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IN THE COMPETITION

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

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

DIRECTIONS HEARING

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APPEARANCES

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

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.

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.

1 (The hearing commenced at 10.30 am)

2 THE PRESIDENT: Good morning, ladies and gentlemen.

3 MR. THOMPSON: Good morning, Mr. President, gentlemen. I have the honour of appearing both
4 on behalf of Albion and Aquavitae today. The Tribunal should have two sets of submissions,
5 quite a lengthy document from us and a more modest one from Aquavitae. I do not whether
6 the Tribunal wishes to indicate where it wishes to go with this or whether you are happy for me
7 to take my course and proceed on that basis.

8 THE PRESIDENT: We had noted there were four main things to consider: number one, what
9 course this case should now take, putting it very broadly. That includes in particular what
10 orders the Tribunal should make. Number two, which of course is also related to number one,
11 how to deal with the outstanding issue of dominance. Number three is costs. Number four is
12 interim relief, if any, as regards (a) Albion and (b) Aquavitae.

13 In relation to the last two, in so far as the Aquavitae application for interim relief proceeds,
14 which we might discuss a bit later in the morning, we thought we would deal separately with
15 issues that arise in relation to the Aquavitae Appeal, that is to say case 1045, as a self-
16 contained part of any further hearing that we have today as to what to do with that case,
17 whether any orders are required and whether any relief should be made. That is probably a
18 self-contained issue and should not be allowed to confuse other issues.

19 As regards costs, we are somewhat minded at the moment to say that that can be largely dealt
20 with in writing, but there may be some issues on costs that we need to explore.

21 Coming then to the first two things that I mentioned, it is of some importance, I think, when we
22 consider what course this case should now take, to understand a little bit better what the
23 commercial situation is, as it were, going forward, because there are two aspects to this case.
24 One is the common carriage proposal. Since that proposal was made we have had the
25 2003 Act and we are wholly unclear at the moment as to whether the 2003 Act has any effect
26 on that proposal, or whether that proposal is still a live proposal or not a live proposal, or
27 somewhere in between. It is perhaps not quite clear whether it is or not. Whether or not it was
28 a live proposal could affect how far this case goes forward, or not, and what order we were to
29 make about it. That is one aspect of the whole situation.

30 The other aspect of the situation is the existing arrangements at Shotton, including the Bulk
31 Supply Agreement and the price under the Bulk Supply Agreement, and that raises a separate
32 set of issues from the issues that arise in relation to the proposal going forward. We would like
33 some further help on all that aspect.

1 More generally, under Rule 20(4)(e) of the Tribunal's Rules – you do not have to turn it up,
2 Mr. Thompson – one of the purposes of a Case Management Conference is to facilitate the
3 settlement of proceedings and, in so far as it is at all possible for the Tribunal to do so, we need
4 to pay regard to that Rule, and we have noted in the skeleton arguments occasional references
5 to the possibility of commercial resolution to this dispute being found. If there is no
6 commercial resolution to the dispute that is it, we just carry on, we make the orders we have to
7 make, and so forth and so on. If there was in the background a situation where all the parties
8 had come to the view that it was in their interests to reach some kind of accommodation
9 obviously that is something that the Tribunal would encourage.

10 MR. THOMPSON: I am grateful for that. I think, broadly speaking, that fits into the structure of
11 what I was proposing to say. I think the only thing I might add on is, of course, that this case,
12 and indeed also the *Thames* case, there are a number of satellite pieces of litigation which have
13 not quite been ended. I think there are three Albion Shotton cases still on the go, two of which
14 I think are stayed.

15 THE PRESIDENT: Yes, we have to sort out all those cases.

16 MR. THOMPSON: Obviously the *Thames* case is still awaiting judgment on costs, and since we are
17 all here ----

18 THE PRESIDENT: We have not got *Thames* here, I do not think. It is not an accident that we have
19 not ruled on costs in *Thames*, because we were going to rule on costs in both cases together
20 because there are common points in both cases on costs.

21 MR. THOMPSON: The position of *Aquavitae* obviously is that there is formally a separate Appeal,
22 and there is obviously the role of *Aquavitae* within this Appeal in its role as Intervener.
23 The way I was proposing to look at it was in terms of consequential orders arising from the
24 Judgment and in the light of the submissions that have now been put in by Dŵr Cymru and the
25 Authority and United it did appear to us that it was common ground that the Decision must
26 now be set aside subject to the caveat that the Authority says that that is subject to Appeal.
27 That must be technically correct until 6th November 2006, but it does appear to us somewhat
28 unreal, given the factual findings by the Tribunal that there could be an effective Appeal on a
29 point of law that might have the effect that this Decision would stand. Our basic position is
30 that the reality is that the Decision will have to be set aside in any event and that that nettle
31 might as well be grasped, although obviously we may have something to say about it.

32 THE PRESIDENT: Can I stop you there, Mr. Thompson. Without necessarily disagreeing with the
33 reasoning that leads you to that conclusion, there is a procedural situation we have to grapple
34 with as a result of the *Floe* decision, which relates to the question as to whether we are going

1 to send anything back to the Director or not. If we are going to send something back to the
2 Director, it is for consideration whether we send it back without setting aside the Decision, but
3 for further investigation under whichever sub-rule it is, Rule 19, on the basis of things not
4 being investigated, so that the Tribunal retains jurisdiction over that further stage of the
5 proceedings if there is to be one.

6 What happened in *Floe* was that the Decision was then set aside. In that case the Court of
7 Appeal said, "If you do that the Tribunal is then pointless, there are no further directions or
8 findings that it can make in relation to any further proceedings in front of the Director, and that
9 the better route to follow is the route under the Tribunal's Rules which you follow before you
10 have actually set it aside". That all needs to be explored if we are going to go down that route
11 at all – I am not saying that we are.

12 Secondly, the Decision proceeds on the basis that there is dominance. The Tribunal cannot at
13 the moment see why we should set aside the basic assumption upon which the Decision
14 proceeds, which takes us to the question of how we are going to deal with dominance. In any
15 event, we have not dealt with that yet, so we could not set aside the bit of the Decision that
16 deals with dominance until we have had some argument about it.

17 MR. THOMPSON: Yes. It may be that all this has to be seen in the round and one cannot ----

18 THE PRESIDENT: We shall sort it all out as the day unfolds.

19 MR. THOMPSON: I can see that, Sir. I think I was merely saying that, on the merits, the Decision
20 cannot stand in the light of ----

21 THE PRESIDENT: The merits are what we have decided so far, or the bits that we have decided so
22 far. The Decision, it is very hard to see how it can be sustained.

23 MR. THOMPSON: Yes, regardless of any points of law that the Intervener or the Authority may be
24 able to find.

25 THE PRESIDENT: I do not know about that.

26 MR. THOMPSON: The question of what happens next, I think really can be broken down into
27 declaratory relief and substantive relief. The Tribunal will have seen how we put it at
28 para.31.2 of our submissions, where we effectively unpack the terms of the Notice of Appeal
29 where we are seeking a declaration of dominance and a finding of abuse. Obviously that goes
30 beyond what the Tribunal has to date found. So, to that extent, obviously that does not suggest
31 that this would simply be the end today because it is still part of our Notice of Appeal to
32 determine whether or not the Chapter II prohibition has been infringed and for that purpose one
33 needs a positive finding of dominance going beyond the assumption, and also a finding based
34 on the final Judgment's finding that on the balance of probabilities there has been an abuse in

1 margin squeeze and an excessive price charge. The Tribunal may well have views on the best
2 way forward for that.

3 THE PRESIDENT: I think our provisional view on that is that we have to have a hearing on
4 dominance in any event in order to decide what to do about that part of the Decision that deals
5 with dominance. What eventual finding emerges from that and how far we need to go in
6 deciding dominance are all matters that we should debate on that further hearing as well as the
7 question of whether or not the Decision can stand on the issue of dominance; but that there
8 should be a further round on dominance is at the moment our provisional view, but we have
9 not heard the Authority and Dŵr Cymru on that.

10 MR. THOMPSON: I assume that they will have something to say about that. We have obviously
11 made a positive case on various occasions about dominance, and if we must we will come and
12 make a positive case again, and I think no one will be surprised by the sort of things that we
13 will be saying.

14 The other declaratory issue is, I think, Aquavitae's Appeal which I will come back to in a
15 moment.

16 THE PRESIDENT: Yes, we will deal with all the Aquavitae issues separately.

17 MR. THOMPSON: Turning to the issue of substantive relief, we have dealt with it both in relation
18 to interim remedy and final remedy, although it appears to us that the two melt into one
19 another because of the type of issues that the Tribunal has already raised this morning about
20 where we are now and what might happen going forward. As I understand it, the position
21 where we are now is that the headline price that Dŵr Cymru is charging Albion is 27.63 per
22 metre cubed, but that is subject to the interim order of 2.05p discount, which leads to a net
23 charging price at the moment of 25.58 per metre cubed. The gist of what we are saying in our
24 submission is that in the light of the findings both in relation to margin squeeze and in relation
25 to excessive pricing, that discount has been shown to be too low to meet with the obligations of
26 Dŵr Cymru on the assumption which the Authority has already made and which Dŵr Cymru
27 has never challenged, that Dŵr Cymru is a dominant firm supplying us and therefore subject to
28 the Chapter II obligations.

29 THE PRESIDENT: Can we unpack this a little bit, Mr. Thompson. The Decision is about the future
30 proposals. The Decision is about the First Access Price, which is the price that Dŵr Cymru
31 would charge Albion in the event that Albion was transporting water that Albion had
32 purchased from United Utilities to supply to Shotton. That, at the moment, is a hypothetical
33 situation. It has not yet happened. I asked a bit earlier as to whether it is feasible or
34 envisageable that it will still happen. That is what the Decision under Appeal is about.

1 The Bulk Supply Price – the existing Bulk Supply Price – is a different matter. That is the
2 existing arrangement which is not, strictly speaking, the subject of the Appeal, although I think
3 it is fair to point out that in the interim measures case, under which this part of your
4 Application technically falls, 10131 and 10134R, what is sought by way interim measure was a
5 reduction from the Bulk Supply Price. So the interim measures case is actually quite a
6 conceptually different case from the case under appeal.

7 The interim measure was granted at the time for the purpose of the main Appeal to be fought.
8 Subject to tidying up operations – I will not use the words “mopping up operations”, although
9 in a water case it is very hard to avoid those sorts of terrible puns! – this case has been largely
10 determined, although there are some things left to do. So the question of some interim
11 judgment about the Bulk Supply Price does raise, as far as we can see, some further
12 complications that need to be bottomed out before we can get to the bottom of it. Do you
13 follow me?

14 MR. THOMPSON: I do follow but, with respect, I do submit that the Authority and the Dŵr Cymru
15 position is not a commercially realistic one and indeed Mr. Randolph’s presence is not entirely
16 irrelevant to this particular aspect of it in that one of the issues is that during the course of this
17 Appeal the Tribunal will be aware that we have made efforts to reach some sort of
18 accommodation with United but have been singularly unable to do so.

19 I think our broad submission, partly adopting the point that the Tribunal has made already
20 about the state of the interim case, which does indeed relate to the Bulk Supply Price, would be
21 that if, as we say is the case, the effect of the findings in the final Judgment apply necessarily
22 equally to the Bulk Supply Price as they do to the Common Carriage Price, it would be a quite
23 unreal situation for the Tribunal to throw up its hands and say, “We cannot do anything to
24 preserve the commercial position as we think it should be because technically the scope of the
25 Notice of Appeal relates to a Common Carriage Price which has proved to be difficult to take
26 forward for reasons relating not only Dŵr Cymru but also to United”, and effectively to say
27 that that is the end of that and poor old Albion will have to start again and go right back to the
28 bottom of the snake having got virtually to the top of the ladder.

29 THE PRESIDENT: If you want some kind of interim order in the interim measures case I think you
30 have to take us to the Rule and show us that various aspects of the Rule are satisfied and tell us
31 why we should go down that route in relation to the Bulk Supply Price in the interim measures
32 case now we are at this stage in the main case. In particular, there is an important difference
33 between Albion having a margin – let us say a reasonable margin, but certainly a survival
34 margin – and having what you would describe as a “fair price”. They are different ideas. If

1 you are inviting us to cut the Bulk Supply Price in half that is a different idea from giving some
2 interim relief to keep Albion on a life support machine until the Appeal proceedings are heard.
3 I am not saying one way or other what the answer is, I am simply saying that these difficulties
4 have got to be faced up to and dealt with.

5 MR. THOMPSON: I fully accept that but the point that I would make in response – and I think it is
6 in response to a footnote in the Dŵr Cymru skeleton argument where they say, “Our price has
7 gone up to 30p and therefore you have actually got a margin, if only you put your price up to
8 our nice 30p then you would have a 5p margin” – I think does illustrate the somewhat unreal
9 world that you are likely to get into if you simply concentrate on the margin. Inevitably, one
10 has to look at the thing in the round and look both at the headline price and the margin, or else
11 you can always get rid of a margin squeeze by having a theoretically higher base price or
12 headline price and then say, “There is no need to worry about a margin because we have
13 created it by pushing up the headline price”, whereas in fact it is quite unrealistic to suggest
14 that Albion could suddenly push up its price. So it does appear to us that the Tribunal
15 necessarily needs to look both at the actual price and at the margin and to regulate both if it is
16 to give an effective remedy. That cannot be avoided.

17 THE PRESIDENT: Let us try and break it down again. Are you talking now in terms of an interim
18 remedy, in which case the question arises “interim to what?” – i.e. what are the further
19 envisageable stages of this case in relation to which this is an interim remedy – or are you
20 talking about some kind of final remedy, in which case what are you inviting us to say? The
21 case at the moment is about the First Access Price, it is not about the Bulk Supply Price. It
22 may be a technicality and it may be that it can be circumnavigated or overcome in some way,
23 but it does need to be argued out.

24 MR. THOMPSON: This is obviously an unusual case in that we are still discussing interim
25 questions after two Judgments of the Tribunal and, although that may be prayed in aid against
26 me and said that we cannot get over that interim point, it does mean that if we are talking about
27 interim questions then the Tribunal is exceptionally well informed about the case, and in that
28 respect I think Rule 61(1)(c) is of particular relevance, which gives the Tribunal power to make
29 an order on an interim basis granting any remedy which the Tribunal would have the power to
30 grant in its final Decision. Normally, of course, an interim order would relate to an early stage
31 of the proceedings and one would be looking hypothetically at what possibly might be done at
32 the end. Here we are looking after the Tribunal has already made substantive findings in
33 relation to both excessive price and margin squeeze. It does appear to me in that situation that
34 the Tribunal necessarily would have significantly wider powers to hold the ring on an interim

1 basis because it is fully seized of the case and it is only interim, as the Tribunal is putting to
2 me, because there were one or two other points, and in particular the issue of dominance,
3 which the Tribunal itself wishes to cover.

4 The submissions of the Authority and Dŵr Cymru have rather concentrated on 61(2), which of
5 course is the normal situation in relation to urgent interim applications pending the outcome of
6 the Appeal. We are now two years down the track after the Tribunal has been seized and made
7 findings and, in my submission, the primary power under 61(1)(c) is the relevant one, subject
8 to the criteria at 61(3), which indicates that the relevant issues include urgency, but also relate
9 to the effect on the party making the request if the relief sought is not granted, and the effect on
10 competition if the relief is granted. In my submission, 3(b) and (c) go strongly in favour of the
11 Tribunal making a further interim order to give the type of protection to Albion that the
12 Judgment, at least impliedly, indicates it considers to be appropriate, and also to promote
13 competition in the way that the Tribunal clearly indicates would be desirable. In these
14 circumstances, 61(3)(b) and (c) go strongly in favour of a further interim order to protect the
15 interests of Albion and are not undermined by the fact that this is not the normal type case at
16 the start of a hearing. Whether or not that is technically to expand the interim orders case, or
17 whether it is an interim order within the main case, in my submission, that is the type of
18 technicality that there must be a way through if the Tribunal agrees in substance with us that
19 this is a case where it should not simply be allowed to float off without any protection given to
20 Albion, given the findings that the Tribunal has made in this case.

21 THE PRESIDENT: If we go back to 61(1)(c) – I do not wish to raise difficulties where none exist,
22 but we do need to get it right – what is the remedy and in which case do you say we would
23 have power to grant in our final decision and what exactly is the final decision that you say we
24 would proceed to?

25 MR. THOMPSON: It may assist the Tribunal to go back to the Notice of Appeal itself, where
26 para.2.17 sought five issues to be determined by the Tribunal itself. 2.17(b) is the Chapter II
27 finding. 2.17(c) is the access price issue. 2.17(d) is the issue against United Utilities, which at
28 an earlier stage we indicated is not pursued at this Appeal. 2.17(3) whether the terms of the
29 non-potable Bulk Supply Price should be consistent with the common carriage access price.
30 So formally at least that issue is before the Tribunal as part of this Appeal. As the Tribunal has
31 already pointed out in the interim measures application, which I suspect is in this same file, the
32 remedy was directed to the Bulk Supply Price to reflect the reality of the situation that that is
33 the commercial position pending the outcome of this case.

1 THE PRESIDENT: That was to enable the case to be fought, not to enable the Tribunal to set the
2 fair level to the Bulk Supply Price. Is 2.17(e) – and let us not quibble about the language, we
3 can see what it is driving at – a remedy that we would have power to grant? That is the
4 question in terms of Rule 61(c). As I say, the case is about the First Access Price, and that is
5 2.17(b) and 2.17(c). Technically speaking, the Bulk Supply Price is a different matter
6 altogether. What your argument would come down to saying is that in the light of the
7 Tribunal’s judgment there is an arguable case that the Bulk Supply Price is, in itself, abusive,
8 and the Tribunal should do something about it, which is a different case from the case that is
9 the main case, which was about the First Access Price. It may be that, logically speaking, a
10 consequence of some kind along those lines could be argued to follow. I am still slightly stuck
11 procedurally as to how we get there.

