  
16 determine interim price. The implicit allegation in Cases 1031 and 1034 is that the existing  
17 level of the bulk supply price is itself excessive. That now maintains some support from the  
18 Tribunal's Judgment. Then it would be a question of applying the relevant rules and  
19 considering urgency and balance of convenience, and all those things, to see what order we  
20 should make. But that we have jurisdiction to make an order is not at the moment something  
21 we are in doubt about - rightly or wrongly.

22 So, if we were to go down this kind of route it would have to be in an annexe to an order of the  
23 Tribunal, or something of that kind, whether liberty to apply, so that there would be a proper  
24 failsafe mechanism that would exist in the event of unforeseen consequences. Who knows  
25 what might in the end happen. Whatever determination there is may be challenged in different  
26 legal proceedings, etc., etc. It could go on for a very long time. We would need to ensure that  
27 there was a mechanism to come back to the Tribunal in the event of unforeseen circumstances.  
28 Shall now go to Mr. Thompson and see whether he has had chance to reflect?

29 MR. THOMPSON: I am grateful, sir. I must say, I was slightly surprised by the new gloss that has  
30 emerged from the board because the Tribunal will be well aware that particularly these types of  
31 agreements have, in fact, over the years, been agreed on a very wide range of terms, and are  
32 outside the tariff basket. So, for both those reasons it seemed a curious approach for a board to  
33 adopt - to suggest that these very wide terms are not impossible and that you cannot have  
34 special agreements, or that it would have any very wide implications if there was a specific

1 agreement in relation to this particular supplier. But, if that is the board's position, then we  
2 find it surprising, but we pass on.

3 In relation to the question of whether the agreement in relation to a bulk supply is the right  
4 road to be going down, as against the draft order that we have suggested - quite apart from the  
5 question of who should, as it were, decide, and whether it should be by agreement, or whether  
6 it should be under the order of the Tribunal. We do note that we have suggested - rather than  
7 following the jargon of common carriage or bulk supply - that we should concentrate on what  
8 is actually in issue here - namely, the cost of carrying this water down this pipe; the cost of  
9 treating this water at Ashgrove; and the retail costs of selling this water to Shotton Paper, and  
10 that those three items should be the focus of the Authority's efforts rather than getting bogged  
11 down with the technicalities of the jargon of the Act, because that is not what is before the  
12 Tribunal as a matter of substance, and in the substance of the Judgment. We note in that  
13 respect that the bulk supply price includes the price from United Utilities, which again is not a  
14 matter before the Tribunal.

15 In this respect we note the letter from the Authority of last week. One of the reasons why they  
16 thought we might have problems with pursuing common carriage was precisely because of the  
17 need to reach agreement with United. That therefore opens the prospect of a bulk supply issue  
18 between ourselves and United even if the issue of common carriage is pursued. That is, in my  
19 submission another reason why it would be more appropriate for the Tribunal to concentrate on  
20 the issues between ourselves and Dŵr Cymru, which are the issues of treatment costs, transport  
21 costs, and retail costs, and for that to be the issue that is put back to the Authority for the  
22 purpose of resolving this matter in an expeditious way as a matter of substance. That is, in a  
23 sense, getting ahead of myself into the question of the interim order, but we have been  
24 debating these questions, and - just so that the Tribunal sees where we are coming from - in my  
25 submission I think that is appropriate to say now.

26 There is one other point - our concern about how long the determination of the bulk supply  
27 price might actually take. Miss Finn correctly gave two figures, I think, of four and a half  
28 months and ten months. Dr. Bryan's understanding is that both of those cases were  
29 substantially simpler than this case - one of them, I think, was about indexation. We are  
30 therefore concerned that in reality this might all disappear off into some fairly long grass, or  
31 possibly even deep water.

32 Those are our points in relation to that.

33 Can I now go back, as it were, to the agenda that we would imagine being in place for the day?  
34 We thought there were really three issues: the issue of a negotiated settlement - which we have

1 obviously been discussing so far; the question of interim relief, which we have raised; and the  
2 question of costs, although the Tribunal will, of course, be aware, that the issue of dominance  
3 is, as it were, in the background ----

4 THE PRESIDENT: We do not want to hear any submissions on that

5 MR. THOMPSON: I had understood that you do not want to hear submissions on dominance. I  
6 will only say in relation to dominance that we note that the approach that we have taken has  
7 been to try and address the substance, whereas our impression ----

8 THE PRESIDENT: We do not want to hear any submissions on dominance, Mr. Thompson.

9 MR. THOMPSON: -- is that the parties are taking a different approach.

10 In relation to the question of the interim relief and then negotiated settlement - I think the  
11 common issue comes up - there has been some debate in the correspondence about the issue of  
12 a long run marginal cost insofar as it is relevant, and the question of any read-across from the  
13 common carriage issue to the bulk supply issue or vice-versa. We now have RD21/97 and a  
14 letter going back to August 1996 ----

15 THE PRESIDENT: What are we getting on to now, Mr. Thompson? Are we getting on to matters  
16 of substance? Are we leaving the proposed Dŵr Cymru agreement, etc. etc.?

