



[2006] CAT 33

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1034/2/4/04 (IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 November 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

Supported by

DŴR CYMRU CYFYNGEDIG

and

UNITED UTILITIES WATER PLC

Interveners

RULING (VARIATION OF INTERIM RELIEF)

APPEARANCES

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

Mr. Rupert Anderson QC (instructed by the Head of Legal Services, Water Services Regulation Authority) appeared on behalf of the Respondent.

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

Mr. Simon Gardiner (of United Utilities) appeared on behalf of United Utilities PLC.

1 THE PRESIDENT: This very long running case is now close to its final conclusion as far as the
2 Tribunal is concerned. The Tribunal envisages giving Judgment on the outstanding issues in
3 mid-December at the latest. The only issue on which the Tribunal's ruling is requested today
4 is in relation to a variation sought by Albion of an existing order made in this case requiring,
5 on an interim basis, Dŵr Cymru to reduce its price to Albion under the second bulk supply
6 agreement between the parties – a price known as the “bulk supply price”.

7 The history of the matter is that in parallel with the main proceedings, which are taking place
8 in case 1046 there are other proceedings whose roots are to be found essentially in case 1031
9 and 1034 in which Albion, among other things, has challenged that bulk supply price as an
10 abuse of dominance (e.g. para.4 Notice of Appeal in case 1031 dated 1st April 2004)

11 On 11th May 2004 Albion made an application for interim measures to the then Director
12 seeking a reduction in the bulk supply price by way of an interim order. That request was
13 refused by the Director on 26th May 2004, and Albion then appealed to the Tribunal against
14 that refusal and/or sought interim measures from the Tribunal in proceedings that became case
15 1034R.

16 Under s.47(1)(e) of the 1998 Act, the Tribunal has jurisdiction *inter alia* to hear appeals
17 against refusals for interim measures.

18 On 2nd June 2004, and still in cases 1031 and/or 1034 IR, the Tribunal by consent made an
19 order reducing the bulk supply price by 2.05 pence per cubic metre. Just under a year later, on
20 19th May 2005, we varied that order essentially to deal with a mismatch as regards timing that
21 had arisen as a result of the effect of certain price changes that took place between the parties.
22 The Tribunal's Judgment is at [2005] CAT 19, and the essential reasons for that variation are
23 set out in para.10: “However, looking at the balance that the Tribunal must strike, we have
24 come to the conclusion we should not run the risk of insolvency overtaking Albion pending the
25 delivery of the Judgment in this case. We also bear in mind that this particular Judgment
26 involves matters of public interest that in fact go beyond the immediate parties here involved
27 and affect the water industry generally.

28 What is involved in Albion's application here is a relatively short time period ... and from Dŵr
29 Cymru's point of view a relatively small sum of money, although a sum of money relatively
30 speaking important to Albion. The bargaining power between the Appellant and Dŵr Cymru,
31 if we can put it like that, is not equal.”

32 That was essentially the position as at May 2005. What has then happened with effect from 1st
33 November 2006, as we understand it, is that Shotton Paper – the ultimate customer in this case

1 – has withdrawn from Albion some support that Shotton Paper was according Albion in the
2 sum of 1.5p per cubic metre.

3 Dr. Bryan (on behalf of Albion) has filed a witness statement on 15th November 2006, para. 54
4 of which states:

5 “Failure to agree adequate interim or final measures is likely to require Albion Water
6 to cease trading within two months.”

7 Various arguments have been put to us about Albion’s situation. It has been argued that
8 Albion’s financial position is not as bad as it is painted, and it has also been suggested that it
9 would be quite sufficient for Albion to enter into an agreement with Dŵr Cymru, a draft of
10 which has been circulated, which would envisage that in an interim period the price of bulk
11 supplies would indeed be reduced by 1.5p per cubic metre, but subject to an agreement that
12 both parties would submit to the Authority the question of the determination of a new bulk
13 supply price as a separate procedure under the Water Industry Act rather than under the 1998
14 Act. Various complications about that suggestion have been drawn to our attention in
15 argument but in our view it is not necessary for the purposes of this Judgment to go into detail.
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17 In our view, the Tribunal’s position is essentially the same as it was in May 2005, bearing in
18 mind in particular that we are now only a short time from the Tribunal’s last Judgment in this
19 case. We do not think we should run any risk of insolvency overtaking Albion. There are still
20 outstanding matters to resolve, there is still the question of permission to appeal, there is still
21 the possibility of this matter going further. We bear in mind that the Judgments that we have
22 had to consider do involve matters of public interest, that what is here involved is a relatively
23 short time period, and from Dŵr Cymru’s point of view, a relatively small sum of money,
24 although a sum of money relatively speaking still important to Albion.

25 In those circumstances in the period from today to the delivery of the Tribunal’s further
26 Judgment in this case we have come to the conclusion that the balance is in favour of granting
27 Albion the interim relief that it seeks. The figure of 2.05p per cubic metre in the existing
28 order should therefore be varied to a figure of 3.55 – if our arithmetic is correct – and we think
29 it right that in the circumstances of this case that should take effect from the date of the change
30 of Shotton’s support for Albion, that is to say from 1st November.

31 As we have said, that variation runs until the Tribunal next has occasion to make an order in
32 this case, or to consider the matter further which, as presently anticipated, will be in about
33 three weeks’ time, so that is effectively an order to deal with the next three weeks, and we shall
34 revisit the question again at that stage. In that and other connections, the whole question of the

1 interim or final orders that may be necessary in this case will require further consideration but
2 that seems a fair order for the Tribunal to make *ad interim* at this stage.
3 MR. VAJDA: I do not know if I am entitled to engage the slip rule, as it were. I think, Mr.
4 President, you said it should run from the date of 1st November.
5 THE PRESIDENT: That is what I said – have I slipped?
6 MR. VAJDA: Well the letter from Shotton is actually dated 10th November, it is with immediate
7 effect.
8 THE PRESIDENT: I see, thank you very much. From the 10th.
9 MR. VAJDA: From the 10th, yes.
10 THE PRESIDENT: Thank you very much for that, Mr. Vajda.
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