12 MR. THOMPSON: I think it must, in the end, depend on the interpretation of Schedule 8 of the
13 Competition Act and the question of what the powers are of the Tribunal in the particular
14 circumstances of this case where it finds that a decision is defective in a large number of
15 respects and where it is decided, rather than remitting the matter last December, to make a
16 much more detailed investigation based on disclosure by the Authority and by the interested
17 Intervener, but in the end it will turn on Schedule 8, para.3(e), which refers to any other
18 decision which the Authority could itself have made. Therefore, the question will arise as to
19 whether or not the Authority could have required Dŵr Cymru to act in a particular way in
20 order to avoid the abuse which the Authority might hypothetically have found had it taken the
21 same approach as the Tribunal recommends in the final Judgment. In my submission, the
22 powers of the Authority or the Regulator in the particular circumstances of this case where it
23 finds two monopolists, one after the other, proving very difficult for the new entrant to deal
24 with, and an existing commercial relationship with only one of those monopolists that the
25 Authority could readily have required, as a behavioural remedy, that Dŵr Cymru should
26 reduce its Bulk Supply Price pending a proper investigation of where the blame, as it were, lay
27 between United Utilities and Dŵr Cymru to the predicament in which Albion found itself.

28 THE PRESIDENT: That would be a direction under 3(2)(d) or (e)?

29 MR. THOMPSON: Yes, (d) or (e), but otherwise the Authority would be rendered completely
30 toothless in the particular circumstances of this case because the effect of the inability of
31 Albion to reach an agreement with United would be leaving Albion in the arms of Dŵr Cymru,
32 and so the whole effect of the investigation would be rendered nugatory by the fact that the
33 Authority could not give any effective remedy. In my submission, that is essentially where we
34 are now.

1 THE PRESIDENT: To come back to my earlier question about the interim nature of this remedy, if
2 it is an interim remedy that you are seeking, what are you inviting the Tribunal to do? The
3 situation at the moment is that in our Judgment we found that the evidence that we have got to
4 date does not support the accounting costs conclusion to which the Director came. That is
5 where we are. Are you suggesting that this case should go on and that we should investigate
6 what accounting cost price there should be and fix a figure, which would be a figure for the
7 First Access Price on the Decision, not the Bulk Supply Price, or are you inviting us to say
8 that, whether under our supervision or not, that should go back to the Director and that work
9 should be done by him, again for the First Access Price not the Bulk Supply Price, or are you
10 saying that we should actually now look at the Bulk Supply Price and work out what the Bulk
11 Supply Price should have been – in other words, if we fast forward over the next few weeks,
12 what do you envisage the Tribunal doing?

13 MR. THOMPSON: To some extent, my thoughts on this issue are influenced by the remedy the
14 Tribunal eventually thought was appropriate in the *Genzyme* litigation where the Tribunal did,
15 in fact, a specific discount in pence and, so far as I recall, maintained a supervisory jurisdiction
16 going forwards. In my submission, that is the right shape of a remedy, although the regulatory
17 position here is more complex and there are the issues which Dŵr Cymru has raised in its letter
18 of 17th October about how the two commercial possibilities that have always existed – either a
19 Bulk Supply Price or a Common Carriage Price – fit into the new regime under the 2003 Act,
20 although our basic position is that that is something of a red herring in that, as we understand
21 it, Albion, as an inset appointee, is effectively exempt from those changes going forwards
22 although obviously it could be changed into that format. The idea that we were proposing was
23 that the Tribunal should vary the interim regime to the form of a final order, but subject to the
24 supervision of the Tribunal in the event that circumstances changed for a period going forward
25 – say for a period of two years or something – to give time for the issue to settle down and any
26 further investigations or changes that needed to be made to be made, no doubt under the
27 supervision of the Authority. It is difficult for us to go much further given that we not the
28 Regulator.

29 THE PRESIDENT: In the *Genzyme* case, which was a case about margin squeeze not an excessive
30 price case, and there is a difference between the two, the Tribunal went into considerable
31 detailed over an extended period about exactly what the costs were and what the margin should
32 be, and so forth and so on. I think our question is: are you inviting us to embark on an
33 exercise of that kind?

1 MR. THOMPSON: Ours is a very strange case in that, as I understand it, that is the exercise that we
2 have been embarked upon since last December, but for whatever reason in this case the
3 monopolist and the Regulator – whereas in *Genzyme* the Regulator enthusiastically set about
4 his task and came up with a number of figures which the Tribunal then had effectively to
5 approve – have hared off in a quite different direction and the Tribunal have hared off in a
6 quite direction and the Tribunal has found that basically no useful information has been
7 provided. In those circumstances, it does appear to us that the Tribunal should take a fairly
8 robust approach and should decide the matter itself on the basis it has rather than suggesting
9 that there should be prevarication and looking up and down alleys which may or may not turn
10 out to be blind. That really goes to the whole shape of the suggestion from the Authority that it
11 should all be remitted back to it. The history of this case does not suggest that that would be a
12 profitable way forward or that any more information would be forthcoming than is currently
13 forthcoming. It appears to us that the Tribunal has a great deal more information on this issue
14 than the Authority has ever had.

15 THE PRESIDENT: So your position is that we have jurisdiction and should say that, pending a
16 resolution of this matter or further investigation by the Director, on the evidence before the
17 Tribunal the Bulk Supply Price, which of course includes the water cost, should be no more
18 than X?

19 MR. THOMPSON: Yes, it would have to be a cap and collar arrangement whereby the margin
20 should be at least X and the headline price should be no more than Y, or some variant on that.

21 THE PRESIDENT: The margin should be X and the headline price Y. The route by which you get
22 there, I think, is to say that had the Judgment of the Tribunal been a Decision of the Regulator
23 – i.e. we simply say the Judgment is like a decision of the Regulator – although the complaint
24 was about the First Access Price the proceedings have revealed that the Bulk Supply Price is as
25 questionable as the First Access Price was and that it would, in those circumstances, have been
26 open to the Director to make a direction not only about the First Access Price but also about
27 the Bulk Supply Price?

28 MR. THOMPSON: Yes.

29 THE PRESIDENT: That is how you get there, I think.

30 MR. THOMPSON: Yes, and perhaps in more crude terms the effective jurisdiction of the Authority
31 is to remedy the actual commercial abuse.

32 THE PRESIDENT: The alleged abuse is about the First Access Price not about the Bulk Supply
33 Price. That is the glitch in the argument. I am not quite sure, going back to the complaint,
34 whether the complaint was about the Bulk Supply Price. I do not think it was. The Bulk

1 Supply Price was reluctantly accepted on the basis of, “Well, it can all be challenged later”.

2 The carriage thing can be challenged later.

3 MR. THOMPSON: I think Dr. Bryan’s perception is that effectively Ofwat said that they were not

4 going to look into that question.

5 THE PRESIDENT: The Bulk Supply Price?

6 MR. THOMPSON: Yes, and they were pushed down the route of complaining about the Common

7 Carriage Price. It all goes back to the mists of this case.

8 In terms of the substance of the matter the Tribunal will no doubt have in mind para.748 of the

9 Judgment where the Tribunal reached the conclusion that the Bulk Supply Price was as

10 questionable as the access price. As a matter of logic that must be so, given that they very,

11 very straightforwardly related.

12 THE PRESIDENT: In any event, you are not at the moment inviting us to investigate it any further –

13 it is rather difficult to see what further investigation you could do – but just to take a view on

14 what we have got?

15 MR. THOMPSON: That appears to us to be the only possibility. We have now devoted six months

16 to precisely this question and the Tribunal has reached conclusions on the basis of the best

17 evidence that has been produced with tremendous efforts being made on all sides.

18 PROFESSOR PICKERING: You refer us to para.748 in our judgment which says in the second

19 sentence that the only difference between the First Access Price and the Second Bulk Supply

20 Agreement Price is that the resource cost of water is included in the latter and not in the

21 former. Then it goes on, “If the First Access Price was excessive then it follows also that the

22 Second Bulk Supply Agreement price” – I do not think it would be fair to read into that that the

23 Tribunal is making any comment on the supply price of the water resource.

24 MR. THOMPSON: No, indeed.

25 PROFESSOR PICKERING: I see Dr. Bryan agrees.

26 MR. THOMPSON: I think we have always accepted at the 3p water resource is an acceptable price.

27 Whether that 3p is available to us has always been a slightly movable feast.

28 THE PRESIDENT: Are you in a position, Mr. Thompson, to take us through the statutory

29 framework and just show us that as an inset appointee you do not need a licence to enter the

30 common carriage arrangement that was the subject of the dispute?

31 MR. THOMPSON: I do not think I have got the legislation with me. I had not anticipated that issue

32 arising. No doubt, if we go on after lunch, I can refresh myself on that question.

33 THE PRESIDENT: I think we do need to understand it so that we have got all permutations in our

34 heads.

1 MR. THOMPSON: I do not know whether Mr. Anderson could perform that task.

2 THE PRESIDENT: We need to ask the Authority what his position is on this point.

3 MR. THOMPSON: I cannot say I have settled every issue, but is the shape of our submissions clear
4 on that?

5 THE PRESIDENT: I think that will do for the moment. I do not think we are going to come to any
6 particular conclusions today.

7 MR. LEWIS: Mr. Thompson, could I just take you back to almost the beginning of the discussion
8 when the President asked you in terms what Albion's intentions are now in terms of pursuing
9 the common carriage proposals. It does seem to me at least that to make sense of this we need
10 to have a fairly clear indication of what the commercial options are now for Albion.

11 MR. THOMPSON: Dr. Bryan is here. If I say what I understand the position and he corrects it,
12 perhaps that is a way forward. My understanding is that it all turned on the question of price
13 and that the problem with the common carriage issue, as being initially the issue with which
14 we are concerned, has then led to a second problem of the fact that United appears to wish to
15 charge something like three times to Albion as it is currently charging to Dŵr Cymru and that
16 issue has never been pursued from a regulatory point of view while we have all been trying to
17 battle away and resolve this one.

18 In terms of whether this will ever be a commercially viable proposition, I think it turns on the
19 outcome of this case, but may also turn on certain regulatory questions that might arise in
20 relation to the resource cost. As I understand it, it is a commercial intention but we have hit
21 these two regulatory buffers – perhaps not regulatory buffers but, as we would say, abusive
22 buffers.

23 Can I ask Dr. Bryan if that is broadly accurate. (After a pause) Do you want to hear directly
24 from Dr. Bryan.

25 THE PRESIDENT: Just take the microphone for a moment, Dr. Bryan, I think we know each other
26 well enough by now.

27 DR. BRYAN: I think the point made is whether our commercial intentions are still to pursue
28 common carriage, notwithstanding what Mr. Thompson has said about the price issues which
29 are clearly of critical importance, and whether those options are practicable given the changes
30 in the regulatory regime that have taken place since we started on this course. I can assure the
31 Tribunal that it is still our intention to pursue common carriage. That does have a number of
32 commercial implications as well as the legal ones. I do not speak here as a lawyer, as you are
33 well aware, but I will try and give the Tribunal an understanding of the options that we see
34 ahead of us to pursue common carriage. One is to seek an exemption under the 2003

1 legislation, and we already have such an exemption with regard to our current status supplying
2 Shotton Paper.

3 The second option would be to stand aside from Albion Water to acquire the status of a
4 licensee under the 2003 legislation, and to provide common carriage services to Shotton Paper
5 in that regard.

6 I have to say that that option does not look particularly attractive. It has never happened
7 before. I think the Tribunal is aware that no applications have yet succeeded under the 2003
8 regime, so we are in uncharted water. In particular, we could not, as I understand the
9 legislation, provide services as an arm's length licensee to Albion Water as an inset appointee.
10 That would therefore require Albion to give up its appointment, its statutory responsibility for
11 water on the Shotton site. That would, one assumes, allow Dŵr Cymru to re-occupy their
12 original territory. That is not a given, but that would appear to be the logical conclusion of that
13 exercise.

14 I would be very uncomfortable about that route because it removes us from the close proximity
15 that we have with the customer. It significantly reduces our legal powers to assist our
16 customer.

17 Then there is a third option. That third option recognises that the problems created by the 2003
18 regime – problems in terms of our perception – are because the current supply arrangements,
19 as the Tribunal will be well aware, involve Dŵr Cymru assets connecting directly with our
20 customer's assets. We have no assets in this game and therefore there is a direct supply
21 connection between the Dŵr Cymru system and the customer's system.

22 That creates problems in terms of the legislation for us. More importantly in our mind, it
23 creates problems in terms of our ability to prove the security of supply to our customer. We
24 are currently in discussions with Shotton – those discussions actually started well over two
25 years ago – with a view to acquiring the Sealand site and the associated pipe network pumps
26 and reservoirs, so that we can actually create an Albion Water system within the supply
27 arrangements. My understanding is that such a supply arrangement would take us outside the
28 2003 water supply licensing regime and firmly back into the realms of this inset appointee and
29 under those circumstances there is a clear bulk supply between two undertakers from
30 Dŵr Cymru, as it currently stands, to Albion Water's system and Albion Water's system
31 would be the customer. Clearly, if we are able, as a result of a non-abusive price, to supply the
32 Corus site – as has been evidenced before the Tribunal they desire for us to do so – then that
33 would enlarge our system and enlarge the scope for us to offer benefits to both customers.

1 In short, and I apologise for having gone on at length, there a number – three probably at least
2 – of options, two of which appear practicable to us.

3 THE PRESIDENT: Thank you, Dr. Bryan.

4 Mr. Thompson, I do think we need, after the short adjournment, to get to the bottom of this.
5 What I have understood from what Dr. Bryan has just told us is that if we were to wave our
6 magic wand and find that tomorrow United Utilities said, “Fine, we will offer it to you at a
7 price that is entirely acceptable to you”, and Dŵr Cymru said, “Fine, we will agree a First
8 Access Price that is entirely acceptable to you”, so that all the commercial pieces fell into place
9 tomorrow, it still could not actually happen following the 2003 Act unless you either extended
10 your existing exemption or Albion acquired in some way the assets to which Dr. Bryan has just
11 referred us. I think we would like to know very much what your view of the legal situation is
12 and we will ask the Authority, who have no doubt studied this point, what its view is of the
13 situation.

14 MR. THOMPSON: I am grateful. That is, of course, a further relevant issue in terms of what
15 jurisdiction the Tribunal might have in terms of the interim relief.

16 THE PRESIDENT: Absolutely.

17 MR. THOMPSON: If you look at the source of the power for the Regulator that comes under s.33 of
18 the Act the power is ----

19 THE PRESIDENT: This is the Water Act?

20 MR. THOMPSON: The Competition Act.

21 THE PRESIDENT: Section 33 is a directions power, is it not?

22 MR. THOMPSON: Yes, it is, but I think that would be relevant in terms of what the Regulator itself
23 could do.

24 THE PRESIDENT: Going forward from here, in view of the change of regime, I think we have to be
25 reasonably clear that whatever the arrangements are, they are outside that regime, because if
26 they are inside that regime there is a whole statutory framework for sorting it out.

27 MR. THOMPSON: Yes, but I think the point that we are making is that the Authority would have
28 the power, it says, to give to such person or persons – here Dŵr Cymru – as it considers
29 appropriate such directions as it considers appropriate to bring the infringement to an end.
30 I think the point that the Tribunal is now putting to me is that, even with a magic commercial
31 wand, there is no magic statutory wand that would give Albion an exemption and so there
32 would still be an interim question about what should done given the commercial position that
33 now exists and a hypothetical common carriage at commercially agreed rates at some time in
34 the future. In my submission, the Authority would have the power in those circumstances to

1 do something to bring the abuse to an end and the only sensible thing to do would be to give a
2 discount off the Bulk Supply Price until all this had been sorted out, because otherwise the
3 abuse would continue in substance.

4 THE PRESIDENT: When you refer to “the abuse”, or as the section says “the infringement”, what
5 you are referring to is not the First Access Price that Dŵr Cymru quoted to Albion as long ago
6 as February 2001 but the existing Bulk Supply Price, and, as your argument runs going back to
7 748, you say it now emerges that it is perfectly plain that the existing Bulk Supply Price is as
8 much of an infringement as the First Access Price was.

9 MR. THOMPSON: We have been exploring these issues now for five years hypothetically as the
10 Authority and we discover that there is a margin squeeze and excessive price and then we are
11 wondering what to do to put it to an end.

12 THE PRESIDENT: Whether that is so or not, in relation to the existing Bulk Supply Price it would
13 be something that the Authority would now have to direct its mind to and *ad interim* there
14 should be some remedy?

15 MR. THOMPSON: Yes, we cannot hide behind the fact that this is all five years ago and we were
16 operating on a completely different hypothesis but the powers arise now.

17 THE PRESIDENT: You are going to come back to the legal situation after the adjournment?

18 MR. THOMPSON: Yes. I am afraid I cannot take that any further now. Dr. Bryan has given an
19 eloquent layman’s account but I am sure the Tribunal ----

20 THE PRESIDENT: I think we need the black letter law in chapter and verse.

21 MR. ANDERSON: I do not know if it assists the Tribunal, but we did, I think, put in quite a detailed
22 fax after the main 2005 hearing.

23 THE PRESIDENT: Perhaps you could take us back to it when we get to you.

24 MR. ANDERSON: I am not sure if I have it with me now, but I will see if I can get it.

25 THE PRESIDENT: See if someone can get it in the meantime and we will look at it after lunch.
26 Yes, Mr. Thompson, I am sorry?