17 MR. THOMPSON: Yes, I think so, unless the Tribunal wants to determine what comes next. I am  
18 very happy to respond, or to make submissions.

19 THE PRESIDENT: I think we had better park the discussion we have had up to now and get on to  
20 the points that we need to get on to.

21 MR. THOMPSON: Shall I leave it to the Tribunal to indicate how you want to deal with those?

22 THE PRESIDENT: Let us just collect our thoughts. We have agreed to park dominance. We  
23 cannot take negotiated settlement any further, I do not think. Interim relief - we have had an  
24 exchange of views of possibilities, but we have not had any argument really. So, we do need  
25 to deal with that. If you are still applying for interim relief, you need to make good your case  
26 on that. We have then got the question of what orders the Tribunal should make in terms of  
27 remitting back or not, or final orders, etc., etc. both on excessive price and margin squeeze.  
28 We have then got costs and we have also got permission to appeal. Have I left anything out?  
29 I hope not. We have one or two outstanding issues about Aquavitae as Mr. Lewis reminds me.  
30 Those are the points I have in mind but I think it is up to you to decide what order - sorry, Mr.  
31 Vajda, have I left something out?

32 MR. VAJDA: No, I was just going to say in relation to permission to appeal, I was not proposing to  
33 address the Tribunal.

1 THE PRESIDENT: I see, we will just deal with it on the papers, but he may want to reply to what  
2 you have put in in writing, and you may want to reply to what he replies.

3 MR. VAJDA: Certainly.

4 THE PRESIDENT: But you were not going to develop it?

5 MR. VAJDA: No.

6 THE PRESIDENT: Thank you.

7 MR. THOMPSON: If I may just jump ahead to that, what we were going to suggest was that it  
8 might be appropriate for us to put in a brief response on that issue within a short timetable,  
9 which would be consistent with the other timetable – I am talking about a matter of days rather  
10 than a matter of weeks.

11 THE PRESIDENT: Yes, I think we would need to have it by the end of the week by the very latest,  
12 Mr. Thompson.

13 MR. THOMPSON: Yes, I anticipated that might be the position, and the Tribunal has already  
14 indicated that it would like some written submissions in relation to the Bathhouse Appeal.

15 THE PRESIDENT: On costs.

16 MR. THOMPSON: Yes, in relation to costs, so I do not know whether it would be appropriate for us  
17 to undertake that whatever written material is needed we would produce by the end of the  
18 week, for example?

19 THE PRESIDENT: That would be good.

20 MR. THOMPSON: It may be that there are some technical issues on costs where we would invite  
21 the indulgence of the Tribunal on that as well in that there is quite a lot of material that has  
22 come in fairly late last week, which I think the Tribunal has indicated it wishes to hear from us  
23 today but if there are points that need to be addressed in writing we would undertake to deal  
24 with them within the same timetable, if that would be convenient for the Tribunal.

25 THE PRESIDENT: Yes, we do need to have everything in by the end of the week.

26 MR. THOMPSON: I think the question of interim relief and remit back is probably the next issue,  
27 where there has obviously been an indication this morning that the Tribunal intends, as it were,  
28 to deal with everything in substance in three weeks' time, and so it may be appropriate for  
29 there to be, as it were, a short holding position for those three weeks, and for the substance of  
30 our application in relation to interim relief to be considered, as it were, as part of the substance  
31 of the ruling that is anticipated at the beginning of December, but we still have the position of  
32 Shotton Paper in relation to the period between now and then and we would invite the Tribunal  
33 to at least indicate what the position is and I understand from what Mr. Vajda said that that  
34 may be something that the Dŵr Cymru Board would show a degree of flexibility but that is

1 obviously a matter that he can come to in due course. But it is obviously a short period and no  
2 doubt we can soldier on for another three weeks, but the substance of our application is as in  
3 our written submissions.

4 THE PRESIDENT: So are you inviting us to make an order today, or are you saying it can keep for  
5 three weeks, or what are you asking us to do?

6 MR. THOMPSON: Well our formal position is as indicated, but I had understood from the Tribunal  
7 that it wished to deal with everything all in one shot at the beginning of December, and the  
8 pressing issue that has changed since the last hearing is the position of Shotton Paper, and the  
9 1.5p which, even for a single month, is quite a significant amount of money for my client, and  
10 so that is formally pursued.

11 In relation to the rest, the position in relation to common carriage ----

12 THE PRESIDENT: So what is the position in relation to this proposed agreement?

13 MR. THOMPSON: Well obviously we are not inclined to sign it in its present form, and it seems to  
14 us, given Dŵr Cymru is effectively not prepared to negotiate on the substance of its terms, that  
15 there is no purpose in entering into it, it might as well be dealt with by the Tribunal as part of  
16 the Judgment at the beginning of December.

17 MR. VAJDA: I hesitate to interrupt, but that is simply wrong. I have indicated that my friend had  
18 three issues with those, I dealt with them, and to say that we are not prepared to enter into  
19 negotiations about the substance of this agreement is simply wrong.

