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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1166/5/7/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

19 October 2012

Before:

VIVIEN ROSE  
(Chairman)  
TIM COHEN  
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**ALBION WATER LIMITED**

Appellants

– v –

**DWR CYMRU CYFYNGEDIG**

Respondent

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*Transcribed using LiveNote by Opus 2 International  
10 Fetter Lane, London, EC4A 1BR  
Tel: +44 (0)20 3008 5900  
[info@opus2international.com](mailto:info@opus2international.com)*

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**HEARING (DAY 5)**

Note: Excisions in this transcript marked “[...][C]” relate to passages excluded.

## **APPEARANCES**

Mr Thomas Sharpe Q.C., Mr Matthew Cook and Mr Medhi Baiou (instructed by Shepherd Wedderburn LLP) appeared on behalf of the Claimant.

Mr Daniel Beard Q.C., Mr Meredith Pickford and Ms Ligia Osepciu (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

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Friday, 19 October 2012

(10.00 am)

DR JEREMY BRYAN (continued)

THE CHAIRMAN: Good morning.

MR PICKFORD: Good morning.

Cross-examination by MR PICKFORD (continued)

MR PICKFORD: Dr Bryan, we were dealing yesterday, and will continue to deal with this morning, issues in relation to your calculations of quantum at the end of your particulars of claim.

A. Yes.

Q. Now, you have obviously been in the box for two days already, and I quite appreciate it's a tiring process. If you could try and focus on the particular questions that I am asking this morning, and hopefully we can move things on swiftly.

A. Yes.

Q. If you could go, please, to folder 10, page 3340, which is tab 1. Again, as per yesterday, this is a key folder that we will need to retain.

A. Yes, Mr Pickford.

Q. Now, we are looking here on page 3340 at your scenario 4 -- not 4(a), but 4; do you see that?

A. Yes.

Q. What you are doing here is you are calculating your

1 total lost margin as a result of having been deprived of  
2 common carriage?

3 A. Compared to what we were paying under the factual  
4 situation, yes.

5 Q. So what it is is it's the total by which the common  
6 carriage arrangements would have yielded a better supply  
7 price for you and your customer, Shotton, than bulk  
8 supply, and then multiplied by the relevant volumes?

9 A. That's correct.

10 Q. So in essence it's the total loss that between you, you  
11 and Shotton have been caused?

12 A. It's the loss that we have been caused?

13 Q. Yes, because --

14 A. I haven't factored in Shotton Paper here, I don't  
15 believe.

16 Q. Exactly. This is before going on to your arrangements  
17 with Shotton. What happened in the factual is that you  
18 paid under bulk supply, and Shotton paid you according  
19 to the terms that followed through from the bulk supply  
20 arrangements?

21 A. That is correct.

22 Q. What you are positing in the counterfactual is that,  
23 instead of bulk supply, you get common carriage and  
24 a supply of water from United Utilities?

25 A. Yes.

1 Q. And you say under this scenario that would have yielded  
2 a lower cost than under the bulk supply arrangements and  
3 therefore you, and implicitly your customer, lost out by  
4 that amount of money?

5 A. If I can correct what I think I mistakenly agreed to  
6 just a second ago, when you said to me that the price  
7 paid by Shotton Paper flowed from the terms that we were  
8 actually paying at that time, that much is true, but as  
9 we discussed at length yesterday afternoon, that was not  
10 a reflection of a tariff raised in accordance with the  
11 share of benefits agreement, it was a state of affairs  
12 that was largely governed -- well, in fact entirely  
13 governed -- by the situation that occurred before  
14 the Tribunal, namely the interim measures that had been  
15 agreed.

16 Q. For the time being we are putting that benefit share  
17 agreement to one side; we are going to come back to that  
18 in a moment, because that's your 4(a) scenario. What  
19 I am looking at here is scenario 4, which ignores the  
20 contractual arrangements between you and Shotton in  
21 terms of benefit share, doesn't it? That's the point of  
22 this scenario, it doesn't grapple with those.

23 A. Well, it does to the extent that, as you will see on  
24 that page to the right, there is an implicit benefit  
25 share calculation.

1 Q. That's United Utilities?

2 A. No.

3 Q. It says:

4 "Albion benefit share from enhanced United Utilities  
5 revenue."

6 That's not the benefit share between yourself and  
7 Shotton, that's the benefit share between you and United  
8 Utilities?

9 A. No, it's not, Mr Pickford. Part of that is, columns L  
10 and -- oh, wait a minute. I may be mistaken. You are  
11 quite right, I do apologise. You are quite right. Yes.  
12 I apologise to the Tribunal as well. The columns J, K  
13 and L are indeed a breakdown of the benefit share  
14 agreement with United Utilities.

15 Q. Yes, because the way you constructed these analyses is  
16 that scenario 4 puts to one side the issue of the  
17 benefit share with Shotton, and looks simply, as we see  
18 here, at the actual price paid?

19 A. Yes.

20 Q. Then looks at what you could have got, you say, under  
21 common carriage?

22 A. Yes.

23 Q. Looks at the difference between those, then adds in  
24 a further element which is what you say you would have  
25 also got in from United Utilities in this counterfactual

- 1 world --
- 2 A. Yes.
- 3 Q. -- and then looks at the total amount that has been
- 4 lost?
- 5 A. That is correct, yes.
- 6 Q. So before getting on to anything to do with the
- 7 contractual arrangements between yourselves and Shotton,
- 8 this is the total extent of the losses that have been
- 9 caused by being forced to have bulk supply rather than
- 10 common carriage?
- 11 A. No, it's the total extent of the losses under the
- 12 circumstances in which our bulk supply prices were, and
- 13 the margin inherent therein, set effectively by
- 14 the Tribunal, and the counterfactual, which is what the
- 15 terms of common carriage and bulk supply would have been
- 16 in what we considered to be the worst case scenario,
- 17 namely 14.4 indexed by PPI and 9p indexed by RPI.
- 18 Q. I am afraid I don't understand why that's a "no" to my
- 19 question. My question is that in the real world there
- 20 was bulk supply and, I agree, obviously I think we are
- 21 at one on this --
- 22 THE CHAIRMAN: Is the difference that the actual price paid
- 23 under (b) takes into account the interim relief from the
- 24 court?
- 25 A. Yes, it does.

1 MR PICKFORD: Certainly we are in agreement with that.

2 I understand that it's not a pure bulk supply price that  
3 you are looking at in (b), because as Madam Chairman  
4 just said it takes account of the interim relief  
5 payments, and you say that was effectively therefore the  
6 price that was set by the Tribunal, and that was the  
7 real world?

8 A. Yes, it was.

9 Q. Yes, and then what you are doing is then you are saying:  
10 okay, in the counterfactual world the price would have  
11 been better than that because, by virtue of going on to  
12 the common carriage arrangements and having a certain  
13 price for common carriage and a certain price from UU,  
14 you would have done better than under bulk supply;  
15 that's right, isn't it? That's the essence of what this  
16 is setting out?

17 A. Yes.

18 Q. Therefore that's the total amount by which you have been  
19 deprived by Dwr Cymru?

20 A. On this methodology.

21 Q. On this methodology?

22 A. (Witness nods).

23 Q. Okay. So let's look, then, at page 3344. The only  
24 thing that changes here, we have now moved to  
25 scenario 4(a). Do you see that?



- 1 A. Yes, I do.
- 2 Q. The only thing that's changed here is that you are now  
3 taking account of the contractual relationship between  
4 yourselves and Shotton in relation to benefit share?
- 5 A. No, no, that's not the only thing that's changed,  
6 Mr Pickford. What I'm doing here is presenting what  
7 I now understand to be a more accurate picture of the  
8 correct counterfactual.
- 9 Q. Well --
- 10 A. And this picture, the picture that you have taken me to  
11 here, is not constrained, does not refer back to what  
12 one might call the artificial prices set by  
13 the Tribunal. It assumes in this counterfactual that  
14 the abusive behaviour didn't take place so that none of  
15 that remedy -- none of the interim measures would have  
16 happened.
- 17 Q. No, that's not right, Dr Bryan. Can I take you back,  
18 please, to folder 11, which -- if you keep out  
19 folder 10, please, but also take up folder 11, which is  
20 what I took you to yesterday.
- 21 A. Yes.
- 22 Q. I took you to paragraph 53 of your skeleton argument.  
23 Do you recall that?
- 24 A. Yes.
- 25 Q. I took you to subparagraphs 7 and 8.

1 A. Yes.

2 Q. There, and you agreed with this yesterday, option 4(a)  
3 is described in the following terms: it's option 4  
4 taking into account the prevailing Welsh Water  
5 non-potable tariff. Now, we understand what you are  
6 saying there, that's what you say is the benchmark for  
7 your benefit share --

8 A. Yes.

9 Q. -- and the agreement between Albion and Shotton Paper.  
10 So you are taking account of two things there,  
11 additionally to what you took into account in option 4:  
12 the Dwr Cymru retail price and how you say that is then  
13 apportioned, effectively, the benefits between that and  
14 what you were actually able to charge, distributed  
15 between you and Shotton?

16 A. Yes. But then maybe what I should say is the  
17 description of option 4(a) may be inadequate, because it  
18 is clear, very clear from the workings, from the  
19 approach that is being taken, that the description in  
20 subparagraph 8 that you have just taken me to is a bit  
21 light. Fundamentally the basis for the difference, the  
22 gross margin, if you will, is fundamentally different in  
23 4(a) than it is in 4, and there is no secret to that.  
24 In 4 it is the difference between what we might term  
25 an artificial bulk supply price, the price that was set

1 in the real world subsequent to what we now know to  
2 be --

3 Q. Okay. That's very helpful, Dr Bryan, but let's pause so  
4 we can be clear about exactly what you are talking  
5 about. In 4 when you refer to the artificial price  
6 that's set, that's your real world that you are  
7 comparing --

8 A. That's the real world, yes. Yes.

9 Q. The counterfactual is always a counterfactual which is  
10 not the real world, and is not based on that, what you  
11 call constrained price?

12 A. That is true.

13 Q. In 4(a) you told us yesterday that the real world  
14 calculation, your real world calculation was, you said,  
15 in column L, and you were at pains to point out  
16 yesterday that that included taking account of the  
17 constraints of the interim relief. So your real world  
18 scenario here in column L also takes account of the  
19 interim relief and is in that sense the same constrained  
20 price that you are talking about, the real world bit?

21 A. The reason for the inclusion of column L in the  
22 counterfactual --

23 Q. It's not in the counterfactual, Dr Bryan, it's in your  
24 real world bit, and that's what you use to compare  
25 against your counterfactual to work out your loss,

1           because you work out the benefit in box 4, and that's  
2           your letter K, that's your Albion benefit; you see that?

3           A. Yes. Yes.

4           Q. You then say "What margin did Albion make", that's L,  
5           that's your real world calculation?

6           A. Yes.

7           Q. And you emphasised yesterday that that also had the  
8           interim relief in it?

9           A. That was effectively the interim relief.

10          Q. That is based on the price set by the Tribunal, as you  
11          have called it?

12          A. Yes.

13          Q. Then you say "What is Albion's loss of margin", and  
14          that's comparing one with the other?

15          A. Indeed it is.

16          Q. Yes, so --

17          A. Because --

18          Q. So there is no difference between 4 and 4(a) in relation  
19          to the approach you take to the real world, in both  
20          cases the real world is one where you are looking at the  
21          price that was actually the price paid, taking account  
22          of interim relief; that's not a difference between these  
23          scenarios, 4 and 4(a)?

24          A. No, I am sorry, Mr Pickford, I don't know whether I am  
25          being dense, but the inclusion of column L in the

- 1 counterfactual --
- 2 Q. It's not in the counterfactual.
- 3 A. The inclusion of column L on page 3344, which is  
4 an analysis of the counterfactual --
- 5 Q. No, it's not, it's your analysis of the real world,  
6 Dr Bryan. You use that as your benchmark to compare  
7 what you have lost in the counterfactual. Your  
8 counterfactual world is: one, the price to beat; two,  
9 the buying price; three, what is the greater margin;  
10 and, four, what would Albion have made? That's your  
11 counterfactual world.
- 12 A. Well, thank you for clarifying that, Mr Pickford.
- 13 Q. And then you compare that to what you say was the real  
14 world, which is L, and then you get to "What is Albion's  
15 loss of margin?" That's how this calculation works.
- 16 A. I don't disagree with what you are saying, but the  
17 reason that column L is there is to ensure that any  
18 quantum that is derived in the counterfactual reflects  
19 the fact that we have already received some benefit as  
20 a consequence, as a direct consequence of the interim  
21 measures, and that we should not be claiming that again  
22 as part of the quantum.
- 23 Q. That's absolutely fine, Dr Bryan, there is nothing  
24 between us on that.
- 25 A. Oh, right.

1 Q. What was between us is that you said that was a feature  
2 of scenario 4, and you said it wasn't a feature of  
3 scenario 4(a). What I have just taken you through and  
4 you have now agreed with is it's actually a feature of  
5 both, Because you are looking at the real world in both  
6 there.

7 A. My understanding of the way that one goes about  
8 justifying damages in this situation is that one is  
9 bound to reflect, in the counterfactual claim, what  
10 actually happened, if there were some benefit. It would  
11 have been wrong to do the calculation and deny the fact  
12 that the interim relief did indeed provide some benefit.

13 Q. Absolutely, and I haven't suggested to you at any point  
14 otherwise. What I am saying is that it's the same,  
15 isn't it? You have done the same thing in scenario 4 as  
16 you have done in scenario 4(a); in both cases you have  
17 taken account of the fact that you got some interim  
18 relief, quite rightly?

19 A. To the extent that 4, method 4, is the difference  
20 between the buying price and the putative bulk supply --  
21 sorry -- sorry, Madam. To the extent that method 4 is  
22 the difference between the prevailing bulk supply terms,  
23 those which are dictated in effect by the Tribunal and  
24 the counterfactual common carriage terms, they do of  
25 necessity reflect the influence of the interim measures.

- 1 Q. Yes, so that's scenario 4; scenario 4(a), same thing?
- 2 A. No, because the counterfactual -- you were very clear,  
3 you just told me that column L, which is the factual,  
4 has no part in the counterfactual.
- 5 Q. Yes.
- 6 A. And if you take the counterfactual analyses, the price,  
7 the published non-potable price, the price to beat, and  
8 the buying price, the assumed bulk supply and common  
9 carriage terms, nowhere in that will you find the  
10 factual price that was actually charged during that  
11 period.
- 12 Q. No, of course not. Of course you won't. But what you  
13 will find it in is column L, which is your comparison  
14 point. In both scenarios --
- 15 A. It's not a comparison point, Mr Pickford, it's  
16 a correction point.
- 17 Q. Well, column L in this scenario is your comparison of  
18 the real world with what you say would have happened in  
19 the counterfactual world to enable you to work out what  
20 you say your loss is. That is what you are setting out  
21 in these tables.
- 22 A. Well, comparison, correction. I am not --
- 23 Q. My statement is correct, isn't it, that is what you are  
24 setting out in these tables? You are setting out what  
25 you say the Albion margin would have been, and that's

1           what you get to in box 4. You then compare it to what  
2           you say you did make in column 5, and that takes account  
3           of the interim relief?

4           A. That is correct.

5           Q. And then you get to what you say is your lost margin in  
6           column 6?

7           A. That is correct.

8           Q. So you must agree with me that you have done the same  
9           thing in scenario 4 as you have done in scenario 4(a),  
10          which is in both cases, having calculated your  
11          counterfactual, you then go on to compare -- and this is  
12          correct, I'm not suggesting this is in error -- with the  
13          real world in both cases, and in both cases in the real  
14          world you take account of the fact that you got interim  
15          relief, and then that gives you a figure of what you say  
16          is your loss. That's what you have done in both  
17          scenarios; that's correct?

18          A. It's not a train of logic that I recognise, because the  
19          column L again is embedded in 4, it's there, because  
20          it's reflected in the column which shows the bulk supply  
21          price actually paid.

22          THE CHAIRMAN: Yes. I think the point is being put to you  
23          that whichever counterfactual you are examining, you  
24          always have to ultimately compare the figures that come  
25          out with that, with what happened in the real world, and



1 the real world included the interim relief, and then you  
2 derive from that a figure representing the difference  
3 between the counterfactual world and the real world.

4 A. That is fine, Madam Chairman, yes, I don't have  
5 a problem that.

6 MR PICKFORD: I am very grateful. In which case, we can  
7 move on from that point. I apologise for having to  
8 labour it, but it's very important that we actually  
9 understand what these numbers mean.

10 THE CHAIRMAN: Yes.

11 MR PICKFORD: So I did have to press that until we finally  
12 had the admission from Dr Bryan.

13 Now, I was then explaining to you, before we got  
14 into that side debate, that the difference, therefore,  
15 between scenario 4 and scenario 4(a) is that you have  
16 taken the same assumptions in scenario 4, applied them  
17 in scenario 4(a) but then added in some extra  
18 ingredients, and the extra ingredients which you have  
19 added in are: taking account of what you say is the  
20 implications of the contractual benefit share between  
21 yourselves and Shotton, which you say should be  
22 calculated by reference to the Welsh Water retail price.  
23 That's the difference between 4(a) and 4; that's  
24 correct, isn't it?

25 A. That is correct.

1 Q. Now, if we are looking at 4(a), before you apply your  
2 grossing up formula in column 7, I would like you to  
3 look at box 6.

4 A. Yes.

5 Q. Now, go down to the total, box 6 --

6 A. Yes.

7 Q. -- and that shows that you say that the total Albion  
8 lost margin in 4(a) is the best part of 1.2 million; you  
9 see that?

10 A. I do.

11 Q. Now, something rather magical has happened, Dr Bryan,  
12 because in the first scenario I showed you, scenario 4,  
13 we saw that your lost margin, the total amount you were  
14 claiming -- if you flick back to page 3340 -- was  
15 £303,000. Do you see that?

16 A. Yes.

17 Q. Suddenly, nothing else has changed apart from that you  
18 have now applied the contractual arrangements which  
19 determine, between yourselves and Shotton, how you share  
20 the benefits --

21 A. Yes.

22 Q. -- between you, and suddenly we discover that your loss  
23 has shot up by a factor of 4. You have now actually  
24 lost more as a result of applying a benefit share  
25 between you and Shotton, which is supposed to distribute

1 benefits between the two of you, than you had when we  
2 calculated what the total loss to both of you was in  
3 scenario 4. So that must be wrong, mustn't it?

4 A. Not at all. That is why I say that 4(a) is the correct  
5 counterfactual, the one that most accurately reflects  
6 what the real world would have been, absent abusive  
7 conduct. In the real world what would have driven the  
8 relationship between us and Shotton with regard to  
9 pricing would have been the market conditions, and the  
10 market conditions are represented very clearly by  
11 Dwr Cymru's published tariffs, the only alternative  
12 supplier for Shotton Paper, and that is why  
13 methodology 4 is not an accurate counterfactual because  
14 it shows a price point which is a constrained price  
15 point in the factual world, a price point that's  
16 constrained by the actions of the Tribunal itself.

17 THE CHAIRMAN: And that price point you are talking about  
18 there is the price that Shotton paid you for the water?

19 A. No, in effect it's the price that -- in scenario 4 on  
20 page 3340, it's the price we paid for the water to  
21 Dwr Cymru, net of the interim measures, so it takes  
22 account of the fact of the interim measures, the  
23 difference between that price and the, what we assume in  
24 the counterfactual to have been the common carriage  
25 terms, both the access price and the bulk supply price.

1 So it is, in my understanding -- I have to say my  
2 understanding has improved considerably since the  
3 2 Travel judgment and there have been various papers,  
4 particularly a useful one from Oxera which improved my  
5 understanding of counterfactual arguments considerably,  
6 rather late I'm afraid. So there is no question in my  
7 mind that in table 4 the assumption that we would have  
8 continued in effect to be in a position where we were  
9 buying -- where the benefit, the margin, was one that  
10 was set by a decision of the Tribunal.

11 That I don't believe has any place in the true  
12 counterfactual. The only consideration I think that  
13 does have a place in the true counterfactual were the  
14 real world factual conditions of Dwr Cymru's published  
15 tariff, the tariff we would have to beat, and the method  
16 by which we calculate the benefit, the margin, is the  
17 buying price, our input prices, by a number of  
18 scenarios, adjusted or unadjusted as we have set them  
19 out, and then the benefit share agreement with  
20 Shotton Paper, which is, I think, very clearly set out  
21 in my methodology.

22 MR PICKFORD: Okay. Can I just pick up a couple of points  
23 in relation to that. The first one: is it my  
24 understanding now that you are resiling from the  
25 position that you previously advanced, which was that

1 option 1, not with the (a) but option 1, was your  
2 primary case, and that that went down to 4(a), as your  
3 last alternative; are you now saying that the (a)  
4 alternatives are your primary case?

5 A. No, I am saying that my growing understanding of what  
6 constitutes the correct counterfactual points to the (a)  
7 methodologies rather than the first methodologies that  
8 I produced.

9 Q. Okay. Now, we have agreed that the only difference  
10 between scenario 4 and scenario 4(a) is the relationship  
11 between you and Shotton; all of the other inputs in  
12 terms of prices from Dwr Cymru, et cetera, stay the  
13 same?

14 A. Well, let me be quite clear on that. The input  
15 assumptions remain the same. The costs to Albion remain  
16 the same. The share agreement with United Utilities  
17 remains the same. But of course the two things, or the  
18 thing that really affects the calculation is the fact  
19 that we are now looking at the real world tariff that we  
20 have to beat, namely Dwr Cymru's tariff.

21 Q. The only thing that's changed between the two is the  
22 relationship between you and Shotton?

23 A. No, as I have just said, the driving force and the  
24 reason why the benefit claimed under 4(a) is so much  
25 larger than the benefit under 4 --

- 1 Q. Is because your price goes up?
- 2 A. -- is that in the real world Dwr Cymru's tariff has  
3 gone up from 26p to 36 or 35p, and that has driven the  
4 benefit share mechanism that has indeed led to  
5 an increase in our tariff to Shotton Paper.
- 6 Q. Right, so in scenario 4(a) the tariff goes up with  
7 Shotton Paper relative to scenario 4?
- 8 A. Scenario 4 has no implicit reference whatsoever to the  
9 tariff to Shotton Paper, and that is one of its  
10 weaknesses.
- 11 Q. There is an implicit price to Shotton Paper in  
12 scenario 4, isn't there?
- 13 A. Well, there is an implicit price which says we don't  
14 get -- yes, in the calculation of the quantum of losses,  
15 yes, one can derive an implicit price which is,  
16 I suppose, in that sense, the bulk supply price.
- 17 Q. So what you are saying is that in going to  
18 scenario 4(a), applying the benefit share, and changing  
19 the relationship between you and Shotton, your price to  
20 Shotton has gone up?
- 21 A. Yes, indeed.
- 22 Q. So that's where all of this, all these very large sums  
23 of money, nearly 8 or £900,000 are coming from, they are  
24 coming from Shotton?
- 25 A. Well, ultimately as a water company selling water to our

1 customer, the only source of income we have is that  
2 customer. The profits we make is not solely dependent  
3 on the income received, it's the difference between our  
4 income and our outgoings.

5 Q. So when you calculate what you say would have happened  
6 in the counterfactual, applying the benefit share,  
7 Shotton's price goes right up?

8 A. It depends which counterfactual -- sorry, it depends  
9 which iteration you choose. You have picked the worst  
10 case, and I understand why you have done so --

11 Q. On this scenario.

12 A. On this scenario.

13 Q. Do you agree on this scenario?

14 A. I agree on this scenario that Shotton Paper's tariffs  
15 would go up. I think that's inevitable over time; you  
16 would expect that. But what I would say that (a) they  
17 go up less fast than they would in a non-competitive  
18 market, and under any other scenario, they go down  
19 fairly dramatically and remain at a significant discount  
20 to Dwr Cymru's published tariffs.

21 Q. I showed you yesterday a statement that you made to  
22 Mr Bronnert at Shotton about the benefit share, and you  
23 agreed with it. What you said then was:

24 "As soon as we get a new definitive and fair price  
25 for the water this will be reflected in a reduction in

1           your tariff to reflect the benefit sharing agreement  
2           between us --"

3       A.   Yes.

4       Q.   "-- 70/30 in your favour."

5           And you said that that was correct?

6       A.   I did.

7       Q.   And you are now telling us that the operation of the  
8           benefit share increases Shotton's price?

9       A.   We are looking over a period of time, as you are well  
10           aware. I can't remember what time, what date that  
11           letter, that communication took place, but I think under  
12           most of the scenarios there would indeed have been  
13           a reduction in the price that Shotton paid.

14      Q.   Now, there was a comment that you made yesterday about  
15           how you had in fact calculated the implicit price to  
16           Shotton but it wasn't on the spreadsheet that we can  
17           see. You remember that?

18      A.   That's right, it was on the spreadsheet but it was --  
19           and I apologise for this -- the column to the right of  
20           the ones that you have got, and I think I must have  
21           concluded that to make the print still smaller by trying  
22           to squeeze it on, when it didn't form any part of this  
23           calculation, was unnecessary, particularly as it is  
24           visible on the Corus sheets.

25      Q.   And do you recall, was that implicit price to Shotton,



1 was that the same as the price, as Dwr Cymru's retail  
2 price, higher than Dwr Cymru's retail price or lower  
3 than Dwr Cymru's retail price?

4 A. If there was adequate gross margin to allow for  
5 a reduction, then it would be lower than Dwr Cymru's  
6 retail price. If there was inadequate gross margin to  
7 allow for a reduction, then it would track Dwr Cymru's  
8 price.

9 Q. And in scenario 4(a), do you recall what it did? I can  
10 hand it up, actually, so it's not a memory test.

11 A. I believe I can, but I would be grateful for  
12 confirmation. I believe that in scenario 4(a) the  
13 benefit in terms of tariff reduction only became viable  
14 towards the very end of that -- of the period of the  
15 claim.

16 Q. (Handed). So this is exactly the same spreadsheet, but  
17 we have printed off that extra column for you, which you  
18 hadn't printed off and we have put it on A3 so we can  
19 all read it.

20 A. Thank you. That's very helpful.

21 Q. We can see the extra column "Albion's effective tariff".

22 A. Yes.

23 Q. And we can compare that to the DC published non-potable  
24 tariff in column C.

25 A. We can.

1 Q. And we see in the first year, the first time period at  
2 least, Shotton is now doing much worse in your world  
3 than it would be doing if it was on Dwr Cymru's tariff?

4 A. That's right. Those are the errors that you pointed me  
5 to yesterday. If you remember, Madam Chairman,  
6 Mr Pickford said that there appeared to be errors in my  
7 tariff calculation, and the first three figures in that  
8 extra column that you can now see are erroneous. The  
9 reason for the error, and it's entirely my fault and  
10 I do apologise, is that the way I have calculated the  
11 tariff is pretty straightforward, and as Dwr Cymru have  
12 clearly looked into the spreadsheet they would have seen  
13 it. I have taken effectively our input prices, which is  
14 column F, and I've added to the input price the Albion  
15 benefit in column K divided by the volume to make sure  
16 that we get the right price.

17 Now, in doing so, on those first three time periods,  
18 I have erroneously included the UU benefit in the  
19 calculation of the tariff, and it has no place there.

20 Making a correction for that mistake would bring  
21 those first three figures in the last column, the  
22 column T to, I believe, match the DC published  
23 non-potable tariff.

24 Q. So we see for pretty well the whole period thereafter,  
25 it then tracks the DC tariff?

1 A. Indeed. In that iteration of the counterfactual, where  
2 the costs are escalating, as they are, from a high  
3 starting point with relatively high indexation, it does  
4 take us until the end of the period of the claim before  
5 there are tariff benefits to Shotton Paper.

6 Q. So this is pretty extraordinary, isn't it, because what  
7 happens is in this counterfactual scenario that you have  
8 calculated in 4(a), as compared to the real world, you  
9 are doing a lot better. You say you have lost out on  
10 £1.2 million?

11 A. Yes.

12 Q. Shotton, however, is doing a lot worse than it did in  
13 the real world, because in the real world it never paid  
14 Dwr Cymru's retail tariff, did it, it paid a price that  
15 was pegged, as you say, by the Tribunal?

16 A. No, that's not true at all.

17 Q. Sorry, your price was pegged by the Tribunal, but it  
18 paid a price of around 26p and then it moved up  
19 gradually?