27 MR. THOMPSON: I think the issue of dominance I can take quite shortly, because I think, at least
28 at the moment, the Tribunal has indicated that it wishes to hear more about that. I think
29 I would only say that we would not accept, in so far as they are still in the field, the Appeal
30 grounds that Dŵr Cymru raises about jurisdiction and fairness. We say the Authority would
31 clearly have made a finding of dominance in its Decision and so the Tribunal can do so, and
32 that there is no procedural bar to it doing so, essentially because the Tribunal gives full Article
33 6 of the Convention rights to parties such as Dŵr Cymru. There is no difficulty about that.

1 There have been witnesses in this case and full rights of cross-examination were given to
2 Mr. Vajde which indeed he made use of.

3 We pointed out in our earlier submissions that the High Court has the power to make findings
4 of dominance as well as abuse and overall we cannot see anything in the history of this case
5 that gives any substance to Dŵr Cymru's complaint in that it has had every opportunity to
6 make its case on dominance. The Authority investigated the substance of the issue for a period
7 of years and the Tribunal has given both the Authority and Dŵr Cymru the specific
8 opportunity to be heard on a number of occasions. We cannot see any bar or any reason why
9 the issue of dominance could not be resolved. Indeed, I think it is fairly clear from our
10 submissions that we think there is only one answer and that the matter could be resolved on a
11 fairly summary basis, but that is obviously a procedural question on which Dŵr Cymru and the
12 Authority will have any view, but we do not, ourselves, see any need for it to be remitted and
13 we think that the unfortunate history before 2004 rather weighs against the Authority having
14 another chew on the bone of dominance. That is all I was going to say about that.

15 In relation to costs, I think the Tribunal has indicated that it does not particularly want to hear
16 oral submissions on costs now. We have set out our position in writing, and there is also a
17 short schedule, which I hope has been put before the Tribunal, indicating the costs position
18 behind our legal submissions.

19 THE PRESIDENT: Yes.

20 MR. THOMPSON: We say that the position on costs is really clear and is independent of the
21 question of relief or appeal for the reasons we have indicated. The substance of the case has
22 gone in our client's favour in really wholly exceptional circumstances – as we have described a
23 David and Goliath case of a very particularly clear kind. We do not say that this would
24 establish a precedent for other cases. Given the jurisdiction of the Tribunal, particularly in
25 regulatory cases, our submission is that this is an overwhelmingly strong case for an award of
26 costs to Albion, and in particular we have put out our case in writing that there should be a
27 contribution towards the costs of Albion's own internal costs of the Appeal, given that it has,
28 in fact, acted as witness, expert, administrator, solicitor for the whole case and that, in reality,
29 very substantial solicitors' costs have been avoided by the way in which Albion has conducted
30 the case. Although the sum is a large one, in our submission, given the scale of the case, it is
31 difficult to imagine a way in which it could be conducted more economically.

32 THE PRESIDENT: I do not think, subject to further submissions, at this stage I do not think we
33 need hear you any further on the principle, Mr. Thompson, but there is a question of
34 assessment that arises in relation to the internal costs. You make mention in the skeleton

1 argument of the Civil Procedure Rules as regards litigants in person. As I broadly understand
2 it, if you can, as a litigant in person, prove financial loss then, subject to taxation, etc, you get
3 that loss. You cannot show actual loss in the sense that because you were working on the case
4 you could not exploit other opportunities. You are then entitled to a daily rate and you get to
5 an hourly rate, but the hourly rate in the CPR is £9.75.

6 Alternatively, if you can show you have acted as an expert, then you may be allowed costs as
7 an expert.

8 What is likely to arise, I think, is which one of those various categories these claimed hours fall
9 into. Whether that is something that you want us to deal with, or whether you want this to be
10 dealt with on a detailed assessment – I think in this case it would not be a particularly detailed
11 assessment in terms of the normal scale of those things – I do not know. At what stage should
12 that kind of issue be dealt with, I think is the question?

13 MR. THOMPSON: I think one issue that has been in my mind in preparing for this hearing is
14 whether or not a further statement of evidence in relation to Albion's financial position or the
15 role that Dr. Bryan, Mr. Jeffrey and Mr. Naggs have played would be of assistance in enabling
16 the Tribunal to determine questions of that kind. I do not know whether that is what the
17 Tribunal has in mind.

18 THE PRESIDENT: In order to deal with these questions of the internal costs I think some further
19 particulars would be necessary at some stage to enable the Tribunal or a costs judge, or to
20 whomever we assign the task if we do not do it ourselves, to understand a little bit better what
21 this was all about.

22 MR. THOMPSON: I think the other element which we rely on and which I think does not have any
23 obvious precedent is the extent to which Albion has been acting, effectively, as its own
24 solicitor.

25 THE PRESIDENT: Yes, I can see that had Albion instructed solicitors and had we now received a
26 schedule of costs, one could imagine your bill would be approximately twice the bill that you
27 have actually put in.

28 MR. THOMPSON: I think the Tribunal will have experience of other cases of less complexity than
29 this where the sums of money involved have been very much larger than this one.

30 (The Tribunal conferred)

31 THE PRESIDENT: Mr. Lewis points out that if Aquavitae is pursuing an application for costs, and
32 in particular in relation to the expenses it has incurred in relation to experts' reports, we also
33 need some figures in that regard.

1 MR. THOMPSON: Yes. I am slightly embarrassed in that the skeleton argument for Aquavitae was
2 drafted by someone else and I think it said that the issue of costs was not going to be dealt with
3 today. I am not sure on what basis that was said.

4 THE PRESIDENT: I have already said that we would like to deal with the issue of costs in writing
5 so there will be opportunities to deal with it, but we do need some figures in order to deal fully
6 with Aquavitae's application.

7 MR. THOMPSON: I am grateful. There is obviously a question of principle but I am sure that the
8 figures can be provided in any event.

9 There was a point raised by Dŵr Cymru about the extent to which interim relief should be
10 taken into account in relation to legal costs. Our submission is that that is essentially a
11 spurious point. That was not the basis for either a consent order or the interim order. We have
12 been back to the transcript and it appears to us that it was clearly accepted on all sides that this
13 was effectively a way of holding the ring so that Albion survived and there was no question of
14 the discount being hypothecated for legal costs. It is not a point that the Authority takes and,
15 in my submission, it is not a good point. Albion has been surviving on a small scale because of
16 its small margin and has not been using that to fund this Appeal, but rather to enable it to
17 survive in the difficult circumstances that it finds itself in.

18 I do not think I need say anything about the Appeal or probably the other Albion cases which
19 we have discussed already.

20 In relation to Aquavitae, the formal position is ----

21 THE PRESIDENT: Just before we leave the other Albion cases, Mr. Thompson, technically – I am
22 just trying to remember how many cases there are – the first case, which I think is 1031, is the
23 case in which the interim order was made in the end. That was brought just before there was a
24 Decision, was it not?

25 MR. THOMPSON: I may be wrong, I thought there were three cases still technically on foot, the
26 one where we are complaining about no decision having been made, then the interim
27 application and then this one, the main case.

28 THE PRESIDENT: The first two, I think, got elided together. I think the first interim order ----

29 MR. VAJDE: The position is that the first interim order is 1031, 1034, and then a variation of also
30 1031.

31 THE PRESIDENT: Yes, that is how I had remembered it. Thank you, Mr. Vajde. What do we do?
32 I suppose it depends what we do with the interim orders. So we will cross that bridge when we
33 come to it.

34 MR. THOMPSON: I think it is probably all part of the same thing.

1 THE PRESIDENT: It is all part of the same thing, yes.

2 MR. THOMPSON: In terms of Aquavitae, the formal position is that there is an issue about the
3 position on the intervention, but there is also Aquavitae's own Appeal, which has been stayed,
4 which I think is not formally before the Tribunal today, but obviously is in everyone's mind as
5 one element that needs to be sorted out. One possibility would be to adjourn that issue to see
6 whether any agreement could be reached between the Authority and Aquavitae on the types of
7 issues that are raised in the interim relief application as to the wider implications of the
8 Judgment where the Tribunal has made various remarks, and made various remarks during the
9 hearing – for example, in relation to a possible market investigation and matters of that kind,
10 and it appeared to us that it may be possible to provide Aquavitae with sufficient comfort that
11 the Authority intends to proceed on the basis that this Judgment, subject of course to any
12 appeal, in which case the issues raised by way of interim application may turn out to be somewhat
13 academic.

14 My instructions are not to pursue that application today but, as I hope I have indicated, the
15 issue of what exactly the implications of this Judgment are for Aquavitae's business are very
16 much matters of concern for Aquavitae and will obviously become clear in the light of the
17 future and in particular whether or not any Appeals will be brought in this case and whatever
18 remedy is given in this case. I think, having seen what is said by the Respondent and
19 Dŵr Cymru in relation to Aquavitae's Appeal and having reflected on what the terms of the
20 Judgment are in terms of the issues on which Aquavitae chose to intervene, I do not have any
21 instructions today to pursue any substantive order, either as the Intervener or in relation to the
22 stayed Appeal. In my submission, it would be best to leave that open to see whether or not the
23 matter can be sorted in the light of whatever happens in this case and there is no need for an
24 order.

25 THE PRESIDENT: In relation to the stayed appeal, you do not want us to do anything about the
26 stayed appeal either at the moment?

27 MR. THOMPSON: Not at the moment, no. I think it can remain where it is for the time being.
28 In terms of costs, the point is correctly made that in the original ruling on Aquavitae's
29 intervention it was stated correctly that Aquavitae made its intervention on the basis that it
30 would not seek its costs. However, the order permitting the intervention made no order to that
31 effect and reserved the issue of costs on the application. In my submission, that, therefore,
32 leaves the question open, at least to this extent: first of all, in relation to the application, in my
33 submission, Aquavitae has been overwhelmingly successful in relation to the issues on which
34 it has argued. It has conducted its intervention in precisely the spirit in which it indicated it

1 would by making short and focused submissions both in writing and orally which the Tribunal
2 has very largely, if not entirely, accepted in relation to the costs principle and the relevance of
3 the Competition Act under the amended regime. In my submission, Aquavitae has a strong
4 claim to its costs of the original intervention.

5 The other two points are the position since last January, as it is put in para.12 of our skeleton
6 argument – i.e. when it became clear that a second hearing would be required to deal with the
7 issues in the interim Judgment. That was not something that was anticipated or could
8 reasonably have been anticipated by Aquavitae, and in particular nobody could have
9 anticipated that Aquavitae, as a modest Intervener, would adopt a leading role in the
10 instruction of an expert, Dr. Marshall. In our submission, as a matter of policy, the question of
11 an expert was a matter which the Tribunal effectively raised of its own motion and where
12 Aquavitae, in a spirit of good neighbourliness, took on the burden of finding and instructing an
13 expert and, as it has turned out, the Tribunal has found Dr. Marshall's evidence to be of
14 substantial value and has indeed adopted a number of points made by Dr. Marshall. In those
15 circumstances, in our submission, it is appropriate that the costs of that contribution should be
16 part of the regulatory costs in the industry and should not be borne by the Intervener, and the
17 Intervener should not be precluded by an undertaking given right at the beginning of this case
18 in relation to a completely different issue that no one could have anticipated at the time.

19 I am not clear whether the Authority actually strongly opposes that but, in principle, it appears
20 to us reasonable that we should seek our costs of Dr. Marshall's expert report, and indeed we
21 seek our costs since January of this year in relation to the second hearing.

22 Sir, those are our points.

23 THE PRESIDENT: Mr. Anderson, I think we are going to rise for five minutes before you start.

24 MR. ANDERSON: I was going to ask that you would.

25 (The hearing adjourned between 11.45 am and 12 noon)

26 THE PRESIDENT: Yes, Mr. Anderson.

27 MR. ANDERSON: Could I start with the question of interim relief. We have set out in our written
28 submissions essentially what our position on interim relief is. There are two essential grounds
29 upon which the Tribunal could grant interim relief. One is 61(c), which is the first point I want
30 to address, and that is the question of an adjustment to the Bulk Supply Price in the context of
31 this interim relief application.

32 In our submission, the Tribunal does not have jurisdiction, as a final order, to order a variation
33 to the Second Bulk Supply Price. The Second Bulk Supply Price is not part of the complaint
34 and it was not investigated in the context of the Decision. The Second Bulk Supply Price is

1 calculated in an entirely different way to the price that was the subject of this case, which is the
2 First Access Price. The Bulk Supply Price was calculated in 1996 in a forward looking manner
3 on a long run marginal cost basis. The access price was calculated on an average accounting
4 cost basis on the seven steps that were set out and analysed.

5 THE PRESIDENT: Can I just interrupt you there, Mr. Anderson. We have always understood that it
6 was done largely on the basis of comparables. There is a reference to LRMC but it has never
7 been clear to us as to what extent that was significant or what the underlying calculations were.

8 MR. ANDERSON: Exactly, sir, the Second Bulk Supply Price has not been analysed in our
9 Decision and has not been subject to scrutiny in this case. For that reason, therefore, it would
10 be inappropriate for the Tribunal, by way of interim or final relief, to order a variation to that
11 Second Bulk Supply Price. That is why, in our submission, 61(c) does not provide a route for
12 this Tribunal to order a reduction in the Second Bulk Supply Price.

13 THE PRESIDENT: Are you able to enlighten us as to whether the Authority intends to do anything
14 about the Second Bulk Supply Price?

15 MR. ANDERSON: That is a matter which, in the light of what we have heard, we will consider, and
16 we are very happy to revert to the Tribunal on the question. Indeed, what I was going to
17 suggest, if the Tribunal is even minded to consider making an order of the kind that my learned
18 friend has invited the Tribunal to make, we should put something more specific in writing to
19 the Tribunal on this issue because it is very important.

20 THE PRESIDENT: I can see it is an important issue, Mr. Anderson, and you can see we are taking it
21 seriously by the way we were pressing Mr. Thompson just now. It seemed to us, if I can
22 sketch out the way we were looking at it, that the Decision was about the First Access Price
23 and not about the Bulk Supply Price.

24 MR. ANDERSON: Because that is that what the complaint was.

25 THE PRESIDENT: Exactly, as you rightly submit. The route that I thought Mr. Thompson
26 eventually identified was to say, suppose the Judgment was a Decision of the Authority, it
27 would have become manifest in the course of the exercise that, hypothetically speaking, the
28 Authority had carried out, that there was at least a question mark over the Bulk Supply Price
29 because that follows from the question mark over the First Access Price, because the First
30 Access Price is closely related to the Bulk Supply Price, it is the same thing except for the cost
31 of the water.

32 MR. ANDERSON: Sir, if I could just ----

33 THE PRESIDENT: Just let me finish my line of thought and then you can comment on it. I am only
34 exposing it so that you can comment on it – and that therefore the Bulk Supply Price would

1 need to be looked at, and therefore in the interim period the Tribunal would at least have
2 jurisdiction – whether it would exercise it or not is quite another matter, but it would have
3 jurisdiction – to consider whether the Authority would have made a direction about the Bulk
4 Supply Price, or could have made a direction about the Bulk Supply Price, and in what
5 circumstances, and therefore *ad interim*, as an interim step, the Tribunal would have
6 jurisdiction to do the same. Something along those lines was how I understood the argument
7 finally to take shape.

8 MR. ANDERSON: I think it is the first step in that line with which we would take issue, and that is
9 the assumption that because of what might have been unearthed in investigating the First
10 Access Price, one can therefore assume the same criticisms can apply to the Second Bulk
11 Supply Agreement price. It is that jump in logic with which we would take issue because they
12 are entirely different calculations.

13 My instructions are that in relation to the Second Bulk Supply Agreement it is a different
14 regime. There is a statutory regime under s.40 of the Water Industry Act whereby the Director
15 can determine a Second Bulk Supply Price. That is an entirely separate regime and an entirely
16 different investigation from that that was undertaken in relation to the First Access Price.

17 Accordingly, in our submission, we would not have been in a position on the investigation we
18 had undertaken to make any direction in relation to the Second Bulk Supply Price. It is a
19 separate question to making an interim order in relation to the First Access Price, but in
20 relation to the Second Bulk Supply Agreement price, we did not investigate that in the context
21 of this complaint and we would therefore not have been in a position to make an interim order
22 in relation to that agreement. That is our position on the Second Bulk Supply Agreement. It is
23 a different regime, a different price, a different investigation, not investigated in the context of
24 this case. One cannot simply read across the criticisms that may be made about the average
25 accounting cost analysis on the First Access Price to the Second Bulk Supply Agreement.

26 We have been making this point from the very outset of this case, that what is at issue in this
27 case is the First Access Price, not the Second Bulk Supply Agreement price.

28 THE PRESIDENT: If we went back into the files we would find a lot of LRMC calculations, would
29 we, on the Second Bulk Supply Agreement price?

30 MR. ANDERSON: I do not know. I do not know about our files. It was looked back in 1997.

31 There are two elements to it, of course, the water resource, which has not been looked at all in
32 relation to the Second Bulk Supply Agreement.

33 THE PRESIDENT: I do not think that arises at all.

1 MR. ANDERSON: The Second Bulk Supply Price agreement is a single price not broken down into
2 each of its components. It has not been investigated.

3 THE PRESIDENT: I do not think you can attack the water resource part of it. There is no basis for
4 attacking the water resource component of the Second Bulk Supply Price.

5 MR. ANDERSON: Our position is, therefore, that that is a separate investigation, not undertaken in
6 the context of this Decision in this Appeal, and therefore it would be outwith the jurisdiction of
7 the Tribunal to grant interim relief because it would have been outwith the powers of the
8 Director to make any interim order in relation to the Second Bulk Supply Agreement in the
9 context of this investigation and this Decision. That is why we would submit that it is not open
10 to the Tribunal to make an interim order in relation to the Second Bulk Supply Agreement in
11 the context of, or under, Rule 61(c).

