IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th February 2009

Before:
LORD CARLILE OF BERRIEW QC
(Chairman)

THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED
ALBION WATER GROUP LIMITED — Appellant

-v-

WATER SERVICES REGULATION AUTHORITY — Respondent

and

DŴR CYMRU CYFYNGEDIG
UNITED UTILITIES WATER PLC — Interveners

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HEARING

APPEARANCES

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

Miss Valentina Sloane (instructed by Pinsent Masons LLP) 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 and Mr. Simon Gardiner (instructed by McInnells) appeared on behalf of United Utilities Water plc.

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THE CHAIRMAN: Good morning. Miss Sloane, I understand that you have been left in a little bit of difficulty this morning. We have absolute confidence that that is likely to cause you no difficulty.

MISS SLOANE: That is very kind, sir.

THE CHAIRMAN: If you want any time at all because anything arises on which, understandably, you were not expecting to address us, then all you have to do is say and we will be of assistance.

MISS SLOANE: I am extremely grateful.

MR. THOMPSON: Good morning, sir, gentleman. This is not the first time I have appeared in this case in this jurisdiction, but it is the first time that I have appeared before you, sir. I am very grateful that you have taken this on. I hope that I can assist the Tribunal today.

As the Tribunal will be aware, there are essentially two points: the issue of remedy and the issue of costs. As I hope we have made clear at all stages we, Albion Water, have taken seriously the indications given in the most recent judgment of the Tribunal, and would, if it were possible, wish to resolve this matter amicably, not least because this is a regulator who is our regulator, and this is a supplier who is our principal supplier. Therefore, in the end, the matter needs to be finished in a way that all three parties deem to be satisfactory.

By way of introduction in relation to the remedy, which I propose to take first, it does appear to us that although there is dispute about certain matters in the order that Albion seeks, that in reality the order that we see does reflect good sense and the reality of the position that now prevails. We have tried to set out in our skeleton argument at para. 53 the substance of the issues that need to be addressed in order to give effect to the large number of judgments that this Tribunal and the single judgment of the Court of Appeal.

THE CHAIRMAN: Can I just say we have read the skeleton arguments and all the recent material.

MR. THOMPSON: I am very grateful for that indication. Paragraph 53 of our skeleton leads to para. 54 where we suggest that there is a need for what we call, in colloquial terms, a "cap and collar". In relation to the margin squeeze abuse we say simply to cap the level of charges to Albion would leave it open to Dŵr Cymru to charge the same price to Albion and to Shotton and thus to squeeze Albion out of the retail market. Were the Tribunal only to award a margin that would leave open the possibility that the absolute level of charges to Shotton could still be at an excessive level, so that Shotton would obtain no benefit and the substance of the judgment given last November would be frustrated.

We say that in reality there is a degree of consensus about the need for a remedy going forward and one can see that from various angles. Perhaps the best place to start is the way that Dŵr Cymru saw the matter right back in 2001 given that in a sense that what we had to do is wind the clock back and see what the Authority could or should have done had it investigated the matter somewhat more expeditiously and reached what we would say were more correct legal and factual conclusions in 2001. So it is relevant to look at what everyone was thinking in 2001 and one finds that at tab 14 of the bundle, the letter from Mr. Brooker to Ofwat (as it then was).

THE CHAIRMAN: Which bundle are we looking at?

MR. THOMPSON: There should be a bundle that was prepared for the purposes of this hearing – it was the subject of extensive discussion between counsel.

THE CHAIRMAN: Tab 14. You are looking at the letter of 10th August 2001?

MR. THOMPSON: That is right. It is referred to in the skeleton argument, but it is a letter from Dŵr Cymru to Ofwat. I believe that Mr. Brooker was then the managing director of Dŵr Cymru and I think he is now on the board of Ofwat, so to some extent he may reflect some degree of consensus.

In the first paragraph he refers to what the purpose of the letter is and then he goes on:

> "You state in the notice that the Director General has reasonable grounds to suspect that Dŵr Cymru has abused a dominant position by making access to the Ashgrove system by Albion Water subject to the acceptance of unreasonable terms."

So it is a relatively broadly characterised understanding on the part of Mr. Brooker. He then goes on:

> "Your further letter of 9th July 2001 indicates the approach taken by Dŵr Cymru in calculating the access prices offered to Albion Water is the key issue on which you will be focusing, i.e. whether the resultant prices are either excessive or predatory."

He then makes various remarks about how that should be assessed, but the main relevant passage is the final page of the letter at the top where he asserts on behalf of Dŵr Cymru:

> "As a result of the pricing methodology adopted by Dŵr Cymru, there is consistency between the common carriage price offered to Albion Water and the bulk distribution and non-potable treatment components of the prices charged to other customers. In particular, the proposed access price for common carriage has the same basis as the current bulk supply price for the inset appointment to the

> Shotton Paper site, less the water resource component. This bulk supply price was set in 1999, at which time the Director General had the opportunity to dispute the basis for this price if he had seen sufficient grounds to do so. There are no material differences from the supply characteristics of the proposed common carriage arrangement as compared to the 1999 bulk supply arrangement."

So at least in 2001 there was a consensus between Dŵr Cymru and Albion that the common carriage price with which this case has been primarily concerned was simply the costs for distribution and partial treatment and that the only difference with the bulk supply price was that the resource costs were simply knocked off.

If we bring the matter more up to date, and look at what is actually being proposed by Authority and by Dŵr Cymru, one finds that at tab 15 of the same bundle, and in particular I would refer the Tribunal to pp. 5 and 6 of that letter. This is a letter written in November 2006 but indicating the position of the Authority in order to resolve this matter and there is a reference at the bottom, in the last paragraph to how the Authority thinks it appropriate to deal with the bulk supply agreement. There, the Authority says:

> "It may be that the discount to the Second Bulk Supply Agreement of which Albion Water has had the benefit since 2004 (first with the consent of Dŵr Cymru under a consent order dated 2 June 2004 and latterly pursuant to an order of the Tribunal in its Ruling dated 11 May 2005), when taken together with the financial support offered by the Shotton paper mill, may have allowed Albion Water to amass sufficient funds to maintain its viability until we could make a final bulk supply determination. However, we are conscious that Albion Water may not consider this to be sufficient to guarantee its viability throughout a period of which the end point inevitably cannot be guaranteed."

- a prescient remark by the Authority. Then they say:

> "In that case we would ask Dŵr Cymru to seriously consider allowing Albion Water to maintain the benefit of an appropriate discount until such time as we make a final determination. Any such allowance would be voluntary. However, bearing in mind the importance both we and the Tribunal attach to Albion Water remaining viable until matters have been resolved appropriately, it would be unfortunate if Dŵr Cymru felt unable to offer such support or felt it needed to withdraw that support at a later date before we made a final determination."

So there you find the Authority back in 2006 considering that effectively it would be appropriate for the bulk supply position to be maintained pending the resolution of the matter to the agreement of the Authority and Dŵr Cymru.

Then at tab 25 you will find a more recent letter from November 2008, written by Wilmer Hale (solicitors for Dŵr Cymru) and in relation to bulk supply there is a proposal at p.4 of the letter, para. 12, where Dŵr Cymru puts forward a quite detailed proposal in relation to non-potable bulk supply starting:

"Dŵr Cymru is mindful that Albion requires bulk supply services, at least for an interim period, and that a commercial resolution of the issues subject to the future determination by the Authority is desirable."

And it therefore makes a number of proposals effectively to maintain a lower level of payment, but with a view to reviewing the situation in the light of the final determination of the Authority.

So, in my submission, what this shows is that not only Albion but also the Authority and Dŵr Cymru recognise that to leave the Bulk Supply Agreement up in the air would not be satisfactory although it is fair to say that the Authority and Dŵr Cymru have proposed different ways in which this matter could be addressed. Our basic submission is that our order is a perfectly reasonable and proportionate way in which to address the issue which I think all parties recognise that in reality the abuse that has been found has in practice been carrying on in relation to the bulk supply in that it is on that market, or in relation to that supply, that the excessive charging for treatment and distribution has taken place and it is in relation to that that the margin squeeze, as found in the judgments of 2006, actually took place in the continuing period 2001 through to 2006, and one can see from the letter of Mr. Brooker how that was because it was simply the same price with the resource cost added on. So we say that as a matter of commonsense there is a degree of consensus that this issue needs to be dealt with in order to bring this matter to a satisfactory conclusion.

THE CHAIRMAN: Forgive me for interrupting you, Mr. Thompson, I am sure you are right when you say that this matter needs to be dealt with, but there is, of course, an issue as to whether we can deal with that issue. I am bound to say, and I think I need to say this once firmly, is that I – and I think I speak for the whole of this Tribunal – am astonished that I am surveying a room with a very large number of lawyers and other professionally qualified people in it costing an enormous amount of money in a piece of litigation which may produce a result that is completely unsatisfactory to all parties - or possibly a result that is satisfactory to the one, but completely unsatisfactory to the other, and that it has not been

possible for those who are responsible for both the expenditure of private and public money to sit down with everyone present around the table and try and reach an agreement which does not require this Tribunal to make a decision on jurisdiction which may be unwelcome. I am not in any way predicting the result of that argument, but it is more than slightly surprising that we are actually sitting here considering this matter, given the amount of litigation there has been so far. I will say in open court that if there is any potential for the parties coming to terms in this matter, then we would give it every encouragement in accordance with the overriding objective set out in the CPR.

I thought I should say that, and that it might be an opportune moment to say it.

MR. THOMPSON: I have been trying to at least touch on some areas where there may be some agreement, but given the indication from the Tribunal, I think I am bound to say that very similar remarks were made by your predecessor chair, the former President, in the light of the judgments at the end of 2006. Indeed, a proposal was made that a very distinguished former judge of the Court of Justice might act as mediator in this matter. My client enthusiastically embraced it, but another party, who will be well-known to everyone, chose to take two points to the Court of Appeal, including a point on jurisdiction.

THE CHAIRMAN: Here we are, on 13th February, 2009 now.

MR. THOMPSON: Indeed, sir. All I am wishing to say that that we, going back to 2001, considered that this entire exercise is really a regulatory disaster and that the Authority must have seen what the position was in 2001.

THE CHAIRMAN: I have a suspicion that the good people of Shotton, whom I know well historically, if they know anything about these proceedings at all, will be looking upon them with bemusement. That is a criticism of everyone. That is the fair way of putting it.

Anyway, carry on. You know what we think.

MR. THOMPSON: Indeed. We certainly agree that it would desirable to reach an agreement. But, obviously, we think it should be in the light of these judgments. We are surprised that it has not been possible to agree the way forward in the light of these judgments.

I will not go to it now, but the Tribunal will have well in mind the factual findings that it made in particular in its second judgment, as we referred to the December 2006 judgment - in particular at paras. 264 to 268 where it, I think, probably referred to the letter to which I have referred the Tribunal now, and essentially made the point that there is a very direct read-across between the common carriage issue, which has been the subject matter of this case, and the bulk supply price, which has been in fact paid over the eight years of this protracted dispute.

Turning to the approach that Dŵr Cymru orders, which is essentially a declaratory order but nothing further, we say that that would essentially, on the consensus that I have pointed the Tribunal to, be a very bad order to make. It would effectively give no substantive remedy. It would leave the matter subject only to s.40 determinations which have proved to be extremely slow and ineffectual, and, indeed, led to this complaint in the first place because the s.40 determinations or indications that were given in, I think, 1996 were unsatisfactory, and no further determination has been reached, despite the passage of time since then. It effectively would mean that eight years of effort by a very small company in relation to a very large and abusive company would have been totally in vain, despite the fact that three or four judgments of this Tribunal have been given, and an unsuccessful appeal had been taken by the monopolies. The serious risk as set out at para. 28 of our skeleton would be that in the end the successful appellant would be excluded from the market and the monopolist would achieve his purposes, having wasted a good deal of public money, both in the Authority and in the Tribunal. That would be an extremely poor first go at regulation under the Competition Act which has effectively taken up the entire period since it came into force, up to 2009, that this matter is being pursued.

Thirdly, I would just mention that as I understand it the position of the authority differs somewhat from either Dŵr Cymru or Albion. One finds that at para. 9 of their skeleton argument where, as I understand it, and I had the opportunity to speak swiftly to Miss Sloane during our unexpected adjournment before we started this morning. At para. 9 of the Authority's skeleton argument I think the suggestion is that instead of the interim order being terminated and a final order being given - which I think is an issue that Dŵr Cymru and ourselves had reached some degree of consensus on - the Authority takes the view that the better course is for the interim order that has been in place first in a consensual form and then by order since May 2005, should be maintained for a period so that effectively this matter would remain under the supervision of the Tribunal pending an agreement between the parties. We had not anticipated that being a course that was attractive to the Tribunal. It does seem to us a slightly paradoxical situation and that it might be preferable to reach the position that we have suggested in our order whereby the Tribunal would give a final order, but, in effect, the matter would then be subject to the supervision of the Authority in accordance both with the 1998 Act and with its more general powers under the Water Act.

THE CHAIRMAN: I think we would need some persuasion that we could make a further interim order in a situation in which the substantive parties were asking for a final order.

MR. THOMPSON: Yes.

THE CHAIRMAN: You cannot give interim relief as a final order.

MR. THOMPSON: We found it a slightly paradoxical situation. It seemed to us that our solution of a final order by this Tribunal, but leaving matters under the supervision of the Authority, fitted better with the structure of the Act. I think it reflects the approach that was taken in *Genzyme* where I think, similarly, the Oft (who I happened to act for in that case) were quite keen to leave things to the Tribunal to sort out. I think Sir Christopher Bellamy took the view that really it was down to the regulator to regulate, and not for the Tribunal to keep jurisdiction, if indeed it was entitled to.

THE CHAIRMAN: We are at the situation that the parties were agreed that there remains an area for further negotiation, and that the holding position might be to leave the interim relief in place so that the matter can be brought back to the Tribunal. That would be a quite different matter obviously. But, on the face of it, I do not see that we can substitute interim relief for final relief.

MR. THOMPSON: I think we found it a somewhat paradoxical suggestion.

THE CHAIRMAN: Obviously we will hear argument on this.

MR. THOMPSON: I do not know if Miss Sloane is in a position to develop that, but, obviously we are sympathetic to her position as well. I would not be unreasonable in relation t that.

MR. VAJDA: I hope to assist the Tribunal: I share the view of Mr. Thompson - so that the Tribunal has our position. We think it would be wholly wrong for any interim relief to be maintained, and were the Tribunal minded to go down that route, I would make submissions as to why that would be inappropriate.

MR. THOMPSON: Those were remarks by way of introduction. First of all, we are essentially saying that our order is very good and that everybody else is not so good. But, if I could then, just by way of a sort of orientation for where we are, give a homely account of what is going on here. It struck me that we were somewhat in the position of someone looking at a set of rabbit holes where people were liable to pop out at any moment. There are effectively four holes here: there are the resource costs which could, in principle, be excessive. There are the treatment and distribution costs, which could, in principle be excessive, there is the margin between the final selling price and the retail price which might, in principle, be too small, then fourthly there are what I might call ancillary costs which in this case basically mean the costs of common carriage or the costs of the back-up supply which the Tribunal will be familiar with and that standing back the Authority is in the position of the gamekeeper who is trying to keep the monopolistic rabbits in the holes and is wanting to make sure that there are not an excessive resource or treatment and distribution costs, that

the margin is sufficient, and that there are not some hidden ancillary costs which once they watched the other three holes the rabbit runs out of those holes anyway.

What we would say the Tribunal has investigated the second and third, the excessive charging for treatment and distribution and the size of the margin in great detail, and has obtained probably more evidence than any regulatory body has ever received on any discrete topic, and we say that you should make a final order to address the abuses that have been found on the basis of the evidence that you have received which is effectively all the evidence that any of the three related parties were either able or willing, or under direction of the Tribunal prepared to produce, and that those are matters which can be finally resolved.

In relation to the resource costs where possibly a different rabbit could leap out of the hole, that is a matter for United Utilities, who are represented here but they are clearly outside the scope of these proceedings. They are a matter for Albion Water and United Utilities to negotiate, and for the Authority to regulate under its powers under either the sectoral powers or its general Competition Act Powers, but we are not seeking any order in relation to that hole.

The fourth one, the ancillary costs, that is partly within the present case insofar as it might relate to common carriage costs, but we would say it is essentially outside for the reasons that the Tribunal itself gave in its judgment in November, so again it is essentially a matter for Albion Water and Welsh Water to negotiate, subject to the regulation of the Authority, and the job of the Authority here is to watch over all four holes to ensure that the rabbits do not escape and that the matter is properly regulated.

We obviously have a general concern that the reality of the matter is that Dŵr Cymru and possibly – we are not making any definite allegations, but we obviously have concerns – that other parties may not be enthusiastic for us to survive in this environment, that they want the baby strangled in the cradle or possibly Harry Potter to stay in his cupboard downstairs, and so we are obviously worried about the regulatory position generally. We thought that it was relevant for the Tribunal to have the relevant factual information in relation to the current supplies so that it understands where we are and, indeed, the information in relation to the current state of negotiations with the parties and so we have prepared a short supplementary note which is available in both a confidential and a non-confidential form, and if I may hand that up, that sets out in hopefully neutral terms the position that currently prevails both in relation to the various issues that Dŵr Cymru deals with, but also at the end in relation to United Utilities. Just so the Tribunal has it in mind

the confidential figures, if the Tribunal is looking at the confidential version, appear on p.4 at para. 13, and it is the number that appears in the fourth line, and then the calculations done in the last sentence and the two figures that appear in the last line and the penultimate line. So those are the commercially sensitive matters – I think the Tribunal has seen similar figures before but that is confidential as against Dŵr Cymru I believe.

THE CHAIRMAN: Right.

MR. THOMPSON: So far as the analogy I have been drawing, perhaps labouring ----

THE CHAIRMAN: Well I was wondering whether we were in Hogwarts or Watership Down!

MR. THOMPSON: Indeed, I do not want to weary the Tribunal with that subject. I think the most relevant points are at the end of para.12 and at the end of para.13 and they are obviously issues which are of great concern to Albion and I think the Tribunal should be aware of them in assessing ----

THE CHAIRMAN: Can we just read those two paragraphs – just bear with us for a moment. (After a pause) Yes, thank you.

MR. RANDOLPH: I think you having read para. 13 and my learned friend, Mr. Thompson, having said that this is couched in essentially neutral terms may possibly be the case but if this becomes relevant, and we would say that this is not at all relevant to anything the Tribunal should be doing today in relation to jurisdiction, we would seek to put further flesh on the bones – I will let you know – if it became relevant the actual factual background with regard to the negotiations and what has happened as between the parties. But our essential argument would be that none of this is relevant to today, and certainly the Tribunal has no jurisdiction with regard to it, and I think Mr. Thompson has very fairly made that clear, it is a matter for negotiations between the parties.

MR. THOMPSON: Obviously the short point, and I think it is one that the Tribunal is aware of anyway, is that as of November 2007 and then there was some skirmishing in May 2008, there has been an issue about the back up charges appropriate on this supply which I think previously there had been no standing charge and, in broad terms, Dŵr Cymru is now looking to impose a million pounds, broadly speaking, by way of a standing charge and then there is the United Utilities issue which is referred to in a number of places in the judgment, whereby the terms that are being offered by United Utilities were recorded by the Tribunal as being significantly less favourable in relation to Albion Water than they have been for the last eight or nine years, or perhaps longer in relation to Dŵr Cymru.