20 A. It paid the effective Dwr Cymru retail tariff until we  
21 came to the Tribunal and received interim measures,  
22 because the only effective DC tariff was the special  
23 agreement, the price that they had offered to  
24 Shotton Paper in competition with Albion. So de facto,  
25 yes, Shotton Paper was on the same price and we were

- 1 suffering a margin squeeze of no income whatsoever.
- 2 Q. Thereafter for the majority of the period of your claim
- 3 Shotton Paper was on a tariff from you that was
- 4 considerably lower than the Dwr Cymru retail tariff,
- 5 wasn't it?
- 6 A. It was indeed, it was a protective effect of the fact
- 7 that we brought action to the Tribunal which enabled us
- 8 to maintain Shotton Paper's tariff at a lower level than
- 9 the escalating Dwr Cymru tariff.
- 10 Q. You are saying, in what you say to be the most realistic
- 11 counterfactual world, that what would have happened if
- 12 there hadn't been the abuse is Shotton Paper would have
- 13 paid more than it did in the real world. So
- 14 Shotton Paper loses out compared to what actually
- 15 happened in the real world and you gain to a benefit of
- 16 1.2 million. That makes no sense, does it?
- 17 A. Your use of the term "most realistic" I take issue with,
- 18 because --
- 19 Q. Those were your words, Dr Bryan, you said that 4(a) --
- 20 A. The methodology, Mr Pickford, is what I consider to be
- 21 most closely reflective of the counterfactual. Within
- 22 that methodology, I have tried to assist the Tribunal by
- 23 providing a range of possible iterations that cover
- 24 what, in my mind, are the lowest sensible realistic bulk
- 25 supply price, the highest likely bulk supply price, and

1 a figure for common carriage terms from Dwr Cymru which  
2 reflects the Tribunal's findings, not necessarily what  
3 Dwr Cymru would itself have come up with had they  
4 behaved properly at the time. That is -- those are the  
5 ranges.

6 Now, what you are taking me to is the extreme of  
7 those ranges, and you are saying: in the extreme,  
8 Shotton Paper doesn't fare very well, and I agree with  
9 you, it doesn't. But I don't believe that the extreme  
10 is anything other than the extreme. I think that  
11 particularly given Dwr Cymru's settled position now,  
12 that it would retain entitlement to the 36 megalitres  
13 from Heronbridge, then at the very least I ought to go  
14 back and refine this to reflect not an assumption of  
15 a purchase price of 9p but, at the very least,  
16 a starting point which is 9p minus the additional  
17 revenue that UU will receive from your intention to  
18 maintain the entitlement.

19 Q. So you are agreeing with me that under the assumptions  
20 that feed into scenarios 4 and 4(a), what it implies  
21 about what happened to Shotton is wholly unrealistic?

22 A. I am trying to assist the Tribunal by providing a range.

23 Q. Okay, I think we are there on that, thank you. If we  
24 can move, please, to folder 4, tab 115, and again it's  
25 sensible to retain folder 10 near us. So we are looking

1 here at the UU benefit share. If we could please go to  
2 clause 9 of the heads of agreement on page 822. We  
3 visited it yesterday.

4 A. Yes, we did.

5 Q. We can be pretty quick here.

6 A. Yes.

7 Q. It's just to remind everyone what the parameters are  
8 before we then go and look at how you dealt with it in  
9 your spreadsheets.

10 A. Yes.

11 Q. So 9.2 deals with the price to be paid:

12 "In respect of water supplied by NWW to Albion under  
13 this agreement, Albion will pay to NWW (monthly?)  
14 charges calculated by multiplying the volume of water  
15 supplied to Albion in that period ... by the unit price  
16 to be agreed by the parties ..."

17 Then under 9.1 you effectively get a proportion of  
18 that price back again for the next 18 months, don't you?

19 A. Yes.

20 Q. It's kind of like a cashback?

21 A. Yes, I suppose it is.

22 Q. So the benefit share with United Utilities that we see  
23 reflected in 9.1 is equivalent to a reduction in price  
24 for the period over which it applies?

25 A. Yes. It could be so described.

- 1 Q. Now if we could go, please, back to folder 10, and look  
2 at 3340. So this is scenario 4 again.
- 3 A. Yes.
- 4 Q. We see how you have calculated the United Utilities  
5 benefit share in this scenario.
- 6 A. Yes.
- 7 Q. And you get to a figure at the bottom "Total benefit  
8 share, 278,857".
- 9 A. Yes.
- 10 Q. If you then, please, move on to scenario 4(a), a few  
11 pages on, on 3344. Are you with me, Dr Bryan?
- 12 A. I am, yes.
- 13 Q. We see the UU benefit reappearing, it's letter U in  
14 box 4, and again we see down the bottom, as we would  
15 expect, the same figure, 278,857?
- 16 A. We do.
- 17 Q. Now, when you are then working out the Albion benefit,  
18 which is the next column along; you see that?
- 19 A. I do.
- 20 Q. That's the one you have entitled K.
- 21 A. Yes.
- 22 Q. You give yourself 100 per cent of that UU benefit share,  
23 don't you?
- 24 A. Yes.
- 25 Q. So none of it goes to Shotton?

- 1 A. No.
- 2 Q. Did you tell Shotton Paper about the benefit share deal  
3 that you had in principle with United Utilities?
- 4 A. I don't think we did.
- 5 Q. Were you planning to tell them?
- 6 A. Everything we do with Shotton is open book, so it  
7 follows that we would have shown them and they would  
8 have seen it.
- 9 Q. So what you are setting out here, then, on that basis,  
10 is the following: you say as regards your relationship  
11 with Shotton "all of our costs", that is Albion's costs,  
12 "have to come out of any benefit that there is between  
13 the Dwr Cymru retail price and the buying price that we  
14 have calculated in this scenario, because this is  
15 scenario 4(a), as 9p per cubic metre"; that's how the  
16 beginning of the -- oh, sorry.
- 17 A. Are you challenging the legitimacy of Albion retaining  
18 100 per cent of that benefit? Is that the point you are  
19 making?
- 20 Q. I am examining with you how realistic it is.
- 21 A. Realistic it is?
- 22 Q. How realistic, yes.
- 23 A. That we would keep 100 per cent of it?
- 24 Q. Yes. And I am taking you through some questions point  
25 by point, I'm not asking you how realistic is it at the



1 moment, that's the wider topic. The question I've just  
2 asked you is, insofar as your relationship with Shotton  
3 is concerned, you say to them, "Under the operation of  
4 the benefit share, clause 7.4, the first thing that  
5 happens in the benefit share is we have to get all our  
6 costs and if there is anything left over after that, we  
7 will share that out 70/30." That's how that share  
8 works, isn't it?

9 A. Yes.

10 Q. So in this scenario, you are buying in, in terms of the  
11 price that you are effectively announcing to Shotton, at  
12 9p per cubic metre, that's the price that feeds into  
13 whether there is any benefit left to then share out with  
14 Shotton?

15 A. Yes.

16 Q. Now, also, in addition to that, there is this other  
17 substantial pot of money from United Utilities, which is  
18 money that could actually meet your costs, but from  
19 Shotton Paper's point of view you are saying: forget  
20 about that money, pretend that doesn't exist?

21 A. It's a -- by its nature it is a payment from United  
22 Utilities to Albion in recognition of the fact that we  
23 have unlocked an extra very substantial revenue stream,  
24 and indeed if you look at the -- just trying to see  
25 whether I have actually calculated it on this. (Pause).

1 No, I am sorry, I am distracting you.

2 Q. That's fine. You agreed with me a few questions ago  
3 that the very same financial arrangements between  
4 yourself and United Utilities, the cashback, they could  
5 have been expressed as a reduction in the price charged  
6 by United Utilities to you?

7 A. Yes, I think that you did your job very well there,  
8 Mr Pickford, and I think that that was a tactical  
9 mistake on my part.

10 Let's look at the facts of the situation there.  
11 These were time limited payments. They would indeed  
12 have benefitted Albion. The question is whether they  
13 should benefit Shotton Paper. They were in effect  
14 one-off payments that reflected a very significant  
15 addition to the revenue stream that United Utilities  
16 would achieve, and you can actually see that on  
17 page 3340, because I've done the calculation, and you  
18 will see under column I the benefits to United  
19 Utilities, the gross benefits to United Utilities, over  
20 that period of some £3 million, of which Albion is paid  
21 £278,000, something under 10 per cent.

22 So in terms of the benefit --

23 THE CHAIRMAN: That column I, is that the benefit of 9p over  
24 3p?

25 A. Indeed, it is, it is the benefit of 9p over the

1 prevailing DC price --

2 THE CHAIRMAN: Heronbridge.

3 A. Yes, the Heronbridge price in column H.

4 So you can see why United Utilities were so keen to  
5 engineer an increase in price, because it's a very  
6 substantial sum of money. Albion's share of that  
7 benefit is very short lived and of very small amount,  
8 but it is true that the intention at the time and as  
9 expressed in this model is that we would keep the whole  
10 of that benefit.

11 MR PICKFORD: Okay, so let's look at how it plays out --

12 MR LANDERS: Sorry, could I interrupt you and check that  
13 number again. That benefit is 9 minus the 3, so it  
14 doesn't include the additional revenue that you said was  
15 going to Dwr Cymru because they would have to keep on  
16 paying for all of the --

17 A. No, it does not.

18 MR LANDERS: So it assumes that Dwr Cymru uses that water --

19 A. No, it assumes that -- the counterfactual assumption  
20 that runs through all of this is that Dwr Cymru would  
21 not have paid extra money for water that it didn't and  
22 couldn't use, and therefore that there would be --

23 MR LANDERS: That's fine.

24 A. -- a reduction.

25 MR PICKFORD: So if we could go to page 3344 again in

1 folder 10.

2 A. Yes.

3 Q. We are back in scenario 4(a).

4 A. Yes.

5 Q. We are looking at the top line, so we see that period,  
6 the gross benefit, which is your column H, box 3, is  
7 said to be 13,630. Do you see that?

8 A. Yes, I do, yes.

9 Q. Then you look at your costs and you see that your costs  
10 are 18,273?

11 A. Yes.

12 THE CHAIRMAN: I am sorry, I've lost where we are. What  
13 page are we on?

14 MR PICKFORD: I beg your pardon, Madam. We are on  
15 page 3344.

16 THE CHAIRMAN: Yes.

17 MR PICKFORD: So we start off in box 3 and we look at  
18 column H, which is the total gross benefit.

19 THE CHAIRMAN: Yes.

20 MR PICKFORD: We find there a figure of 13,813.

21 THE CHAIRMAN: Yes.

22 MR PICKFORD: We then go to the next column along, column I,  
23 and we see Albion's costs recorded there as 18,273.

24 THE CHAIRMAN: Yes.

25 MR PICKFORD: Then you go along to net benefit, which is J,

1 and you conclude that because your costs are greater  
2 than the gross benefit that's available over that  
3 period, that there is zero net benefit. Do you see  
4 that, Dr Bryan?

5 A. I do.

6 Q. So what you are effectively saying to Shotton at this  
7 point is: very sorry, folks, nothing to share at this  
8 moment, we have unrecovered costs, we actually made  
9 a loss on the supply, so no benefit share for you?

10 A. That's correct.

11 Q. Do you see that?

12 A. Well, that is not what -- you are putting words into my  
13 mouth. I would not have said to Shotton Paper "We made  
14 a loss on the supply". In an open book environment we  
15 would have said to Shotton Paper "These were our input  
16 costs, we have received a benefit from United Utilities  
17 for this reason, but there is no net benefit to pass on  
18 in the way of tariff reduction", under this extreme  
19 scenario.

20 Q. There is no net benefit because you are not counting the  
21 United Utilities benefit at all, are you?

22 A. No, not as a benefit that accrues to Shotton Paper.

23 Q. No, so then we see in the next column along, U, that you  
24 in fact are getting in this period £67,000; do you see  
25 that?

1 A. Yes, I do, and that too, in the light of Dwr Cymru's  
2 submissions is overstated by £25,000, because 25,000 of  
3 that assumed benefit share is contingent on Dwr Cymru  
4 modifying its bulk supply agreement. And of course it  
5 is refusing to do so in the factual and the  
6 counterfactual. So that figure is overstated by  
7 £25,000, but of course the --

8 THE CHAIRMAN: But it includes the initial £25,000?

9 A. It includes the initial 25,000, that wasn't contingent  
10 on any change in the Heronbridge Agreement. But of  
11 course it understates or it doesn't recognise any  
12 benefit that would accrue through the continuation of  
13 Dwr Cymru to pay charges under that Heronbridge  
14 Agreement.

15 MR PICKFORD: So I've suggested to you that that's not very  
16 realistic, is it, in terms of your relationship with  
17 Shotton, that you should get a sizeable benefit over  
18 that period and Shotton sees nothing, because on this  
19 open book arrangement you have said: you only look at  
20 that bit of the book, you don't look at this bit of the  
21 book?

22 A. I disagree with you entirely, Mr Pickford, because  
23 Shotton's decision to go with Albion and stick with  
24 Albion was clearly not based simply on savings against  
25 market rate. They went with Albion in 1999, knowing

1 that there would be no financial benefit, because of the  
2 margin squeeze. They stuck with Albion not because of  
3 significant price benefits, because those didn't start  
4 to emerge until 2004. Why they have stuck with us, and  
5 it's something which Dwr Cymru has always struggled  
6 with, is because of the added value services that we  
7 provide as part of that partnership, services that have  
8 enabled them to move from whole fibre production, ie  
9 tree trunks in and paper out, through to 50/50 trees and  
10 recycle, and then to 100 per cent recycled, and  
11 throughout all this piece, with huge changes in the  
12 process, that partnership has enabled them to improve  
13 efficiency, water efficiency year on year. Their  
14 savings in water efficiency far outweigh any potential  
15 tariff improvement that we might have gained over that  
16 period. So you have to see the whole picture.

17 Q. Let's continue along this line. We have seen so far in  
18 this line that the only benefit has come from the UU  
19 benefit share, because in fact in terms of the gross  
20 margin there was none; you see that?

21 A. Which column are you pointing me to, which figures?

22 Q. Well, we saw the net benefit, J, was zero.

23 A. Yes.

24 Q. Then you have your UU benefit, and that's a positive  
25 number?

- 1 A. Yes.
- 2 Q. So the only benefit that's actually arisen in this  
3 period comes from the fact that there is a UU benefit  
4 share?
- 5 A. You are confusing, I believe, gross benefit with net  
6 benefit. The benefit to Albion out of the gross margins  
7 is that it has been able, as is apparent from columns I,  
8 X and XT, that we have been able to recover some of our  
9 costs during that period. So that is clearly a benefit  
10 from the margin squeeze situation that pertained  
11 beforehand. But the net benefit, you are absolutely  
12 right, for the purposes of the Shotton Paper benefit  
13 sharing agreement, is zero.
- 14 Q. Okay, so that's your column K. The benefit that you  
15 would make here is driven by your UU benefit, which is  
16 £67,000, as compared to then your total Albion benefit  
17 which you say is 81,182 because you have managed to  
18 recover some of your costs?
- 19 A. That's correct.
- 20 Q. So we agree that the majority of the benefit in this  
21 period is from UU?
- 22 A. That's correct.
- 23 Q. Then we go into box 7, and notwithstanding that you say  
24 Shotton isn't entitled to any of the UU benefit, you  
25 scale up your award to provide 30 per cent to Shotton



1           and we suddenly see that 81,000, which is what you were  
2           saying was your loss, has become £175,000?

3           A. Yes.

4           Q. That's what you are claiming, notwithstanding that none  
5           of that UU benefit would actually fall to be shared with  
6           Shotton?

7           A. If Shotton had not been -- sorry, if Dwr Cymru had not  
8           been abusive, then that column wouldn't exist, because  
9           we would not be in a position where we are having to go  
10          to the CAT yet again to claim damages. It is the fact  
11          that this claim was anticipated within the agreements  
12          that we have with Shotton Paper that makes us liable to  
13          pay 30 per cent of those benefits to Shotton Paper.

14         THE CHAIRMAN: So just so I am clear, is that column 7,  
15          then, the revised clause 7.3, rather than the original  
16          clause 7.3?

17          A. Yes, it was the subsequent revision to reflect the fact  
18          that anticipated challenge, a legal challenge, and then  
19          anticipated that there would be ultimately a claim for  
20          damages or some other form of restitution, and that  
21          under those circumstances any such claim for past  
22          overcharging, we would keep 70 per cent and Shotton  
23          would benefit from 30 per cent.

24         MR PICKFORD: Okay, let's look at that grossing up formula.

25          We are now on to box 7 and you say Shotton gets

1           30 per cent of any damages. So, as I understand it --

2       THE CHAIRMAN: I thought it was the other way round.

3       MR PICKFORD: It reversed in relation to damages.

4       A. Yes, Madam, in terms of the -- of ongoing tariff

5           structure, Shotton Paper would always get 70 per cent of

6           the net benefit.

7       THE CHAIRMAN: Yes, yes.

8       A. In terms of the specific circumstances in which we were

9           successful in recovering damages, then the ratio would

10          be reversed. But we would be under an obligation to pay

11          them 30 per cent of those damages.

12       THE CHAIRMAN: Yes, sorry, I had misremembered.

13       MR PICKFORD: So is what you are saying in column 7 -- this

14          appears to be what you are saying -- that in order to

15          leave you in the position that you would have been in,

16          without having to pay out this percentage to Shotton so

17          that you get your full damage, you have to gross up to

18          account for the fact you are going to give 30 per cent

19          of those damages away? That's what you are saying,

20          isn't it, in essence?

21       A. Yes, it's a formula that recognises that we should not

22          be penalised as a consequence of Dwr Cymru's illegal

23          behaviour, that in the counterfactual world we should

24          get to keep the totality of the losses that ultimately

25          the Tribunal decides is justified.

1 Q. That you suffered. Now, there is a legal argument about  
2 that, about whether or not that's justified, and I am  
3 not going to engage in that with you.

4 A. Thank you.

5 Q. I want to make sure we are clear about your  
6 calculations. If we could look at this top line again,  
7 we have been looking at how your lost margin was 81,182;  
8 do you see that?

9 A. Yes.

10 Q. Then grossed up in order to leave you, you say, where  
11 you should have been, ie with 81,182. Taking account of  
12 the fact you have to give 30 per cent of your award  
13 away, you say you need £175,000. You see that?

14 A. I do see that. I do see that.

15 Q. Now --

16 A. I think there may be an error there.

17 Q. There is an error there.

18 A. Yes, I think I may be including the UU benefit in that  
19 calculation. So that is almost certainly the case from  
20 looking at the figures, in which case I apologise to  
21 the Tribunal, I will make the corrections and hand them  
22 up on Monday.

23 Q. There are potentially a number of errors there,  
24 Dr Bryan, I am not sure that we would accept necessarily  
25 that you can merely correct it and that we would accept

- 1           that whatever you have done then is corrected. We will  
2           have to --
- 3    A. Okay.
- 4    Q. -- cross that bridge when we come to it.
- 5    A. Right.
- 6    Q. You would agree with me that this calculation,  
7           therefore, in column 7 is just wrong?
- 8    A. It would appear that the first three figures in that  
9           column are wrong, because they include the assumption  
10           that we will pay 30 per cent of the UU benefit to  
11           Shotton Paper.
- 12   Q. You would agree with me that in fact the only thing you  
13           need to do, if you were right about grossing up -- and  
14           obviously we say you are not, but we are putting that to  
15           one side at the moment -- the only thing to do if you  
16           were right is simply to divide by 0.7 in order to then  
17           allow yourself to give away 30 per cent to Shotton and  
18           be back where you were?
- 19   THE CHAIRMAN: Divide what by --
- 20   MR PICKFORD: Divide the Albion's loss of margin figure.
- 21   THE CHAIRMAN: So divide M?
- 22   MR PICKFORD: Divide M by 0.7, and then if you give away  
23           30 per cent of that, you are back to where you were.
- 24   A. To be perfectly honest, Mr Pickford, I can't remember  
25           why I have used such a complicated formula when what you

1 are suggesting to me does seem to make sense.

2 Q. Thank you.

3 A. But I would need to study that in more depth.

4 Q. We are just about there. We have seen that you get to  
5 keep all the benefits of the UU agreement, you say.

6 I would now like to look at what happens to losses in  
7 terms of your arrangements with Shotton. If we could go  
8 down to the bottom of this page to look at the total  
9 gross benefit in column H. You see that's about  
10 1.8 million?

11 A. Yes, I do.

12 Q. And we look at your total costs at 1.847 million?

13 A. Yes.

14 Q. So we see total costs exceed total gross margin, so we  
15 then go along to the net benefit column, that's J, and  
16 we discover that there is in fact a net loss, because it  
17 has a negative sign in front of it, do you see that?

18 A. Yes.

19 Q. Now, at this point we are obviously ignoring the benefit  
20 from United Utilities, and then we go to look at your  
21 benefit, then, in K?

22 A. Yes.

23 Q. In your formula there, again something rather magical  
24 happens, because your formula you see at the top,  
25  $K \text{ equals } I \text{ plus } U \text{ plus } 0.3J$ . Do you see  $0.3J$ ?

1 A. Yes.

2 Q. You only have to absorb, according to this spreadsheet,  
3 0.3 of the net loss occurring; do you see that?

4 A. Yes, that's clearly --

5 Q. You agree with that?

6 A. Yes, I do, and that's clearly an error carried over from  
7 previous sheets when there was no negative net benefit.  
8 So I apologise, you have pointed out another mistake.

9 THE CHAIRMAN: Explain to me why that's a mistake, then? If  
10 you were going to it.

11 MR PICKFORD: I didn't feel I really needed to explain why  
12 it was a mistake, because it appeared to have been  
13 conceded to be wrong by the witness. But I am happy to  
14 continue through it.

15 THE CHAIRMAN: In a nutshell. No, no.

16 A. Madam, I think it's a formula that works for the other  
17 iterations because there are no negative values.

18 THE CHAIRMAN: Oh, I see.

19 A. And in this one there is a negative value, and I do not  
20 correct for it, for which I apologise.

21 MR PICKFORD: Finally, you said yesterday, towards the end  
22 of the day, when we were talking about how the benefit  
23 share would feed through in your relationship with  
24 Shotton Paper, you said that you were:  
25 "Answer: ... required by law, and certainly by the

1 Regulator, to produce tariffs at the beginning of each  
2 year and have them agreed by Ofwat, and so that is the  
3 process that we would undertake."

4 Do you recall that?

5 A. Yes.

6 Q. You also say that:

7 "Answer: ... the only mechanism that we have for  
8 recovering that benefit [and this was the benefit share  
9 point] as a licensed undertaker is through our tariff,  
10 and our tariff was in effect set by the Tribunal."

11 You recall that as well?

12 A. I do.

13 Q. Could you please go to the contract between yourself and  
14 Shotton Paper, which is at tab 20 of folder 2. Could  
15 you turn, please, to page 371. Do you see there  
16 clause 5 "Consideration and payment"?

17 A. Yes.

18 Q. You see 5.1:

19 "The customer shall pay the charges to Albion Water  
20 provided that such charges are no higher than the  
21 charges which would otherwise have been levied by  
22 Dwr Cymru pursuant to the DCC agreement."

23 Do you see that?

24 A. I do.

25 Q. If you go back to the beginning, first page of the

1 agreement, and you see a definition of "The charges",  
2 that means the charges payable by the customer to  
3 Albion Water for the supply of water in accordance with  
4 schedule 3; do you see that?

5 A. I do.

6 Q. If you go to look at schedule 3, that's at the end, the  
7 penultimate page --

8 A. Yes.

9 Q. -- schedule 3 makes no reference to, has no  
10 relationship with, clause 7.4 which deals with the  
11 benefit share; that's right, isn't it?

12 A. I think it is right, yes.

13 Q. So what you told the Tribunal yesterday about how the  
14 benefit share works is wrong?

15 A. No, I said that the mechanism by which the benefit share  
16 would be in practice delivered to Shotton Paper would be  
17 through the tariff.

18 Q. So your evidence at least is entirely inconsistent with  
19 this contract?

20 A. I don't believe it is. I think it reflects the  
21 practical manifestation of this contract in the real  
22 world.

23 MR PICKFORD: I have no further questions, thank you, Madam.

24 THE CHAIRMAN: The DCC agreement that's referred to there in  
25 clause 5.1, the prices under that, is that what we have



1           been referring to as the published DCC tariff?

2     MR PICKFORD: No, Madam, the DCC agreement is defined on the  
3           first page to mean the agreement between the customer  
4           and dictated 1 August 1997 for the provision of water  
5           services to the premises. So it's the prices that would  
6           have applied continuing to apply the terms in that  
7           agreement. That is not Dwr Cymru's retail tariff.

8     A. I think, on a point of clarification, Madam, there was  
9           no non-potable tariff at the time, and indeed no  
10          non-potable tariff existed until 2003.

11   (Pause)

12     MR PICKFORD: Madam, just for avoidance of doubt, that was  
13           the previous agreement that applied between Dwr Cymru  
14           and Shotton when there was a direct supply to Shotton.

15     THE CHAIRMAN: I am just trying to work out what is the  
16           price, the benchmark price, which is described in your  
17           table as the DC published non-potable tariff, as being  
18           the price against which the gross benefits are assessed  
19           under the benefit share.

20     MR PICKFORD: Yes, and that is not the same as this price,  
21           Madam.

22     THE CHAIRMAN: It's not the same as --

23     MR PICKFORD: Sorry, it's not the same as the price that  
24           would have prevailed under the contract to which you  
25           have been referring, the DCC agreement.

1 THE CHAIRMAN: Do you agree with that?

2 A. No, I don't. It is the price under the agreement  
3 initially, and until the -- until DC published tariffs  
4 that replaced, sought to replace such special agreement  
5 prices in 2003, and the first customer that Dwr Cymru  
6 attempted to move onto that tariff was Corus in 2004.

7 MR PICKFORD: For the majority of the period over which you  
8 claim damages, that's after the first three periods  
9 I think, by reference to Dwr Cymru's published tariff,  
10 which wasn't, prior to that point, in existence?

11 A. That's correct.

12 Q. That tariff is not the prices that would have been  
13 embodied in the DCC agreement as defined in this  
14 contract at tab 20 of bundle 2?

15 A. That is true.

16 MR PICKFORD: Thank you.

17 MR LANDERS: So what prices were embodied, higher or lower  
18 than the tariff?

19 A. The reality is that those -- that price reference point  
20 ceased to exist, and my reading of that agreement is  
21 that the purpose of that clause was to set an upper  
22 threshold for the tariff, for Albion's tariff vis-a-vis  
23 the competitive tariff from Dwr Cymru. That was its  
24 purpose. When this agreement was drafted, it was  
25 drafted very much in the terms of the preceding

1 agreement between Dwr Cymru and Shotton Paper, and  
2 because there was -- there were no published tariffs at  
3 that time for non-potable water, to safeguard  
4 Shotton Paper and to make sure that Albion didn't try to  
5 increase its prices, that clause was introduced.

6 THE CHAIRMAN: But when this agreement or when the DCC  
7 agreement expired, did you have a discussion with  
8 Shotton Paper to say: well, in order to be able to  
9 operate this benefit share, we need the benchmark price  
10 against which the savings can be assessed, so we will  
11 use the DC published non-potable tariff?

12 A. We didn't have that discussion at the time, because  
13 there was no such tariff until 2003, and the preceding  
14 agreement effectively fell away on 1 May 1999 when the  
15 inset became live. The clear understanding was that,  
16 whatever the prevailing Dwr Cymru price, be it in the  
17 form of a special agreement, ie up to 2003, or in the  
18 form of a published tariff, that in the real world would  
19 set the price beyond which Shotton Paper would  
20 understandably want to look for an alternative supplier.

21 THE CHAIRMAN: Thank you very much, Mr Pickford.

22 MR BEARD: Given the time, perhaps now is a sensible moment.

23 THE CHAIRMAN: Okay, we will we will take a short break and  
24 come back at 11.30.

25 (11.25 am)

1 (A short break)

2 (11.30 am)

3 Cross-examination by MR BEARD

4 MR BEARD: Dr Bryan, you have provided a lengthy witness  
5 statement, and Mr Pickford has questioned you on various  
6 matters that you refer to in it, and I am going to cover  
7 some more. Now there is quite a lot history in your  
8 statement, quite a lot of commentary on other people's  
9 documents and a fair amount of submissions, and I am  
10 going to try and keep my questions relatively limited.  
11 I want to first of all work out whether there is much  
12 common ground in relation to the lead-up to the FAP, so  
13 I am going to go through quite a few documents but  
14 relatively briefly, just sort of focusing on the  
15 chronology of what happened.

16 You are very familiar with the Competition Act and  
17 know that it came into force 1 March 2000, but prior to  
18 it coming into force, Ofwat sent out various letters to  
19 managing directors of water undertakers, what are called  
20 in the industry MDs, I believe. The first one I want to  
21 take you to, that you have had a brief look at,  
22 I believe, is in bundle 3, tab 31.

