IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14 February 2008

Before:
MARION SIMMONS QC
(Chairman)

THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ALBION WATER LIMITED

-and-

(2) ALBION WATER GROUP LIMITED

Appellants

-v-

WATER SERVICES REGULATION AUTHORITY

Respondent

-supported by-

DŴR CYMRU CYFYNGEDIG

-and-

UNITED UTILITIES WATER PLC

Interveners

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HEARING DAY ONE

APPEARANCES

Mr. Rhodri Thompson QC and Mr. John O'Flaherty (instructed by Palmers Solicitors) appeared on behalf of the Appellants.

Mr. Rupert Anderson QC and Miss Valentina Sloane (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. Fergus Randolph (instructed by United Utilities Water plc) appeared on behalf of United Utilities Water plc.

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THE CHAIRMAN: As you know we have to start again. I do not know if you want me to repeat the three points made – I think it probably is not necessary – does anybody want it on the transcript?

MR. THOMPSON: I am grateful. I will start again. What I am proposing to do is to deal with the three points by way of introduction and then the excessive price over costs and then the issue of abuse. The scope of the hearing is defined at p.51 of the case management conference, tab 2 of the core bundle, lines 26 to 27 where the Chair said: "We first have to decide what the costs are in order to decide whether the first access price is excessive. We then have to decide whether that is an abuse, whether that is unfair." In relation to costs the issue is defined as "the costs reasonably attributable to the service" of the transportation and partial treatment of water by Dŵr Cymru, generally and through the Ashgrove system in particular and in relation to abuse the question is defined as whether, in the light of these costs, the first access price was an unfair price within the meaning of the Chapter II prohibition.

So far as the nature of this hearing is concerned, it is defined in my submission, at paras. 277 and 279 to 281 of the further Judgment of December 2006. The Tribunal is to determine this issue of abuse, i.e. the abuse of excessive pricing. The final report is evidence to assist the Tribunal in determining that matter, and one particular issue identified in para.279 is the extent to which the first access price was unrelated to costs.

I then handed up a note identifying four points of principle in relation to costs, the first of which simply restates para. 280 and 360 of the further Judgment, the costs reasonable attributable either to the transportation of water or to the partial treatment of water by Dŵr Cymru. The second is that the approach to be adopted must be consistent with the regulatory practice of the authority, and we rely on two passages, one from the main Judgment and one from the further Judgment. In relation to the main Judgment, para.582 of the main Judgment states as follows.

> "As the decision rightly presupposes a common carriage charge ought to be calculated in a manner that is not inconsistent with the principles generally applicable to the charges made to customers."

Then further down:

> "We accept Albion's submissions that it would be discriminatory to adopt such an approach in calculating a common carriage charge vis-à-vis a new entrant when the approach in question is not used by Dŵr Cymru for charging purposes."

Then further down at paras 590 to 591 the context is set out, the stand alone calculations relied on before Tribunal and they show that if Dŵr Cymru were to set its common carriage charges on that basis for use of its existing assets it would earn profits of the order of 15 to 17 times higher than it would normally earn on its regulated water business. The difference is accounted for by the fact that on its regulated water business Dŵr Cymru is allowed to earn a rate of return deemed compatible with its financing requirements but taking into account its position as a monopoly supplier. In our view there is no reason why a common carriage charge should be calculated any differently. On that basis Dŵr Cymru would still be earning the return on MEA value that it would have earned had it been supplying the water itself instead of hiring out its facilities to Albion for the latter to Shotton Paper via common carriage."

Then there is a reference to the higher risk of industrial customers, and then it goes on:

"In any event it has never, as far as we know, been suggested that Dŵr Cymru is entitled on that basis to earn a higher rate of return in respect of assets used to supply some customers rather than others. Dŵr Cymru is effectively a monopoly supplier with a secure and stable revenue stream. In the case of Ashgrove, Dŵr Cymru has enjoyed a substantial revenue stream of apparently over £2 million a year for the last 20 years from a pipeline that is 50 years old and has apparently required minimum maintenance and capital investment. The notional investment must by now have been recovered many times over."

Then in the further Judgment, a passage in relation to the relationship between the bulk supply price and the common carriage price (paras 256 et seq of the further Judgment). 256 sets the context. There is a reference to the inset appointment, and then it says:

> "It has been our view the situation in which Albion finds itself is largely traceable to the actions of Dŵr Cymru and the Director. The Director did not deal with Albion's complaint expeditiously nor according to law as indicated in the main Judgment. Secondly, Dŵr Cymru obstructed the development of competition through common carriage by quoting a first access price which would have given Albion a zero margin and which bore no reasonable relation to costs."

So that is the context, and then at 259 to 264 the Tribunal considers the relationship between the bulk supply price and the common carriage price. 259 sets out some context by reference to s.40(6) of the 1991 Act, and in particular 6(a) which refers to the desirability of facilitating effective competition within the water supply industry, and then (b) and (c) relating to the costs of the supplier, and (d) relating to the ability of the supplier to meet its existing obligations. Then 260:

"It is true that the determination of a bulk supply price under s.40 is a separate statutory exercise . Certain points may arise which do not arise in relation to common carriage, nonetheless we accept Albion's submission that in determining the bulk supply price the Authority will inevitably be considering the costs of partial treatment and transportation relevant to the bulk supply provided by Dŵr Cymru to Albion. Similarly, the Authority will need to address the issue of retail costs in determining the relevance or otherwise of such costs to the bulk supply price."

Then in its letter to Albion of 15th November 2006 the Authority accepted notably that in the determination of the bulk supply price it would have appropriate regard to the Tribunal's Judgment, that the information generated in the appeal to the Tribunal about treatment and distribution costs was relevant to the bulk supply price determination and so on. I do not think it is necessary to read through to the end of that.

Then it says:

> "In those circumstances the determination of the bulk supply price and the investigation of the costs to which we have already referred will, to a large extent cover common ground at a different time period is unlikely to affect the underlying principles. It follows that whether or not Albion obtains an exemption from the licensing provisions of the 2003 Act, the Authority will still be likely to be investigating treatment, transportation and retail costs in the context of the s.40 determination."

Then it is clear that this was considered relevant to the question of whether this investigation was useful, and effectively they are saying that they would be exactly the same exercises.

Then 263:

> "The Authority and Dŵr Cymru argue, however, that the bulk supply price was arrived at on a quite different basis from the first access price, namely on the basis of long-run marginal cost."

Then at 264 the Tribunal expressly rejects those submissions.

> "For the reasons already given, it is clear that there is a substantial 'read-across' between the two prices. Moreover, it is plain on the evidence before the Tribunal that, historically, the bulk supply price was set on the same costs basis as the first access price."

So, in my submission, it is quite clear that the Tribunal found there that the approach that was appropriate under the regulatory regime for bulk supply was exactly the same as the

approach that was appropriate for common carriage. So we say that our principle two necessarily flows from those two passages in the earlier judgments, which of course the Authority has not seen fit to appeal, despite over a year or nearly a year and a half in one case having gone by since those judgments were given.

Our third principle, which again, on the face of it, does not look very controversial, certainly not in relation to this Regulator, is that the primary approach to the assessment of costs is the general or regional average approach. Again, there are two passages relevant to that. First of all, the passage where this issue was specifically discussed by the Tribunal in the main judgment at paras.604 and following. It is really the first two sentences:

> "The Authority argues that it is impermissible for the Tribunal to consider the actual costs attributable to the Ashgrove system, even as a cross-check, because of the principle of 'regional averaging' on a geographic basis. According to the Authority, 'regional averaging' is the practice whereby a water company sets its prices by reference to the average cost of supplying all customers in its water supply area, although different charges can be applied to different classes of customer if there is a cost-based justification for such a difference."

There is then a very detailed discussion of all the issues that have been raised, and certain reservations that the Tribunal thought were appropriate, particularly in relation to non-potable distribution.

Then the conclusion is at paras.627-8, and in particular in 627 there is a reference to *United Brands* and the approach of the Commission in a *Telecoms* notice and they reject the submission that regional averaging is the only approach, and it is required to seek to establish what the elements of costs are and to disentangle the costs of the line of business under inquiry from the costs attributable to other businesses carried on by the allegedly dominant company:

> "We do not think that 'geographic regional averaging' can be put forward as a reason for not undertaking such an exercise in a Chapter II case in circumstances where non-potable systems generally, and the Ashgrove system in particular, are discrete entities separate from the generality of Dŵr Cymru's potable systems."

In my submission, it is clear that the approach that the Tribunal had in mind there was as a cross-check on to the regional averaging approach which the Tribunal had presented to it as an average accounting costs approach. One sees that at the end of the judgment, para.981.

You will see that the primary conclusions in relation to excessive price relate to the average accounting costs basis, i.e. the regional average approach that had been adopted by the Authority.

Then this is followed on in the further judgment at paras.234-8 and 249. Paragraphs 234-8 set out the history of the matter and the main conclusions in the main judgment, and then 249 sets out what the main issue is for the purposes of this investigation. It says:

> "The main issue is 'transportation' costs. Transportation costs, including any appropriate allocations, need to be distinguished from other costs currently included under the heading 'Distribution' Costs. Costs relating to activities that are not fairly referable to the transportation of non-potable water, including but not limited to retail costs, need to be identified and excluded if appropriate. To have a full picture transportation costs need, in our view, to be established both on the basis of an average for non-potable users generally and, as a cross-check, in relation to the Ashgrove system."

So it is quite clear that the first primary was, as had originally been said by the Authority, the regional average system, and as the Tribunal had presented to the Authority in the course of argument in the June 2006 hearing, it was appropriate to use the local costs, as it were, as a cross-check. In my submission, that was the approach that was envisaged at all times, and in particular was strongly urged on the Tribunal by the Authority, that the regional average position was the primary position. Indeed, the Authority said it was the exclusive position.

Then the fourth point of principle really flows from the AAC plus methodology in so far as we understand it, but on the more granular approach is the wording used by the Authority to the allocation of costs on a regional average basis adopted by the Authority in its principle AAC plus approach. Costs are allocated to individual non-potable systems on the basis of the specific services that they received. We would say that that principle is really integral to the AAC plus system, and should not really be controversial. One sees it, for example, in table 6 of the final report on p.91, where you see that treatment costs are only provided under systems S6 and S10. In fact, we find later that sludge disposal is only actually offered on our system S10, because the only other sludge is apparently used by system S6 as part of its potable service, as I understand it.

So we say these principles should not be controversial. A to C flow, or 1 to 3 flow clearly from the main judgment or the further judgment, and the fourth one appears to be the approach adopted by the Authority itself. However, surprisingly perhaps, most if not all of

Albion's concerns flow from one or other of these principles. There are some limited issues of factual appraisal and legal submission, but, in my submission, the main points flow from these principles. Taking the first one, we say that the back-up supply is plainly not reasonably attributable either to the transportation or to the partial treatment of water. Both in principle and on the evidence, it is a separate service, essentially a separate resource offered to Albion and through them to Shotton Paper, but could in principle have been supplied by somebody completely different, including Albion itself or CORUS, for example, if there had been a suitable bore hole, or from United Utilities, or indeed another adjacent water company. It is entirely coincidental and fortuitous that it is actually Dŵr Cymru that provides this service. We will come to the evidence in due course which makes it plain that that was Dŵr Cymru's view as well until some sort of Damascan revelation came over them when they saw the figures in the draft report and saw how very inconvenient it would be if that 4.4p figure disappeared from the costs.

Secondly, the second principle, the Authority specifically rejects the second principle, however uncontroversial it may seem. For example, para. 9 of its response sets the position out clearly. This is what I call the over-view document, or the response document. I think it is in Tab 6 of the core bundle at p.4.

> "The Authority notes, for the avoidance of doubt, that the calculations in the Final Report, and the further work being undertaken in order to respond to the parties' points of dispute, do not reflect the approach which the Authority takes in general to the regulation of prices in the water industry. As was noted in the Final Report, the Authority does not consider the work it has been requited to undertake in this case to be a reflection of, or constraint on, its current or future policies in relation to retail or common carriage access pricing".

We say that is really just a very extraordinary thing for the Authority to say. It is a public body. It has not appealed the judgment. There are clear statements of law which tell it what to do. It is acting under the control of the Tribunal. But, instead of doing what it is told it simply says, boldly, that it is going to do something completely different. In my submission, that is a basic flaw in the entire approach that the Authority has taken in relation to this matter.

The third issue - regional average pricing - reflects a surprising change of position by the Authority, which has always been emphatic that regional average pricing was not only legitimate, but the only legitimate approach as one can see from at para. 604 of the main judgment. However, this issue is omitted completely from the final report and was only

raised by the Tribunal itself at the start of the case management conference of 23rd October. In the skeleton argument served last Friday the Authority still appears to take the view that it should be ignored for the purposes of the unfairness issue. It is also notable that the Authority made no attempt to calculate its LRAC figure on a regional average basis. Also, that the 2001 internal documents which we saw only in September 2007 - although the Authority has had them apparently since June 2001 - that the first access price was not Ashgrove-specific and therefore did reflect regional average pricing. Again, we find this a quite extraordinary approach of the Authority.

The fourth point - the granularity of the AAC-plus methodology - which is the Authority's favoured system. We say that despite it being the Authority's own creation it has not been very consistent in its application. For example, it maintains that the cost of sludge disposal at Ashgrove should be included in the regional average cost even though only Ashgrove actually receives that service. It says that the back-up supply should be excluded on the ground that only Ashgrove receives that service. It then maintains that the cost of distribution pumping should be included in the regional average costs of Ashgrove, even though it recognises that Ashgrove does not in fact receive that service and in fact pays United Utilities under the proposed arrangements to provide that service at Heronbridge. The Tribunal will have seen in the papers various concerns expressed by Albion Water, particularly in relation to the somewhat notional MEAV figures that seem to have actually been used by the Authority in various places, although it does not appear in the final report. Our concern is that if this approach were put into practice it would have the effect that non-potable customers would be asked to pay for services that they do not in fact receive (the water distribution pumpings are a good example), but that it would be costed by reference to assets that do not in fact exist. That is where one finds that these notional storage costs in relation to assets that do not actually exist are being larded on to the Authority's estimates. We find the entire approach really quite bizarre.

Turning to the issue of abuse, just by way of introduction, we just put down four markers in terms of principles. First of all, the extent of any excess is, in our submission, one with only relevant factor in determining the issue of abuse. Secondly, we say that the Authority was right to follow the guidance of the Tribunal in respect of comparators (I will come back to the references in due course). Thirdly, we say that non-cost factors - and I think this a matter that is common ground with Dŵr Cymru at least - are highly relevant as a matter of principle on authority and on the facts of this case.

Fourthly, and, we say, very importantly, the overall profitability of the market in question and the share of the dominant company in that profitability is a highly relevant factor - again as a matter of principle on authority and on the facts of this case. I will obviously come back to that in more detail in relation to abuse.

Turning to the issue of excessive price over costs in more detail, first of all, I draw the Tribunal's attention to the findings of the Tribunal itself in the earlier judgments. I do not think we need to go to any specific references, apart from one. The passages I rely on are paras. 234 to 239 of the further judgment, which cite paras. 981 and 631 to 637 of the main judgment. Paragraph 247 of the further judgment does, I think, warrant a quick look. This is referring back to para. 637 of the main judgment. The Tribunal states this:

> "The Tribunal expressed the view that the first access price was apparently at least double what could be justified on the basis of costs".