12 PROFESSOR PICKERING: Mr. Anderson, this is just me thinking aloud. I think we are agreed
13 that the Bulk Supply Price – set aside whether it is first or second – as these things are
14 determined reflects two components, the price for the water resource plus the price for access.
15 Under the Regulation, if an access price, be it first, second, third or what, is subject to a
16 regulatory decision which would say – in this particular case it would obviously be implying
17 that it should be reduced – then all other things being equal, which at an instantaneous point in
18 time I think we could assume, would one not then expect the consequences of that to flow
19 through to the Bulk Supply Price? I am not predicting or postulating who, if anybody, should
20 actually specify that, but we have got one situation, one change, in terms of a simple equation.
21 Would one therefore not expect the effects of any decision on the access price to flow through
22 to the Bulk Supply Agreement, just as in any business one would expect, other things being
23 equal, a change in the costs of a significant component of the overall price to be reflected in a
24 change in that price itself?

25 MR. ANDERSON: I think my immediate reaction is, Professor, that you may well be right, but I am
26 not going to commit myself to that. The critical question though is a question of exercise of
27 powers in those sorts of situations. The regime for the Second Bulk Supply Price involves
28 determinations under s.40 of the Water Industry Act in which there are series of considerations
29 to take into account. The exercise of investigating and determining the Bulk Supply Price has
30 not formed part of the Director's considerations in dealing with this complaint. Whether he is
31 called upon to look at the Second Bulk Supply Price agreement if that is the way for the future
32 of the arrangements for water supply in this situation, that may well arise and, of course, no
33 doubt there will be aspects of your Judgment that may well be material to that assessment. At
34 the moment we are not there. At the moment we are addressing whether or not the First

1 Access Price is excessive or not. That is the question that was looked at. I am not sure there is
2 necessarily the read-across that my learned friend is inviting the Tribunal to make in as clear
3 cut a way as he has.

4 THE PRESIDENT: Mr. Anderson, I am a bit concerned about this submission at the moment,
5 because, as I recall it, when the Second Bulk Supply Agreement price was notified to Albion
6 no mention whatever was made of long run marginal cost.

7 MR. ANDERSON: I would need to go back. This is why I say that if this matter is to be pursued it
8 will need to be pursued properly by reference to the papers.

9 There is a letter of 21st November 1997, Bulk Supply Connection Agreements, RD21 of 97 –
10 this is a Determination – we can provide copies of other documents and address this in more
11 detail if the Tribunal wishes:

12 “The Director is minded to determine a price of non-potable water of 26p per cubic
13 metre similar to that charged by Dŵr Cymru to other customers and consistent with its
14 estimate of long run margin costs.”

15 That is back in November 1997.

16 THE PRESIDENT: November 1997?

17 MR. ANDERSON: Yes, so there has been mention of long run margin costs, but again this is a
18 matter that one would need to go back and investigate.

19 THE PRESIDENT: According to the Decision, the price in the Second Bulk Supply Agreement was
20 agreed in August 1997.

21 MR. ANDERSON: I forget the exact history of the Second Bulk Supply Agreement. There was a
22 *quasi* ----

23 THE PRESIDENT: I am not on top of it either.

24 MR. ANDERSON: I think there was what has been termed a *quasi* determination.

25 THE PRESIDENT: What is at the moment rather surprising is the submission that the whole thing
26 was done on long run marginal cost and that was the only real basis for the Second Bulk
27 Supply Agreement price.

28 MR. THOMPSON: There is a document dated 12th December 1996 addressed to Dr. Bryan which
29 seems to suggest that the long run marginal cost was relevant to potable water, but for non-
30 potable it was simply a matter of comparison.

31 THE PRESIDENT: That is the letter referred to in para.40 of the Decision?

32 MR. THOMPSON: It is the 12th December 1996, tab 7, p.1 of the Appeal bundle.

33 THE PRESIDENT: That is how I had remembered it.

1 MR. ANDERSON: Sir, there may well be a lot of information on how the Second Bulk Supply
2 Agreement was calculated, but it was not at issue in this case. It has not been gone into. If it is
3 necessary to go into it it will have to be gone into, but it was not investigated as part of this
4 complaint and an assessment of it did not form part of the Decision under appeal. That is the
5 essence of my submission on the question of whether of any interim or final order in relation to
6 the Second Bulk Supply Agreement should be made.

7 The alternative ground for interim relief is a matter of whether Albion has been able to
8 demonstrate urgency in all sorts of factors arising under 61(2) of the Rules, which provide the
9 Tribunal with a wider power, and we have dealt with those at p.4 of our submission. I simply
10 raise those as observations. That is the test that should be applied and, in our submission, there
11 is a series of questions over whether Albion has produced the material necessary to meet that
12 hurdle.

13 That brings me next to what the Tribunal should now do with this case. Clearly, as things
14 stand in the Tribunal's Judgment, this Decision could not be maintained. The question
15 therefore is whether you set it aside now and either make no further order or make some order
16 for remission or whether you should adopt some alternative course, given that a number of
17 your criticisms of the Director are that he did not investigate matters satisfactorily.

18 If one takes, for example, average accounting costs, that is the first basis, the basis upon which
19 the access price was calculated. In relation to treatment costs, the Tribunal has raised doubts
20 about the 3.2, but has been prepared to assume for the purposes of its Decision that it was
21 somewhere within the range of 1.6 to 3.2. Of course, if the matter is to move on to either the
22 Director taking a firm view on excess pricing, or the Tribunal, that may need to be bottomed
23 out and that will involve some further work of some kind.

24 Similarly, in relation to the potable and non-potable distribution costs, the Tribunal has
25 identified in the light of the evidence put before it a number of cost drivers that are, in the view
26 of the Tribunal, material to that question but the Tribunal has not been able to make definitive
27 findings as to what the level of those differences. That is, therefore, a matter that would
28 require further investigation.

29 Both those, therefore, are material to the question of whether or not the First Access Price was
30 excessive. The Tribunal has deliberately chosen not to conclude that the First Access Price
31 was excessive, merely that the evidence strongly suggests that it was. Therefore there is
32 further work required before the Tribunal could reach the view that the access price was
33 excessive.

1 THE PRESIDENT: I am not quite sure that is completely right. It may not be possible to say what,
2 within a range, the First Access Price would be, but on a balance of probabilities, if the
3 evidence strongly suggests something, then it may be that on the balance of probabilities that
4 you can say that it was excessive without necessarily deciding where the price should be. That
5 is a slightly different exercise.

6 MR. ANDERSON: I accept that is a definite exercise, but the Tribunal has not even gone so far as to
7 say on the balance of probabilities that the price was excessive.

8 THE PRESIDENT: No, not yet.

9 MR. ANDERSON: Not yet, no – in other words, more needs to be done before that point is reached.
10 In our submission, that “more” should be undertaken by the Director.

11 THE PRESIDENT: Can we explore that, Mr. Anderson. Your position has always been, as
12 I understand it, that this case has become academic because of the change of the regime, and
13 that is why we want to very fully understand what the new regime is and whether this common
14 carriage proposal is a live proposal or not in terms of the new regime, or whether, as I think
15 Dr. Bryan was saying, it would need at least something – perhaps an exemption, perhaps the
16 purchase by Albion of some fixed assets – to enable it to happen. There may not be any point
17 in the Director spending a lot of time investigating sterile issues.

18 MR. ANDERSON: That is absolutely right. In a sense, there is not a lot I can say about that because
19 I do not know what Albion’s plans are. You, Sir, are absolutely right, as you pointed out, that
20 there are two alternatives as far as common carriage is concerned. The new Act, which Albion
21 itself could not do unless it gave up its inset appointment, or obtaining an exemption from the
22 new regime. The current exemption that Albion has would not cover common carriage. The
23 current exemption that Albion has is for the bulk supply to Shotton, not common carriage. So
24 there would need to be a different exemption and it is not in our gift, that exemption. The
25 relevant body that can provide that exemption is the Welsh National Assembly.

26 I do not know what the position is in relation to that. Only Albion can assist the Tribunal on
27 what its position is so far as that exemption is concerned.

28 If it obtains an exemption then the issues that have been canvassed in this case would not in
29 that case be academic. It would not fall within the regime of the new Water Act of 2003. It
30 would arise in much the way that the hypothesis on which the case has been would arise. That
31 would be the regime. In that case it would not be academic, but again it rather depends on
32 what Albion plans to do and whether it is able to do what it plans to do, and on that I cannot
33 really assist the Tribunal.

1 THE PRESIDENT: If we were to invite the Director to re-investigate some of these matters – for
2 example, using our power under Rule 19(j) – what purpose would that serve? It is a fairly
3 resource intensive exercise from the Director’s point of view. Why would there be any point
4 in doing it from your point of view?

5 MR. ANDERSON: No point from our point of view other than ----

6 THE PRESIDENT: We told you to do it!

7 MR. ANDERSON: Exactly. We have no particular desire to spend time looking at the potable and
8 non-potable distribution costs of the Ashgrove system in North Wales at all. We had rather
9 assumed that the position would have been simply setting aside the Decision and leaving it at
10 that because Albion would be seeking some form of final relief.

11 What we are saying is that before any final relief could be granted there is further work that
12 would need to be done before any conclusion could be reached on abuse. That further work
13 includes dominance, it includes excessive pricing, it includes a local cost cross-check, it
14 includes even the second limb of the *United Grounds* case. Even if the price is excessive one
15 then has to go on and decide whether it is unfair, which is a matter that has not been looked at
16 all.

17 That, in our Decision, posed three questions. The third question was whether the price is
18 unfair if excessive, and we did not even address it, we did not get to it. So there are still a
19 number of issues that would need to be explored before the Tribunal, or indeed anyone, could
20 conclude that the price was excessive, that the price was abusive, that it was dominant. All we
21 are suggesting is that the options open to the Tribunal for pursuing that course, if it is a
22 sensible course at all to pursue and I take fully your point that it may well be that it becomes
23 academic, that exercise does require more work. Ordinarily, given the criticisms of the
24 Decision one would set aside the Decision and remit it to the Director.

25 There are, as I say, quite a number of issues to look at and maybe 19(2)(j) is not the most
26 suitable vehicle when there is quite so much to look at, but we have raised the option of
27 19(2)(j) in the light of the Court of Appeal in *Floe* for obvious reasons.

28 THE PRESIDENT: It would seem the obvious route to follow if there was something more to
29 investigate. Otherwise the thing just disappears into a void never to be seen again.

30 MR. ANDERSON: There are practical difficulties with 19(2)(j). For example, we do not believe –
31 it is not entirely clear, it has not been settled – we would have our s.26 powers under a 19(2)(j)
32 re-investigation, whereas we would have if the matter were remitted.

33 THE PRESIDENT: Why on earth not?

1 MR. ANDERSON: Section 26 powers arise in the context of an investigation under s.25. Our s.25
2 investigation ended when we reached our Decision.

3 THE PRESIDENT: It is still in existence. Notionally speaking, you simply reopen the investigation
4 that has always been there.

5 MR. ANDERSON: That is, of course, as the Court of Appeal pointed out, what happens if the
6 Decision is set aside. The Court of Appeal made clear that if the Decision is set aside then the
7 original investigation is continuing. If the Decision is not set aside it is not clear that the
8 original investigation is ongoing, rather than ----

9 THE PRESIDENT: If you cannot investigate it the only alternative is for us to do it.

10 MR. ANDERSON: I am not saying we cannot investigate it, I am simply saying we may not have
11 s.26 powers in relation to that investigation, so we may be coming back to you if we find that
12 we need to compulsorily require a third party to produce information, coming back to you for
13 an order rather than ourselves exercising s.26 powers.

14 THE PRESIDENT: Mr. Anderson, it seems to me that we need to break this down in a somewhat
15 more sophisticated way than has so far been done in the argument. There are a number of
16 outstanding threads. The first issue which I think we would like to have some discussion about
17 is what do we do about the question of dominance? That issue arises on the Notice of Appeal.
18 There are various findings in the Decision that suggest that, in the Director's view, there are
19 not any barriers to entry, there are no essential facilities, and so forth and so on; but, on the
20 other hand, he assumes that there is dominance. The first question that arises is should the
21 Tribunal just leave that where it is or should the Tribunal, as part of fulfilling its duty to
22 determine the Appeal on the merits in accordance with the Grounds of Appeal, not address the
23 points that are made in the Notice of Appeal about those points? That is the first question and
24 that is quite independent of what powers the Tribunal has got to decide anything or take its
25 own decision or not, it is a simply a question of dealing with the Notice of Appeal. That is the
26 first set of questions.

27 The second set of questions, which we would like some help on, is what is there left to
28 investigate? This case has been going on now for six years practically speaking. If in
29 circumstances such as the present the public Authority cannot decide over a six year period
30 whether a company with 100 per cent monopoly and no competitors in sight and the need to
31 construct alternative facilities to make the supply is or is not dominant, then very serious
32 questions arise about the effectiveness of the UK regime or the Regulator.

1 MR. ANDERSON: I think, with respect, sir, that is a little unfair. We did not decide dominance
2 because we did not need to decide dominance. We have not investigated dominance for the
3 last six years, we have looked and investigated ----

4 THE PRESIDENT: You spent the first three years of this Decision doing exactly that and you
5 produced a draft decision that said there is no essential facility here. That is what you
6 investigated for the first period of this investigation and nothing else as far as we can see. All
7 I am asking you to do is to address the serious question of whether, realistically speaking, there
8 is anything else to investigate, and at what stage any such re-investigation should happen –
9 i.e. whether or not, after the Tribunal has dealt with the remaining points that are sitting there
10 in the Notice of Appeal.

11 MR. ANDERSON: We have set out in our written submissions the further work that we say would
12 need to be done before the question of dominance could be finally decided.

13 THE PRESIDENT: What I would like you to do is to take us through those things and point out
14 what difference any of them could possibly make to the assumption that you make in the
15 Decision and upon which this whole four years have been predicated that there is dominance
16 which is, as we said in our first Judgment, a very sensible assumption to make.

17 MR. ANDERSON: The items in para.17 of our written submissions deal with the question of market
18 definition.

19 THE PRESIDENT: Yes, but how does market definition help you? However you define the market
20 this company still has 100 per cent of it.

21 MR. ANDERSON: One nonetheless has to form a view on what the market definition is in order ----

22 THE PRESIDENT: Not necessarily, if the situation is, whatever the definition of the market there is
23 a monopoly, you do not have to go and define the ultimate parameters of it.

24 MR. ANDERSON: Could I just take instructions on one point. (After a pause) My understanding
25 is that, for example, on item 17(d), the water resource flows might well extend into the
26 neighbouring water undertakings.

27 THE PRESIDENT: It might well, but it does not alter the fact that Dŵr Cymru is the only supplier.
28 There cannot be another supplier unless somebody builds a plant.

29 MR. ANDERSON: There may not be another supplier to Shotton, that may be so. The question
30 mark on definition may well include an area where is a further water undertaker, in which case
31 Welsh would not have 100 per cent of that relevant market. That is why the definition of the
32 “relevant market” is material.

1 THE PRESIDENT: It is not a material definition because the situation we are talking about is supply
2 to Shotton. The fact that there may be another supplier who could supply somewhere else does
3 not affect Shotton.

4 What we are driving at, Mr. Anderson, I think is this: the Tribunal at the moment feels that
5 before we remit anything back, if we do – and I am not saying whether we will or not, but it is
6 an option that you have put on the table – we need to have a hearing on this issue of dominance
7 in order to sort out what is relevant and what is not and how it should be approached. Our
8 feeling at the moment is that there are points in the Decision that are open to question as to
9 whether that is the right approach to go about looking at dominance. We are not at the moment
10 minded to let it just go back to the Director without considering that, possibly giving guidance
11 and addressing the points that are raised in the Notice of Appeal. Otherwise great confusion
12 will continue to exist and there seems to us to be considerable confusion in the minds of the
13 Authority at the moment as to what it is that it is looking in the dominance area. If it seriously
14 thinks that market definition is so important that we cannot decide it after five years then we
15 need to have a hearing to explore why that it is so and whether it really matters.

16 MR. ANDERSON: I am not saying that it is so important that we cannot decide it after five years.
17 Any exercise in seeking to address whether an undertaking is dominant requires one to identify
18 the marketing which it is alleged is dominant. We have not done that and to simply say that
19 the relevant supply is to Shotton does not answer the question of market definition or
20 dominance, it is all about what are the competitive constrictions.

21 THE PRESIDENT: Where is it going to get us? If at the end of the day somebody else has to build
22 a pipeline, if there is a wider water to source zone you are still back at the alternative pipeline
23 argument. You are inviting us to send something back to do some work and we need to be
24 satisfied that the work is necessary to be done and it needs to be done and it is a proper use of
25 public resources to do it. We are told the whole time by authorities that they have not got the
26 resources to do this sort of work and it is quite unnecessary for everyone to make rods for their
27 backs by doing things that do not need to be done.

28 MR. ANDERSON: Again, as in potable and non-potable, we have no particular desire to undertake
29 further work. All we are saying is that before anybody could reach a conclusion, or reach, for
30 example, an infringement decision, it would be necessary to come to a view on dominance and
31 a view has not yet been taken on dominance. There is some further work that requires to be
32 undertaken before that position can be reached. If it is not necessary to determine the question
33 of dominance – and it is certainly, in my submission, not necessary to discharge the Tribunal's
34 duties to determine the Appeal by reference to the merits because we know from the Court of

1 Appeal in *Floe* that it does not follow from that that the Tribunal necessarily has to decide
2 every issue that has been raised, it only needs to decide sufficient to dispose of the Appeal.
3 That is what dealing with the Appeal on the merits means, it does not mean addressing every
4 single point if it is not necessary to address those points.