23 This document is dated 12 November 1999, so it's in  
24 anticipation of the coming into force of the Act. It's  
25 to do with the Competition Act, and I think Mr Sharpe

1 referred to this document in opening in the second  
2 paragraph on the first page, down at the bottom:

3 "The Competition Act is the catalyst to achieve more  
4 widespread use of common carriage ..."

5 It's referring to here, because the paper is all  
6 about the development of common carriage:

7 " This letter sets out how I envisage the  
8 development of a coherent common carriage framework, and  
9 provides guidance on what companies should do and by  
10 when and the principal elements they should address in  
11 deciding how to operate shared use of their networks,  
12 and sets out how I see the legal position."

13 So this is from Ian Byatt. If you turn over the  
14 page, it says:

15 "Each company should be ready by 1 March 2000 to  
16 respond positively and substantively to enquiries and  
17 requests to share the use of its infrastructure. It  
18 should have ready [so that's each company] a statement  
19 of principles which would govern this shared use."

20 So he is saying "We want statements of principles on  
21 common carriage from all the companies by 1 March";  
22 that's how you understand this, I think?

23 A. Yes.

24 Q. And Ofwat are conscious of the importance of the

1 Competition Act and are sending out a clear signal that  
2 they will use it where they feel common carriage is not  
3 being provided in line with Competition Act principles.

4 You agree with that?

5 A. I do.

6 Q. If we turn to the next tab, Ofwat had invited comments  
7 in that document, I think there is no issue about that.  
8 And then this was a document that probably wasn't sent  
9 to you, but it's a response from Dwr Cymru,  
10 Mike Brooker, dated 23 December 1999, and it's headed  
11 "Development of common carriage MD 154". You probably  
12 had a chance to read this in looking at the disclosure.

13 If you turn over the page, 417, Dr Brooker is making  
14 a complaint about the way in which MD 154 has been  
15 structured and the lack of definition of the type of  
16 competition that Dwr Cymru understands that Ofwat  
17 believes should be made possible, and it raises a number  
18 of issues that they think should be dealt with, and it  
19 says:

20 "When the above issues are resolved, it will then be  
21 possible to move to the practicalities of granting  
22 access and how that should be costed and charged.  
23 Therefore, it's been necessary to assume certain basic  
24 principles in order to comply with the timescale laid  
25 down in the Competition Act 1998. Appended to this

1 letter is our current list of assumed principles. It is  
2 essential that we receive as soon as possible Ofwat's  
3 position on each of these."

4 So he is taking issue with some points in MD 154 as  
5 the policy is developing. If you turn over the page to  
6 419, these are the assumed principles that Dwr Cymru is  
7 explaining to Ofwat it wants to proceed on the basis of,  
8 and the first one is:

9 "Entrants must be licensed and there must be no  
10 detriment to the level of service delivered to any  
11 customer."

12 If you work your way down to point 9:

13 "Average pricing remains the charging principle for  
14 all customers except large users, for which Ofwat has  
15 approved a large user tariff."

16 So one of the assumed principles that Dwr Cymru is  
17 putting forward is average pricing is the general  
18 charging principle that it thinks is the basis on which  
19 it should be proceeding, and that's what it's saying  
20 there, that's what this statement is saying --

21 A. Yes.

22 Q. -- do you agree with that?

23 A. Yes, I do.

24 Q. If we then move further on to tab 36, we come to the  
25 next MD, managing director, paper, "The managing

1 directors of water and sewerage companies and water only  
2 companies". Again it's about common carriage, dated  
3 28 January 2000. Introduction:

4 "MD 154 was issued on 12 November 1999, it sets out  
5 my views on the important issues which companies should  
6 address in developing common carriage."

7 And it talks about specific legislation, and  
8 licensing new entrants. Then if you turn over the page,  
9 point 5 "Way forward":

10 "Companies have told me they welcome competition.  
11 Many of them are working together to agree a common set  
12 of principles governing access to networks. We would  
13 welcome the opportunity to discuss these principles as  
14 they develop. The Competition Act will be in force in  
15 a matter of weeks. Companies have assured me that they  
16 will meet the 1 March deadline. Each company should  
17 continue to transform its statements of principles into  
18 an access code. Companies need to lead this work and  
19 ensure that their approach doesn't conflict with the  
20 prohibition on abuse of a dominant market position. I would like to  
21 be able to announce  
22 publicly on 1 March that all companies have their  
23 statements of principles in place and are progressing  
24 the development of access codes."

25 So the discussion about how the Competition Act is  
26 going to work is continuing, Ofwat are clearly concerned



1           about these matters, and what they are saying here is:  
2           two stage process, develop your statement of principles  
3           by 1 March and develop the access codes on the basis of  
4           those statements of principles; that's right, isn't it?

5           A. Yes, it does, it is.

6           Q. Now, the next tab, I think, is probably tab 37, "Common  
7           carriage application":

8                     "Thank you for the letter of 15 December."

9                     This is an Ofwat letter. It's in the wrong place,  
10           isn't it? This isn't rightly dated, is it, Dr Bryan?

11           A. No, I think this is the -- this is a letter that's  
12           actually 2001, and the author forgot the year change.

13           Q. That's fine. Just so that the Tribunal is aware that  
14           this document, there wasn't any prior common carriage  
15           application.

16           MR SHARPE: Madam, we have seen this document before in my  
17           opening submissions, but my friend can't ask Dr Bryan if  
18           it's the right document between Ofwat and Welsh Water,  
19           his own client. How can he be expected to know that?

20           THE CHAIRMAN: I think he is putting to him that it looks as  
21           if actually the date is wrong and does he have any  
22           reason to ...

23           MR BEARD: It is nothing more than that, it is --

24           MR SHARPE: He is here to give evidence about his case, not  
25           the pagination and the dating of documents. Can I just

1 put --

2 THE CHAIRMAN: It is helpful for us to know to know if it's  
3 common ground between the parties that this letter is  
4 actually dated 29 January 2001 rather than 2000.

5 MR SHARPE: As I had already declared it to be so on Monday.  
6 I am just, as it were, laying a marker for future  
7 questions.

8 MR BEARD: If you move on to tab 39, this was the first  
9 formal guidance on the Competition Act 1998 that was  
10 published by Ofwat; that's correct, isn't it?

11 A. Yes. I mean, Ofwat and the OFT, and I don't know who  
12 contributed most.

13 Q. No. It's definitely in the format of OFT documents that  
14 were published around that time?

15 A. Yes, very much so, it's part of a series.

16 Q. It's part of a series undoubtedly. If we turn through  
17 this, we will see various considerations of the basic  
18 legislative provisions, but if I could just take you  
19 through to page 494, what this document does -- I think  
20 you would agree -- is set out what Ofwat and OFT's,  
21 possibly, considerations were about issues relating to  
22 the Competition Act in the water industry, and that's --

23 A. That's correct. The operation of the concurrency  
24 arrangements.

25 Q. Yes, well, amongst other things. If you look at 4.2,

1 4.3, it's headed "Issues in pricing of water and  
2 sewerage services".

3 A. Yes.

4 Q. I don't think any of this is contentious.

5 Just in 4.3 it's perhaps worth noting, second  
6 sentence:

7 "Undertakers have been able to offer tariffs for  
8 their large users without reducing overall revenues, and  
9 have therefore been able to compete on price in a manner  
10 that could be predatory or exclusionary, without  
11 significant risk to their revenue."

12 So what Ofwat is saying here is that there is  
13 a danger that undertakers can drop their prices if they  
14 focus on particular levels of costs, and by doing so  
15 exclude potential new competitors; that's right, isn't  
16 it?

17 A. Yes, I think they are saying they can cross-subsidise  
18 those who are in a competitive area of the market with  
19 those who are not.

20 Q. Let's see when what it says at the beginning of that  
21 paragraph:

22 "The tariff basket mechanism permits undertakers to  
23 rebalance tariffs between categories of customers, for  
24 example between customers on a meter and those charged  
25 by other means such as rateable values."

1           So what it's saying is that if you drop one price,  
2           you can raise others, and maintain the same overall  
3           level of revenue?

4           A. That's correct.

5           Q. It's not talking about the basis on which you would be  
6           dropping prices, you could drop prices because the  
7           prices in relation to a particular service were related,  
8           if you took a narrow view of costs, to low costs, and if  
9           you drop those prices that would have a concomitant --

10          A. Yes.

11          Q. Thank you.

12                 So if we just keep going through, 496, there is  
13                 a brief consideration, 4.14, on excessive prices. It's  
14                 very brief indeed and doesn't give a lot of guidance on  
15                 how one might assess technicalities of these sorts of  
16                 issues. There is a larger section you see over the  
17                 page, 4.16 through to 4.24 on common carriage. So it's  
18                 pretty clear that OFT and Ofwat were concerned about  
19                 these issues and were focusing on them. You are welcome  
20                 to read through those sections, but you don't suggest  
21                 that there is any mention of an appropriate pricing  
22                 methodology in relation to these sections on common  
23                 carriage here?

24          A. No.

25          Q. No. So then we come on to the next tab, tab 40. This

1 was a managing directors' report that I think you wrote  
2 for the February 2000 board.

3 A. Yes.

4 Q. Just at the bottom of the page, 514:

5 "Regulatory attitudes. The previously relaxed and  
6 informal relationship with Ofwat has become more rigid  
7 of late with Ofwat resorting to letters rather than  
8 phone calls. This is part of a reflection of their  
9 greater exposure under a Competition Act regime with the  
10 need to be seen as completely impartial. We believe of  
11 greater concern and significance is Ofwat's awareness  
12 that Enviro-Logic are likely to use the new legislation  
13 in an effort to break competition log jams and challenge  
14 anticompetitive behaviour. Any such challenge risks  
15 exposing Ofwat's past inconsistencies and we believe  
16 that Ofwat's recent responses are in large measure  
17 defensive."

18 So you were concerned here that Ofwat might be a bit  
19 defensive about the way it would apply the  
20 Competition Act, notwithstanding the documents we have  
21 already seen that Ofwat was effectively going on to the  
22 front foot in relation to the Competition Act and was  
23 very keen to ensure that it was properly applied and  
24 developed?

25 A. That is true.

1 Q. I don't think we have the letters you refer to in the  
2 bundle, but I am not sure anything turns on that. If  
3 you turn over the page, just at 515 there are various  
4 bits and pieces about Corus and Shotton and so on in  
5 this, points you were purporting to make to the board.  
6 I just want to take you down to the last paragraph above  
7 "CA98 access codes":

8 "As soon as we have received the promised  
9 information and considered legal advice, we will ask  
10 Dwr Cymru for common carriage access to the  
11 Ashgrove System, the existing delivery system. There  
12 are no resource, hydraulic or quality issues to address  
13 as the supply arrangements will be unchanged except for  
14 the contractual relationships [so this is your belief as  
15 to how it would work]. We will need to guard against  
16 any attempt by Dwr Cymru to confuse local costs with  
17 long run marginal costs and will not be able to rely on  
18 Ofwat to assist."

19 Pausing there, what you are identifying there is:  
20 you want to argue for common carriage on the basis of  
21 local costs, is what you are saying here, when you make  
22 an application?

23 A. Yes.

24 Q. What you are concerned about is, you say, confusing, but  
25 Dwr Cymru will refer to wider consideration of costs,

1 regional costs as being the basis for common carriage  
2 pricing --

3 A. Yes.

4 Q. -- that's your concern there. And your concerned that  
5 Ofwat may not accept your approach on local costs and  
6 will instead potentially agree with Dwr Cymru on some  
7 sort of regional cost methodology; that's right, isn't  
8 it?

9 A. No, not strictly speaking. The concern that I was  
10 voicing there was that Ofwat exhibits what is now  
11 I believe termed confirmation bias, that having made  
12 a decision it is incredibly difficult to get Ofwat to  
13 change its position, and there is a tendency -- and  
14 I think we have seen it in the proceedings that have led  
15 to this -- that Ofwat has in the past tended to look at  
16 evidence that supports its position and find ways of  
17 avoiding evidence that runs counter to it. So that,  
18 I think, was the position that I was trying to explain  
19 there.

20 Q. Just to be clear, you are saying confirmation bias, is  
21 that because Ofwat in the past has accepted long run  
22 regional costs as being an appropriate basis for pricing  
23 and you were concerned it would continue to accept that  
24 as an appropriate basis for pricing?

25 A. The evidence that we had, and this was written in 2000,

1           was that four years earlier we had had a "minded to"  
2           determination from Ofwat that specifically identified  
3           long run marginal costs as an underlying support for its  
4           conclusions.

5       Q.   So long run marginal costs, regional costs, you were  
6           concerned that they may well think that that was  
7           an appropriate way of proceeding in future?

8       A.   We were.

9       Q.   Then:

10                 "In order to minimise this risk, it is suggested  
11                 that we make full use of the media to promote this  
12                 application and explain how effective competition has  
13                 been frustrated for the last four years."

14                 So you are going to take your campaign to a wider  
15                 audience, that's what you are thinking about there?

16       A.   Yes, it was.

17       Q.   Next tab, 41, this is to Mike Brooker, a letter from  
18           you, 3 February 2000:

19                 "Further to approaches from some of your existing  
20                 customers, we have been exploring competitive  
21                 opportunities in your appointed area, and we believe  
22                 that access to elements of your network, treatment and  
23                 resource asset base will be essential in facilitating  
24                 this competition ..."

25                 That's a competition buzz phrase that you are using,



1 "essential facilitation", I suppose?

2 A. Yes.

3 Q. " ... and we would seek your co-operation in negotiating  
4 fair access terms. We refer you to Ofwat's recent  
5 correspondence in this matter, MD 154 and 158, and to  
6 the recently published guidelines for the application of  
7 the 1998 Competition Act to the water and sewerage  
8 sector."

9 So those are the documents we have just referred to?

10 A. They are.

11 Q. So you are saying in reliance on those, please have  
12 regard to them:

13 " Would you please supply us with your access codes  
14 for all elements of your asset base which might  
15 reasonably be deemed to be essential facilities ."

16 So you are essentially asking Dwr Cymru here to  
17 identify what it thinks are essential facilities and  
18 then provide its access codes for them; is that right?  
19 Across the whole of Dwr Cymru's system; is that what  
20 that question is?

21 A. No, no, it's not. No. The Ofwat requirement on the  
22 water companies or the advice from Ofwat on the water  
23 companies was that they should be ready by 1 March to  
24 respond substantively, and their suggestion was that  
25 they provide access, they would need an access code.

1           One of the MD letters you took me to earlier was --  
2           included a suggestion that there could be a common  
3           access code for all companies. That never materialised.

4       Q. Right.

5       A. But, no, I'm not suggesting at all that they should  
6           identify the essential facilities, rather that if we  
7           identify the essential facilities then we need an access  
8           code to get access to them.

9       Q. Understood. You are here asking for the access codes.  
10           We obviously saw in the previous MD 154 and 158 that  
11           there was effectively a two stage process, and you then  
12           go on really to deal with that:

13                 "We would be grateful if we could receive these as  
14           soon as possible but no later than 1 March 2000. If you  
15           have only a statement of principles we would ask you to  
16           supply that and advise us of the estimated time needed  
17           to produce the full code."

18                 So there you are effectively recognising that  
19           perhaps you are expecting quite a lot in asking for  
20           access codes by 1 March 2000 when Ofwat had said "Get  
21           your statement of principles out by 1 March 2000", and  
22           so you are saying: well, we recognise there might be  
23           only principles, but could we have those as soon as  
24           possible; is that right?

25       A. If I can unpick your question a little --

1 Q. Please.

2 A. -- I think it would be wrong to suggest that the water  
3 companies were waiting for Ofwat to tell them what to do  
4 in response to their obligations under the Act which  
5 came into effect 1 March. What Ofwat was doing was  
6 providing guidance, the sort of responses that a water  
7 company would be expected to make in the light of their  
8 obligations as dominant players in the market, but Ofwat  
9 has made it clear both then and subsequently that it is  
10 not its role to tell water companies what to do in order  
11 to comply with competition legislation.

12 Q. No, but you say here: well, you may not have your access  
13 code ready, could we have the statement of principles?

14 A. Yes.

15 Q. And the earlier Ofwat documents that indicated that what  
16 Ofwat specifically expected was a statement of  
17 principles by 1 March 2000; you agreed with that  
18 earlier?

19 A. Yes, but the ability for a company to respond  
20 substantively post 1 March.

21 Q. The next document, just for completeness, tab 42, this  
22 is MD 159, LRMC and the regulatory framework, and this  
23 document sets out by reference to an earlier MD letter  
24 I haven't taken you to, it explained:

25 "... the importance of long run marginal cost for

1 water pricing and efficient investment planning. The value  
2 of LRMC depends in part upon the quality of the  
3 companies' estimate, which should be subject to a  
4 regular process of re-evaluation."

5 Then it goes on and provides quite a lot of detail  
6 in relation to LRMC, and if you turn just on to  
7 page 521, there is a short section there on common  
8 carriage referring back to MD 154.

9 A. Yes.

10 Q. So continuing development of pricing methodology issues  
11 by Ofwat and touching on common carriage there. So if  
12 we turn on, then, to tab 45, this is a letter to  
13 Ian Byatt at Ofwat from Mike Brooker:

14 "I am pleased to enclose for your attention a copy  
15 of Dwr Cymru's statement of principles."

16 So this is the statement of principles that were  
17 being suggested in the previous MD letters and that  
18 Dwr Cymru was producing and copying to Ofwat; you would  
19 agree? Please, have a turn through the documents.

20 THE CHAIRMAN: Oh, it's tab 44, I think, in ours.

21 MR BEARD: I am sorry, I am at tab 45. Did I misspeak?

22 I am sorry.

23 If you just turn on to 541 and 542, 541 "Principles  
24 and guidelines" setting out fundamental principles, and  
25 if you turn on to 542, there are various points being

1 set out in relation to the statement of principles, and  
2 in particular talking about costs of entry being borne  
3 by the new entrant, that's at 6, number 8:

4 "Allowances for leakage will be based on DCC average  
5 leakage levels."

6 Then 9:

7 "Access and use charges will be consistent with the  
8 charges levied to existing customers of DCC and will  
9 reflect DCC's method of recovering its costs from its  
10 customer base. The charges will include the network  
11 related costs predicted by Ofwat in periodic views and  
12 the costs of various obligations on DCC such as social,  
13 environmental and general quality obligations."

14 So there talking about generalised costing  
15 principles from DCC, would you agree?

16 A. Yes.

17 Q. If we then go on to tab 49, just to be clear, this  
18 letter, 14 March 2000, I don't think we have got the  
19 letter of 8 March 2000 in the bundle, but regarding the  
20 bulk supply for Shotton Paper, so you have written to  
21 Ofwat relatively recently raising issues about bulk  
22 supply at Shotton, and this is Ofwat's reply. That's  
23 what this letter is about; is that right?

24 A. Yes, we had commenced the inset appointment on  
25 1 May 1999, and we had written to Ofwat asking them to

1 re-examine the bulk supply price because we felt that it  
2 had been set at a level that was unjustified by the  
3 costs.

4 Q. So you are trying to drive down the bulk supply price,  
5 and here --

6 A. We are trying to get a fair bulk supply price, yes, we  
7 are, and Ofwat is rejecting that attempt.

8 Q. Now, that letter was dated 14 March. If you turn on to  
9 tab 51, this is a letter from Dwr Cymru to you, and it's  
10 replying to a letter of 13 March, so a letter you sent  
11 before you had had the reply from Ofwat.

12 A. Yes.

13 Q. We don't have this letter in the bundle, I don't think.  
14 I don't think you have provided this one. This reply  
15 from Dwr Cymru is 16 March:

16 "Thank you for your letter of 13 March. We  
17 understand from this communication [so the letter of  
18 13 March] you now agree with the overall average price  
19 for non-potable water in the Ashgrove System of 26p but  
20 contend that Albion should receive a discount of 3.9p  
21 for flows under the 18 megalitres a day backdated to 01 May  
22 1999."

23 So your letter of 13 March was a letter about bulk  
24 supply, and you were raising with Welsh Water --

25 A. Yes, this is a specific response to Welsh Water that

1           they had -- this related to the neighbouring Corus site  
2           at Shotton where, if the Tribunal remembers, the  
3           previous agreement had expired in 1996. Corus was then  
4           benefitting from a continuation of the same terms  
5           through to the year 2000, was under some pressure from  
6           Ofwat, because there was a clear Gulf between the 26p  
7           that we were paying and the 15p that British Steel was  
8           paying for the same water from the same system. In the  
9           background, it is clear, and this is a response to that,  
10          that Welsh Water were trying to increase the price to  
11          Corus to reduce the differential between Corus price and  
12          our price. And the way they did that was to impute  
13          a certain value for the Corus lagoons, and in effect  
14          what DC did, Dwr Cymru did, was to offer Corus a cheaper  
15          price than the Shotton price, a price that was 3.9p  
16          less, and it's that offer of a lower price that prompted  
17          us to contact Dwr Cymru saying "If it's good enough for  
18          the much smaller supply to Corus, then surely it's  
19          appropriate that that should be reflected in our prices  
20          and could we please have the prices adjusted to reflect  
21          that".

22        Q.   So this was the same issue that you had been raising  
23            with Ofwat as well?

24        A.   I think we had raised with Ofwat our concern that it  
25            appeared to us that Corus was getting a much cheaper

1 price than the price that Ofwat had determined for  
2 Albion, based, as it said in 1996, on certain  
3 assumptions about corresponding prices for other  
4 customers, and it became clear between 1996 and 1999  
5 that actually the closest customers, both geographically  
6 and in terms of the water taken, were actually being  
7 charged very substantially less.

8 Q. I just want to be clear on this. The letter I took you  
9 to from Ofwat which was dated 14 March replying to  
10 a letter of yours of 8 March regarding bulk supply, your  
11 letter of 8 March was presumably raising the same issues  
12 as you had been raising with Dwr Cymru in your letter of  
13 13 March regarding the bulk supply price; is that right?

14 A. I am sorry, it's important that I've followed the line  
15 of questioning. Could you repeat the question, please,  
16 Mr Beard?

17 Q. Certainly. If you turn back to tab 49 --

18 A. Yes, I have it.

19 Q. -- it says:

20 "Thank you for your letter of 8 March regarding the  
21 bulk supply to Shotton."

22 A. Yes.

23 Q. In that 8 March letter, were you raising the same sorts  
24 of issues as you were raising with Dwr Cymru about the  
25 bulk supply price to Shotton?



1 A. I believe I was using that discrepancy between terms for  
2 neighbouring customers as a basis for Ofwat to look at  
3 it again.

4 Q. Right. So what you had done was that you had raised the  
5 issue with Ofwat on 8 March and then you had pursued the  
6 matter with Dwr Cymru on 13 March, you hadn't waited --

7 A. Yes.

8 Q. -- for any response from Ofwat. You had started off  
9 with Ofwat, you had not waited for any response from  
10 them, you had then started raising the same issues with  
11 Dwr Cymru, and this letter of 16 March was the response  
12 from Dwr Cymru in relation to that?

13 A. Yes, I mean, we were, as in any attempt at commercial  
14 transaction we are dealing with Dwr Cymru directly, as  
15 we always tried to, but in parallel we are dealing with  
16 Ofwat.

17 Q. So a sort of twin track approach?

18 A. It's a twin track. If we waited for Ofwat to respond,  
19 because by and large they are very slow to respond, and  
20 to be fair to them a lot of the issues that we raised  
21 were challenging, then we would be a lot slower off the  
22 mark.

23 Q. Right. I am just trying to get the chronology clear.

24 A. That's all right.

25 Q. If we can go back to tab 51, just to be clear, the

1           16 March letter, it looks from the terms of the response  
2           like you were raising Competition Act issues in your  
3           letter of 13 March in connection with the terms of the  
4           bulk supply price?

5           A. I am sure I would have been.

6           Q. You could have been.

7           A. No, I would have been.

8           Q. You would have been, I am sorry, I misheard, my fault.

9                    I am sorry to ask you these questions, because this  
10           letter hasn't been disclosed. The argument you are  
11           raising, the Competition Act had been in force  
12           effectively 13 days and you were raising it in the  
13           context of the bulk supply price then?

14          A. Yes.

15          Q. Good.

16          A. Yes.

17          Q. If we could turn just on to tab 54, not the first page,  
18           that's an internal email, the next page, it's another of  
19           these MD documents. So 12 April 2000. So it's after  
20           the Competition Act has come into force. If you just  
21           see the second paragraph, this is page 569A, just for  
22           reference, for the transcript:

23                    "All companies should now be preparing full access  
24           codes."

25                    This is headed "Common carriage statements of

1 principles", but it's saying: you should have been doing  
2 that and now it's time for access codes.

3 This letter is fairly clear, it says at the top of  
4 the fourth paragraph:

5 "This letter doesn't cover pricing issues for common  
6 carriage."

7 If you then turn over the page, you see "Companies'  
8 statements of principles" is the heading and there are  
9 all sorts of issues that are then considered in that  
10 document, so it refers back to in particular MD 154 and  
11 158. At that stage Ofwat was saying you need to have  
12 done your statement of principles now, you really need  
13 to pull together your access codes and there are a whole  
14 range of issues that arise in relation to common  
15 carriage and in this MD we are talking about the  
16 non-pricing issues, but there are a whole range of them  
17 that need to be considered; that's right, isn't it?

18 A. Yes. Yes, there clearly are a large number of issues,  
19 most of which, I have to say, relate to the assumption  
20 that most common carriage applications would be for the  
21 potable system and those are clearly very complex  
22 systems, by their very nature.

23 Q. This is a letter that's directed generally to common  
24 carriage, isn't it?

25 A. It is.

1 Q. It's raising a whole range of issues that are generally  
2 relevant to development of statements of principles, and  
3 access codes in relation to common carriage, and it  
4 says: these are pretty complicated issues, you are going  
5 to need to cover them, effectively?

6 A. Yes. But the complexity -- the point I am making,  
7 Mr Beard, is that the complexity is driven primarily by  
8 access to complex potable systems.

9 Q. You say that, but if we turn over the page, in relation  
10 to company statements of principles it talks about trial  
11 periods, eligibility of customers, connectivity,  
12 essential facility, some issues to do with time limits,  
13 leakage, applicant status. Now, all of those sorts of  
14 issues, they will apply whatever, won't they?

15 A. Many of the issues will apply generally, yes.

16 Q. If we move on through the rest of it, the same is going  
17 to be said about secondary connections, charging for  
18 processing applications, and then when it moves on to  
19 specific questions, they are slightly more technical,  
20 but again issues to do with arbitration, and terms of  
21 contracts and reasonableness. Again, that's going to be  
22 for all sorts of common carriage, isn't it?

23 A. I suspect so.

24 Q. So it's got all these complicated issues, and it says:  
25 we are not even covering pricing here, we are going to

1 deal with that in another letter later in the summer.

2 And I'll come on to that, I'm not going to test you on  
3 the latter without --

4 A. That's fine.

5 Q. -- taking you to it. So that's MD 162. Actually  
6 I will take you to tab 55, if I may. This again is not  
7 a document or something you will have been aware of at  
8 the time. This was a meeting between representatives of  
9 Dwr Cymru and Ofwat. There is a fairly detailed agenda  
10 set out there, and if you just turn on to 573, this is  
11 about statements of principles -- this is something that  
12 Mr Sharpe may want to question the Dwr Cymru witnesses  
13 on in due course -- there is a "Statement of principles"  
14 heading here where Dwr Cymru are asking for specific  
15 comments from Ofwat on the statement of principles  
16 that's been provided, and setting out their intention to  
17 produce an access code, and that's Dwr Cymru, third  
18 paragraph:

19 " ... intend to develop prices based on regional  
20 averages to include a share of social, environmental and  
21 quality obligations."

22 So that really reflects what had already been said  
23 in the statement of principles that you had already had,  
24 and I know it's asking -- this is from an agenda,  
25 effectively, notes for the meeting -- is this consistent

1 with Ofwat's thinking. So that was Dwr Cymru setting  
2 out emphatically what its consideration of the relevant  
3 charging approach would be to Ofwat. You see that?

4 A. Yes, I do.

5 Q. Thank you. In fact, tab 56, there is an account of the  
6 meeting which sets that out, but I am not going to take  
7 you to that in the time available.

8 Tab 58 I will take you to, if I may. This is  
9 a document that's a response by Dwr Cymru to  
10 a consultation being operated by the Department for The  
11 Environment, Transport And The Regions as it was at the  
12 time. So this is June 2000, so a little while after the  
13 Competition Act has been in force, and in a way it's one  
14 side of a conversation, a conversation with, I suppose,  
15 many participants.