That is the first passage. The second is paras. 599 to 600 of the main judgment. There are some rather critical remarks in the first sentence about the level of information. Then the second sentence refers to the methodology. In the third sentence the Tribunal goes on,

> "However, such information as the Tribunal does have suggests that, on the average accounting basis used in the decision, the return on capital element as regards the Ashgrove system (main and treatment works together) will be in the range of roughly 1p to 1.5p, even accepting for argument's sake the disputed MEA values relied on. We have no reason to doubt the estimates put forward by Dŵr Cymru that direct operating costs (chemicals, manpower, system management, etc.) for the main and treatment works together are around 2p per m3.
>
> However, those figures would give rise to a total average accounting cost of around 3.5p per m3 for the mains and treatment works together, as compared with the average accounting cost done by the Director in the decision of 19.2p/m3 and the first access price quoted by Dŵr Cymru of 23.2p/m3. We would be sceptical of any suggestion that the difference between the figures in the decision and the figures supported by the evidence before the Tribunal could be validly accounted for by a large allocation for 'general and support overheads', although the Authority's calculations appear to assume an apparently high level of general overhead."

So that was the most specific finding of the Tribunal in the earlier Judgment.

The second point by way of background is the original calculations which are most conveniently found at tab 47 of the bundle for the case management conference on 23rd October 2007, then p.223, and you will see "Recommendations" and then a blanked out passage and then underneath that it says:

> "Calculate common carriage network access prices for each constituent part of Dŵr Cymru's water service based on whole area average costs"

so that is the approach that was going to be adopted and this is the January 2001 document. Then, over the page, 224 under "Pricing", it is stated:

> "Dŵr Cymru's clean water service is segmented into resource treatment, bulk distribution local distribution and customer service. The services requested by AW are treatment to a non-potable standard as present and bulk distributions."

Then on the next page a figure is given based on certain assumptions and you will see under (c) the relevant figure, 19.94 and then above it the reference to what was used to generate that on an average accounting basis.

Then 226 is rather a difficult document to read but I think it is common ground that it is the workings that were actually used before the February 2001 prices were produced; there are various clearer versions of that document in the following tabs, but that also has an average accounting cost calculation as well as the first access prices calculation which was subsequently used.

Then on p.228, this is a February 2001 document – you can see that from p.227, there is a reference at the bottom to Mr. Edwards, February 2001. Then 5.5:

> "Upon publication these prices will be Dŵr Cymru common carriage prices. The price is based on whole company average prices and is therefore not particular to the Ashgrove application."

So we made various points about that. We say that this contemporary document, which was not available to the Tribunal at the time of the original hearing confirms that the approach adopted and proposed in the further Judgment was correct, that the first access price was based on two services and two services only, namely, treatment and distribution. Secondly, that those costs were not specific to Ashgrove; and thirdly, perhaps more controversially but in my submission correctly, the approach adopted in calculating the first access price was wholly unorthodox even on Dŵr Cymru's own approach in that they had actually produced two conventional average accounting cost calculations which gave quite different figures for bulk distribution than the figure that was put forward to the Tribunal and dealt within the decision, albeit that the question of whether non-potable distribution

costs were actually lower than potable distribution costs clearly was not addressed in this calculation, and so is obviously to be read subject to the observations of the Tribunal on that issue at part 11 of the main Judgment.

The third document that I think warrants examination is the 17th March 2003 document which was disclosed recently which is at tab 29 of the core bundle. You will see that there is a covering letter from Dŵr Cymru which gives various attempted glosses on this document, and then the actual document itself is at the back. The first part of the document, pp. 1 and 2, is a calculation of how Dŵr Cymru proposes to actually generate tariffs for large users. Then under the heading "Additional information" there is reference to a cross-check. There is an explanation of how it has been conducted in relation to third party services which I think it is agreed is where the relevant part of the accounts are, and there has been an allocation on an agreed basis after a meeting with Ofwat and you will see reference to an agreed methodology as discussed at the meeting. So it is obvious that Ofwat had agreed this and then had agreed a methodology to be used to derive an estimated unit price for non-potable water. It is a point that we did not make in our skeleton that Dr. Bryan has pointed out to me that that of course includes not only the treatment and the distribution cost but also the resource costs here. So it is interesting that the figure that is generated is some 7.86p per m3 one finds at p.3.3 as the starting point, and then it is only by adding in general costs of about 15 or 16p that one gets back up to a figure of 22.5p. So in my submission it is interesting in that that figure is actually closely comparable to the figure not only that the Tribunal itself reached of 3.5p, which would have been exclusive of resource costs so it would be a similar figure. It is also similar to the figure that Albion itself reaches in the calculations which were put into the Tribunal in response to its request on Monday. In our skeleton we come up with a figure of about 10p when one adds in the general costs which the Authority now considers to be appropriate. If one takes off the resource cost one comes down to a figure of about 7p.

What I was proposing now to do was to go through the specific issues which are raised by Albion and then there were also two additional issues which were decided in the response which, as it were, were adverse to Albion's interests and so I think I should comment on those. That requires not only a certain amount of courage, but also to take the 231 page document in your hands. The second page of the note I handed up provides a correlation between the final schedule and the number in the Albion schedule. The first point is the back up supply – I am proposing to take this fairly fast and to notify the points of principle

that we rely on but I hope that will be useful at least in terms of the transcript to set out what we say about these things.

In relation to the back up supply, as a point of principle, we say it is not part of treatment or distribution, it is not mentioned in the contemporary documents as a service that was to be included and, indeed, it is consistently referred to by Dŵr Cymru as a separate issue, as I say, until the draft assessment. The Tribunal may recall that in our reply we exhibited a letter from December 2006 which set out the position of Dŵr Cymru and we say that that is a particularly valuable document in that it is independent of any, as it were, pleadings in this case; it is simply a commercial document. You may also recall in the 13th November 2007 bulk supply quote there is a claim for £1 million (roughly) for standing charge for the right to have access to Dŵr Cymru's surplus potable water from time to time.

The reply is at tab 13 of the core bundle. The Tribunal will find a letter at the back, which is a letter dated 5th December 2006, addressed to Dr. Bryan from Mr. Peter Jones, who I think is the commercial director of Dŵr Cymru, or was at that time – unfortunately there are a large number of people called "Bryan" and quite a number called "Brooker" and "Jones" in this case, so it is quite difficult to follow sometimes.

The relevant part is under the heading: "The Relevance of the Judgment to the 1999 Bulk Supply Price." You will see that Dŵr Cymru obviously had the Judgment in mind. It is the longish paragraph saying "In any event …" Mr. Jones says:

> "It would have been over-simplistic to characterise a bulk supply price purely as the sum of a common carriage price, plus the price of the water at source, because there are important differences between the economic characteristics of, and therefore the contracting arrangements, which under pin the transactions involved. For example, had Albion proceeded with its common carriage proposal, contractual arrangements would have had to have been established to determine how "unders and overs" would have been dealt with …"

And then this is the important part:

> "… together with a separate arrangement for dealing with the potable back-up to the Shotton Paper site."

Then there is reference to other sectors, such as electricity, gas and rail, which

> "… shows that such matters are not straightforward, especially in circumstances where the operator of the facility (Dŵr Cymru) is also, in effect, one of the users of the common carriage service (since it makes supplies to Corus) and there may potentially be conflicts of interest between Corus and Shotton (and t heir

> respective suppliers) in terms of prioritisation of access. Under the bulk supply arrangement all such issues are effectively 'internalised' within the vertically integrated water supply service. However, vertical disaggregation in the form of common carriage requires regard to be had to these points and explicit provision to be made for them."

So, in my submission, it is quite that, both a matter of principle now and also looking at the matter historically, Mr. Jones clearly thought that bulk supply was something quite separate from common carriage.

This is confirmed by the documents in these investigation and in particular by a remarkable document at tab 28 of bundle A to the final report, annex A to the final report. It is the first volume of annexes to the final report. You will see that it is a document sent to the solicitors to the Authority dated 5th March, from Miss Cross, the Agreements Manager, copied to Dr. Bryan. It is certainly not part of my case that any offences have been committed, but the Tribunal will of course be aware that under ss.44 and 72 of the Competition Act it is actually a criminal Offence punishable by two years imprisonment, I think for the directors of the company and also for its relevant employees to mislead the Authority in an investigation of this kind. With that in mind it may be worth just turning through to the answer to question 8, which is a quite express question from the Authority. You will see at question 8:

> "Dr. Bryan has stated that 'Shotton has to buy potable water (as a back up)'. What were the charges for the back up price in 2000-01 and did you include these in the First Access Price? Please explain how you think this back-up service should be accounted for in any new access price?"

Then in the second paragraph:

> "In the event that Dŵr Cymru were unable to supply the full 18 Ml/d of non-potable water any time, Albion Water could use potable water to make up the shortfall, but would only pay the non-potable price.
>
> The agreement therefore provided two benefits to Albion Water, the 'standby' service of up to 8 Ml/d and the fact that potable water supplied to make up the 18 Ml/d entitlement would only be charged at non-potable rates. Neither benefit was priced for separately in the bulk supply agreement. Effectively, therefore they were 'bundled' together with the basic water supply service in one volumetric price.

> The First Access Price did not include any allowance for either benefit. By definition, since Dŵr Cymru's role would have changed from 'supplier' to 'common carrier', the various services that were included in the bulk supply agreement would automatically have become 'unbundled'. The basic supply of non-potable water to the Shotton site would have become Albion's responsibility. Whether or not Albion would have required …"

– and then there are three possibilities –

> "… is not known. Further, whether or not such services would have been negotiated as part of the access agreement (and therefore a single pricing agreement), or as separate agreements, is not known. However, Dŵr Cymru's preference at the present time would be for different services to be priced separately (whether as a single agreement or as separate agreements) because this provides transparency and offers better incentives. For any standby or 'top-up' supply it would seem logical to adopt a two-part structure, consisting of a 'reservation' element as well as a volumetric charge for the water actually taken. The levels of such charges would depend on the nature of the actual services required."

That is clearly a detailed and comprehensive answer to the question, which leaves no doubt about what the answer was.

The next stage in this perhaps slightly odd saga is at the first tab of bundle B to the final report, and p.4 is equivalent to para.1.14 of the Final Report. In view of that response it may surprise the Tribunal to see the figure of 4.4 for Potable Back-Up Supply set out under each of the four headings, AAC, LRIC, increment of 20 per cent and 50 per cent, and the LAC. In each case the 4.4 for back-up supply is included. Then the reasoning for that appears at paras.5.23 to 5.36. 5.36 concludes:

> "… that it would be reasonable to assume that the costs of the back up supply were included in the FAP …"

although the Tribunal does indeed quote at 5.32 the answer of Dŵr Cymru, but it does not really explain how it is that Dŵr Cymru could have been so completely wrong in its answer. Indeed, it recognises that it would not necessarily require a back-up supply, as one sees in 5.34. There is no principled basis for saying that a back up supply should be included, and so the Authority simply rejects without any real explanation a statement to the contrary by Dŵr Cymru.

The point then goes on at tab 11 of bundle B, which is a letter from the solicitors to the Authority to Dŵr Cymru. Whether rightly or wrongly, this is a point that my clients feel quite strongly about. This point had been put to Dŵr Cymru and they had given a categorical answer. Then the Authority effectively asked them to think again at the third paragraph without, as it were, saying, "What you said before was false or wrong", they have another go.

Then the next day a long letter comes back from Dŵr Cymru, which one finds at tab 14, and the relevant parts are at p.3, the second paragraph, and p.5, the second paragraph. They claim, first of all, that Albion had:

> "… misrepresented Dŵr Cymru's position on whether or not the costs of the back-up supply wee included in the first access price."

The Tribunal have seen what Dŵr Cymru's position was. Then they assert that the position had not been clarified either way. Then they say it was entirely correct for the

> "… draft assessment to proceed on the assumption that the back-up supply was to have been provided within the scope of the FAP, especially in view of the strong indication from Albion that it wanted the back-up arrangements to continue."

Then at p.5 it says:

> "First, as noted above, Ofwat are entirely correct in including the potable back-up supply service in their draft assessment."

What is interesting about this is that there is no actual statement of what Lynette Cross was wrong, but they say that, nonetheless, the Authority was quite right to add that 4.4p in. In my submission, that does not really add up and what really is going on here is that Dŵr Cymru have seen the numbers and sees what a very good thing it is that that 4.4p should appear. There is no real other credible explanation of what is going on here.

The second point is the quantum of the back-up which is dealt with at pp.9-12 of the Final Schedule, which is point 5 of the Albion Schedule. Again, essentially, we object to this by reference to principle 2, our regulatory principles. We say that these costs, which are essentially the costs of the potable headroom on the relevant systems of Dŵr Cymru, are already fully accounted for as part of the potable headroom. The Authority concedes that if a substantial charge had been included it would have required a regulatory change to be made subsequently in 2004. We say it is not separately charged for under the current bulk supply, and we say it is essentially a fixed charge for access to a water supply that is essentially surplus and where the potable uses take priority anyway and which is fully accounted for, and so we do not accept the approach that has been adopted for the costing of

that fixed charge if, contrary to our main submission, the Tribunal finds that it is appropriate for that to be included in the first access price. By way of a footnote, we say that the £1 million or the 14p pm3 added on in relation to this in the proposal of 13th November is a gross further overcharge.

The third point in order in the schedule comes at pp.13-17 of the Final Schedule and relates to sludge disposal, which is point 2 in the Albion schedule. As we understand it, this applies only to S10, the Ashgrove system, and our main issue here is that as far as we understand it sludge disposal is fully accounted for normally as part of sewage services. So it is again a form of double counting or discrimination to include a charge which would have required a regulatory change, and so there is no basis to think that this was included in the first access price in 2001, and we say it would be contrary to principle to include it now.

I think I have made the point about principle four, about how on earth this actually works under the AAC plus methodology and why it is, if we are the only person who get it, it is included on a regional average basis if the Authority takes out the bulk supply on the basis that we are the only person who gets that.

The fourth point is the no less riveting topic of water distribution pumping, which appears at pp.17-19 of the Final Schedule. This is a matter that was left out in the original report, but then makes a come-back in the final, final report and adds 2p to the figures. As we understand it, the Authority accepts that this service is not actually provided under system S10, and in fact the service is actually bought from United Utilities. We say that on the granular approach of the AAC plus, even if one values water distribution pumping on a regional average basis, one should not have to pay for it if one does not actually receive it, any more than someone who does not receive treatment services should pay for treatment services that they do not receive. Again, we think there is an unclarity in the Authority's approach and some inconsistency there.

Fifthly - and this is pp.20 to 22 of the final schedule - we come to the difficult question of the MEAV cross-check. I think the figures are now agreed and appear at the foot of p.21. The figures in the left-hand column are the figures that appear in the final report under this heading at Table 16. The table on the right-hand side are figures which were subsequently revealed after the CMC in October and November 2007. You will see that the numbers are in fact consistently higher - in some cases about three times as high; in some cases double - and in total something over double the figures. Really we have two complaints here: (1) we find it rather extraordinary that these numbers were hidden away and not included in the final report - and we reject any suggestion that it was clear from the final report that these

figures were there, and the mere fact that Dr. Bryan effectively inferred some of them because he could not make the numbers add up in our submission does not mean that they were clear in the final report; (2) we cannot see any basis on which the figures that Dŵr Cymru presented itself during the course of the investigation should effectively be rejected and replaced with figures which are two or three times as high. We say it is a very material change in the figures, and one which should be taken into account.

It also appears from Appendix 1 to this schedule that these figures were not simply used as a cross-check, but they were actually used as some of the source figures in some of the calculations. One sees that at para. 2 of Annexe 1.

> "For a few functional assets, the Authority's gross MEAV estimates were used as more than just cross-checks".

So, in our submission it is particularly regrettable that these figures were not actually stated until Dr. Bryan chivvied them out of the Authority after the last CMC.