The final point by way of factual background the Tribunal should be aware of is Albion Water's current financial position. That is a matter that is touched on in the second judgment at para. 339, tab 58.

THE CHAIRMAN: Why are we concerned with Albion's current financial position? Why is that of any interest to this Tribunal at all? You may have a very good answer but I would like to hear it?

MR. THOMPSON: The answer, which I think has been troubling the Tribunal throughout is that Albion is not only the only market entrant – it may not be true now, but certainly it was true up to 2006 – but is also a very vulnerable market entrant, and so in exercising whatever discretion the Tribunal may have it is relevant to bear in mind what the implications for competition will be if nothing much is done for Albion, that there is a serious risk that Albion will be driven out of the market which has always been something which has been of concern to the Tribunal. I think the position is summarised at para.339 of the December 2006 judgment, and it relates to the effects of the interim measures order that has been in place in effect since 2005. It is really the last two sentences:

> "We do not think it should seriously be contended that a reduction in the bulk supply price of 3.55 p/m^3 should not remain an appropriate interim reduction to enable Albion to continue in business. It appears from Mr. Jeffery's witness statement of 9th November, 2004 and from Dr. Bryan's more recent witness statement of 15th November, 2006 that the sum of that order will maintain Albion's existence in the interim, albeit giving the company little or no surplus beyond its current outgoings".

For the Tribunal's information we have actually got a very recent letter submitted to the Authority (which I can hand up if it would be helpful - it is a letter of Wednesday of this week) which essentially confirms that the position is much the same - that Albion is surviving.

THE CHAIRMAN: It is precarious.

MR. THOMPSON: It is in a precarious financial position.

I think that takes us to the core of this issue which the Tribunal has already touched on, which is the issue of jurisdiction. What exactly is the jurisdiction? We would say that if you had the jurisdiction to make the Albion order (if I may call it that), that is clearly the appropriate order.

THE CHAIRMAN: What are you actually asking us to do? Are you asking us to make a decision first on the jurisdiction issue? Do you want to take that as a discreet point? If there is

jurisdiction then there are a number of other issues that remain necessary for argument. If there is not jurisdiction, then it obviously has an effect on the rest of the case.

MR. THOMPSON: Yes.

THE CHAIRMAN: Do you want us to make a jurisdiction decision before we consider anything else?

MR. THOMPSON: I think it would have to be relative to the order that we are seeking, because I do not think it is disputed that you have a general jurisdiction to make an order. It is just a question of how wide it goes.

THE CHAIRMAN: But the point is take that we have no jurisdiction to make a decision on the bulk supply price.

MR. THOMPSON: Correct. That is the issue.

THE CHAIRMAN: That is really the issue.

MR. THOMPSON: I think that is the substantive issue for today's hearing. We would say that ----

THE CHAIRMAN: Supposing we were to come to the conclusion that we do not have jurisdiction in relation to the bulk supply price? What is the consequence of that in simple terms?

MR. THOMPSON: I think we would say you clearly have jurisdiction in relation to the margin. I will come to the remedy that was given in Genzyme, which was actually substantially wider than the remedy we are seeking.

THE CHAIRMAN: As set out in your skeleton.

MR. THOMPSON: Yes. That was a remedy contra mundem. It was not just in relation to Albion. In that case, *Healthcare At Home*, it was actually that they had to have a margin for all retailers who were wishing to take ... We would seek an order to that effect.

MR. VAJDA: It may be helpful to the Tribunal in looking at this jurisdiction if you just look at the terms of the order sought. If one takes up Bundle 1, Flag 5 - and Mr. Thompson will correct me if I have misunderstood it - there is an issue about, if you like, the declaration. That can be left to one side for the moment. That is not a bulk supply point. For the bulk supply jurisdiction point really one goes to paras. 2 to 5 of what is being sought here. Certainly our submission is that the Tribunal has no jurisdiction to do anything in relation to paras. 2 to 5. I hope that assists.

THE CHAIRMAN: Thank you.

MR. THOMPSON: I had two, as it were, preliminaries. First of all, there is the legislation which is essentially -- The primary jurisdiction arises under Schedule 8, para. 3 of the 1998 Act.

It then refers across to s.33, in effect, of the Act, which sets out the jurisdiction of the Oft or, here, the Authority. I am sure the Tribunal is aware of that. I do not know whether it would be helpful to look at those provisions or whether they are sufficiently familiar.

THE CHAIRMAN: We are familiar with them.

MR. THOMPSON: I anticipate that the Tribunal will also be familiar with the judgment of the Court of Appeal in relation to jurisdiction where the issue was your jurisdiction to make a finding of dominance. In my submission, very much the same approach is appropriate here - that you are concerned with what the powers of the Authority were in terms of its substantive jurisdiction. So, the type of order it could have made - say, in 2001 - if it had investigated the matter expeditiously and reached the conclusions that the Tribunal and the Court of Appeal have now found as the correct conclusions. We say that it is clear on authority that the Authority in 2001 could have made an order prohibiting similar conduct. That is clear from a number of materials we have referred to in our skeleton argument, and which are in a narrow blue file I think primarily which the Tribunal should have. It may be in another form for others, but it is the authority's materials at Tabs 49 to 55.

THE CHAIRMAN: Yes.

MR. THOMPSON: The first passage is from **Bellamy & Child**, which is at Tab 49. This is dealing with the powers of the EC Commission. I do not anticipate that there is any great dispute about the difference between those powers. Under the heading,

> "Orders to terminate, Decisions ordering termination of infringements normally take effect forthwith, although in appropriate cases the parties will be given a short period in which to comply. The Commission is not required to specify its requirements in detail, provided the infringement to be terminated is reasonably clear from the decision as a whole. The Commission may additionally order the parties to refrain in future from similar conduct"

Then there is a footnote giving reference to a number of cases - *Hasselblad*, *Polypropylen*e, *Hilti*, *Polypropylene II*. The case we have brought is the one that is referred to explicitly where Hilti was required to refrain from measures having an equivalent effect to those found to have been abusive. One finds *Hilti* at Tab 52. This was a judgment about abusive conduct on the nail gun market. So, we do not need to worry about the facts. The Commission made its order and its operative decision at p.23 of that print-out and, in particular, Article 3. The Commission ordered Hilti to:

> "... refrain form repeating or continuing any of the acts or behaviour specified in Article 1 and shall refrain from adopting any measures having an equivalent effect".

So, it was not specifically in relation to conduct. It was in relation to effect. The judgment of the court of first instance is at the next tab. The operative of the judgment was quoted without comment or criticism at para. 8 of the judgment (p.5 of the clip at Tab 53). They quoted the same passage there. Although a numerous number of points of appeal were taken, it does not appear that anybody challenged that and certainly there is no criticism made of this form of order.

If one looks at the statutory position under Community law, that appears at Tab 55. This is the overall regulation governing the implementation of Articles 81 and 82 of the EC Treaty. We have just got the relevant provision - Article 7. This confers the power on the Commission.

> "Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end".

Now, we would stress the words "any", "proportionate" and "effective", and in our submission that is entirely consistent with the approach taken in *Hilti* and we would refer the Tribunal respectfully to tab 50, which is a passage from another eminent textbook on the matter by Kerse and Nicholas KHAN, who is in the Commission Legal Service and it is a very distinguished and long standing book (this is the fifth edition). The matter is summarised at para. 6.025 – I would not claim it is more distinguished than **Bellamy & Child**, I think almost all the counsel in this room have contributed to **Bellamy & Child** so I would not wish to denigrate that in any way.

Paragraph 6.025, p.338 of the clip, the learned authors say:

> "In summary, the Commission's powers under Art.7 of Reg.1/2003 to order positive action are extensive. The only restriction on the commission would appear to be the principle of proportionality. What this means, as the Court said in *Magill*, is 'that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate

> and necessary to attain the objective sought, namely compliance with the rules infringed."

So here obviously s.18 of the Competition Act, and so again that is an effect based test. In my submission, there is just a basic confusion in the submissions that have been put forward by the Authority and by Dŵr Cymru insofar as they are saying that your jurisdiction in relation to remedies is limited to the abuses that you have specifically identified, whereas in my submission it is clear from Authorities that once one comes to remedies the Authority and therefore the Tribunal has an extensive jurisdiction to prevent the substance of what it has found being circumvented by similar, but not identical, conduct by, in this case, the abusive monopolist. One finds that borne out in the *Genzyme* case, both as a statement of principal and in the terms of the order, which you will find at tab 51 of the same file. The statement of principle we have quoted in our skeleton argument, and it is at para. 233 – I think it is an abbreviated judgment in fact, but long enough.

> "In our judgment, the power to make a direction under section 33 of the Act includes the power to ensure that an infringement is not repeated, if the OFT in its discretion considers that such a direction is necessary. Moreover, in our view, the power 'to bring the infringement to an end' covers conduct closely linked to, or to the like effect as the infringement found, otherwise section 33 would be ineffective. Similarly, the Tribunal's powers to give such directions or make any decision the OFT could have given or made must, it seems to us, be construed as a power to give a direction that is adapted to the developments that have taken place in the course of the proceedings, provided that the underlying problem to be addressed remains the same or similar. Otherwise, a kind of 'catch as catch can' situation could arise in which a dominant undertaking could, by constantly changing its arrangements, keep the competition authorities at by indefinitely."

The position is not exactly the same here in that the conduct has remained singularly the same throughout. It was recognised by Mr. Brooker in 2001 as being exactly the same, and it has remained exactly the same, so in my submission the position here factually is, if anything, stronger than the position that prevailed in *Genzyme* where there had been some corporate restructuring and the question arose as to whether or not the margin squeeze abuse could still be effectively dealt with and the Tribunal made an order to deal with that problem.

If one looks at the terms of the order in *Genzyme*, that is at p.36 of the same tab, I draw the Tribunal's attention to two features: first para.1 imposes mandatory restrictions on

Genzyme, 1.1. in relation to the actual behaviour. 1.2 in relation to repeating the behaviour, so it is no good just to stop for a bit and then start again. Secondly, so it is forward looking, thirdly: "refrain from adopting any measures having an equivalent effect."

THE CHAIRMAN: It is a *Hilti* like order with a few details thrown in.

MR. THOMPSON: Indeed, it is supposed to be reflecting the terms of the text books, that you are fully entitled to make a like effect order. Then it is worth noting, I think, that para. 3 of the order:

> "The OFT may if it thinks fit, after consulting interested parties,
>
> 3.1 modify any provision of this direction, with a view to ensuring that this direction remains appropriate and effective for its purpose."

That was the approach the Tribunal thought appropriate in that case, to make a final order but to give a power to the Authority to vary it.

The final point I note which is the point I made that the order we are proposing is significantly narrower than the order made in *Genzyme*, para. 2 the order was that Genzyme should supply Cerezyme, which was the drug in question:

> "To any bona fide provider of Homecare Services at a drug-only price exclusive of any charge in respect of any element of Homecare Services, at a discount from the prevailing NHS List Price for such drugs from time to time of not less than 20 pence per unit."

So there, it is all rather gobbledygook in terms of the ----

THE CHAIRMAN: It is the species of paragraph is it not?

MR. THOMPSON: What it is is that the retail price, there had to be a discount of 20 per cent off the retail price to anybody wanting to perform the wholesale service, and we would say the equivalent here would be to require Dŵr Cymru to give a discount we would say of at least 5p to anybody wanting to retail non-potable water within Wales, and we are seeking a more modest remedy that Dŵr Cymru should give a discount of 5p to Albion wanting to retail non-potable water within Wales, and we say that that is an entirely proportionate and reasonable, and indeed a relatively modest remedy, that we are seeking.

PROFESSOR PICKERING: Mr. Thompson, could I ask you to what extent would you persuade us that *Genzyme* has sufficiently similar characteristics to this case for us to want to pursue that argument that you have just advanced, and furthermore do you think that, setting aside the specifics of the *Genzyme* case, that it is actually a good thing for a Tribunal, such as ourselves to specify a minimum retail margin? Are we not getting back to the days of resale

price maintenance, and having changed our views about that should not the determination of an appropriate margin be left to the players in the market rather than the Tribunal?

MR. THOMPSON: This is obviously a subject that we discussed in *Genzyme*, I believe there is some identity of representation in this case, although the complainant and the active regulator will have merged into a single entity in that case. The position that was taken there and, in my submission, a very sensible and reasonable one was that by imposing this remedy in *Genzyme* one created a market that people could come into and compete with Genzyme as the incumbent. If they wish to offer more favourable terms, then their retail margins might be eroded, but at least they would have a space in which to compete whereas in those circumstances, as in here, if there is no gap between the retail margin offered to Shotton and the wholesale price offered to Albion then there simply will be no competition and exactly the same position prevailed in *Genzyme* by a different route, where by the NHS was charged the same price for Genzyme to provide the relevant services or for it to receive the drug without the relevant services and so there was no margin to compete. I think what was anticipated, and I have no idea whether it has actually happened, was that over time companies would come into the market that was opened up in this way and then it as left open to the Office of Fair Trading in that case, and here it would be the Authority, to vary the terms of the order once the competitive position was established. But, in my submission, that makes perfect good sense, and the Tribunal has seen, and indeed asked questions since 2005 about why it is that a regime for common carriage was established with a great panoply of guidelines, etc., and absolutely nothing has happened, and I had understood that one of the core findings of the Tribunal was that the reason was because nobody could make any money out of it. Margins were indeed shown by the Authority and criticised by Aquavitae as giving absolutely no margin for anybody to enter this market. So, the purpose of this remedy would be to create a margin and therefore hopefully to create a market, and that was the purpose in *Genzym*e. In my submission it would be an admirably suitable purpose here.

PROFESSOR PICKERING: But if you had a remedy that went along the lines that you have been advocating whereby we specified that such margin squeeze should not continue, nor should there be anything to like effect, why do you wish us then to go on and prescribe a specific margin? Why do you want us to proceed beyond saying, "No margin squeeze. Nothing to like effect"? Why do you then want us to say, "AndDŵr Cymru must ensure that its offer price for the retail supply of water to Shotton Paper..." because that is the

problem, is it not, that it is a competitor – why do you want us to say: "They must ensure that their offer price is at least 5p above the wholesale price that they are supplying to you"?

MR. THOMPSON: Well, it is because that the only evidence that is before the Tribunal, despite the Tribunal having asked for this on numerous occasions, as to the retail margin that is required by Dŵr Cymru, there has been a deafening silence. It is a matter that was criticised in all the judgments in 2006 - that neither the Authority, nor Dŵr Cymru took the opportunity that was offered to them both in 2005 and 2006 to cross-examine Mr. Jeffery on the evidence that he put forward. They did not put forward any other evidence. The only submission was made by the Authority as you will recall was the vexatious postman point, namely, that this was a matter that did not require any margin at all. So, if the matter is simply left at large by the Tribunal we have what we would say would be a very well-founded concern that in reality no margin will be given.

PROFESSOR PICKERING: That would be a margin squeeze again ----

MR. THOMPSON: Indeed it would.

PROFESSOR PICKERING: -- and that would breach the order, would it not?

MR. THOMPSON: The Tribunal will be aware that that was indeed, in a sense, the substance of the decision which the Tribunal has roundly criticised - namely, that the same water flowed through the same pipes and therefore nothing was done and nothing should be given and that was precisely the matter that was found to be completely wrong in the judgments in October and December 2006 when it was said that a substantive margin was required.

PROFESSOR PICKERING: Yes. But, what I am asking you specifically is why we should specify the minimum margin, and is that not getting pretty close to engaging on our own part in anti-competitive conduct?

MR. THOMPSON: Not at all. I would respectfully say that the reasoning of the Tribunal in *Genzyme* and indeed of the Oft in *Genzyme*, who spent a great deal of time working out what was required by a reasonably efficient competitor in that market -- The reason why I say 'reasonably efficient' there was that Genzyme itself was a very small competitor on that retail market and so it was agreed by everybody that in fact Genzyme's own efficient margin was far too high. So, there was no need to investigate Genzyme's figures. So, they did a market analysis and the Tribunal gave a margin for the purposes that I have indicated of allowing competition to commence in that market. In my submission, for exactly the same reasons, the Tribunal has comprehensive evidence showing not only as a matter of theory, but in practice, the very low or non-existent margins that have been offered by the monopolists who practice not only in Wales but throughout this country, and the result has

been that there has been no retail competition. The Tribunal heard extensive expert evidence from Dr. Marshall about why that was the case, and the barriers to entry that are faced by people wishing to enter this market. For those purposes, in my submission, in order to give an effective remedy to the abuse as found, it is necessary for the Tribunal to take a view, as was done in Genzyme, of what is required to allow some degree of competition on the retail market in this particular centre. In my submission, not only is it sound as a matter of authority, but it is also sound as a matter of principle. I understand what is being put to me, and it may be that the margin turns out to be too high and can, in due course, be reduced. But, certainly the approach that was taken by the former President in *Genzyme* - and I think with consensus from *Genzyme* in that case and the Office of Fair Trading - was that the appropriate course was to try to identify what the appropriate margin was and to make an order to that effect. It was simply the level of margin that was controversial in that case. I do not think that there was any question but that that was thought to be an appropriate form of order and it was simply a matter of doing the exercise ----

THE CHAIRMAN: That may well be right on the facts of *Genzyme*, but I just want to be clear in my own mind - and forgive me if I am being obtuse about this - how far you are asking us to go beyond a *Hilti*-type order. It seems to me that there are three levels. There is an order which falls short of *Hilti* in that it does not include the last parenthesis 'and shall refrain from adopting any measures having an equivalent effect'. There is a *Hilti*-type order which is broad and general and contains that additional parenthesis, and then there is a *Genzyme*-type which *Hilti*-plus-plus, which involves us, as I understand *Genzyme*, not a departure from a *Hilti*-type order but simply adding some specificity to it because it was thought appropriate on the facts of that case. Now, is that a fair analysis so far?

MR. THOMPSON: I have been saying that *Hilti*, in general terms, clearly - and the case law also entitles the Authority, or the Oft, or the Commission, or whatever, to make a like effect ----

THE CHAIRMAN: Yes - which is the subject of a continuing dispute here.

MR. THOMPSON: I think what I am saying is, "Does that actually allow us to impose any specific requirements?" But, in my submission, it is quite clear that specific behavioural requirements can be imposed. I think I have showed you Regulation 1 of 2003. I think it said 'any behavioural requirement'. That obviously is not just general pious statements of good intent. That is, "You shall do this and that. You shall not charge more than this --" There were quite specific undertakings actually taken in *Hilti*. I am just looking at it. I do not think it went down to specific sums of money, but there were particular requirements

imposed which are at the annex to the Decision. Even if there were not specific numbers stated there, I would again refer to the *Genzyme* order as evidence that quite specific remedies can be imposed by this Tribunal and have been in the past. I have been trying to explain why it is that that makes good sense, both in general terms and on the particular facts of this case, given the findings that have been made here.

THE CHAIRMAN: What are the consequences if this Tribunal makes an order which does not contain specifics, but is more general in sort of Hilti-like terms? What happens then, if Albion are aggrieved?