16 What had happened, Dr Bryan, was that the Government  
17 was concerned to consult further on how competition in  
18 the water industry was working in England and Wales;  
19 that's correct, isn't it?

20 A. That's correct, yes, they were.

21 Q. It's certainly a time of flux, you have a new Act coming  
22 in, it's just been introduced, and at the same time  
23 there was a consultation process going on specifically  
24 in relation to competition in the water industry as  
25 well; that's right?

1 A. Yes, I think it was driven by the fact that the  
2 perception was that competition wasn't working, although  
3 it had actually been made possible by the 1992 Act, the  
4 Competition and Utilities (Services) Act(sic) or  
5 something.

6 Q. It's the one that got referred to the other day, it's  
7 amended to the Water Industry Act.

8 A. Yes.

9 Q. Sorry, not the Water Industry Act.

10 In any event, this is Dwr Cymru's response which  
11 I just highlight so that I understand, 597, you see  
12 question 21, I think that's a question from the  
13 Government's consultation paper:

14 "How could the current system of averaging prices  
15 within regions best be maintained, given the  
16 introduction of new suppliers?"

17 So this was a question being posed by government  
18 saying: average pricing is the general way that these  
19 things are dealt with, but if there is going to be  
20 competition and new suppliers coming in, how is that  
21 going to affect that sort of pricing methodology? That  
22 was what was being asked by government?

23 A. No, no, no, it had no bearing on the methodology, what  
24 it was reflecting was the fact that domestic tariffs are  
25 explicitly averaged so that there is, within the

1 domestic tariff, the implicit cross-subsidisation of  
2 customers, domestic customers, who are cheaper to serve  
3 because they live next door to the waterworks, for  
4 example, with those who are more difficult to serve,  
5 more expensive to serve. And the Government was very  
6 anxious to ensure that the development of competition  
7 didn't lead to a situation where some domestic customers  
8 benefitted and others became effectively stranded.

9 It's the same with the postal system, exactly the  
10 same. It did not affect larger industrial customers who  
11 were deemed at the time and subsequently to be able to  
12 look after themselves. So this was very much a domestic  
13 issue.

14 Q. I think there may be -- I don't think that is how this  
15 was understood by Dwr Cymru. But the central  
16 proposition that's being considered here is effectively:  
17 if you have an average pricing mechanism and a new  
18 supplier comes in and picks off low cost elements by  
19 focusing on supposed discrete cost measures, then the  
20 problem then arises for the remaining customers subject  
21 to the average that their prices can go up; that's  
22 right, isn't it?

23 A. I am not sure that's what this says, is it?

24 Q. I'm not saying that's what it says; that's what the  
25 question is to do with, isn't it? That's the concern



1           that's being expressed?

2       A. It is true to say that there were concerns expressed,  
3       I have to say primarily from water companies that were  
4       trying to maintain their monopoly status, that entrants  
5       would go for the low hanging fruit, was the sort of --  
6       or cherry-pick, and that that could have the effect of  
7       driving up prices.

8       Q. Right.

9       A. I have to say that the Tribunal went through this in  
10       great detail during the main proceedings, and dismissed  
11       any such notions.

12      Q. I think that's probably a matter for submission, and  
13      I am not sure that again we would concur at all with  
14      your interpretation of the decision, but I am not going  
15      to get into a discussion about that.

16             If we just move on to 59, this is MD 163, so this is  
17      effectively the letter that was expected later in the  
18      summer about pricing issues for common carriage?

19      A. It is.

20      Q. The Tribunal has already seen, I think, reference to  
21      this in opening. What's said, this is 30 June, and  
22      Ofwat are saying in the second paragraph down:

23             "Companies have already produced statements of  
24      principles regarding access to their networks and are  
25      now preparing full access codes. MD 162 [to which

1 I referred you, Dr Bryan] provided companies with  
2 feedback on progress so far. It has also promised a  
3 further letter on pricing."

4 This is it, effectively.

5 A. Yes.

6 Q. Then we turn over and see principles being set out.

7 A. Yes.

8 Q. Then I think I am not going to take you right through  
9 all the details of it, but if you look down (v) of  
10 "Principles":

11 "If companies respond to competition by adjusting  
12 their tariffs to reflect local costs more closely, they  
13 will need to do so with reference to the director's duty  
14 and their own responsibility to protect customers'  
15 interest, particularly the interest of customers in  
16 rural areas. Similarly having regard to the Secretary of  
17 State's guidance on fairness and affordability in water  
18 Charging, the Director will expect companies to take into  
19 account the impact on customers of changes to their  
20 tariffs. Companies will be expected to manage the pace  
21 of any rebalancing."

22 So this is the concern that if you take certain  
23 customers out of an average price system and you apply  
24 different tariffs to them, you have to have  
25 a rebalancing of tariffs across the entirety of the

1 average system and those are concerns that are being  
2 expressed by Ofwat, and there are concerns both as to  
3 the appropriateness of those moves but also the pace at  
4 which any such moves should occur. That's what's being  
5 referred to here, isn't it?

6 A. The point you took me to beforehand was Ofwat's very  
7 clear point that in terms of basket rebalancing, which  
8 is the mechanism by which some would pay more and others  
9 less, that industrial tariffs which were going to be the  
10 main target for this competition were effectively going  
11 to be moved outside the basket so that anticompetitive  
12 pricing behaviour wouldn't be capable of being  
13 subsidised by the generality of customers.

14 So although I accept your principle in terms of the  
15 generality of domestic potable customers, I don't think  
16 it applies in the current case.

17 Q. Just to be clear, you are saying that where a process of  
18 rebalancing might be involved, that just doesn't apply  
19 in relation to --

20 A. Ofwat made it very clear that if companies lost revenue  
21 as a result of competitive action, that was a loss to  
22 the company not to its customers. In a situation where  
23 a company had shareholders, then that would be a loss  
24 borne by the shareholders and not recoverable from the  
25 customers who had not got the benefits of a competitive

1 market.

2 Q. Yes. That's not really the question, is it? Because  
3 the question pertains to changes in prices by the  
4 company in question: if it drops certain of its prices,  
5 there has to be a tariff rebalancing. Are you saying  
6 that that doesn't apply in relation to large user  
7 tariffs?

8 A. I am saying it's very clear that companies cannot  
9 recover lost profits due to competitive action from  
10 other customers who are not able to take advantage of  
11 competition.

12 Q. Again, that wasn't an answer to the question.

13 THE CHAIRMAN: Well, I don't understand your question, then,  
14 if that's not an answer to it.

15 MR BEARD: I think the question is very simply: is Dr Bryan  
16 saying that in circumstances where you are carrying out  
17 an average pricing methodology, if you drop prices as  
18 a company to a particular group of customers or to  
19 a particular customer, then that has an effect on the  
20 remainder of the average pricing for the remainder of  
21 customers?

22 THE CHAIRMAN: As I understand his answer, it's: no, it  
23 doesn't.

24 A. Perhaps it would help to explain why. When we talk  
25 about average pricing, we talk about average pricing in

1 the context of a class of customer, and therefore within  
2 the domestic class of customer for potable water. What  
3 you say is absolutely true, if some customers within  
4 that class were suddenly to get discounts, then others  
5 would have to pick up the tab. However, such  
6 a situation is not allowed, it would be a breach of  
7 licence condition E of a company's appointment.

8 Where customers fall into discrete classes, which is  
9 the only justification for offering different tariffs,  
10 then the only average that we are interested in is the  
11 average for that class, and that average has, by  
12 definition, no impact on any other class, because the  
13 average is the costs for that class and that class  
14 alone.

15 MR BEARD: I understand the position that Albion takes,  
16 which is you do delimit classes, and that's how this  
17 pricing exercise should be undertaken, and that is the  
18 point of difference with Dwr Cymru, because Dwr Cymru  
19 proceeded on the basis that you didn't need to specify  
20 separate classes when you went about the process of  
21 carrying out regional average costing, albeit that you  
22 then made modifications.

23 What I was going to take you to is just -- because  
24 this may embody what you are saying -- if you move on to  
25 number 3, "Main approaches to access pricing":

1            "In assessing disputes or complaints about access  
2            prices, Ofwat will focus on the effect of the price on  
3            competition in individual cases and on the cost  
4            information on which it's based. Nevertheless it's  
5            instructive to review the approaches that companies have  
6            considered. There are many different ways of  
7            calculating access prices but the list of alternatives  
8            can be grouped into three main approaches, specifically  
9            access prices can be based on accounting costs, ie the  
10           book value of the assets to which access is sought, the  
11           long run marginal cost of that part of the incumbent's  
12           system to which access is sought, the efficient  
13           component pricing rule. Most companies have indicated  
14           that they intend to charge for use of their systems  
15           principally on the basis of the book value of their  
16           assets."

17           Now, am I right in thinking that Albion's reading of  
18           this is that if you are going to base access prices on  
19           accounting costs, ie the book value of assets, you  
20           should do so in relation to a small class of people that  
21           are similar; is that your approach?

- 22           A. You don't need to use the adjective "small". The  
23           reality is that, yes, it has to be justified by class  
24           and Dwr Cymru's own large industrial tariff explicitly  
25           recognises various classes of potable customers, this

1 was the tariff that they introduced in 1998,  
2 specifically recognises different classes of potable  
3 customers, and that allows them to assign different  
4 costs to that -- to those classes.

5 Now, when you talk about small classes, the very  
6 largest class within Dwr Cymru's large industrial  
7 potable tariff has no more than three members, three  
8 customers.

9 Q. That's what you say is the relevant class and the  
10 relevant approach that should have been adopted, don't  
11 you?

12 A. I am saying that regional average pricing should be on  
13 the basis of the class of customer to whom those prices  
14 are directed, yes, and that is what Ofwat says as well.

15 Q. I think we will work our way through as to what Ofwat  
16 says about it and how it deals with it, because clearly  
17 there is an issue here between Dwr Cymru and Albion that  
18 has been identified in the correspondence, as to whether  
19 or not you should use local costs in relation to the way  
20 in which you attribute costs for the purposes of  
21 pricing, and whether or not you can use a broader  
22 measure of costs and then subtract different elements  
23 from it, and also a dispute in relation to how you  
24 define what you refer to as the relevant class in  
25 relation to these matters. You would agree that those

1 are the two issues of dispute in this between Albion and  
2 Dwr Cymru?

3 A. Yes, it's a summary of a complex area.

4 Q. If we just move on to page 616, number 6:

5 "Relationship with general tariff policy. As  
6 competition develops companies may wish to bring their  
7 regional average tariff structures more closely into  
8 line with local costs."

9 So Ofwat here is recognising that generally regional  
10 average tariff structures are the ones that are being  
11 applied, but there is a possibility of change and  
12 a greater focus on local cost reflected pricing; that's  
13 what they are saying here, yes?

14 A. Yes, that's the general view, yes.

15 Q. "Should they choose to adjust their tariffs, companies  
16 would need to develop further their methods of cost  
17 allocation."

18 So you would need to develop cost allocation systems  
19 in order to be able to allocate local costs; you would  
20 agree with that?

21 A. No, I don't think I would necessarily. I certainly  
22 think that the high level reporting that the companies  
23 make to Ofwat in terms of the regulatory accounts would  
24 certainly need some changes, but I am presuming that  
25 companies still understand their cost structures at



1 a very local level.

2 Q. We will come on and deal with that in general, but Ofwat  
3 here are suggesting that you would actually need to  
4 develop your methodologies for cost allocation further.

5 Then:

6 "Any de-averaging would also have to be consistent  
7 with the director's duty to protect the interests of  
8 customers, particularly those in rural areas. Moreover,  
9 de-averaging in electricity has been phased in order to  
10 minimise any potentially adverse impact."

11 So this is dealing again with this difficulty that  
12 arises from de-averaging prices that it has collateral  
13 impacts on other groups of customers?

14 A. Yes.

15 Q. Then the next paragraph is essentially about the risk of  
16 de-averaging that can create other problems excluding  
17 new entrants:

18 "Companies may wish to go further to respond  
19 reasonably to a competitive threat by pricing down to  
20 avoidable cost."

21 And there is a discussion of European case law about  
22 this, but the concern here is about what companies can  
23 lawfully do if they move to de-averaged pricing but not  
24 straight into, for instance, predation or exclusion;  
25 that is what is being talked about here, isn't it?

1 A. It is, yes.

2 Q. Then "Next steps":

3 "I welcome the minister's consultation on  
4 competition in the water industry."

5 So that's the consultation, the response to which we  
6 have seen:

7 " I anticipate that it will provide further opportunities for  
8 development of competition in the water industry.  
9 However, companies must be aware that they can't wait  
10 until this consultation is concluded or any decision is  
11 made before making further progress in preparing full  
12 access codes and agreeing individual terms of access.  
13 To do so puts them at risk of infringing the  
14 Competition Act which is in force now. It is reasonable  
15 for companies to make full access codes available by  
16 31 August 2000. I look forward to confirmation from companies  
17 when they have achieved this."

18 So this is saying: we are in a state of flux but you  
19 still have the Competition Act applying, you need to  
20 develop your access codes by 1 August; that's correct?

21 A. It is correct and I note the very useful comment below  
22 that about companies thinking about improving the  
23 transparency of their accounts, including separation,  
24 which took a further ten years to materialise.

25 Q. Yes, it refers to the consultation on regulatory

1 accounting guidelines, RAGs as they are known?

2 A. Yes.

3 Q. If I could move on to tab 61, this is the network access  
4 code that was developed by Dwr Cymru as the second stage  
5 of the process following on from MD 154 and 158, and if  
6 I could just turn on to page 635, you see at 3.4 "Use of  
7 system", 3.4.1:

8 "Charging for transport for water through the  
9 network will be on the basis of recovery of average  
10 costs."

11 So Dwr Cymru was saying to the world that that was  
12 the way in which it would deal with pricing in relation  
13 to network access pursuant to the scheme that was being  
14 set up by Dwr Cymru in the light of Ofwat's various  
15 letters and cognisant of the Competition Act; you agree?

16 A. I agree that it refers to average costs for each class  
17 of customer, because clearly if it was just on the basis  
18 of average costs everyone would be paying the same.

19 Q. I don't think Dwr Cymru has ever suggested that the  
20 costs are all going to be identical for everybody.

21 A. No.

22 Q. Then we turn on to tab 62, this is your letter of  
23 28 September 2000:

24 "I am writing pursuant to the Competition Act 1998  
25 and Water Industry Act 1991 to request access to your network

1 for the purposes of common carriage.

2 "As you are aware Albion Water (Shotton) Limited, by  
3 way of an inset appointment, is the licensed supplier of  
4 ... Shotton Deeside. We currently have a bulk supply  
5 agreement with for you for the supply of Non-potable and  
6 potable water to the Shotton site. We have recently  
7 had entirely positive and constructive discussions with  
8 North West Water Ltd with a view to purchasing  
9 a replacement bulk non-potable supply. The bulk supply  
10 from North West Water would be abstracted at Heronbridge  
11 from the River Dee and delivered to the same point at  
12 which you currently purchase water from North West Water  
13 for onward sale to Albion Water. We are therefore  
14 seeking network access to your pipeline that will carry  
15 the water from Heronbridge to our site at Weighbridge  
16 Road, Shotton. This arrangement would be a very simple  
17 application of the common carriage concept with no  
18 apparent hydraulic, quality or liability concerns.

19 To progress this agreement I would be grateful if  
20 you could undertake to supply the following by Friday  
21 6 October 2000.

22 Copies of your network access code and statement of  
23 principles. I have requested this information on two  
24 previous occasions and have not received a response.

25 The price of access: which I expect will reflect

1 the dedicated nature of the pipeline where there are  
2 only two sites served and there are no apparent  
3 hydraulic, quality or liability concerns. I believe  
4 that this price should also reflect the fact that you  
5 have voluntarily de-averaged the tariffs for this supply  
6 and that the appropriate costs are those relating to  
7 this system alone.

8 A contact name for progressing the application."

9 Now, yesterday you referred to a detailed  
10 application for common carriage. Is this the document  
11 you were referring to?

12 A. No. No. The response to this was to require us -- and  
13 it was a delayed response, and I am sure it's in here --  
14 was to require us to complete a network access  
15 questionnaire, and you will find that at tab 66.

16 Q. Right.

17 A. And that was provided under cover of the letter of  
18 18 October. So it took three weeks to respond.

19 Q. Well, it took three weeks to respond. Let's turn over.

20 THE CHAIRMAN: Before you finish with this letter, what does  
21 it mean that you have voluntarily de-averaged the  
22 tariffs for the supply?

23 A. It reflected the fact that there was already -- with  
24 only two customers on that supply, Corus and Albion,  
25 there were different tariffs for the two customers, so

1 in effect there was no average tariff applying on that  
2 site, on that system.

3 MR BEARD: That was your position. I think we may spend  
4 more time on this in due course.

5 At tab 63 you say there was a long wait for  
6 a response. 2 October, you see:

7 "Dear Mr Bryan, thank you for your letter dated  
8 28 September 2000... I can assure you that your application  
9 will be given thorough consideration and we will be  
10 contacting you in due course to arrange a suitable date  
11 to discuss the matter. Although at an early stage of  
12 the application process, it is important that you are  
13 aware of the following inaccuracies in your letter.  
14 Dwr Cymru's statement of principles was sent to you by  
15 Email on 19 June 2000 and a hard copy was posted to you on  
16 21 June 2000. Dwr Cymru has not de-averaged the tariffs  
17 for this supply I enclose for your attention a copy of  
18 Dwr Cymru's recently published "Common carriage network  
19 access code"."

20 Which is the document to which I have already taken  
21 you. That is the right document, isn't it?

22 A. Yes.

23 Q. So he is immediately stressing in relation to the  
24 argument that there had been voluntary de-averaging that  
25 in fact that wasn't Dwr Cymru's position at all.

1           At tab 65 is a letter from Dwr Cymru to you with  
2           various particular questions and network access  
3           questionnaire preliminary stage; you can see that at  
4           page 647?

5           A. Yes.

6           Q. And indeed if you just look back on 646 you will see  
7           that this also at 1.1.3 notes that Mike Brooker has  
8           already said that the tariffs aren't de-averaged?

9           A. Yes.

10          Q. Then tab 66, which is the letter which you say is the  
11          detailed common carriage application:

12                 "Thank you for you letter of 18 October ...  
13                 including Dwr Cymru's network access questionnaire which  
14                 I now return, completed. You will see that I have  
15                 provided space for you to countersign, in relation to  
16                 confidentiality and for subsequent return of signed  
17                 copy. You repeat the curious statement that Dwr Cymru  
18                 has not de-averaged tariffs for this supply network.  
19                 All the evidence suggests otherwise and I believe that  
20                 continued insistence on regional average costs is likely  
21                 to be deemed as anticompetitive."

22                 So you said, "You voluntarily de-averaged",  
23                 Dwr Cymru say actually, "No, we haven't", and then you  
24                 are saying "If you insist on regional average costing,  
25                 that is likely to be deemed anticompetitive", so there

1 is a clear dispute there?

2 A. Yes.

3 Q. Then in support of that contention you then cite MD 163,  
4 which is the Ofwat letter to which we have already  
5 referred, and you say:

6 "Ofwat states that each company should charge  
7 entrants as it would charge itself and be able to  
8 demonstrate this to both entrants and Regulator."

9 You are drawing attention to this in support of your  
10 argument that regional average cost based pricing is  
11 anticompetitive; that's right?

12 A. No, no, no. No, a distinction needs to be drawn between  
13 regional average cost pricing, which accurately reflects  
14 a class of customer, and regional average cost pricing,  
15 which is a way of concealing the costs applicable to  
16 a particular class by confusing it with a much wider  
17 class, and our experience in relationships with  
18 Dwr Cymru at that point over five years had taught us to  
19 be wary of anything that Dwr Cymru might do to condition  
20 confuse the issue, to attempt to conceal what we knew to  
21 be very low costs associated with that system.

22 Now, subsequently at the Tribunal we have accepted  
23 that a regional approach to costing is perfectly  
24 legitimate, both as a cross-check, a sense check to  
25 locally derive cost, but again it only stands comparison



1 if it's rigorously applied to an appropriate class of  
2 customer.

3 Q. So you are citing MD 163 here not for the proposition  
4 that is on its face written in the second paragraph of  
5 "Insistence on regional costing is likely to be deemed  
6 anticompetitive", you are actually citing it for a  
7 refined principle: it's okay to have regional averaged  
8 costs but you then have to be very careful about the  
9 identification of the relevant class?

10 A. That is true.

11 Q. Right. But that's not what you actually say here.

12 A. No, I think Mr Holton, given his long experience at that  
13 point with dealing with Albion, would have been  
14 conscious of the context in which this was written.

15 Q. Right. Just to be clear, we will come back to it:

16 "Access charges should allow incumbents to recover  
17 network operating costs and capital maintenance charges  
18 without over or under-recovery. Our assessment,  
19 following extensive analysis, indicates that a 7p per  
20 metre cubed price is a fair cost reflective price for  
21 water delivered."

22 So that's your, I suppose, opening gambit in  
23 relation to what the access price should be; is that  
24 right?

25 A. It was our initial calculation based on the only

1 evidence that was in the public domain at that time,  
2 namely the third party costs items in Dwr Cymru's  
3 statutory account, and the knowledge that third party  
4 costs specifically include bulk supply prices, bulk  
5 supply services and large user tariffs -- sorry, and  
6 non-potable tariffs, non-potable income.

7 Q. Right. Now, just turn over to the next tab. This is  
8 another letter from you 31 October 2000:

9 "I refer to your letter of 26 October 2000 regarding the  
10 above and acknowledging receipt of our returned  
11 questionnaire. I agree that the best way to progress  
12 this application is to meet and discuss the issues.  
13 However, in order to expedite matters I believe that  
14 it's appropriate to progress both prices and legal  
15 agreements concurrently with the operational and  
16 contractual issues."

17 So it's been suggested by Dwr Cymru that there  
18 should be a meeting and you are saying "Yes, but we want  
19 everything to be on the table at that meeting"?

20 A. Yes.

21 Q. Right. Then if we could move on to tab 71, so  
22 2 November 2000, this is further to the letter I've just  
23 referred you to, Dr Bryan:

24 "Further to the letter of 31 October 2000 I thought it  
25 would be beneficial to send you a proposed agenda for

1 our meeting on 10 November and also to outline the key  
2 issues which I believe are pertinent to this  
3 application. Firstly we have assumed a locally  
4 de-averaged basis for charging because of the mass of  
5 evidence supporting the contention that Dwr Cymru has  
6 voluntarily de-averaged the terms of supply to  
7 Shotton Paper and Corus. Should you continue to claim  
8 otherwise it will be important for you to explain why  
9 this evidence has been misinterpreted. We believe that  
10 failure to do so would be indicative of anticompetitive  
11 behaviour."

12 So you are ramping up the point that you say: you  
13 voluntarily de-averaged and you have to stick to that,  
14 otherwise we are concerned about it and we are going to  
15 raise Competition Act issues. So you are signalling  
16 that very clearly. And secondly:

17 "There appears to be no objective justification for  
18 you not being in a position to discuss price at the  
19 meeting. Ofwat states that each company should charge  
20 entrants what it would charge itself."

21 You then conclude:

22 "Beryl Brown of Ofwat will be happy to confirm this  
23 and I am copying this letter to her so she can  
24 anticipate your call."

25 So the two issues you are raising are de-averaging

1 and desire for pricing, and you are praying in aid  
2 Ofwat's guidance and approach in relation to these  
3 matters and saying speak to Beryl Brown if you have any  
4 doubts about it; that's right, isn't it?

5 A. It is, yes.

6 Q. Turn on to tab 76, over the page, 688. This is a letter  
7 to you in reply to that 2 November letter:

8 "I note your comments about the basis of charging  
9 within Albion Water Shotton Limited's bulk supply  
10 agreement. Indeed it would be important for you to  
11 share with us the mass of evidence in your possession so  
12 we can understand and then explain why it is our  
13 assertion that charges are based on whole company  
14 averages."

15 So this is dealing with the de-average point,  
16 Dwr Cymru are saying "We don't really understand what  
17 your evidence is and we base our charges on whole  
18 company averages". That's what they are saying there,  
19 isn't it?

20 A. It is, yes.

21 Q. Then:

22 "I have no issue with discussing methodology that  
23 would be used to set the price for treatment and  
24 transportation of water within our licensed area.  
25 However, for this particular application we have not

1 completed our investigation with all interested parties  
2 and therefore won't be in a position to make a specific  
3 offer on Friday, 10 November 2000."

4 The significance of that date is the date when the  
5 meeting was to be held, that's right, isn't it?

6 A. Correct.

7 Q. They are making it clear that they are happy to discuss  
8 methodology but they will not in a position to provide  
9 a price:

10 "Be assured your application will be concluded as  
11 quickly as possible. However, there are issues to be  
12 resolved with other parties, in particular North West,  
13 that may prevent the conclusion to negotiation with  
14 Albion before the end of November 2000. Look forward to  
15 seeing you on Friday and your offer of lunch."

16 That was copied to Ofwat, you can see at the bottom  
17 it says "cc Julie Griffiths", and actually if you turn  
18 back a page that's the cover letter indicating that.

19 So they are happy to discuss methodology, copied to  
20 the Regulator, so they were not exactly hiding the way  
21 they approached these matters.

22 Now let's move on to the meeting itself. Your notes  
23 of the meeting are at tab 79. It may be that there are  
24 certain matters relating to this meeting that Mr Sharpe  
25 will want to cross-examine the Dwr Cymru witnesses on,

1 but what we have here is your note of this meeting. Did  
2 you draw it up or did someone else draw it up?

3 Malcolm Jeffery or Roddy Monroe?

4 A. I suspect it will have been based on the notes kept by  
5 Roddy Monroe.

6 Q. Right, I see.

7 A. But I can't be absolutely sure.

8 Q. But you don't believe it was you?

9 A. No, I don't believe so.

10 Q. Then "Objectives of the meeting":

11 "JB [that's you] stated the objective of the meeting  
12 was to identify issues for resolution and identify  
13 actions required to enable agreement sign-off by the end  
14 of November. DH [that's Dave Holton] stated he was  
15 prepared to discuss operation of contractual methodology  
16 that DCC will use to determine the access price but not  
17 in a position to disclose actual price."

18 Operational and contractual issues were discussed.

19 Then the access price:

20 You outlined why you were "in no doubt that  
21 Dwr Cymru have de-averaged the prices for Shotton and  
22 Corus system. The evidence included de-averaged status  
23 of previous and current tariff arrangements to  
24 Shotton Paper and Corus, prior acceptance of local cost  
25 basis for tariffs by Dwr Cymru, presence of tariffs on

1 special agreement register, accumulated evidence since  
2 inset proceedings began in 1995."

3 Then you say:

4 "It is stated that Ofwat access charge guidance  
5 clearly states that companies should charge entrants as  
6 it would charge itself. Any charge based on regional  
7 average would run counter to this and would be challenged  
8 to the full."

9 So actually at that point you were challenging  
10 regional average pricing generally, no de-averaging --  
11 de-averaging had to be undertaken, I am sorry, no  
12 compromise on de-average pricing, that was your  
13 position?

14 A. We were pretty certain at that time that Dwr Cymru would  
15 try to base charges on the generality of their potable  
16 customers. That, in that sense, the de-averaging of  
17 whole company costs -- well, as it turned out prices --  
18 for what was a very discrete and separate service.

19 Q. So your position at that stage was there should be no  
20 compromise on de-averaged basis for pricing?

21 A. That is true.

22 Q. Then you have an account of Dave Holton's response  
23 saying that that understanding was misplaced, and that  
24 that was not the way that Dwr Cymru would deal with  
25 these matters, and it was agreed, you can see, the

1 single paragraph above the bullet point:

2 "This issue would not be resolved here."

3 So it was an agreement to disagree, effectively, at  
4 that meeting?

5 A. Yes.

6 Q. Then there was a discussion of the legal agreement,  
7 a draft network access agreement had been provided.

8 Then bottom of the page "Timescales", Dave Holton indicated that your  
9 anticipated start

10 date of 1 December was unlikely to be met.

11 So he was clearly indicating that there were going  
12 to be difficulties with hitting the end of November date  
13 that had been previously discussed.

14 A. But if I may say so in response --

15 Q. Of course.

16 A. -- here we have Dwr Cymru saying "access price to be  
17 issued shortly as fairly simple case of updating  
18 existing methodology with current data", so that -- and  
19 I simply draw that really to the Tribunal's attention  
20 because that was Dwr Cymru's position as of 10 November.  
21 And, yes, I fully agree that they said the 1 December  
22 date was unlikely to be met, but in the context of  
23 Dwr Cymru's position now, there was certainly no  
24 suggestion that we should be looking at a year or more,  
25 which I believe to be the position that Mr Pickford put



1 to me yesterday.

