



Neutral citation [2007] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

1045/2/4/04

Victoria House
Bloomsbury Place
London WC1A 2EB

12 January 2007

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

AQUAVITAE (UK) LIMITED

Appellant

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly Director General of Water Services)

Respondent

ORDER (DISCONTINUANCE)

Mr. Michael O'Reilly (instructed by Messrs. McKinnells) appeared for the Appellant Aquavitae.

Mr. Rupert Anderson QC, Miss Valentina Sloane and Miss Anneli Howard (instructed by the Director of Legal Services, OFWAT) appeared for the Respondent.

1. This appeal was introduced by Aquavitae (UK) Limited (“Aquavitae”) on 21 July 2004 against the Decision of the Director General of Water Services (“the Director”) no. CA98/01/2004 (“the Decision”) dated 26 May 2004 made under the Competition Act 1998 (“the 1998 Act”) in respect of the complaint by Albion Water Limited (“Albion”) under Chapter II of that Act against Dŵr Cymru relating to common carriage through the Ashgrove system. The essential relief sought in the appeal was: (i) a determination by the Tribunal that, in the Decision, the Director had misapplied the Costs Principle set out in section 66E of the Water Industry Act 1991 (“WIA91”) as amended by the Water Act 2003 (“WA03”); and (ii) a declaration that the 1998 Act still applied in the water sector notwithstanding the enactment of the WA03. Aquavitae is licensed under section 17E of the WIA91 to supply water by retail.
2. The Director submitted a defence on 15 September 2004, questioning, amongst other things, whether Aquavitae had a “sufficient interest” to bring an appeal under section 48(2) of the 1998 Act.
3. At a case management conference on 21 September 2004, Aquavitae applied to intervene in a parallel appeal (Case no. 1046) against the Decision introduced by Albion on 23 July 2004.
4. In its ruling of 16 November 2004, [2004] CAT 19, the Tribunal gave Aquavitae permission to intervene in Albion’s appeal in Case no. 1046 on certain issues relating to the Costs Principle, and stayed the present appeal. Aquavitae agreed not to seek costs in respect of its intervention in Case no. 1046.
5. Aquavitae participated on the issues relevant to Aquavitae in Case no. 1046. Aquavitae’s submissions were dealt with in the Tribunal’s judgments in that case of 6 October 2006 [2006] CAT 23, and 18 December 2006 [2006] CAT 36.
6. In its submissions for the case management conference of 24 October 2006 in Case no. 1046, Aquavitae invited the Tribunal to make a determination “as to the interplay between [the] Costs Principle and the Chapter II prohibition”, and to lift the stay in this appeal for that purpose. Aquavitae also sought interim measures, under Rule 61 of the

Tribunal's Rules, to the effect that the Tribunal should: (i) direct the Authority¹ to revise its *Guidance on Access Codes*, June 2005, and to produce a new edition in conformity with section 66E of the WIA91 within 28 days; and (ii) direct that, in the interim, water companies should supply licensees under section 17A of the WIA91 at margins in conformity with the law on margin squeeze under Chapter II of the 1998 Act and Community law. That application was, not, however pursued on 24 October 2006 (transcript p.19). Further correspondence on those matters subsequently took place between Aquavitae and the Authority.

7. In a letter to the Tribunal of 14 December 2006 Aquavitae renewed its application for interim relief, seeking directions that: (i) the Tribunal require the Authority to revise its *Guidance on Access Codes* as aforesaid; and (ii) in the interim, the Tribunal require water companies to supply Aquavitae at a margin of no less than 7 per cent of the retail price. Aquavitae invited the Tribunal to consolidate this case (no. 1045) with Case no. 1046, and to deal with its application for interim relief at the same time as it dealt with an application by Albion for interim relief in Case no. 1046. Aquavitae also sought its costs of preparing and submitting its appeal in this case (no. 1045).
8. The Tribunal dealt with Aquavitae's application for interim relief at paragraph 356 to 358 of the judgment of 18 December 2006 in case 1046. The Tribunal decided not to grant that relief, but made certain observations as regards the issues arising. The Tribunal has also held, in Case no. 1046, that the 1998 Act continues to apply in the water sector: see paragraphs 152 and 196 of the judgment of 6 October 2006 [2006] CAT 23, and paragraph 353 of the judgment of 18 December 2006 [2006] CAT 36.
9. In our view, it is manifest that there is no longer any purpose in this appeal in Case no. 1045 proceeding further. The only outstanding issue is whether Aquavitae should recover the costs of preparing its appeal in this case. Aquavitae has informed the Tribunal that such costs are some £3,818 plus VAT.
10. In our view, the relatively minor costs of this appeal incurred by Aquavitae should lie where they fall. Aquavitae's costs as an intervener in Case no. 1046 have already been

¹ The Water Services Regulation Authority replaced the Director pursuant to the WA03 with effect from 1 April 2006.

dealt with by agreement. Aquavitae had already, in effect, obtained such relief from the Tribunal as it is entitled to, in the context of Case no. 1046.

11. Similarly, to the extent that the Director incurred any costs in this appeal, in our view they too should lie where they fall, in view of the outcome of Case no. 1046. Technically, as far as the Tribunal is aware, there were no interveners in this case since Dŵr Cymru's application to intervene of 20 August 2004 was never ruled upon. The costs incurred (if any) by Dŵr Cymru, United Utilities Water plc or Albion in relation to Case no. 1045 should, in our judgment, also lie where they fall.

12. For those reasons that Tribunal orders that:

1. the appeal in case no. 1045/2/4/04 be discontinued
2. there be no order as to costs.

Christopher Bellamy

Antony Lewis

John Pickering

Charles Dhanowa
Registrar

12 January 2007