MR. THOMPSON: I suppose we would be back at the bottom of the snake, having ascended a number of ladders, and we would have to go to the Authority -- I see Mr. Bailey looking doubtful. I would have to check my copy of the Act as to whether or not breach of a Tribunal order -- what exact forms of enforcement there are - whether it counts as a contempt of court or whether there is a specific machinery under the Act. I am afraid I had not prepared that issue.

THE CHAIRMAN: We may come back to that.

MR. THOMPSON: The point, sir, we are making is that we say that it is entirely clear that the Tribunal would have jurisdiction to deal with similar abuses, including the bulk supply agreement, if Dŵr Cymru had currently been abusing its dominant position in relation to common carriage. So, supposing the actual abuse, maybe in a more conventional case -- the abusive conduct was actually taking place and the Tribunal wanted to prevent similar conduct. Supposing UU offered a very favourable price to Albion Water - much cheaper and more expensive to Dŵr Cymru, and so we had leapt on the common carriage offer as the best way of surviving in this market, but you had found that the distribution and treatment prices were too high and it was abusive. In my submission, it would be entirely clear that you could have covered the bulk supply point. It is an equivalent thing. If Dŵr Cymru had supplied the water itself, it still could not have charged an abusive price for its treatment and distribution. We say that it would be absurd to suggest that it is no jurisdiction in relation to the actual conduct that has been going on over the last eight years, involving equivalent conduct and the very same assets and the very same pricing, and to say that that is not something that could not be dealt with by the Tribunal given the knowledge that it has and the findings that were made (for example, at paras. 264 to 268, and 351 to 353 of the second judgment). In particular, we would say that the Tribunal has already decided this issue. One finds that at para. 353 of the second Tribunal judgment. Tab 58 in the second red volume. It is a passage that we quote in our skeleton argument, but at para.

352 the Tribunal hypothesises - which, in my submission, is exactly what should be done here -

> "Had that investigation been properly conducted, it would by now be apparent to the Authority that, not only was there an infringement of the Chapter II prohibition in relation to the First Access Price, but that there were also reasonable grounds to suspect an infringement in relation to the bulk supply price. It would also be apparent to the Authority that there would be a risk of Albion going out of business before the decision on the First Access Price could take effect, by virtue of the level of the Bulk Supply Price. In those circumstances, we can see no reason why the Authority could not adopt interim measures under s.35 of the 1998 Act to preserve effective competition, for example pending a re-determination of the bulk supply price. In the postulated circumstances, no other remedy would be available to the Authority to protect the public interest.
>
> 353. We would not accept, and indeed it has not been suggested, that the bulk supply price in this case is not subject to the Chapter II prohibition. As already set out in paras. 152 and 196 of the main judgment, it is plain that the 1998 Act is not ousted by the 1991 Act ... The same applies to Community law. We do not see any jurisdictional reason why the Authority could not give either an interim measures decision under s.35, or a final direction under s.33 of the 1998 Act, in relation to the existing bulk supply price".

In my submission, that is dead on and reflects exactly what I have just been saying by reference to authority. There is no jurisdictional reason why not. In my submission it is a bit late for the Authority to start raising problems or, indeed, Dŵr Cymru in that Dŵr Cymru put in a pretty *portmanteau* comprehensive appeal, of which only two points made it to the Court of Appeal. They could perfectly well have appealed this point if they did not like it. It is clear from the hearing that took place at the end of 2006 in the light of this judgment that the Authority specifically considered this question and decided not to appeal it. One finds that at Tab 10 of the bundle.

MR. VAJDA: I will come back to this. This obviously an important submission made by Mr. Thompson, but just so that the Tribunal is aware where this comes: if one goes to p.115, this is the Tribunal's jurisdiction in relation to interim relief. It is not in relation to final relief.

THE CHAIRMAN: I anticipated that you would make that point.

PROFESSOR PICKERING: I wonder whether I might ask him what the significance is in his view of the reference in para. 353 and also in para. 352 essentially to the powers of the Authority as distinct from comment about the powers of the Tribunal?

MR. THOMPSON: I hope I touched on that at the start of this part, which is that the powers of the Tribunal, as found by the Court of Appeal at para. 127 of the jurisdiction - and we have copies of the Court of Appeal judgment if the Tribunal wants it (or whether you have it) -- Essentially the finding was that the Tribunal had the same substantive jurisdiction as the Authority. So, if the Authority could have done it, then the Tribunal can do it under Schedule 8, para. 3. That was in relation to a finding of dominance. But, in my submission, the same reasoning would apply in relation to remedy. So, we would say that the fact that the Authority had jurisdiction -- Indeed, I think that was the point that was being addressed by the Tribunal here - the fact that they had jurisdiction in relation to interim measures meant that the Tribunal also had authority in relation to interim measures. The point I am making is that neither Dŵr Cymru , nor the Authority sought to appeal that. Clearly there was a broader finding which could have been appealed as the basis for interim measures. But, no such appeal was brought.

PROFESSOR PICKERING: The problem for me is that this is about what the Authority could do which presumably pre-supposes that there has been a due process.

MR. THOMPSON: In that case I think it probably is going to be helpful to look at the Court of Appeal judgment because that was, in a sense, the point that was raised by Mr. Vajda - that there was a procedural objection to the Tribunal doing something without issuing a statement of objections. We said, "That's a rather bad point in that the Tribunal is a court with the procedural protections of a court". So, whereas the Authority normally operates essentially on paper, and although there is a paper procedure, there is not a right to cross-examination, etc. However, here the Tribunal has very extensive powers which in fact it has exercised extensively in this case which enable the parties, such as Dŵr Cymru , to have substantially greater procedural protection than they would do in front of the Authority. Essentially, the Court of Appeal agreed with us.

THE CHAIRMAN: You summarise that in your skeleton argument effectively. So, shall we move on?

MR. THOMPSON: Yes. I was going to take the Tribunal to the passage I refer to in the skeleton, but you have probably got it. I will just give you the reference. It is p.2 of Tab 10, lines 23 to 24. Mr. Anderson is looking at points in the December judgment that go beyond the judgment in October. In particular, he refers to,

"-- a finding that the second bulk supply price agreement is capable of giving rise to an abuse for precisely the same reasons as the First Access Price ----"

I anticipate that what was being considered there was whether or not the jurisdictional points that were just referred to were in fact open to the Tribunal in this case. But, it is clear that a decision was taken not to appeal that issue by the Authority, and in practice by Dŵr Cymru as well.

Mr. Vajda helpfully anticipated me. Can I now look at the terms of the order being sought by Albion? Tab 5. In our submission, at para. 1, the declaration (p.26 on my copy) should be in reasonably uncontroversial terms. It reflects the judgments. I think the only point is whether or not it is appropriate to include the words 'and thereafter'. I think you have my submissions on that in paras. 38 to 40 in relation to excessive pricing, and paras. 45 to 47 in relation to margin squeeze. In particular, I would refer to the passages from the judgments in relation to margin squeeze which make it clear that the Tribunal was finding an ongoing abuse. In my submission, the same must apply in relation to excessive pricing given that it was the very same commercial conduct.

The substantive order in relation to excessive pricing is para. 2 through to 4, and then 6. The suggestion is that the findings of the Tribunal at para. 197 of the excessive pricing judgment should be given effect (para. 2.1). The figure of 14.4 - I think the Tribunal will have seen - is simply an average of the three figures that were found at para. 197. In our skeleton we have pointed out that one of those figures is in fact a general figure rather than an Ashgrove-specific figure. So, it may be that the Tribunal thinks that that is actually slightly too high. We also refer to the fact that the Tribunal made a number of remarks suggesting that the findings they have made were somewhat cautious in relation to matters such as costs of capital. So, we would say that 14.4 was, as it were, the maximum and the Tribunal might think that a lower figure was appropriate. Then we have put the reference in relation to indexation in brackets because there is an issue about that. Then we have made a provision for, effectively the ancillary costs point I have mentioned - so, any additional costs there might be and a provision for that matter to be referred to arbitration if not agreed. Then the bulk supply point is essentially the same point but with the substitution of the resource costs. So, essentially the position that was described by Mr. Brooker in 2001 and, indeed, the position that prevails in practice now to be continued so that they simply pass through the resource costs as has been apparently satisfactorily the case for the last decade. That is the suggestion there. Subject to the point of jurisdiction we do not see it as a particularly controversial suggestion because it essentially maintains

the status quo and, indeed, the interim relief, but modified in a way that reflects the final findings of the Tribunal which appears to us to be the appropriate final remedy.

Point 4 is simply a technical point that I do not think the Tribunal needs to be concerned with.

Point 6. It seems to us that that is appropriate and that it reflects the approach in Genzyme that this is not a final order that must stay the same for ever. It seems to us that the Authority is the appropriate body to be supervising the matter as, for example, the EC Commission has, for many years, supervised IBM in the implementation of undertakings that were given, and is now supervising Microsoft. It seems to us entirely appropriate that the Authority should resume its role as the regulator. So, that is the suggestion here.

In relation to the margin squeeze, I think we have already discussed that. In a sense, it is a simple suggestion - it is simply that Dŵr Cymru's retail arm should be taken into account in relation to anyone wishing to supply the non-potable water within Wales on a wholesale basis. But, we have taken a relatively conservative approach by making that only in relation to Albion. But, it would obviously be implicit in the obligations of Dŵr Cymru as a monopoly water undertaker that it would have to offer similar terms to other parties should that arise. But, it did not seem to us that that was necessary for the Tribunal to address that point. It seemed to us better to take a slightly more conservative approach which reflects the actual findings in the judgments.

At para. 7 we suggest the interim order should be removed, which we have discussed.

Then, para. 8 is the issue of costs which I will come to in a moment.

So, we say that that is in fact an entirely reasonable and proportionate way to give effect to the findings of the Tribunal.

The specific points on quantum. I have already touched on the excessive pricing issue.

The Tribunal will have in mind, I think, para. 193 of its latest judgment where it says that costs and pricing are not an exact science, in fact quoting the *Genzyme* judgment at para. 193. In my submission the issue of quantum is to be dealt with by the Tribunal (you might say) applying a broad brush. That was the approach taken in the unfair pricing case. We would say that the same approach should be applied here.

I may have given the Tribunal a wrong reference. (After a pause): It is Tab 59, para. 193, p60 of the most recent judgment, quoting paras. 277 and 279 of the Genzyme remedies judgment.

We say in relation to an excessive pricing remedy that the 14.4 pence would be doubly conservative by reference to the findings at para. 197 of the latest judgment in that it

would include an element for distribution pumping which the Tribunal had found probably should be excluded. So, it may be that the Tribunal would think that 13.6 or 13.8 pence would be more appropriate.

In relation to the margin we suggested 5 pence. That is based on the only positive evidence available to the Tribunal, which is the witness statement of Mr. Jeffery, which he was not cross-examined on, either in 2005 or 2006 or any alternative evidence put in by either the Authority or Dŵr Cymru , despite its substantial resources and the substantial resources that they have put into this case. It is consistent with the findings of the Tribunal, both in its 2006 and 2008 judgments that there was an overall overcharge of somewhere between 7 and 9 pence, depending on which figure is reached. So, in my submission, applying the broad approach commended by the Tribunal itself in its recent judgment and in *Genzyme*, that would be an entirely appropriate place to start in relation to margin.

The only other issue in relation to quantum is the question of indexation. We have suggested that the PPI figure is used, which is a somewhat lower figure than the RPI figure. The basis for that one finds at Tabs 7 and 8 of the bundle for today's hearing - the agreement between Shotton and Albion - in particular Schedule 3 on p.11 of Tab 7. You will see that it has been agreed since 1998 that the pricing should move by reference to the PPI index (third line). So, that was the basis on which this was undertaken and agreed. Likewise, the contract between Albion and Dŵr Cymru - at the next tab we find the same point at para. 4.9 - reference to the PPI as the basis for -- the substantive point is para. 4.4(i) - the annual percentage movement in the PPI index recorded in the previous November. I think the point that Dŵr Cymru make in correspondence is that that is a bit old-fashioned these days. As a sort of Jury point, we note that the effect of their favoured index is to give them a supply price going forward in relation to the excessive pricing remedy which is somewhat higher than the one that we would favour. But, as one may say, "What goes around, comes around". The effect would be that the margin on their basis should be somewhat higher than the one we had originally sought. So, it may not be the most world-shattering issue in that it would imply that the margin should be somewhat higher if the RPI was used in this case.

Sir, those are the points I had in relation to remedy, subject to any questions that the Tribunal may have. In relation to costs, it appears to us that we have made rather a meal of this issue in that it has been essentially agreed that we are entitled to our costs, and we set out a detailed schedule, including our counsel's fees – my counsel's fees and Mr. O'Flaherty's – and then what we would say were relatively, for the size of this case,

exceedingly modest other fees, £10,000 for solicitors' costs on an admittedly broad basis, and some £3,000 for disbursements. I think the Tribunal will have well in mind the costs judgment in this case, and, for example, para.3 of the costs judgment in February 2007 whereby it was said that the costs incurred by Dŵr Cymru and the Authority were some £3 million, and at p.35, paras.103-104, that Dŵr Cymru's solicitors had at that time worked some 3,000 hours on this case. So it does appear to us that this is a discrepancy which obviously struck the Tribunal in 2007. It does appear to us to be the same here, that there is a somewhat parsimonious approach to dealing with costs issues where they involve Albion and a rather more extravagant approach in relation to their own costs and time. I am not sure how long we should be taking to dispute over £3,000 of disbursements or £10,000 of solicitors' costs and our own fees, as set out in fee notes. We have not actually had any specific counter-offer made or any specific criticism of any item on our schedule, with the possible exception of an appearance which I made at a hearing in Birmingham during the investigation of the costs by the Authority, and it may be said that that does not fall within the scope of these proceedings, but we have included them because the only purpose of that investigation was to give effect to the order of the Tribunal. Again, there must be a question of how proportionate it would be to spend a long time poring over that type of issue in the context of this case.

We received a letter yesterday from Dŵr Cymru. I do not know whether it has reached the Tribunal. It was copied to the Tribunal. In that case a number of points were made in relation to costs.

THE CHAIRMAN: I do not think I have seen that.

MR. VAJDA: I think that may not have reached the Tribunal. If I could just say, this is, in a sense, the "theatre of the absurd" in relation to costs.

THE CHAIRMAN: It is.

MR. VAJDA: The position is that we have no objection to a standard order for costs. We would hope that then they can be agreed without us having to go off for detailed assessment. The concern of those instructing me is that what is being asked for is all the costs, which is effectively really an indemnity form of costs. If Mr. Thompson says he is happy with a standard order for reasonable costs to be assessed if not agreed then the issue falls away.

MR. THOMPSON: The position we have here, and it is, in a sense, the same position that occurred two years ago, is you have an extremely impecunious party. It has won its case. The other parties have accepted in November an obligation to meet our costs, but they have

made no proposal whatsoever, and they have apparently been unable to agree between themselves how to allocate the liability for costs.

THE CHAIRMAN: I suppose you could ask for an interim order in any event, could you not?

MR. THOMPSON: It had occurred to me but, in my submission, as indeed was the position in 2007, we would not regard this as a speculative interim order, but we would be seeking, if not a final order in relation to costs, a substantial proportion, we would suggest 80 or 90 per cent.

THE CHAIRMAN: It just occurs to me in relation to costs, and I am completely open-minded about this, the sum of £10,000 seems to me to at first blush to be far from disproportionate, to put it at its lowest. As for the other aspects of costs, well, a realistic assessment of the position may be that you are likely to recover the bulk of them, and that the simplest way to deal with this, without wasting a great deal of the Tribunal's time over costs, would be for a substantial interim order to be made with the residue to be left to be determined in the usual way if it cannot be agreed. In all interim order cases, as I understand it, the norm starts at 50 per cent anyway and works upwards, and occasionally downwards. I heard a case here last week in which I made an interim order which only amounted to a third of the costs, but there was a very, very substantial dispute.

MR. THOMPSON: I had the pleasure to appear for one of the parties in that case at an earlier stage, so I know about it.

THE CHAIRMAN: You know the case, yes. I merely offer that as a suggestion for avoiding a great deal of unnecessary argument.

MR. THOMPSON: It may be that I could finish and then leave it to the others. In my submission, that would be an eminently appropriate way, but I think the only point I would make was that in this particular case and in these particular circumstances, we are looking at the high end rather than the low end, and so we would be seeking an order in the 80s and 90s, rather than the 20s and 30s.

THE CHAIRMAN: You can make your bid and they will make their counter-bid, possibly.

MR. THOMPSON: I think those are my submissions.

THE CHAIRMAN: Thank you very much.

MR. THOMPSON: Just one more point on the approach to costs, the matter was exhaustively analysed by the Tribunal in 2007 and we had not anticipated any dispute about the correct approach to assessing costs. So we were a bit surprised by that issue.

THE CHAIRMAN: We will see where we go. Thank you, Mr. Thompson. Who is next? Do you want to go next?

MISS SLOANE: Sir, I am happy to speak next if the Tribunal would find that helpful?

THE CHAIRMAN: We would.

MISS SLOANE: Sir, there appear to be four issues – that is the common carriage remedy, the bulk supply remedy, the margin squeeze remedy and costs. Getting costs out of the way, first, the Authority is very happy with an order along the lines just discussed – that is an order that the reasonable legal costs of Albion be paid by the Authority and Welsh Water in proportions which, as I understand it, we still hope to agree – we hope that we would not trouble the Tribunal with that – and then to be subject to detailed assessment if not agreed with a substantial interim order. The Authority has no problem with that. I am not going to get into precise figures at this stage. I would need to take instructions, so it might be better to do that after the lunchtime break, if that is all right.

THE CHAIRMAN: Yes, certainly.

MISS SLOANE: So that then leaves the remedy, the common carriage, the bulk supply and the margin squeeze. Before I get into those three issues I would make one preliminary observation on behalf of the Authority, and that is this: Professor Pickering this morning made a number of important observations in relation to the correct balance between the role and function of the Tribunal and the role, function and powers of the Authority as the relevant regulator in this sector. The Authority is well aware of Albion's concerns about its conduct in the past. We have to take that on board. The position now is that we are in 2009, we have had years of litigation and the Authority has the benefit of very detailed reasoning of the Tribunal, and indeed has conducted very detailed work in this case which has been scrutinised. It will of course have due regard to those judgments of the Tribunal, and indeed it is currently conducting a review, as one would expect, of the impact of those judgments on its regulatory powers. So it will have due regard to those when exercising its powers in relation to this case should the need arise after this judgment and after this final order.

What is quite clear is that the Authority has a range of powers, both under CA98 and the Water Industry Act which can be of assistance to the parties here. The Authority is willing to deploy those.

In the same regard it is incumbent upon me to draw to the attention of the Tribunal the very recent judgment in *Floe*, of which the Tribunal is no doubt aware. I am not going to ----

THE CHAIRMAN: The Tribunal is acutely aware of the judgment in *Floe*.

MISS SLOANE: I am not going to make that point then, sir. Of course, that is a relevant background factor in deciding how to take this case forward, but I would reiterate once

again before addressing the points in substance that the Authority has taken those judgments to heart and is well aware also of the need to give a real practical effect to those judgments. That is the backdrop of my submission.

THE CHAIRMAN: Yes, you are rightly stating the backdrop as being, in a sentence, something like this: "We have won, but it is only a pyrrhic victory". That is what Albion are saying, unless the full remedy described by Mr. Thompson can be put into the order.

