



Neutral Citation: [2006] CAT 25

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Case No.1031/2/4/04
1034/2/4/04 (IR)
1045/2/4/04
1046/2/4/04

24 October 2006

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

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

Respondent

and

AQUAVITAE (UK) LIMITED

Appellant

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

Respondent

and

ALBION WATER LIMITED

Appellant

Supported by

AQUAVITAE (UK) LIMITED

Intervener

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

Respondent

Supported by

DŴR CYMRU CYFYNGEDIG

and

UNITED UTILITIES WATER PLC

Interveners

Mr. Rhodri Thompson QC and Mr. John O’Flaherty, Managing Director of Albion Water Limited appeared on behalf of the Appellant.

Mr. Rupert Anderson QC and Miss Valentina Sloane (instructed by the Head of Legal Services, Water Services Regulation Authority) appeared on behalf of the Respondent and Aquavitae (UK) Limited.

Mr. Christopher Vajda QC (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of Dŵr Cymru Cyfyngedig.

Mr. Fergus Randolph (instructed by the Group Legal Manager, United Utilities) appeared on behalf of United Utilities.

RULING

1 THE PRESIDENT:

2 1 Various issues have been canvassed today but it seems to us that the question which logically
3 comes first is the approach that the Tribunal should adopt on the issue of dominance. As
4 appears from the Tribunal's Judgment of 6th October 2006 the issue of dominance has not yet
5 been addressed in these proceedings by the Tribunal, although the matter has been raised in
6 Albion's Notice of Appeal. The general background is set out in Annex A to our Judgment
7 and we will not repeat the matters that are set out in that Annex.
8

9 2 The Tribunal expressed the view at para.983 in its Judgment of 6th October that the position on
10 dominance is unsatisfactory. On the one hand the Decision assumed dominance (para.215),
11 but a number of other passages in the Decision suggested that the Director had doubts about
12 dominance (para.215) and in particular indicated that there were points about the market
13 (para.213). For present purposes the main point is that, according to the Director, it would not
14 be uneconomic to duplicate the Ashgrove System, and that the cost of constructing new
15 infrastructure is not a barrier to entry in this particular case (para.176). The Director does not
16 believe that the Ashgrove System is an essential facility, as is also stated in the Decision,
17 particularly at para.225. Albion, at paras. 188 – 211 and Annex 2 of its Notice of Appeal, puts
18 those findings in issue.
19

20 3 The Director contends that those are only ancillary aspects to the Appeal, but at para.170 of the
21 Defence the Director did explain that it was important to include findings in the Decision on
22 the essential facilities question because the Appellant had argued that the relevant facility was
23 essential, and given that it was the Director's first investigation into common carriage. I quote:

24 *"It seemed appropriate to opine on this particular question. During the investigation*
25 *the Director had explained to the Appellant that the case raised important issues*
26 *relating to common carriage generally, but it was important both for the Appellant*
27 *and the industry as a whole that his detailed thinking was publicly available and open*
28 *to challenge if necessary."*

29 We agree with the sentiment there, that the Director's thinking on this point is and should be
30 open to challenge and we note that Albion has challenged it.
31

32 4 The dominance issue here is of importance to the industry, but in our judgment it is also of
33 wider importance with regard to the working of the Chapter II prohibition under the Act more
34 generally. In particular the question of in what circumstances the cost of constructing new

1 infrastructure is not to be regarded as a barrier to entry and whether such a proposition can be
2 credibly advanced on the facts of this particular case seem to us to be matters that are raised in
3 the Notice of Appeal which we should, as a Tribunal, address. These matters are raised in the
4 Notice of appeal and under para.3(1) of Schedule 8 of the Act, the Tribunal is obliged to decide
5 the Appeal on the merits by reference to the grounds of Appeal.

6
7 5 It is true that the Court of Appeal in its recent Judgment in the *Football Shirts*' case has said
8 that there is no need for the Tribunal to determine every aspect of the Decision or every point
9 that has been raised. It is, however, in our judgment a matter for us as to what points we
10 should determine, bearing in mind all the various considerations. Our present view is that we
11 should address the points that are made in the Notice of Appeal, or at least investigate how far
12 we are in a position to address them as an alternative to remitting the matter back to the
13 Director. The Authority submits that this matter should be remitted back, but we need to
14 decide by looking at the specific points whether or not that is necessary having regard to the
15 public resources that would be involved in any such investigation. From the point of view of
16 balancing the public resources that might be involved in a further administrative stage, and the
17 further resources involved in these proceedings being completed in front of the Tribunal, it
18 seems to us that the balance is plainly in favour of the Tribunal looking at these matters if it
19 turns out that it is in a position to do so.

20
21 6 We bear in mind the circumstance that this matter has already been under investigation at the
22 level of the then Director in the administrative stage for over three and a half years before the
23 Decision was taken, a large part of which was taken up with addressing the question of
24 dominance and essential facilities. We also notice that Dŵr Cymru seems to have, and to have
25 had at all material times 100 per cent. share of the market, i.e. effectively there does not appear
26 to be any alternative supplier in the relevant area, at least at first sight though no doubt we shall
27 hear submissions about that in due course, but certainly no alternative supplier does seem to be
28 on the horizon unless alternative infrastructure is constructed. The question of whether, in
29 those circumstances, it is impossible to form a view about dominance without further
30 investigation is in itself a matter the Tribunal feels we should address. That matter, as we have
31 already said, is of some general relevance to the effectiveness of the 1998 Act, and in particular
32 whether dominance can only be determined under the Chapter II prohibition by an elaborate
33 examination of the kind embarked upon by the Director or whether, as Albion submits, the
34 issue is in fact much simpler than the respondent parties would contend, is again in our

1 judgment something that the Tribunal should address. To leave matters in the present state of
2 uncertainty after several years of inconclusive investigation does seem to us likely to bring the
3 working of the Act into disrepute, and to decide that further investigation is necessary (and it
4 may turn out that that is the case) of course is not a conclusion the Tribunal would wish to
5 come to without having itself at least looked at the arguments on both sides.

