



Neutral citation [2013] CAT 6

Case No.: 1166/5/7/10

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

28 March 2013

Before:

VIVIEN ROSE
(Chairman)
TIM COWEN
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

B E T W E E N:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

Heard at Victoria House on
15, 16, 17, 18, 19, 22, 23, 24, 25 and 26 October 2012, and on 5 and 6 November
2012

JUDGMENT

66. The issues that we have to decide under this head of claim can be grouped as follows:

- (a) Albion's costs of supply in the counterfactual world. This involves identifying the costs Albion would have incurred in order to supply water to Shotton Paper, including the cost of the raw water itself, the common carriage price and, according to Dŵr Cymru, various additional costs such as augmentation of capacity at the Heronbridge pumping station and the reservation of a back-up supply of potable water.
- (b) Albion's income from Shotton Paper in the counterfactual world. In order to compare Albion's position in the real and counterfactual worlds, we must work out how the supply agreement between Albion and Shotton Paper would have operated as regards the price that Shotton Paper would have paid Albion for the water.
- (c) Is there a loss which is attributable to Dŵr Cymru's infringement? We must then compute the difference between the actual monies earned by Albion in the real world over the period and the monies it would have earned in the counterfactual world and, in particular, consider what part of that difference should be treated as having been caused by Dŵr Cymru's abusive conduct? This involves a consideration of the length of the period during which the effect of the abusive conduct continued to be felt.

A. The counterfactual common carriage price

i. The test to apply to find the common carriage price for the counterfactual

67. The first 'input' into the costs incurred by Albion to supply Shotton Paper is, of course, the cost of common carriage itself. Dŵr Cymru argued that the Tribunal's task here was not to find a reasonable access price but rather to find the highest price that Dŵr Cymru could have charged without committing an infringement of the Chapter II prohibition. That, Dŵr Cymru says, is because the Tribunal should strip out of the counterfactual only the unlawful element of Dŵr Cymru's actual behaviour. Dŵr Cymru accepts that the 14.4p/m³ may be a reasonable access price. It argues, however, that the Tribunal in Case 1046 did not rule that any price above 14.4p/m³ would be unlawful. As the Unfair Pricing Judgment makes clear, an abusive price is a price which is not only excessive (that is too high in comparison with costs) but also unfair (in terms of the economic value of the product or