There is one particular figure which we still consider is obviously far too high . It is a point which is raised in the Appendix to the note that we served on Monday (paras. 9 to 15, Tab 11 of the core bundle, p.4). You will see reference at the end of para. 10 to:

> "-- raw water and distribution mains account for £104 million out of a total of £141.5million".

That is the Ofwat MEAV figures that we have just been looking at. As he points out, that is 74 percent of the total which relates to raw water and distribution mains which allegedly amount to £104 million in the Authority's estimation.

Then Dr. Bryan refers to the asset inventories of Dŵr Cymru for 1998 and 2003. These are figures taken from Mr. Jones' witness statement. He states that they go up. Then, at para.. 12 he points out that over the same period - so, from 1998 to 2003 - the value of raw and non-potable water mains fell from £303 million to £102 million. So, they divided in three. Then he asserts,

> "The only credible explanation for this dramatic fall in value is that the valuation applied to these assets in 1998 was too high, by a factor of approximately three. It is that same excessively high valuation that has been used to underpin Dŵr Cymru's 2003 and 2007 MEAV estimates for raw water and non-potable mains.
>
> The Authority's decision to further inflate these valuations (by a factor of almost two) ignores the clear evidence that they were already excessive.

This leads to the Authority's implausible suggestion that the MEAV of the 216km of raw and non-potable mains associated with non-potable systems (£119 million) is greater than the MEAV of the totality of Dwr Cymru's 697km of raw and non-potable mains (£102 million, according to its most recent (2003) asset valuation".

That is all quite complicated, but I think the simple point can be seen by reference to one document which I hope the Tribunal has - the first witness statement of Mr. Jones. It is Tab CH4 to the first witness statement of Mr. Jones. The first is Table C11 of the C3 Asset Inventory for 2004. So, those are the 2003 figures. The first page, C11, has a little heading - (a) - Group 1 Water Resources and then (b) - Raw Water Aqueducts. If you read across you will see the total is ----

THE CHAIRMAN: Can you do this a bit slower. Can we start at the beginning, because I am not sure what we are looking at.

MR. THOMPSON: It is the first witness statement of Mr. Jones. There were three witness statements sworn by Mr. Jones for the purposes of the -- This is No. 1. To that he exhibits various official documents ----

THE CHAIRMAN: The exhibits are not there. Where have you got the document?

MR. THOMPSON: I have it as Exhibit CJ4.

THE CHAIRMAN: No. In which bundle?

MR. THOMPSON: In the first witness statement of Mr. Jones. (After a pause): I do not want to delay matters with proportionality, etc. Would it be sensible if I simply make the point.

THE CHAIRMAN: It is for the purposes of the transcript.

MR. THOMPSON: It is simply that line A2, under the heading Water Resources on Table C11 -- the length of 696.65km is given, which is the figure referred to at para. 15 of the appendix we have been looking at. Over the page, a valuation for the raw water aqueducts under A2 in Table C11A of £102.19 million is given. So, this is the entirety of the raw water system in 2003 valued at £102 million, which is less than the Authority's figure gives for simply the 216km associated with non-potable systems. So, about one-third of the length is valued by the Authority as at more than the totality was valued in 2003. That is the point. We say that is a gross over-valuation and cannot possibly be right.

Just returning to the MEAV cross-check generally, the stance that we are adopting now is that the Table 15 figures - so, Dŵr Cymru's own figures, the left-hand column that we were looking at, are a much more plausible figure, although we take the view that they are still on the high side.

The next point is the question of stranded assets which again represents a change of position by the Authority between the final report and the response document. That is pp.22 to 24 of the final schedule. In relation to that, our position is, I think, that we accept in principle the idea of an allocation of costs for stranded assets, but that their valuation should be subject to the cost of capital issue. So, we say that they are over-valued at the moment.

(Short break)

MR. THOMPSON: I think we had reached p.22 to 24 of the schedule, I think. We, I hope, will get on quicker in due course but the position in relation to stranded assets. We have accepted in principle a charge in relation to that although I understand the position may not be so clear in Scotland, but we accept in principle but say it is subject to what the correct cost of capital is and we also have the same point about the correct MEA value, and we say that Dŵr Cymru figure rather than any inflated figure should be used.

The next point is at pp 24 to 27 of the schedule, which is the first point we make, where we question whether the AAC-plus approach actually reflects what was done. I think on reflection we are not objecting in principle to what the Authority is attempting to do but we do have concerns about its consistency of application about the values that have been used, and about the weightings, and in particular we say that it must be applied consistently with the Authority's regulatory policies, in accordance with the Judgment of the Tribunal. That is no.1 of the Albion schedule.

The next is "Common carriage services" which is effectively the other additional cost that is added on by the Authority in relation to the back-up charge, and that is at pp. 27-28 of the final schedule, and it is the third point in the Albion schedule. I think our primary concern there is what I might call "principle 1" whether it is referable to these activities and we have concerns as to whether there may be some degree of double recovery in relation to customer facing operational costs. We say it is not a major issue, it is not a huge amount of money, but our suspicion is that there would, in fact, have been a separate charge if indeed additional costs had arisen beyond those attributable to distribution and non-potable treatment.

We then come to some smaller points, I think; first, "Bad and doubtful debts", pp.28 – 31 of the final schedule, which is the sixth point raised by Albion. I think our main point is that they were fully allocated to potable customers so there is an element of double charging here, but we accept the figure as reasonable.

The next point is sludge disposal (our ninth point), pp. 31-32 of the final schedule, again we say that those were fully allocated costs. I think it is the same point we have already had but we do not dispute the figures.

The next point is our point 8, pp.34-35 of the final schedule. Again the back up supply and I think we have had those points. We say it is not attributable to treatment or distribution, it should have been separately costed and accounted for and that is the evidence that would have happened in any event, and we have looked at that.

Then the next point (pp. 35-36) is, I think, a return to doubtful debts – our tenth point, and again we say that it is fully allocated, and in relation to the Albion specific costs, which is what this is about, the LAC costs, we make the further point that we carry the debt risk in that we are the ultimate supplier in relation to Shotton Paper.

The next two points, both on p.36 of the final schedule, our points 11 and 12, are scientific services and insurance and management. We make certain points but the sums are small and, for these purposes, we can take those as agreed, I am pleased to say.

The next point, point "O", is a rather general question – the question of a lack of workings and we make some points about that, our 13th point (pp. 37-41). In general terms this is still a source of concern, especially in relation to MEAVs and the detailed capital calculations. We say this is really a matter for the Tribunal to take a broad view of and we compare it to the earlier concerns that the Tribunal has expressed at various times about the lack of information. We say that the Authority should have produced the specific figures that are used, and it also should have produced a calculation by reference to the regulatory rate of return which, on the face of it was the obviously correct cost of capital figure to have used.

The next point is pp 41-48, and again is the dispute about costs of capital, our 14th point, as a matter of principle, and you already have my main submission on that. We say that it is discriminatory and contrary to policy to adopt this approach. We say it is contrary to the approach of the Tribunal, both in relation to stand-alone costs and the bulk supply price issues. We also say that it is highly significant that the first access price was found by the Authority itself to be excessive, even on the basis of a disaggregated cost of capital - so, as it were, making an assumption in favour of Dŵr Cymru that the ordinary regulatory approach should not be used nonetheless they still found an excess of price over cost.

The next point, at pp.48 to 51 of the final schedule, is our fifteenth point - the quantum of the cost of capital. Obviously we object to it as a matter of principle, but we also say that there is a clear factual error which is clearest from the final report itself at Fig.2, p.132. I am not sure where the Tribunal has the final report, but it may be that it is separate.

THE CHAIRMAN: I think over lunch it may be helpful if you knew what numbers we had. It is very confusing for you.

MR. THOMPSON: It is p.123 of the final report. You will see that there is a graph there which clearly reflects the reasoning of the Authority which is crucial to the question of how the authority has approached the relative risk and shows by reference to the base year 2001 that there has been a drop-off of non-potable demand by reference to potable demand. We say that is really a very obvious error of principle in that the relevant period is the period before 2000-2001 and not the period after, and that that is a sort of gross error or factual appreciation which, even on Mr. Friday's approach, would justify the Tribunal intervening. One can see where these figures come from in Annexe B47 to the final report, which is the first B bundle.

THE CHAIRMAN: Bundle 35.

MR. THOMPSON: You will see it is a fax from Pinsent Masons to Dr. Bryan on 5th June. It is Bundle 2 of the B bundles at Tab 47. There is quite a long letter from Pinsents. Towards the back of the tab you will find a report. This is the basis for the differential cost of capital - that non-potable water was more volatile than potable. The basis for this is a table which one finds at p.5 of the report. I found it convenient to draw a line between 2001 and 2001/2. Effectively the Authority seems to have based its thinking on the numbers below the line. Indeed, the report is based on the entire period, but when one looks at it first of all one can see that the Authority has made a gross error; and, secondly, if you look at the right bit of the ten year period that the experts have looked at, their error is basically the same in that the position in relation to non-potable water is essentially constant over that period and drops slightly, and is almost exactly the same as the pattern for potable water. So, effectively, the approach of the Authority is to take a hypothetical risk of stranding and to say that on that basis non-potable should be charged at the higher cost of capital than potable. But, the point that we make is that as a matter of policy the previous year the Authority had said that a hypothetical risk of stranding should not be taken into account in their MD163. So, we say it is both an obvious factual error and a breach of principle too, contrary to their own regulatory policy.

The next point is a rather complicated issue about treatment weighting where the Authority did have another go and made some adjustments to the figures that it used. That is pp.51 to 54 of the final schedule, and Point 16 of our points. Unfortunately, as you may recall, we put in another letter just after because another point came to us, which was the point that we addressed in that letter. That is at Tab 20 of the core bundle.

THE CHAIRMAN: What do you want us to look at?

MR. THOMPSON: I think it is probably sensible to look at the letter at Tab 20 of the core bundle. This an area where I do not know whether there was an advantage or a disadvantage, but the chair may be at some different position from the rest of us because we have lived with some of these disputes for the happy period of nearly four years.

THE CHAIRMAN: I have not worked out whether it is an advantage or disadvantage either.

MR. THOMPSON: I do not think we need to go back to the detail, but the point here was that the weighting figure of 15.2 percent, which was used in the decision was based on a very short little document setting out comparative figures for, I think, twelve treatment works including Ashgrove and the Court Farm treatment works, and doing various calculations which showed that the costs of the non-potable too were, on average, only 15.2 percent of the potable ones. That was used as the basis for the 2003 new tariff. The essential point we are making is that there is no reason to depart from that on the basis of this subsequent report by Dŵr Cymru , which is referred to in the final report, and the reason we say that is that the 2003 examination was done, as we would say, on a like-for-like basis and that there was a broadly similar throughput for the twelve works. They were clearly selected by Dŵr Cymru as part of an exercise performed for a regulatory function. I think the Tribunal itself was sceptical that we could suddenly go away from that figure at this late stage. The point that struck us immediately the ink was dry on our point was that when you actually look at CJ4 (it is actually the same document we were talking about before) there were in fact a very large number of treatment works - mostly potable and mostly extremely small - and that it was not really a like-for-like comparison to compare the two relatively large industrial non-potable works with a selection of small little potable works dotted about all over Wales, and that therefore there was no reason to depart from the figure that had been used in the new tariff, especially given that it was a regulatory figure which had clearly been produced much closer in time to the relevant events than this, as it were, ex post facto report produced several years later. So, that is the basic point. There is more detail. As I understand it, the Authority does not accept that and think that all these little comparators are particularly good. But, it seems to us implausible, and the fact that it gives a different figure does not seem to us a reason to depart from the one that was used in the decision itself, and by Dŵr Cymru itself in setting its tariff in 2003.

The next point I think I have dealt with before - the raw water MEAV point. That is pp.54 - 59 of the schedule. I have already given the point that we consider there is material cost inflation here.

The next point - pp.59 to 62 - our Point 18 - Treatment Costs. It is a factual issue and there has been some adjustment to meet our concerns. I suspect that is as far as we can go on that particular point.

The next point is another MEAV point at pp.62 to 64 of the final schedule - our Point 19. this is a curious one in that the Authority seems to have simply created a sort of fictional MEAV of £19 million although it accepts that the actual figure is something like £3.5 million. It has produced a fictional MEAV figure, as it were, as if storage units existed. That is why we find it particularly troubling if people who do, or do not, have storage are to be charged on an average basis by reference to assets that do not actually exist. So, we think that the Authority should explain how that is an appropriate way to value assets.

The next point is in relation to IRC - Infrastructure Renewal Charges. These are charges which are made in relation to the costs of maintaining assets over their viable lifetime. It is really a very straightforward statistical question about what the correct assumption is to make. One finds that at pp.67 to 68 of the schedule. In particular, you will see a footnote at the bottom of p.67 setting out some calculations which show that consistently a factor of 180 had been used (180 years) as the relevant lifetime of these assets. There must be reference to that footnote 6. All I can find is 3, but that is metre cubed. So, there must be a footnote 6 to which this refers. (After a pause): It is p.68, I think.

> "The references to the MEAV for various mains diameters in Table 11, divided by 180 equals the IRC stated in Table 10."

I do not take any credit for this. Dr. Bryan is tireless in his ability to discover these points. He has worked out that there is a precise equivalent of 180 years between the MEA values and the IRC figures, and so we – I think not unreasonably – raised the question of why the figure of 120 has been used by the Authority in relation to this particular calculation which obviously inflates the relevant cost by 50 per cent.

The answer that comes back is that "Well, we thought it was sensible to use an industry average". Well we do not accept that the industry average is correct. We have looked at the recent figures and we, on our calculations find that the figure is about 190 years, if you look at the industry average, but in any event we do not see for ourselves why you do not use the actual figures that are in the report, rather than some unspecified industry average and so we object to that.

The next point is simply a question of arithmetic, that is pp.68 – 69, I think this is a point that I made and it turns out to be a bad point, that although the final report is not particularly

well drafted I am told that the calculations are in fact correct although badly expressed, so I think that point goes.

The next point is pp. 69-76, point 22 of the Albion schedule, and there is a dispute between gross and net MEAVs; this is partly a factual point, partly a regulatory point. We consider that in principle it really relates to the assets at the treatment works and whether or not you should take into account the fact that they have depreciated over their useful lifetime, and so they should not be taken into account. I think the figures are relatively small and I do not think at this stage we particularly require that point to be resolved so I think we can take that point as having gone.

The next point is a point which the Tribunal I think will be familiar with by reference to the Mott Macdonald Report and various other issues, the LG main, which is the value of the water distribution main and, as we point out in the appendix – and I fully give credit to Dr. Bryan for most of the legwork on it – at tab 11 to the core bundle. Page 11 of the appendix, para.46 sets out the various figures that have been bandied about for the valuation of the main over the period of this investigation. The position that we are prepared to accept, as it were in a spirit of compromise is that we should use Dŵr Cymru's own figures as they appeared in its response that they put in in 2007, which is approximately £8 million, we consider that the estimate used by the authority – I think it states 10.4 but in other positions I think it 9.7 – we still consider to be a substantial over statement.

We make points in our reply submissions about the recent adjustments to the Mott Macdonald estimate, and the two points that we make – apart from, as it were, points of prejudice about the rather curious way that the authority appears to have treated this issue in the rather late change of mind on the point is that there is a considerable under estimate of the difference that this makes, and we made two points at paras. 11 to 15 of our reply, and in particular at 14 and 15. At 14 we make the point that the specification for the raw water pipeline and the treated water pipeline now appears to be the same, but the plant costs for one are approximately 2.5 times the other, which we find difficult to understand if, in fact, the specification was the same and it was simply a typographical error that they appeared to be different in the relevant part of the report.