MISS SLOANE: Yes, we understand that submission.

THE CHAIRMAN: We are interested in what the Authority will do if the order we make is not as detailed as Mr. Thompson is contending for, but Dŵr Cymru then decide to circumvent it -- --

MISS SLOANE: Absolutely, and we have representatives of the Authority here who are taking that very much to heart.

THE CHAIRMAN: Let me just finish the sentence, do forgive me, and that is of real concern to us because we are a specialist Tribunal trying to ensure that competition law and fair competition is effective and that we are an appropriate instrument as part of the general picture. I am sorry, that is the end of sentence. Oh, no, I have provoked Mr. Thompson, I am so sorry.

MR. THOMPSON: The question of circumvention perhaps puts it a bit too low in that our concern is that Dŵr Cymru simply takes no notice whatsoever. The Tribunal will be aware that there was a judgment of the Court of Appeal in May, but its conduct has remained markedly the same.

THE CHAIRMAN: Yes – well, circumvention or malevolence, it comes to the same in effect. Carry on, Miss Sloane.

MISS SLOANE: I am going to deal, first, with the bulk supply because that is probably the most difficult issue for us to grapple with and its is perhaps the most contentious. I think it is important to take a step back and remember how the bulk supply arises in these proceedings. In my submission, it arises in two respects. The first is the interim relief order, and the second is the Tribunal's observations on read-across. Taking the first of those, the interim relief, Albion's counsel is relying on passages from the Tribunal's December 06 judgment in order to establish jurisdiction for the order now sought by Albion in relation to the bulk supply price. As Mr. Vajda has already pointed out and the Authority endorses, it is important to bear in mind that that passage which is relied on was in the context of interim relief and was addressing interim relief.

I would ask the Tribunal to just turn up the passage, the two key paragraphs, which are 352 and 353 behind tab 58, p.117. I make two observations in relation to those in addition to the one already made, that this is all in the context of interim relief. The first is one to which I think Professor Pickering has already adverted, which is in para.352. We see the context of what the Tribunal is there saying was that there were reasonable grounds to suspect an infringement in relation to bulk supply price – reasonable grounds, not a finding of an infringement.

The second point is that this is framed in terms of the Authority's powers and, in my submission, demonstrates just quite how wide ranging and effective those powers can be in a situation such as here, because you will see that it calls to mind that, if necessary, the Authority could adopt interim measures under s.35 of the 1998 Act whilst conducting a determination of the bulk supply price under s.40 of the Water Industry Act. The short point is that that was in the context of interim relief and there has been no finding in this case that the bulk supply price is, itself, an infringement of the Chapter II prohibition.

This takes me to the second point which is the read-across. I would ask you to turn up para.335, where we can see in terms what the Tribunal said about read-across, as discrete from its jurisdiction points and interim relief. At para.335, which is at the bottom of p.111, it says:

> "It follows, in our view, that the determination of the First Access Price and the determination of the Bulk Supply Price cover a large degree of common ground and raise substantially similar issues."

We heard this morning from Mr. Thompson that Albion acknowledges the bulk supply price is not one and the same with the common carriage price, not least because there are four aspects to the bulk supply price, as he put it, and even on Albion's own submission the Tribunal has only looked at two of those.

Were there any doubt about this, about what the Tribunal has actually found, it is made crystal clear by the Tribunal's judgment and its refusal of permission of appeal, and I believe that copies are available. The relevant paragraphs that I would ask you to go to are paras.104 and 105 of that judgment on p.46. You can see just above para.104 there is a summary of the ground of appeal which was being considered by the Tribunal. It says:

> "THE TRIBUNAL EXCEEDED ITS JURISDICTION IN HOLDING THAT IT IS NECESSARY TO CONSIDER THE COSTS UNDERLYING THE BULK SUPPLY PRICE IN ORDER TO COME TO A CONCLUSION ABOUT THE FIRST ACCESS PRICE."

In para.104 the Tribunal explained why it was necessary to look at the bulk supply price in order to form a view on the first access price. The Tribunal went on in that judgment at para.105 to say:

> "However, that does not imply that the Tribunal has taken any position, in its judgments or otherwise, in relation to what the level of any contemporaneous or future Bulk Supply Price should be, or how that price should be determined under section 40 of the Act."

In the Authority's submission, the Tribunal was absolutely correct to draw a line between observations as to a read-across and a clear statement that it has not made a finding on the bulk supply price, and indeed refers to the determination being under s.40. We would say that is right, there is a specific statute price setting mechanism available to the Authority – price setting, which the Authority is willing to deploy.

THE CHAIRMAN: Are you going to give us some sort of information about the progress in relation to both the bulk supply price and determinations that Ofwat has?

MISS SLOANE: I will do what I can off the cuff and if necessary I will take instructions over lunch.

THE CHAIRMAN: I think this is material, is it not?

MISS SLOANE: I understand. There are currently two determinations, as it were, which it is important to keep separate. One is as to potable supply, which is the Authority is conducting at the moment, and indeed that covers back-up supply. So that issue is already being looked at.

Then there is the non-potable. My understanding is that Welsh Water has consistently taken the view that it is happy for the Authority to conduct a determination on that, but it is Albion who has resisted that. My understanding is that Albion would prefer to go down the route of the Tribunal determining. So at the moment the Authority has not gone down that route, it is not something that Albion wants. If Albion changed its mind the Authority is willing to conduct it, subject of course to all conditions being fulfilled. There are conditions. I cannot give a guarantee that all those are met, so this is hypothetical. All I can do is say that the Authority is, in principle, willing to go down that route.

THE CHAIRMAN: How quickly this gets put in hand – it is two years since the Tribunal gave its views about what it thought might be found. Also, while obviously this is determined by the nature of the evidence, and so on, the duration of any such investigation would be quite material because, as has been pointed out, we have been eight years in this.

PROFESSOR PICKERING: There is a legitimate expectation that it will be done within a reasonable time, is there not?

MISS SLOANE: Sir, could I make two comments in response to that. The first is that we would obviously have to be clear what is being determined. It is not 2001. Historical price is probably of little practical relevance. 2009 going forward, we would have to know precisely what bulk supply is wanted by the parties, if that is what Albion wants. From my understanding of the correspondence, that might not be precisely the same as what has historically been in place because other services or other customers might be encompassed within that. That is the first point. It is not just going to be a matter of dusting down the report and the judgments and doing a couple of figures on the back of an envelope. It could be fairly significantly different.

The second point is that I have taken instructions on how long it would take to conduct bulk supply determination. I am afraid the answer is not particularly helpful in that the precise time it is going to take is obviously going to depend on, first of all, what is being required; secondly, how co-operative the parties are. There is a wide degree of antagonism and opposition between them and that is obviously going to take longer. It would be a matter of months, it is not weeks, but nor is it years.

The other point is that obviously the Authority does have the benefit of detailed work on this case already which the Tribunal has already scrutinised. It would be expected that there would be at least some level of overlap and some work which has already been conducted which can be used.

THE CHAIRMAN: Thank you.

MISS SLOANE: We understand that Albion might have concerns about its position being protected pending that determination. In response to that, I would raise a couple of possibilities. The first is that one would hope the parties might be able to agree some interim provision pending the determination. If not and if there were real concerns, then exactly as the Tribunal identified in that passage they went to earlier, the Authority of course has CA98 powers to put in place interim measures pending the determination if it did consider – if it had reasonable grounds to suspect – that what was in place was a breach of the Chapter II prohibition.

THE CHAIRMAN: If the Authority refused to put into place interim powers that would be judicially reviewable?

MISS SLOANE: No, I think there is an appeal to the Tribunal.

THE CHAIRMAN: To the Tribunal, right, just to be clear on the jurisdiction. The image of a revolving door is very much in my mind!

MISS SLOANE: So going back to the directions that Albion has requested, the Authority's position is that there is no need, and indeed there are real jurisdictional problems, we say insuperable problems trying to go down the route of setting prospectively a bulk supply price. We can see that what the Tribunal could do, if it wanted to assert more control, is issue a *Hilti* style direction. The Authority would not oppose that, although it does raise the thorny question of what has an equivalent effect. I cannot say right now that the current bulk supply would infringe that direction. So there would be an issue as to what is equivalent effect, not least because the bulk supply price has those four different aspects.

THE CHAIRMAN: So a *Hilti* style direction, even if it were general, as general as the *Hilti* direction itself, might concentrate the mind of the Authority?

MISS SLOANE: The equivalent effect?

THE CHAIRMAN: Yes. It should.

MISS SLOANE: It should. I cannot say ----

THE CHAIRMAN: Especially given the history of this case and this dispute.

MISS SLOANE: So the Authority considers that those are real and practical means of giving Albion a practical remedy, its own powers. In its submission, actually given those powers, the Tribunal need only direct that Albion refrain from the identified abusive conduct.

PROFESSOR PICKERING: I think you mean Dŵr Cymru.

MISS SLOANE: Sorry, Dŵr Cymru, yes, refrain from the identified abusive conduct, but if the Tribunal wanted to go further and have a *Hilti* style direction that is not going to be opposed by the Authority, but it is a question as to whether that would actually be of any practical significance and use.

Sir, those are the Authority's submissions in relation to the bulk supply price. Unless the Tribunal has any more questions I will move on to the margin squeeze.

THE CHAIRMAN: Please do.

MISS SLOANE: In relation to margin squeeze, the Authority makes submissions to similar effect, that it would be sufficient for the Tribunal to issue a direction that Welsh Water refrain from the identified abusive conduct. If Welsh Water were to impose a margin squeeze, and this is of course now in circumstances where it looks as though a common carriage price is being agreed, but if nevertheless Welsh Water were to impose a margin squeeze then it would be in breach of that direction and indeed the Authority has its CA98

powers by which it could also address any margin squeeze, any repetition of the margin squeeze.

The question is, is there any need to go further and fix the price of the margin? The Authority's view is that is undesirable for two reasons. The first is that it is not necessary having regard to the powers which I have just referred to. Second, it would be necessary to have further findings of fact in order to determine the level of the margin. In *Genzyme*, as the Tribunal will probably be aware, there was a further hearing with expert reports, reports from the OFT and then a 99 page judgment setting out the Tribunal's conclusions on what the appropriate margin was. The Authority's view was there was no jurisdictional problem with the Tribunal going down that route here and investigating fully what the proper margin should be, but it would be an expenditure of resources, a significant expenditure of resources, and we say we cannot see that it is necessary, particularly at this stage. Should the matter arise subsequently, and we are really talking hypotheticals now, in the event that Welsh Water were to breach, or appear to breach, a direction of the Tribunal, then at that point there might be a question as to whether the margin is sufficient and it could be dealt with if and when it arises. The Authority does not see this being a case similar to *Genzyme* where it would be an efficient use of resources now to go down the route of trying to identify what the margin is.

In that regard I hear what Albion is saying about the unchallenged evidence of Mr. Jeffery and that the Authority had an opportunity to cross-examine Mr. Jeffery, etc.

It must be borne in mind that the hearing at which that evidence was given was not directed at this specific issue of what the margin should be. The Tribunal made no findings of fact as to that margin and, indeed, Albion made submissions that that matter should be remitted to the Tribunal and that is clear from the Decision of 18th December 2006; we can see that from paras. 215 to 217. This is where we are discussing where the Tribunal was looking at Albion's submissions in relation to margin squeeze and final orders. Albion made the point that the matters that remain for determination in this case would have to be dealt with in a determination under s.40, and contrary to the submissions of the Authority.

> "…the matters that remain for determination in this case relating to distribution costs, treatment cost and retail margin would all have to be dealt with in a determination under s.40."

At para. 217 Albion sought an order from the Tribunal at that stage that the price paid by Albion should be at a discount of not less than 5p/m^3 then Albion requested an order that the Authority prepare a report for the Tribunal on the assessment of costs of treatment

transportation at retail supply of non-potable water. Now, we know that what actually happened there was that the Tribunal did not make that finding and did not make that order. Having heard the evidence it declined to do so. You will recall that the Authority's submissions were directed far more, not at the level of any necessary margin, but that there was no margin squeeze, and the Tribunal found against the Authority. But there was not any discussion at that point, if there is going to be a final order, of what the appropriate measure should be and how much it should be. In the Authority's submission it would have to be the case that if the Tribunal wanted to go down the route of setting a margin, it would have to go down the route it adopted in *Genzyme* of giving the parties a full opportunity to set out submissions and adduce evidence on that particular point after the remedies hearing, because that is what happened in *Genzyme*, it was decided "This is the remedy that we have in mind", and then they had a hearing and submissions directed particularly at that.

So just to reiterate, the Authority clearly accepts that this is an avenue which is open to the Tribunal. Is it necessary? In the Authority's submission, no, because of the possibility of a *Hilti* style order, and the Authority's ability to deploy CA98 powers.

So, Sir, unless the Tribunal has any questions on margin squeeze, I will move on finally to common carriage. I think the Authority actually has very little to say on common carriage because it is pleased to see that the parties do appear to have agreed in principle as to an acceptable level for the common carriage price, subject to other matters, and I am not going to elaborate on the possibility of an interim order subsisting pending that order, I have heard what the Tribunal said on that, I have heard neither party considers that suitable, I do not think it would be useful for me to elaborate on that.

Sir, unless the Tribunal has any questions in relation to the common carriage of the Authority, I propose to leave that to the parties at this stage.

THE CHAIRMAN: Thank you very much, Miss Sloane.

PROFESSOR PICKERING: Miss Sloane, could I just ask a couple of questions, please? First, our discussions today have focused obviously on the position of Albion and its needs, and what it seeks. The purpose of competition is ultimately to produce a benefit in defined respects to a consumer, the final user. We have not actually said anything or considered anything in relation to the likely implications for Shotton Paper and clearly since this case as a whole began the world economic climate has become more difficult, does Ofwat have a particular interest in the speed with which price reductions perhaps arising out of the judgments of this Tribunal are passed on to the final user.

MISS SLOANE: I will have to take instructions on that.

PROFESSOR PICKERING: Could I ask you one other question then, please? In its pre-budget report in November the Government through the pen of the Treasury said it was – I forget the precise words – but strongly minded to require an arms' length separation of retail functions in the water industry, has OFWAT anything further to say about developments in that respect, or how that may bear upon the submissions about the sort of order that we might produce.

MISS SLOANE: Again, sir, I see those have been carefully noted, can I take instruction over lunch and give you an update this afternoon?

PROFESSOR PICKERING: Certainly, if you do not mind, thank you.

THE CHAIRMAN: Mr. Vajda?

MR. VAJDA: Sir, may I begin by saying that we share plainly the Tribunal's concern about the fact that everybody is back here many years after this case started. Today we are focusing on remedies, and what we need to do is to remind ourselves of the origin of the case. The origin of the case was a common carriage proposal, and this is also then going to be relevant to the remedies. It was on that basis that the complaint was made to the Authority and I just quote, there is no need for the Tribunal to take it up, but at para. 71 of the Decision the genesis of the complaint was the application for common carriage access price. Now, it has not been clear to us, and this is something that the Tribunal has pressed in the past, whether or not Albion wishes to take that forward today, it does not really matter, but it is important to understand what is going on, also it is important in terms of remedy.

The other aspect, which is very much in play today is bulk supply and that is, of course, because we see paras. 2 to 5 of the draft order relate to bulk supply. Leaving aside the issue of jurisdiction for a moment, which I will come back to and obviously being a court jurisdiction is fundamental, the short point in relation to bulk supply – the sort of point that Professor Pickering was making earlier this morning – is that there is a remedy and there is a remedy under s.40. Can I, in the light of Professor Pickering's question, ask the Tribunal to go to flag 16 of bundle 1, which in a sense gives some flesh to what Miss Sloane was saying.

This is a letter written by Albion to the Authority, which begins – and this in effect confirms what Miss Sloane says –

> "I am very conscious that Dŵr Cymru is pressing the Authority for a section 40 determination, further to the expiry of the 1999 bulk supply agreement for the supply of non-potable water."

So that is important for a number of reasons. First, it shows that we have been seeking a s.40 determination for a long time, and Albion has not joined in. I do not ask the Tribunal to read this letter now, but perhaps over lunch they would like to look at it. The effect – bottom line – of this letter is that Albion does not consent to a s.40 determination. That is the first point that comes out of this letter, and that is very relevant to the question that Professor Pickering asked, because we have been saying for years "Let us have a s.40 determination".

The second point that comes out of this letter is that you will see it says (in the second line): "… further to the expiry of the 1999 bulk supply agreement …", and again just a little bit of history: we have the agreement in the bundle, in fact, we can take it up, it is at tab 8. It is an agreement dated 10th March 1999 and it came into force on 1st May 1999 – we see that at p.19 (internal pagination) clause 8.1:

> "Subject to the provisions of this Clause this Agreement shall be for a fixed term of 4 years commencing on the date of Albion Water's appointment as water undertaker for the site."

Now, Albion, as I understand it, was appointed on 1st May 1999 and that is common ground. So this agreement actually expired on 30th April 2003 which, even by the standard of this case, is quite a long time ago. That is one of the reasons why my clients have been saying for a long, long time "if there is a dispute we are happy for this to be resolved. That is the obvious remedy and I will come back to this because it is important in terms of jurisdiction, it is also important in relation to the point that Professor Pickering made. Parliament has laid down in relation to bulk supply. You can go to the Authority and they determine it. Perhaps what I can do just before going a little further is if I could ask the Tribunal to take up – I hope it has found its way into the Tribunal bundle – the relevant provisions of the Water Industry Act 1991. They should be behind flag 55

THE CHAIRMAN: Apparently they are 55(a).

MR. VAJDA: Brilliant, the system is working well. This is the remedy that Parliament has laid down, and the section is of some interest as well, because not only does Parliament lay down a specific remedy, and to come back to the important point that Professor Pickering made, which I shall take up in a moment, because it is also a legal point, is that Chapter II and Article 82 are not price fixing regulations, and Professor Pickering is entirely right, and I will show this Tribunal in a moment a Court of Appeal authority – this Tribunal is not in the business of price fixing in a competition case. But, Parliament has said "yes", we are going to give a power to the Authority to price fix and that is the obvious remedy. In a

sense Mr. Thompson's submissions about *Hilti* plus, *Hilti* minus whatever, might have a great deal of force if he did not have s.40, but you have s.40, that is the route that Parliament laid down.

If we just look at this for a moment, one of the reasons why this is an important route, and this is relevant to the respective functions of the Tribunal on the one hand, and the Authority on the other, if I could just ask the Tribunal to focus on subsection 5, you see that one of the requirements on the Director is to consult the Environment Agency, and there are obvious reasons for that because there is, if you like, an environmental aspect to the cost of water, whether you like it or not. And, then you see at para. 6 what matters the Director should have regard to in exercising his functions – a number of factors, one of which is plainly competition. I should say that it is not the submission of my client that in any way doing a determination under s.40 is competition law immune, everybody accepts that competition law applies to bulk supply, but this is the mechanism that Parliament has laid down.

THE CHAIRMAN: And competition is referred to in subsection 6, specifically.

MR. VAJDA: Precisely. The Authority has said that of course they are going to take account of what the Tribunal have said in relation to the Competition Act. So here you have a tailor made remedy for people who are in dispute about bulk supply. So we do find it, particularly in the light of the letter of Dr. Bryan to the Authority that I have shown you, we do find it surprising that we are here having an argument, and I will come to the law in a moment because in a sense obviously the first thing the Tribunal have to decide is whether it actually has the legal power to do something. But to talk about the real world, which is what Mr. Thompson was talking about, the real world is here is a route which allows a determination to be made, taking account of all those factors.