2 Q. I think we will go on and see. We know that it wasn't  
3 a year before the first access price was provided and  
4 there is an indicative price much sooner than that.

5 Those are different --

6 A. We are talking here about a start date, Mr Beard. Not  
7 the provision of a price but a start date for common  
8 carriage.

9 Q. Just in relation to that, at that meeting you made it  
10 clear that you would take action under the  
11 Competition Act if you didn't get your way in relation  
12 to these matters; that's the position, wasn't it?

13 A. It was very clearly stated.

14 Q. That's right, and Mr Holton had made it clear that this  
15 agreement to disagree was on the basis that Dwr Cymru  
16 was basing its tariffs on an average price methodology  
17 that had then been adapted in certain cases; that's  
18 clear, isn't it?

19 A. What Mr Holton was saying was that the reason why there  
20 was a plethora of special agreement prices, no two being  
21 the same, and showing some distinct gaps, a range of  
22 prices, was that all those prices had a common basis,  
23 a common average basis, but then each price was adapted  
24 to local circumstances.

25 Q. Right, okay. There was one issue that was raised by

1           him. He said that sludge tankering had high costs. You  
2           would agree that sludge tankering does have high costs,  
3           wouldn't you?

4           A. Sludge tankering does have high costs, if it's a method  
5           for disposing of sludge, yes.

6           Q. At that time the sludge from the Ashgrove System was  
7           actually discharged into the River Dee; that's right,  
8           isn't it?

9           A. That's right, yes.

10          Q. So there was no sludge tankering at that time?

11          A. No, there was not.

12          Q. But there was going to be a need for a change in  
13          relation to the methodology for the disposal of sludge  
14          in the relatively near future; that was understood at  
15          the time, wasn't it?

16          A. That was on the cards, as we understand it.

17          Q. In the end, what happened was that the sludge was no  
18          longer discharged directly into the River Dee, it was  
19          actually discharged at the Chester Sewage Treatment  
20          Works from 2001; that's right?

21          A. No, technically that's not correct. What happened was  
22          that Dwr Cymru connected the existing sludge main which  
23          went to the River Dee to a local sewer, discharged into  
24          the sewer, the existing sewer, and that sewer ultimately  
25          discharged to Chester sewage works.

1 Q. So that was a more cost effective way than tankering  
2 would have been?

3 A. It was a very cheap way of solving the problem, yes.

4 THE CHAIRMAN: All that discussion of sludge, is that  
5 an appropriate time for us to break?

6 MR BEARD: Yes, it is. Unfortunately I have still some way  
7 to go, I am sorry.

8 THE CHAIRMAN: We will come back at 2 o'clock.

9 MR BEARD: I am grateful, thank you.

10 (1.00 pm)

11 (The short adjournment)

12 (2.00 pm)

13 MR BEARD: Dr Bryan, we were in bundle 3, just before the  
14 short adjournment. Can we stay in bundle 3, tab 83.  
15 This is a letter from you to Philip Fletcher, the DG of  
16 Ofwat. It's dated 10 November 2000. Now, that's the  
17 same day as the meeting. Do you recall whether or not  
18 that's right?

19 A. No, it can't be, because if you read down in the letter,  
20 it mentions a date of 17 November, so it must postdate  
21 that, so it's an error in dating.

22 Q. That's fine, understood. Maybe, then, I'll take it out  
23 of order since you have confirmed that. If you could  
24 turn on to 84:

25 "Further to our meeting of 10 November ...

1            "... thank you ... for making the effort to come  
2            [over] ... I found the meeting constructive and would  
3            like to note my appreciation of the positive and helpful  
4            approach you and your team displayed in dealing with our  
5            application. I believe this bodes well for a healthy  
6            working relationship.

7            "Secondly, following your meeting with  
8            North West Water [so this is a meeting between Dwr Cymru  
9            and North West Water], it would now appear appropriate  
10           for a tripartite meeting to discuss operational details  
11           ... happy to co-ordinate such a meeting ... If you  
12           agree, can you inform me of your views as to the timing  
13           and location.

14           "Thirdly, [as] we appear to be at odds regarding the  
15           appropriate pricing method for this network access  
16           charge, I would appreciate a breakdown of DCC's proposed  
17           average cost for non-potable water. As you said at the  
18           meeting, this information has been previously sent to  
19           [Albion] in 1996 relating to DCC's derivation of  
20           a non-potable charge ... updated version of this would  
21           prove a useful starting point."

22           So meeting on Malcolm Jeffery's impression had gone  
23           well, but a tripartite meeting was required, and there  
24           was still this dispute about the price methodology; you  
25           would agree?

1 A. Yes.

2 Q. Then I think if we turn back, then, to 83. Now, it  
3 doesn't precisely matter when this was sent, but I think  
4 it was clearly sent before 27 November because someone  
5 has written on the side "Received by Ofwat 27/11", so  
6 it's within the ten days after that letter from  
7 Malcolm Jeffery. This adopts a very different tone:

8 "On 28 September we formally asked Dwr Cymru for  
9 an access agreement and an access price to allow water  
10 to be delivered to Shotton Paper."

11 So that was the letter which was the rather informal  
12 common carriage request that was referred to previously.

13 Then:

14 "Following our successful bulk supply negotiations  
15 with North West Water ..."

16 Just to be clear, I think most people reading that  
17 would suggest that they had been concluded successfully,  
18 but that was not the case, was it?

19 A. No.

20 Q. "... Dwr Cymru has now informed us there are no major  
21 issues concerning contractual terms for access. They  
22 have also confirmed that they have an access price and  
23 the breakdown of the figure."

24 You have written that there. That wasn't what was  
25 noted in relation to the meeting. Was there

1 a subsequent communication that had set that out?

2 A. I think it referred -- must have referred back to the  
3 comment that you drew my attention to before lunch which  
4 indicated that Dwr Cymru were of the view that they got  
5 all the methodology and it was simply a matter of  
6 plugging data that they had into that methodology to  
7 produce a figure.

8 Q. Right, so it's the meeting --

9 A. This was some time post that event, yes.

10 Q. Right, okay. So they hadn't actually confirmed at that  
11 meeting that they had an access price, but they had  
12 suggested that there was a methodology that could be  
13 used for it?

14 A. Yes.

15 Q. Right.

16 "They are not prepared to give us any of this access  
17 price information until after their board meeting in  
18 mid-December, a delay of almost three months."

19 That's a very different tone from the one that's  
20 been adopted by Mr Jeffery.

21 "Our first concern is based on legal advice such  
22 delay is unwarranted and represents anticompetitive  
23 behaviour. Our second concern relates to our  
24 understanding confirmed by your competition team on  
25 17 November."

1           So I interpolate that you had had a meeting at Ofwat  
2           on 17 November about these issues; is that right?

3       A. I can't recall a meeting, or possibly a telephone  
4           conversation.

5       Q. But you had been in contact with Ofwat?

6       A. Yes, of course, yes.

7       Q. Discussing these issues and the state of play of the  
8           negotiations?

9       A. Yes.

10      Q. And where you were in terms of the debate about pricing?

11      A. Yes.

12      Q. "The presence of site specific deals on Ofwat's special  
13           agreements register is evidence of de-averaging."

14           So you are saying here that Ofwat had confirmed that  
15           the special agreements register was evidence of  
16           de-averaging; that's what you are saying here?

17      A. Yes, that is the implication of what I am saying there,  
18           yes.

19      Q. "We are concerned that Dwr Cymru might be using these  
20           delays to introduce a new non-potable tariff which would  
21           reduce the number of special agreements and would then  
22           be used to justify a higher access price based on broad  
23           regional average costs."

24           What this boils down to is that you are concerned  
25           that Dwr Cymru could introduce a regional average costs

1 approach and that if it did so that could apply in  
2 relation to Shotton, and you didn't want that to happen?

3 A. Yes. I think we were concerned that if Dwr Cymru  
4 successfully persuaded Ofwat as to the basis for  
5 a region wide non-potable tariff, that in our experience  
6 that would fix Ofwat's views and it would not then be  
7 prepared to consider any other formulation or  
8 justification of price.

9 Q. So you are saying to Ofwat "You have to be really alert  
10 to this"?

11 A. We are.

12 Q. Okay. Just in relation to that, are you suggesting  
13 there that it's not possible to have a regional average  
14 cost based price?

15 A. No, as I think I said before, it is possible to have  
16 a regional average cost based price if you take the  
17 appropriate class of customer and use the costs  
18 appropriate to that class of customer.

19 Q. Right. Can I just take you on to tab 85. This is  
20 actually an internal email, so you wouldn't have seen it  
21 before disclosure. It's an email from Paul Edwards  
22 about a call, I think, with Roddy Monroe, it appears,  
23 and the only reason I raise this is:

24 "I had just spoken to him before I received this."

25 So it sounds like he has spoken to Roddy Monroe,



1 Mr Sharpe can test this:

2 "He wants prices. I told him these weren't  
3 available until at least mid-December as it would need  
4 to go to the board."

5 So could it be that the letter we have just been  
6 looking at from you was written shortly after this,  
7 because that would have been an indication of  
8 a particular time? Does that make sense? I am just  
9 trying to sort out the relevant dates for the letter.

10 A. Erm --

11 Q. Given that we know --

12 A. We know it was a misdated letter. I suspect it was  
13 received after this. If you refer back to tab 83, you  
14 will see that the letter was sent by mail and fax, and  
15 so if it was received on the 27th it's a reasonable  
16 assumption that it was sent on the 27th and dated that  
17 day.

18 Q. So the concerns about timing expressed there were  
19 probably the product of the call between Roddy Monroe  
20 and Paul Edwards?

21 A. That may well have been the case.

22 Q. Just whilst we are going through, if you turn to 86,  
23 this is another internal email, just down at the bottom  
24 here, 709, after the "Dave" it says:

25 "Ideally we will have a plan of action agreed

1 tomorrow for the process of moving to completion on the  
2 following deals:

3 "Albion Water's common carriage application ...

4 "Common carriage price.

5 "DCC's supply from North West Water (new or  
6 confirming exiting with quantity variation).

7 "Terminate the current potable and non-potable  
8 Dwr Cymru agreement with Albion.

9 "New potable supply agreement with Albion (with  
10 possible provision for a reservation of 'last resort')."

11 Now, that's a sort of, that looks like, agenda list.  
12 Would you agree that is actually what would be needed to  
13 be completed in order to put in place the common  
14 carriage arrangements?

15 A. Subject to the caveat that the last two points could  
16 have been achieved by an amendment of the existing  
17 agreement, which still had more than two years to run,  
18 yes.

19 Q. Thank you. Then if we turn on to tab 88, this is  
20 actually a letter to Jackie Boarer at Dwr Cymru but it's  
21 copied to you, and this is essentially Ofwat saying  
22 "Look, Dwr Cymru, could you please get on with dealing  
23 with this access price? We have had a letter from  
24 Dr Bryan of 27 November", and I think that's probably  
25 the misdated letter?

1 A. I think it must be.

2 Q. So essentially she is taking your letter and she is  
3 concerned about it, and she is passing on the concerns  
4 to Dwr Cymru and asking about whether in fact Dwr Cymru  
5 has calculated an access price, and she says at the end:

6 "It would appear that much of the information needed  
7 to calculate an indicative price was available to you  
8 and such a price could have been disclosed to Albion to  
9 facilitate discussion."

10 So Ofwat is chasing up, sort of almost on your  
11 behalf, in relation to those matters?

12 A. Yes.

13 Q. Then if we turn on to tab 91, 30 November, this is  
14 a response to that Ofwat letter, and you will see there  
15 that in response to the Ofwat letter, second paragraph:

16 "Dwr Cymru hasn't yet finalised an access price for  
17 treatment and transportation on the Ashgrove System.  
18 Our position remains, as explained to Dr Bryan at the  
19 meeting on 10 November, we will present Albion Water  
20 with an access price when all investigations and  
21 relevant issues are finalised. Albion was informed at  
22 the meeting the access price would be based on regional  
23 average cost of each of the services requested by  
24 Albion. However, no indication was given that we would  
25 provide a price immediately. Dwr Cymru informed Albion

1 in a telephone conversation on 23 November that a price  
2 would not be available until mid-December."

3 So that's probably the conversation that was set out  
4 in that email I took you to:

5 "This is considered normal procedure considering the  
6 importance of the issue. Albion will be presented with  
7 the appropriate access price as soon as possible  
8 following resolution of all issues and consideration of  
9 the consequences for all affected parties.

10 "Turning to Dr Bryan's letter ..."

11 The first bullet point is one you have already  
12 agreed with, that in that letter you suggest that there  
13 had been a successful completion of the negotiation, but  
14 that wasn't Dwr Cymru's understanding. Then he says:

15 "We would be most interested in your comments in  
16 response to Albion Water's statement that deals on  
17 Ofwat's special agreements register is evidence of  
18 de-averaging."

19 So the other point about that that you had been  
20 raising with Ofwat, Dwr Cymru are saying, "Hang on  
21 a minute, what are your comments on that?" to the  
22 Regulator, and then:

23 "The prospect of developing a non-potable tariff has  
24 been discussed with Ofwat over a number of months. This  
25 is not a rapid decision in response to Albion's request

1 for common carriage."

2 And you have no reason to dispute that, do you?

3 A. I don't know, because we haven't had disclosure, but it  
4 does appear from some of the contemporaneous material  
5 that Dwr Cymru clearly saw an Ofwat agreed non-potable  
6 tariff as a bulwark against competition, and were keen  
7 to promote such a thing.

8 Q. Well, that's not really what I was asking you. That's  
9 an interesting submission and I am sure Mr Sharpe will  
10 echo it in due course, but you have no reason to dispute  
11 the fact that Dwr Cymru had in fact been discussing with  
12 Ofwat over a number of months issues to do with common  
13 carriage?

14 THE CHAIRMAN: It's not common carriage, it's a non-potable  
15 tariff.

16 MR BEARD: A non-potable tariff, I am sorry, I misspoke. My  
17 fault.

18 A. No, and I would note that we alerted Dwr Cymru to our  
19 intention to pursue common carriage, I think, in  
20 February of that year. So that probably pre-dated any  
21 discussion that Dwr Cymru had with Ofwat about a new  
22 non-potable tariff.

23 Q. Let's go on to another exchange with Ofwat, tab 97.  
24 This is 11 December, this is from you to Ofwat:

25 "We are now of the view that Dwr Cymru's behaviour

1 regarding our request for fair access terms for the  
2 Ashgrove System constitutes an abuse of ..."

3 Chapter 2 I'll refer to it as, but the section is  
4 provided.

5 "Your office is already familiar with our efforts to  
6 achieve parity of treatment. To date neither we nor  
7 your staff have managed to persuade Dwr Cymru to release  
8 relevant cost information. This frustrates the  
9 implementation of common carriage arrangements that  
10 should have been in place by 1 December."

11 So here you are saying: look, we are on the same  
12 side here, there is a problem with Dwr Cymru, we want to  
13 escalate it by turning it into a Competition Act  
14 complaint, effectively, we want to raise this as  
15 an issue?

16 A. Yes.

17 Q. "I would ask you to use your powers under the Act  
18 [that's the Competition Act] to investigate Dwr Cymru's  
19 actions, persistent failure to negotiate the access  
20 price that Albion offered on 20 October."

21 The 20 October offer, was that your sort of opening  
22 gambit 7p?

23 A. That was our view of the price based on the published  
24 information in Dwr Cymru's statutory accounts.

25 Q. So that was an offer?

1 A. That was our opening price, yes. It was clearly part of  
2 a negotiating process, we thought.

3 Q. It says here, this is your letter, you say Albion  
4 offered?

5 A. Yes, indeed.

6 Q. "Refusal to divulge any information regarding the costs  
7 of the system and/or apportionment of any costs, refusal  
8 to accept that current supply terms for both customers  
9 on the Ashgrove System are based on de-averaged costs of  
10 that system. This despite Mike Brooker's confirmation  
11 of this fact in his letter of 17 February 2000."

12 17 February 2000. If we keep a hand in that and  
13 flip back to tab 43, this is a letter from Mike Brooker  
14 to you. Is that the letter you were referring to?

15 THE CHAIRMAN: What page?

16 MR BEARD: I am sorry, it's page 526 in my bundle. I am  
17 just trying to track down the cross-reference.

18 THE CHAIRMAN: Yes, I just have it in different tabs.

19 Although I don't have it at all now.

20 MR LANDERS: Neither do I.

21 (Handed)

22 THE CHAIRMAN: Thank you.

23 MR BEARD: Thank you.

24 Dr Bryan, is this the letter you were referring to  
25 in your 11 December 2000 letter?

1 A. I don't think it can be, because this letter doesn't  
2 make any reference to the claim that I make in my  
3 11 December 2000 letter.

4 Q. That's why we were slightly confused.

5 A. I must admit I am as well at this moment.

6 Q. Right. Because it says:

7 "Despite Mike Brooker's confirmation of this fact in  
8 his letter of 17th of 2000 copied to Beryl Brown ..."

9 So it wasn't a letter directed to Ofwat, by the look  
10 of things, it was a letter you had, and the only one we  
11 could find was that one?

12 A. And this letter wasn't copied to Beryl Brown, judging by  
13 the --

14 Q. Well, we can't absolutely tell that.

15 A. Yes.

16 THE CHAIRMAN: But this is looks like an unsigned letter.

17 MR BEARD: Yes, it is, so it may be one that's been pulled  
18 down off a system.

19 A. Yes.

20 MR BEARD: I'm simply trying to identify whether or not that  
21 is the letter to which Dr Bryan was referring.

22 A. It doesn't look as though it is, because the content is  
23 not consistent with the claims I make.

24 Q. No. What's interesting about it, of course, is the fact  
25 that you are saying that Mike Brooker has effectively



1 confirmed that there was a de-averaging of costs in your  
2 10 December letter. As you rightly say, this  
3 17 February letter doesn't say anything of the sort?

4 A. No, it doesn't.

5 Q. Of course we went through correspondence earlier where  
6 as soon as you mentioned de-averaging, Mike Brooker said  
7 "No, we hadn't de-averaged those tariffs"?

8 A. No, I accept that. What I can't explain is the apparent  
9 absence of another letter dated 17 February 2000.

10 Q. It would have been a bit odd, given Mike Brooker's  
11 initial response to you as soon as you raised  
12 de-averaging, to have subsequently or indeed previously  
13 have confirmed to you that --

14 A. There were two live issues at that time which might  
15 explain it. One was the fact that we had just written  
16 about our desire to take up common carriage -- we are  
17 talking now about February 2000 -- and Dr Brooker's  
18 response to me, the one that's in the bundle of 17th,  
19 clearly relates to that advance warning that we had  
20 given him, and that's perfectly understandable.

21 But there was in parallel with that a dialogue  
22 between me and Dr Brooker relating to what we knew  
23 Dwr Cymru were trying to conclude with Corus at Shotton  
24 that related to the, shall we say, the normalisation of,  
25 or the imposition of some sort of contractual terms when

1 the period between 1996 and 2000 had been effectively --  
2 there had been no agreement, simply a continuation of  
3 the terms of an agreement that had expired in 1996.

4 So it is likely that the reference to a letter of  
5 that same date was in relation to what Dwr Cymru had  
6 been doing with regard to the tariffs at Shotton.

7 Q. I'm not sure we can take this much further.

8 THE CHAIRMAN: Can I just be clear I understand that. In  
9 parallel with this discussion, there was a discussion  
10 going on about -- that correspondence we saw about the  
11 difference in price between the Shotton tariff and the  
12 Corus tariff in the lagoons, that was much later, was  
13 it, or was that about this time as well?

14 MR BEARD: It was earlier on in this bundle, so it is around  
15 this sort of time. I am not sure we can explore it  
16 further. We genuinely didn't understand what was being  
17 referred to here, because the cross-reference to the  
18 letter that we had got in the bundle doesn't make any  
19 sense and I wanted to understand it, because it's saying  
20 something different from what Mike Brooker has  
21 repeatedly said in the correspondence.

22 THE CHAIRMAN: We don't know whether Beryl Brown has a copy  
23 of the letter?

24 MR BEARD: We can ... no.

25 THE CHAIRMAN: Never mind.

1 MR BEARD: It's not something we have a copy of it, because  
2 if it was, that would have come out in the disclosure  
3 exercise. It's clearly not something that Dr Bryan has  
4 a copy of, because it hasn't come out in the disclosure  
5 exercise.

6 A. What I would note is that the numbering at the foot of  
7 this, of the later 11 December letter, the 86 that you  
8 see there indicates that it was in our bundle of  
9 enclosures in 2004, for the substantive appeal to  
10 the Tribunal, and so this document has been well known  
11 to the Tribunal and to Dwr Cymru for eight years.

12 Q. I've no idea. I am not remotely going to question that.  
13 I am sure your recognition of the handwritten pagination  
14 is much better than mine in relation to these matters.

15 Someone much more knowledgeable behind me has said  
16 that Beryl Brown has long left Ofwat, so I imagine that  
17 this may be a futile exercise.

18 If we could turn on to tab 100, this is a letter, if  
19 you turn over the page to 753, dated 11 December. I am  
20 going to assume that it crossed with your complaint,  
21 because there is no reference to your complaint here.

22 A. Yes.

23 Q. One would anticipate that Ofwat would have commented on  
24 your letter, if it hadn't been. It's a letter from  
25 Ofwat, carrying on that chain of chasing up with what's

1 going on with the negotiations. The first paragraph:

2 "I note from the correspondence that I've seen that  
3 you have made some progress in your common carriage  
4 discussions and that these discussions appear to have  
5 been conducted in an open and transparent way. Clearly  
6 this is something I welcome. However, I have two  
7 points ... remain concerned about the unreasonable delay  
8 in providing an indicative access price."

9 So again, concerned about chasing the price down and  
10 what's going on with it.

11 "Second, I am aware that you are involved in bulk  
12 supply negotiations between North West and Albion.  
13 I would be grateful if you could tell us whether this  
14 has any effect on your common carriage negotiations with  
15 Albion."

16 So those are the two points, she wants to make sure  
17 that an access price is forthcoming, and she's aware of  
18 the need for the dealings with North West, and:

19 "On a point of interest I understand from an earlier  
20 conversation with you that Dwr Cymru has agreed to  
21 reduce the amount of water it takes. Please confirm  
22 this is the case. If this is correct I would be  
23 interested in your reasons for changing your current  
24 contractual arrangements. I would be grateful if you  
25 could confirm that your current contractual arrangements

1 with North West Water are contained in an agreement."

2 So at this stage she is engaged, she is concerned  
3 about what's going on, she is chasing up Dwr Cymru, and  
4 that's precisely what you wanted Ofwat to be doing at  
5 this stage, notwithstanding they hadn't even got your  
6 complaint yet?

7 A. Yes, that's what we hoped they would be doing.

8 Q. Right. Tab 101, this is just the response to that  
9 letter. Here it's Dwr Cymru recognising the comments  
10 being made by Ofwat about the conduct of the  
11 negotiations and they are highlighting the fact in the  
12 third paragraph that they confirmed at the meeting on  
13 10 November that the approach would be in line with  
14 network access pricing as per the network access code.

15 The final paragraph, concern about the allegation of  
16 the breach of the Competition Act, might need to take  
17 legal advice:

18 " at this stage we hope you and Albion  
19 recognise our efforts to conclude this on a negotiation  
20 basis. Our understanding of negotiations between Albion  
21 and North West Water are at an indicative stage."

22 And then highlighting that there is  
23 a misunderstanding that has arisen about the amount of  
24 water required by North West Water at Heronbridge.

25 Then:

1            "To help expedite matters it would be most useful to  
2            have your response to the request included in my  
3            30 November letter, namely clarification."

4            That was the comments they had asked for on the  
5            Albion assertion that Ofwat's special agreements  
6            register is evidence of de-averaging:

7            "I would like to copy this letter to Albion and ask  
8            for your confirmation that your letter dated 14 December  
9            has been forwarded."

10           So checking with Ofwat that it's fine just to copy  
11           stuff to you and that this response could go to you.

12           Then I think the next tab to turn up is shortly  
13           after this, your more expansive complaint, tab 107. It  
14           looks like, from the start of this letter, Ofwat have  
15           already reverted saying "We will come back with  
16           an initial assessment of the complaint by 24 January",  
17           and some questions had been posed, and you said:

18           "Yes, we will provide some information. As  
19           a general principle, our view is that any information  
20           offered in support of our case should be capable of  
21           disclosure in order to facilitate dialogue. The single  
22           reservation I have is one of timing. In this instance,  
23           and this will apply elsewhere in similar circumstances,  
24           I would be unwilling to disclose details of our own  
25           calculations to Dwr Cymru at this stage as the incumbent

1 should be developing their arguments from their own  
2 data. There may come a point later in the process where  
3 the two arguments are reviewed concurrently by each of  
4 the parties, I would be happy to exchange information to  
5 facilitate that approach. In particular, I don't  
6 believe it would be appropriate for details of the  
7 financial relationship with North West Water to be  
8 divulged to Dwr Cymru until North West Water are happy  
9 to do so. Not sure why that's necessary in any event."

10 Here what you are saying is: whilst we are in  
11 negotiations I don't want my calculations disclosed to  
12 Dwr Cymru; is that right?

13 A. I am saying that there should be an even-handed  
14 approach, so if they are in a position to show us their  
15 calculations then we would reciprocate, but not to show  
16 our hand entirely while they were showing no signs of  
17 being prepared to divulge any information.

18 Q. But you are indicating that you have concerns about  
19 confidentiality of your own data and calculations whilst  
20 the negotiations are going on?

21 A. Before we have seen Dwr Cymru's, yes. We were fairly  
22 confident that in such event they would concentrate on  
23 demolishing our arguments rather than presenting their  
24 own.

25 Q. If you turn over the page, "Cost analysis in support of

1 Enviro-Logic's offered price", halfway down the  
2 paragraph:

3 "Our view is that only locally de-averaged charges  
4 comply [and this is with the legal requirements of the  
5 Competition Act] and a set of charges based on regional  
6 average is not sufficiently representative of cost to be  
7 appropriate for the Ashgrove System."

8 So here you are going a bit further than you were  
9 suggesting earlier, you are saying only local cost based  
10 prices are appropriate?

11 A. Because we were concerned, and that concern was  
12 justified in the event, that Dwr Cymru's view of  
13 regional averaging would embrace charges, costs that  
14 were unrelated to the services that we were seeking.

15 Q. But here you are actually saying only locally  
16 de-averaged charges comply with the Competition Act  
17 requirements?

18 A. That was our position at that time, yes.

19 Q. And it's changed since then?

20 A. It's changed and it certainly changed at an early stage  
21 in front of the Tribunal where, as I said before, we  
22 recognise that properly constructed costs analysis based  
23 on the right data for the right class of customer would  
24 be useful, or indeed comparable to that derived from  
25 local costs, particularly in a system where



1           arithmetically there are only two systems. And given  
2           that those systems are similar, it would be very unusual  
3           if the cost of one system was remarkably different to  
4           the cost of the other.

5       THE CHAIRMAN: Those two systems are the Ashgrove System and  
6           the Llanwern system.

7       A. And the Llanwern system in South Wales.

8       THE CHAIRMAN: How far away is that from the  
9           Ashgrove System?

10      A. About as far as away as you can get while remaining in  
11          Wales. One is at the extreme north of the country and  
12          the other is at the extreme south.

13      MR BEARD: So you have changed your position since then.

14            Tab 109, all I wanted to go to here is the bottom of  
15          page 796. You are closely engaging with Ofwat, and  
16          Ofwat were being quite forthcoming, because you had  
17          actually had a meeting with Philip Fletcher, the DG of  
18          Ofwat.

19      A. Yes, newly appointed.

20      Q. Yes.

21            "Very useful, found him informal, courteous,  
22          attentive, gave little away, more user friendly. I gave  
23          a general appraisal of market forces, very keen that  
24          I should meet Julie Griffiths, Competition Act 1998 case  
25          manager."

1           That is Philip Fletcher was very keen that you  
2           should; yes?

3           A. Yes.

4           Q. "Key issue for Philip Fletcher was facilitate or  
5           regulate. Uncomfortable as designer of competition  
6           processes. I judged that he would prefer to facilitate  
7           the efforts of others if he was confident that the  
8           outcome was benign and manageable. I tried to provide  
9           that sense of purpose, awareness and competence!

10           "I stressed the need for predictability of outcome  
11           ... He welcomed that [approach] ... PF confirmed that  
12           Ofwat could not provide funding but he recognised the  
13           value of an Ofwat CA98 determination as support for  
14           third party action."