20 THE PRESIDENT: On the interim question, Mr. Thompson, what is going through our mind is as  
21 follows: if we made an interim order in your client's favour, that at least dealt with the 1.5 p  
22 per cubic metre point, and as I think we probably would make it a term of that interim order  
23 that either Albion or both parties refer the dispute as to the determination of the bulk supply  
24 price to the Authority, and that in other respects the *status quo* continued, I am not completely  
25 sure that that result would result from a significantly different position from the position of  
26 substance that this agreement is trying to reach. Do you follow me?

27 MR. THOMPSON: I do, except it occurs to me, and it is implicit, I think, in what I said just now,  
28 that the bulk supply price, as I understand it, includes whatever price is forthcoming from  
29 United Utilities.

30 THE PRESIDENT: It is presumably arrived at on the basis of the existing arrangements between  
31 United Utilities and Dŵr Cymru.

32 MR. THOMPSON: So I think, at least formally, it would require some assurance from United  
33 Utilities that it was not going to change the ground rules for that, or else it would need some  
34 sort of consent by United or the Authority as to what the position in relation to United would

1 be because, as I think I indicated, the position of the bulk supply pushes the focus onto United,  
2 as well as on to Dŵr Cymru, because obviously if United put up its prices by a substantial  
3 amount that might have a material effect on the bulk supply that came through to Albion, so it  
4 is a somewhat problematic state of affairs.

5 THE PRESIDENT: You just want an interim order, like the one you have at the moment, over and  
6 out, basically.

7 MR. THOMPSON: Well, pending the outcome of the proceedings before the Tribunal where these  
8 issues can be determined and put forward once and for all on the basis of all the issues that the  
9 Tribunal considers to be relevant.

10 MR. VAJDA: I hesitate to interrupt my friend, but he is questioning difficulties that are not there.  
11 As the President has appreciated, this agreement gives a price, if United Utilities turn around to  
12 Dŵr Cymru tomorrow and say “We are going to treble the price” Albion have the benefit of  
13 this agreement. What United Utilities do is completely irrelevant, and it is a complication that  
14 we simply do not need to get into.

15 THE PRESIDENT: I just need to understand the position a bit further, Mr. Thompson. Are you  
16 saying that you would be happy for the Authority to proceed to a determination of the bulk  
17 supply price without prejudice to all your Competition Act requirements without prejudice to  
18 the possibility for common carriage proposal actually taking effect. Or, are you saying you do  
19 not really want the Authority to determine the Bulk Supply price, you are happy with just an  
20 interim order?

21 MR. THOMPSON: As I indicated, it may be appropriate to look at the draft order that we have  
22 suggested.

23 THE PRESIDENT: Yes, let us do that. (After a pause) Yes.

24 MR. THOMPSON: You will see that what we have proposed is effectively a para.1 which addresses  
25 the case on excessive pricing on an interim basis, we are proposing a 10p reduction. A margin  
26 squeeze remedy which protects the margin at 5p as an interim basis, but then a requirement on  
27 the respondent to deal with the three issues of substance which arise in this case, namely, the  
28 question of the costs of treatment where the Tribunal will recall that the bulk supply we are  
29 currently paying still includes 7p per metre cubed for treatment, although the Director himself  
30 found that the figure was 3p and the Tribunal have said that the costs are 1.5 to 3p.  
31 Transportation, which is obviously the big issue in terms of the numbers, and retail supply,  
32 which is obviously crucial in relation to the margin squeeze issue, and that those points of  
33 substance need to be addressed by the Authority in order to get to the bottom of the issues  
34 which have arisen in this Appeal, and that they need to be addressed as at the date of the

1 complaint, the date of the Decision and to date, given the length of time that has passed  
2 between the complaint and now, and that is the substance of what needs to be addressed. The  
3 terminology of “bulk supply” and “common carriage” only serves to confuse the issue as  
4 between ourselves and Dŵr Cymru, which relates to those three actual figures, and it is that  
5 issue which should be the focus of the Tribunal and the Authority’s efforts in trying to bring  
6 this case to an end. That is the substance of it. I see the time, I do not know whether it would  
7 be appropriate to break so that we can consider what is being put to us by the Tribunal, and the  
8 Tribunal -----

9 THE PRESIDENT: By all means we can break, what I am slightly hazy about at the moment is  
10 whether this is in effect a request that the Tribunal should remit these matters to the Authority  
11 for determination under the 1998 Act, or whether in parallel, or perhaps implicitly there is also  
12 the suggestion that there should be a re-determination of the bulk supply price under s.40; that  
13 is the question.

14 MR. THOMPSON: Yes, the latter then does inevitably, I think, bring in the position of United  
15 Utilities, where we have indications from United Utilities that the basis for the bulk supply  
16 price, which has been there since 1999 give or take is intended to be radically changed.