The second point is really about the calculations that the Authority has made about the difference it makes, and we point out that there are a selection of percentage add-ons which are reflected by this, which are overall about 40 per cent and so the reduction should be about 40 per cent more than the Authority has accounted for in its calculations, but those are fairly small factual points. Otherwise, the Tribunal has our submissions in relation to the

differences between the A550 and the overall pipeline, and the similarities with the LG Phillips main, the issues about inflation and so on and I think that is probably a matter of factual appreciation for the Tribunal to give due weight to as it sees fit.

PROFESSOR PICKERING: Mr. Thompson, could I just ask you in relation to the little table in that para. 46 which you have just drawn to our attention -- When I read this originally I felt I had to assume that the reference to Ashgrove was the Ashgrove Water Treatment Works as part of the system. So, if we wrote in WTW there, that would explain it?

MR. THOMPSON: Yes. That is right. It is really treatment works and pipeline, I think.

We are on the home stretch of this rigorous journey! The last point, Point Z, is in relation to rates which is pp.88 to 90 - Point 24 of the Albion schedule. Our point is that rates should be calculated by reference to MEAVs, and that calculating by reference to rates of return or profits artificially inflates them and that is set out -- I do not think we need to go to it - at paras. 35 - 36 and para. 61 of the appendix to the 11th February note. So, that sets out Albion's final position on that.

We now move on to Point AA. These points get rather more general and longer. So, we get on quicker. This is the LRIC methodology at pp.102 to 114 of the final schedule - our Point 27. I think we have made the points at various times, and so I can make them briefly orally. We say the methodology is based on completely unreal assumptions. Therefore it is useless as a cross-check and we draw an analogy with the stand-alone calculations which the Tribunal rejected in the main judgment. We say that the 10 percent increment figure is more relevant. We say that over the term of this agreement at least LRIC and the short-run incremental costs may be very close. There is nothing particularly counter-intuitive about that. Professor Pickering, in particular, may be interested in the academic report which is appended to the relevant policy statement which we refer to in our point. This is the article by Professor Turvey, appended to MD170, which states in some italicised wording on p.107,

> "When excess capacity is expected to exist over the period under investigation, only SRMC is relevant except in a case where decrement would allow some scrapping of capacity".

So, that was the theoretical point that was put and appended by Ofwat to its MD170 paper. We also make the point that there is no general figure for LRAC, which is perhaps unfortunate given that that was the priority approach.

Then we come to the position in relation to the contemporary document and its compatibility with the AAC-plus methodology. We set out position out in some detail in

writing, and in the little columns and the final schedule, that takes up pp.135 to 154. It is our Point 26. I think I can summarise the points quite shortly. We say that the contemporary documents speak for themselves. They show that Dŵr Cymru in fact conducted a conventional AAC analysis in 2001. The documents show the bulk distribution costs for potable water were only 11pence or 12pence on a conventional AAC basis and therefore that the entire basis for the appeal hearings in 2005 and 2006 were on a flawed basis. Both Dŵr Cymru and the Authority were well aware of this, but did not bring it to the Tribunal's attention, and it only emerged when the documents were disclosed in September 2007. We say that is relevant to the credibility of both Dŵr Cymru and the Authority on disputed issues of fact and judgment - for example, in relation to the back-up supply and the issue of the MEAVs. That is the gist of the point we are making there.

The penultimate point is the question of the status of the findings (pp.154 to 161 of the final schedule - our Point 25). I think it is a point dear to Mr. Vajda's heart. In summary, we say that his judicial review point has not improved with age. It is obvious nonsense. This is a determination on the merits. The final report is simply additional evidence to assist the Tribunal in reaching that determination. It is not determination of a point of law. So, the "E" case is irrelevant. It is not determination on judicial review principles. So, the Communications Act is irrelevant. In addition, the authorities are party to these proceedings and it is therefore clearly not an impartial or independent decision-maker. Candidly, our client considers that there are legitimate grounds for concerns about actual bias. So, on all these grounds this is not an appropriate case for a judicial review approach.

Finally, the question about the LAC methodology. That is partly a factual question; partly a question of the regulatory approach, or our Principle 2. At the appendix to our note of 11th February we provided our best estimate of LAC costs on a proper factual basis and a correct rate of return. In principle, Albion Water has always favoured this as the fairest approach, notwithstanding Principle 3 which was largely urged on the Tribunal by the authority itself - the priority of regional costing. But, we say that it needs a realistic approach to valuations, consistent with our first two principles. So, it must actually be by reference to treatment and distribution, and it must be consistent with the regulatory approach of the Authority generally. We say it is certainly the best cross-check if it is done properly. We have tried to do that in our note served on Monday.

Those are our submissions on costs. Inevitably it has been a bit of a gallop, and quite tedious. That is what we wanted to say about that.

THE CHAIRMAN: That has been very useful. Shall we say five past two?

MR. THOMPSON: There is only one other point which is the confidential documents and whether the Tribunal wishes to even think about that question. Would it be sensible to allow some time for that or at five past two? It may be more convenient to do it at five past two. I do not think it will take long. I think it is simply a matter of deciding how we proceed. I have not made any reference to them.

MR. RANDOLPH: Madam, if that is going to be discussed, of course we are not in the ring.

THE CHAIRMAN: You need to sit outside.

MR. RANDOLPH: Well, at least for that part of it where details are going to be discussed, I assume.

MR. THOMPSON: I suspect the only people allowed to be in the room are myself and Mr. O'Flaherty. Everybody else who is not acting for either Dŵr Cymru or the Authority ought to be out.

THE CHAIRMAN: It is more convenient to do that at five past two.

(Hearing in private – formerly confidential)

MR. THOMPSON: Madam Chair, I think our main submission is a bit of a storm in a teacup in that it seems to us that these two documents are not really particularly confidential at all, certainly not a this passage of time, but on the other hand there are two points in them which we refer to in our note – in particular at para.8 we make the point that in the commentary by Mr. Halton, an employee of Dŵr Cymru in relation to a letter from Albion he makes the point that Albion has a contractual arrangement with Shotton that may well demand investment in a security of supply if we cannot provide a back up supply – not a contractual requirement if we carried out all our duties exhibiting a reasonable level of expertise and care. So we rely on this to show that Dŵr Cymru at least took the view that there was no back up obligation in place, and so effectively the draft and final report operate on the basis of a false premise in assuming that that was in place and that it must be implied into the first access price. That is the first point – no, I am sorry I have taken them in the wrong order.

The other point is at paras. 4 – 5 and relates to the fact that North West Water (as it was then) was apparently complaining that the purchase price from United (as it is now) to Dŵr Cymru was anti-competitive, and this is repeated two or three times. We make the point that it seems to chime with something which Mr. Randolph says and curiously the point has emerged in United Utilities' submissions, in the very last paragraph tab 10 core bundle, in fact bundle 41 that the Tribunal has, where it is said that it is quite incorrect to suggest that

United is a victim of Dŵr Cymru and it is dictated by contract and has nothing to do with any power, monopoly or otherwise which Dŵr Cymru might or might not have.

Obviously there are two points there: one, the fact that something is dictated by contract does not determine whether the terms of the contract reflect market power and, as a matter of fact, it seems that United (or North West Water) took a different view in 2001 as to the market position. So those are the two points of substance.

Then we close our note by saying "is it sensible to treat this as confidential, given that this is all so old?" So those are the only three points, anyway for what they are, there are two points of substance and one procedural point and I do not think there is anything more to be said about it.

THE CHAIRMAN: How are we going to deal with this? Are we going to deal with it now?

MR. THOMPSON: Well obviously, if there are points to be made on any of those three points I suppose now would be the time.

THE CHAIRMAN: I would have thought so.

MR. VAJDA: Well I would prefer to make points on those at the end of my submissions.

THE CHAIRMAN: Does that mean that we have to clear the court again?

MR. VAJDA: Well we can do it at the end of the day.

THE CHAIRMAN: Are you saying that what is in para.8 is confidential?

MR. VAJDA: I need to get the note that was put in.

THE CHAIRMAN: What is going through my head from looking at it - and I have not discussed it - is that para. 8 is just a letter -- The other one could possibly be dealt with by two sentences which would not be confidential. You have not got it in front of you, but that is what is going through my mind.

MR. VAJDA: I have no objection. Mr. Thompson is perfectly entitled to make the point he has made. I do not actually have the documents to hand. I am just asking if I can make my reply at some convenient point.

THE CHAIRMAN: All I am saying is that possibly when you are considering how to make your reply you could consider actually whether these two points that he has pointed us to really are confidential.

MR. VAJDA: I understand.

THE CHAIRMAN: One is just a letter and the other one -- It may be that you want it expressed in the way that is expressed in paras. 4 and 5. I do not know. But, the facts in paras 4 and 5 -- In respect of the other one there are two paragraphs. It may be that that could be reduced to two or three sentences, and there would be nothing confidential in those sentences.

MR. VAJDA: Certainly we can try. What I would just like to say, if I can assist you --

THE CHAIRMAN: All I am suggesting is that during the afternoon, while you are not on your feet, when you are thinking about how to respond you can also think as to whether really there is any confidentiality issue.

MR. VAJDA: There is the e-mail and then there is the internal document. Madam Chairman, you have just been referring to which of the two documents?

THE CHAIRMAN: Both. Paragraph 8 is the letter ----

MR. VAJDA: Yes. That is why I said I wanted to know.

THE CHAIRMAN: Paragraph 8 is the letter. I was wondering whether there is anything confidential ----

MR. VAJDA: I think probably the best way of dealing with this is what you, Madam Chairman, have put to me I need to put to my clients who will have heard what has been said. I would respectfully suggest that we get on with the rest of the case, and it may be that tomorrow morning I can deal with that first thing in two minutes - either on the basis that we do not accept it (in which case I will explain why) or we say, "That's fine" and I also make my substantial submissions on that. I am grateful.

THE CHAIRMAN: It may well be that paras. 4 and 5 - everybody would agree two or three sentences the facts of which we received on that basis.

MR. VAJDA: Yes. Certainly if we can assist we will.

THE CHAIRMAN: Then it is much better that it is not opened and then we do not have a problem having to decide how to deal with it in the judgment.

MR. VAJDA: I appreciate that.

THE CHAIRMAN: Shall we have everybody back.

MR. THOMPSON: That rather confirms the last paragraph of our note. There we are.

THE CHAIRMAN: I was not making any indication as to whether or not it was confidential. I was asking you to consider whether it was.

MR. THOMPSON: Absolutely. The only point we were making is that these things always take up time.

(End of hearing in private)

THE CHAIRMAN: Just for the transcript, we are now in Open Court.

MR. THOMPSON: We are now moving on to the topic of abuse. I will make a number of points under this heading. The first one relates to the extent, and we say the extent of the excess ultimately found by the Authority is 44.1 percent. Under that we make a number of points

First of all, the Tribunal accepted the Authority's position that the primary costs issue was the regional average or general figure. Secondly, the Albion-specific figures were perceived as a cross-check on that figure. Thirdly, the contemporary documents produced in September 2007 confirm that this was the approach adopted in the first access price. Fourthly, therefore, the regional figure is the like-for-life figure for the purposes of comparison. Fifthly, the only regional average figure that the Authority has produced is the AAC-plus figure of 16.1 pence which one finds at para. 22 of the response, or overview, document served by the Authority. Sixthly, the other cross-checks are, in fact, either identical in the case of AAC-plus, or very similar in the case of the LAC, or irrelevant in the case of LRIC, subject only to the back-up supply issue. Seventhly, the back-up supply issue is a clear error and therefore all the Authority's results are in the range of 44 to 50 percent. That is our first point.

The second one: these figures are highly conservative. One sees that set out in the reasons given in our note of 11th February, 2008 at Tab 11 of Bundle 41. We say that for the reasons given in our note a more realistic figure would be in the range of 90 to 190 percent. Thirdly, we say, in particular, that application of the Principles 2 to 4, which I have set out this morning, would require, independently of any issue of factual appreciation, first of all use of the regulated rate of return rather than the rate of return used in the final report and the response document, exclusion of distribution pumping costs on the basis that they were not received under the common carriage arrangements and were in fact paid for to United Utilities under the proposed arrangements; and, thirdly, reduction of IRC costs by 50 percent.

Our third main point is that the extent of excessive pricing is one - but only one - relevant factor. That is referred to specifically at para. 279 of the further judgment, and an example of the extent being taken into account is the *Deutsche Post* case at Tab 7 of the authorities (which I will come back to in due course) where a figure of 25 percent in a monopoly case was found to be sufficient evidence of excessive pricing, although a figure of just over 40 percent is also referred to in that judgment.

Our fourth point is that the Authority was right to follow the guidance of the Tribunal in respect of comparators. The relevant passages are paras. 753 to 757 of the main judgment and para. 250 of the further judgment. We refer again to the *Deutsche Post* case where a similar issue arose. I will come to that in a moment.

Our fifth point is that Albion Water and Dŵr Cymru apparently agree that an excessive price case, like any other abuse case, requires consideration of the wider economic context,

and one can find support for that in the standard text books and also in the *Deutsche Post* case. If one looks at the text books, with due modesty one place to look is **Bellamy & Child** the relevant passages – only part of it is in the relevant tab so if we could add that into the bundles at tab 15 of the authorities' bundle (bundle 42). It is the first paragraph of the section on abuse.

THE CHAIRMAN: This is self-serving, of course, is it not?

MR. THOMPSON: It is. It can be taken as a submission … (laughter) … but in my submission it is correct.

I should say that Peter Roth and Vivien Rose did not seem to disagree. The relevant points are set out towards the bottom of the main text:

> "The assessment of its actions in any particular case will be a question of fact and degree in which the following considerations are relevant when assessing whether a credible case of anti-competitive conduct is made out."

Then there are 11 considerations set out.

> "(i) How far competition on the market is already weakened by the economic strength of the undertaking concerned.
>
> (ii) The nature of the market on which the alleged abuse takes place and the extent to which actual potential competitors are vulnerable to exclusionary conduct on that market.
>
> (iii) The extent to which the conduct in issue can be seen further to weaken competition to the dominant undertaking on the relevant market, or to strengthen the position of that undertaking, or a related undertaking on a connected market.
>
> (iv) The effect, direct and indirect, of the conduct on end consumers.
>
> (v) How far the conduct in issue is normal industry practice or on the contrary is exceptional and plainly restrictive of competition
>
> (vi) How far the conduct reflects the transitory response to a competitive threat as against a systematic attempt to exclude or discipline competitors if the threat is to impose a long term impediment to effective competition.
>
> (vii) Whether the conduct of the dominant firm is motivated by an exclusionary intent or constitutes a legitimate response to competing firms;
>
> (viii) The extent to which a dominant undertaking can be seen to be 'leveraging' its market power in order to place competing undertakings to a significant

disadvantage on parts of the market, or related markets, that are in principle contestable; and

(ix) Whether the adverse impact of the conduct in issue is 'proportionate' to any legitimate commercial interest or public policy objective which may be identified as an 'objective justification' for such conduct."

In my submission those nine principles are all highly material to the facts of this case and the findings of fact that have already been made by the Tribunal and that those context factors are relevant and that is essentially what we are getting at in Part D of our submissions in our skeleton argument.

The other general point relates to the relationship between exclusionary and exploitative abuses. One finds the relevant passage at p.952. As a contrast between exclusionary and exploitative abuses, and then about half way down it says: "Of these two categories, the first is the more important in practice" – so exclusionary abuse.