15           So you were there discussing in some detail  
16           Competition Act complaints that had been made, in  
17           particular that concerning common carriage, and you were  
18           getting a receptive audience from Ofwat and the  
19           Director General, and he was encouraging a meeting  
20           between you and the case manager effectively; is that  
21           right?

22           A. That was certainly true, yes.

23           Q. Then other strategic developments at the bottom of  
24           page 797:

25           "Ofwat have formally notified us that our complaint

1           against Dwr Cymru with regard to Shotton Paper appears  
2           to have merit. Ofwat are now progressing their  
3           enquiries, but we have no benchmarks by which to assess  
4           the timing or nature of the outcome."

5           So what you are reporting to the board here is that  
6           having had this meeting and having been engaged with  
7           Ofwat, Ofwat having been engaged all along the way, the  
8           vibes you were getting from Ofwat were broadly positive  
9           at this stage; is that correct?

10          A. They were.

11          Q. Yes, right. If we could put away bundle 3 and move to  
12          bundle 4, tab 114, this is just really for reference.  
13          This is the note of the fact at page 818 that  
14          an indicative price was provided 16 January 2001, 20p  
15          per metre cubed for the services that Albion had  
16          requested. So this was a discussion that was had -- and  
17          we all know that this wasn't the first access price but  
18          this was a discussion that was had, two individuals  
19          including Paul Edwards from Dwr Cymru, Malcolm Jeffery  
20          and Roddy Monroe from Albion, and this was what was  
21          provided at that time; is that right? And that was  
22          communicated to you, I imagine, directly?

23          A. Yes, it was.

24          Q. Tab 116, this is the tripartite meeting. Mr Pickford  
25          has already taken you to this, I will not go through it,

1 but this was the product of the discussions that had  
2 happened in November and the contact that had occurred  
3 and the fact that there were a number of issues that  
4 needed to be resolved with North West Water, Albion and  
5 Dwr Cymru in order for there to be a common carriage  
6 arrangement; is that right?

7 A. That was the view of Dwr Cymru, yes.

8 Q. Are you saying you didn't think there was any need for  
9 the tripartite arrangement?

10 A. No, I fully agreed with the need for a tripartite  
11 meeting.

12 Q. Thank you.

13 A. The point I was trying to make was that some of the  
14 issues were -- there was a dispute about the importance  
15 of some of the issues.

16 Q. But it was a sensible way of proceeding?

17 A. It was an entirely sensible way of proceeding.

18 Q. Tab 122, 2 February 2001, this is a letter from  
19 Dwr Cymru to Ofwat. Ofwat had clearly been in touch  
20 saying: what sort of indicative access figure have you  
21 given? They had indicated that they wanted sight of  
22 an indicative access figure by "today", presumably  
23 2 February, and what's indicated there is that 20p has  
24 been given as an indicative figure, it was given on  
25 16 January, he is apologising that he didn't inform

1 Ofwat sooner in relation to those matters, there are  
2 clearly other questions that need dealing with, he is  
3 going back to some of the correspondence we have already  
4 referred to, and he is making clear in the final  
5 paragraph:

6 "The current negotiations with Albion Water are  
7 being conducted on a commercial basis with the full  
8 knowledge of Ofwat. Our position is and always has been  
9 to conduct these negotiations in an open and  
10 communicative manner. In fact at the tripartite  
11 agreement on 16 January progress was discussed and all  
12 parties said that they were satisfied. This approach is  
13 particularly appropriate given the precedent the deal  
14 has the potential to create."

15 You would agree the negotiations were being  
16 conducted with the full knowledge of Ofwat, and you  
17 would agree that at the tripartite meeting parties had  
18 come away saying that they were satisfied with the  
19 discussions?

20 A. I draw a distinction between the notification to Ofwat  
21 of the negotiations and the suggestion that Ofwat had  
22 full knowledge of what was happening within Dwr Cymru at  
23 the time, which I don't believe to have been the case.

24 Q. Just move on to 128, this is a letter to Paul Edwards  
25 from the competition case manager, Julie Griffiths:

1           "Thank you for your phone call today. I am pleased  
2 to hear you have finally reached agreement on your  
3 access price figure methodology after your board  
4 meeting. I hope that this now puts you in a position to  
5 answer the questions in my letter of 29 January. When  
6 we have received your response and supporting evidence  
7 we will decide how best to take this forward. I look  
8 forward to your response. Could you get this to me by  
9 20 February?"

10           So this is Ofwat, pleased that the indicative  
11 pricing has moved to an access price figure that can be  
12 offered, and just wants to know what is going on in  
13 relation to it; that's correct, isn't it?

14 A. That appears on the face of it to be correct, yes.

15 Q. Then if we go on to tab 131, this is an email,  
16 an internal email within Albion from Roddy Monroe to you  
17 and Malcolm Jeffery:

18           "Record of telephone conversation between  
19 Roddy Monroe and Julie Griffiths 19 February ...

20           "General introduction: genuinely frustrated that the  
21 fundamental problem with progressing our two complaints  
22 is that much relies on Ofwat's competition policy  
23 [that's] not yet been decided."

24           I take it that that's Roddy Monroe expressing the  
25 Albion view?

1 A. No, I take it, and having spoken to Roddy at the time,  
2 he is reporting the conversation he had with  
3 Julie Griffiths, so it's Julie Griffiths' view from  
4 within Ofwat.

5 Q. So competition policy is still under development, and  
6 because of that, working out how best to deal with the  
7 complaints that you put under the Competition Act is  
8 something that's still under discussion within Ofwat?

9 A. Yes.

10 Q. Yes.

11 "Julie is currently working on developing  
12 a consultation document for guidelines for common  
13 carriage to be published potentially Easter [so that  
14 would be presumably April] although as acknowledged this  
15 is not much use to us."

16 So what we have here is Ofwat indicating that they  
17 are willing to help and engage with you, but there is  
18 a great deal of uncertainty about competition policy and  
19 how the Competition Act applies, and that needs to be  
20 developed?

21 A. I took it not that it was an issue of how the  
22 Competition Act applies but how Ofwat would conduct  
23 itself, how it would use its powers under the  
24 concurrency arrangements to actually do what the Act  
25 requires it to do.

- 1 Q. So how Ofwat will apply competition policy?
- 2 A. Yes, the -- sorry.
- 3 THE CHAIRMAN: You read this, where it says those quotes  
4 about the elephant and dinosaur, did you read that as  
5 being Roddy quoting how Julie Griffiths was describing  
6 Ofwat?
- 7 A. Yes.
- 8 THE CHAIRMAN: Right.
- 9 MR BEARD: Then if you go down to a single line-paragraph:  
10 "Who is winning the argument ..."  
11 This is a question being posed. Is this Roddy  
12 asking Julie:  
13 "Who is winning the argument re average price based  
14 on appropriate class of customer versus average price  
15 based on all costs?"?
- 16 A. Yes, I believe it is.
- 17 Q. So he is there recognising that there is a debate going  
18 on in the context of consideration of these Competition  
19 Act complaints, and he is asking Julie who is winning  
20 the argument. He wants to get a sense from Ofwat who is  
21 winning this particular battle which you consider is  
22 important in the context of the common carriage  
23 arrangements?
- 24 A. We do indeed, but you will notice that he is talking  
25 about, in both cases, average price, but one based on



1 the class of customer, the appropriate class of  
2 customer, and the average cost based on everything.

3 Q. Yes, and so this is a move away from your local costing  
4 approach to the average price based on appropriate class  
5 of customer, but he is recognising that in relation to  
6 those issues there is a genuine debate going on, there  
7 is an argument that Ofwat are considering, and the  
8 question is: who is winning that argument; is that fair?

9 A. That is fair, yes.

10 Q. Thank you.

11 132, this is the first access price, and it's  
12 actually sent to Ofwat, which is perhaps understandable  
13 given that there was a pending complaint in relation to  
14 it. I won't go through it, it's the 23.2p, which is the  
15 price that was then subject to further consideration,  
16 some of which we will come to.

17 A. I think it is worth pointing out that it specifically  
18 seeks approval from Ofwat for that price, on page 876.

19 Q. Yes. It certainly does. Would you consider that in any  
20 way surprising given that there was a pending complaint  
21 in relation to those issues?

22 A. I consider it surprising in that it was very clear from  
23 Ofwat's guidance that it was up to the companies  
24 themselves to decide on the appropriate approach to  
25 tariff, to price setting.

1 Q. It surprises you, does it, that Dwr Cymru, subject to  
2 a complaint in relation to precisely these matters, in  
3 circumstances where both parties have been closely in  
4 contact with Ofwat, provides the price to Ofwat and says  
5 "We would like approval of it", knowing that if the  
6 price is not meeting with Ofwat's approval, then there  
7 is a real risk of that Competition Act complaint being  
8 pursued against it? You find that surprising?

9 A. No, the competition complaint at that time was of delay  
10 and the failure to disclose cost information, and it  
11 would have been sensible to have sent us that  
12 information as soon as possible in the light of that  
13 complaint, not to delay another ten days, or 12 days, as  
14 it turned out.

15 Q. I am sorry, just to be clear, your complaint back on  
16 11 December, which we don't need to turn up again but  
17 just for reference is folder 3, tab 97, included failure  
18 to negotiate, is what you alleged, notwithstanding the  
19 fact that negotiations had been going on; refusal to  
20 divulge any information, so concerns about  
21 confidentiality, notwithstanding the fact that you knew  
22 that Dwr Cymru were in the process of working through  
23 their methodology in relation to these matters;  
24 a refusal to accept that the current supply terms for  
25 both customers on the Ashgrove System are based on

1 de-averaged costs of that system -- that was a key part  
2 of your complaint, so your summary misses a bit, doesn't  
3 it, that you have just given of your complaint?

4 Actually you were putting squarely in issue in December  
5 the de-averaging issue, weren't you?

6 A. Yes.

7 Q. Thank you. If you turn over to 135. Just to confirm  
8 the position, that was Paul Edwards making absolutely  
9 clear on 21 February that, as long as Ofwat were happy,  
10 they would release the figures. If you turn on to 137,  
11 you get the response from Ofwat saying "Look, you don't  
12 need approval from us in relation to those charges; send  
13 them out".

14 If we go on, then, to tab 142, this is a further  
15 variant on the complaint:

16 "Further to my letter of 7 March 2001 I now write to  
17 inform you that having reviewed Dwr Cymru's methodology  
18 and indicative access price, Albion Water is now of the  
19 view that this constitutes a breach of chapter 2 of the  
20 Competition Act."

21 Just working through the four heads of complaint,  
22 the first is:

23 "Failure to comply with published access code. The  
24 access code states charging for transport of water  
25 through the network will be on the basis of average

1 costs."

2 That was the part we looked at earlier:

3 "As you will be aware, Dwr Cymru have based their  
4 analysis of access charges on the apportionment of  
5 prices to consumers not on their allocation of costs,  
6 changing of numbers previously quoted."

7 So this is holding up against Dwr Cymru the proposed  
8 access charges, as you put it, of 20p, that was the  
9 indicative one released on 16 January, wasn't it?

10 A. Yes.

11 Q. And then the 23.2p, then the fourth bullet point:

12 "Failure to comply with MD 163 which clearly states  
13 that access charges should allow incumbents to recover  
14 network costs and that companies should charge entrants  
15 as it would charge itself. To base charges on income is  
16 clearly inconsistent with these guidelines. In the  
17 short run it is unreasonable to assume current income is  
18 entirely representative of current network costs.

19 "Discriminatory behaviour through the use of an  
20 unrepresentative customer class."

21 So you have four heads there of your complaint to  
22 Ofwat, and you have already averted to them, but those  
23 were the heads of your complaint, I have fairly  
24 summarised them there; yes?

25 A. You did.

1 Q. Thank you. If we then move on to tab 147, here you have  
2 a further letter in relation to the competition  
3 complaint. There is just one paragraph I want to refer  
4 to here, beginning:

5 "I now write to offer clarification on this  
6 important point. Enviro-Logic is indeed of the view  
7 that the network access price offered by Dwr Cymru is  
8 unreasonable and would deter legitimate competitive  
9 activity and therefore constitutes a breach of the Act."

10 So you are clarifying what you were saying in your  
11 four heads and making sure that Ofwat were really alive  
12 to what your concerns were?

13 A. That's right.

14 Q. Then we go on to 152, this is an update letter from  
15 Ofwat, 31 May 2001:

16 " ... informing you of progress on complaint against  
17 Dwr Cymru ... initially addressed the four complaints  
18 raised in your letter of 11 December before dealing with  
19 your recent correspondence."

20 So they are trying to pick up all the different  
21 facets of your particular issues that you have raised.

22 So there is, number one, failure to negotiate;  
23 number two, refusal to divulge information; number  
24 three, refusal to accept that current supply terms for  
25 both customers on the Ashgrove System are based on the

1 de-averaged costs of that system; four, Albion's request  
2 for parity of treatment had been pre-dated by  
3 discussions with Ofwat; five, Albion Water complained  
4 that Dwr Cymru is changing numbers previously quoted;  
5 six, Albion complained of Dwr Cymru's discriminatory  
6 behaviour through an unrepresentative class of customer;  
7 seven, Albion complained that Dwr Cymru fails to comply  
8 with MD 163; and then eight, which was the one that was  
9 emphasised in the letter I just took you to, Albion  
10 Water has complained that the access price offered by  
11 Dwr Cymru is unreasonable.

12 I am not going to go through the terms of the Ofwat  
13 answer, but they were correctly picking up all the  
14 various issues that you had raised in relation to your  
15 complaint, including compliance with MD 163 and pricing  
16 methodologies.

17 Then if we move on to tab 176 in this bundle, this  
18 is an Ofwat letter dated 21 June 2002, so -- I am not  
19 going to say some water has flowed under the bridge --  
20 there has been some correspondence and interaction and  
21 various dealings between you and Ofwat, and indeed with  
22 Dwr Cymru and Ofwat, and there is further concerns being  
23 articulated. At this stage Ofwat are saying "We don't  
24 think we have made a Competition Act decision on the  
25 relevant issues":

1            "I have spoken to Philip Fletcher [this is  
2            Mike Saunders]. We both have some sympathy with your  
3            view that you need a fully reasoned decision. The case  
4            does appear to raise important issues relating to common  
5            carriage generally and the calculation of access prices.  
6            I agree that it's important both to you and the industry  
7            as a whole that our detailed thinking on the issue is  
8            publicly available and open to challenge before the  
9            Competition Commission Appeal Tribunals (the CCAT) if  
10           necessary."

11           The old name for the current tribunal.

12           So you had been saying to Ofwat that you were not  
13           happy with where they were coming to in relation to  
14           this, you were suggesting that they had taken a decision  
15           in relation to your complaint, and they were saying "No,  
16           we haven't, but we do understand you really want to have  
17           the full reasons"; that's right, isn't it?

18           A. They closed the case and we requested them to re-open  
19           the case. They closed the case on the basis there were  
20           no grounds for complaint, but without making a formal  
21           decision to that effect, and we asked them to re-open  
22           it.

23           Q. So they did, and they carried on, and they carried out  
24           quite an extensive exercise, because it wasn't until --  
25           I won't do it by date but by bundle -- bundle 5, tab 227

1           that we get the decision. This is a decision dated  
2           26 May 2004, so the investigation and the preparation of  
3           the decision has taken some time, and as I say there had  
4           been a good deal of exchange with Ofwat and Dwr Cymru  
5           and Dwr Cymru and Ofwat in the preparation of this, and  
6           no doubt you were deeply frustrated by the time that  
7           this had taken to emerge from Ofwat, I imagine?

8        A. I think that's a reasonable conclusion to draw, yes.  
9           Yes.

10                 Sorry, which tab number?

11       Q. I am sorry, 227. You will quite rightly say this  
12           decision was the one subject to appeal and scrutiny  
13           under various Tribunal judgments, and of course that is  
14           absolutely right, and the outcome of those decisions by  
15           the Tribunal was that Dwr Cymru had committed a breach  
16           of the Competition Act. Just to be absolutely clear,  
17           that is not being in any way put in issue.

18                 Just looking at this decision, if you would. You  
19           are no doubt much more familiar with it than I am, but  
20           nonetheless if we turn on beyond the summary and the  
21           legal background to page 1453, just above paragraph 68,  
22           there we see the summary of Albion Water's complaint.  
23           Just over the page, a brief chronology of the complaint  
24           and there are various documents and incidents referred  
25           to in that summary.



1           If we turn over the page to 1455, this is all part  
2 of the summary of Albion's complaint, "Price related  
3 alleged breaches of the chapter 2 prohibition", and if  
4 we focus on the excessive pricing: unreasonable cost  
5 recovery, criticisms of Dwr Cymru's access price  
6 methodology, inconsistency with regulatory accounting  
7 guidelines, price squeezing, discrimination, non-price  
8 related alleged breaches of chapter 2 prohibition,  
9 delay, failure to provide information or negotiate,  
10 changing tariffs, changing the indicative first access  
11 price -- so that's the 20p to 23.2p -- and allegations  
12 of misrepresentation as well.

13           So what was being reflected here was the range of  
14 complaints that you had raised, in particular the points  
15 that had been raised by you in the documents to which  
16 I have referred?

17       A. That's correct.

18       Q. If you move on to page 1488, here we get the section on  
19 analysis of abuse, and it goes on for some time. If we  
20 turn to 1492, in relation to the first question, namely  
21 whether there was any misallocation of costs by  
22 Dwr Cymru, Albion challenged in detail the way that  
23 Dwr Cymru had calculated the first access price:

24           "As discussed below, Albion Water also alleged that  
25 Dwr Cymru had knowingly and willingly misallocated

1 costs."

2 So you were putting four-square before Ofwat the  
3 idea that there had been fault by Dwr Cymru in the way  
4 that it had gone about calculating that first access  
5 price, and that's then echoed as you turn over the page;  
6 that's correct, isn't it?

7 A. That is correct.

8 Q. Then you turn over the page "Access pricing in the water  
9 industry" at 240:

10 "At the time of Albion Water's complaint there was  
11 no specific statutory framework for common carriage, or  
12 any particularly favoured method within the water  
13 industry for calculating access prices. We had sent  
14 a public letter to managing directors of water  
15 undertakings in June 2001 about pricing issues for  
16 common carriage. This letter set out the main possible  
17 approaches to access pricing."

18 You don't disagree with anything in that paragraph,  
19 do you?

20 A. No.

21 Q. Then it quotes from MD 163 in 241. Then 242, on access  
22 codes for common carriage, that was draft guidance.

23 243:

24 "When companies produce their public access codes  
25 a number had based their access price calculations on

1 ECPR."

2 Efficient component pricing rule, which obviously  
3 wasn't well favoured by the Tribunal:

4 "Most had used average accounting costs, although  
5 one company did refer generally to the principles of  
6 LRMC."

7 Then there is discussion of the Water Act 2003, and  
8 in particular that the cost principle there will enable  
9 what's called a retail minus approach.

10 245, under "Average accounting cost method used by  
11 Dwr Cymru":

12 "Dwr Cymru offered Albion Water the first access  
13 price of 23.2p in February 2001. Dwr Cymru based the  
14 first access price on an AAC method, or as Dwr Cymru  
15 called it, on a whole company average basis."

16 So Ofwat, having been involved in the sense of being  
17 kept abreast by both parties to the negotiations and  
18 being well aware of what the dispute was between the  
19 parties in relation to methodology, was also well aware  
20 of the methodology and basis that Dwr Cymru had used for  
21 the calculation of the first access price; that's right,  
22 isn't it?

23 THE CHAIRMAN: Well aware at what point?

24 MR BEARD: I am sorry, well aware of the basis -- I am  
25 saying in relation to here it is clearly well aware of

1 the basis on which Dwr Cymru had produced its access  
2 price.

3 A. We have no evidence of that, because the disclosure by  
4 Ofwat in 2004 of all the information that it relied on  
5 to produce this determination (indicated) contained none  
6 of the material that related to the way that the access  
7 price had moved. It did contain obviously the letter  
8 that was received, the final offer letter, but all the  
9 various LCE papers, the local cost information, was  
10 not -- or the local cost information was not disclosed  
11 until Mr Jones' witness statement in 2006, the LCE  
12 papers, the papers that went to the board, were not  
13 disclosed until after the referred work was concluded in  
14 late 2007, and the other mass of relevant papers was not  
15 disclosed until the latter part of 2011 in response to  
16 disclosure requests in this case. So I am in no  
17 position to know what Ofwat had sight of when it reached  
18 this conclusion.

19 Q. That wasn't what I was asking, I was asking if Ofwat  
20 knew clearly the basis on which Dwr Cymru -- the  
21 methodology it had used for the calculation of the first  
22 access price, and it clearly did know that, didn't it?

23 A. I don't believe it did. I believe, and I think the  
24 evidence shows, that Ofwat had been told that the  
25 methodology was consistent with the potable large

1 industrial tariff that it had approved in 1998, and with  
2 the methodology that had been used to substantiate the  
3 26p "minded to" price from 1996.

4 Now, what is clear is that careful examination of  
5 some very complex and difficult number work shows that  
6 it's actually not related to either of the earlier  
7 calculations. So I think that to the extent that Ofwat  
8 came to that sort of conclusion, it begs the question  
9 how they came to that conclusion, because the actual  
10 evidence does not support that conclusion.

11 Q. Can I ask the question again: did Ofwat know that  
12 Dwr Cymru had prepared the first access price using  
13 a whole company average basis?

14 A. Yes.

15 Q. Thank you. Now, at 247, Ofwat says:

16 "At the time [this is at the time that it offered  
17 the first access price] Dwr Cymru did not have a general  
18 tariff for non-potable water upon which it might have  
19 based the first access price. However, subsequently  
20 Dwr Cymru proposed new large user tariffs which included  
21 volumetric charges for both raw water and partially  
22 treated water."

23 You agree with both of those statements, don't you?

24 A. Yes.

25 Q. 248, Dwr Cymru's approach to the first access price and

1           its approach to the new tariff were similar; you accept  
2           that?

3       A. No.

4       Q. No?

5       A. No. I don't.

6       Q. Then "First access price" further down the page:

7           "First access price offered by Dwr Cymru was 23.2p.  
8       Dwr Cymru's approach to calculating the first access  
9       price involved seven stages which are described in  
10       detail below, together with comments from Albion Water  
11       and our comments. A table summarising this seven-stage  
12       process is provided in paragraph 304 below."

13           So not only did Ofwat know that the methodology  
14       Dwr Cymru was using was on a whole company average  
15       basis, it knew the details of the steps that had been  
16       taken by Dwr Cymru in coming to its access price, didn't  
17       it?

18       A. That's what this says, yes. I am not sure it fully  
19       understood what was going on, but I don't dispute the  
20       wording that's here.

21       THE CHAIRMAN: Can I just be clear, is what Ofwat is looking  
22       at here what justifications were put forward by  
23       Dwr Cymru in the course of the Ofwat Competition Act  
24       investigation, or is it saying that this is the process  
25       that Dwr Cymru went through before the 2 March 2001 in

1 coming to the price?

2 MR BEARD: It's the latter. If you turn over the page, 250  
3 itself, to which I have just referred you, set out what  
4 it was doing. It makes clear in 250 that:

5 "Dwr Cymru's approach to calculating the FAP  
6 involved seven stages which are described in detail  
7 below."

8 Then it's actually appropriate just to look very  
9 briefly, I'm not going to take the Tribunal through in  
10 detail, if one turns over the page you can see  
11 starting -- I am going to come back to 255 -- at 257  
12 a systematised diagram of the process. Over the next  
13 several pages is a detailed analysis of the seven steps  
14 that were taken to reach the access price. So Ofwat  
15 were there looking at the methodology that had been  
16 followed.

17 Just to put it in context, I just go back to 255:

18 "Using average revenue figures in this way ..."

19 Because 254:

20 "Dwr Cymru used average revenue figures as a proxy  
21 for average costs without individual specific cost data.  
22 When calculating for example new tariffs, undertakers  
23 have typically used average revenue figures as  
24 a reasonable proxy for average costs on the basis that  
25 these average revenue figures are regulated under the

1 1991 Act. The fact that Dwr Cymru used average revenue  
2 figures as a proxy for average costs when calculating  
3 the first access price is not therefore unusual within  
4 the water industry in England and Wales."

5 Dr Bryan, you agree with that summary at 254?

6 A. (Pause). I don't think I can agree with it, because it  
7 was the first example of a price for common carriage and  
8 the first example of a price in a competitive situation  
9 beyond the start of the Competition Act.

10 Q. It's the first price, so it was a new one, so you are  
11 saying you are in a new world, it is a different world  
12 to be dealt with?

13 A. I would also point to two paragraphs here which show  
14 that Ofwat was misled. And I simply note it so that  
15 the Tribunal can read it: 253 strongly suggests that  
16 there were no local costs, local direct costs collected  
17 for the Ashgrove System, and we now know that not to be  
18 correct.

19 Q. I'm not sure that is an uncontentious proposition,  
20 I think when we go to Mr Jones' witness statements the  
21 evidence may be rather different.

22 A. Okay. But can I point to 1498, because I think in that  
23 step 1 figure is a very clear error there.

24 Q. I am sorry in 149 ...?

25 A. 1498, where you have taken us to the seven-step process.



1 Q. Certainly.

2 A. That step 1 figure, the 73.3p, is very clearly not the  
3 unit cost for the supply of potable water, it is what  
4 Dwr Cymru describe as the whole company average cost for  
5 both potable and non-potable water. I think if Ofwat's  
6 lack of understanding was that fundamental, then there  
7 were clearly some flaws in its own internal processing.

8 Q. Sorry, just to be clear, you are referring to the 73.3p?

9 A. Yes.

10 Q. You know in step 1, where that's considered, that Ofwat  
11 actually adjusted that figure, didn't it?

12 A. I think the point is not that it was adjusted but that  
13 Ofwat considered that it represented potable costs when  
14 in fact Dwr Cymru's position was that it was an average  
15 figure for both potable and non-potable costs.

16 Q. You are saying that Ofwat was confused about this?

17 A. I believe the findings of the Tribunal suggest that  
18 Ofwat was confused about quite a number of issues.

19 Q. Clearly the Tribunal didn't accept some of the findings  
20 by Ofwat. But just on that point, paragraph 258 it  
21 says.

22 "Step 1, Dwr Cymru estimated an average unit price  
23 for the supply of potable and non-potable water."

24 So it's clearly spelling out what it knew was going  
25 on there?

1 A. Then it's the labelling that's at fault, I apologise.

2 Q. Thank you.

3 255, if we could turn back, I just want to note that  
4 actually Ofwat was concerned about how you used average  
5 revenue figures in the way that is set out in 254, and  
6 highlighted certain difficulties in relation to it.  
7 Presumably you thought Ofwat was right to be  
8 highlighting such concerns?

9 A. Yes. That wasn't the sum total of our concerns, but  
10 yes.

11 Q. I wasn't beginning to suggest so, no.

12 There is just one point I do want to pick up along  
13 the way. Page 1506, so this is actually in the detailed  
14 analysis of step 5, the estimate of the unit cost of  
15 non-potable treatment, which was the subject of some  
16 discussion with Mr Pickford yesterday. 294:

17 "As part of its work on the new tariff, Dwr Cymru  
18 reviewed its assumption of a split between potable and  
19 non-potable treatment costs by examining the treatment  
20 cost incurred at 11 treatment works of comparable size  
21 and capacity to Ashgrove. On the basis of this new work  
22 Dwr Cymru considered that non-potable treatment costs  
23 should be assumed to be 15.2 per cent rather than  
24 30 per cent of potable treatment costs. We were  
25 surprised by this reduction in percentage as our initial

1 view was that the original 30 per cent might in fact  
2 have been a low estimate. However, through the 11  
3 treatment works, although the 11 treatment works  
4 considered are still only a sample, the new work clearly  
5 indicates that 15.2 per cent would be a more appropriate  
6 figure in this calculation."

7 So the 15.2 per cent that you were discussing  
8 yesterday, that was actually a figure that was  
9 identified by Dwr Cymru; you accept that?

10 A. There is no dispute, but I think it does confirm my  
11 theory of confirmation bias, that Ofwat, having been --  
12 Ofwat was originally told that 30 per cent was the right  
13 figure by Dwr Cymru, and it is clearly clinging to  
14 a view, as it says very eloquently here, that we  
15 thought -- Ofwat thought the original 30 per cent figure  
16 might actually be somewhat low because the Ashgrove  
17 treatment works appears to be relatively sophisticated.