17 THE PRESIDENT: Well the submission we have at the moment is that there is a statutory procedure  
18 under s.40 for determining the bulk supply price if that is what is in issue, and there are  
19 Competition Act procedures for determining the matters that are in issue in this case. One can  
20 imagine a situation in which the two begin to overlap because conceivably it is not impossible  
21 to imagine a situation where the 1998 Act might impinge also on the bulk supply price, that is  
22 a possibility we have certainly not ruled out yet, but we just need to be clear what it is and  
23 under what legal route you are inviting us to do something.

24 MR. THOMPSON: This is a remedy in relation to the 1998 Act, a complaint made in relation to  
25 Dŵr Cymru in relation to effectively these three elements and a decision of the Tribunal  
26 relating to essentially these three elements.

27 THE PRESIDENT: But the further submission that is then made, and I appreciate this is extremely  
28 frustrating but we have to go through it and get it right, these three elements relate to the  
29 common carriage proposal that was the subject of the Decision and at the moment it is not yet  
30 clear whether, in practical terms, that proposal is likely to go forward, and if in practical terms  
31 it is not likely to go forward then it is said that is an element that points against the Tribunal  
32 remitting all these things, because there is no practical purpose in getting these things looked at  
33 again in the 1998 context. The only relevant context going forward would be a s.40 context  
34 which is a different context, that is the submission that is being made.

1 MR. THOMPSON: I appreciate that but, in my submission, the position in United Utilities becomes  
2 critical in this, because any s.40 determination would have to take into account the position of  
3 United. So far we have all been assuming, cheerfully, that United's price will always be 3 to  
4 4p and that that will continue. If that is not the position then that really is something which is  
5 not within the scope of these proceedings at the moment because, for better or worse we did  
6 not make a complaint about any indications.

7 THE PRESIDENT: Well perhaps we can have some clarity on that because I had understood from  
8 the various submissions that were made I think particularly by Mr. Randolph that you were  
9 stuck with the agreement, I cannot now recall off hand what the terms of the agreement are as  
10 regards its termination, or whether we even knew what the terms were, but we have certainly  
11 been assuming up to now that the agreement continues but if that is not the case then I agree  
12 we can have some clarity on that at 2 o'clock.

13 PROFESSOR PICKERING: Mr. Thompson, could I just ask you two questions? You do not need  
14 to answer them now but you might want to think about them. First, I am interested to know  
15 how your clients view their preferred business model, because clearly common carriage has a  
16 different business model implication from bulk supply and I think it might be useful if we were  
17 at least to be aware, given the options that have been put as to which one you would really  
18 hope to achieve, and the second one is in relation to the first point numbered 3 in your draft  
19 order. I just wonder why, and the President has just talked about going forward, whether you  
20 would care to consider and tell us this afternoon why you think each of the three dates for the  
21 cost analysis is relevant and necessary and why a report on the current situation would not  
22 suffice?

23 MR. THOMPSON: Yes, I can answer that question easily, but I will do it at 2 o'clock if that is  
24 convenient.

25 PROFESSOR PICKERING: Can't wait! (Laughter).

26 MR. ANDERSON: Before the Tribunal rises, could I just make one very quick point just to clarify  
27 the purpose of our letter of 15<sup>th</sup> November, the letter in which we indicated as a way forward  
28 the s.40 determination. Our view was that really the position that Albion is faced at the  
29 moment is essentially to make a choice between common access route and the bulk supply  
30 route. We indicated that we would be prepared to undertake a s.40 determination as quickly as  
31 we can, as soon as the parties ask us, but not in tandem with having matters under the common  
32 access price remitted to us, because not only would that involve the possible duplication of  
33 work but one might have an impact on the other. So it is really one or the other rather than  
34 both, if I could just make that point.

1 THE PRESIDENT: But is the transport cost, and indeed the treatment cost, common to both of  
2 them?

3 MR. ANDERSON: There may indeed be elements, and we have said in our letter we would have  
4 regard to your Judgment, of course, and we would have regard to a number of other matters.  
5 They were in fact determined in different ways and the second bulk supply agreement was not  
6 the subject of our decision and was not the subject of this Appeal, and it is simply not  
7 sufficient for Mr. Thompson to say, setting aside “the jargon of the Act” as he puts it, they are  
8 different prices calculated in different ways and different considerations arise. That is why it is  
9 important in our submission to retain this distinction between the common carriage access  
10 price issues and the second bulk supply agreement price, and there are of course relevant  
11 factors, relevant matters, and a great deal in your Tribunal’s Judgment that no doubt we would  
12 take into account, but they are different exercises, and one has a separate route, a s.40  
13 determination, and if a party is aggrieved with that determination the remedy is not an Appeal  
14 to this Tribunal it is Judicial Review. So in our submission it is important for the Tribunal, as  
15 indeed it is important for Albion, to retain that distinction in mind.

16 PROFESSOR PICKERING: Is it not important also to be clear and for all subsequent parties  
17 coming along to be clear, whether or not there is or should be an economic accounting, and  
18 indeed logical relationship between a common carriage price and a bulk supply price?