> "… and reflects the increasing focus on the wider economic impact of conduct alleged to be abusive. Nonetheless, the protection of end consumers is an important aspect of competition law and it is often highly relevant to consider whether any allegedly exclusionary conduct has in practice caused detriment to end consumers, either in terms of an increase in price or a restriction in output or choice. There is, therefore, no absolute distinction in practice between these two classes of case , and some abuses, such as the imposition of tying clauses may be both exploitative and exclusionary. In addition, although the concept of abuse is an objective one, a realistic characterisation of an exclusionary abuse will be strengthened by an explanation of the motivation of the dominant firm, in terms of a supra-competitive return resulting from the exclusion of its competitors, so there is often an explanatory link between an exclusionary and an exploited element in an individual case."

In my submission that is also relevant here. Leaving aside any self-advertising, tab 17, which I had nothing to do with, written by Jonathan Faull and Ali Nikpay, who are former … Mr. O'Flaherty and myself, and the relevant paragraph we quote in our skeleton, but it is at p.398 of the book at para.4.364, where the authors say: "The EC Treaty …" and so by the operation of s.60 also s.18 of the Act:

> "… is expressly concerned with a dominant firm's ability to exploit consumers by charging them unfairly high prices. Intervention against excessive pricing can moreover be supported by a number of economic and policy justifications. While

economic theory may predict that new firms should enter a market the reality may prove otherwise …"

And then a number of characteristics are set out.

"… particularly where a market is characterised by structural problems, hence the need for intervention. Protecting consumers is moreover a legitimate policy objective of antitrust law. Where, for example, the barriers to entering a market are particularly high, such a policy interest may be particularly compelling. Furthermore, while competition rules should not deprive a firm of the fruits of its genuine success in the market place it is legitimate to prevent the undue exploitation of its market power. It should also be added that, in some instances, a firm's dominance arises as a result of forces other than competition."

In my submission that is highly material and again all the factors are present here.

If one looks at the actual cases, it is fair to say that there are not very many of them and one is probably closest on the facts to the present is the *Deutsche Post* case to which I have referred, which is tab 7 of the authorities' bundle. It is a case about the German postal service and in fact it was a complaint by the British Post Office that Deutsche Post was interfering with cross-border mail and it is particularly paras. 3 and 4. You will see the nature of the complaint. The British Post Office was getting increasing refusals from Deutsche Post to distribute cross-border bulk mailings coming from the UK, unless the BPO paid a surcharge corresponding to the German domestic tariff minus terminal dues. Effectively you had to pay the full domestic tariff with a discount, and the question was whether effectively this was genuine post and, if so, whether these prices were legitimate. The relevant part of the decision is at paras 159 and following and you will see that at 155, p.72 of the official Journal, the Commission refers to the *General Motors* case, which I think is the first case on excessive pricing. It says:

"The Court of Justice has declared that a price which is found to be excessive in comparison with the economic value may infringe Article 82 if it has the effect of curbing parallel trade or of unfairly exploiting customers."

Then there is also a reference in the footnotes to *United Brands* under footnote 208. That comes down to 159, which is the Commission's assessment.

"According to the case law of the Court of Justice, the fairness of a certain price may be tested by comparing this price and the economic value of the good or service provided. A price which is set at a level which bears no reasonable relation to the economic value of the service provided must be regarded as excessive in itself since

it has the effect of unfairly exploiting customers. In a market which is open to competition the normal test to be applied would be to compare the price of the dominant operator with the prices charged by competitors. Due to the existence of DPAG's wide-ranging monopoly, such a price comparison is not possible in the present case. Furthermore, DPAG has only recently introduced a transparent, internal cost accounting system and no reliable data exist for the period of time relevant to this case. Consequently, the Commission is not in a position to make a detailed cost analysis of DPAG's average costs for the services in question during the relevant time period. An alternative benchmark must therefore be used".

So, the Tribunal will see certain similarities to the present case in that because there has not been any segregated proper accounting and Dŵr Cymru throws up its hands at the thought that it should have such material, effectively one has to operate on a different basis. Then it goes on,

"In their notification to the Commission of the Reims II agreement, DPAG and the other signatories argued that the average cost of forwarding and delivering incoming cross-border mail (including a reasonable profit margin) may be approximated to 80 percent of the domestic tariff".

So, they relied on that as an alternative guide, effectively that this was an official statement by, basically, the national post organisations. Then, at 162 it goes on,

"For the purposes of the present decision and in the absence of reliable cost accounting data, the Commission finds that the estimated average cost of delivery for incoming cross-border mail expressed as a percentage of domestic tariff, and as submitted by DPAG and the other Reims II parties in their notification to the Commission may serve as a benchmark to estimate DPAG's costs in this respect. As mentioned above, the DPAG charges the full domestic tariff for items it has classified as virtual A-B-A remail, i.e. a price which is 25 percent above the estimated average cost and the estimated economic value for that service .It should be stressed in this connection that postal services - and in particular the bulk mailings examined here - involve the processing and mailing of large volumes in respect of which the profit margin per item is low. In 1997 the average profit margin per item came to 3 percent".

So, there are two points here: because of the 80 percent figure they have deduced that 100 percent is 25 percent above. So, they have inferred that that is the excess. They have referred to the fact that the profit margins in respect of bulk mailings is low and they

obviously have marked that. Then at 163 - 164 they suggest that possible the margin is actually larger. So, at 164 they conclude that it is possible that 43 percent is a more realistic figure. Then, at 165 they conclude that the DPAG's arguments to the contrary are not credible.

So, that is the factual position. They then summarise the factual position in 166 and reach their conclusion in 167. The Commission - and this is important here - say,

> "The Commission - bearing in mind DPAG's status as monopolist and the above-mentioned peculiarities of postal services - concludes that the tariff charged by DPAG has no sufficient or reasonable relationship to real costs or to the real value of the service provided".

So, the two factors that they take into account are, first of all, the monopoly status, which is presumably why they cannot find comparators, and, secondly, the above-mentioned peculiarities of postal services, which is the very low margins for bulk mailings. So, they take into account those two contextual factors. Taking those into account they reach the conclusion that there is an abuse of price.

In my submission, that is a quite close analogy to the present case of two factors: namely, monopoly power and low margins being taken into account in deciding what level of excess is to regarded as abusive. They conclude at the end of that recital,

> "The imposition of this tariff cannot be objectively justified. DPAG therefore contravenes Article 82 of the Treaty and, in particular, sub-paragraph (a) of its second paragraph".

In my submission that is a useful, recent decision of the Commission which applies a contextual approach which I do not believe is actually contested, though some of the factors that Dŵr Cymru relies on are obviously different from the ones that we rely on.

The other case that I think is most useful in relation to this contextual approach is, as it were, at the opposite extreme factually - the *AtTheRaces* decision of the Court of Appeal which I believe is in the same bundle at Tab 10. This is an important case because it is a judgment of the Court of Appeal subsequent to the two earlier judgments of the Tribunal. It concerns one of the many horse-racing disputes which have unfortunately bedevilled competition law over the last five years or so. I think it is summarised in a reasonably convenient way at para. 2 of the judgment.

> "This case involves a challenge, on competition law grounds, to the lawfulness of the financial and other terms on which a party in sole possession of valuable information (pre-race data about British horse races) is willing to supply it to

another party. The legal basis of challenge is that the party possessing the information has allegedly abused a dominant position in connection with ongoing access to and the pricing of, information, the supply of which is an 'essential facility' for the established business of the other party (the supply of audio-visual services about British horse races)".

For reasons which I do not think we need to worry about, in fact it was a somewhat narrower dispute relating to overseas betting rights. The passage that is relevant for my purposes is at para. 211 of the transcript (p.33). I should perhaps explain what this is. This starts at para. 203 under the heading 'Conclusions on Excessive Pricing'. They come out with their view straightaway,

"In our judgment, although the judge reached the right conclusions on important issues raised by the claim for abuse of dominant position, he erred in holding that the charges proposed by BHB were excessive and unfair. We are in broad agreement with Mr. Roth's submissions criticising the judge's approach to the issue of excessive and unfair pricing of the pre-race data".

I think, to summarise, and I doubt if this is controversial, the judge had essentially applied what is called a costs-plus approach and said that because the margins struck him as terribly big, it must be excessive. Then, at para. 210 onwards it deals with the substance of it.

"BHB has two principal answers to the accusation of excessive pricing. The first is that, if the price is one which the market will reasonably bear by definition, it is not excessive. The second is that its own role and status are such that its returns are not and should not be treated as simple profit because they are ploughed back into the very product for which ATR are paying".

I do not think the second one is particularly important. I think it is the treatment of the first that is important here. The Court of Appeal says,

"We are not prepared to accept the first answer, even with the adverb 'reasonably'. The qualification would be sufficient to answer Mr. Hollander's hypothetical example about charging a ransom price for electricity, but we would also think that the case he postulates is one where the abuse consists of overtly arbitrary pricing. His argument then is that this is another such case. It is perfectly possible to envisage a differential price structure for a monopoly product which places some purchasers at such a disadvantage in relation to others that their ability to compete is compromised, even though, since they are able to pay and survive, it can be said that the market will reasonably bear the price. This is one of the points at which

> excessive pricing and discriminatory pricing, which we deal with later, overlap. But there is no finding here that ATR's ability to compete will be significantly compromised".

There the important comment, which is taken up again in para. 214, is that the Court of Appeal found here that the level of pricing did not imperil the purchaser's ability to carry on in business on the downstream market.

Then Mr. Roth's contentions are summarised about the costs-plus test. Then, paras. 213 and 214 are, in my submission, the core reasoning in the case.

> "As already noted, the Commission's decision in *Scandlines* supports the view that the exercise under Article 82, while it starts from a comparison of the cost of production with the price charged, is not determined by the comparison. This in itself is sufficient to exclude a cost-plus test as definitive of abuse. Mr. Roth accepts that there is no single methodology or litmus test of abuse: the court has a choice of methods, but not an unlimited one. His contention is that the judge has gone outside the admissible limits of method in coming to his conclusion. Mr. Hollander, also contending that the choice of methodology is for the court, defends both the choice made by the judge and the way he has implemented it.
>
> As the expert witnesses in the present case agreed, economic theory recognises the relevance of externalities to price".

I think it is common ground that, here, the Court of Appeal is not using a very technical use of the word 'externalities'. I think it is really non-strictly cost factors. That comes out in what follows.

> "The judge rejected BHB's argument that the benefit of the system to overseas bookmakers was a relevant externality. But it was incontestable that the overseas bookmakers were paying ATR, in a competitive market [so, that picks up the earlier point] amounts which afforded it a handsome profit which it wanted, so far as possible, to keep. The facts found by the judge do not suggest that anybody is going to go out of business as a result of the alleged abuse of dominant position [so, that picks up the point again]. Despite its elaborate legal and economic arguments and the high levels of moral indignation, the case is about who is going to get their hands on ATR's revenues from overseas bookmakers. There is no need to classify the benefit derived by the bookmakers from the deployment of part of BHB's products as a 'positive externality' in order to recognise that it has a bearing on whether their pricing is excessive".

So, in my submission, that is the core reasoning. Then that works out in the next paragraphs. In my submission, what they are really saying is that this is at the opposite pole from the low profit monopoly position that was considered in Deutsche Post This is a commercial market where nobody is going to go out of business, and where the margins are very high. Why should the court intervene? Everybody is making money. Nobody is going out of business. So, it is a pretty high test to show an abuse of such a case. We say that this is, as it were, the counter-example to the present facts.

That takes us to Part D of our skeleton argument, which I do not propose to read out. We say that the relevant principles are those set out there. That is at Tab 8 of Bundle 41, the second volume of the bundle for this hearing. We made very much the same sort of points in a letter last May. I went up to Birmingham and made very much the same sort of points at a hearing on 18th May last year. We have set out the material in our reply. I am sorry if the table is somewhat wasp-ish, but, on the other hand, it is somewhat galling to make points and then for it to be said, "Why did you not make these points before?" I do not mean to give offence, but it is slightly tiresome.

We say that this approach is not only correct and reflects the approach in the case law and in the textbooks, but we also say that it reflects the approach of the Tribunal in the main judgment and the further judgment. There are numerous references that could be given. We have looked already at paras. 256 and 257 of the further judgment. That is one example of the type of concern that the Tribunal has expressed in this sort of area.

My seventh point is a point I made this morning - that the overall profitability of the market in question, and the share of the dominant company in that profitability is a highly relevant factor. In my submission, that is implicit at least in the *Deutsche Po*st case. Applying that to the present case we say that even if the Authority's approach - which we say is plainly wrong, but even if it were accepted - to the cost of capital were accepted, the position is that the FAP - the first access price - first of all is substantially in excess of costs; secondly (para. 6 of the main judgment) Dŵr Cymru enjoys an 87 percent gross margin on its transport and treatment business. So, it takes seven-eighths of the money that is made in this business. United Utilities, its supplier, is apparently operating at a loss. Mr. Randolph makes this point emphatically at paras. 30 to 33 of the United Utilities skeleton (Tab 10 of Bundle 41). Albion Water, its customer, is operating on a zero margin. We say, therefore, the position is *a fortiori Deutsche Post* at paras. 159 and 162. The costing and accounts position is, if anything, even more obscure than it was in that case, and the margins are even lower. In our case, zero. We say the case is a counter-point to *AtTheRaces*, as we have said. It is in that

sense that the margin squeeze abuse, as a matter of fact, and without contending that the legal tests are in any way the same, we say the margin squeeze abuse is highly material to the question of whether the excessive price in this case should also be regarded as abusive and unfair.

Just to summarise, even the lowest excesses that the Authority has come up with are 10 to 20 percent on a disaggregated cost of capital in a market where the only other players are either operating at a loss or on a zero margin. In my submission that is sufficient for an excessive and unfair price, even on the findings in the report.

That brings me to my conclusion. First of all, this is a plain case of abusive pricing. Secondly, the extent of the excess is at least 7.1 pence, or 44.1 percent. Thirdly, the precise figure is a matter for the Tribunal, but Albion has sought to provide useful information from which the Tribunal can reach a view. The approach to be adopted, in my submission, is usefully summarised by the former President in his remedies judgment in *Genzyme*, which we cite at para. 108 of our skeleton argument. It is perhaps a bit late in the day to go to my skeleton for the first time. It can be found at Tab 8 of Bundle 41. It is actually the last page of the skeleton, at p.39. You will see a citation from paras. 277 and 279 of the *Genzyme* remedies judgment, which I do not think is in the authorities bundle. The Tribunal says this,

> "Although we consider that the OFT's detailed costs studies should play a substantial part in our assessment, we do not consider that those studies should be the sole determining factor. Estimates and allocations of costs will always have a degree of arbitrariness. … The actual margin to be set is not a matter of precise mathematics. In our view we should set the initial margin at or near the top of the OFT's range for several reasons."

Obviously the factors in this case are a matter for the tribunal, and this is not a margin but an excess. However, in my submission, the point of principle carries across. In the end, this is a matter of appreciation which the Tribunal has also recognised in its judgment, I think, at para. 310 of the main judgment.

In conclusion, we say that as we argued in respect of interim measures, if we have to name a figure, then 10 pence per meter cubed, or just under 76 percent would be one reassuringly round figure that is conservative and reflects the range of evidence now before the Tribunal while fully respecting the rights of defence of Dŵr Cymru . We say that 12.6 pence per meter cubed, or 100 percent, could equally be said to be conservative. But, beyond that it does not seem to us that we can go any further in assisting the Tribunal, and that ultimately it is a question for the Tribunal's discretion what level of excess it

considers to be appropriate given all the evidence that it has received over nearly four years in this case.

Can I just ask if anyone wants me to say anything else? Otherwise, those are my submissions.

PROFESSOR PICKERING: I will be brief, Mr. Thompson. You have told us this morning that there were a number of costs that you accepted that had been produced by Dŵr Cymru and the Authority. Could you indicate on what basis you accept those? Have you done your own investigations there? Are you saying that, "This is sufficiently small to be in the noise and we will not worry"?