THE CHAIRMAN: Can I just ask you, I have not read it – or recently at least – whether s.40A makes any difference to your submissions on s.40? It has been included and I assumed it was included for a reason, or was that too optimistic? (Laughter)

MR. VAJDA: I am told it is being used for potable because, of course, as the Tribunal knows, there is a determination which is still going on in relation to potable. The other point is, it looks to me, and if I am wrong no doubt somebody in this room will correct me, that in a sense 40 is if you have no agreement at all, whereas 40A is you can effectively – even if you are party to an agreement Parliament would have said "You have a right, as it were, to go along to seek to vary it; you are not ousted by a private law arrangement" if I can ----

THE CHAIRMAN: So what you are saying really this is a discrete system of law for bulk supply?

MR. VAJDA: Absolutely, it is the remedy, and of course the position is now – and that is why, as you can imagine, my clients have been somewhat dismayed by the attitude of Dr. Bryan, where as one might have said prior to the Tribunal's judgment on excessive pricing: "Well, if there is a s.40 determination you may get it wrong because you may not effectively have had the benefit of the Tribunal's knowledge and wisdom on excessive pricing", that cannot be said since the Tribunal handed down its judgment on pricing in November 2008 and safely say that that is the route to go down.

MR. THOMPSON: I will take instructions over the short adjournment, but my understanding is that the letter that Mr. Vajda referred you to was from January 2008 and the point that was being made was that this on our case was an abuse going back to 2001 and that it would be premature to resolve that matter without the Tribunal having ruled on the evidence that was being accumulated and put to the Tribunal and was then dealt with in November 2008, but Mr. Vajda then seemed to be making a different point that since November 2008 we have still been dragging our feet, and I am not quite sure what the basis was for him saying that.

MR. VAJDA: Mr. Thompson is entirely right in terms of chronology, but we would not be here in front of the Tribunal arguing as to whether or not the Tribunal should effectively give, if I can put it this way, a bulk supply remedy if Albion had said to us "Yes", we agree for this to go off to Ofwat.

THE CHAIRMAN: Dr. Bryan makes the point, which I think, Mr. Thompson has just been making on his behalf, in the third paragraph from the end of the letter on p.2 he is basically saying that it would be inappropriate to go into a s.40 procedure before this Tribunal has handed down its judgment.

MR. VAJDA: Yes, the first reason I wanted to show this letter to the Tribunal is to show that for part of my clients we have been saying s.40 all along, we have not been dragging our heels on this. As of today we have not had a letter from Albion saying "Yes, we agree to a s.40 determination."

THE CHAIRMAN: You said. s.40 all along, they have not said "Thank you very much, we will go down that route."

MR. VAJDA: Exactly. Now, it is true that until the Tribunal delivered its judgment in November 08, there may have been an argument for saying: "We do not want the Authority to start work because it needs to have the benefit of what the Tribunal is going to say", although in our submission what we have been seeking is the fact there was nothing to stop the Tribunal

starting work, because one of the points Miss Sloane made to you, which I also make, and it comes back to the so-called "rabbit holes" that Mr. Thompson is referring to, if you like the key disputed area in relation to bulk supply is going to be the water resource cost, and that is something which the Tribunal has not touched and, in our submission, it would have been a lot better had the Authority been getting on with that.

Just to explain, this is simplified background but the issue – and one of the reasons, quite apart from jurisdiction, the whole idea of this order is completely misconceived – it is a very important issue as to whether or not somebody in the position of Albion is entitled to what is called "the local resource cost", which is the cost of Heronbridge, or the regional average cost, and that is – without going into the figures – there is a large gap between the figures.

THE CHAIRMAN: There was a fairly extensive debate about that issue last time, yes.

MR. VAJDA: What we have had an extensive debate about in the Tribunal is the transport and treatment costs, but we have absolutely nothing on water resources, and for the Tribunal to say "Right, we are going to put a stamp on to say you would have no … " would be astonishing and we would go straight to the Court of Appeal on that. So we say that cannot be right.

Can I then come to jurisdiction? In a sense, my submissions mirror very much what Miss Sloane has said for the Authority. The starting point has to be the Decision and, as I have said, the Decision which produced a non-infringement decision was simply about common carriage and what the Authority found, wrongly as it has turned out, is that the FAP (First Access Price) of 23p the Authority found that that was non-abusive. That was the only thing that the Authority investigated, they got it wrong. They also got the issue of dominance wrong.

The question that then came to this Tribunal was whether or not the Authority was right or wrong on the FAP and, as we know, the Tribunal reversed the Authority first of all on dominance, and then on excessive pricing and on margin squeeze.

Miss Sloane is entirely right that the Tribunal has made absolutely no finding in relation to bulk supply, and she has taken you to that passage in the refusal judgment, that is absolutely fundamental and as lawyers we all know that there is a world of difference between saying "reasonably suspect" or something is "similar" to actually making a finding. Of course, there could not have been a finding because if we just look – and maybe the easiest way to do it is to take up, as it were, Mr. Thompson's rabbit holes which are to be found at flag 5 of bundle 1. If we go to para.2, and these are the effects of the elements – the first element is

the mean figure for distribution and treatment, and the 14.4, as we know, that is effectively the price that has been agreed, that is what we have offered and has been accepted by Albion and again I stress, my clients have not sought to be recalcitrant, we have made an offer, we have responded to what the Tribunal said and obviously if Albion were to go forward on common carriage that was the price that was offered.

If you then look at the next element – the Tribunal has made absolutely no findings on indexation whatsoever. Why has the Tribunal made no findings about indexation because what the Tribunal was investigating, and what the Tribunal sent back to the Authority to investigate is what the proper price was in 2001; they were not investigating what the proper price was in 2008. I am not going to weary the Tribunal today with what is the right or the wrong indexation, the point is there was never any dispute about indexation, and there was a very good reason there was no dispute because you were looking at what the price was, whether it was right or wrong in 2001.

PROFESSOR PICKERING: Sorry, Mr. Vajda, can I just raise with you, as you are clearly entitled to do you are relying upon a legal procedure. I am sitting here rather wondering when you are going to say "Well, we have now got and Dŵr Cymru has accepted with Albion, the indication as to what the appropriate level of costs in 2001 for transport, treatment and distribution would be". Whether there is a precise read across to the bulk supply price or not, you have a view about that and the Authority has expressed a view this morning, it is quite clear that treatment and distribution costs are a substantial element in the bulk supply price.

MR. VAJDA: I agree with that.

PROFESSOR PICKERING: I am wondering whether your clients today are going to encourage you to say something about how for the duration of the bulk supply price, while bulk supply arrangements are required, whether you are actually going to take a step rather than just continually relying upon further legal objections and legal steps to say: "This is how we are going to address this". That is the first point, and you may want not to respond ----

MR. VAJDA: No, no, it is very simple, we have said there is a dispute mechanism, it is the Authority, we have said in relation to bulk supply – that is why I showed you the letter from Dr. Bryan – we have been saying go off to the Authority to determine it, that is what Parliament has laid down. There are lots of disputes between, not just Dŵr Cymru and Albion, but there are other disputes which have gone to the Regulator to resolve, that is the mechanism laid down by Parliament.

PROFESSOR PICKERING: I would imagine that we would have hoped that in our most recent judgment we would have given some guidance which hopefully might have avoided the need to rely upon a dispute mechanism in relation to the bulk supply price.

THE CHAIRMAN: Hence my interruption of Mr. Thompson almost at the beginning this morning, but there having been no resolution you are saying: "This is the mechanism that has been set down, and we cannot create our own."?

MR. VAJDA: If the bulk supply was effectively simply transport and treatment the point you were making, Professor Pickering, would have force, but as I have explained a large part of the dispute on bulk supplies, what the water resource cost should be, which is a matter that the Tribunal has not touched on, and is a matter that is – if I can put it like this – controversial, and that is a matter on which the Authority is going to have to rule on.

PROFESSOR PICKERING: With respect, the resource cost is not a matter that is relevant to Dŵr Cymru, surely?

MR. VAJDA: What is relevant is what is the right price for a bulk supply agreement between Dŵr Cymru and Albion, and we can see, and we can see again it is helpful to look at this order, because if you look at para.3.2, you see what Albion are seeking in this order is the bulk supply agreement shall be based on "the costs of the Heronbridge bulk supply as invoiced by United Utilities to Dŵr Cymru." That is a huge debate, that has been completely outside the scope of the Tribunal.

PROFESSOR PICKERING: Your submission to us and, presumably, a submission from United Utilities, might be to say that this is not something on which we could make an order. But with respect I do say to you that I do not see how the water resource cost is a matter on which Dŵr Cymru should or, indeed, if I may say so as a non-lawyer, dare – surely – opine?

MR. VAJDA: I think we are getting into dangerous territory here, Professor Pickering. We are looking at the question of remedies in relation to what the Tribunal has decided, and I am also mindful, as the Chairman, of what the Court of Appeal said in *Floe* recently, and we really have to stick – I am sorry to say this – but we have to stick to effectively what needs to be determined. Now, so far as the Tribunal is concerned, they came out with what they said was, if you like, a range of figures for the First Access Price. We made an offer which was, as Mr. Thompson said, the average of 3, which was accepted by Albion, that is the 14.4p. The question that I am addressing, which is a legal question, I make no bones about it, is: Does the Tribunal have jurisdiction to make an order in relation to bulk supply along the terms that we see in paras. 2 and 3?

THE CHAIRMAN: I think this may be the moment to *"Floe"* into the lunch adjournment.

(Laughter)

MR. VAJDA: I agree.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Vajda?

MR. VAJDA: I was on the second element of bulk supply in water resource, and my point – I think the Tribunal has it – is that this was not a matter that was explored in front of the Tribunal.

In relation to the point that Professor Pickering put to me before the short adjournment as to what it expected my client to have done, there is, in fact, a letter which I can show the Tribunal which is in the bundle at tab 25.

THE CHAIRMAN: Before you go on to that, can I just indicate that in such discussion as we had over the short adjournment we reflected upon the fact that we have heard little about the question of whether the pricing abuses were on-going or not.

MR. VAJDA: I am going to deal with that.

THE CHAIRMAN: Thank you. We would like to hear something about that.

MR. VAJDA: That is to come. Tab 25. I am still on the topic of jurisdiction, bulk supply. I am making a small detour to take account of what Professor Pickering put to me. What we have here – and I think in fact Mr. Thompson referred the Tribunal to this letter before I did - is effectively an offer. There is a bit of discussion as to the ambit of the Authority's decision. Then if you go over the page to p.2 you will see at the bottom of para. 4 it says,

> "Dŵr Cymru welcomes Albion's acceptance of Dŵr Cymru 's offer of 14.4 ... as the measure of treatment and transportation costs in the context of common carriage".

Then there are other aspects of common carriage. Common carriage has not really been pursued with much vigour this morning. Perhaps the most significant aspect in the light of discussions on bulk supply is at p.4, which I think is the page which Mr. Thompson took you to. Could I ask the Tribunal just to read to itself paras. 12 to 14? (Pause whilst read):

Now, perhaps for the benefit of Lord Carlile who has not been burdened with this case for as long as the rest of us, in a sense something similar to this was offered in November 2006. It was in the context of interim measures and the Tribunal did not accept that. The point I am making is that this offer in November 2008 was pretty much along the same lines.

Perhaps I could just explain one other thing on p.4 - the price there -- When I say the 'price'

-- The figure at (v) 25.19 is not, in a sense, a price because that is what is going to be done interim because the point is that the determination was going to be back-dated. That figure - just so that the Tribunal knows where it comes from - is the figure from the second bulk supply agreement (the one that expired in 2003), indexed in the manner set out in that agreement, less what I might call the 3.55 discount or interim relief that the Tribunal granted in November 2006. Indeed, Mr. Pickford helpful reminds me that if one looks at the note that Albion put in this morning -- Does the Tribunal have that? If you go to (b) on p.2 you will see:

> "Dŵr Cymru is currently supplying non-potable water at 25.19 p/m^3 in accordance with the Tribunal's interim measures order".

That is exactly the same figure. That was the offer that was made in November 2008. You can see that as part of that both parties agree that the matter go off to the Authority.

We now go to Flag 28. Can I ask the Tribunal to read the first paragraph to itself? (Pause whilst read): The short answer is that that was not acceptable to Albion. You will see if we go to p.3 of this letter that they say, "If you're not going to budge from that, we're going to go in front of the Tribunal". Could I ask the Tribunal to read the whole paragraph to itself?

THE CHAIRMAN: We have read it. I presume the terms indicated are the terms of the draft that we have?

MR. VAJDA: Yes. In the course of his submissions this morning Mr. Thompson did make reference to this letter and (if I can put it this way) that offer. Having discussed the matters with my clients over the short adjournment we were willing to, as it were, make this offer which, as I say has been rejected. We are willing to make that offer again. We have been doing some work over the adjournment. The mechanism for this - just so that I can just explain what I have in mind - is that there is obviously an issue of jurisdiction here in relation to what the Tribunal can do in relation to bulk supply. What we are proposing is to have an order which would have, as one of the recitals - and what I would propose to do when I finish my submissions is to hand that up and perhaps we could have a short adjournment to consider it - the fact that Dŵr Cymru is making this offer which would then be, as it were, set out in the schedule. It would be clear in the recitals that that would be without prejudice to Dŵr Cymru's position that that is without prejudice to the jurisdiction issue, because obviously we take the view that the Tribunal has no jurisdiction. This draft would also then recite, as I understood it this morning from Miss Sloane from the Authority,

the Authority then agreeing to do a s.40 determination. I will hope to have a draft which people can look at. Obviously I will need to show it to people, and people need to look at it. What I would like to do with the permission of the Tribunal is to finish my submissions - because obviously it is important that the Tribunal has our submissions - which are just as strong at ten past two as they were at ten to one - that the Tribunal does not have jurisdiction in relation to that -- I want to finish that and then go on to margin squeeze and the continuing abuse point.

Obviously, this proposal may commend itself to the Tribunal. It may commend itself to Albion. If it does commend itself to the Tribunal, one possibility is that the Tribunal may then decide that it is not necessary, as it were, to determine the jurisdiction issue. I leave that open. That is an option for the Tribunal.

What I would now like to do is effectively continue on the points of jurisdiction which I hope I can deal with quite shortly. I have dealt with, then, the second element of bulk supply, which is the water resource point. I have made my point in relation to that. There are then, as it were, two other elements. Mr. Thompson put it this morning that -- I am trying to remember his rabbit holes. (After a pause): The ancillary costs. I think he accepts that there has been no investigation in relation to that. I agree with him on that.

There is also one other matter which is, in a sense, a bit of a hybrid, but which is important. There is dispute, as Professor Pickering will remember - in fact, all the members of the Tribunal will remember - as to the back-up supply. Of course, the Tribunal took the view that in fact, as a matter of fact, the FAP did not include a back-up supply. We have accepted there was no appeal on that. As you will recall, the Authority did some work on the back-up supply, but the Tribunal effectively said, "We are not interested in that because it is not a part --" That is obviously another element in bulk supply.

We therefore fully align ourselves with the position of the Authority that there are important aspects of the bulk supply that have not been gone into either in fact by Authority or the Tribunal. Therefore, the Tribunal does not have jurisdiction to make any order in relation to that.

That brings me effectively to the arguments that Mr. Thompson has advanced, both on paper and in writing as to why the Tribunal does have jurisdiction. The first, which I can be very short on, is his reliance on para. 352 of the December 2006 judgment. I am very happy simply to adopt the submissions of Miss Sloane on that point which, if I may say so, were dealt with comprehensively.

THE CHAIRMAN: Interim measures.

MR. VAJDA: The interim measures point. I also fully adopt the point which she made which is that reasonable grounds for suspecting does not include a finding. If there is any doubt about that, you have it at para. 105 of the refusal judgment. Insofar as this Tribunal wants another reference, I have another one which I am not proposing to go to, but it is para. 760 of the 6th October judgment (Flag 57 of my bundle 2, p.225).

I think the only additional thing I wish to say in relation to the interim relief point above what Miss Sloane has said - and we can do this, as it were, without turning up the passages - is that the Tribunal has two powers to grant interim relief. The first is Rule 61(2). That is effectively a wide power to do anything to preserve the status of its decision. We say that that was the main ground relied upon by the Tribunal to give itself interim jurisdiction. If I can give the Tribunal the references: para. 345 of the December 2006 judgment. Perhaps it might just be worth looking at because Miss Sloane did not take us to that. There is a short passage in the transcript of 24th October, 2006 which is at Flag 9 of Bundle 1.

THE CHAIRMAN: Just looking at para. 345 of the December 2006 judgment, if we may -- That does make a direct reference to Rule 61(2). That is your point really.

MR. VAJDA: Yes. Sir, if you have that out then I can perhaps just develop this very briefly. Rule 61(2) is, as it were, the catch-all interim measures power. There is then also what we might call the narrower power under Rule 61(1)(1). I see that the Chairman is reaching for his Rules. Rule 61(2) is,

> "Without prejudice to the generality of the foregoing, if the Tribunal considers it is necessary as a matter of urgency for the purpose of preventing serious damage ... it may give such directions as it considers appropriate".

That effectively means that the Tribunal has, if you like, greater jurisdictional powers at the interim stage than at the final stage. You also then have a power at Rule 61(c) which is that it can grant on an interim basis any remedy that it would grant -- That is why you have Rule 61(2) because it is a wider power. The point that I make, sir, is that when one looks at these passages, in my respectful submission, the Tribunal is focusing primarily on the wider Rule 61(2). That is, if you like, the first breach of jurisdiction. Then we see at para. 348 the second jurisdictional route. That is in relation to an interim measure sought by Albion which was a reduction in the bulk supply price. We see the conclusion of the Tribunal at p.116, at the end of para. 348.

> "Such jurisdiction is exercisable, it seems to us, either under Rule 61(2), which is widely expressed, or under Rule 61(1)(c)".

Again, the third jurisdictional route, which begins at para. 351,

"The Tribunal would then itself have power to grant interim measures, either under rule 61(1)(c) or under rule 61(2)".

I was going to take the Tribunal to the transcript at Tab 9 of Bundle 1. In terms of chronology, this is before the December Decision. There is a short interchange between Mr. Thompson and the President at the bottom of p.7. Mr Thompson says,

"As the Tribunal has already pointed out in the interim measures application, which I suspect is in this same file, the remedy was directed to the Bulk Supply Price to reflect the reality of the situation that that is the commercial position pending the outcome of this case".

The President, "That was to enable the case to be fought, not to enable the Tribunal to set the fair level to the Bulk Supply Price . . . As I say, the case is about the First Access Price ----"

These are references, I think, to the notice of appeal. But, what we say is that really what the Tribunal was doing in relation to the bulk supply order was preserving the position pending the final judgment.