5 THE PRESIDENT: The general position, I think, from the Tribunal's point of view at the moment is
6 that it is unsatisfactory to leave dominance in the muddle that it is in at the moment without
7 trying to sort it out.

8 MR. ANDERSON: I hear what you say, Sir. I am not sure that I would accept that it is in a muddle.
9 A degree of work has been done on it and an assumption has been made because it is not
10 necessary to move on to a final decision.

11 THE PRESIDENT: Are you suggesting to us that the assumption is in question?

12 MR. ANDERSON: The assumption is only an assumption, it is not a basis for any finding that there
13 is dominance. It is an assumption we took in order to move on and deal with the question of
14 excessive pricing. Because of the conclusion we reached on excessive pricing we did not need
15 to reach a final view on dominance, it was only an assumption.

16 THE PRESIDENT: Is the position of the Authority that there is a serious question as to whether this
17 company is dominant or not?

18 MR. ANDERSON: That is our position. We have not reached a final view on it.

19 THE PRESIDENT: If your position is that there is a serious question as to whether this company is
20 dominant or not we have to address this point while we are seized of it. We cannot let it go
21 back on the basis of there is a serious question as to whether exists or not.

22 PROFESSOR PICKERING: Mr. Anderson, you are concurrent Regulator with the OFT. I do not
23 have the document immediately to hand, but I think it is probably OFT 422, but forgive me if
24 I am wrong, which makes clear that there is a sequence in these Chapter II investigations. You
25 investigate dominance and then, if appropriate, you go on to investigate abuse. It seems to me
26 that, by taking the decision that Ofwat has, you inevitably, and I am sure intentionally, taken
27 the view that you are working with a dominant firm. Surely the guidance notes – and I am
28 pretty certain I have got this right in terms of the sequence – mean that if you put cart before
29 horse then that is your choice, but it does not then mean that you can come back and change
30 the thing round later surely.

31 MR. ANDERSON: We did put the cart before the horse because we adopted the assumption of
32 documents and then moved on to consider the question of an excessive finding. We did not,
33 however, as you made clear in your Decision, reach a final view on dominance.

1 THE PRESIDENT: You are now saying it is seriously open to question whether the cart had a horse
2 in the first place.

3 MR. ANDERSON: We had not reached a view on dominance and before ----

4 THE PRESIDENT: I wrote it down, there is a serious question whether there is dominance or not.

5 That was your position.

6 MR. ANDERSON: Yes.

7 THE PRESIDENT: Right. We have to address that. We cannot leave this situation as it is, I would
8 have thought. That is dominance.

9 MR. ANDERSON: I am in your hands, Sir. Do you then want further written submissions from us
10 with another hearing?

11 THE PRESIDENT: I think so, yes. We will come back to the mechanics of it in a minute. That is
12 dominance, that is one aspect.

13 Excessive pricing is another aspect that is more complex for a number of reasons, including
14 those that you gave. There is a question mark about what we should do about that. I think that
15 question mark really revolves around whether it is sensible to require the Authority to make
16 further accounting cost calculations with a view to arriving at a view about the price or not.

17 That could linked to whether that is a purely hypothetical exercise that has no practical value
18 because this common carriage proposal cannot happen at the moment and might only happen
19 hypothetically; or whether all that is actually linked, indirectly at least, to the questions of
20 interim relief, and so forth, that Mr. Thompson has raised and to which you are about to come.
21 The next aspect of the case which nobody has mentioned so far is the margin squeeze aspect of
22 the case and whether there is actually any further investigation that is needed on that. On the
23 view that is taken in the Judgment – whether the Judgment is right or wrong is another matter –
24 there would not seem to be much more that needs to be actually investigated as far as that is
25 concerned.

26 I have tried to break these things down into their component parts in order to try to see where
27 we are.

28 MR. ANDERSON: The way we saw it, rightly or wrongly, was that we took a decision on excess
29 pricing which the Tribunal has found to be flawed in its adequacy. The effect, therefore, is
30 effectively that without a formal order setting it aside one has to assume that we are wrong
31 there and there is therefore a subsisting complaint against a subsisting access price. The access
32 price that has been quoted therefore has to be assessed again in the light of the criticism that
33 the Tribunal has made of our assessment. The question is, how should that be done? Should
34 that be done by way of remittal or should it be done by way of the Tribunal directing us to

1 undertake further investigations and reporting back under 19(2)(j). That is necessary in order
2 to resolve the complaint.

3 If it is, however, the case that it has now become academic because Albion cannot undertake
4 common carriage then there is no need for either us or you to look at that further. I cannot
5 answer whether it is academic or not, only Albion can.

6 The basis upon which we are suggesting this further work is that if the Decision is flawed there
7 is a complaint that has not been resolved.

8 THE PRESIDENT: I see that.

9 MR. ANDERSON: So the only question, therefore, is on that basis, if it is not academic, should it be
10 done under 19(2)(j) or should it be ----

11 THE PRESIDENT: What we are all struggling for, Mr. Anderson, is to find the most efficient and
12 fair way of concluding this matter. One does not want to impose on the Authority work
13 that is unnecessary or academic; on the other hand, we have got to do our best to be fair to the
14 Appellants and all the rest of them. Your view that there is a complaint that needs to be
15 resolved and the effect of the Decision is that their complaint remains outstanding and
16 therefore you, the Authority, need to do some further work is a perfectly reasonable view, but
17 I am trying to explore whether that work needs to be done or ought to be done and who is to do
18 it and by what mechanism. That is what we are now doing.

19 MR. ANDERSON: I understand that, Sir, but the options seem to me to be only setting aside the
20 Decision and then leaving it to the Authority to decide whether a further investigation is
21 justified in the circumstances, possibly because it is academic; a negotiated settlement, which
22 is not in our gift any more than it is yours; or for the Tribunal to proceed, possibly with work
23 under 19(2)(j), to take its own decision.

24 THE PRESIDENT: It is partly the difficulty that the *Floe* decision gives rise to, because if we just
25 let it go back and then, for whatever reason in a few months time the Authority – and let us
26 assume they are perfectly good reasons – says, “We are completely snowed under, this is very
27 old stuff, it is six years ago, we really think we are going to down tools on this case”, that
28 leaves the situation unresolved or it leaves it hanging in the air, which may not be an ideal
29 solution. On the other hand, if there are things that can be done so as not to send things back,
30 or to send things back under sub-rule (j), that may be easier. I am struggling to find what is the
31 right mechanism for handling all this.

32 MR. ANDERSON: We struggled as well, and that is why we put forward the alternatives ----

33 THE PRESIDENT: It was very helpful and it is very helpful.

1 MR. ANDERSON: ---- rather suggesting that the Tribunal can take a view as to how it wishes to
2 deal with it.

3 THE PRESIDENT: I am not trying to bark at you, Mr. Anderson, it is very helpful and these
4 questions are not that easy.

5 MR. ANDERSON: What we have sought to identify are the areas on which one could sensibly say
6 the Tribunal's criticism is that we did not investigate it adequately, and that is, we would
7 suggest, treatment costs, distribution costs and the local cost cross-check.

8 THE PRESIDENT: The local competition, yes.

9 MR. ANDERSON: Margin squeeze is a hybrid, if I can put it that way, because you have, in a
10 sense, effectively decided that we got margin squeeze and there is margin squeeze and at the
11 same time there are a couple of criticisms. One is that the up-stream price is so high as to
12 cause the margin squeeze. That is effectively the First Access Price, which brings us back to
13 the inadequacy of the investigate on access pricing.

14 The other aspect is water efficiency where you say we did not look at that closely enough and
15 there are a number of items.

16 In a sense, part of the criticism of us, and this is encapsulated in your final paragraph, is that
17 we got it wrong and the part of the criticism is that we did not investigate it thoroughly enough.
18 So margin squeeze falls into that hybrid category of there being partly more work to be done
19 and partly not necessary.

20 ECPR: no further work to be done in terms of remittal back to us; and probably similarly in
21 relation to the regional average pricing debate.

22 It seems to us that it is essentially the local costs and the average account distribution costs of
23 treatment issues that would need to be addressed before a view could be reached on excess
24 pricing and then, of course, there is the question of, if the price is excessive, is it unfair under
25 the second limb of United's grounds, which is an issue nobody has yet addressed?

26 THE PRESIDENT: We will pass on that last point at the moment. I think it is a difficult area, this
27 relationship between excessive and unfair. We have dealt with interim relief.

28 MR. ANDERSON: I have dealt with interim relief. I have discussed dominance.

29 Costs: we would welcome the opportunity to have a few more days to consider Aquavitae's
30 costs, the costs schedule. There are, of course, issues about the recoverability of Dr. Bryan's
31 and his colleagues' expenses. We do have a few questions that we would like to put to Albion
32 before we put our submissions. If we could have a couple of weeks we would be grateful. We
33 are perfectly happy for the Tribunal to deal with the point of principle and percentage and we
34 have made it clear that we see this as a case where Albion should get its costs, but there are

1 issues as to how much colleague to my right and his client should contribute and issues like
2 that, but we the Tribunal can deal with it without ----

3 THE PRESIDENT: You are fully entitled to that time, Mr. Anderson. Shall we say 14 days and, of
4 course, generally speaking, anything that can be done to move that along the more delighted
5 we would be.

6 MR. ANDERSON: The final point I would wish to raise is the question of the time in which to
7 make any application for permission to Appeal. Ordinarily it would expire on 6th November.
8 This is a long judgment, it covers a lot of ground. The Authority, as a public Authority, would
9 not take any decision on this lightly, and it really does want to consider it very carefully, and
10 has, of course, been spending a lot of time preparing for the consequential orders. We have not
11 taken any decision yet. There is, of course, a slight difficulty in the sense that whilst one can
12 identify discrete issues on which there is not necessarily further work required, there are issues
13 where it is not entirely clear what the way forward is going to be and that may have a bearing
14 on whether or not we would seek permission to Appeal.

15 THE PRESIDENT: One of your suggestions was that if something did go back – for example, the
16 excessive pricing point – we should park the whole question of Appeal until that was all done.
17 Is that not one of your suggestions?

18 MR. ANDERSON: It was. Since writing this I have become less convinced that that is satisfactory
19 from this point of view. Take, for example, the local cost calculation: we undertake a local
20 cost calculation using the rate of return that you have indicated is the appropriate rate of return.
21 We may come to the view on that basis that it is an excessive price. The Tribunal may agree
22 with that. Albion may agree with that. We may take issue with the Tribunal on the premise on
23 which we had done that calculation. Unless we have, as it were, put down the marker and
24 sought permission to appeal that issue it is going to look rather odd appealing a conclusion
25 where, in fact, we and the Tribunal are in agreement. That is just a hypothesis. That is the sort
26 of problem that might arise if we left the whole question of appeal until the whole case was
27 resolved. The middle ground might be to make an application for permission and then, in the
28 light of how the rest of the case proceeds, take a view on whether the Appeal itself should be
29 stayed if permission were granted either by yourselves or by the Court of Appeal.
30 In any event, we do ask for a little more time in which to form a view and, of course, to draft
31 the appropriate documentation.

32 THE PRESIDENT: I would have thought that if there are points upon which the Authority – and we
33 will come to Dŵr Cymru in a minute – feel strongly that they should appeal and they have a
34 reasonable prospect of success, and so forth and so on, my feeling, without having discussed it

1 with my colleagues, is that that should really be out in the open and on the table at as early a
2 point as is conveniently possible. I think it does fit this whole difficult matrix we are
3 struggling to sort out.

4 MR. ANDERSON: Absolutely, sir, that is why I say that, since writing the submissions, on
5 reflection it probably is not sensible to leave ----

6 THE PRESIDENT: So just park it for what could be a prolonged period of time. We see that. What
7 are you actually asking for?

8 MR. ANDERSON: I am asking for the time in which to make an application for permission to
9 Appeal to be extended by 14 days or so from 6th November.

10 THE PRESIDENT: We will consider that and other things over the short adjournment.

11 PROFESSOR PICKERING: Mr. Anderson, could I ask a question about the new regime following
12 the 2003 Act. The question is a simple one. In your judgment, do the changes that have been
13 introduced there advance the promotion of competition or, in your judgment, are they less
14 favourable to the development of the competition in the water industry?

15 MR. ANDERSON: Could I discuss that with those behind me over the short adjournment and
16 answer you at two o'clock? My view would not matter, it is the view of those behind me.

17 THE PRESIDENT: Are we dealing with any other aspect of Aquavitae's Appeal at the moment?

18 MR. ANDERSON: Albion's Appeal?

19 THE PRESIDENT: Let us just finish on Albion.

20 MR. ANDERSON: Aquavitae, we have set out our position, but in view of the fact that my learned
21 friend is seeking neither substantive nor interim relief ----

22 THE PRESIDENT: He has not really pressed anything today on behalf of Aquavitae.

23 MR. ANDERSON: We are content. We cannot at the moment see what the point of staying it is.
24 There does not seem to us there is anything left in the light of what you have said. There is no
25 particular objection to the course that he is suggesting at the moment, but we would of course
26 want it resolved at some point as a matter of form.

27 THE PRESIDENT: That could be dealt with. In terms of Aquavitae's costs?

28 MR. ANDERSON: We will address that, if we may, in writing.

29 THE PRESIDENT: In writing, yes.

30 MR. ANDERSON: We have nothing to say on this question of penalty.

31 THE PRESIDENT: I do not think that arises.

32 Very well, shall we rise until two o'clock.

33 (The hearing adjourned at 1 p.m. and resumed at 2 p.m.)

34

1 MR. ANDERSON: Sir, could I just make two very brief points? Could I clarify the Authority's
2 position on this vexed question of dominance?

3 THE PRESIDENT: Yes.

4 MR. ANDERSON: Our position is that we would not feel able to reach a final decision on
5 dominance without providing Welsh, and indeed Albion, with an opportunity to make
6 submissions and provide information on the issues that we have identified. So our concern is
7 primarily one of process.

8 THE PRESIDENT: Can I just check what that means in relation to what you told us before the
9 short adjournment when you said twice that the Authority's position was that there is a serious
10 question of whether there is dominance or not?

11 MR. ANDERSON: I think that may have given the wrong impression. Our difficulty is we do not
12 want to, as it were, be forced to take a position on it today. Our position is primarily, as I
13 say ----

14 THE PRESIDENT: No one is forcing you to take a position today, Mr. Anderson. I did ask you
15 what your position was so I suppose to that extent you have been invited to state your
16 position.

17 MR. ANDERSON: That is our position. It is primarily an issue of process. In relation to the new
18 regime, the Authority welcomes the new regime because it provides ----

19 THE PRESIDENT: Well just a moment, when you say you would not feel able to reach a final
20 position on dominance without giving them an opportunity to comment, where does that leave
21 a number of the statements in the Decision to the effect that the Authority does not consider
22 there are barriers to entry, does not consider that it is an essential facility, and all that sort of
23 thing? Are those still standing?

24 MR. ANDERSON: Those are still standing subject to anything that may be put to us, but there are
25 certain issues on which we took no position at all. Those are the ones identified in our written
26 submissions, and we believe as an Authority it would be inappropriate for us to reach a final
27 view on questions of dominance without providing those affected by it with an opportunity to
28 make whatever representations and provide whatever information they are so advised to
29 provide. That is our concern on the question of dominance.

30 Can I move on to Professor Pickering's question – a very brief response. We believe the new
31 regime is helpful because it provides clarity. The Government have said they will review
32 certain aspects of the new regime by December 2008, and we are currently monitoring very
33 closely what is happening on the ground.

34 PROFESSOR PICKERING: So you are not answering my question about the effect on competition?

1 MR. ANDERSON: We are looking at it. I know the Act is 2003 but it has only been going for less
2 than a year, so we are looking at it very closely, monitoring it.

3 THE PRESIDENT: And what is happening on the ground, Mr. Anderson?

4 MR. ANDERSON: Well I cannot answer that today. If you want me to take instructions we can, no
5 doubt keep you updated, but it is ----

6 THE PRESIDENT: Well the submission from Albion and Aquavitae this morning is that nothing is
7 happening on the ground. Does your monitoring confirm that, or is there something that has
8 been ----

9 MR. ANDERSON: I would need to take instructions on that. I had not investigated it fully because I
10 could not immediately see how it was of relevance to what the Tribunal needs to decide to day,
11 but we will if it will assist the Tribunal.

12 THE PRESIDENT: Thank you. Yes, Mr. Vajda

13 MR. VAJDA: If I am allowed to address the Tribunal on the position of Dŵr Cymru I will. What I
14 propose to do is deal with just two issues really, which is the issue of interim relief and the
15 issue of next steps, and I propose to follow Mr. Anderson and deal with interim relief first.

16 THE PRESIDENT: Yes, before you kick-off, I wonder if we could just come back to our opening
17 comment at the beginning of the hearing today – and I am not asking for any reaction, it is just
18 a comment – about whether or not there is a possibility of a commercial solution somehow or
19 other emerging in this case, because it seemed to us perhaps the key to such a solution does lie
20 very much in your client’s hands, and if it were the case that the Tribunal was in any way able
21 to facilitate the resolution of this affair without us all having to spend more cost and time
22 resolving it, that is something the Tribunal would standby ready to do.

23 MR. VAJDA: Thank you for that, Sir, and certainly my clients will be grateful for the assistance
24 offered by the Tribunal. The current position so far as the Tribunal’s Decision is concerned is,
25 as we have outlined in our skeleton, we are at the moment considering (like the Authority)
26 whether or not to appeal. Plainly that decision will colour, if you like, the next steps of my
27 client.