19 MR. ANDERSON: Well, you may well be right, Professor, and no doubt that is something that we  
20 will be taking into account, but the only point I am really making is that they are distinct  
21 exercises, and the exercise with which this Tribunal has been concerned is considering the  
22 Authority’s decision on the common access price, that is the scope, if you like, of the  
23 Tribunal’s jurisdiction and the scope of any remedy the Tribunal can grant. The second bulk  
24 supply agreement price is a distinct issue, whatever the common elements of the facts may be  
25 they are different exercises and different routes under the statutes.

26 THE PRESIDENT: If the Tribunal remitted issues in the existing proceedings, along the lines that  
27 Albion has invited it to remit, and if on the same day you get a request from Albion, or the  
28 parties jointly, to re-determine the bulk supply price, how are you going to proceed?

29 MR. ANDERSON: I will take instructions over the short adjournment on that, but the answer may  
30 be that one or other exercise has to await the outcome of the other.

31 THE PRESIDENT: That is what I do not understand because there are so many elements in  
32 common it would seem rather ----

33 MR. ANDERSON: There may be elements in common but they are not the same exercise?

1 THE PRESIDENT: They are not the same, or they may not be quite the same, but they are so very  
2 closely related that it might not be a particularly good use of resources not to do them in  
3 parallel, however.

4 MR. ANDERSON: Let me take that up with those next to me and behind me during the short  
5 adjournment.

6 MR. THOMPSON: I do not want to delay our lunch, but it would help me if there was actually  
7 identified an element that was different in relation to the transport and distribution costs that  
8 Dŵr Cymru assessed as a bulk supply as against assessed as common carriage. To my mind  
9 they are exactly the same thing.

10 THE PRESIDENT: Yes. Right, let us say 2.15.

11 (Adjourned for a short time)

12  
13 MR. THOMPSON: Good afternoon, Mr. President, gentlemen. If I may deal first of all with the  
14 question of the agreement - and that obviously impacts on the question of the draft agreement  
15 that Dŵr Cymru have put forward - that does impact on the question of common carriage and  
16 bulk supply. I think it remains the position, as well as a matter of commercial and regulatory  
17 aspiration, that common carriage would be the best way forward in that it would give us the  
18 status that we wish - vis-à-vis Dŵr Cymru. However, we recognise that there is both the  
19 regulatory problem, given the changes to the Act, or the Acts, that have taken place since 2001  
20 where, to some extent, that is outside our hands; secondly, there is a commercial issue between  
21 us and UU which has not been resolved. I am not quite sure how much information has come  
22 before the Tribunal ----

23 THE PRESIDENT: We do not know what figures have been discussed.

24 MR. THOMPSON: I do not know whether you want to know. At the moment it is being treated as  
25 confidential between UU and ourselves, and I do not, myself, see why it should be confidential  
26 vis-à-vis the Tribunal if the Tribunal wishes to know what the number is. I can write it down.  
27 I do not know what UU ----

28 MR GARDINER: With respect, it is not really a matter that is before the Tribunal.

29 MR. THOMPSON: It is not a matter that is currently before the Tribunal, and it is a commercial  
30 discussion that has, in the past, been ongoing and has stopped while these proceedings go on.  
31 But, I would say that we do not see any reason why we cannot pursue those discussions this  
32 forum, and certainly we would submit that this is not the right forum to be discussing it.

33 THE PRESIDENT: I think its potential relevance, from our point of view, is to know whether it is  
34 sensible to remit anything back to the Authority, or not, if the situation is that for various

1 reasons that is not a sensible course - that is one situation. On the other hand, if there was a  
2 sensible prospect of the commercial situation resolving itself that would be another situation.

3 MR. GARDINER: But, sir, you would not be remitting our commercial discussions, would you?

4 THE PRESIDENT: We have to decide whether we need to invite the Authority to look again at  
5 various points on price, and in order to do that we need to form some view of whether that is a  
6 useful move to make. That is undoubtedly affected by whether this common carriage proposal  
7 is a live commercial proposal, or not.

8 MR. GARDINER: We would say that it is a live commercial proposal, but I would say that I  
9 suspect where Albion are coming from is that they are always seeking to base this new  
10 commercial arrangement, which would be a new contract with Albion, on a pre-existing  
11 contract with Welsh, and the two are unconnected, sir, because ----

12 THE PRESIDENT: A new contract with UU, you mean.

13 MR. GARDINER: Well, it would be. It would be a new contract between UU and Albion ----

14 THE PRESIDENT: Absolutely. Yes.

15 MR. GARDINER: -- and that would be based on the appropriate guidelines, and it would have  
16 nothing to do with our existing arrangement with Welsh. Obviously, were we to enter into  
17 new contractual arrangements with Albion ---- I think we would say that that would probably  
18 be the end of our arrangements with Welsh - certainly under that agreement anyway.

19 THE PRESIDENT: Yes. Well, we know what the existing price was that UU offered before. One  
20 can simply assume that that is the price that you have offered unless we are informed to the  
21 contrary, but I think it would be better for us to know what the price is.