I then come to the second argument, which is what I might call the like effect point. There are a number of points made here. In my submission, the most important point here is that the Tribunal will have observed that there is a fundamental difference of view between the parties as to what 'like effect' means because plainly what Mr. Thompson's arguments are is that like effect catches the bulk supply price. We say that therefore that is a very good reason, apart from the jurisdictional reasons which I will come to, for the Tribunal not to make a like effect order because if would be, if I can put it like this, a bit of a recipe for chaos because the Tribunal would be making an order in using words that it knew were the subject of dispute between the parties. The matter could then come back to court and there are potential issues of contempt and matters of that sort. What I was proposing to do is to show the Tribunal a short passage from the speech of Lord Diplock in *Garden Cottage Food* which was really the first competition case certainly to reach the House of Lords and one of the first cases in the courts altogether. This was an Article 82 case. I summarise it very briefly.

Garden Cottage Food was cut off by the Milk Marketing Board, and it sought an injunction. It was a refusal to supply case. It alleged breach of Article 82. This is in the good old days of when Lord Denning was Master of the Rolls in the Court of Appeal. The application had a somewhat chequered history. The trial judge refused the injunction, and one of the reasons that he refused the injunction was the form of the order sought. The Court of Appeal, led by

Lord Denning granted the injunction and it then went to the House of Lords who in fact discharged it. The short passage that I want to take the Tribunal to is in the speech of Lord Diplock who gave the leading speech (p.145).

THE CHAIRMAN: I now know why you know about this case instinctively, Mr. Vajda.

MR. VAJDA: Unlike Mr. Thompson I was not going to advertise ----

THE CHAIRMAN: You must have been extremely young at the time.

MR. VAJDA: I had a sort of baby stroller in court, something like that.! If we go to p.145. Could I ask the Tribunal to read the short passage from, "I next turn briefly --" to Letter D at 146. (Pause whilst read): This is obviously House of Lords authority and, as it happens is in the realm of Article 82, and is, of course, a point that is well-appreciated by English lawyers, one has got to be very careful how courts draft orders because of the contempt jurisdiction and also issues of legal certainty. What I am saying here is that where you have got one party wanting a like effect order because that party hopes it will catch bulk supply, and you have another party saying that bulk supply is outside the jurisdiction of the Tribunal, then on the facts on that dispute it would in my view be unfortunate - and this is obviously a matter that goes to discretion rather than jurisdiction - to issue an injunction in like effect terms. I say it goes to discretion rather than jurisdiction -- Obviously it shades into jurisdiction because if the Tribunal decides on the jurisdiction point and were to decide it in my favour that obviously affects the scope of the like effect provision if the Tribunal were minded to put a like effect provision in.

So, my point is both a jurisdictional point and a discretionary point. The jurisdictional point is that bulk supply is different from common carriage. So, if I can put it in euro terms, "It is not a measure of equivalent effect to common carriage". The two are very different: common carriage does not include the water resource. Certainly Professor Pickering will remember that, in a sense, the competition thinking behind common carriage is to encourage people to seek out new water resource resources that are not yet in play. Of course, with bulk supply you are getting a package which includes the water.

We say that a like effect order would not catch bulk supply. What we are concerned about is if the Tribunal made a like effect order and left this in the air. There would be uncertainty and then future courts, possibly the High Court if it is brought back on a matter of contempt, would have to grapple with what 'like effect' meant, given the divergence of views of the parties.

THE CHAIRMAN: If we were to make a like effect order, let us say, on the discretionary basis -- supposing we made a finding in your favour on the jurisdiction point?

MR. VAJDA: Yes.

THE CHAIRMAN: But we made a like effect order on the discretionary basis, in reality what disadvantage does that place upon Dŵr Cymru? Is not the reality of the case that whether the like effect clause is in or not, it is going to be treated as if there was a like effect clause in any event – there may be a degree of tortology here.

MR. VAJDA: Yes, that is right, but plainly certainly my clients want, if I can put it this way, legal certainty. We do not want to be dragged back to court. If a like effect order was made, and it was unclear whether it covered bulk supply or not. I say this with regret, almost inevitably there is going to be a future dispute as to whether or not bulk supply comes within it.

THE CHAIRMAN: I understand.

MR. VAJDA: That is the point. If the Tribunal were with us on the jurisdiction point, and the Tribunal were minded to make a like effect order, and then the Tribunal were to give a judgment on jurisdiction, to make it very clear in a sense what the like effect order did not cover, that it did not cover bulk supply. If I can just show the Tribunal *Genzyme* because it is important when one is looking at this to have one's eye both on the jurisdiction issue and also the discretion issue in relation to the facts of the case. The *Genzyme* order, which Mr. Thompson took us to this morning, I think is at tab 51. I think as you, Chairman, observed this morning, in a sense this was a sort of almost a *Hilti* plus because what you had is some general language in 1 and then you have in particular in 2. The point about the "in particular" in 2, and this is a point that we elaborate in our skeleton is that that is precisely the conduct which had been found to be abusive. If the Tribunal wants to then re-read it, it is pp.6 to 7 of our skeleton argument where we deal with the *Genzyme* case.

THE CHAIRMAN: Just a thought that has come via Professor Pickering, and I think it is a very helpful one. The words "like effect" are extremely general, and I do not think they are used in the *Hilti* decision as a term of art, as such, they are simply a way of expressing it, probably originally in a different language anyway. Supposing if we were to replace the words "like effect" with something like "not to abuse a dominant position through margin squeeze, excessive or exploitative pricing", what would you say about that?

MR. VAJDA: I see that that might be said to come within the framework of like effect, but that seems to me to run into the difficulties that Lord Diplock identified in *Garden Cottage Food*. We could set up a Drafting Committee, as it were, here.

THE CHAIRMAN: Yes.

MR. VAJDA: If the Tribunal were minded to do something in relation to like effect, and I have not drafted out anything myself, to effectively take account of the points that Lord Diplock made, tie it in some way to an access price or something like that, but in my respectful submission the language that Professor Pickering has used in a sense is, if I may say so, helpful in the sense of trying to limit it down, but I would not accept those words to go ----

THE CHAIRMAN: In a sense, to use larger animals than Mr. Thompson, it is a cart and horse situation, because you really need a decision on the jurisdiction point.

MR. VAJDA: Yes.

THE CHAIRMAN: It may be that once you have your decision on the jurisdiction point one way or the other, then the drafting of an order may fall into place as between the parties. I am not terribly keen on us drafting the order if we can avoid it.

MR. VAJDA: That may well be the case. That is really my point on like effect. I now come to a point which, in a sense, I began with this morning, but it is in my notes here because it was a phrase that struck me in Mr. Thompson's written skeleton. He talks about having a meaningful remedy, and the meaningful remedy is now said to be bulk supply. The point that I have made already is that if and insofar as Albion want bulk supply as opposed to, say, common carriage and we have had a lot of litigation now where common carriage has been the focus, it was the whole focus of this complaint, the decision and all the rest of it, and there we are; it is perhaps a bit surprising that we have now come back to bulk supply. I have now shown the Tribunal the letter that Wilmer Hale wrote in November following your judgment, and we say that there is a remedy there. Unless the Tribunal has anything further that is all I want to say in relation to jurisdiction and, if you like, bulk supply in terms of pricing.

I want to say something about jurisdiction in relation to the margin squeeze remedy and again I would ask the Tribunal just to look at the relevant paragraph in the draft order, and that is to be found at flag 5.

> "Subject to paragraph 6 below Dŵr Cymru's tariff offered to retail customers for the bulk supply of non-potable water shall exceed the wholesale price for such supply offered to Albion by a minimum of …"

And then there is a figure to be inserted. There is a jurisdiction point here as well because this is an order being sought in relation to a margin squeeze on bulk supply and there has been no infringement found in relation to any margin squeeze on bulk supply. The margin squeeze that was found was, and this is important in terms of the figures, the difference

between the first access price at 23.3p and the then retail price of 26p. It was then found that that in 2001 would not give Albion a sufficient margin and if we can just take up the judgments to see that. If we look at the October judgment first at flag 57, p.260 and if I could ask the Tribunal to read to itself para. 871?

THE CHAIRMAN: Yes.

MR. VAJDA: Then if we go forward to the December judgment, which is at the next flag and we go to para. 286, at p.95 and you will see there the Tribunal cites again para. 871, and then at 287 says: "The effect of that margin squeeze is, and was, to prevent Albion from entering into a common carriage arrangement", so it was a margin squeeze in relation to common carriage.

Then if we go to para.312, you see the finding of the Tribunal at the top of p.105: "We therefore find Dŵr Cymru abused its dominant position in the relevant market by quoting a First Access Price of 23.2 p/m^3 that in fact imposed on Albion a margin squeeze between that price and Dŵr Cymru's …"

And the important word here is "**then** retail price", because this is looking at the position in 2001. So it is absolutely clear that there has been no finding of any margin squeeze in relation to bulk supply and so there is exactly the same jurisdictional issue in relation to margin squeeze as there is in relation to pricing and paragraphs 2 to 4 of the draft order. I emphasised the word "then" in 312 because that was a long time ago – eight years ago – and the position today is very different, and the retail price that is being charged today is 35p. What I propose to do is to hand in a short little table which shows what has happened to prices since 2001. (Document handed to the Tribunal)

I apologise for the late delivery of this, it was only produced very late last night, in fact probably the early hours of this morning. What this chart shows is three sets of prices. The first is the average retail price that Shotton would have been paying had they remained a customer of Dŵr Cymru, and that is the highest line in the table. What you will see is that in June 2004 which is effectively the time that the decision was taken, that price was 26p, and the margin squeeze abuse was the difference between 23p and 26p. I am doing a bit of rounding there. That price has now risen to 35p so the retail price is not 26p it is 35p. This also goes, incidentally, to the submission I will be making in due course - when I say "in due course" shortly, I hope – on the continuing abuse point. If we then go to the second bullet, we have dealt with, if you like, the retail price, the next line is the price that Albion has been paid which would be gross the effect of the interim measures, i.e. forgetting about the interim measures that the Tribunal has ordered, and it is said there in the note: "This has

been calculated on the basis the indexation provisions at clause 4.4 of the Second Bulk Supply Agreement" and that is the one at tab 8 of bundle 1. We know, because Albion have very helpfully confirmed this morning in their note that they are supplying non-potable water to its customer (this is para. 5 on p.2) at 28.740, that is the price to Shotton, and that is effectively the dotted line here.

The third line, the line at the bottom, is the effect of the interim relief that the Tribunal granted, and you can see how the gap was widened in November 2006. It was originally 2.005 and it is 3.55, and that is the price that Albion is paying at the moment under the interim relief.

What one can see from this table is that there is now a large gap between, if you like, Dŵr Cymru's retail price and the price that Shotton is paying.

The point here is that the margin squeeze could only arise if Dŵr Cymru cut its retail price from, say, 35p down to, say, 29p, or something like that. The position so far Dŵr Cymru is concerned is that it is subject to something called Condition E, which is undue preference, which is effectively that it cannot, as it were, discriminate between its customers and a price cut of that level to, say, Shotton. It would almost certainly cause Ofwat to carry out an immediate investigation.

The point I am making here is not a jurisdiction point, because I have made the point of why there is no jurisdiction, but this is a point to show that actually the position has changed radically since 2001, and there certainly is no margin squeeze as of today.

THE CHAIRMAN: This is the ongoing point really, is it not?

MR. VAJDA: It is the ongoing point, but it is also relevant to the question, were the Tribunal to be against me on the jurisdiction point, whether or not the Tribunal should go down at all the question of investigating what margin there should be and the points that Professor Pickering made and the points that Miss Sloane made this morning. I will come to that in a moment, but effectively if one was going to go down that route one would have to carry out an investigation which would construe both public and private resources. The question is whether one should do that, particularly because ----

MR. THOMPSON: I am sorry to intervene, but Mr. Vajda is on his feet and obviously he is the best person to inform us, but we have some doubts as to who is actually paying this top line and whether it is regarded as actually the retail price. Our understanding that it may be that nobody is actually paying it and so it may be a slightly misleading table.

MR. VAJDA: I am grateful for Mr. Thompson giving me the opportunity to deal with that because I had forgotten to do so. If you would just go to p.2 of this little note, there you

have got, as it were, how the indexation provisions work. Then, which we? think is pretty common ground, what we have done behind that is to give the source of the retail price figures of each year going forward from 04 to 05. If we go to the last page you do not find a figure of 35p, because it is a volumetric charge, but if you put in the amount of cubic metres of water that are used by Shotton, that is what it comes out at.

THE CHAIRMAN: At 35?

MR. VAJDA: Yes, 35.

THE CHAIRMAN: So we are looking at the volumetric charge in table 13?

MR. VAJDA: Yes.

THE CHAIRMAN: Item 5, greater than 1,000 per year?

MR. VAJDA: Yes.

PROFESSOR PICKERING: Mr. Vajda, this table on the first page shows that a prices quoted, charged by Dŵr Cymru have gone up on an annual basis in March each year.

MR. VAJDA: Yes.

PROFESSOR PICKERING: These are prices determined by Dŵr Cymru in a non-competitive market situation and if I remember rightly they are not subject to the direct approval of the Regulator?

MR. VAJDA: That is correct.

PROFESSOR PICKERING: And they start from a ----

MR. VAJDA: That is not correct – please continue with your question, sir?

PROFESSOR PICKERING: They start from a level of retail price of 26p or just above, which your clients justified initially on a basis that the Tribunal overturned.

MR. VAJDA: Yes.

PROFESSOR PICKERING: It seems to me that recognising those points, there is not a great deal that the Tribunal would want to take from either the evidence on the current level of those prices or indeed about the rate of change of those prices year on year. Just to explain that, if we said, "Well, you have justified this price of 26p on a basis that the Tribunal has said we do not think is appropriate", then where would the prices be if you had been starting from a more realistic cost basis in 2004? What is the credence to be placed in this in terms of any arguments on behalf of your client?

MR. VAJDA: I think we need to unpack your questions, if I may, Professor Pickering.

PROFESSOR PICKERING: Yes, please do.

MR. VAJDA: I think there are two points that you are making. The first is what is the relevance of this evidence. The relevance of it is that, if the Tribunal is against me on jurisdiction in

relation to margin squeeze or bulk supply – and I will come to all the factors – whether or not it is, in its discretion, the right thing that the Tribunal should effectively order a margin squeeze enquiry into, as it were, the amount of margin that Dŵr Cymru is entitled to, that is what they are relevant to.

You have asked me then, in a sense, a separate question which is how do you justify these prices, are they not – and I think this is the sub-text of question – excessive?

PROFESSOR PICKERING: No, are they not a monopoly price and therefore not reflecting the competitive situation?

MR. VAJDA: They are the price, but we are looking at the moment, Professor Pickering, not at excessive price, we are simply looking at the question of margin squeeze. As you have seen quite clearly from the Tribunal's judgment, the Tribunal did not say, "We are going to ignore 26p for the purpose of the margin squeeze because we think it is excessive", they said, "We simply look at the difference between two prices". That is what a margin squeeze is about. You do not look at whether or not 26p is justified or not, that was the retail price, and it was on that basis that the Tribunal found that there was a margin squeeze. The point I am making is that the retail price today is not 26p, it is 35p. This all goes to margin squeeze. We would not accept, but I do not want to get into, as it were, *Floe* territory, if I can use that shorthand, that 35p is excessive, but that is not really a matter that, with the greatest respect, the Tribunal should wander into now. I could spend a couple of hours happily addressing the Tribunal on that, but the relevance of this evidence is simply on margin squeeze. The margin squeeze, just to remind the Chairman, we simply look at the difference between the access price and the retail price, and you then have to buy in the water, you have got no margin, therefore margin squeeze.

When you look at the remedy that is sought here at para.5, the first thing that strikes one is that it is not a remedy sought in relation to common carriage, which is the margin squeeze that the Tribunal found. It is a remedy in relation to something the Tribunal did not make a finding on in relation to bulk supply.

THE CHAIRMAN: Right, let us move on.

MR. VAJDA: I am grateful, sir. I have got some very short further point on margin squeeze. As I said, no order has been sought in relation to margin squeeze and common carriage, and that is certainly important for the Tribunal to appreciate. If one was going to go down the route of making any margin squeeze order at all, and I have already explained that we say that there is a complete jurisdictional bar, we make these points, most of which have been made in the skeleton argument. The first is that there would have to be a factual

investigation, and it would have to be following *Deutsche Telekom* now, of Dŵr Cymru's costs. I will just give the Tribunal the reference. I do not want to delay matters. That is p.12 of our skeleton. So Albion's costs are completely irrelevant to what the actual margin would be as a matter of law. Therefore, what Mr. Jeffery said about needing 5p is, as a matter of law, completely irrelevant because that relates to Albion's costs, not the costs of the dominant undertaking.

We do not accept, I would add, and I align myself fully with what the Authority said, on any view that his evidence was unchallenged. The final point is that any such exercise, we would say, would have to be done by Ofwat, not the Tribunal. We will come back to the Tribunal, it would be, if you like, a referred work. That was exactly what happened in *Genzyme*. Mr. Thompson points out that he was in *Genzyme*. I was also in *Genzyme* on the other side at the back end of the case. That was a phenomenal amount of work and the OFT had to produce a very long report. It was then commented, we had further hearings in front of the Tribunal. The Tribunal needs to ask itself whether it should go down that route in relation to common carriage which, as I say, is still hypothetical and on which no remedy is being sought, and in relation to bulk supply, something that was not the subject of the infringement.

So that then brings me, unless the Tribunal has any questions on margin squeeze, to the last substantive point, which is the continuing breach point, which is the declaration point. Again, if we can just take up Mr. Thompson's draft to remind ourselves of the area of dispute, which here is in a smaller compass than the rest. Does the Tribunal have it, p.26, flag 5. It is the words "and thereafter". There is no dispute but that the declaration can be granted, should be granted, it is the question as to the scope of the declaration.

We have a short point in relation to why we say that the declaration has to be limited to the position in 2001, and that is because there have been no findings made other than in relation to what happened in 2001. I will just give the Tribunal some references, we will not go to them. The Decision plainly only looked at what happened in 2001. When the reference back was made to the Authority in December 06 it was to look at the position in 2001, and para.280 of the December 06 judgment refers to that – we do not need to go to that now – and then the more recent unfair pricing judgment at paras.40 and 50. I may have got my references wrong. (After a pause): If we go to Flag 59 in Bundle 2 we see, that in its report the Authority first sought to identify the services -- If we go to para. 50 on p.17,

"The answers were given by reference to the information available, and the circumstances prevailing, at the time at which the First Access Price was offered, namely, the year 2000/2001".

The Tribunal will recall that it found on balance that there was an abuse because when the FAP was quoted it did not include the back-up price. You will remember there was some correspondence, and such. So, it was all specific to 2001. Now, if we just take margin squeeze for the moment, we know now that Dŵr Cymru's retail price had risen since 2001. I have just shown the Tribunal that, in fact, in 2008 they were 35p. Whatever, they are not at 26p. So, it simply is not right in the case of margin squeeze to say that there is a continuing abuse on the basis that the Tribunal found. The cap, if you like, was the 26 pence. It is different between the 26 pence and the 23 pence. The 26 pence has gone up. So, it is simply wrong to say that there is a margin squeeze in 2005 when, say, the retail price was 30 pence.

In relation to excessive pricing, which is the other abuse, we simply have no evidence one way or another as to whether the First Access Price was excessive in 2005. It may be that the Tribunal has suspicions or reasonable cause to believe, etc., etc., but I come back to the point - and I detect a smile on the face of Professor Pickering; he knows what I am about to say - that in legal terms a suspicion is not the same as a finding. Therefore, we say that it would not be appropriate for there to be a declaration other than in the terms as to what happened in 2001.