28 THE PRESIDENT: Absolutely.

29 MR. VAJDA: But we will certainly bear in mind the observations that you have made, Sir.

30 THE PRESIDENT: Yes, thank you.

31 MR. VAJDA: Now, so far as interim relief is concerned, we fully endorse the observations that you,
32 Sir, made this morning to Mr. Thompson, that interim measures were granted for the purpose
33 of this Appeal being fought, it is the “life support” point.

34 THE PRESIDENT: Yes.

1 MR. VAJDA: As I see it, there are effectively three routes for interim relief and all three have been
2 discussed at greater or shorter length today and I will go through them quite quickly. Route 1
3 is the 61(1)(c) route. I do not know if the Tribunal wants to look at that ----

4 THE PRESIDENT: We have it handy, yes.

5 MR. VAJDA: It is the final relief point.

6 THE PRESIDENT: Would we have power to grant final relief?

7 MR. VAJDA: Yes, and the answer, we say, is “no”, in relation to making an order in relation for
8 bulk supply price, the point that you, Sir, made to Mr. Thompson this morning. I adopt what
9 Mr. Anderson has said fully in his skeleton and, subject to the Tribunal, I do not want to say
10 anything more on that.

11 Route 2 is 61(2), which is:

12 “Without prejudice to the generality of the foregoing, if the Tribunal considers that it
13 is necessary as a matter of urgency for the purpose of –

14 (a) preventing serious, irreparable damage to a particular person or category
15 of person, or

16 (b) protecting the public interest,

17 the Tribunal may give such directions as it considers appropriate for that purpose.”

18 Mr. Thompson referred us to 61(3) and he in fact drew the Tribunal’s attention to (b). I would
19 simply say in relation to that there has been no evidence filed today, or in anticipation of today
20 as to what the effect would be on Albion if the variation sought in the interim relief is not
21 granted. I also, of course, draw the Tribunal’s attention to (a), we have had no submissions –
22 or no evidence – as to the urgency of this matter, and I would rely on the skeleton argument
23 where Mr. Thompson quite rightly says that because of the interim relief that was granted in
24 2004 and was varied, Albion has survived. So it is a little difficult for us to see that there is a
25 material change of circumstance. In that respect I would also remind the Tribunal, I am sure
26 the Tribunal has this well in mind, in the consent order that was made in 2004 – I will just go
27 to that briefly.

28 THE PRESIDENT: It was until the determination of the Appeal.

29 MR. VAJDA: Also – I was not present at the time – para.3 of that order says that the Appellant is to
30 undertake to notify the Tribunal on a timely basis of any material change in its financial
31 circumstances from the date of that order. We would say that should apply in any event, so
32 effectively if it was now said “What we have had in the past is not sufficient now”, and there is
33 no evidence of that, because of the Tribunal’s earlier order there would be, we would say, an
34 obligation on Albion to explain that there has been a change in financial circumstance, which

1 we have not had. I do not think I need say anything further about Route 2. So that brings me
2 to the third route, the one devised by Mr. Thompson, through a bit of creative work this
3 morning, which is the Schedule 8, s.33 of the Competition ----

4 THE PRESIDENT: A sort of route began to take shape in the course of ----

5 MR. VAJDA: Yes, with a little help or prompting from the President.

6 THE PRESIDENT: Well just to understand what was being put.

7 MR. VAJDA: Exactly, yes. That is the third jurisdictional route. The short point, if I can put it, to
8 the route 3 is exactly the same point I have made in relation to route 2, that there is no evidence
9 of urgency, serious or irreparable harm, no evidence of any material change.

10 THE PRESIDENT: Sorry, I just need to go back to s.33 just to remind myself ...

11 MR. VAJDA: (After a pause) I think with respect – well maybe Mr. Thompson did not refer to the
12 wrong section – he referred to s.33 and as I read s.33 that is effectively concerned with final
13 relief.

14 THE PRESIDENT: I had just had the same thought at the same moment you were taking me to it.

15 MR. VAJDA: Yes, and I think he probably had in mind s.35 – I say “probably”, Mr. Thompson will
16 no doubt come back in reply on this – because I think the argument was effectively well if in
17 the course of his investigation on the access price the director formed the view that it might be
18 excessive, and if at that time Albion was not providing common carriage but had a bulk supply
19 price, that the Director might take some form of interim measure directed to the bulk supply
20 price but that would be, as I understand it, under s.35, it could not be under s.33. I am sure the
21 Tribunal has this well in mind, there is a degree of elision in both my friend’s written and oral
22 submissions between interim and final relief.

23 THE PRESIDENT: Yes.

24 MR. VAJDA: But let us assume that Mr. Thompson is referring to s.35. One sees again, not
25 surprisingly, pretty much the same conditions that all of us in this room are familiar with for
26 granting interim relief at s.35(2):

27 “... for the purpose --

28 (a) of preventing serious, irreparable damage to a particular person or
29 category of person, or

30 (b) of protecting the public interest.”

31 and one comes back to the short point that there has been no evidence of urgency as to why
32 there should be a variation of the current discount of 2.05 pence, nor any evidence how, in the
33 absence of that variation, there will be any serious and irreparable harm to Albion, which as we
34 know is still in existence today. The concern of the Tribunal at the interim stage was to ensure

1 that Albion did not go under so that the Appeal was ineffective, and one can understand that.
2 The Tribunal wanted to ensure that when it gave any Judgments at the end of the day there
3 would still be an Appellant there. So that is, if you like, the easy way through. We would not
4 accept – and I would not accept – that as a matter of jurisdiction, and I am now getting into
5 slightly more tricky areas of the law, we would not accept that the general powers of the
6 Tribunal in Schedule 8 allied to the powers of the Director under s.35(3) can effectively create
7 or override the specific rules in Rule 61. One can see that perhaps understandably the
8 Tribunal’s own rules for the grant of interim relief in s.61 have been drafted widely and
9 flexibly and one can understand why that is the case, and if I am allowed to use Latin in this
10 Tribunal ----

11 THE PRESIDENT: Yes.

12 MR. VAJDA: -- Rule 61 has an element of what one might call the *lex specialis* about it in relation
13 to interim relief and it would be, in my submission, quite an astonishing result that, as it were,
14 despite the width and flexibility of Rule 61 – and one must not forget that it is legislation,
15 albeit a secondary legislation – but that, as it were, by a side wind the Tribunal then has an
16 other leg of jurisdiction outside Rule 61 where it can operate by reference to criteria that are
17 alien to Rule 61. So we would say that even if there was this third route, it does not actually
18 lead anywhere, and that is the end of that point. However, I would just make the point, which
19 the Tribunal has on board – and I recognise that I am now treading on more dangerous ground
20 – we would not accept that in relation to the bulk supply price there is, if you like, a *prima facie*
21 case of abuse, it is the “read across” point and if I can just deal with that very shortly because,
22 as I say, it is really *obiter* to this whole argument ----

23 THE PRESIDENT: No “read across” to bulk supply price, yes.

24 MR. VAJDA: If I could just take the Tribunal to para.759 of its Judgment, the Tribunal there quotes
25 para.40 of the Decision and para.40 of the Decision we see at 752 (the Director’s Decision)
26 where he explains the methodology for bulk supply price – if I can put it like this – it is a bit of
27 a ‘hybrid’ because in doing so it has a look at what one might call ‘comparators’, but also one
28 sees at the top of 223 the “LRMC”, and as Mr. Anderson pointed out that was a forward
29 looking calculation done in 1996 and as the Tribunal rightly observes at 759: “The reference to
30 LRMC introduces yet another method of calculating ...” and that is entirely correct. That as not
31 explored at all. Again, this is simply by way of *obiter* remark. If I could just ask the Tribunal
32 to take up Annex 4 to the Notice of Appeal of Albion.

33 THE PRESIDENT: In the enclosures’ bundle?

1 MR. VAJDA: Yes, there should be a letter from Ofwat, it is RD7 of 98, dated 6th March 1998. It
2 says: “The Director’s conclusion on RD21/97 ...” and they then set out an element of
3 consultation, and we see a general summary at (2), the second paragraph, second line:
4 “Most responses agreed that long run marginal cost is the correct principle in
5 determining price although there were many queries on the LRMC methodology.”
6 Then one sees over the page a heading “Long Run Marginal Cost”, so that of course is all of a
7 piece with what the Tribunal says at 759, namely, that LRMC is a different methodology. I
8 fully accept that it does not appear it was based solely on LRMC, as I said it is a sort of hybrid,
9 but regard was had to that. No doubt one could have an interesting argument as to whether
10 what the Tribunal has said in relation to the first access price can read across to the bulk supply
11 price, but I just put down a marker that we would not accept that; in any event, it is not
12 necessary for the Tribunal really to determine that for the interim relief application because it
13 fails for lack of urgency and lack of serious and irreparable harm.

14 THE PRESIDENT: You say at the very least there is a major complication?

15 MR. VAJDA: Yes, and it is not an issue that, in a sense, I am inviting the Tribunal ----

16 THE PRESIDENT: So you submit, yes.

17 MR. VAJDA: Yes. So effectively, in summary, Sir, we say that none of the three routes lead
18 to ----

19 THE PRESIDENT: Lead to where they want to go.

20 MR. VAJDA: I am grateful. I think the only other point I would make on interim relief is this, and
21 it is a point we have made in our skeleton, but I would make it again in the light of what Mr.
22 Thompson said this morning. Of course it is trite that an interim order can only last as long as
23 there has not been final Judgment and we would not accept that any order could then continue
24 after the final order of this Tribunal. The position, of course, is entirely different from ----

25 THE PRESIDENT: That I think probably gets us on to your ----

26 MR. VAJDA: It does, it does.

27 THE PRESIDENT: -- two next steps, because certainly at the moment the way I am looking at it is
28 that an interim order has to be interim to something ----

29 MR. VAJDA: Precisely.

30 THE PRESIDENT: -- whether a further investigation or a final Judgment, or something.

31 MR. VAJDA: Yes. Subject to anything the Tribunal wants to say, that is all I have to say on interim
32 relief.

33 THE PRESIDENT: I think Professor Pickering may have one question – or more than one, I do not
34 know.

1 PROFESSOR PICKERING: Mr. Vajda, can I engage in a little bit of simple economic analysis with
2 you at this point, in relation to interim relief? Any organisation may well accept that in the
3 short run it may not cover the full costs of a particular activity and it would accept this in the
4 interests of establishing its position and building up its volume for the long term. In the long
5 run, to stay in business, an organisation would normally need to cover its full costs, not only its
6 variant costs. You are arguing that Rule 61 should not apply, or does not apply, in relation to
7 Albion's situation and you appear to be taking the view that the short run can continue. I just
8 wonder at what point you would consider that the short run, within which failure to cover full
9 costs should actually end and the long run implications of not obtaining a return that covers the
10 full costs would actually cut in?

11 MR. VAJDA: That is an extremely complicated question, which I think I am going to duck, if I
12 may. What I am here to address is whether or not the criteria are met under Rule 61 or
13 Schedule 8; in my submission they are not.

14 PROFESSOR PICKERING: Could I just say, so far as I can see, the whole question as to how long
15 any organisation can go on incurring a net loss is clearly a part of the consideration related to
16 the interpretation of Rule 61, which is why I raise the question.

17 MR. VAJDA: I think what I can say, and this perhaps addresses what you, Professor Pickering, have
18 in mind is that at the moment we have no financial information at all – we have simply had a
19 submission and a skeleton argument, we have had no information, no accounts – we have had
20 nothing as to what is actually happening on the ground and part of what I am saying is
21 therefore at the moment what we do know is that Albion has survived, is here today,
22 represented ably by Mr. Thompson and his Junior, and therefore there is no basis for any
23 variation of the existing order to be made.

24 PROFESSOR PICKERING: Thank you.

25 MR. VAJDA: On – perhaps if I can use the neutral expression – ‘next steps’ there seem to be three
26 alternatives and then there is a question mark, and if I can just set them out and the Tribunal
27 will tell me if I have missed something out. On the alternatives there is first of all obviously
28 setting aside, and I think it is common ground that that plainly is a consequence of the
29 Judgment. Secondly, is set aside plus an order for remission to the Director. The third is
30 effectively the 19(2)(j) route which does not involve, if you like, an immediate set aside, and as
31 I said there is the question of dominance which I shall deal with, but I think those are the main
32 ----

33 THE PRESIDENT: I suppose the fourth is the Tribunal taking its own decision.

34 MR. VAJDA: Yes, I suppose that is right.

1 THE PRESIDENT: That is another possibility. But, as I think I said to Mr. Anderson in argument,
2 it is probably useful analytically to try to break it down into the various different issues that we
3 have, because the situation is a bit different, for example, as between excess price and margin
4 squeeze.

5 MR. VAJDA: Yes. Could I begin by saying that we would again gratefully adopt what you,
6 President, said this morning, that in looking at next steps – looking at the big picture for the
7 moment before going down to the breaking down – it is important to look first of all at where
8 this case is going; and secondly, the use of public resources. Putting it another way, supposing
9 the Tribunal were to say “We are going to do a reference back 14(2)(j), and we are simply
10 ignoring the question of public resources, we are ignoring where the case is going”, that could
11 be said to be a misuse – I am sure the Tribunal would not do that, but the Tribunal have a
12 discretion which it will wish to exercise reasonably and lawfully.

13 THE PRESIDENT: Yes.

14 MR. VAJDA: We, with respect, suggest that those two points that you, Sir, made are pretty critical
15 in determining the next steps, because you made the observation “What is effectively the point
16 of further public money, whether it is being spent at the Tribunal level, through more work
17 being done, or if it is being spent by Mr. Anderson’s clients, if in fact the common carriage
18 proposal does not work, if I can put it in that way. In that respect we have been enlightened
19 this morning by the evidence given by Dr. Bryan. As I understand it – I am sure I will be
20 corrected if I have got it wrong – the position is that at the moment Albion cannot pursue the
21 2001 proposal because of the change in the law. There are two ways that it can effectively
22 seek to do this and of course, when I say “the proposal”, it is the proposal the Tribunal rightly
23 sets up at para.8 of its Judgment, that is the proposal ----

24 THE PRESIDENT: It is a proposal that is the subject of the Decision.

25 MR. VAJDA: Of all this litigation it is the para.8 proposal. Now, the first way forward, as I
26 understand it, is that one can seek an exemption from the prohibition in the Water Industries
27 Act 1991, as amended by the 2003 Act. As I understand it, the new licensing regime has been
28 in place since 1st December 2005, and as Mr. Anderson said an application for an exemption
29 does not go to Ofwat but it goes in this case to the National Assembly for Wales.

30 THE PRESIDENT: I think Mr. Lewis, who is a native, would remind us that it is the Welsh
31 Assembly Government to whom it goes, and not the National Assembly for Wales.

32 MR. VAJDA: I hope I will get that right, I apologise. It used to be the National Assembly for
33 Wales.

34 THE PRESIDENT: It is not Ofwat, anyway. (Laughter)

1 MR. VAJDA: Relief on Mr. Anderson's face, no doubt.

2 THE PRESIDENT: One of the few things that is not.

3 MR. VAJDA: In relation to that, so far as I am aware, but obviously I will stand corrected, no
4 application has been made by Albion to the Government Body.
5 The other alternative that Dr. Bryan mentioned this morning is the purchase, I think he said, of
6 certain of the assets, for instance the pumping station at Sealand, and he says that the effect of
7 that would be that there would be no interface between the DC assets and the Shotton assets,
8 because that is the problem, if there is an interface you are prohibited from introducing the
9 water. Effectively, if those assets are purchased, and I think those at the moment belong to
10 Shotton, so the argument goes he will be able effectively to introduce water without
11 contravening the prohibition and without needing an exemption.

12 THE PRESIDENT: Just let me articulate it to see that I have understood it. If those assets were
13 purchased then, strictly speaking, at the meter at Sealand the water would transfer from Dŵr
14 Cymru to Albion, it would be a transfer between water undertakers.

15 MR. VAJDA: Yes.

16 THE PRESIDENT: Then the subsequent onward supply by Albion would fall under the inset
17 appointment and therefore we are outside the Act.

18 MR. VAJDA: Yes.

19 THE PRESIDENT: That is the way that argument runs?

20 MR. VAJDA: Yes. Perhaps I can put it no higher than this, those instructing me express doubts as
21 to whether one can do that to get round the Act, but I do not want to address the court on
22 matters of law today. The point I want to make is that at the moment those assets have not
23 been purchased and therefore Albion is not in a position to move forward with a 2001 proposal.
24 In those circumstances, my respectful submission is that the appropriate course in this case –
25 and I will come to the issue of dominance in a moment ----

26 THE PRESIDENT: Yes.

27 MR. VAJDA: -- but the appropriate course, having looked at that, is for the Tribunal plainly to set
28 aside the Decision and to leave it at that. I say that because who knows what may happen in
29 the future? Albion may decide not to go down that route, in which case there is absolutely no
30 point in continuing spending public money on this, or alternatively Albion may obtain the
31 exemption from the Welsh Government, or purchase the assets and they may then say "We
32 want to continue with the 2001 proposal". In that eventuality there would clearly then have to
33 be a new discussion between my clients and Albion in relation to the access price – subject to
34 any questions of appeal or whatever - that discussion will plainly be informed by the terms of

1 the Judgment, and if the matter cannot be resolved it will obviously go to the Authority. Now,
2 I can just hear Mr. Thompson getting up and saying “This is wholly unacceptable because we
3 have been here for years and years, and this is absolutely typical of Mr. Vajda’s client; they are
4 asking us to do the long march, go all the way back, do it all over again”. There is an element
5 of truth in that, that is right, but what I say is that the Tribunal needs to look at the wider
6 picture here, that effectively – and I am not criticising Dr. Bryan, the law has changed, things
7 have moved - we are not in the position that we were in 2001, and in my respectful submission
8 the Tribunal has recognised that and that is important in deciding where we go now. We do
9 not know – certainly we do not know on the basis of what we have been told today – where we
10 are going to be, whether or not the common carriage proposal is going to go forward or not. In
11 those circumstances that, in my respectful submission, does justice to this case.