MR. THOMPSON: I think it is probably both actually. We have done our costs calculations and if the sums are down to the sort of 0.1 and 0.2 pence, then we think that in the end there is a proportionality issue about what sense there is in battling on. Dr. Bryan is obviously closer to the detail than I am. He is nodding.

PROFESSOR PICKERING: You accepted that there should be a charge within the price and the costings for stranded assets. Yet, the Authority's MD163s, to which you made reference this morning, indicates that the Authority would not expect stranded assets to be included in such charges. Would you like to comment?

MR. THOMPSON: I think I was talking about a forward-looking -- that there should not be, as it were, some sort of provisional estimate of stranding going forwards, but that if the assets are actually there, then there may be an argument for giving some sort of value to them. I think that was all I was conceding - although I understand that not all regulators agree.

PROFESSOR PICKERING: If they are stranded, it is reasonable to include a cost for them you are saying?

MR. THOMPSON: I think we have been prepared to accept that, yes. We are not expressing any great enthusiasm for it.

PROFESSOR PICKERING: You have also drawn quite a bit of attention, both in your presentation this morning and also in your submissions, to your concerns about the size of the increment assumed for the LRIC - long run incremental cost - calculation. Can you make clear why you would be prepared to accept 10 percent increment, but would not be happy with 20 percent?

MR. THOMPSON: I think we have said in our submissions that the reality is, as has been known for everyone, that this was substitution rather than an additional supply, and also that we were supplying water efficiency services, and so we thought that the likelihood was that it would decline rather than increase the throughput. So, it seemed to us wholly unrealistic to

assume a major increase and investments which nothing, in the history of the system, suggested would ever take place.

PROFESSOR PICKERING: I do not think I got from the paperwork clearly - and this may be my obtuse understanding of want you were saying, and if so forgive me -- What you seem to be saying now is that 10 percent could be accommodated within the capacity of the existing system, but 20 percent implies new capital expenditure which would inevitably have to be costed across the totality of the consumption?

MR. THOMPSON: Yes, I think in reality however long the term, the likelihood is the only additional costs would be such things as power and chemicals. You have actually been to the place and it is a fairly primitive set up and essentially another dollop of chemicals and maybe a bit more power would be required. But until the pipes started to seize up or the water ceased to flow nothing much else would happen as a result of increased throughput.

PROFESSOR PICKERING: So as I put to you just now the essence of your concern is to preclude or exclude the possibility of new capital expenditure?

MR. THOMPSON: Yes, I think we would simply say that it was unrealistic and certainly for the purposes of this exercise it casts no light on the actual costs to speculate on unrealistic investments.

PROFESSOR PICKERING: If you were to be faced with a situation where the back up supplies – and I have heard what you have said about them, whether they should be included or not, but if back up supplies were to be costed at 4.4p and charged at that and you have indicated what that would amount to in terms of the amount that your client has been taking, what would you do about that? Would you be forced to buy it? Would you be able to go elsewhere, or what effect would this have?

MR. THOMPSON: I shudder to think of another complaint, but certainly the numbers that have been cited most recently are quite extraordinarily high. You will have seen that the Dŵr Cymru is claiming 14p as a flat rate charge for I am not quite clear what. One alternative which has been floating around is the possibility of Albion taking over the entire Ashgrove system and making the lagoons work more efficiently. But I do not want to trespass on any commercially confidential issues, but I do not think that is a secret and there have been other possibilities pursued, but obviously the volumes are large and so to some extent Dŵr Cymru has a captive market and one can see what happens as a result.

PROFESSOR PICKERING: Would that be an alternative source of supply of back-up water?

MR. THOMPSON: We are reaching the limits of my knowledge. (After a pause) Yes, I think an obvious source is a re-engineering of the lagoons. The Tribunal will be aware that there are

two substantial lagoons and currently the water can only flow one way, but if you introduce piping you could use the lagoons to return it back to Shotton, whereas at the moment the water can flow on to the lagoons but it cannot flow back effectively.

PROFESSOR PICKERING: Okay. Finally, and this may be something that you are not able to answer and I would understand. Do you and your clients have any information about the actual depth at which pipelines, the mains, are laid in supply to non-potable customers?

MR. THOMPSON: Well in our skeleton argument we have set out a number of indications of the, as it were, best practice, followed by a series of companies, including Dŵr Cymru.

PROFESSOR PICKERING: Yes, but I am asking about the reality.

MR. THOMPSON: Well those behind me have made tremendous efforts and have been to the Public Record Office and obtained information which suggests that the actual pipeline, in this case at least, is consistent with that – it is possibly slightly deeper but it is in that order. I do not know whether they know about other examples. I am told that the LG Phillips' main shows 0.9 metres to the pipe crown, which would be the same, consistent with the stated policy.

PROFESSOR PICKERING: Thank you, Mr. Thompson, thank you very much.

THE CHAIRMAN: Mr. Vajda.

MR. VAJDA: Madam Chairman what I propose to do has been to some extent foreshadowed by a reply skeleton. I am going to begin by making some observation on what I call the "Role of the Tribunal", that is, if you like, the first area. I am then going to make relatively short oral submissions in relation to the first issue which is the issue of cost for the service, and I am going to spend my time principally dealing with the back-up supply point, and of course the Tribunal has all our submissions in writing and repetition, although it is … because I am proposing to avoid using it, it is there and we have full confidence that the Tribunal will look at those matters carefully.

I will then say something about the abuse issue, which is, if you like, the second issue, and I will adopt in a sense the structure of Mr. Thompson and say something on the law and then say something about the application of the law to the facts of this case.

Can I start with the role of the Tribunal? As we know this has, in a sense, been left over from the last hearing on the basis that at that point it was premature to deal with it. In deciding how the Tribunal should approach matters now it is helpful, and I think this is common ground between us all that we need to go back to see what the Tribunal did in the final Judgment.

What it did first of all was to set aside the decision in respect of excessive pricing on the basis of the issue of excessive price was not – and these are the words the Tribunal used "sufficiently investigated."

Secondly, it chose not to decide the excessive price issue on the evidence before the Tribunal. Thirdly, it chose not to ask the parties to form more evidence in front of the Tribunal; and fourthly, instead it chose to refer the matter back to the authority, for the authority to act as the investigating body requiring the Authority to give a full opportunity to both parties to comment on the Authority's preliminary views.

In the refusal Judgment – there have been so many Judgments in this case – that is the Judgment where the Tribunal refused Dŵr Cymru permission to appeal to the Court of Appeal, the Tribunal made it clear that the excessive pricing issue had not been decided and that is absolutely key, and it is key because both orally and in writing Mr. Thompson has made a number of comments about findings of fact made by the Tribunal. In fact, what the Tribunal said in the refusal Judgment, I will just quote from para.7:

> "The reason is that matters relating to the excessive pricing issue have not yet been decided but have been referred back by the Tribunal to the Authority for further investigation."

And it goes on to say:

> "Moreover, if that further investigation and any subsequent proceedings before the Tribunal are favourable to Dŵr Cymru on the excessive pricing that aspect of the appeal would fall away".

So plainly the Tribunal was making this clear as could be made that no findings have been made on excessive pricing. It was perfectly possible that at the end of the day there would be a finding in Dŵr Cymru's favour.

Now in deciding to refer it back to the Tribunal, as I said, it expressly required the Authority to take account of the views of the parties. So the Authority really had two tasks. Task no.1 was to find some primary facts – what lawyers call "primary facts". Task no.2, which was probably as great – if not greater – than task no.1, is to make a number of Judgments, because a number of evaluations of Judgments, methodologies, that sort of thing based on its own expertise, so it was both looking at the facts and also making judgments. In doing that and in referring the matter back to the Authority, the Authority, in my respectful submission, is to be taken as a public authority acting in the public interest in accordance with well established principles of English law.

In other words, the final report that the Authority put before the Tribunal, and indeed the response document, because when we came back for the CMC in October so far as I can see what the Tribunal effectively did was to continue the iterative process and say that both parties have an opportunity of putting in their observations on the final report, we then have a response document from the Authority.

So both the final report and the response document, in my respectful submission, is not to be equated simply to evidence that is put in by a party to court proceedings. Given that the process – in a sense the public law process – that the Tribunal laid down for the Authority, in my respectful submission the conclusions of the Authority carry considerable weight and are not to be interfered with lightly.

That then brings one to the question as to how the Tribunal should determine the referred matters. We know that the reference was made under 19.2J and 19.2J of course is part of Rule 19, and Rule 19.1 provides for directions to be made, and these are the words that madam Chairman used to me last time – forgive me for quoting them again, they are probably well known to the Tribunal: "To secure the just expeditious and economical conduct of proceedings". In my submission it plainly follows that those principles must apply to a referral back under 19.2J just as much as a direction under 19.1.

Against that background there are, so far as we can see, three possibilities, three routes for the Tribunal.

Route 1 would be to treat the final report and the response as an appealable decision on the merits. That, we say, would be the wrong approach – we said that in writing; the Authority say that as well, paras. 4-8 of their response. Although Mr. Thompson has attacked numerous parts of the final report and the response I have not heard him say that it is to be treated as an appealable decision on the merits, so we say that it is not an appealable decision on the merits and therefore that route is not an appropriate one. That is route 1.

Route 2 is to treat the final report and the response – if I can put it in this way – as normal "evidence" which the Tribunal has to adjudicate on. In my respectful submission, that is not the appropriate approach either, and I stress the word "normal" here. It is not the appropriate approach for two reasons. First, because in my respectful submission that was not what was envisaged by the referral back, nor would that be the correct approach more generally looking at the position wider than the position of this case, and if the Tribunal allows me to expand on those just briefly.

Dealing with "it was not envisaged by the referral back", if effectively the position was that the report of the Authority is simply to be treated as normal evidence the Tribunal would

have asked the parties to put in evidence and make submissions directly to the Tribunal so the Tribunal could adjudicate itself. But in fact the Tribunal expressly directed the Authority to engage in what I might call an adjudication role in weighing up the evidence and submissions of both parties to the Authority, because that – Professor Pickering may recall – was one of my concerns I mentioned I think in 2006, and it is absolutely clear that the Authority had to engage in a process of more than consultation with the parties.

The next point is that if one was going to say the evidence in the final report and the response is, if you like, normal evidence, it is like a witness statement or something like that, the question is what other evidence is there going to go into the equation? As I have already indicated a large part of the final report and the response rely on matters of judgment. Although of course both parties have come along and criticised various of them, what both parties have not done is produce Professor X or Professor Y or whatever – we have not gone into that, so there is no expert evidence that is before this Tribunal effectively putting into dispute the expert approach of the Authority.

My next point is that if, in fact, the Tribunal were to treat the final report and the response as what I call "normal evidence" in my respectful submission it would really amount to a backdoor appeal on the merits which is agreed is not an option.

Then coming to the important words in Rule 19.1, looking at the just conduct of the proceedings, the just conduct of the proceedings would only be met if everything were up for grabs. You could not have a "We'll pick out this, pick out that". Effectively, if it is treated as normal evidence then everything would have to be opened up. If everything were then opened up you would then have the problem that it would not secure the expeditious and economical conduct of the proceedings, precisely because everything would be opened up.

So those are the reasons, madam Chairman, why we say that as regards this case that the final report and response are not to be treated merely as what I call "normal evidence."

I then want to make one point on the position generally, that is to say stepping aside from the normal case because plainly the Tribunal will wish to look at what I think your predecessor called "the horizontal position", effectively the position more broadly. We do say, and we do maintain the position that there is an analogy – I put it no stronger, no higher than that, but there is an analogy – with the situation where there is a reference by this Tribunal to the Competition Commission on a price control matter, and I am not going to get into the detail but if I could just give some references to the Tribunal for their note. We deal with this at para.6 of our reply skeleton, and the relevant sections of the

Communications Act for the Tribunal's note - I will try and work off the Tribunal's bundle numbering – is in bundle 42 (a bundle of authorities) tab 13, but I do not intend to go there now.

I accept that it is only an analogy because the Communications Act provides for the Competition Commission to determine the matter and I accept that in this case it is the Tribunal to determine the matter. But what I say is that when one looks at it as a matter of principle that if within the context of some overarching function – here we have a competition appeal – a specific matter is referred by one public body to another for assessment, the former body should not start all over again when the reference comes back, and that is in a sense what one gets out of the Communications Act analogy.

So those are my reasons, both specific to this case and more generally, why, in my respectful submission, it would be wrong to treat the final report and the response just as merely any other sort of evidence, so that is a second possibility.

I come then to the third possibility, which is that the Tribunal should look at the report and the response and look at it by reference to the principles of Judicial Review. Now, why do I say that? I say that because that hits, in my submission, fully the three objectives of Rule 19.1. It hits the "just" button because it ensures that there has been fairness and natural justice observed by the body called on to carry out the reference. That is plainly important that the Tribunal ensures t hat the conduct of the proceedings just as much before this Tribunal as before the Authority have been fair – the principle of fairness has been adopted. It also hits the other two objectives of rule 19.1 – it ensures the expeditious and economical conduct of these proceedings by avoiding a full hearing and determination on the merits of all the points decided by the Authority.

So on this approach, madam Chairman, we are not saying that the final report or the response is out of bounds, not at all. What we are saying is that the Tribunal should give due weight to what the Authority has done and ensure that the Authority has complied with its public law duties. The Tribunal will be well familiar with how public law operates in this case.

The Tribunal will also be well aware that when one is looking at a determination or a consultation by a public authority one distinguishes between public law ground challenges and challenges of what I might call on the merits, and indeed that of course is a distinction that is very well known to this Tribunal because it has a Judicial Review function, for instance, in relation to mergers, and it has a merits' function in relation to appeals. I accept

that we are here in the context of an appeal but I have already made my submission as to why the final report and the response is not itself an appealable decision.

This morning Mr. Thompson took us through a large number of points, and very helpfully he provided his issue of principles' document which ran from A to Z and AA to DD. Now, we say in relation to most of these points that these are merits' points. We say that it is important for the Tribunal to decide now, before it goes in to A to Z and AA to DD what approach to adopt. It is important because if contrary to my submission the Tribunal were to say: "Everything is up for grabs", then of course fairness requires the Tribunal to consider equally carefully all the points that my clients have made in relation to the report, which I am not going to go through, but are set out in writing. The only point I am going to deal with is the cost of a back-up supply. So those are my submissions on the role of the Tribunal.

I come then to the next heading, which is: "What are the costs reasonably attributable to the service of transportation and partial treatment by Dŵr Cymru generally, and through the Ashgrove system in particular?" The Tribunal will understand that in a sense these submissions are without prejudice obviously to my submissions as to the test the Tribunal should apply, but I will be making some specific points on the back-up supply which Mr. Thompson focused on this morning.

What again we need to do here, in my respectful submission, is to go back a little in history. Certainly the wing members of the Tribunal will recall, and the Chairman probably will have it well in mind, that the basic thrust of the Albion case in relation to Ashgrove, and the basic reason that the AAC price was flawed, was that it was the whole company average, it was the averaging across, and the whole thrust of the argument of Albion has been "No, no, that is completely wrong; it is very unfair to have an averaging system because there is an awful lot of stuff. We have a completely discrete system in Ashgrove, we want something that is specific to the Ashgrove system."

With the Tribunal's permission, if I may just take the Tribunal to a few passages in the main Judgment. If we could pick it up at p.166. The section is headed "E The Costs Attributable to the Ashgrove System", para. 564. I am not going to read the whole of this, but just so the Tribunal has the structure of it, the whole of section E which runs from para. 564 to 603 is all to do with Ashgrove's specific costs – that we see if we start at 564:

> "In the reply and during the first hearing of this case Albion supported its submissions under what has become known as "Albion's fourth methodology" which was to the effect that the assessment of the 'local' costs attributable to the

Ashgrove system would show that the 'distribution cost' was very much less than the 16p/m3 found in the Decision."