PROFESSOR PICKERING: You have not sought to indicate to Albion that the effect of your subsequent actions - and, indeed, any offers that you have made to Shotton Paper - has had the effect of removing the abuse of a margin squeeze, have you?

MR. VAJDA: It is perfectly true that the First Access Price has remained in play, but what has happened in practice - and there may be issues of causation here because, as we know, one of the things to make common carriage work is that Albion needs to get the water at a 'reasonable' price from UU ----

PROFESSOR PICKERING: That is their problem - and not the concern of Dŵr Cymru .

MR. VAJDA: No. You are absolutely right. But, what I am saying is that it was an offer that was made in 2001. It was not taken up. So far as what happened to our retail prices are concerned, those, as I have shown you -- or, if they have to be published, they are published each year. It was, if you like, in the public domain that the 26 pence -- As you said, Professor Pickering, it goes up each year. I would not accept that, if you like, knowledge is

relevant to whether or not there is an abuse. Albion in fact was aware of the fact that prices had risen.

THE CHAIRMAN: When were the interim measures first introduced?

MR. VAJDA: Interim measures were first introduced by consent in 2004.

THE CHAIRMAN: July 2004. It occurs to me that the continuation of the interim measures from 2004 onwards rendered any such exercise as might be under discussion at the moment redundant in effect - it never happened.

MR. VAJDA: That is right. In terms of continuing conduct, if you like the conduct that continued was the supply of water at a price fixed by the Tribunal.

THE CHAIRMAN: Yes. So, what you are saying is that that having occurred, there simply was not a debate about the margin squeeze in the subsequent years because there was always a reference back to 2001, because everyone was quite content for the interim measures to continue.

MR. VAJDA: I am making two points. The first point I am making is that as a matter of fact we know today - and we would have known in 2004/2005/2006 that in fact the gap between the First Access Price and the retail price was widening all the time. As Professor Pickering rightly points out, the prices go up each year - the retail prices. We know that. That is, if you like, a self-standing point. Then there is a second point which is: As a matter of fact, what conduct did my clients pursue vis-à-vis Albion in terms of supply of water for Shotton and the conduct they did is they supplied water on a bulk basis to Albion at a price that was dictated ----

THE CHAIRMAN: Determined.

MR. VAJDA: 'Determined' is a much better word. -- determined by the Tribunal. Indeed, the Tribunal said the reason they made the order was to enable Albion to continue its activity to enable it to push forward with its common carriage proposals and to enable Shotton to get the benefit of effectively the price that Albion had negotiated .

THE CHAIRMAN: So, if the Tribunal has what might be a very shrewd suspicion that if there had not been the interim measures there would have been a margin squeeze in 2005/2006/2007, you say that because that has not been determined it is not open to us to find that there has been an ongoing margin squeeze.

MR. VAJDA: Why I say the two points are different is because the first point, which is that in fact the retail prices have diverged is good whether or not the Tribunal made an order for interim relief, or not. In other words, I could make the first point, regardless of whether an

interim relief order was made, simply that First Access Price no longer gave rise to a squeeze as extreme in 2001 over the years.

The other point is, if you like, the continuing conduct point. The fact is that, yes, Albion and Dŵr Cymru continued to have commercial relations between each other, but the commercial relations were those determined by the Tribunal which were on a basis which meant that there was no margin squeeze because Albion in fact -- The whole point of the order was that they got a margin of 3.55. Initially they got 2.05.

THE CHAIRMAN: There is a bit of a forking for the tongue here, is there not, if you will forgive me putting it that way, Mr. Vadja - not by you, but possibly by your clients. The reality of this situation is that if one looks at the history of the dispute which has been, shall we say, a hotly contested dispute throughout, it is difficult to foresee, or to imagine a situation in which Dŵr Cymru would not have been seeking to obtain the maximum possible price out of Albion, whether for tactical or other reasons. The reality is that the margin squeeze now is being used as a way to help you, whereas it was designed as a protection for competition, and therefore for Albion.

MR. VAJDA: With respect, sir ----

THE CHAIRMAN: That sounds like a 'No'.

MR. VAJDA: It does, yes. The Tribunal put in place a mechanism to prevent a margin squeeze. Now, I am sure it is a purely hypothetical question, sir, that you are putting to me - that my client would like to have better commercial terms with Albion than in fact were provided by the Tribunal -- That, with respect is to condemn people for wicked thoughts, whether or not my clients have wicked thoughts -- You cannot say somebody has committed an abuse of dominant position in their head. It has to actually be conduct on the ground. The conduct on the ground in this case was determined by the Tribunal. That is the point I am making.

(After a pause): I am reminded that in fact the very first interim order was by consent. So, in fact, we did in fact offer that.

THE CHAIRMAN: I am aware of that.

MR. VAJDA: The second was not by consent.

THE CHAIRMAN: I am sorry. What I said may have been a little hard on your clients. I am sure one of their mottos is 'chwarae teg' I am sure there is somebody behind you who can translate that.

MR. VAJDA: Yes. I will continue in English, if I may. Coming back to the declaration, these are important reasons why, in our submission, the Tribunal has to act - and I am sure the

Tribunal will act - with care. It is simply not open to the Tribunal to make a declaration in relation to conduct that occurred since ----

THE CHAIRMAN: It is a *Floe* point.

MR. VAJDA: I was not going to mention *Floe*, but in a sense ----

THE CHAIRMAN: We are not sensitive! (Laughter)

MR. VAJDA: That is the point that I want to make on the declaration. The last point I want to make on para. 2 is in relation to the common carriage point. I have done these in the reverse order, as it were. However, I need to say something about common carriage. There is the point in relation to para. 2 that it covers some items that have not been determined by the Tribunal. I have said that, and I do not want to repeat it. There is another point that is important. It is a point which, in a sense, Professor Pickering touched on this morning which I would like to just develop for a moment. Chapter II is not about fixing a price. What Chapter II is about - and Professor Pickering was absolutely right - is to effectively say, "Well, we're going to tell you whether or not a price is abusive". There is some recent learning on this very topic in the Court of Appeal which is bang in line with what Professor Pickering says the position is. Sadly, this does not seem to be paginated, but if we go to para. 119 -- Could I just ask the Tribunal to read to itself para. 119? (Pause whilst read): By coincidence or otherwise, the author of this judgment, Lord Justice Mummery, is also the author of the *Floe* judgment, so one can see that the Court of Appeal would not be terribly keen, in my respectful submission, to see Tribunals effectively fixing prices in Chapter II cases because that is not what competition law is about, it may be what regulatory law is about, and paragraph 2 is a price fixing remedy. I see Professor Pickering nodding.

PROFESSOR PICKERING: I am not agreeing with your interpretation but I am sympathetic to the drift of the general argument.

MR. VAJDA: That is progress! (Laughter) So effectively that is all I have to say on para.2. Very briefly, para. 6 the ongoing supervision point. We have made the point in our skeleton, 21 to 22, we say the remedies are to be limited until abuse is found, and in my respectful submission this paragraph is unnecessary, too vague, unenforceable and a recipe for chaos and I also mention the word "*Floe"*, I do not think the Tribunal should go near that, with respect.

On costs, I have taken instructions on the issue of costs. The debate between Albion and us, whether there has been a misconstruction I do not know, but we have always been prepared to pay reasonable costs so we would invite the Tribunal to make an order for reasonable

costs, or cost on the standard basis, and so far as the interim payment is concerned, that you, Chairman, suggested, we have no objection to that as a matter of principle. The figure that I have been instructed to put forward is 50 per cent and it has been pointed out to me that in the recent *JJB* case, where you handed down judgment a few days ago, I think you gave a figure of 30 per cent.

THE CHAIRMAN: It was quite particular. I do not think the *JJB* case provides a precedent for an interim costs order in general.

MR. VAJDA: No, we all know on costs there are effectively no precedents, but I am offering 50 per cent.

THE CHAIRMAN: Okay, thank you.

MR. VAJDA: I hope that I am now in a position to hand up the proposed ----

THE CHAIRMAN: Can I just be clear by whom this is proposed?

MR. VAJDA: This is being proposed by my client and maybe what I can do, it may be helpful if I can hand this up, including to Mr. Thompson and take the Tribunal and everybody through that for two or three minutes, and then it may be sensible for the Tribunal to rise and for Mr. Thompson to consider that and the Tribunal to consider it, and then we can resume.

THE CHAIRMAN: We have not heard from Mr. Randolph yet.

MR. RANDOLPH: I am grateful, Sir. I am going to be very short, because not much if any of this concerns me. There have been a couple of points that have been made that I would like to address if I may. I am in your hands, Sir, because obviously if this proposal is agreed ----

THE CHAIRMAN: It will be even shorter?

MR. RANDOLPH: It will be even shorter, because we come out of the equation even more than we are at present.

THE CHAIRMAN: If Mr. Thompson, after we have heard further from Mr. Vajda, is in agreement that we should have a short pause for thought, I think it might be sensible to do it, otherwise we will hear from you.

MR. RANDOLPH: Certainly nothing I say will impinge on that proposal. What I was going to say was simply going to deal with the point made in passing by Mr. Thompson with regard to ----

THE CHAIRMAN: This is Mr. Thompson's call, I think.

MR. RANDOLPH: I agree, and the time is ticking, absolutely.

MR. VAJDA: Does the Tribunal have copies? (Document handed to the Tribunal)

THE CHAIRMAN: Thank you. So this is a 6A in effect?

MR. VAJDA: Yes, this is effectively a 6A. Without in a sense wishing to sell this draft, my task is really to explain how it works. What this does, and in fact it may be helpful to have 6 to hand to see the differences, is that we have added two new recitals to what was in 6. The first is: "UPON Dŵr Cymru offering", and I leave out the bracket, that effectively preserves the position in relation to the jurisdiction point, "to continue to provide its existing non-potable bulk supply service to Albion on the basis set out in the Schedule …" and I will come to that in a moment. Then the last new recital is:

> "UPON the Authority agreeing to determine under section 40 … the terms of the bulk supply … between Dŵr Cymru and Albion, in respect of the Shotton Paper site."

The text of the order is the same, save we then have the schedule, and the schedule, which is on p.4:

> "Dŵr Cymru will continue to provide its existing non-potable bulk supply service to Albion on the following basis:
>
> a) the Authority commences the Determination with one month of [today]"

Because obviously I think it is in everybody's interest that speed, we have been going on for a long time we want to get this resolved. Then "b)" the Determination shall have effect from today, obviously subject to anybody judicially reviewing it. Then "c)" is effectively that Albion will make payments on account of the figure of 25.19, exactly the same figure that it is paying under the Tribunal's interim order.

Then "d)" following Determination, and obviously we do not know which way it will go – whether it will be above or below the 25p, but there will then effectively be a set-off as it were, payment by one party to the other, so that is how it works, and that is essentially, we say, very much in line with the offer that we made in November, which I took the Tribunal to at tab 25 at para. 25, which we had hoped might obviate the need for today. That is all the explaining I wish to do and unless the Tribunal has any questions on it I propose to sit down.

PROFESSOR PICKERING: Could I just ask, Mr. Vajda, accepting that we have had some debate as to the extent to which there is a read across from the FAP to the BSP, and taking that as now a given that treatment and distribution costs are being accepted at 14.4, and I think the resource ----

MR. VAJDA: I am not sure ---

PROFESSOR PICKERING: In relation to common carriage.

MR. VAJDA: Yes.

PROFESSOR PICKERING: I have given you the caveat that the degree of read across is not necessarily conceded, but we have 14.4p treatment and distribution, is it 3.32 resource costs – water resource?

MR. VAJDA: No, it is not that today.

PROFESSOR PICKERING: Can you tell me what it is today?

MR. VAJDA: I am not sure I can, I can write it down – it is a different figure.

PROFESSOR PICKERING: It is a different figure but it is presumably within ----

MR. VAJDA: It is not in double figures.

PROFESSOR PICKERING: It is in a ball park, and the retail margin is not obviously part of this 25.19, so that leaves ancillary costs, so if I were to double what my memory suggests was the original resource cost for water, then that would suggest that ancillary costs are about 5p/m^3, is that right?

MR. VAJDA: I do not know, but if I can interject, as I have said before, there is an issue in bulk supply which is, is it right to take the local cost of water or the regional average cost of water and you cannot, as it were, reverse engineer at the moment and say let us put the 3p, which is a 2001 figure in any case in. The point about this figure is that this is a figure that the Tribunal ordered in 2006 to enable, and indeed, the President when he made the order said it would be just for a short time, he made that in November 2006, we are now in February 2009, but it is the price that the Tribunal itself ordered.

PROFESSOR PICKERING: Is my approach to this fundamentally wrong. I recognise that it is more rough at the edges?

THE CHAIRMAN: I understand you to be saying, Mr. Vajda, there may be argument about this but that really we should not be doing this kind of fine calculation?

MR. VAJDA: Not at all, this is in a sense ----

THE CHAIRMAN: This is back to *Floe*.

MR. VAJDA: -- *Floe* territory. I do not want to say *Floe* to Professor Pickering when he asks me a question ----

THE CHAIRMAN: It is all right, he is not sensitive, if you just say "*Floe*" he will understand what you mean. We discuss nothing else in this Tribunal, I can assure you, at the moment. (Laughter)

MR. VAJDA: Yes. The reason that we are in *Floe* territory, and in a sense this is very much an off-line discussion, Professor Pickering, I did not read out aloud, but in the third recital, this is without prejudice to all these jurisdiction arguments, and ----

PROFESSOR PICKERING: I will not pursue it.

THE CHAIRMAN: Let us get back to this. What do you want to do, Mr. Thompson?

MR. THOMPSON: I must say I had understood it in a somewhat more pragmatic spirit than I think Professor Pickering is suggesting.

THE CHAIRMAN: Well keep in the pragmatic spirit.

MR. THOMPSON: As I understand it, what is being proposed is the price that is currently, as it so happens, the result of the interim measures, so 3.55p off what would otherwise be paid will be maintained pending the s.40 ----

THE CHAIRMAN: Pending the s.40, yes, that is what it amounts to.

MR. THOMPSON: But on the basis that if the determination is in Dŵr Cymru favour, then we will be liable from today's date. If it is in our favour then we will get ----

THE CHAIRMAN: That is what the schedule says. Do you want to think about this?

MR. THOMPSON: Just immediately that raises a number of issues. It is obviously a sort of Gordian Knot approach so it is good in that way. It raises the question of the margin squeeze remedy because that would go, as I understand it. I see the order has lost the ongoing abuse issue so that would obviously be an issue. The level of the discount was, I think, regarded as somewhat conservative when it was made in December 2006 and obviously the Tribunal has made rulings since then, so there may be a question about whether it is the right number.

THE CHAIRMAN: Forgive me for cutting across you, Mr. Thompson, if I may. I understand this to be a rather unusual procedure in that Mr. Vajda on behalf of Dŵr Cymru has made an offer in the face of the court, which plainly the court, the Tribunal, cannot determine save to say that every encouragement is always given to reach an accommodation if parties can. There are obviously some difficulties that arise from your client's point of view, the question is do you want us to adjourn for a time so that you can take instructions and possibly have a conversation with all the other parties here. I do not think either of the other parties present objects to this process, if that is what is suggested, or not?

MR. THOMPSON: Well it seems to me it would be sensible for me to take instructions rather than to try and guess what I might be told, so it would be sensible to have at least 15 minutes.

THE CHAIRMAN: Okay, we shall have at least 15 minutes. Let us know when you are ready.

(Short break)

MR. THOMPSON: I am grateful for the time. I am afraid I cannot announce that peace has broken out on all sides. I have had a discussion with Mr. Vajda and also with Miss Sloane.

I think there is a perceived difficulty about the form of this order on the part of authority, given the fact that the precise scope of the determination may not be entirely certain, particularly given that Shotton Paper is not the only undertaking that is served through this site and the Authority is concerned about what exactly it would be being asked to determine which might in effect also ----

THE CHAIRMAN: It might affect Corus colour.

MR. THOMPSON: Yes, and it might also affect any backdating or any issue of that kind. I think my clients are concerned about the back-dating issue. I think what has been agreed is that subject to the approval of the Tribunal I shall make my submissions on the issues which have been aired today – I do not know what the Tribunal thinks about this, but, clearly, if we can make any further progress between ourselves obviously we would inform the Tribunal, but we thought that it would be helpful to at least make the full submissions today so that the hearing would have finished.

MR. VAJDA: Could I say in Open Court, as Mr. Thompson said, peace has not broken out, although we live in hope. The offer that we have made will remain open until four o'clock on Wednesday. Obviously, from our perspective, and, I hope, everybody's perspective, we want to get legal certainty as soon as possible. So, what we would propose, subject to the Tribunal is, obviously, if there is then agreement before then, we will let the Tribunal know the order that we propose by consent. But, if that date passes without agreement, then the Tribunal will just have to issue a judgment and then an order.

THE CHAIRMAN: I think that will fit in with the pattern that we had in mind because we were proposing to meet for up to a day after Wednesday. I think we were proposing Thursday. So, please, do let us know if peace does break out.

MR. VAJDA: Then four o'clock on Wednesday is a particularly apt time, yes.

THE CHAIRMAN: I think we need to hear from Mr. Randolph.

MR. RANDOLPH: It will be very short. I am sure Mr. Thompson is probably rueing his rabbit analogy, but I will try not to set any hares amongst his rabbit warrens. A few very short comments.

Mr. Thompson made clear in his opening submissions this morning that the issue of water resources that we were looking at briefly just a moment ago - the first rabbit hole and the only one which concerns you - was outside the scope of these proceedings, which is absolutely right. So, insofar as we need to, we join issue and entirely endorse the submissions on that point made by the Authority and, indeed, by Welsh Water - that this Tribunal has no jurisdiction to make any order in relation to that issue.

However, despite Mr. Thompson's admission with regard to the fact that that issue was not concerned by these proceedings, he brought in by way of his supplementary note a position statement with regard to, amongst other things, UU and negotiations with Albion. That was fine as far as it goes. But, you will remember, sir, that I said that it was not quite all that needed to be said. I would not like the Tribunal to be left with the impression that that was all there was. There had been discussions going back as far as 2006 as Professor Pickering and others will remember that there were discussions in front of the Tribunal. Indeed, in Tab 9 to the bundle there is a transcript and there is a great section of me answering questions from the then President with regard to what we were doing; what we should do; how we saw ourselves going forward; good faith; the fact that community competition law; and indeed UK competition law did not impose any obligation on us to settle at a price below cost, which was later found to be the case with regard to the first part of the price. I want to say this in Open Court, on instructions: that is our continuing position. It has not just been, as of January 2009. Correctly in the note, it talks about reopening negotiations. Yes, they started way back in 2006. We have provided a draft agreement. There are going to be discussions and then they are going to go forward - we hope. We cannot promise. But, of course, it is not for the Tribunal. This is a question we were discussing earlier. It is not for the Tribunal to wade into commercial discussions. Far from it. It has got far too many other important things to do rather than concern itself with those things.

THE CHAIRMAN: Is that a polite way of saying, "*Floe*"?