12 This is an Appeal, if you remember, from an non-infringement Decision by the Director in
13 relation to the first access price, and the Tribunal has made very clear the numerous respects in
14 which they say the Authority has not properly investigated the matter. If, as I say, the matter
15 were ever to come back to the Authority again, and one does not know, but if it were to do so,
16 and subject, as I say, to any Appeal, one would assume that the Authority, as a public
17 Authority, is going to pay careful attention to the criticisms that have been made by this
18 Tribunal of its previous approach. So we would say that that would be the obvious solution in
19 the present case.

20 THE PRESIDENT: Mr. Vajda, if we went down a route of that kind, and it turned out that in six
21 months’ time, or whenever it is, either Albion had managed to get an exemption or there had
22 been a purchase of the assets and it was thought that it worked from the point of view of the
23 Act, what comfort would we have – or could you offer – that in those circumstances the matter
24 could be then addressed in a sensible and expeditious way, so that it could be resolved without
25 another lengthy costly and stressful set of proceedings? Of all the various alternatives what
26 concerns us most is that this thing just goes on and on and on and on, and never comes to a
27 resolution which is not in the best interests of your clients necessarily, who are obviously
28 spending a lot of time and effort on the whole case, nor above all in the interests of Albion or
29 the wider public.

30 MR. VAJDA: Yes.

31 THE PRESIDENT: So we need to think about that, and we would need to be pretty sure that there
32 was some sort of failsafe mechanism of some kind built in to make sure that any later stage was
33 conducted in a way that is, shall we say, moved a bit faster and in more of a constructive way
34 than some aspects of the present proceedings.

1 MR. VAJDA: Yes, well the Tribunal will appreciate ----

2 THE PRESIDENT: I am not asking for an immediate response, but you might just think about it and
3 take instructions on that aspect of it.

4 MR. VAJDA: As I said, obviously an important factor in all that is whether or not there is going to
5 be an Appeal.

6 THE PRESIDENT: Yes.

7 MR. VAJDA: If there is going to be an Appeal then there are going to be major issues – assuming
8 permission is granted and so on – it will have to be sorted out elsewhere. But if there is not an
9 Appeal one would assume that all parties are going to be guided by the Judgment. Having said
10 that, and this is a point that the Tribunal itself has made, in relation to the question of excessive
11 pricing if one takes that, in my respectful submission it is quite clear that the Tribunal has not
12 made findings on excessive pricing. As Mr. Anderson has said further work would
13 undoubtedly be required, and the Tribunal has, with respect, quite properly recognised that.
14 These are complicated and detailed matters and, in a sense, through the procedure of the
15 Tribunal the magnifying glass has been applied to various areas whereas no magnifying glass
16 may have been applied in the past.

17 THE PRESIDENT: Yes.

18 MR. VAJDA: As I say, subject to Appeal obviously the Tribunal’s Judgment will provide a starting
19 point, but I think it would be wrong to say that it would provide the finishing point.

20 THE PRESIDENT: As you are making your submissions it occurs to me to wonder whether we can
21 sort out the question of relief – interim or otherwise – until we know whether or not there is
22 going to be an appeal, because that might change the situation again, might it not? If there was
23 an Appeal then we are back into an interim situation of some sort.

24 MR. VAJDA: Yes, so far as today is concerned, I have not ----

25 THE PRESIDENT: I do not want anyone to take positions today, I really do not. It all needs to be
26 thought about and from everyone’s point of view it is rather a complicated situation, not least
27 from the Tribunal’s point of view. The Appeal side of things is another bit of the jigsaw, is it
28 not?

29 MR. VAJDA: The Tribunal, of course, is aware that we have not come to this court seeking, as it
30 were, to vary the interim relief order ourselves, although careful thought has been given to that
31 and will continue to be given to that.

32 THE PRESIDENT: That is running on for the moment.

1 MR. VAJDA: That is running on for the moment, and we are going to take our decision on Appeal –
2 obviously the question is whether or not we think that they are matters that ought to be
3 explored in the Court of Appeal, matters of substance in the Judgment.

4 THE PRESIDENT: Of course.

5 MR. VAJDA: As you know, Appeals do not stay proceedings in the lower courts and unless we
6 come back with a specific application it is only if the case is running then the interim relief
7 here will continue to run. We say that looking at this matter in the way that you, Sir, outlined
8 this morning is effectively a clean solution and a solution that recognises the commercial
9 realities that we are now in. I accept the Tribunal's concern about – if I can put it this way –
10 the 'fall back position', but if one knew that an application had been made, say, in December
11 last year, and Dr. Bryan was on the point of getting it, or something like that, the position
12 might be different. At the moment we simply do not know, and it is on that basis that I am
13 addressing you this afternoon.

14 THE PRESIDENT: So on this side of it you say simply "set it aside, over and out" effectively?

15 MR. VAJDA: Yes. What I have not done there, and I do not know how the Tribunal is minded to
16 proceed, obviously that is one option, the Tribunal may feel "That is not the option the
17 Tribunal wants to take. The Tribunal may be, nonetheless, attracted by either remission or a
18 19(2)(j) reference back.

19 THE PRESIDENT: I think we ought to just go around the track on those possibilities.

20 MR. VAJDA: Yes, I will address you briefly in relation to those, if the Tribunal is not attracted to
21 our first submission. In relation to the question of outstanding issues, if we do it as you, Sir,
22 suggested, issue by issue, so far as excessive prices are concerned I would really be repeating
23 what Mr. Anderson has said. We consider there are a number of matters that do require further
24 investigation because the thrust of what the Tribunal said is "You did not do your job
25 thoroughly enough" and indeed in a number of places where, for instance, one is looking at the
26 water comparison – we mention that in our skeleton – the Tribunal said there are certain
27 consequences of our approach which would need to be investigated.

28 THE PRESIDENT: So excessive pricing, some further investigation of some sort by somebody?

29 MR. VAJDA: Yes, and broadly, again in the interests of brevity, we would adopt, if you like, the
30 shopping list of points that Mr. Anderson mentioned in his skeleton, to which we would add –
31 and I hope it is not too an esoteric point – the second limb of *United Brands*, which I do not
32 want to address the court on now really, but it is simply that it is plainly an important issue and,
33 as the Tribunal have seen from our skeleton and the recent Decision of the European

1 Commission, the *Helsingborg* case, which has settled the question once and for all as to whether
2 or not it is a two stage process, and it is quite clear that it is a two stage process ----

3 THE PRESIDENT: Well that is a Commission Decision, so we cannot say it has settled the question
4 once and for all, but it is a Decision to which we have to have regard under the Statute.

5 MR. VAJDA: Yes, and that was a case, in fact, where the difference between cost and price was
6 much greater than in this case as it happens, and the Commission nonetheless said that unfair
7 prices had not been proved.

8 THE PRESIDENT: Just forgive me, Mr. Vajda, because it is sometimes interesting just to pause on
9 interesting points, even though we do not have to immediately address them. It has sometimes
10 been the situation, and we may have been guilty of it to some extent ourselves, or done it to
11 some extent ourselves, to use the words “excessive” and “unfair” as sort of synonyms, and I
12 think what you are saying is that just because in a given case there is a big gap between
13 accounting costs and the price you cannot automatically assume that that is an unfair price for
14 the purposes of the Chapter II prohibition.

15 MR. VAJDA: I think that is right, and I think that both in Article 8 and in Chapter II the reference is
16 “unfair price”, not “excessive price”.

17 THE PRESIDENT: It is, absolutely, but they are sometimes used as synonyms, although it would
18 still be an excessive price if you could not find some other justification. If there was a huge
19 gap between cost and price, as sometimes there is in royalties, for example, on copyright or
20 music performances, you would need to have some other way of justifying it.

21 MR. VAJDA: The *Helsingborg* case is, in a sense, quite an interesting parallel because it is to do with
22 infrastructure where there is effectively a natural monopoly and the difference between cost
23 and price was very large indeed. Obviously each case to some extent depends on its own
24 facts, but they are the two stage process.

25 That point, in my submission, is of some importance then in looking at other routes, because I
26 can see from the Tribunal’s point of view, the attraction of the 19(2)(j) route and it is a route –
27 the Court of Appeal has said it is a route. However, again in deciding whether or not one
28 would go down the remission route or the 19(2)(j) route – and of course the Tribunal will
29 approach this judicially – the Tribunal will need to do a balancing exercise, and the question of
30 whether or not it is an unfair price is, if I can put it thus, is an element of mixture of law and
31 policy ----

32 THE PRESIDENT: It is a matter of judgment.

33 MR. VAJDA: It is a matter of judgment. We would say this is plainly a matter that the Regulator
34 needs to look at first, and it is a pretty big issue. The Regulator, to give him credit, flagged it

1 up in the Decision and then no doubt with great relief said “I do not need to get into it because
2 I do not find an excessive price”, but it is a big issue. In *Floe* the Court of Appeal was setting
3 out the options. There is no doubt that 19(2)(j) is an option but that does not mean to say that
4 one can simply, as it were, adopt *Floe* mechanistically and say “Right, just because we want to
5 get help, we are always going to do a 19(2)(j).

6 THE PRESIDENT: No, quite.

7 MR. VAJDA: And plainly, in a case where, for instance, we just had one small issue on the
8 excessive pricing one might say that 19(2)(j) would be clearly the appropriate thing to do in
9 this case, rather than remitting it back. In my submission, if we are not going to adopt the route
10 of simply quashing the Decision, in deciding whether or not it should be remission or 19(2)(j)
11 the Tribunal needs to have in mind these factors. In my submission the unfair price point is a
12 big point, and that is a point in my respectful submission that weighs, or points towards a
13 remission rather than a reference back.

14 THE PRESIDENT: You have already submitted that any remission or reference back is against the
15 hope that there may be some practical benefit from doing so, which was your first point.

16 MR. VAJDA: These are, if you like, alternative submissions. My primary submission is building on
17 what the Tribunal has said this morning that the sensible way to bring these proceedings to an
18 end is simply to quash the Decision and do no more. If the Tribunal is not with me on that we
19 then have effectively three options: does the Tribunal do it? Does the Director do it via
20 remission, or does the Director do it via 19(2)(j)?

21 THE PRESIDENT: Yes.

22 MR. VAJDA: If the Tribunal is against me on my first point, in relation to, if you like, the unfair
23 price point, what I am saying is that plainly it would be inappropriate for the Tribunal to tackle
24 that *de novo* first off, but we would go on to say that that is such a big issue that – I am not
25 saying the Tribunal would not have jurisdiction under 19(2)(j) to do it itself – the Tribunal
26 needs to think is this really what 19(2)(j) is intended to do, given that 19(2)(j) is effectively in
27 the section on the Rules dealing with case management powers? Obviously case management
28 powers are quite large, but an observer from Mars, who dropped in here this afternoon to find
29 that on a case management matter this whole new issue is being referred, might be slightly
30 surprised by that, it is not to say that it cannot be done, but ----

31 THE PRESIDENT: An observer from Mars might be somewhat surprised by a number of things in
32 this case, but never mind. But that again takes us back, I think, to my earlier point that if you
33 are inviting us to just make a simple remittal what kind of comfort can we have that this thing

1 will not just plough into the sands or go on for years and years? That is what is worrying us
2 the whole time.

3 MR. VAJDA: This is assuming that the Tribunal disregards the first option, which is simply
4 quashing ----

5 THE PRESIDENT: Yes.

6 MR. VAJDA: That in relation to remittal it will go into the never never?

7 THE PRESIDENT: Yes.

8 MR. VAJDA: I can see one has to face up to the fact, and this is obviously a factor that the Tribunal
9 must have in mind, that if the Tribunal simply remits, the Tribunal loses control of the case and
10 that is the message of *Floe*, and plainly the Tribunal will wish to consider anxiously whether or
11 not they want to lose control of the case.

12 THE PRESIDENT: Well it is not that the Tribunal as such wants to control the case, it is simply that
13 there is some mechanism or other there to protect both the parties and the public interest to see
14 that something at the end of the day is actually done in which ever direction. It is surely
15 possible to solve all this but quite what the mechanism is I do not know.

16 MR. VAJDA: Yes. I can see that in relation to remission on the one hand and 19(2)(j) on the other
17 hand, the 19(2)(j) gives the Tribunal the ability not just to control the agenda, but perhaps
18 importantly for the Tribunal, to control the timetable.

19 THE PRESIDENT: I think that is probably implicit in *Floe* is it not, that that is how you can do it if
20 you are worried – there may be many cases where you are not worried about the timetable, or
21 indeed, whether it is ever done again at all. But I think the history of this case suggests that we
22 need some mechanism for making sure that some conclusion or other is reached at some timely
23 moment.

24 MR. VAJDA: If the Tribunal decides to remit it has gone out of the Tribunal and one is back in the
25 hands of Mr. Anderson, and I cannot speak for the Authority or Mr. Anderson, all I can seek to
26 assist the Tribunal on is trying to identify the factors that the Tribunal has to strike. In looking
27 at the factors, one of the factors, in my view, if you like is the size of the outstanding work – if
28 I can put it in a layman's type way. If the size of the outstanding work is quite small and also,
29 if I can put it this way, uncontroversial – and I will come to that in a moment – then 19(2)(j) is
30 an obvious route.

31 Where the size of the outstanding issues are larger and more controversial that is a factor that
32 points to remission rather than 19(2)(j). The reason for that is that, as you know, Sir, and are
33 probably weary of me repeating it, one of the features of the Competition Regime established
34 by the 1998 Act is this two tier structure.

1 THE PRESIDENT: Yes.

2 MR. VAJDA: If there is a reference back under 19(2)(j) it is not entirely clear to me how that two
3 tier structure would work. In a formal sort of way it would work because obviously it would be
4 the Authority that would do the work and not the Tribunal. But that raises the question as to
5 what the procedural rights of the parties would be on a reference back. Would they have then
6 an opportunity of commenting on controversial points that the Authority was looking at,
7 because normally in an investigation the answer would be “yes” they would. Plainly I am
8 addressing the Tribunal from the perspective of my clients so I would term “procedural rights”
9 “rights of defence”, because obviously we are the company in the firing line here.
10 Then there is another aspect which again is unclear, namely, let us assume for the sake of
11 argument that the Authority comes to the view that there is both an excessive price and it is
12 unfair; it then refers that back to the Tribunal. What is the position of my clients, because first
13 of all we may not have enjoyed the rights of defence we would have enjoyed had there been an
14 investigation in front of the Authority? Also, what would our position be here, because
15 normally if, say, the Authority then took a decision it is unfair we would have effectively a full
16 Appeal on fact and law to this Tribunal. If the Authority comes back with a finding which is
17 unfavourable to my clients, it is not clear to me how I am to deal with that, because I would
18 then say “I am effectively going to want to have an appeal on that”.

19 THE PRESIDENT: We would have to work out, I think, what sort of administrative procedure was
20 envisaged. I was just noticing that if you go back to the source of this power ----

21 MR. VAJDA: This is the 19(2)(j) power?

22 THE PRESIDENT: Yes, which is in Schedule 4, para.2 of the Enterprise Act, on p.292 of the
23 current **Butterworths**, the 11th Edition. It does not throw any immediate light on the point that
24 you are on at the moment, but it is just of some general interest that it has a subsection to itself,
25 subsection 4 of para.17 of the relevant Schedule, which is a different bit from the case
26 management stuff that is in para.17. This is primary legislation now, so that clearly somebody
27 thought that this was a useful safety valve to have, and I would not have thought it was beyond
28 our collective imagination to devise a procedure that would be fair to everybody.

29 MR. VAJDA: In relation to this point my submissions today are not of an absolutist nature, but what
30 I am seeking to do – obviously I am not here as an *amicus*, I am here as ----

31 THE PRESIDENT: No, but we are all exploring the frontiers of this relatively new jurisdiction.

32 MR. VAJDA: What I am saying is that here is a very important procedural issue here, and plainly I
33 must accept, and I do accept, that if effective procedural safeguards are built into the 19(2)(j)
34 process, if I can put it like that, that would obviously be of great comfort to my clients.

1 THE PRESIDENT: In other words, you do not want to be presented with a *fait accompli* whereby
2 the Authority simply reports back to the Tribunal that these people are guilty.

3 MR. VAJDA: I bang on about the Statement of Objections long and hard in this case, but one needs
4 to have effectively something that is put to us at the administrative stage, if the administration
5 is minded to do something unfavourable to us, which we have an opportunity of dealing with.
6 The administration then may accept or reject that. It then comes here, and fairness would
7 dictate that we would effectively have the same rights when it comes back here that we would
8 have if there had been a remission. Plainly, obviously, the Tribunal will be alert to the fact that
9 we are not going to go over points that have been gone over – abuse of process, all that sort of
10 stuff – but obviously the issues that are going to be dealt with by the Authority are going to be
11 issues that have not been dealt with by the Tribunal, otherwise there is no point in referring
12 them back. So they are in a sense new points, and if an issue does arise, and plainly one must
13 have the opportunity of effectively dealing with that fully both as a matter of fact and law.
14 Certainly, if the Tribunal in weighing the balance between remission on the one hand, and
15 19(2)(j) on the other hand, and it was attracted to 19(2)(j) for example by keeping hold of the
16 timetable, we would say in looking at the timetable one needs to build in these provisions; as
17 the President says, that one needs to act creatively to ensure that one can develop the system
18 that not only delivers competition law but also delivers fairness in the process.

19 THE PRESIDENT: Yes, absolutely.

20 MR. VAJDA: So that is really what I want to say on excessive pricing, subject to any point that any
21 member of the Tribunal has.