18 Now, as we saw, as the Tribunal saw when it visited  
19 Ashgrove treatment works, it was anything but  
20 sophisticated, it was a bit of a monument to 1950s  
21 municipal design, it had had very little investment over  
22 the years and was a series of settling chambers. And  
23 the Tribunal then had the benefit of going to a more  
24 modern treatment works, and the obvious conclusion would  
25 have been drawn that 30 per cent was hopelessly too

1 high. The problem was that at the time of writing this  
2 determination Ofwat had not visited Ashgrove and the  
3 members of the team had never visited any treatment  
4 works, so they were completely in the dark, they were  
5 totally reliant for their information on information  
6 provided to them by Dwr Cymru.

7 Q. I want to just pick up two points in relation to that.  
8 First of all, you accept that specifying 15.2 per cent  
9 rather than 30 per cent was actually, in this process,  
10 to Dwr Cymru's detriment?

11 A. No, it wasn't, with the methodology that was employed.

12 Q. We will come back to that. I think the position is that  
13 Dwr Cymru considers it wasn't.

14 Second point: you talk about confirmation bias here  
15 and the concerns of Ofwat's grotesque ignorance and that  
16 it had never crossed the threshold of a pumping works or  
17 whatever in relation to site visits. Actually when we  
18 go on to the referred work somewhat later on, actually  
19 the relevant figure increases beyond 15 per cent when  
20 the matter is further considered in more detail?

21 A. It does. Not very much though.

22 Q. Well --

23 A. If you want to take us there, I can explain.

24 Q. I am happy to, but I am concerned about time at this  
25 stage.

1 A. Fine.

2 Q. I just move through the document --

3 THE CHAIRMAN: Is that a convenient point for us to break?

4 MR BEARD: I am terribly sorry, yes.

5 THE CHAIRMAN: We will come back at 3.30.

6 (3.25 pm)

7 (A short break)

8 (3.30 pm)

9 MR BEARD: Page 1507, same bundle, I think I had taken you,  
10 Dr Bryan, to paragraph 294, and this was to do with the  
11 15.2 per cent that Dwr Cymru had indicated was, it  
12 thought, the more appropriate figure, and 296:

13 "There is no evidence that Dwr Cymru had  
14 deliberately overestimated the non-potable treatment  
15 costs as Albion had alleged. In fact it was Dwr Cymru  
16 itself that highlighted the case for a lower percentage,  
17 following its own further work, in the context of the  
18 new tariff."

19 You said I think that you didn't think in the  
20 structure of this assessment that that was to the  
21 detriment of Dwr Cymru. If you could turn over the  
22 page, 1509, there is a table at the top. Slightly  
23 unhelpfully the header for the table is on 1508. If it  
24 assists, what you have got, the first rank of numbers is  
25 the first access price and the second rank of numbers is

1 the first access price with Ofwat adjustments, because  
2 when they went through this seven-step process and  
3 looked at it, they did have one or two concerns in  
4 relation to it.

5 The point I was raising in relation to the  
6 15.2 per cent not 30 per cent that was volunteered by  
7 Dwr Cymru, that figured in step 5, and if you look down  
8 the table, step 5 figure was 7.2 under the Dwr Cymru  
9 first access price, at that stage in the methodology:

10 "Assumption should be that non-potable treatment is  
11 15.2 per cent not 30 per cent of the step 3 figure."

12 So this is what Dwr Cymru volunteered, and it drove  
13 the price down to 3.2. So at that stage, it was a very  
14 significant impact on the calculation; that's correct,  
15 isn't it?

16 A. At that stage, it was, yes.

17 Q. But more than that, Ofwat, in scrutinising the figures,  
18 concluded that using its adjustment you came out with  
19 a price of around 19.2p at the end of step 7, rather  
20 than 23.2p, and the change was primarily driven by the  
21 difference between the step 5 figure in relation to the  
22 first access price and the step 5 figure in relation to  
23 the correction that Dwr Cymru had made. In fact, doing  
24 the maths, that's the entirety of the difference, isn't  
25 it?

1 A. It is. There are other differences, but that is the  
2 entirety of the difference, yes.

3 Q. So it's simply wrong to say that it didn't have any  
4 impact?

5 A. It didn't have any impact on the price that we were  
6 receiving or on the offered access price.

7 Q. Let's just keep moving on, because Ofwat did make  
8 further considerations in relation to this. You will  
9 see at 1510 that consistency with the regulatory  
10 accounting guidelines was considered, that's dealing  
11 with your complaint that there is a failure to comply  
12 with the way that Ofwat's regulatory accounting  
13 guidelines worked in the relevant calculations.

14 If you go on, then, to page 1522, here Ofwat are,  
15 after having carried out that analysis, identifying its  
16 consideration of the allegations of faults in  
17 Dwr Cymru's calculation of the first access price, the  
18 consistency with MD 163 -- I am just referring to the  
19 subheadings. And then over the page, basing the access  
20 price on an unrepresentative class of customer, supply  
21 by Hyder Industrial.

22 So those particular concerns you had about the way  
23 in which Dwr Cymru was approaching the pricing  
24 calculation -- the unrepresentative class, the failure  
25 to comply with what you interpreted MD 163 as doing and

1 the faults in the calculation of the first access  
2 price -- were specifically being considered by Ofwat in  
3 the context of this overall assessment; that's correct,  
4 isn't it?

5 A. No, Ofwat's got it wrong.

6 Q. Ofwat's got it wrong, I think we know from the final  
7 conclusion that Ofwat got it wrong, that wasn't the  
8 question. Ofwat was specifically considering the  
9 concerns that you had raised in this decision, wasn't  
10 it?

11 A. Yes, but it's stating in 364 that we withdrew our --  
12 that particular part of the complaint, and that was not  
13 correct. That's the only point I wish to make.

14 Q. Let's just be clear about that. "In its letter  
15 14 May 2002 Albion withdrew this particular part of its  
16 complaint and accepted that the access price could be  
17 based on average regional costs rather than the direct  
18 costs of supplying Shotton"?

19 A. That is not a base. The point I am making is that the  
20 heading on 362 is -- the element of the complaint is  
21 basing the access price on an unrepresentative class of  
22 customer. That presupposes that you are going for  
23 average costs. What we said in the letter referred to  
24 in 364 was: yes, we accept that average costs are  
25 an alternative to local costs, but they have to be for



- 1 the appropriate class of customer.
- 2 Q. Ofwat, in carrying out its analysis, analysing the seven  
3 step process, was taking a whole company cost and  
4 extracting relevant components of it in order  
5 effectively to apply a regional average cost to a subset  
6 of customers, wasn't it?
- 7 A. I believe that's what they thought they were doing.
- 8 Q. Thank you. Just in relation to this, you didn't pursue  
9 an analysis based on direct costs, because that would be  
10 the local average cost and you said earlier that was not  
11 the methodology that you continued to pursue; that's  
12 right, isn't it?
- 13 A. We couldn't, because we didn't know that Dwr Cymru  
14 collected local costs, and they didn't disclose that  
15 fact until two years after this determination was handed  
16 down.
- 17 Q. You could still pursue an argument on the basis of  
18 a methodology without having had the information,  
19 couldn't you?
- 20 A. It's extremely difficult when a regulator puts the  
21 burden of proof on the complainant, which it clearly did  
22 in this situation.
- 23 Q. That's not the same question. The question is: you  
24 could have pursued an argument that the appropriate  
25 methodology was local average cost without knowing the

1 underlying costs in question, couldn't you?

2 A. Not local average, it's either local or it's average.

3 If it's local, it's local --

4 Q. Sorry, local accounting costs, my fault, I apologise.

5 But you could have done?

6 A. Technically, yes.

7 Q. Right. If we could just skip on, then, to bundle 8,

8 tab 274.

9 A. Yes.

10 Q. This is the referred work, so what the Tribunal asked  
11 Ofwat to do pursuant to the judgment of the Tribunal  
12 which was dated 18 December 2006 [The Margin Squeeze  
13 Judgment]. So this was after judgment in principle on  
14 various principles had been made, and Ofwat was asked to  
15 go away and carry out further analysis on the basis of  
16 further material.

17 I just want to take you to page 2347, section 6,  
18 which is entitled "Why the methodologies have been  
19 chosen and some issues common to some or all of the  
20 methodologies". At paragraph 6.3 it says:

21 "Under the referred work the Authority is therefore  
22 investigating these costs ..."

23 So that's costs in relation to the provision of  
24 services to Albion:

25 "... in respect of three methodologies in response

1 to the Tribunal's referral: an average accounting costs  
2 plus ... approach; a long run incremental cost ... and  
3 a local accounting costs ... approach ... All three of  
4 these methodologies are more locally cost based than the  
5 form of AAC methodology Dwr Cymru used to calculate the  
6 FAP. The Authority's preferred methodology is the AAC  
7 plus methodology which is the closest to that used in  
8 the regulatory context in 2000/2001."

9 Do you accept that sentence from Ofwat:

10 "The Authority's preferred methodology is the AAC  
11 plus methodology which is the closest to that used in  
12 the regulatory context in 2000/2001."

13 A. To produce potable tariffs, yes, I do.

14 Q. That's not what it says, is it?

15 A. No, it's not what it says, so I qualify my acceptance by  
16 saying that the AAC plus methodology is used to  
17 calculate potable tariffs.

18 Q. Sorry, you were saying the AAC plus methodology is used  
19 to calculate --

20 A. You are saying in the regulatory context that Ofwat  
21 refers to here, Ofwat is referring to those allocations  
22 of costs which underpin its potable tariffs.

23 Q. Well, let's just be clear. Ofwat here is dealing with  
24 identifying the costs relating to the supply to Albion  
25 because this is referred work that has flowed

- 1 specifically out of the Tribunal decisions?
- 2 A. That's correct.
- 3 Q. So Ofwat is very well aware of the context in which this  
4 is being dealt with?
- 5 A. Yes.
- 6 Q. And the Authority's preferred methodology is AAC plus,  
7 which is closest -- and I interpolate -- to some other  
8 methodology that was used in the regulatory context  
9 in 2000/2001; that's what they are saying in relation to  
10 provision of non-potable water services; that's what's  
11 being said here, isn't it?
- 12 A. No, that's not what's being said. The wording is --  
13 does not mention non-potable or potable. All I am  
14 saying to you is that the regulatory context to which  
15 Ofwat is referring means potable. There was no  
16 non-potable tariff in 2000/2001. The only context in  
17 which that sort of cost breakdown could operate was in  
18 the context of the setting of potable tariffs.
- 19 Q. So you are saying that the regulatory context in 2000  
20 and 2001 was AAC, but because there hadn't been  
21 a separate non-potable tariff, all this could refer to  
22 is potable tariffs; is that right?
- 23 A. What Ofwat goes on to do, and I think it's important --
- 24 THE CHAIRMAN: Can I just ask a basic question: was there  
25 regulation of non-potable prices in 2000/2001?

1 MR BEARD: Yes.

2 A. No, Madam. The regulation was that there was licence  
3 condition E which prevented undue preference or  
4 discrimination, and also post March 1 there was  
5 Competition Act. There were no specific provisions,  
6 rules or regulations regarding the construction of  
7 non-potable tariffs because there were no non-potable  
8 tariffs; it's already been accepted that at that time  
9 they were all special agreements.

10 THE CHAIRMAN: Is that just for Dwr Cymru, or is that for  
11 all water companies?

12 A. With regard to special agreements, it was for all water  
13 companies, there was no regulation of special  
14 agreements. Where Dwr Cymru is unusual, if not unique,  
15 is that it has a very large number, relatively speaking,  
16 of non-potable customers, whereas most water companies  
17 have none whatsoever. I think Anglian has a couple and  
18 there may -- and United Utilities has a few.

19 MR BEARD: I think the regulatory context is more than  
20 merely a specific requirement of a particular tariff to  
21 be set in a particular way. The interpretation  
22 Dwr Cymru puts on this is that Ofwat is talking about  
23 the way in which it approached and companies approached  
24 the calculation of pricing in 2000/2001 generally, and  
25 it may assist if one turns to 6.8, because what is said

1 in 6.8 -- this is referring to an AAC methodology, not  
2 an AAC plus methodology which is the one that was  
3 adopted in referred work and by the Tribunal in its  
4 Unfair Pricing Judgment and applied:

5 "The AAC methodology investigates from a top-down  
6 regionally averaged start point moving through layers  
7 of~..."

8 It says granularity, I'm not sure you can have  
9 layers of granularity, but maybe you can:

10 "The Authority is using a form of AAC methodology as  
11 its principal methodology in the referred work for  
12 several regions. AAC was the methodology Dwr Cymru  
13 actually used to set the FAP in 2001. In MD 163 of  
14 30 June accounting costs were one of the three main ways  
15 of setting access price the Authority refers to ..."

16 So it's talking there about using AAC, and of course  
17 MD 163 was the common carriage MD:

18 "... and the AAC approach provides insight into the  
19 regulatory price level, the approach that is  
20 traditionally used in the water industry to set  
21 non-discriminatory retail prices for different customer  
22 classes."

23 So AAC was the way that things were done, that's  
24 what we understand it to be saying here.

25 Do you disagree with any of that, Dr Bryan?

1 A. I don't.

2 Q. Thank you.

3 When we sort of track back and look at the run-up to  
4 the FAP, the position was that competition law was just  
5 starting to be implemented; you agreed with that. The  
6 Regulator was sending out guidance and consulting on how  
7 competition law might work; you would agree?

8 A. Yes.

9 Q. There was a good deal of uncertainty about all of that,  
10 hence the MDs and so on; you would agree?

11 A. Yes.

12 Q. There was a good deal of discussion about pricing and  
13 pricing methodologies, wasn't there?

14 A. Yes.

15 Q. You thought, as Albion, that Dwr Cymru should be using  
16 a narrower cost focus, and they thought a wider  
17 averaging was appropriate, didn't they?

18 A. They certainly did, yes.

19 Q. Ofwat became involved in the negotiation and then  
20 consideration of the complaint that you brought?

21 A. Yes.

22 Q. Ofwat was very well aware of the debate about the  
23 different pricing methodologies?

24 A. Yes.

25 Q. And Ofwat engaged with your complaints, didn't it?

1 A. It did.

2 Q. In its Competition Act 1998 decision [The Chapter II  
3 prohibition], Ofwat accepted Dwr Cymru's pricing  
4 methodology, didn't it?

5 A. Yes, it did.

6 Q. And you didn't like that and appealed, and after several  
7 hearings, and the referred work was done, and Ofwat  
8 still thought the basic regional pricing methodology was  
9 the right focus, although it did look at other measures  
10 as well because of the way the Tribunal had made its  
11 order; that's right, isn't it?

12 A. I think there are fundamental -- there is a fundamental  
13 shift in Ofwat's thinking for the referred work. The  
14 starting point is undoubtedly the same, but when you  
15 drill down into the referred work and see how it moves  
16 from that starting point, then what is in my mind the  
17 clearest distinction between the referred work and the  
18 2004 decision is that Ofwat accepts that distribution  
19 costs for non-potable are not the same as distribution  
20 costs for potable. And if there is one turning point,  
21 one point on which this argument hinges, it is the  
22 change of view of Ofwat from a view in 2004 where it  
23 accepted Dwr Cymru's contention that -- and indeed back  
24 in 2001 -- potable bulk distribution costs were  
25 an entirely satisfactory proxy for non-potable bulk



1 distribution costs to the referred work where, if you  
2 drill down into it, you will see that from a -- from the  
3 capital cost point of view, it then rejects Dwr Cymru's  
4 argument that it should be 100 per cent and reduces that  
5 to 10 per cent of capital costs in relation to pipe  
6 sizes between 300 and 600 mm, and 50 per cent in  
7 relation to pipe sizes above 600 mm, and on an operating  
8 cost basis, where again Dwr Cymru's position was they  
9 are equivalent, Ofwat's conclusion in the referred work  
10 was: no, non-potable operating costs were half those of  
11 potable ones. So overall, the Ofwat conclusion was that  
12 the costs properly attributable to non-potable bulk  
13 distribution were less than half of those for the  
14 corresponding potable.

15 That, I think, is how Ofwat had moved, I think  
16 largely as a result of the very clear signals that  
17 the Tribunal had sent in its October 2006 judgment [The  
18 1046 Main Judgment].

19 Q. Just taking that in two stages, first of all in the  
20 Ofwat 2004 decision they were alive to the issue of the  
21 distinction between potable and non-potable, but decided  
22 it wouldn't distinguish between the cost of the systems;  
23 that's right?

24 A. No, I don't think they were alive to the issue at all,  
25 I think they had been told that the two systems were to

1 all intents and purposes identical, and although Ofwat  
2 is referred to in these proceedings and elsewhere as the  
3 Expert Economic Regulator, and I am not going to  
4 challenge that, what is clear is that at all relevant  
5 times Ofwat's technical knowledge of systems, its  
6 experience of systems, how companies run, was weak, and  
7 there was not only the information asymmetry that you  
8 will always find between regulators and the regulated,  
9 but there was also a very acute skill asymmetry in terms  
10 of engineering and technical skills within Ofwat, and so  
11 it was vulnerable to regulatory gaming.

12 Q. Right. I am loathe to go back to it, it was a point  
13 that you raised that is highlighted by Ofwat at  
14 paragraph 298 of the decision of Ofwat, and I'll just  
15 quote it:

16 "Albion Water argued that Dwr Cymru had pooled low  
17 costs associated with non-potable bulk transport with  
18 the much higher costs associated with bulk potable  
19 transport in order to manufacture an artificially high  
20 access price."

21 That, which is a consideration at step 6, is  
22 rejected by Ofwat, but they were entirely alive to that  
23 issue, weren't they?

24 A. They were clearly alive to that issue, but they --  
25 I think one has to ask the question: why was it rejected

1 without any further discussion? We have never seen, and  
2 it's certainly not been disclosed in the bundles, any  
3 internal discussion within Dwr Cymru that says: these  
4 costs are comparable. My view is, with my long  
5 experience in the water industry and talking to  
6 distribution engineers whose opinions I value, that  
7 no-one sensibly appraised of the realities of the  
8 situation, a comparison of --

9 THE CHAIRMAN: I think we --

10 A. I do apologise, I am going on.

11 MR BEARD: Yes. And I won't go back to the referred work,  
12 I think it's something for submission in due course.

13 Overall, at the time that it was done, in the  
14 context in which these matters were being considered and  
15 the state of uncertainty as to the appropriate  
16 methodology, a regional average cost pricing approach as  
17 adopted by Dwr Cymru was far from unreasonable in 2000  
18 and 2001, was it?

19 A. I believe it was, the way it was conducted.

20 Q. Just one final question in relation to it: when you are  
21 pulling together information in relation to regional  
22 average costs, obviously you are pulling together cost  
23 information from all across your network?

24 A. Yes.

25 Q. And there may be a good deal of sensitivity about cost

1 information elsewhere in the network if there is any  
2 consideration of the basis for particular prices; you  
3 would agree?

4 A. I am sorry, could you unpack a question a little?

5 Q. When you are dealing with a situation where you are  
6 talking about the provision of a price that's based on  
7 regional average costing, in order to be able to provide  
8 background material in relation to that, you would have  
9 to be disclosing information about your wider network  
10 and your wider costs across your network, wouldn't you?

11 A. Yes, I mean, we have seen the accounting evidence  
12 produced for Ashgrove, for example.

13 Q. And there may well be sensitivities about providing that  
14 to particular parties, competitors or undertakers, might  
15 there not?

16 A. No, there shouldn't be.

17 Q. I think we have already heard about United Utilities'  
18 concerns in relation to confidentiality yesterday.  
19 Dwr Cymru clearly had confidentiality concerns. You may  
20 be in a different position in relation to the provision  
21 of confidential information from others; would you  
22 agree, Dr Bryan?

23 A. If I am trying to conceal something, yes, I think  
24 perhaps I would.

25 Q. Sorry, if you trying to conceal something, you would be

1 in a different position?

2 A. The information on Dwr Cymru's costs on a whole company  
3 average basis, there is nothing confidential about them,  
4 they are published. The information that has been kept  
5 from us was information that related to issues such as  
6 the chemicals costs and the telephone costs for the  
7 Ashgrove System. Yes, it is possible to say that there  
8 is some element of confidentiality associated with those  
9 figures, but one has to ask why they should be  
10 confidential in a situation where MD 163 says very  
11 explicitly that incumbents are to share the accounting  
12 information on which their prices are based with  
13 entrants.

14 Q. I am going to move on.

15 You know that Dwr Cymru are owned by Glas Cymru?

16 A. Yes.

17 Q. And you know, I think, that Glas Cymru is a company  
18 limited by guarantee?

19 A. Yes.

20 Q. And you understand that a company limited by guarantee  
21 has no shareholders?

22 A. I do.

23 Q. So it returns all its surpluses to customers?

24 A. No, it doesn't, it maintains a very healthy surplus  
25 which it requires for cashflow management and to achieve

- 1 the lowest possible cost of borrowing in the market.
- 2 Q. So to make it an efficient operator in order to generate  
3 further surpluses that would go to customers?
- 4 A. That is the argument that Dwr Cymru put forward.
- 5 Q. Do you disagree with that?
- 6 A. Well, what is -- I don't disagree with the proposition  
7 as you have put it, but there is a lot more to  
8 an efficient company, and efficient service to customers  
9 than the way that that company is structured.
- 10 Q. Now, if you could have your witness statement open, it's  
11 in folder 1, tab 4, page 45, paragraphs 70 to 72,  
12 "Acquisition of Dwr Cymru by Glas Cymru".
- 13 A. Yes.
- 14 Q. You are stressing here that the acquisition of Dwr Cymru  
15 by Glas Cymru was completed in May 2001, over three  
16 months after Dwr Cymru's board had approved and issued  
17 the abusive first access price; that's paragraph 71.
- 18 A. That is what I believe to be the case.
- 19 Q. And the reason that you are saying that is because you  
20 are emphasising that as at March 2001 Dwr Cymru was  
21 owned by Western Power Distribution?
- 22 A. I believe that was the case.
- 23 Q. Are you suggesting that Western Power Distribution is  
24 a rather red in tooth and claw profit making company, so  
25 Western Power had every reason to abuse and do so

1 intentionally; is that what you are suggesting?

2 A. No.

3 Q. No? Right. If you could go to bundle 3, tab 73, this  
4 is a letter from Lord Burns, who was then the Chairman  
5 of Glas Cymru, to Philip Fletcher, the then  
6 Director General of Ofwat, setting out that Glas Cymru  
7 is a new and independent company which has been formed  
8 for the purpose of acquiring Dwr Cymru, and it's  
9 stressing the importance of its independence and its  
10 ethical conduct. You don't have any doubt that  
11 Lord Burns, in making this statement, was sincere in  
12 what he was saying in this open letter?

13 A. I presume he was.

14 Q. And you don't have any doubt that that reflected the  
15 views of the board of Glas Cymru in relation to this  
16 acquisition and the intended conduct of Glas Cymru, do  
17 you?

18 A. I have no grounds on which to doubt it.

19 Q. It may not be necessary to take you to this document,  
20 but do you accept that the Glas Cymru acquisition of  
21 Dwr Cymru, the price for it was fixed and set on  
22 5 February 2001?

23 A. I am quite happy to accept that.

24 Q. Just for reference, for the Tribunal, folder 4, tab 150,  
25 page 921A. The price was actually £1, and an awful lot

1 of debt.

2 5 February 2001, obviously is before the first  
3 access price, so the price for the company was set  
4 before the first access price was put forward; you  
5 accept that?

6 A. I do.

7 Q. So Western Power is still in charge. Are you saying  
8 that at that time they had reason to exploit the  
9 situation?

10 A. No.

11 Q. Are you saying that Glas Cymru, the incoming entity,  
12 which had made it clear that it wanted to operate  
13 ethically and lawfully in customers' interests, it  
14 wanted to abuse a dominant position?

15 A. Yes, I believe it did.

16 Q. So Glas Cymru in November 2000 had set out its  
17 principles, it had set out the basis on which the board  
18 wanted to proceed, it agreed a price in February, and it  
19 wanted to ensure that there was an abusive price, first  
20 access price, provided in March; is that right?

21 A. No, it wanted to ensure that the debt market, on which  
22 it was entirely dependent to finance this purchase, the  
23 purchase of the debt that we have heard about, the debt  
24 market was convinced that the Glas model, Glas Cymru  
25 model was the lowest possible risk model, and the whole



1 of the Glas model is geared towards that: no shareholder  
2 dividends, a prohibition on competition on forays beyond  
3 its borders which had led to the downfall of the  
4 original Dwr Cymru as privatised in 1989, and  
5 contracting out all its operations under tender to the  
6 lowest cost bidder, which was United Utilities.

7 So the whole structure of the Glas deal was that it  
8 was the lowest possible risk borrower in the water  
9 industry. And in that context, what Albion was doing  
10 was threatening that low risk perception, because, as  
11 Mr Sharpe has already taken you to, there was  
12 recognition that a significant amount of revenue was at  
13 risk from competition. And to compound that problem,  
14 the Glas Cymru commitment to its bondholders actually  
15 tied it in knots. It was unable to compete outside its  
16 area. So if it suffered losses, as is inevitable with  
17 any 100 per cent monopolist, on the opening of markets,  
18 it was prohibited by its own bondholder undertaking for  
19 going out and making good those lost profits elsewhere.

20 So my view then and now is that the motivation  
21 behind the abusive first access price was not so much to  
22 swell the coffers with extra profits but to maintain the  
23 existing profit stream and to defend the Glas Cymru  
24 model against competition.

25 Q. So just to be clear, it was Glas Cymru that intended,

1           you say, to ensure that Dwr Cymru abused a dominant  
2           position?

3       A. One of our problems is we do not know what dialogue took  
4       place between Glas Cymru and Dwr Cymru at the time.  
5       What we do know is that they shared the same economic  
6       adviser, because we see Mr Liesner's name on various of  
7       the documents at the time. So there was clearly  
8       a significant transfer of information between Dwr Cymru  
9       and its putative parent at the time of the abusive  
10      access price. And I can take that argument no further  
11      because we don't have any further information.

12     Q. I just want to be clear, you are saying that Glas Cymru  
13      intended that there be an abuse of dominance by  
14      Dwr Cymru in relation to Albion?

15     A. What I am saying is that successful competition within  
16      Dwr Cymru would damage the perception that this was  
17      a very low risk vehicle. If it were perceived as  
18      a vehicle that was vulnerable to competition, and had no  
19      means for defending itself against competition in  
20      a conventional and legal sense, then yes, I think that  
21      perception of risk would be damaged and the borrowing  
22      costs to Glas Cymru would inevitably rise.

23     Q. So you are saying that the Glas Cymru board sanctions  
24      abusive behaviour, knowing it to be abusive, and  
25      intended it to be carried out; is that right?

1 A. We have no idea what board decisions were taken.  
2 We haven't even got records of the Dwr Cymru board when  
3 they approved the first access price.

4 Q. Now, we are going to have to have a discussion about  
5 pleaded issues if this is going to be pursued, because  
6 nowhere has it ever been suggested --

7 THE CHAIRMAN: Well, you asked him the question, Mr Beard,  
8 he has given you the answer. That's now evidence in the  
9 case.

10 MR BEARD: Absolutely, it certainly is, but it's on the  
11 basis of no evidential basis at all, it's just a wild  
12 accusation.

13 THE CHAIRMAN: Well he has just said it, so there it is.  
14 You asked the question, you have the answer.

15 MR BEARD: I certainly have an answer.

16 So this was a decision by the Glas Cymru board, you  
17 say --

18 THE CHAIRMAN: No, he doesn't say that, he says he has no  
19 idea because he hasn't seen any of the papers, none of  
20 us have seen the papers, he doesn't know what the  
21 Glas Cymru board or the Dwr Cymru board is. He has put  
22 forward, as I understand it, a hypothesis based on his  
23 knowledge of what was going on as to why they might  
24 consider it in their interests to charge a price which  
25 keeps out competition. I think that's where we are at

1 the moment.

2 MR BEARD: Yes. I think that is.

3 It would be entirely contrary to the statements that  
4 Glas Cymru had made in the open letter to Ofwat and  
5 subsequently; you would accept that?

6 A. I do, yes.

7 Q. You described it as wanting to avoid risk, so you are  
8 saying that going around committing abuses of an alleged  
9 dominant position, as it was at that point, committing  
10 infringements of competition law, getting fined and  
11 potentially paying damages, that's low risk behaviour,  
12 you consider?

13 A. I don't consider it low risk behaviour, but I wasn't the  
14 one making the decisions that led to an abusive access  
15 price.

16 Q. But your hypothesis is that Glas Cymru would have  
17 thought that was low risk behaviour?

18 A. If one follows my hypothesis through to its logical  
19 conclusions, someone somewhere must have sat down and  
20 thought: are we going to get away with this? And they  
21 must have come to the conclusion: yes.