That was the thrust of Albion's case, and that was taken up, if I can put it like that, by the Tribunal. Mr. Thompson took us to some passages, and I cannot now remember if he took us to p.177, para.603 – it may be he did – but if I could just go back to that:

"For the reasons given above, the evidence before the Tribunal regarding actual costs incurred or attributable, strongly supports Albion's contention that a calculation of the costs attributable to the Ashgrove system would show that both [the costs] …." etc.

The Tribunal will then recall that the Authority, almost nailing its colours to the mast, made some submissions of principle on regional averaging and we see the flavour of those at 604, that Mr. Thompson took us to this morning:

"The Authority argues that it is impermissible for the Tribunal to consider the actual costs attributable to the Ashgrove system, even as a cross-check because of the principle of regional averaging."

Again, we know that in fact the Tribunal rejected that and if we go to 607, p.178:

"In any event, the question whether 'regional averaging' on a geographic basis is appropriate or not is only indirectly relevant in this case. We are concerned with a specific non-potable system in Wales. What is really in issue in that context is the failure of either Dŵr Cymru or the Authority to 'disaggregate' the 16p/m3 into its component parts … The Tribunal's attempt to acquire a better understanding of the 'actual' costs of the Ashgrove system was directed to establishing a more 'disaggregated' picture of the costs of non-potable distribution."

That is all important in terms of what is then referred back to the Authority. So, that is what the Tribunal said. Then, if we could just go to the end of that section -- Again, Mr. Thompson took us to 627 and 628 on p.184. If I can take it up half-way down that paragraph,

"We do not think that 'geographic regional averaging' can be put forward as a reason for not undertaking such an exercise in a Chapter II case in circumstances where non-potable systems generally, and the Ashgrove system in particular, are discrete entities separate from the generality of Dŵr Cymru's potable systems. What conclusions should be drawn from such an exercise, once it has been carried out, are another matter".

That is effectively why the Tribunal referred it back. What the Tribunal's basic point was, "You did a bad job. You didn't sufficiently investigate it, but we don't have the information to come to a conclusion".

If we then go to para. 631 - the Tribunal's conclusions - we see,

> "The Tribunal's examination has been made under four different heads ----"

Then, if we can look at (4),

> "The costs attributable to Ashgrove. The first of those approaches uses 'average' figures and the fourth assumes that the costs of Ashgrove are similar to the average. Each of those lines of analysis demonstrates, in our view, serious factual weaknesses in the conclusion reached at para. 302 of the decision."

So, the whole concern of the Tribunal was that the approach of the Authority was not local enough. It was on that basis that it referred the matter back both generally and specifically as regards Ashgrove's system. So, we do not accept, if one looks now to Mr. Thompson's four principles that he gave us this morning - this little piece of paper - we do not accept without qualification Points 2 and 3 in his principles because --

> "The approach to be adopted to the identification and quantification of such costs must be consistent with the regulatory practice of the Authority" ----

In fact, the Tribunal, if I can put it like this, is certainly entitled to do it -- It broke the regulatory mould. There was Mr. Anderson saying, "This is the way we've done it. This is the way it should be done". The Tribunal said, "No". So, the Tribunal broke the regulatory mould and therefore once you break the regulatory mould you are going to depart from the regulatory practice. That is the comment we make on Point 2.

Then, Point 3:

"The primary approach to the assessment of costs is the 'general' or 'regional average' approach".

That, in a sense, is an extremely interesting submission. One can only speculate that that is perhaps caused by the bulk back-up supply point coming in. The cynic in me - and I am not cynical at all - might detect a slight shifting in the position of Albion. Having said, "Oh, we want to be very local", when they discover that actually if you are very local there is a lot of back-up supply you have pay, "Oh, no. No. We don't want to be local. Really we want to be general". So, we do detect a shifting of position here.

Obviously we accept - and I think everybody accepts - that once one departs from the regulatory mould there are difficult questions that arise on questions of dis-aggregation. For example, Mr. Thompson mentioned this morning, "Why should Albion, on the AAC-plus

basis, contribute to the cost of a pump that pushes water uphill when, in fact, in Ashgrove the pipe goes in the opposite direction. We don't need a pump. Why should we pay for it?" But, there are other people whose pipes run uphill, who do need a pump. When you are going to have any system -- when you are going to have any form of averaging - and the whole point of AAC-plus is that it is a more granular approach than the AAC - you are going to have swings and roundabouts. That is where I come back to the point I made earlier about the judgment of the authority. Yes, the Authority made a judgment on a number of what I would call swings and roundabouts.

Let me give you another swing and roundabout. Storage costs. Lots of other people pay for storage costs which they may not need, but are needed in the Ashgrove system. So, there are winners and losers, and what the Authority has done is to try to comply with the request of the Tribunal in getting something which is more disaggregated than AAC. What it has also sought to do, given that everybody accepts that this is a difficult exercise, it has not just hung its hat on AAC-plus - it has said, "Well, let's do two other methodologies. We will have LAC [which is, if you like, more local than AAC-plus] and let's have then another methodology, which is the incremental cost of LRIC". So, it is not as if you have taken just one methodology.

That takes me to, in a sense, the only specific issue that I want to deal with in relation to Issue 1. That is the back-up supply point. The first point I want to make about this - and this is essentially the point that the Authority makes - is that the question as to back-up supply in 2001 (and we obviously keep on having to put on back our 2001 hat) was hypothetical in two senses: first of all, as Mr. Thompson has reminded us this morning, and it is not in dispute, the FAP price which was quoted in 2001 was a company average price. It was not a local price, because in those days nobody thought - and Dŵr Cymru did not think - about having a local price. I will take the Tribunal in a moment to some of the contemporary documents, but what Dŵr Cymru did was actually to submit the price to Ofwat for its approval.

So, what we do know, and what is clear - and in my submission the authority were entirely right to reach this conclusion - is that one cannot see from the documents at the time whether back-up supply was in or out. The reason one cannot see why it was in or out was because you were not looking at it on a local basis. You were looking at it on a company basis. So, it would have been extraordinary to see any mention of it for that reason.

However, there is a second reason why this is hypothetical, and it is this: the common carriage proposal was never pursued by Albion into what I might call a full detailed

negotiation. Again, we will have a look at the chronology because only days after the price of 23 pence was given to Albion, the complaint was lodged with Ofwat. Again, one then has a situation - and this, of course, is a contrast to all the other excessive pricing cases in the bundle of authorities - where this is not a case where Albion has ever actually to pay for anything. In all the other cases you have had people who have actually paid for a service. Now, I am not saying that merely because you have never paid for anything you cannot have an excessive price, but it is important to bear in mind that we are looking here at something hypothetical.

MR. THOMPSON: I do not understand that. We have been paying very large amounts of money - admittedly under a different contractual arrangement, but ---- It is not that we have not been paying anything.

MR. VAJDA: There is no common carriage proposal and no common carriage agreement has been assigned. It is perfectly true, as Mr. Thompson says, that there is a bulk supply agreement. I will come to that because that is of some relevance as to how one approaches back-up supply.

Now, in a situation, members of the Tribunal, where a consumer has paid for something the classic approach of an authority is to look precisely at the services provided for the fees charged. Perhaps we could just look very briefly at the *Scandline*s case just to see what happens in a real case. Bundle 42, Tab 8. If we could go to p.12 of the decision -- If I can summarise in a non-controversial way what was going on in *Scandlines* -- This was a complaint by a ferry operator. They operated a ferry from a place that probably familiar to probably everybody in this room - namely, Elsinore, Denmark. They went about twenty minutes north to a place that is perhaps not so familiar to people in this room - Helsingborgs (which is one of the largest ports in Sweden). They said, "You are charging us too much money". It was an excessive pricing case. So, they were actually paying the charges that the port was laying down. This is simply by way of illustration: if one looks at p.12, para. 47, you see that there is a heading - "Facilities and services provided and charged by HHAB [that is the port] to ferry operators on the HH route [that is the Helsingborgs route] through the port fees".

If we can just look at para. 49 over the page we see that Scandlines, which was, if you like, the Albion of the waterways there, maintained that it only uses the vessel traffic control in the port to a very limited extent. So, they were saying, "Well, there are lots of these things that the port says that they are providing, but we don't really need them. They are not very important". What the Commission says at para 50 is,

"All the services indicated above, i.e. vessel traffic control, navigational aids, towage and emergency service are linked to maintaining sufficient maritime safety in the port. These services, albeit the fact that all of these services are not used regularly by the ferries, have nevertheless to be kept available by HHAB in case they are needed. It can be considered normal and acceptable that all vessels, including the ferries calling the port (i.e. not only those who actually use the service) contribute to the costs of keeping such safety-related services and facilities available".

So, there you see the basic approach which is that if you are using something even intermittently, you should pay for it.

I would now like to take the final report in Bundle 31. If we go to p.40 we see how the Authority approached the question of back-up supplies. They asked themselves two questions. Question 1, "Would Albion have required the back-up supply in 2000/01 had the common carriage proposals gone ahead?" The answer to that was, "Yes". Now, they did not just answer that, "Yes" off the top of their head. But, they relied on evidence. Because of time limitations, I am not going to take the Tribunal through that, but if I could ask the Tribunal to look at 5.42 to 5.48 -- We will see some of the evidence they rely on is in fact evidence that comes from Albion itself.

Mr. Thompson, this morning, said that the back-up supply could have been supplied by someone else. He has not actually produced any evidence - it is merely an assertion. The point is that it is irrelevant to the present case because the Authority made a finding that Albion would have required the back-up supply and, in fact, the only person who was in a position to supply it was Dŵr Cymru, and in relation to the park supply agreement, which, if you like, is the nearest analogy. The back-up is part of the bulk supply. Who supplies that? Dŵr Cymru .

That was the first question. You can see that is very much in line with the *Scandlines* approach. I do not really think that the approach of the authority can be criticised in relation to that.

The second question which is, I accept, more controversial because it is not accepted by Mr. Thompson, is the question they ask at the bottom of p.42, which is, "Should the costs of the back-up supply be included in the FAP?" Again, what the Authority did is review the evidence they had. Again, because of time I am not going to go through that. I would ask the Tribunal - and I am sure the Tribunal will - to look carefully at what the Authority says at paras. 5.49 to 5.63. Effectively, if we go to para. 5.61 we say that the finding that they make -- the view that they express at

para. 5.61 is entirely correct - that back-up supply was neither explicitly included, nor was it explicitly excluded. Of course the reason was because you were looking at it on a company average price. So, it certainly did not occur to Dŵr Cymru as to whether it was in or out.

Then we see at para. 5.62 the Authority then reached the conclusion that given the uncertainty it would be reasonable to assume that the cost s of the back-up supply were implicitly included, and then they give three reasons. I will come back to the three reasons in a moment. Could I just, before I forget it, draw the Tribunal's attention to para. 5.66? As I say, there are three methodologies. I cannot remember now whether Mr. Thompson said LRIC did, or did not, include back-up, but just so that the Tribunal had it at para. 5.66 -- I think Mr. Thompson took the Tribunal to the draft report where back-up was included in LRIC. If you look at the final report you see it in the second sentence of para. 5.66 that they did not include the back-up in LRIC. So, you had back-up included in LAC and AAC-plus, but not LRIC.

If we can then go back to para. 5.62 I would just like to expand on the third bullet point,

"Dŵr Cymru's original calculation of the FAP was based on an allocation of average revenues ----"

Of course, that is entirely correct. Mr. Thompson took us this morning to the LCE document. Perhaps if we can just go back to those in Bundle 37, and go to Tab 39 at p.188. It is headed, "To LCE". You will see at 1.4,

"These have now been developed [that is to say, the indicative prices] on the agreed framework of average prices to produce values which will become Dŵr Cymru 's common carriage prices".

If we turn to p.228 at Tab 47 (again a document Mr. Thompson took us to this morning) -- "Consequences" at para. 5.5,

"On publication, these prices will be the Dŵr Cymru common carriage prices. The price is based on the whole company average price and therefore is not particular to the Ashgrove application".

It was an AAC price. That is what was done. So, when one looks at what the Authority says at the third bullet point of para. 5.62 they were entirely correct in saying that it was based on allocation of average revenues.

While we are on the document at p.188, could I just make one or two submissions on that? You will see at 1.3 that there is reference to indicative prices. The word 'indicative' is used, and then there is reference to that document that we have just seen at p.228. Mr. Thompson

was entirely correct this morning when he took us to a little table at the back of p.228 which showed us how we got to the 19.9 pence and then the 23 pence. If we go to para. 5.2 then of this document at p.188,

> "The indicative price released to Albion Water was a simple estimate produced to give Albion Water an idea of the likely price. The calculation has now been revisited and a firm price has been calculated".

Obviously there has been something made of the expression 'firm price'. What I would ask the Tribunal to bear in mind is, first of all, that this is an AAC price. As I say, it is company-wide. The second point is to look at 5.4 - "Consequences". "As the constituent prices are based on the whole company averages they are not particular to the Ashgrove application [that is the point I have made] therefore they are, effectively, Dŵr Cymru's common carriage prices. Ofwat's 'approval' will be sought prior to general publication". We will see that in the correspondence. They were firm in the sense that that was what Albion were offered. But, it was always the case that they were subject to Ofwat's approval. In fact, what happened is that Ofwat said, "We've dealt with this in our skeleton. We're not going to, as it were, prove and give them to Albion, and negotiate". But, it is important to bear in mind, particularly in all this question about intentional abuse and all the rest of it, it is quite clear that these prices were put by my clients to Ofwat for Ofwat's approval.

THE CHAIRMAN: Did they require Ofwat's approval?

MR. VAJDA: Madam, can I just take instructions on that? (After a pause): The answer I have been given is that the company believed that they required Ofwat's approval. Whether the company's belief was correct, I do not know. That is the basis on which they were submitted to Ofwat.

THE CHAIRMAN: Perhaps in the morning you can tell us whether they did need approval.

MR. VAJDA: Yes. Anyway, there it is. It is simply in terms of what my clients were doing at the time.

We also know, as I said, and this is now looking back at the position at 2001, that Albion required the back-up supply because it had that in, as I said, the Shotton bulk supply agreement. There was never, so far as we are aware, any suggestion whatsoever from Albion that the back-up supply would not be required. Now, we say it is simply not credible that an important aspect of this supply would be entirely omitted with no mention made by Albion of this critical aspect being negotiated separately, or any discussion whatsoever of the price to be paid in relation to it. One can look at that in two situations -

and this is where one gets into the hypothesis because, of course, it did not occur -- These are the negotiations between Dŵr Cymru and Albion. They were sufficiently advanced to make the FAP price a meaningful price to assess for excessiveness, in which case, in the absence of a separate agreement over the integral part of the system, back-up supply must have been implicitly included; alternatively, negotiations had not got far enough for any meaningful assessment of excessive prices to be made.

We say that in those cases all the benefit of the doubt in terms of burden of proof must, as a matter of law be afforded to Dŵr Cymru . I say this for this reason: supposing (which did not happen) negotiations had started and Dŵr Cymru had then claimed the extra charge for the back-up supply, and said, "Well, in fact, there is an extra 4.4 pence on top of the 23 pence that we have already offered you" and Dŵr Cymru had said, "Well, the reason that we are doing this is because it is based on local Ashgrove-specific costs". Albion could quite rightly have said, "Well, you, Dŵr Cymru, cannot do that because you cannot have a local costs supplement over an AAC price". Of course, because negotiations never got that far, Dŵr Cymru never made that claim. What I do say is that it would be wholly wrong for this Tribunal to proceed on an hypothesis, or an assumption, because that is what it would be, that Dŵr Cymru would have made that claim.