22 MR. GARDINER: Well, it is not dissimilar.

23 THE PRESIDENT: I think that tells us all we need to know.

24 MR. THOMPSON: I am sorry. You are not under any mis-apprehension about dissimilar to the  
25 price that we were offered before rather than the price that is currently being offered to Dŵr  
26 Cymru ----

27 THE PRESIDENT: Very similar to the price that was offered before.

28 MR. THOMPSON: It is a price that was offered before. There were two prices - one was higher than  
29 the other. It is not the lower one. I cannot myself see what harm it would do for the Tribunal  
30 to know what we are talking about.

31 MR. GARDINER: I would rather not conduct my confidential commercial discussions, sir, in front  
32 of third parties when I do not have to, sir.

33 THE PRESIDENT: We may ask Mr. Thompson at the end of the hearing to write it down for us. I  
34 do not want it revealed in open court.

1 MR. THOMPSON: Absolutely. I can quite see that.  
2 The position it leaves us in though is that because of this unresolved commercial issue and the  
3 regulatory difficulties that we are pushed in the direction of the continuing of bulk supply, and  
4 I think that is the position that the Authority has come to the view of. In relation to the  
5 agreement that has been put forward as a possibility by Mr. Vajda, then we do see some merit  
6 it in relation to the position going forwards because it does appear to us that in the end, if it is  
7 to be a bulk supply arrangement and we cannot agree terms, then that is correct - that it will  
8 need to go down the Section 40 route. However, that is subject to quite a number of caveats.  
9 The first of the three variations we discussed this morning - namely, the Competition Act  
10 protection, the position in relation to the 1.5p, and the position in relation to payment ---- It  
11 sounds as though we might be able to make some progress on that. More substantively, it is  
12 subject to the ruling of the Tribunal in relation to margin because whatever the position is in  
13 relation to bulk supply, if, in practice, there is no margin, it will not advance us at all.  
14 THE PRESIDENT: Assuming that the common carriage proposal ---- What are we assuming?  
15 MR. THOMPSON: Even as a bulk supplier ----  
16 THE PRESIDENT: Even as a bulk supplier you still want a margin.  
17 MR. THOMPSON: That is by no means a theoretical point, because it has been pointed out to me -  
18 particularly by Dr. Marshall, who looked at this - that when one looks at the indicative prices  
19 that are currently on offer, there is effectively no margin, and that is something which the  
20 Authority would need to take into account in looking at this whole issue.  
21 THE PRESIDENT: Would you mind just taking us back over those figures, Mr. Thompson  
22 MR. THOMPSON: The actual margins?  
23 THE PRESIDENT: Yes. If the 1.5p point was taken care of, that would bring the bulk supply price  
24 as contemplated by this document down to 24p as a price per cubic metre; is that right?  
25 MR. THOMPSON: Well, it would hold the ring at that level pending the actual bulk supply  
26 arrangement. But, clearly, we would want the Authority to take into account the position of  
27 the margin in resolving whatever the position was between ourselves and Dŵr Cymru.  
28 THE PRESIDENT: The margin would be between Dŵr Cymru's notional current price - or  
29 between Dŵr Cymru's existing retail tariff; is that right, and the bulk supply price?  
30 MR. THOMPSON: Yes. Offered to us. So, it would need to take that issue into account at the  
31 moment. We have no guarantee, and the Authority's practice in the past does not give us any  
32 confidence that that is an issue that the Authority would ----  
33 THE PRESIDENT: So, in other words, in theory at least your worry is that the bulk supply price  
34 could be re-determined, but still at a level that gave you no margin.

1 MR. THOMPSON: Indeed.

2 THE PRESIDENT: So, you need protection on that point.

3 MR. THOMPSON: We do not think that is a theoretical risk, given the experience we have had to  
4 date.

5 THE PRESIDENT: Right. How do we deal with that?

6 MR. THOMPSON: Well, in terms of procedure I think the Tribunal indicated that at least pending  
7 resolution of this case, or any appeal, it would intend that any agreement of this kind would be,  
8 as it were, appended to an order of the Tribunal who would retain supervision, which we, with  
9 respect, would welcome. In our submission it also should be subject to any findings of the  
10 Tribunal in respect of this appeal in relation to issues such as dominance, excessive pricing and  
11 margin squeeze. At the moment we do not find that in the agreement, and that obviously  
12 concerns us.

13 THE PRESIDENT: When you say it should be subject to those findings, what do you have in mind  
14 exactly?

15 MR. THOMPSON: At the moment - and it may be Mr. Vajda will say that this has already been  
16 dealt with by some form of wording dealing with the Competition Act - in our submission it  
17 needs to be more specific than that. It needs to be made subject to the ruling of this Tribunal in  
18 this case so that we are not, as it were, floating free from the Competition Act back into the  
19 Water Act. You will appreciate that this is something which is very a concern to our clients -  
20 that certainly this original draft does not feature competition at all. So, we want to be very sure  
21 that that is not what is being envisaged, and that the Tribunal - and I am sure it would not do -  
22 does not approve anything which effectively floats away from the competition implications of  
23 this case.

