



Neutral citation: [2005] CAT 19

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos 1034/2/4/04 (IR)
1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 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: INTERIM MEASURES

APPEARANCES

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

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

THE PRESIDENT:

- 1 The appellant Albion Water Limited (“Albion”) applies for a clarification or, alternatively, the variation of the consent order made by the Tribunal on the 2nd June 2004 in cases 1031 and 1034 of 2004. Those cases involved an appeal by Albion against a refusal by the respondent Director to grant interim measures and Albion’s own application to the Tribunal for interim relief. The background to those proceedings, and indeed the present proceedings, was and is that Albion challenges the price it is required to pay the intervener, Dŵr Cymru Cyfyngedig (“Dŵr Cymru”) for the common carriage of water to the Shotton Paper Works.
- 2 The current position is that Dŵr Cymru sells its water to Albion and Albion sells on to Shotton. Dŵr Cymru’s sales price to Albion is the same as Albion’s price to Shotton, with the result that Albion has no margin between those two prices. Shotton, however, pays 1.5p. per cubic metre to Albion, as we understand it, in order to maintain Albion in being at least until these proceedings have been determined.
- 3 The present proceedings, which we have been hearing over the last three days, involve Albion’s substantive appeal against the Decision of the Director dated the 26th May 2004 on the substance of the case, which is the subject of a separate appeal, namely case 1046 of 2004.
- 4 The background to the consent order was that it was agreed by the parties, with the encouragement of the Tribunal, as a way of disposing of the original interim relief application without the Tribunal having to rule on it. Paragraph 1 of the consent order provides that with effect from the 1st July 2004 (or the first date thereafter on which the meter is read) the price payable by the appellant for the bulk supply by Dŵr Cymru of non-potable water, based on a continuation of the original Bulk Supply Agreement between the Appellant and Dŵr Cymru dated the 10th March 1999, will be reduced by 2.05p. per cubic metre.
- 5 It is first of all contended by Albion that the consent order is clear enough, in the sense that what was intended was that they should continue to have the margin reflected by the consent order until these proceedings were disposed of. What has happened in the meantime, however, is that the proceedings have been more lengthy than was originally anticipated. As at present advised, as far as we now recall it, the Director’s Decision had only very recently been made available to the Tribunal on the date this consent order was made, and the complexities of this

case were not yet apparent.

- 6 Following the introduction of the substantive appeal, the written pleadings were not in fact closed until just before last Christmas, although all parties worked on the matter as fast as they could. There then followed a case management conference and a site visit, which took place in the early part of 2005, with the result that this appeal has only now been heard, with the best will in the world, early in May. The Tribunal's original indication therefore that it hoped to get the case on for hearing by the end of the year was unavoidably, as it turns out, somewhat over optimistic.
- 7 The problem now is that Dŵr Cymru normally adjusts its prices from the 1st April each year, but under the relevant agreement between Shotton and Albion, Albion is not able to pass on any price increase until the 1st August. In this particular case there has been a price increase of some 0.79p. per cubic metre, with the result that in the four month period between the 1st April 2005 and the 1st August 2005 that higher price cuts in, so it is said, to the margin that it was envisaged Albion would receive under the consent order. The price increase by Dŵr Cymru that came into force on the 1st April 2005 was apparently higher than the price increases for previous years, but it is an across-the-board price increase affecting all Dŵr Cymru's customers as a result of various cost pressures, and has been approved by the respondent Director. Dŵr Cymru, in those circumstances, objects to there being any change to the consent order, and says in effect that it is for Albion to bear the risk that the increase in price has produced from the 1st April 2005.
- 8 Albion says, in brief, that if it has to bear that difference, which amounts to some £4,500 a month between the 1st April 2005 and the 1st August 2005, that that will be a serious matter given that, at least by implication, Albion is on the very edge of viability, that the matter was not foreseen at the time of the consent order, that it had been understood that the proceedings would come on more quickly, that what is at issue here is a very small sum of money from Dŵr Cymru's point of view (Dŵr Cymru having a turnover of apparently over some £400 million) but it is very important for Albion.
- 9 We say, first of all, that it seems to us that what we are considering here is likely to be a variation of the existing order rather than a clarification of the order. It was an order made by consent and we think the position is that at the time the order was made no party was

addressing their mind to the particular circumstances that have now arisen. On the other hand, it is not, in our judgment, a very large step to see the original consent order in terms of a percentage reduction in the price payable as distinct from a reduction expressed in pence per cubic metre. However, be that as it may, it seems to us to be a situation where, effectively, the Tribunal is being invited to make an order pursuant to rule 61 of the Competition Appeal Tribunal Rules 2003. That rule has been interpreted on a number of occasions in the past, but it seems to us that we have not previously considered a situation that is quite in point as regards the present matter.

- 10 The situation in the present case is that the appeal has been heard now over the last three days. It has been an exceptionally heavy and complex appeal and it is now for the Tribunal to produce its judgment. The proceedings have taken longer than originally anticipated, but that is no one's fault. The Tribunal's view is that there is quite a difficult balance to strike here. However, looking at the balance that the Tribunal must strike, we have come to the conclusion that we should not run the risk of insolvency overtaking Albion pending the delivery of judgment in this case. We also bear in mind that this particular judgment involves important matters of public interest that in fact go beyond the immediate parties here involved and affect the water industry generally. What is involved in Albion's application here is a relatively short time-period from the 1st April 2005 to the 1st August 2005, and from Dŵr Cymru's point of view, a relatively small sum of money, although a sum of money, relatively speaking, important to Albion. The bargaining power between the appellant and Dŵr Cymru, if we can put it like that, is not equal.
- 11 In all those circumstances, but not without some hesitation, we have come to the view that we should make an order, the effect of which is that the appellant should pay Dŵr Cymru for water between the 1st April 2005 and the 1st August 2005 on the basis of the same reduction in percentage terms from the price that was reflected in the original consent order; in other words, in effect, that the general price increase introduced by Dŵr Cymru with effect from 1st April 2005 should not come into effect vis-à-vis the appellant until the 1st August 2005. That seems to us as far as we can possibly go in terms of interim relief as regards the appellant, and, as at present advised, it seems to us unlikely that the Tribunal will be able to be sympathetic to any further applications for interim relief that may be made.
- 12 So there will be an order accordingly.

MR. THOMPSON: I am grateful for that, Sir. If I could just clarify, the percentage reference in the judgment, is it envisaged in effect that the price should ----

THE PRESIDENT: What is envisaged is that the status quo should remain.

MR. THOMPSON: So the price to Albion from Dŵr Cymru should remain as it is?

THE PRESIDENT: Yes.

MR. THOMPSON: For a further four months in effect.

THE PRESIDENT: Yes.

MR. THOMPSON: I am grateful. I am sure the drafting can be sorted out.

THE PRESIDENT: Yes, we will make an order through the Registry and circulate it.

MR. THOMPSON: I am grateful.

THE PRESIDENT: Thank you very much.