MR. RANDOLPH: It is another way. Exactly. But, I did want to make sure that the Tribunal did not think that we were dragging our heels. Also, there was a mention made by Mr. Thompson earlier this morning of babies being strangled at birth (which is rather unfortunate). We are not in that position. We are not in a Herod position or indeed in any other baby strangling position - not that we are willing to accept that Albion is a baby. But, as long as the Tribunal has it that we are being as co-operative as we can in commercial negotiations, we will see what happens. Obviously, if peace does break out with regard to the two main protagonists, then our issues drop out. Those negotiations will become otiose. We have other issues, but not insofar as these proceedings are concerned, and not with regard to Albion. So, we will look at developments as they arise, but we will not input directly into them.

It should be noted as well, just in terms of bringing the Tribunal up to speed, that mention was made of s.40A and there was a question as to the differences between s.40 and s.40A. Section 40A looks at existing agreements, and parties to existing agreements or terminated

agreements, and s.40 looks at a non-agreement situation where you are going to try and set one up. Indeed, in that manner we, you have sought an application under s.40A with regard to the first bulk supply agreement. We have done that twice - once a long, long time ago well before these proceedings - so, it must have been aeons ago - and one more recently and we hope to have a reply from the Authority on that. We have yet to have a reply and we understand why the Authority possibly has been a little busy to date. But, we would hope that we would be able to have a reply on that point as well. One is looking at possibly the whole gamut of this case. We were at the start and Albion are at the end, if you will. It is quite useful to try and tie everything up. Again, we are not foot-dragging. We are trying to sort this out. As the Tribunal will have noted - and I am going to repeat it - the original price which is in, which is not confidential, of 3.3, which is no longer the price -- That was below cost and is lost in the mists of time. So, we are hoping that that application under s.48 can bring a supply price up to date.

That is all I think I need say. Unless the Tribunal or you, sir, have any questions of me ----

THE CHAIRMAN: I do not want to run the risk of another metaphor.

MR. RANDOLPH: Good. Good. Massacre on Watership Down! Thank you very much.

THE CHAIRMAN: Thank you very much, Mr. Randolph.

MR. THOMPSON: Sir, there are a number of points. I will try and keep them in some sort of order, but inevitably they will be slightly disparate given the time of day and the fact that I am dealing with various points. I think the main point I want to make is that in the light of the submissions from Miss Sloane and Mr. Vajda, it is necessary for the Tribunal to establish the realistic context in which it is exercising its discretion. We say that is relevant not only to the general issue of discretion, but also to the issue of jurisdiction, given that I think it is clear from the statutes and from the case law that the question of jurisdiction relates to what is necessary and appropriate in all the circumstances of the abuse as found. That is particularly the case here where the Tribunal is very well seized of all the issues, having examined this matter for five years and the Authority having examined the matter for four years.

I think the first point that needs to be borne in mind is that the submissions that were made by Miss Sloane about the availability of s.35 of the Competition Act need to be viewed with a good deal of caution by the Tribunal. As I understand it, only one s.35 measure has ever been made by any regulator. That was overturned by this Tribunal. The realistic position is that I think the two decisions which my clients have been involved in before the Tribunal were, for a long time, the only Competition Act decisions that were ever taken, both

rejecting the complaints and being overturned by this Tribunal in part, and in this case in whole. Ofwat has consistently taken the position, including in this particular case the issue of the potable supply last summer, that it will prefer its 1991 Act powers to its 1998 Act powers, and that whatever the Tribunal may have said in the judgment I do not think there is any case of it having considered using s.35 Competition Act powers in a case where it is seeking a determination or making a determination under the Water Act. So, the suggestion that it might act in that way, I think, is wholly unreal. Certainly there has been no rush to act in that way in the light of the judgments of the Tribunal today, or indeed the judgment of the Court of Appeal last May. In our submission, that is a highly questionable and unlikely scenario that that would be used.

So far as Dŵr Cymru 's negotiating position is concerned, subject to the document that has been put in recently, our understanding was that the position in relation to resource costs - and that was partially confirmed today - was effectively to add a figure of some 12 p/m^3 (so, approximately quadrupling the resource cost and adding approximately £1 million per year to the liabilities of my client) and to add, admittedly in relation to the potable supply, but effectively it comes to the same negotiation, approximately £1 million for back-up supply on a basis of the standing charge, but with the terms of supply otherwise unchanged and so making no alterations to the bulk supply offer by reference to the judgments of this Tribunal, even in their provisional form, or since November in their confirmed form. So, so far as we understand it, with the exception of the offer for common carriage, which the Tribunal is aware of, the intention of Dŵr Cymru is to take no notice of this series of judgments whatsoever and the intention of the Authority is to do nothing about it - at least so far as the 1998 Act is concerned.

So, the consequence of that is that Albion Water is very concerned, given the history of this case, that the use of s.40 determinations would, in effect, subvert the outcome of this appeal, and that was reflected in the correspondence that Mr. Vajda showed you from January 2008 - that there should not be a determination that effectively subverted this appeal before it had finished, particularly in relation to excessive pricing, and the concerns were obviously exacerbated by the offer made in November 2007 which included the elements of resource costs and back-up charges to which I referred, which effectively, for the same service, proposed we increase charges by the best part of £2 million.

Likewise, in May 200 Dŵr Cymru initially threatened to refuse to supply a back-up and it was only settled after a possible application to this Tribunal.

MR. VAJDA: These are submissions by way of reply. This is not a jury speech either. I do object to comments being made about my client like this in reply.

THE CHAIRMAN: We will take into account what is relevant.

MR. VAJDA: Thank you.

MR. THOMPSON: We would say that this is a matter that is extremely urgent. Aquavitae was the intervener and had already exited the English market and is now insolvent. There have been lengthy failures where we have been unable to persuade the Authority to give effect to the Tribunal's rulings. We think all these matters need to be taken into account.

THE CHAIRMAN: But we cannot re-write competition law, can we, Mr. Thompson. That is not our role. You have to go elsewhere if you are not satisfied with the way in which competition law operates. We are a court in effect. We can only act within our jurisdiction.

MR. THOMPSON: Indeed. I am about to come to the *Floe* point which has been mentioned on a number of occasions. But, in my submission it is quite misconceived in the present context. The point in *Floe* was that the Court of Appeal was concerned to discourage the Tribunal from embarking on academic or irrelevant issues by way of guidance to the regulators as against resolving real disputes. Where the Tribunal has decided real disputes, not only in this case but in other cases, such as *Napp*, the Court of Appeal has been fully supportive and has upheld the Tribunal. There is nothing in the Court of Appeal judgment to suggest that the Tribunal should not exercise the full extent of its Schedule 8 powers for it finds that the Oft - or, here, the Authority - has failed to do so. We are simply seeking broad discretionary powers which could have been exercised by the Authority and which the Tribunal found in 2006 could have been exercised by the Authority on the facts that have now been found. We are asking the Tribunal to exercise those powers in an effective manner. We are not asking for any theoretical guidance to be given, or for any abstract questions of law to be resolved. We are asking for a practical remedy for a practical problem which has existed for eight years and which the Tribunal has repeatedly found to exist after lengthy investigation of the facts.

So far as the margin squeeze remedy is concerned, we would say that the history of the case shows that Dŵr Cymru will ignore the margin squeeze ruling. It has given no effect to the CAT rulings and there has been no intervention by Ofwat. We take the point that there is an interim measures order in place at the moment, but we would say that that was recognised to be put in on a conservative basis in 2006. You have my submissions as to what a more realistic basis would be by reference to the evidence before the Tribunal.

So far as resource costs are concerned, the point that I would wish to make and which appears clearly from the terms of the matter that was referred back to the Authority at the end of the December 2006 hearing, is that the issue here concerns the costs of distribution and partial treatment, and it was that issue, not the issue of common carriage or the issue of bulk supply, which was the subject of intensive investigation by the Authority and the final ruling of the Tribunal last November. We would accept that the resource costs, and indeed the back-up supply, fell outside the scope of that and I made submissions on that issue in relation to the matter when the hearing took place last February.

So far as resource costs are concerned, they have proceeded on apparently an agreed basis for eight years, but Mr. Vajda has made it quite clear that that is no longer an agreed basis, and I think I would have to accept in those circumstances that there is a defect in para.3(2) of the order as proposed. In that draft order ----

THE CHAIRMAN: We are looking at your draft at flag 5?

MR. THOMPSON: My draft order. In my submission, para.2 is correctly drafted in that it refers to the common carriage access price offered by Dŵr Cymru to Albion Water for the treatment and distribution of non-potable water through the Ashgrove system. I would say that was precisely the scope of the decision that was made by the Tribunal on the substance. Ignoring the jargon of common carriage one could simply say, "The access price offered by Dŵr Cymru to Albion Water for the treatment and distribution of non-potable water through the Ashgrove system shall be". Then the mean figure distribution and treatment costs, so that reflects the judgment, and then ancillary costs – that is simply a matter that fell outside, which is clearly necessary for common carriage.

Then para.3, in relation to bulk supply, again the jargon of bulk supply is quite irrelevant. If one added in the words under 1, 14.4p, if one put in the same words as appear in 2, "the mean figure for distribution and treatment costs found by the Tribunal", that would simply reflect the terms of the judgment. In my submission, that is clearly implicit in the terms of the order, and if it was not clearly drafted I apologise for that.

Then 3(2): given the indications from Mr. Vajda that that is very much in play, I would agree that 3(2) should say the resource costs of such supply, rather than the costs of the Heronbridge bulk supply, because I would accept that that is not a matter that is currently within the scope of the investigation, although Professor Pickering's expressions of incredulity, in my submission, realistically reflect the fact that it is a bit rich at the end of this process for Dŵr Cymru now to effectively seek to recover £1 million a year for doing absolutely nothing simply by marking up the costs that it is actually paying United Utilities,

but I would accept that that is a matter for the Authority rather than for this Tribunal to regulate.

I am trying to keep to the main points that I hope will be of assistance. I think there was a degree of agreement between Mr. Vajda and myself about the difficulties of making a *Hilti* type order in this case, given that, as I think even today's hearing will have shown, there is a good deal of disagreement about what such an order would mean if it was made in general terms, because there seems to be a fairly fundamental difference of view between the Authority, Dŵr Cymru and Albion about even the meaning of the emphatic wording of the judgments of the Tribunal to date. However, Mr. Vajda and I draw radically different conclusions from that. Mr. Vajda, I think, effectively says that the Tribunal should stand back and not make any order, whereas in my submission a much more natural moral would be that the Tribunal should make a specific order which was not capable of misunderstanding. In my submission, the order that we have proposed is precisely such an order, and I have already explained why we say ----

THE CHAIRMAN: So you say you do not want a like effect order if we do not make an order in the terms you propose?

MR. THOMPSON: I am not saying that. I am saying that I think that the like effect order is difficult if it is not, as it was in *Genzyme*, accompanied by something more specific, that there would be a risk for the reason ----

THE CHAIRMAN: Can I pin you down. Supposing we were to decide that we were not prepared to go all the way along the road which you have submitted to us, and we understand your submissions completely, would you then be saying to us you do want a like effect order if we were prepared to give one in the exercise of our discretion, or you do not?

MR. THOMPSON: No, I would want an order in broad terms, but it would need to be more specific than simply like effect, given the indication ----

THE CHAIRMAN: So you do not want a like effect order?

MR. THOMPSON: It is not that I do not want it, it is that I see that there is a difficulty in it for the reasons that Mr. Vajda has indicated, that it would inevitably be uncertain in scope for no other reason than because of the obvious disagreement between the parties about what it would mean.

THE CHAIRMAN: Anything without the specificity that you have contended for is bound to be fairly broad, and what I am trying to tease out of you, Mr. Thompson, is whether, if you are faced with an unwelcome choice between a merely broad order and a broad like effect order of the kind in *Hilti*, which would you be contending for, the first or the second?

MR. THOMPSON: I would be contending for the second, but I would wish to make it clear, and I think I have made it clear just recently, that not only the detailed provisions in the order as we have drafted, but also the point that the findings of the Tribunal are actually quite specific and relate to distribution ----

THE CHAIRMAN: You have made that absolutely clear and I am grateful to you for the response.

MR. THOMPSON: -- and treatment though not simply to the jargon of common carriage and bulk supply.

THE CHAIRMAN: Thank you.

MR. THOMPSON: (After a pause) I am trying to give some sort of rational structure to my submissions.

THE CHAIRMAN: All right, take your time.

MR. THOMPSON: We are at some disadvantage in that we were given a pricing table at very short notice and we have had some difficulty in understanding exactly what it means, and some points were raised by the Tribunal. On the basis of the information that we have at the moment, we are doubtful that this retail price that appears at the solid line has actually been applied to anybody. We think that the only person who it has been attempted to be applied to is Corus itself, who is Dŵr Cymru's largest customer, and that has been the subject of litigation on the basis that Corus says that it is an abusive price and has challenged the regulator's approval of it. As far as I know, that is ongoing litigation. It is rather unsatisfactory that we are not in a position to take it further, but we are aware that there is a major dispute between Corus and Dŵr Cymru which has been reflected in High Court litigation, so we think that that casts some doubt on it.

The other point we would make, and I think it is partly the point that Professor Pickering has made, is that the dotted lines obviously reflect the effects of this litigation. As we understand it, if the November 2007 offer to Albion was put in here a very different situation would arise and one would rapidly move to a quite violently negative margin, and so we do not think that this table in fact suggests that a margin squeeze would not happen or that a remedy is not needed along the lines of para.5 of our proposed order. Mr. Vajda referred to the *Deutsche Telekom* case, and I would accept that in that case the Court of First Instance opted strongly for the equally efficient test for a margin squeeze as a matter of principle. However, the reason for that was in part that the monopolist had to have an opportunity to avoid a margin squeeze in the future, and here the position is that the Tribunal has found either a negative, or a zero margin and also Dŵr Cymru has had every

opportunity to give evidence as to its costs and has been the subject of adverse criticism from the Tribunal for failing to do so. In those circumstances it seems to us unreal to suggest that it would be unfair to use the figures put forward by Mr. Jeffrey or to embark on yet another investigation of this matter. There has been every opportunity for the Authority and for Dŵr Cymru to put forward information to the Tribunal if it wishes to do so, but neither has been prepared to recognise the existence, let alone the quantification of any retail costs. In those circumstances it appears to me that the traditional alternative applied in *Genzyme* would be perfectly appropriate in this case as well.

I think that I am nearly at the end. The issue of continuing abuse, there is obviously an issue about the effect of the interim measures that have been in place since 2004. In my submission they are not a full answer to the question of continuing abuse both because it is recognised that the margin in effect that has been created has been set at all times at a conservative level, and so in my submission the evidence suggests that there has still been an element of margin squeeze notwithstanding the existence of the interim measures. Perhaps more importantly the findings of the Tribunal in November last year strongly suggest an ongoing excessive price abuse in that the effect of the interim measures has been set by reference to the retail price rather than the realistic costs of providing this service, and the Tribunal has now found in firm terms that those prices were excessive by reference to costs.

I think the only other points I need to touch on, there was reference to Lord Justice Mummery's remark in *Attheraces* in relation to price regulation. I hope it will be clear that our order is precisely not intended to set up the Tribunal as a price regulator, on the contrary para. 6 is precisely intended to vest ongoing regulation of the situation with the Authority, which is entirely consistent with its role as the central regulator and its central powers under s.40. All that is intended is that the Tribunal should set the starting point by reference to the factual findings that it has made and, in my submission, that is wholly unobjectionable, and not objectionable to Lord Justice Mummery either on the basis of the *Attheraces* case or the *Floe* case, I think Mr. Vajda's objection to ongoing supervision appeared to me to sit very ill with the submissions that have been made both by him and Miss Sloane earlier on to the importance of s.40, in my submission our para. 6 of our order is an eminently practical way of bringing the two regimes together.

I will close on the key point of jurisdiction and I think, as I have said already, there is a fundamental misunderstanding, whether deliberate or just a matter of misunderstanding, we are not talking here about finding an abuse or the jurisdiction to find an abuse in relation to

the bulk supply agreement, or indeed to resources, the back up supply or anything of that kind. There has been a finding of abuse, in fact, there have been two findings of abuse – one, of a margin squeeze driving Albion as a retailer out of the market if it is not rectified, and one an excessive price abuse in relation to the costs of treatment and distribution. The Authority would have had a broad discretion under s.33 to deal with those two elements, margin squeeze and excessive pricing for distribution and treatment. We are seeking an effective remedy for that and we say that it is quite clear, both as a matter of principle, and on authority, that the Tribunal has a very broad discretion to take a proportionate and effective remedy which will put an end to two very serious and long running abuses which have been taken by a particularly gross case of a David and Goliath situation as recognised by all the Tribunals that have heard this up to and including the Court of Appeal. If I could just ask if there are any submissions that anyone wants me to make, but those are the core of my submissions.

THE CHAIRMAN: Thank you very much indeed, Mr. Thompson.

MR. THOMPSON: The only other issue was the one of costs.

THE CHAIRMAN: Do we really need to hear more submissions on costs?

MR. THOMPSON: I do not know whether the issue of an interim order on costs is one ----

THE CHAIRMAN: Well I am taking it that you have applied for an interim order, and I am taking it that nobody is objecting to your application for an interim order, and everyone has agreed that there should be an interim order, it is just a question of what proportion it should be.

MR. THOMPSON: And when it should be made. Obviously my interim order would be 100 per cent made now, but Mr. Vajda is 50 per cent made in 10 years' time, so somewhere between the two.

THE CHAIRMAN: Thank you, and thank you all very much. You look as though you want to say something, Miss Sloane?

MISS SLOANE: Sir, I do, I have rather warmed to my role! (Laughter) I was just going to say that I owe Professor Pickering a quick answer to a couple of points that he raised before lunch.

THE CHAIRMAN: Oh yes, you said you were going to answer them.

MISS SLOANE: The questions as I recall them concerned the efforts the Authority was making to ensure the consumer saw the benefits of competition and also he mentioned the pre-budget report relating to the separation of the retail function. I will deal with them together if that is all right. The pre-budget report followed the recommendations of the Cave review.

The Authority's response to that, which was written on 19th January is available on its website, and sets out very clearly that it strongly endorses the recommendation that the retail function be separated from the statutory functions of the undertakings. Whilst that does not have any direct repercussions here in terms of the longer term view clearly it will bring enhanced transparency for things like margin squeeze.

THE CHAIRMAN: It will give Professor Pickering something to do over the weekend.

MISS SLOANE: Exactly. Secondly, in terms of the Authority, quite apart from the response as it is set out there, which summarises its view it has also implemented some structural changes and it has a whole new department, the competition reform team, with its own competition reform director and it has brought in economic and legal consultants who are assisting in a review of the impact not only of the Tribunal's decisions but of the strategy to promote competition on pricing and specifically bulk supply pricing, which is included in that. So I hope that is of assistance.

THE CHAIRMAN: Thank you very much, Miss Sloane. Oh, you have provoked Mr. Thompson!

MR. THOMPSON: It is purely a point of information, but it is one of some importance that I think the Tribunal should be aware of because it partly deals with the issue of urgency, which is that the Shotton Paper Agreement, which was 10 years long, expires at the end of April this year and therefore Albion Water's commercial position is particularly sensitive, and it is a matter that the Tribunal should be aware of.

THE CHAIRMAN: Thank you very much. Anybody else want to say anything? No more metaphors? In that case can we wish everyone a good weekend and we look forward to hearing from you all in one way or another next Wednesday.

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