24 PROFESSOR PICKERING: Mr. Thompson, could I ask you to remind me, please: what is the  
25 constraint from the commercial agreement which you have entered into with Shotton? Are you  
26 debarred from raising the price to Shotton at any time? Or, at what point can you reflect  
27 increased costs to Albion in increased prices to Shotton, and under what circumstances?

28 MR. THOMPSON: We essentially have an annual right to uplift the price on 1 August. The  
29 Tribunal may recall that that was one of the issues that arose at the end of the hearing in 2005 -  
30 because there was a gap between the uplift that was intended by Dŵr Cymru and our ability to  
31 pass it through to Shotton. But, essentially, it is an annual uplift.

32 PROFESSOR PICKERING: Did you increase the price on 1 August, 2006?

33 MR. THOMPSON: We did.

1 PROFESSOR PICKERING: So, there is presumably no reason why you should not take your  
2 margin by increasing the price to Shotton?

3 MR. THOMPSON: I am told that there is a cap on how much we can increase the price, and there  
4 is also a right of Shotton to go elsewhere. So, we cannot simply pass it through, I think, by  
5 increasing our margin.

6 PROFESSOR PICKERING: Are those significant considerations?

7 MR. THOMPSON: In terms of our ability to raise our prices?

8 PROFESSOR PICKERING: Yes.

9 MR. THOMPSON: I would think they are very significant.

10 PROFESSOR PICKERING: So, you could not take a 5p margin through the charge to Shotton.

11 MR. THOMPSON: I do not think we could simply unilaterally increase our prices on 1 August to  
12 create a margin. I am not quite sure what is being put to me.

13 THE PRESIDENT: I have the impression from Professor Pickering's question that he is asking,  
14 possibly in relation to the 1.5p and possibly more generally in relation to your concern about  
15 the margin, whether those aspects could be dealt with by a price increase to Shotton? You may  
16 say it would be a pretty ironical outcome of this dispute that if the customer's price actually  
17 went up, but, in theory at least, are there possibilities in relation to that?

18 MR. THOMPSON: It would be appropriate for Dr. Bryan to answer this. He is much closer to the  
19 commercial reality of this.

20 THE PRESIDENT: Yes – either now, Dr. Bryan, or at some point in a few minutes' time.

21 DR. BRYAN: Well in a few seconds, Sir, if I may. In answer to Professor Pickering we are limited  
22 in the amount that we can increase prices by the lower of either producer prices' index or the  
23 increase in Dŵr Cymru's domestic potable tariff. The margin is not for us to apply, it is  
24 subject to the price formula within our bulk supply agreement, which means that any benefit  
25 that we gain by the negotiation of a lower bulk supply price for example would affect our retail  
26 price, 75 per cent. of that benefit would accrue to the customer, and 30 per cent. to us, and  
27 thereby you could determine what margin would result from any change in the bulk supply  
28 price.

29 PROFESSOR PICKERING: Could I just ask in terms of Shotton's ability to go elsewhere, what  
30 does that mean? Where would they go?

31 DR. BRYAN: If I may, Sir, they are allowed to change supplier at any time that they get a better  
32 commercial offer. The terms of our supply agreement are no more specific than that. As to  
33 who would provide that offer I am not really in a position to speculate.

1 THE PRESIDENT: Mr. Thompson, on these various points that you are on at the moment about  
2 these various projections and the margin and so forth, have you got a form of words that you  
3 would like us to consider? Or perhaps you could produce one in due course.

4 MR. THOMPSON: It is quite possible. It may be that you will recall that we were looking at the  
5 draft order that we have ----

6 THE PRESIDENT: Your draft order?

7 MR. THOMPSON: -- prepared. That obviously takes a different approach.

8 THE PRESIDENT: Can these two approaches be brought a little closer together, I wonder? Yes,  
9 we have the draft order.

10 MR. THOMPSON: It obviously depends what the form of the Judgment that the Tribunal is  
11 envisaging making in December might be. If, of course, the Tribunal is intending to make  
12 effectively a final order on the issues of treatment, transportation and retail – put it another  
13 way, on excessive pricing and margin squeeze, then a different form of order will be  
14 appropriate in that it would not then be appropriate to remit the matter back to the respondent  
15 to address those questions. This draft order proceeds on the basis that for the purposes of  
16 finally resolving those questions a short further reference back might be appropriate, and some  
17 form of holding ring pending that happening. If that were not the case, then the form of the  
18 order would, I think, be varied so that whatever the final ruling in relation to excessive pricing  
19 would effectively become “1”, the final ruling in relation to margin would become “2”.  
20 There might then be room for some variant of this agreement to govern the position that would  
21 prevail pending a ruling on a bulk supply price going forward, although we would still be  
22 seeking a ruling in relation to the past in order to address the substance of the complaint as at  
23 the date of the complaint and the date of decision. To answer Professor Pickering’s question to  
24 me before lunch the reason will be – and I anticipate that the President at least will be very  
25 familiar with this – that there is a question of over payment over a period of some five to six  
26 years which, in our case, is £70,000 per year per penny of overpayment, which is a potentially  
27 substantial claim in money terms, where a ruling of the Tribunal is potentially very valuable to  
28 us under s.47(A) of the Competition Act, so at least in relation to the past we are still seeking a  
29 ruling from the Tribunal in relation to the substance of the matter, whether or not that requires  
30 some form of reference back to the Authority to provide additional information, but that is the  
31 reason why those dates appear.

