



Neutral citation: [2005] CAT 18

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

Case No 1046/2/4/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

9 May, 2005

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)  
THE HONOURABLE ANTONY LEWIS  
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**ALBION WATER LIMITED**

Appellant

supported by

**AQUAVITAE (UK) LIMITED**

Interveners

and

**DIRECTOR GENERAL OF WATER SERVICES**

Respondent

supported by

**DŴR CYMRU CYFYNGEDIG**

and

**UNITED UTILITIES WATER PLC**

Interveners

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**RULING:**  
**APPLICATION TO ADMIT A FURTHER WITNESS STATEMENT**

## APPEARANCES

Mr. Rhodri Thompson QC and Mr John O’Flaherty appeared on behalf of the Appellants.

Mr. Michael O’Reilly (instructed by McKinnells) appeared on behalf of Aquavitae.

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

Mr. Aidan Robertson (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of the Intervener Dŵr Cymru.

Mr. Fergus Randolph appeared on behalf of the Intervener United Utilities.

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THE PRESIDENT:

In their skeleton argument for the hearing of this appeal, served on the 18<sup>th</sup> April 2005, the intervener Aquavitae (UK) Limited (“Aquavitae”) referred to various case studies that have been taking place on the implementation of what is known as the “Costs Principle”, and described what it considers to be the outcome of those case studies on which it wants to place reliance in these proceedings. Aquavitae also offered to prepare a witness statement dealing with the case study exercise, subject to confidentiality issues being resolved, if the Tribunal considered it relevant to the Tribunal’s deliberations.

Objection is taken on behalf of the Director to any such witness statement on the grounds that the case study exercise was being conducted under an umbrella of confidentiality and that information was only being passed to identified persons with appropriate consents; and secondly, and more fundamentally, upon the basis that these case studies are essentially directed to the future implementation of section 66E of the Water Industry Act 1991, as it now is, that was enacted by virtue of the Water Act 2003, and is only due to come into force later this year. Those statutory provisions are not, says the Director, relevant to the issues that are before the Tribunal which relate to the Decision under appeal. Those arguments are supported by United Utilities, the Intervener.

Our view is, first of all, that there are confidentiality issues here which it is quite difficult for the Tribunal to resolve, not least in the absence of one of the undertakers that was active in the case study exercise. Secondly, at this stage of our reflection at least, we are not satisfied that it would be useful or relevant for us in these proceedings to go into detail on the results of the case studies or the inferences that might be drawn from the way those case studies have apparently gone. There seems to us to be a real risk of a kind of satellite debate taking place that may not be helpful to the Tribunal in resolving the issues before it in relation to the Decision under appeal.

Accordingly, we are not minded at this stage to permit any further witness statement on behalf of Aquavitae dealing with the case studies exercise.

As regards the use that may possibly be made by Aquavitae of what it says the results of the case studies are, our view at the moment is that, first of all, as a precaution, the outcome of the case studies should not be mentioned in open court without the Tribunal’s permission. More generally, in view of the fact that there is likely to be a dispute as to the status, nature and outcome of the case studies and the inferences to be drawn from the facts that are put before us, we think it is probably not going to be helpful for us to be taken into the details of the case

studies by Aquavitae, especially, as we have just indicated, we do not wish to hear any evidence about it. It also follows from that that the other parties, namely the Director and United Utilities, are not called upon to answer the points that Aquavitae is making about the case studies. We note simply that, in Aquavitae's submission, the case studies have not been productive but, beyond that, it does not seem to us appropriate that we should go into further detail at this stage.

So we can now go into open court, if you would be kind enough to let the public in.

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