6
7 7 It is said by Dŵr Cymru, the Authority and United Utilities that the Tribunal would not have
8 jurisdiction under para.3(2)(e) to make any decision which the Director could have made in the
9 absence of a Statement of Objections. We may or may not need to address that submission in
10 due course if and when we get to the question of exercising any power under s.3(2)(e) of the
11 Act, and we contemplate taking a decision within the meaning of that paragraph. In those
12 circumstances it does not seem to us convenient to address that particular issue as a
13 preliminary issue, though if the need arises we would of course address it fully when we came
14 to rule upon it with our full reasons.

15
16 8 As to how we should proceed from here, it seems to us necessary to have a further hearing in
17 as short a time as possible to determine whether the Tribunal is in a position to decide whether
18 the Decision is correct on the issue of essential facilities and the associated question of
19 dominance, and whether the reservations expressed in the Decision are well-founded, whether
20 that matter should be further investigated and what conclusions and on what basis it is open to
21 the Tribunal to rule on this issue having regard to the jurisdictional matters raised. From the
22 Tribunal's point of view it would be convenient if such a hearing could take place on 14th
23 November, with 15th November in reserve, with any written submissions being submitted to us
24 by 9th November.

25
26 9 Various other issues have been canvassed in the course of this afternoon, in particular whether
27 there should be some kind of interim remedy in terms of a reduction of the Bulk Supply
28 Agreement price – interim or perhaps even final remedy; the question of whether the issue of
29 an excessive price should be remitted back to the Director, and if so under what rubric and a
30 similar question arises in the case of margin squeeze. As to the question of the interim remedy
31 and the excessive price, we do not propose to make any order today. We are conscious of the
32 fact that there may be procedural implications in relation to making an interim order, some of
33 which has been canvassed in argument, and one particular practical difficulty is at the moment
34 it is not wholly clear to the Tribunal whether or not the common carriage proposal, the subject

1 of the Decision, is in commercial terms still a realistic proposition. That seems to depend both
2 on the willingness of the relevant parties to negotiate an arrangement acceptable to them, and
3 on matters that arise as a result of the introduction of the new statutory regime under the Water
4 Act 2003.

5
6 10 We would propose to give the parties time to see whether these various matters can be worked
7 through in more detail than they have been up to now. We would expect, if we may, Albion to
8 give further thought and take any necessary preliminary steps to explore ways in which, were it
9 possible for the common carriage proposal to take place, it could be done in conformity with
10 the 2003 Act. At the same time we would invite United Utilities and Albion together to
11 consider whether, in practical terms, it is realistic to enter into further negotiations and to
12 report back to us in due course on whether or not there is a realistic prospect of those
13 negotiations being successful. It would evidently be convenient if that side of things could be
14 clarified before the next hearing of the Tribunal on 14th November. We only add in parenthesis
15 that it would (at least as present advised) be a somewhat surprising result in the Tribunal's
16 view if an Act designed to facilitate competition should end up by suppressing the potential for
17 competition that that particular common carriage arrangement presents, but that is another
18 matter which we do not propose to go into further.

19
20 11 Similarly, the question of whether anything should be sent back to the Director, certainly in
21 terms of the excessive price issue, is a matter at this stage that we do not wish to resolve
22 without having more detail about the commercial situation. Similarly in relation to margin
23 squeeze our present view is that it may not be justifiable for various reasons to remit the
24 question of margin squeeze for further investigation and we will consider at the next hearing
25 what final order (if any) the Tribunal should make on the issue of margin squeeze. All that
26 said, we would particularly invite the full Board of the Authority (which of course did not exist
27 at the time these proceedings started) and the full Board of Dŵr Cymru to give careful
28 consideration as to whether there are circumstances in which these proceedings can be resolved
29 in a way that is appropriate bearing in mind all the various interests of the parties and the
30 questions at issue. If matters cannot be resolved despite that expression of hope by the
31 Tribunal, the Tribunal will of course make all the necessary and appropriate Rulings it needs to
32 make.

33

1 12 As regards the various issues of costs, we would hope again that those can largely be sorted out
2 without the need for the Tribunal to make a Ruling, but if insofar as there are written
3 submissions on costs we would invite the respondents and the relevant Interveners to put in
4 any observations that they have on that issue within 14 days. If, as we propose, we extend the
5 time for appealing both for the Authority and Dŵr Cymru by seven days that will conveniently
6 take us, I think to just before 14th November and at that stage on that day, or the following day
7 we will be better informed as to what the situation is and be able to make any necessary orders.
8 I think we have asked Aquavitae to provide a schedule indicating its costs and, in particular, its
9 expenses in relation to its experts' reports, and we do not propose to make any further Rulings
10 in relation to Aquavitae's Appeal unless and until we are alerted to the fact that that is a live
11 issue. Once again it may very well be that that can be resolved. That is the conclusion the
12 Tribunal has come to as far as today's proceedings are concerned.

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