32 THE PRESIDENT: Any ruling we would make in relation to the first access price, for example on  
33 the issue of margin squeeze, would be in relation to the first access price, it would not be in  
34 relation to the bulk supply price, you would have to then infer some cross over, would you not?

1 MR. THOMPSON: Well, indeed, Sir, that was the next point I was going to come on to once we  
2 have looked at that, which is the read across point, where various quite strong things were said  
3 both by Mr. Vajda and Mr. Anderson at the last hearing, about whether there are different  
4 calculations, in fact I think Mr. Anderson said that this morning and we find that quite difficult  
5 to accept. I showed you the Dŵr Cymru letter setting the price at the last hearing which simply  
6 showed exactly the same figures but with the resource cost left out – I think the Tribunal will  
7 remember that. Since then we have seen some correspondence from the Authority in relation  
8 to long run marginal cost, but I would like to show you the letter from Dŵr Cymru to the  
9 Authority in 2001, which is in the reply bundle – it has a tab D in it.

10 THE PRESIDENT: The Albion reply bundle – page?

11 MR. THOMPSON: It is at p.D46. Just for the Tribunal’s note, the letter we looked at before is at  
12 tab 9, p.31 and following of the original notice of application bundle, that is a letter to Julie  
13 Griffiths of 20<sup>th</sup> February 2001 about Albion’s common carriage. That is the original letter.  
14 Then there is a follow-up letter dated 10<sup>th</sup> August 2001, again to Julie Griffiths. You will see  
15 at the bottom of 46:

16 “The proposed access prices have been determined by Dŵr Cymru using its whole  
17 company average cost allocation methodology. Dŵr Cymru has consistently applied  
18 this methodology to establish pricing policy since 1989. This methodology is fair,  
19 simple and consistent. It draws primarily upon data which is disclosed by the  
20 company and certified by ...”

21 THE PRESIDENT: Yes, we have read it, yes.

22 MR. THOMPSON: Then on p.48, at the top, Mr. Brooker, the managing director, was saying:

23 “As a result of the pricing methodology adopted by Dŵr Cymru there is consistency  
24 between the common carriage price offered to Albion Water and the bulk distribution  
25 and non-potable treatment components of the prices charged to other customers, in  
26 particular the proposed access price for common carriage has the same basis as the  
27 current bulk supply price for the inset appointment to the Shotton Paper site, less the  
28 water resource component.”

29 THE PRESIDENT: Yes.

30 MR. THOMPSON: Then at the end: “There are no material differences from the supply prices to  
31 the proposed common carriage arrangement as compared to the 1999 bulk supply  
32 arrangement.” In fact the same is said in the answers to the s.26 notice, it is that sort of  
33 material which made it surprising to us that both the authority and Dŵr Cymru now apparently

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

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

7 THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

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

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

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

32 THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 THE PRESIDENT: Right, I see.

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

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

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

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

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

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

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

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

19 THE PRESIDENT: Yes.

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

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

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

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

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

31 THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

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

23 THE PRESIDENT: Yes.

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

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

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

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

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

32 MR. THOMPSON: Yes.

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

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

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

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

9 THE PRESIDENT: Carry on, Dr. Bryan.

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

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

14 DR. BRYAN: It does, yes.

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

18 MR. THOMPSON: Yes.

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

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

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

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

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

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

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

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

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

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

12 THE PRESIDENT: Yes, fine.

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

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

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

16 THE PRESIDENT: Yes. Mr. Anderson?

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

23 THE PRESIDENT: Quite.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 MR. ANDERSON: Yes.

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

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

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

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

7 \*\*\*

8 .....termination of the substantive appeal in this case.

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

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

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

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

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

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

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

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

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

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

20 MR. ANDERSON: Nothing.

21 THE PRESIDENT: Yes.

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

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

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

30 THE PRESIDENT: Thank you very much.

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

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

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

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

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

8 PROFESSOR PICKERING: I am sorry.

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

10 PROFESSOR PICKERING: Yes.

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

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

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

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

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

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

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

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

32 PROFESSOR PICKERING: Thank you.

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

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

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

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

11 THE PRESIDENT: Yes.

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

26 Now, as the Tribunal ----

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

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

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

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

1 THE PRESIDENT: You tell us what it says.

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

5 THE PRESIDENT: I think 1031 became 1034R.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 THE PRESIDENT: Conceptually speaking ---

11 MR. VAJDA: Yes. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 THE PRESIDENT: A comment.

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

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

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

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

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

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

26 (Short break)

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

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

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

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

33 MR. THOMPSON: It is here.

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. ANDERSON: That may present difficulties.

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

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