There is another point here, Madam Chairman. We can see in this point I have just made to you - and you have asked me a question about it - that so far as my clients are concerned they were at all stages anxious to ensure that the authority approved the FAP. So, let us assume against me, hypothetically, that in the negotiations, Dŵr Cymru had said, "Well, we want to claim an extra 4.4 pence for the back-up supply", the likelihood is - and I am still going to hypothesise because none of this happened - that the Authority would not have approved that because they said, "You can't have it". We know that from, effectively, the state of mind of my clients that my clients would not have proceeded because my clients were anxious to ensure that what they did conformed with what the Authority said. So, the likelihood - and this is all hypothesis - of Dŵr Cymru first of all demanding, and secondly, as it were, getting away with an extra 4.4 pence, we say is very remote.

So, this is an important factor. I will be coming, when I come to abuse -- The Chairman will be familiar with the *Napp* case on the burden of proof. There is also an important section in *Scandlines* on burden of proof. Because we are looking here at a hypothetical situation -- It is hypothetical in the sense of what would be charged for a product shows, in our submission, it is dangerous to contemplate making a finding in relation to excessive

pricing in relation to a price for a service which had not been finally agreed because, as I say, one needs to build a hypothesis on that.

Now, that takes me to what I want to do, I hope quite quickly – I have dealt with the two LCE documents that Mr. Thompson took us to this morning. A letter that he then took the Tribunal too was the letter that was written by Mr. Peter Jones, which is in bundle 2. It is annexed to the reply submissions of Albion. Mr. Thompson has very helpfully annexed the letter.

THE CHAIRMAN: We have it now.

MR. VAJDA: "The Relevance of the Judgment to the 1999 Bulk supply Price", and it is the paragraph beginning "In any event", that we went to this morning, and the passage that Mr. Thompson relies on is:

> "For example, had Albion proceeded with its common carriage proposal, contractual arrangements would have had to have been established to determine how 'unders and overs' would have been dealt with, together with a separate arrangement for dealing with the potable back-up to the Shotton Paper site."

What Mr. Thompson say is that when you read the words "separate arrangement" you really have to insert the word "price" in between "separate" and "arrangement". I can see that certainly if one is seeking to construe an Act of Parliament or something like that one might – or might not – include the word "price". But we have to look at it, as Mr. Thompson quite rightly said, the key documents are the contemporary documents in 2001 and we say in a sense what Mr. Jones said in 2006 is going to be perhaps not of huge relevance, but what we say he was referring to is an arrangement in relation to services but not a separate arrangement in terms of price for essentially the reasons that I have already outline to the Tribunal a moment ago.

The next bit of correspondence, which is also not contemporary that I should go to because Mr. Thompson made some play of it this morning, is the answer to question 8 of Ofwat, and that is in bundle 32, tab 28. This, you will recall, is the response to Ofwat's request for information in March 2007 and effectively the point was made – regrettably this letter is not paginated, but it is the answer to question 8. Do the Tribunal have that page?

THE CHAIRMAN: Yes, we have it.

MR. VAJDA: The first point that is made is in relation to the bulk supply arrangement, which is the arrangement that was in play then and still is in play today, and we see that there it makes the point that:

"Neither benefit was priced for separately in the bulk supply agreement. Effectively, therefore, they were 'bundled' together with the basic water supply service in one single volumetric price."

Then the next sentence, and this is the one that I think Mr. Thompson focused on: "The First Access Price did not include any allowance for either benefit." Again, this is a letter written in 2007. If one inserts the word "explicitly", then it all becomes perfectly clear, because it plainly did not explicitly include any allowance for either benefit, and the reason that it did not make any allowance for either benefit was because, as I said, it simply was done on an AAC basis, and there had been no negotiations that had taken place so one simply did not know what the position would be.

Then what is said is that going forward, and that is effectively the point made in the last paragraph of this page: "Further, whether or not such services would have been negotiated as part of the access agreement … or as separate agreements, is not known" that must be right. It then says: "However, Dŵr Cymru's preference at the present time …" and that is the preference today "… would be for different services to be priced separately". So that is the position today.

We say that there has been no shift of position so far as Dŵr Cymru is concerned. The reason that, in a sense, back-up has come into the picture is because we have now focused on what is being supplied locally, and we come back to the *Scandlines*' point – what do the ships actually require when they go into the port? That is why, when you are looking at something locally, you then focus on the service and there is no question that Albion required the service; I accept that it is not a service that would necessarily be required by somebody elsewhere in the system using common carriage, but it is required in relation to Ashgrove, and we know, from the passages that I have shown the Tribunal that both the Tribunal and Albion have been keen to have disaggregation and the cost of the Albion specific figures will include back-up supply.

PROFESSOR PICKERING: Can I just ask, what we actually have for AAC plus is the addition of 4.4p for back-up supply.

MR. VAJDA: Yes.

PROFESSOR PICKERING: Now how does that stack up with what you have just been saying? Because here we have a regional average price, albeit of greater granularity, but something that is specific to Ashgrove has been added back in specifically for Albion's disbenefit ----

MR. VAJDA: Yes.

PROFESSOR PICKERING: And what you were saying earlier about swings and roundabouts in the regional averaging seems to go by the board in this case. I am not quite sure that it all stacks up, Mr. Vajda.

MR. VAJDA: Oh well that is a great pity … (Laughter) … because normally I like to present cases that stack up, so obviously I am not doing very well. The objective was to get greater granularity, was to have a look at the local position. AAC plus is an element of hybrid because it has some local and some averaging. The Authority did not hang its hat simply on AAC plus and this is where the question of the cross checks come in, they looked at an LAC basis, which is purely local, and the LAC price comes in at pretty close to the AAC plus with the back-up and also you have the LRIC price – and the LRIC price, as I have indicated, is a different methodology from one used by the Authority in the decision; that does not include back-up. I can see that there might be force in what the Professor is putting to me if one was simply looking at AAC plus in isolation, but one is not. One is looking at three methodologies and one has to effectively say why one is looking at three methodologies in terms of pricing is to try and find a figure which is broadly in line with all three methodologies. If there was one methodology that was much too low or much too high one might think that there is something wrong here.

I accept it is quite a large element of cost, 4.4, it is more than, say, the pumping cost – it is more. There is no dispute that it was required and then there may be a matter of judgment as to where one has the swings and where one has the roundabouts. That is what the Authority did, but the process of reasoning of the Authority in terms of, if you like, looking at the primary evidence, in my submission was entirely correct. Was it needed? Yes. Question 2: was it effectively discussed? The answer was "No". Then we come to this, if you like, the hypothetical situation that I have indicated which is that because there were no negotiations no one will ever actually know whether in fact on an FAP basis one would have had a supplement or not. So what I am saying, so far AAC plus is concerned, that was a matter of judgment of the Authority, and effectively where the Authority drew the line was that they took the view that pumping, if you like, is part of a transportation service function, but in relation to back-up that is something sufficiently distinct to constitute a separate service, and that is a service which should be paid for.

PROFESSOR PICKERING: While we are on this point, could I just ask you one other question?

MR. VAJDA: Yes, certainly.

PROFESSOR PICKERING: To what extent was the 4.4p related solution the most cost-effective solution in the long run? Were alternative ways of meeting this back-up supply investigated and costed?

MR. VAJDA: It may be more a question for the Authority.

MR. ANDERSON: That is a matter I could deal with tomorrow. The position is that was the only one that was actually costed but alternatives were looked at and ruled out as not being feasible at that time because they had not been developed or considered I think is the answer but I will check.

THE CHAIRMAN: Mr. Vajda, it may be that I have go t terribly confused but can you just explain to me, if the LRIC price did not include the back-up supply and the AAC price did, how do you compare the two? How do you say that they are comparable because there is 4.4p floating around?

MR. VAJDA: Well because the LRIC looks at things in a completely different way.

THE CHAIRMAN: When you are looking to see whether or not these three methodologies are the appropriate methodologies you are looking to see whether you come out with about the same amount.

MR. VAJDA: Right.

THE CHAIRMAN: Well if you are putting back-up supply in AAC plus and you get to – I cannot remember the figures, just say 19p – and if you do not put back-up supply in the LRIC figure and you get to 19p, do you not have to add the 4p, which is 23p?

MR. VAJDA: Well, madam Chairman, ironically that is one of the points that we made to the Authority and indeed – I cannot put my finger as to where it is in the schedule ----

THE CHAIRMAN: Maybe that is where I read it and that is where I have got it from.

MR. VAJDA: No, but we said that it should be in LRIC.

THE CHAIRMAN: You put it into LRIC and you will get a higher figure.

MR. VAJDA: You will get a higher figure.

THE CHAIRMAN: Which you say is the right thing to do – is that it?

MR. VAJDA: Well what one is looking at, when one is looking at all the methodologies and we see this very much when you look at *Scandlines*, there is going to be an element of judgment here, and what, as I understand it, the Tribunal was interested in was effectively having a number of methodologies to establish a range. Again, the Tribunal will probably have seen already the passage in the Judgment of Lord Justice Mummery in *Attheraces*, the one thing that we know Article 82 is not is a price fixing – it is not a question of X being an excessive price, and that is why you are looking at this range.

MR. ANDERSON: I do not know if it would help – again it is a matter that I will deal with – but back-up supply is not included in the LRIC price because it is not sensitive to an incremental change in demand. Therefore, we recognise that if one were to charge on the basis of LRIC one would not be recovering all one's costs. We recognise that, and indeed Dr. Marshall recognised that. What we did in this case was to take three approaches to see it, the FAP was excessive.

THE CHAIRMAN: So what you are saying is, say you are charging on the LRIC price that would be the charge, but what would be included would be back-up?

MR. ANDERSON: Well it would not be on that basis. What one would be saying, if one charged on that basis one would be charging on the basis that did not in fact include LRIC, therefore you would be charging on a basis that did not recover all your costs, which is one ----

THE CHAIRMAN: So like I said, if you decided to price on the basis of the LRIC pricing then it would be back-up supply and you would therefore be making a loss on that cost possibly?

MR. ANDERSON: Yes.

THE CHAIRMAN: So it was included in what services were being provided but it was excluded as an item in the working out of the price?

MR. ANDERSON: It is a question of fact whether or not it is in fact supplied. The point about LRIC – and we adopted a pure approach to LRIC – that the only factors you include in it are those that change with an increase in demand. A back-up supply does not change according to demand, that is only taken as a service, or used as a service if there is a breakdown in the supply. That is why we have indicated in our report, and as I say it was a point made by Dr. Marshall, that if you were to charge on an LRIC basis you may well be under recovering your costs, which is why traditionally it may be used as a test for predatory pricing. We, in this particular case used different assumptions to try and use it to try and be of assistance to the Tribunal in approaching different ways of looking at whether the first access price in fact quoted of 23p could be regarded as excessive or not. We were not suggesting, and this is a point that we have made repeatedly in our submissions, we are not suggesting that any of these methodologies is a methodology that should in fact be used for charging, they are methods of investigating whether this access price was excessive or not.

PROFESSOR PICKERING: Would the unit cost of the back-up supplies be the same, to be added on a LRIC basis?

MR. ANDERSON: I believe the way in which we have calculated the back up costs would be unaffected by levels of demand.

PROFESSOR PICKERING: I would find that surprising because there is an element of ----

MR. ANDERSON: … surprising, I noticed one of those behind me was ----

PROFESSOR PICKERING: I accept the hand signals! (Laughter)

THE CHAIRMAN: Mr. Vajda, we have interrupted you, I am afraid.

MR. VAJDA: Not at all.

THE CHAIRMAN: Yes, well I have looked at the time as well – would it be convenient?

MR. VAJDA: It would be convenient, what I might in fact propose to the Tribunal, there is that small thing on confidentiality which we talked about, if we could perhaps ----

THE CHAIRMAN: Do that now?

MR. VAJDA: No, do that, say, at 10.15 or so tomorrow and then everybody else can come in, because I want to take instructions on what the Tribunal put to me.

THE CHAIRMAN: Can we do it prompt at 10.30.

MR. VAJDA: We can do it prompt at 10.30, yes. Mr. Randolph is a bit concerned as to how far – I said half a day, I started some time after 3 but I am making reasonably good progress, because I have finished what I am going to say on back-up. I have a few minor points on the first issue and then I am going to move onto the second issue.

THE CHAIRMAN: So you will probably finish by 12 – or before 12?

MR. VAJDA: I would hope to finish before 12; I would hope to finish about quarter to 12, something like that, half past eleven.

THE CHAIRMAN: I am just wondering if we are going to finish tomorrow because I cannot sit after half past four?

MR. VAJDA: That is why I was suggesting ----

THE CHAIRMAN: I know, but I have a problem both ends of the day.

MR. RANDOLPH: That is why I raised the issue with my learned friend because I am in your hands to a certain extent; you have my submissions and I do not want to take up the time of the Tribunal if I do not need to, obviously. The problem I have is the fact that Mr. Thompson has not addressed the main point in my skeleton, that is a question for him. I would imagine he does not accept what I say and he can deal with it any which way, but I am in a slight quandary because I do not know what he is going to say. He is probably just going to say "It's all rubbish", but I would quite like to know why, because otherwise all I am going to be doing is repeating myself ----

THE CHAIRMAN: Yes, well we do not want that!

MR. RANDOLPH: And you do not want that and I have nothing to add. So, query – do I need to be here tomorrow? Laughter.

THE CHAIRMAN: Mr. Thompson has stood up ----
MR. RANDOLPH: Good, good. (Laughter)
MR. THOMPSON: If Mr. Randolph's point is that we are not a customer, if that is his main point, it is wrong as a matter of fact, so that is our answer.
MR. RANDOLPH: So I will be here tomorrow!
THE CHAIRMAN: It really is a matter for you.
MR. RANDOLPH: I thought you might say that, madam. Particularly I was concerned that the Tribunal might have some questions.
THE CHAIRMAN: Well we might do.
MR. RANDOLPH: Yes, indeed, without me even making any additional oral submissions, you might have some questions on my written submissions.
THE CHAIRMAN: We might do.
MR. RANDOLPH: Yes, indeed, and so it would be wise for me to be here, yes.
THE CHAIRMAN: I have made up your mind.
MR. RANDOLPH: I think you have, madam, I think you have.
THE CHAIRMAN: At least I helped you.
MR. RANDOLPH: Indeed, madam, you always help me and I am delighted for that. The one concern that I do have is if we do not make it through tomorrow, obviously, then that will be ----
THE CHAIRMAN: We will have to decide.
MR. RANDOLPH: Que será, sera.
THE CHAIRMAN: We will have to try, but of course we have been going at a pretty good speed, and I do not think that one ----
MR. RANDOLPH: No, absolutely, and Mr. Thompson obviously has to have a right of reply.
THE CHAIRMAN: And Mr. Vajda has to finish, and Mr. Anderson has to ----
MR. RANDOLPH: Start! (Laughter)
THE CHAIRMAN: And finish.
MR. RANDOLPH: And finish, I agree, madam.
MR. ANDERSON: Perhaps I was too shy this morning.
THE CHAIRMAN: Well you will not be shy tomorrow. You might like to consider whether we are actually going to finish tomorrow, and if we are not to consider when we can do it again. I am just putting it out.
MR. VAJDA: Speaking for myself I would very much hope we would finish tomorrow.

THE CHAIRMAN: Well I do as well; we all do. Let us see how we get on tomorrow, 10.30.

Thank you very much.

(Adjourned until 10.30 am on Friday, 15th February 2008)