22 Q. Could we just turn up the witness statement of  
23 Mr Williams, which is in bundle 1, tab 3, paragraphs 15  
24 and 16. Obviously Mr Williams will be available for  
25 cross-examination in due course. I just want to be

1 absolutely clear what you are saying. Mr Williams says  
2 at paragraph 15 and 16, and he is a board member at  
3 Dwr Cymru:

4 "If there had been any malicious motive or otherwise  
5 improper thinking underlying the first access price at  
6 an operational level I would have been aware of this  
7 from my discussions with the team for which I was  
8 responsible. I do not recall having any such awareness.  
9 To my recollection the team dealt with this matter  
10 professionally and objectively throughout. Similarly,  
11 had there been any ill intent at the supervisory level  
12 within Dwr Cymru I am sure this would have come up at  
13 the LCE and/or board meetings at the time and given the  
14 striking nature of such an occurrence that I would have  
15 remembered it happening. As a point of fact I don't  
16 recall any such discussions."

17 Just to be clear, are you saying that Mr Williams is  
18 lying?

19 A. No, I'm not.

20 Q. Could we turn on to Mr Edwards' statement, bundle 1,  
21 tab 2, his first statement, paragraph 50 on page 20.  
22 Halfway down that paragraph he says:

23 "In deriving the first access price, however, I had  
24 no motivation or intention to produce a price that would  
25 result in an unattractive business case for Albion or

1 one that would be particularly disadvantageous to  
2 Dwr Cymru and I do not believe that such motivation or  
3 intention existed within Dwr Cymru at all, either at  
4 an operational or a supervisory level."

5 Then if you turn over to 52, paragraph 52:

6 "To my knowledge there was no discussion or  
7 consideration of any kind within Dwr Cymru as to whether  
8 the first access price might allow Dwr Cymru to achieve  
9 an elevated level of profit."

10 I am not taking you through all of the statement,  
11 but are you saying that Mr Edwards is lying?

12 A. First of all, an observation: we are not talking here  
13 about an elevated level of profit, we are talking about  
14 the protection of existing profits. It is not for me to  
15 judge the veracity of Mr Edwards' statements or other  
16 statements. That, as I understand it, is the purpose of  
17 the Tribunal and the cross-examination that will  
18 undoubtedly follow.

19 Q. So the position is: you are not suggesting either that  
20 Mr Edwards or Mr Williams knew or intended there to be  
21 an abuse, are you?

22 A. I genuinely do not know.

23 Q. In fact, there is no good reason at all to suggest that  
24 anyone within Dwr Cymru or Glas Cymru intended cynically  
25 or outrageously to engage in any abusive behaviour, is

1           there?

2       A. There is, the abusive -- the existence of an abusive  
3       access price, the components of which clearly -- are  
4       clearly excessive. And it's a great shame that it has  
5       taken so long and took the Tribunal so long to uncover  
6       the fact that should have been immediately obvious to  
7       anyone in Dwr Cymru at the time who had any knowledge of  
8       the proper costs associated with potable distribution on  
9       the one hand and non-potable on the other.

10      Q. Just one or two other quick comments on your statement.  
11      From paragraph 211 onwards you say you are commenting on  
12      the validity of various calculations. Obviously you are  
13      a witness of fact. In fact, those comments on supposed  
14      validity talk about justifications and contain all sorts  
15      of opinions. If Mr Sharpe wants to ask the authors of  
16      those calculations about them, he can no doubt put the  
17      points you raise to them, but you didn't produce those  
18      calculations and I am not going to ask you any questions  
19      in relation to them.

20           Just to be clear, in relation to paragraph 211 of  
21      your witness statement, you talk about the timing of  
22      disclosure of calculations. You would accept that there  
23      is a calculation provided in tab 14 of bundle 2 that  
24      included a list of the relevant special agreements and  
25      the prices under them that was provided to Ofwat in

1           1996. It was a document that you wanted attached to  
2           your second witness statement?

3       A. Yes, I think I may be in error in 211. I think that  
4           there clearly was a document provided to us in 1996.

5       Q. Thank you.

6           In relation to paragraph 243, just to be clear, the  
7           analysis of various cost issues in relation to potable  
8           and non-potable matters are not accepted by Dwr Cymru,  
9           but in the light of the analysis and the purpose of this  
10          questioning, I'm not going to consider that further in  
11          relation to questioning.

12          There are two further brief sets of questions that  
13          I want to ask. The first I can dispose of relatively  
14          quickly, that is in relation to your Albion proposed  
15          access price. We have already seen at folder 3, tab 66  
16          the sort of opening gambit, your offer of 7p. It is  
17          right, isn't it, that in your original notice of appeal  
18          you argued for an access price of 1p per metre cubed on  
19          a regional average basis?

20       A. Yes, I did.

21       Q. And then you argued for an access price of 2.22p on  
22          a local cost basis?

23       A. Yes.

24       Q. Later in your revised notice of appeal you argued for  
25          an access price of between 0.8p and 2.1p?



- 1 A. Yes.
- 2 Q. At the interim hearing you put forward four alternative  
3 methodologies for calculating access prices, they varied  
4 between 4.5p and 7p?
- 5 A. I believe I did. I haven't checked, but I believe  
6 I did, yes.
- 7 Q. By the time of the main hearing you were arguing for  
8 a common carriage price of 3.2p; that's right, isn't it?
- 9 A. I do not recall but I am quite happy to take your word  
10 for it.
- 11 Q. So you have put forward a range of different  
12 calculations that no doubt you had undertaken in good  
13 faith but that came out with a range of different  
14 outcomes?
- 15 A. Yes, we undertook it in the dark, so to speak, because  
16 none of the relevant information had been disclosed, and  
17 we were therefore searching around for different ways of  
18 trying to get to the truth, and it's inevitable that we  
19 would make errors under those circumstances.
- 20 Q. Thank you. Could we have the pleadings bundle,  
21 folder 10, please, page 3324. At 97 and 98 these are  
22 the pleadings, I think, so far as they exist, in  
23 relation to the claim in respect of Corus. I think this  
24 has previously been described as somewhat tenuous, but  
25 it's necessary to ask one or two questions in relation

1 to it.

2 The second sentence:

3 "The claimant attached to its original notice of  
4 appeal a letter dated 11 July 2003 in which Corus  
5 indicated that it was highly dissatisfied with the lack  
6 of competition in the water industry and invited the  
7 claimant to tender for its business with effect from  
8 April 2004."

9 You say:

10 "... unable to do so as a result of the ongoing  
11 dispute with the defendant and the weak regulatory  
12 response of the Authority. Such claimant lost the  
13 opportunity substantially to expand its business at  
14 Corus Shotton. For the avoidance of doubt, the basis of  
15 the claim in respect of Corus is a loss of opportunity."

16 That's in 98. Then in the quantum section, over at  
17 3330, paragraph 114:

18 "Your claim in relation to Corus calculated for  
19 a four-year period from 1 April 2004 [so that's  
20 effectively the date of that letter that you relied upon  
21 in paragraph 97] up to November 2008."

22 Then there is a tabulation of suggested quantum in  
23 114.4. If we could just take bundle 5, the page is in  
24 tab 185, page 1148. This is an extract from your diary,  
25 July 10, 2003. I am going to read it, but it's your

1 handwriting, so if I get it wrong, do feel free to  
2 correct me.

3 "Corus.

4 "Graham, Liz, Stephen.

5 "Corus challenging Llanwern, Shotton, Trostre? All  
6 three terminate in April 2004. Three sites in  
7 northeast."

8 Is that right?

9 A. Yes.

10 Q. "15 million total across Corus. Llanwern non-pot  
11 2.5 million plus one.

12 "50K payment okay share of savings."

13 The next word?

14 A. "Corus".

15 Q. "Happy 50/50 if we improve on Llanwern."

16 So this was a meeting you had with Corus on  
17 10 July 2003. Corus were saying "We are looking at the  
18 possibility of other supplies for our three sites", they  
19 wanted all three served, there is a lot of money at  
20 stake, in particular at Llanwern, and that was what they  
21 were asking you about?

22 A. Yes.

23 Q. Then if you move on to tab 204, this is 11 July 2003, so  
24 it just happens to be further on in the bundle because  
25 the whole clip of diary entries are there. It's the

1 next day, Corus write to you:

2 "As I explained in our meeting, 10 July, we are very  
3 unhappy with the current situation in the water supply  
4 industry and the lack of competition. Having raised  
5 this matter with Ofwat they suggested that your company  
6 offers a realistic alternative to the large established  
7 operators."

8 So you were getting a reference off Ofwat at this  
9 stage in relation to these matters?

10 A. We were the only competitive player in the market.

11 Q. "Will you therefore please confirm that you are able to  
12 bid for the supply of water to three of our larger  
13 plants situated in Wales, namely Llanwern, Trostre, and  
14 Shotton."

15 Here they are asking you to bid for all three; is  
16 that right?

17 A. It is.

18 Q. "The existing agreement for supply of water expires  
19 spring of 2004."

20 So that tallies with your meeting note, April 2004?

21 A. Indeed it does, yes.

22 Q. Then it says:

23 "If you are able to confirm your position with  
24 respect to these plants we will take the necessary steps  
25 to open formal discussion and negotiation."

1           You didn't seek any bulk supply price in relation to  
2           Corus, Llanwern or Trostre subsequent in the near period  
3           after that, did you?

4           A. I couldn't.

5           Q. And you didn't seek any common carriage price in  
6           relation to any of those sites either?

7           A. I couldn't.

8           Q. You say you couldn't, but there is nothing related to  
9           the Shotton Paper dispute that stopped you asking for  
10          those sorts of prices, is there?

11          A. Yes. Perhaps if I can explain. I was required to  
12          resign my directorship of Enviro-Logic on 5 May 2003,  
13          and I was -- that was the start of a process that took  
14          until February 2004, which ultimately resulted in Ofwat  
15          agreeing to the transfer of Albion as the regulated  
16          subset of the original company back to myself and the  
17          fellow directors who had come with me.

18          As my witness statement says, Pennon, who were our  
19          joint venture partners, had exercised their rights under  
20          the shareholders' agreement to buy our shares for  
21          nothing -- well, a pound, nominal value -- required me  
22          to resign, and then had notified all our customers that  
23          Enviro-Logic was withdrawing from competition and  
24          exiting the market. And it took until February 2004,  
25          and the explicit support of Shotton Paper that wanted to

1 remain with an independent Albion rather than finding  
2 itself with a large monopolist water company, until we  
3 were able to re-engage with the market, and our first  
4 task, our critical task was to get before the CAT and  
5 try to get something approaching a level playing field  
6 to prevent what caused the demise of Enviro-Logic  
7 happening again.

8 That is why we were in no -- I did not have any post  
9 at that time, I certainly was not a director of  
10 a licensed undertaker, I could not then apply for a bulk  
11 supply agreement or indeed common carriage arrangements.

12 Q. Is there any evidence that's been provided as to the  
13 basis on which Pennon acted as it did, that's been  
14 provided --

15 A. Yes, in my witness statement I go to some length to  
16 describe, and you have already -- I can't remember  
17 whether it was you or Mr Pickford drew my attention to  
18 the paper I provided for Pennon in 2002 explaining the  
19 state of the market and saying that a referral to the  
20 CAT appeared to be the only way out of this impasse.

21 Q. Sorry, I may not have been clear: from Pennon, is there  
22 any evidence from Pennon?

23 A. I am not clear whether there is. I think there are some  
24 letters from Pennon within the bundle. There is  
25 certainly a letter to Ofwat confirming its desire to

1 transfer Albion. I don't think in the bundle that there  
2 is the letter that Pennon required Enviro-Logic to send  
3 to all its customers saying it was withdrawing from the  
4 market, but it may be possible to get a copy. I was not  
5 part of that organisation at that time.

6 Q. None of this, so far as I can understand it, relates to  
7 the FAP, so far as it has been dealt with, but in  
8 relation to Corus itself perhaps it's just worth picking  
9 up one or two of the documents where you do consider  
10 Corus. Tab 211.

11 A. Yes.

12 Q. Now, here, this is a letter from you to Ofwat,  
13 30 October 2003.

14 A. No, it's a letter from Martin Gale, who is the managing  
15 director of Shotton Paper.

16 Q. I apologise, I am looking at the next tab over, 1309A.  
17 That's the document I want to take you to. It's the  
18 next page. It's within the same tab.

19 A. Yes, this is a letter sent by me in my private capacity,  
20 from my home.

21 Q. You see:

22 "I am writing to you now because of my concerns that  
23 this process is taking far longer ..."

24 The process you are talking about is the change of  
25 ownership of Albion Water.

1            "This is no criticism of Ofwat, however the delay is  
2            damaging the interests of Albion Water and those who  
3            wish to continue its pioneering work in the competitive  
4            water market. I attach a letter from Corus which  
5            confirms this demand."

6            I think that's probably the letter we have already  
7            seen.

8            A. The July letter, yes.

9            Q. "Our ability to pursue these as inset appointments has  
10            been delayed by over three months while we strive to  
11            conclude the change of ownership of Albion Water and  
12            I would urge you to do all you can to assist in this  
13            process ...

14            "... you will have received a revised business plan  
15            from Albion Water and a letter of endorsement from  
16            [that's Shotton Paper] UPM-Kymmene [which is the one  
17            that I inadvertently referred you to]. I am aware that  
18            regulatory approval is not a requirement for  
19            a transaction of this size. I am also very conscious  
20            that, whatever your response ... Albion Water will need  
21            to retain your confidence that it is fit and proper ...  
22            I believe you will take comfort from the support of  
23            Albion Water's customer and from the fact that the  
24            original management team are still providing continuity  
25            of support ...



1            "I acknowledge that there are many outstanding  
2 Competition Act complaints associated with Albion Water  
3 and I know that their resolution is causing Ofwat  
4 problems. It would perhaps be understandable if there  
5 were those within Ofwat who wishes to see the back of  
6 Jerry Bryan and Albion Water but I am confident that you  
7 would not allow any such conflicts of interest to  
8 influence your decision on the future of Albion Water  
9 ..."

10           Here you are saying "The concern we have is that we  
11 can't be taken as an inset appointee and in those  
12 circumstances we wouldn't be able to pursue any action  
13 in relation to Corus, that's due to the change of  
14 ownership in relation to Pennon". You talk about the  
15 Competition Act complaints, but you don't here anywhere  
16 suggest that those are linked to what was going on with  
17 Pennon at all, do you?

18        A. I think if you read my witness statement you will see  
19 that linkage is very clear, that the prospect of  
20 an appeal to the CAT against Ofwat was something that  
21 Pennon, as a regulated water company, considered to be  
22 a great risk. Upsetting Ofwat was well known to be  
23 a major problem, or could be a major problem with  
24 profits, a minute variation in the allowable increase in  
25 prices would go straight to the bottom line, and what

1 Pennon were saying at that time -- I have said so quite  
2 explicitly, I said it in the original hearings in the  
3 front of the CAT, it's never been challenged, what  
4 I said then and I say now is that Pennon's view was that  
5 competition wasn't worth the candle. The risk of  
6 upsetting Ofwat was too great and they wanted out.

7 Q. You didn't mention that in the contemporaneous document  
8 that you wrote to Ofwat dealing with these matters and,  
9 just to be clear, that position is challenged.

10 If we turn on to 213, this is a business plan you  
11 have prepared, I believe?

12 A. Yes, it was a requirement for Ofwat approval.

13 Q. At the bottom, 1.7:

14 "This plan seeks to address the immediate future of  
15 Albion Water."

16 Certainly that fits with what you have just said.  
17 If you turn on to 1315, "The purpose and objectives of  
18 Albion Water":

19 "In July 2003 Corus Colors asked Albion Water to  
20 extend its licence by way of further inset  
21 appointments."

22 There you are just referring back to the letter --

23 A. The July letter.

24 Q. So that request wasn't for further inset appointments,  
25 it was for the possibility of discussion:

1            "... [but] to serve its three Welsh sites. This  
2            action has been delayed pending the transfer of  
3            ownership but will be pursued vigorously as soon as  
4            possible."

5            It wasn't pursued vigorously as soon as possible,  
6            was it, because ownership transfer was approved on  
7            3 December by Ofwat in 2003; that's right, isn't it?

8            A. I don't recall, but there was certainly delay on the  
9            part of Pennon which meant that the final transfer was  
10           in February 2004.

11           Q. The final transfer occurred on 20 February 2004?

12           A. That's correct.

13           Q. So up until that point the difficulties you say you had  
14           with Pennon and the transfer of ownership meant that you  
15           couldn't get an inset appointment. But at no time then  
16           did you suggest that you were looking to get bulk supply  
17           for Corus, or indeed common carriage agreement for  
18           Corus, did you?

19           A. No, because we made very clear that we needed a price,  
20           we needed a price that would work in the marketplace,  
21           and to get such a price we had to get that price for  
22           Shotton Paper. We knew absolutely without doubt that  
23           Ofwat would not give us a better price for Corus than it  
24           had already mandated for Shotton Paper.

25           Q. But there were three Corus plants, weren't there, as you

1           said?

2       A.   Yes.

3       Q.   And you didn't do anything in relation to either of the  
4           other two?

5       A.   No.

6       Q.   In particular, nothing to do with Llanwern, which was  
7           the largest of the plants in question?

8       A.   That's correct.

9       Q.   So no steps were taken at all, and Corus signed up to  
10           a new deal with Dwr Cymru in May 2004, and so far as we  
11           can see -- we have to go on to bundle 7, tab 248.

12      THE CHAIRMAN:   So the Llanwern plant was also supplied by  
13           Dwr Cymru?

14      A.   Yes.

15      MR BEARD:   Yes.

16      THE CHAIRMAN:   But not through some different piping system?

17      A.   It was a different system in the south of the country,  
18           but the same provider.

19      MR BEARD:   It's one of the WSHNONPOTs.  I am trying to get  
20           through very quickly to finish this off.  Bundle 7,  
21           tab 248.  This is 30 October 2006, so over 18 months  
22           after the transfer of ownership had occurred, and this  
23           appears to be the first time that any suggestion is  
24           raised about the possibility of obtaining bulk supply  
25           terms for Trostre and Llanwern.

1 A. I think that's probably correct, yes. And it was  
2 immediately following the Tribunal's judgment, so the  
3 first time we felt we had some traction in the matter,  
4 and as you can see from the start of that letter,  
5 I immediately wrote to Dwr Cymru and then followed it up  
6 with specific requests for prices.

7 Q. Yes. You say that it was due to the Tribunal's  
8 decision. Of course, in the previous letters we have  
9 seen, what you were saying was the barrier was the lack  
10 of inset appointment, weren't you?

11 A. No, the barrier was terms, price terms; always had been.  
12 We couldn't get an inset appointment, we couldn't get  
13 common carriage arrangements, or bulk supply  
14 arrangements, unless we had a non-abusive price.

15 Q. I think I've taken you to the document, bundle 5,  
16 tab 211, where it plainly says it was the barrier, the  
17 barrier was an inset appointment.

18 So certainly contrary to your business plan where  
19 you said as soon as ownership was transferred these  
20 matters would be vigorously pursued, they hadn't been,  
21 had they, they had been left for 18 months at least?

22 A. Indeed, until we had progress with the CAT, yes.

23 Q. If I could take you to bundle 9A, tab 358.

24 THE CHAIRMAN: Are you going to the response to this letter  
25 of 30 October?

1 MR BEARD: Sorry, I wasn't going to go to that response.

2 THE CHAIRMAN: Okay.

3 MR BEARD: We will have to come back to that, I am sorry,  
4 Madam. If it assists, it's at tab 250. I am not sure  
5 that that's a direct response to the 30 October letter  
6 because there has been something interposed, the  
7 8 November letter. It does pick up points on Corus at  
8 the bottom of the second page. I think that may be the  
9 closest answer we have in relation to the Corus issues  
10 that were being raised.

11 If I could then take you will briefly to 9A. What  
12 we have been looking at is the fact that although you  
13 had an initial discussion with Corus back in 2003,  
14 actually no real steps were taken to pursue any  
15 opportunity with Corus subsequently until 2006. The  
16 reason given was to do with inset appointments and  
17 transfer of ownership. You were in no position to offer  
18 the three plants any sort of deal at any relevant point  
19 and you did not seek to pursue it. In those  
20 circumstances, there is no good basis for you suggesting  
21 that you had any real chance of obtaining that business  
22 or any of it. But more than that, you would accept  
23 that --

24 THE CHAIRMAN: Do you want him to respond to that?

25 MR BEARD: No, I am just summing up where we have got to and

1 moving on to another point.

2 More than that, in order to deal with the  
3 possibility that you would have been able to win  
4 business at Corus Shotton, you would need to show that  
5 you would have been able to beat the price that  
6 Dwr Cymru was providing for Corus Shotton; you would  
7 also need to be able to show that you could beat the  
8 price for Corus Llanwern and for Corus Trostre; you  
9 would accept that, wouldn't you?

10 A. Yes.

11 Q. If you look at the relevant charges that you had  
12 identified, in fact back in 1999 you were concerned that  
13 the relevant price for Corus Shotton was 15.1p?

14 A. Indeed.

15 Q. And you were hoping to use that as leverage to bring  
16 down the Shotton Paper price, weren't you?

17 A. We were indeed, yes.

18 Q. And you accepted that you weren't going to be able to  
19 win the Corus Shotton business in those circumstances,  
20 didn't you?

21 A. We did.

22 Q. Even when we reached the position in relation to 2004,  
23 we know that the prices being charged, for instance at  
24 Llanwern, were by Dwr Cymru, were effectively 15.15p,  
25 you would accept that?

1 A. No, not for 2004, because that was the whole reason why  
2 Corus had asked us to compete head to head, because the  
3 new tariff would have meant a huge increase in costs,  
4 probably more than a doubling of costs at those sites,  
5 although I don't have the precise figures. But  
6 certainly what I have done is modelled the change in  
7 costs that would apply to Corus at Shotton because that  
8 forms part of our claim, and I haven't got that  
9 particular sheet in front of me, but certainly the cost  
10 to Corus at Shotton would have more than doubled between  
11 2003 and 2004, and it was the realisation of that that  
12 prompted Corus to take action and try to find someone  
13 else who was active in the market, and we were the only  
14 choice.

15 Q. Let's just look at that. Page 3294.

16 Housekeeping

17 THE CHAIRMAN: Can I just pause there? How long is this  
18 going to take?

19 MR BEARD: I was hoping it was going to be relatively brief,  
20 but that answer suggests that it might not be.

21 THE CHAIRMAN: Dr Bryan has been in the witness box since  
22 10 o'clock this morning on the basis that he would only  
23 be part of the day, and this is now at an important part  
24 of their claim, and I am wondering whether it's really  
25 fair on him to have his answers at ten to 5 on a Friday



1           afternoon.

2       MR BEARD: I understand.

3       MR SHARPE: Madam, I was holding back in the hope that my  
4           friend might have lived up to his estimate that we would  
5           be finished by lunchtime today. So I have some dread at  
6           the thought of Dr Bryan remaining over the weekend, but  
7           it looks as though he is going to be.

8       THE WITNESS: May I say something, Madam?

9       THE CHAIRMAN: Yes, of course.

10      THE WITNESS: I have a real problem with trying to run  
11           a business, a business which has been on the edge since  
12           for as long as I can remember, and being in purdah  
13           I have been unable to talk to any of my colleagues for  
14           three days now, and so I have a real problem, I need to  
15           work over the weekend in the interests of a business  
16           which is struggling to fight this action and to grow in  
17           highly competitive markets. I would rather suffer for  
18           a little longer if Mr Beard is not going to be too long.

19      THE CHAIRMAN: Well, then there is also the question of  
20           re-examination by Mr Sharpe. There will be some?

21      MR SHARPE: I am just wondering if Madam might care to relax  
22           the restriction. That seems the obvious way through.

23      THE CHAIRMAN: Yes, it does.

24      MR BEARD: If it assists, as long as Dr Bryan is not  
25           discussing issues directly pertaining to the case,

1 I would like to make it clear we don't have a difficulty  
2 with that; we are not intending in any way to inhibit  
3 the way that he operates his business. There are few  
4 questions left in any event, but obviously it's proper  
5 that he doesn't discuss any issues just in case there  
6 are matters of re-examination. If that is what needs to  
7 be done, we are entirely content with that.

8 THE WITNESS: I would be grateful for that relaxation.

9 MR BEARD: On that basis then ... I apologise that our time  
10 estimates have been --

11 THE CHAIRMAN: No, these things happen.

12 MR SHARPE: Madam, one further piece.

13 THE CHAIRMAN: Yes.

14 MR SHARPE: You will recall that the cross-examination  
15 referred to a letter of 17 February 2000. It became  
16 very apparent that the letter that was adduced was not  
17 the letter that was meant to be referred to. We have  
18 that letter. It was in fact disclosed by Albion,  
19 although it's actually Welsh Water's letter. It was  
20 disclosed, it wasn't inspected. I suspect the party  
21 doing the inspection probably saw the date, the parties  
22 being identical and thought it was the same document.  
23 All the documents have a unique number. I make no point  
24 at all. I have given a copy to my friend. I would like  
25 to, if I may, certainly in re-examining Dr Bryan on that

1           ... if my friend doesn't take him to the correspondence  
2           himself which of course he is free to do.

3           I wonder if I may give you the letter? It's very  
4           short (Handed).

5       THE CHAIRMAN: Yes.

6       MR BEARD: No objection, it appears there has just been  
7           a mix-up over disclosure points. We will look at it  
8           over the weekend as well.

9       MR PICKFORD: Madam, whilst that is being handed up, there  
10          is another piece of housekeeping.

11          I was asked by you yesterday or the day before in  
12          relation to the letter of 16 January 2009, which we said  
13          we didn't receive, and you asked me whether we could  
14          check whether Ofwat had received it. We sent an email  
15          to the person who was apparently copied in on it at  
16          Ofwat, and his response is now included in the bundle,  
17          and that's at tab 76 of bundle 17, and his response is  
18          that he has no record of ever having received it.

19       THE CHAIRMAN: As far as this letter that's just been handed  
20          up, it would be helpful if, on Monday, someone could  
21          tell us where it usefully goes, in which bundle and what  
22          its page number will be.

23       MR BEARD: I think it should probably slot in in bundle 3 --

24       MR SHARPE: Respectfully, no.

25       THE CHAIRMAN: Well, discuss it amongst yourselves.

1 MR BEARD: Sorry, I was trying to be helpful.

2 MR SHARPE: Bundle 18 in the next tab, whatever that may be.

3 MR BEARD: I am not opposing that.

4 MR SHARPE: Page 7,000 and something.

5 THE CHAIRMAN: Right. Should we try and start at 10 o'clock  
6 on Monday, if that's possible?

7 MR BEARD: I think that would probably be sensible if  
8 everyone can bear it, because obviously we have issues  
9 to do with unpleaded matters that have to be dealt with  
10 at some point.

11 MR SHARPE: If that's convenient, that's perfectly  
12 convenient for me.

13 We will deal with Dr Bryan, and then we have my  
14 friend's application, which I sincerely hope won't take  
15 very long and won't materially affect my  
16 cross-examination one way or the other.

17 I want to give my friend notice; he was very  
18 exercised about the prospect of witnesses being asked  
19 about legal advice. I have no intention of asking them  
20 what legal advice they received, indeed if they ever  
21 received legal advice. If that assuages one concern he  
22 has, he has one thing less to worry about over the  
23 weekend. On the other hand I will attempt --

24 THE CHAIRMAN: Well, can you just have a word after court to  
25 work out what is between you in relation to -- without

1           you not keeping your, whatever the opposite of --  
2           wetting your powder or whatever.

3       MR BEARD:   Not keeping your powder dry.

4       THE CHAIRMAN:  Yes.  Without you having to reveal what your  
5           cross-examination is going to be, if you can narrow to  
6           any issues that there remain about the scope of your  
7           cross-examination, I am sure that would be greatly to  
8           everybody's benefit.

9       MR SHARPE:  I'm much used to talking to my friend over the  
10           weekend and I think we might use the weekend  
11           productively on that.

12      MR BEARD:  We will happily do that.

13      THE CHAIRMAN:  Dr Bryan, you understand that you are allowed  
14           to carry on your business and be in touch with your  
15           colleagues as regards that, but you mustn't discuss with  
16           them anything about the case.

17      THE WITNESS:  I am most grateful, Madam.

18      THE CHAIRMAN:  We will meet again at 10 o'clock on Monday.

19      (5.00 pm)

20                   (The court adjourned until 10.00 am  
21                   on Monday, 22 October 2012)

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