22 Perhaps I can now just deal with margin squeeze – I will come to dominance in a moment.

23 Margin squeeze is, as you said, Sir, different to some extent from excessive pricing. It is not
24 entirely clear to us, I think we have flagged this up in our skeleton, but if one goes to the
25 Tribunal’s conclusion at p.297 of the Judgment, that the Tribunal recalls the existence of
26 margin squeeze was not seriously disputed, I think that was probably the existence of margin
27 squeeze as a matter of fact:

28 “The Director’s findings at 352 of the Decision that nonetheless there is no breach of
29 the Chapter II prohibition was erroneous in law and incorrect, or at least insufficient
30 from the point of view of the reasons given the facts and analysis relied on in the
31 investigation.”

32 Again, without wanting to go over the ground that Mr. Anderson went over this morning, there
33 is a passage which suggests that the Authority has not adequately investigated what services

1 Albion were providing to Shotton – 895 I am told. It seems to us that there is a question mark
2 there and if I can perhaps leave it at that.

3 The other point I want to make on margin squeeze is this, which is if you like a point of a
4 slightly different order, that even assuming for the moment that the Tribunal has found, as a
5 matter of law, that there is a margin squeeze, there is this interrelationship, as I read it, between
6 margin squeeze and excessive price because of course one starts off by the original price that is
7 charged – the bulk supply price – and the Tribunal deal with that by saying “Of course, we take
8 the view that that price is excessive”. If one looks at 873 in the Judgment, the Tribunal sets out
9 why the analysis was incorrect or inadequate. For instance:

10 “... the First access price has not been shown to be related to the costs, and the evidence
11 strongly suggests that price to have been excessive and it cannot be assumed that Dŵr
12 Cymru’s upstream price is reasonable.”

13 That, of course, is of significance because the Tribunal will recall that in one of the
14 submissions of Dŵr Cymru, which I think was supported by the Director, we relied on the *IPS*
15 case, saying that where the price is not excessive and the downstream price is not predatory,
16 there can be no margin squeeze – I do not know if the President recalls that?

17 THE PRESIDENT: Yes, I think your clients did submit that if Albion won on excessive pricing,
18 there was a sense in which it did not need the margin squeeze argument.

19 MR. VAJDA: Yes, I think what the Tribunal does is to record the submission of the Authority on
20 *IPS*, which I am trying to find.

21 THE PRESIDENT: I think it might be helpful on margin squeeze just to glance at para.48 of the
22 Judgment, where we summarise the four bases upon which we found that the Decision had
23 gone wrong on the margin squeeze element. It may be implicit, even if (1) and (3) could
24 theoretically looked at again, that if went to the bit of the Judgment that lies behind (4) that it
25 would be quite difficult on the facts, if we are right in law, to resist the conclusion that there
26 was a margin squeeze contrary to the prohibition.

27 MR. VAJDA: It is on that latter point, Sir, that there may be an issue between the Tribunal and Dŵr
28 Cymru on that, because we did rely on the *IPS* case, and the Tribunal distinguished it by saying
29 that it was not relevant because effectively -----

30 THE PRESIDENT: Our approach in law may not be right, but if our approach in law is right then
31 the conclusion probably follows fairly inexorably.

32 MR. VAJDA: As I understand it, the Tribunal’s first point is a point of fact, and the Tribunal has
33 been very careful in the language that it uses, and it uses the words “strongly suggest”
34 throughout which to my mind is not a finding of fact, it is simply what it says – it strongly

1 suggests. If on further work it is found that the price is not excessive we would say, assuming
2 that the Tribunal got all the law on margin squeeze correct, we would still say that that would
3 reopen the question of margin squeeze because of the *IPS* case.

4 THE PRESIDENT: Hang on, I just need to get that down.

5 MR. VAJDA: Yes, it is quite a short point.

6 THE PRESIDENT: If price turns out to be not excessive, that would reopen margin squeeze because
7 of *IPS*.

8 MR. VAJDA: Yes, that is the only read across I can see.

9 THE PRESIDENT: We would need to think about that submission.

10 MR. VAJDA: Yes, but I think in terms of further investigation, I accept that margin squeeze is in a
11 slightly different category from excessive price, and I think in terms of further investigation the
12 only area that might be suitable is the passage at 895, but other than that for our part we cannot
13 see any further factual investigation.

14 Subject to anything the Tribunal has to say about that, that now takes me finally to dominance.

15 THE PRESIDENT: Yes.

16 MR. VAJDA: In relation to dominance, the Tribunal will recall obviously the position that we set
17 out in a letter in July, but I am not proposing to develop that today, it is there in the papers.
18 Obviously, in looking at the question of dominance and how to deal with it, in our submission
19 it would be right for the Tribunal going to look at it by reference to the whole picture. Of
20 course, if one looks at the question of the whole picture, we come back to the fact that the 2001
21 proposal is no longer on the table today, and so far as the question of the Decision is concerned
22 there has been, if one likes, a successful challenge to the Decision in terms it should be set
23 aside, and we have the views of the Authority recorded in the Decision which is that there is
24 dominance. So that is the position.

25 We would respectfully submit that again, looking at the whole picture, that would be a suitable
26 way to dispose of the case.

27 THE PRESIDENT: Just do nothing, basically? Just set aside the whole Decision?

28 MR. VAJDA: Set aside, and I address the point, the Tribunal is obviously mindful of what happens
29 if a common carriage proposal is revived and then for some reason there is a 'dispute' if I can
30 use that word, and it then comes back to Ofwat, and the Tribunal may think this might be a bit
31 unsatisfactory because knows whether or not there is dominance, therefore would it not be
32 much better that we effectively determine once and for all what the question on dominance is.

33 THE PRESIDENT: There are other relevant matters which we will come to in a moment, but it is
34 also relevant to the question of an Appeal, because I am not sure the Court of Appeal is going

1 to be too pleased with us if they are invited to tackle this very difficult case without anybody
2 knowing whether or not there is dominance.

3 MR. VAJDA: In my respectful submission if there is an appeal as things stand now plainly it is not
4 going to cover dominance ----

5 THE PRESIDENT: If dominance is accepted then the whole problem goes away. If dominance is
6 not accepted we are in a situation of public law and a degree of uncertainty, and that is
7 worrying the Tribunal at the moment.

8 MR. VAJDA: Yes, I understand that. What I say is that the starting point, if I can put it like this, of
9 the Authority in relation to an investigation now, following its Decision, is an assumption of
10 dominance, and that is what they have said. They have said that they would want to do one or
11 two other things, but the Decision did not say “You can forget all about dominance; plainly
12 these people are not dominant.” They did not say that and, indeed, as you said in your
13 Judgment they took quite a lot of time investigating the dominance issue and although it might
14 be said that they sat on the fence, the side of the fence on which they came down is probably
15 more dominance than not. So it is not that one is left with nothing.

16 THE PRESIDENT: The problem is that we have some reasonably clear findings in the Decision
17 which are put in issue in the Notice of Appeal, particularly about whether or not constructing
18 new infrastructure is a barrier to entry, whether the facilities are essential, and so on and so
19 forth. It was said earlier this morning – I think there was a bit of clarification after the short
20 adjournment, but it was said this morning that the Authority still thought that there was a
21 serious question of dominance, and you have not accepted dominance.

22 MR. VAJDA: No.

23 THE PRESIDENT: So the situation is not clear at the moment, and we are worried about that.

24 MR. VAJDA: I have made my submissions on quashing. Now, even just in relation to that there is
25 simply setting aside the Decision and doing nothing more altogether, and I can see the Tribunal
26 may be concerned about that, because they may think they have this dominance issue which is,
27 in a sense, floating out there, and we want to tackle it. One possibility is obviously to set aside
28 the Decision, the only question is how is one going to tackle the dominance issue? Again, it is
29 a question of, if you like, the options. Again one comes back effectively to the three that we
30 have been looking at and, as I understand it from the remarks that you have made during the
31 course of today, that the Tribunal’s preferred option is to decide it itself.

32 THE PRESIDENT: On the evidence that we have got?

33 MR. VAJDA: Yes. In relation to that we have a submission which I am not going to waste time on
34 now which goes to jurisdiction, which the Tribunal will obviously rule on. If the Tribunal were

1 to rule against us on that, and the Tribunal obviously then has a decision to make which is does
2 the Tribunal just decide dominance like that, or do they then invite us and the Authority to
3 make further submissions in the Tribunal if that is the way the Tribunal wishes to ----

4 THE PRESIDENT: Can I just sketch out how I think it possibly works? At the moment there are
5 still parts of the Notice of Appeal that we have not yet addressed, particularly on essential
6 facilities and so forth. We have the obligation under the Schedule to deal with the Notice of
7 Appeal on the merits, and it seems to the Tribunal provisionally that we have jurisdiction at
8 least to see whether those points made in the Notice of Appeal on the merits on this issue stand
9 up or not. In order to do that we would obviously need to give your clients in particular, but
10 the Authority as well, a fair chance to make submissions to us. On the basis of those
11 submissions, which I think would probably involve an opportunity to make some written
12 submissions and a hearing if anybody wanted a hearing, we would then come to a view on
13 what we thought of the grounds in the Notice of Appeal – and that may be, for all practical
14 purposes, all we need to do.

15 MR. VAJDA: Yes, absolutely.

16 THE PRESIDENT: At that stage we then may or may not – depending on how things evolve and
17 what submissions we get – need to go on to say whether, in some formal sense, we are
18 approaching para. 3(2)(e) in terms of taking a decision in which case at that stage – but I think
19 only at that stage – we would need to address your submission about the Statement of
20 Objections and the jurisdiction and all the rest of it. But that is how at the moment,
21 provisionally, we see it unfolding.

22 MR. VAJDA: I think I have very little to add. We think in relation to dominance there is a
23 preliminary jurisdiction issue that needs to be resolved. If the Tribunal resolves it against us
24 then the Tribunal will communicate that to us and then the next steps will be ----

25 THE PRESIDENT: But at the moment there is a jurisdictional issue.

26 MR. VAJDA: Yes.

27 THE PRESIDENT: If we are exercising the para.3(2) powers, as we see it at the moment there is a
28 prior stage to that which does not raise a jurisdictional issue, which is simply addressing the
29 points that are made in the Notice of Appeal. One might reach the conclusion – just to put a
30 hypothesis – having addressed those points that the argument made in the decision about lack
31 of barriers to entry was incorrect, in which case that is an incorrect argument, and we find on
32 the merits that that is an incorrect argument. The consequences that flow from all that come a
33 little bit later on in the analysis but we do not know where we are going to get until we have
34 heard the argument, if you see what I mean?

1 MR. VAJDA: Well that is where there is an issue between the way that we see it and the way that
2 the Tribunal sees it. Our point on jurisdiction, whether right or wrong, is that this is an unusual
3 situation that we have a challenge to an assumption in a Decision, and this is why we say that
4 the mere fact that something may be in the Notice of Appeal does not necessarily mean that the
5 Tribunal must determine it.

6 THE PRESIDENT: No, we are not saying that we must determine it, no, obviously not.

7 MR. VAJDA: What we are saying in relation to this Notice of Appeal is that effectively the Tribunal
8 cannot determine, that is if you like the jurisdiction point. Now, the Tribunal may disagree
9 with us on that.

10 THE PRESIDENT: But why can we not determine it?

11 MR. VAJDA: Because under the two tier structure we say that the issue ----

12 THE PRESIDENT: Supposing we resolve it in your favour? Supposing we reject the Appeal on this
13 basis?

14 MR. VAJDA: Sir, jurisdiction are not to be waived around “If it is in my favour I will accept
15 jurisdiction”. We say there is a fundamental issue here, and that it simply cannot be done, even
16 though the fact that the Tribunal may give me a nod and wink and say “Well, don’t worry, we
17 will decide it in your favour ----”

18 THE PRESIDENT: No, I am not giving you any sort of nod or wink. (Laughter)

19 MR. VAJDA: A jurisdiction point is a jurisdiction point.

20 THE PRESIDENT: I think what the jurisdiction point misses is that there is a distinction between
21 addressing the Notice of Appeal under para.3(1) and the various remedies that the Tribunal has
22 jurisdiction to order under para.3(2) and so forth, and so long as you have a fair opportunity to
23 deal with the Notice of Appeal I cannot at the moment see why you tell us we cannot deal with
24 the Notice of Appeal?

25 MR. VAJDA: Well, I have made my submission. This is not something that we can consent to the
26 Tribunal having ----

27 THE PRESIDENT: No, I am not inviting you to consent, I am simply explaining how it works.

28 MR. VAJDA: If the Tribunal considered that the jurisdiction argument is flawed, so be it, and then
29 we move on to the next ----

30 THE PRESIDENT: I am not sure we have even got to the jurisdiction argument yet. We cannot get
31 to the jurisdiction argument until we know what we are talking about. It may be that no
32 consequences flow from the fact that we want to make an effort to clarify where we are on
33 dominance. Just to deal if I may – because it is helpful to articulate things as we go along –
34 with this assumption point. We are, I think, as a Tribunal very uncomfortable with the willing

1 to wound but afraid to strike type of approach, and this is a point that goes right across the
2 board in all our jurisdictions, whereby a Regulator says “I do not really think there is
3 dominance but I will assume it nonetheless and then there is no abuse”, is a difficult situation
4 from two points of view at least. First, as Professor Pickering was saying, it is unhitching
5 dominance from abuse, which is not necessarily a good way of doing it and about which we
6 would probably need to make some comment; and secondly, it leaves everybody very uncertain
7 – especially if there are later proceedings – as to what the situation is and, in particular, leaves
8 the Applicant in the position of having to go all over dominance all over again.

9 MR. VAJDA: I am obviously not here to take Mr. Anderson’s part in relation to that. If I could
10 simply say this, that obviously one is looking at the use of public resources, and I think courts
11 and public bodies throughout the length and breadth of the land, if you can effectively decide a
12 case on a particular point – if, for instance, there is no point in going into dominance because
13 there is no abuse – I would be very surprised if the Court of Appeal would criticise a Regulator
14 for not going into dominance. I do not think one has to be mechanistic and say “We cannot get
15 on to abuse until we deal with dominance”. It is all a question of looking at the matter in the
16 round, but I fully take the Tribunal’s point, the Tribunal may wish, if you like, to nail the
17 jellyfish on this, and if the Tribunal wishes to do so then the question the Tribunal needs to
18 consider is how in a sense it wishes to nail the jellyfish.

19 THE PRESIDENT: Well we want to have a jellyfish argument, basically. (Laughter)

20 MR. VAJDA: Yes, yes. And the question is whether effectively the jellyfish is thrown back to Mr.
21 Anderson, or whether the jellyfish is kept in this room. Our jurisdiction point is effectively
22 saying that it cannot be kept in this room, and if the Tribunal rule against us on that then
23 obviously the Tribunal will then tell us what the next stage is.

24 THE PRESIDENT: Yes.

25 MR. VAJDA: Just wrapping up, in relation to dominance we fully accept and understand the
26 Tribunal’s concerns about dominance. I have made my submission which is, in a sense,
27 looking at the case as a whole one could simply set aside. If the Tribunal says: “We think that
28 is right, but the only thing that troubles us is the dominance point”, then we would say do that
29 and detach the dominance issue and then it is a matter for the Tribunal how the dominance
30 issue is dealt with.

31 THE PRESIDENT: Sorry, just say that all again, Mr. Vajda? If we detach the dominance issue?

32 MR. VAJDA: Yes, then the question is how that is to be dealt with, and I fully accept the Tribunal’s
33 preference is to deal with it here, and I have my jurisdiction point here which the Tribunal ----

34 THE PRESIDENT: Quite, which we have got on board.

1 MR. VAJDA: What I would simply say, looking at it in the round, let us assume for the moment that
2 the Tribunal has jurisdiction to hear the dominance point, then in my respectful submission the
3 dominance point effectively comes back ----

4 THE PRESIDENT: It is a quite discrete point?

5 MR. VAJDA: But it is similar in a way to the excessive pricing point and so on. If, for example, the
6 Tribunal were minded to say “Actually, we think we are going to refer back under 19(2)(j), for
7 example, then in my respectful submission the sensible thing to do in relation to dominance
8 would be to refer that back as well.

9 THE PRESIDENT: So they are all a bit interrelated?

10 MR. VAJDA: What I am saying is if the Tribunal is going to do a 19(2)(j) on certain aspects, the
11 sensible thing, in my submission would be to put dominance into the 19(2)(j) pot, if I can put it
12 like that and it will all go back to the Director. If the Tribunal is not going to do 19(2)(j) at all
13 then I can see the Tribunal may take the view we have jurisdiction; we are going to deal with it
14 here ourselves, and that is the only discrete part of our case that we really want to hear further
15 argument on.

16 THE PRESIDENT: Yes.

17 MR. VAJDA: Subject to that, those are my submissions.

18 THE PRESIDENT: Thank you very much, Mr. Vajda. We will rise for five minutes, if we may.
19 (The hearing adjourned at 3.25 p.m. and resumed at 3.40 p.m)

20 THE PRESIDENT: Yes, Mr. Randolph, good afternoon.

21 MR. RANDOLPH: Sir, good afternoon. Gentlemen, good afternoon. I can be short you will be
22 glad to hear.
23 Sir, you started off this morning setting down what you thought should be discussed in the
24 course of today’s hearing, and those were four issues, namely, what course the case should
25 take, how to deal with dominance, the issue of costs, interim relief with regard to Albion and
26 Aquavitae. I do not need to deal with the last two points, obviously you have our submissions
27 with regard to the interim relief on Aquavitae.

28 THE PRESIDENT: It has not been pursued today.

29 MR. RANDOLPH: It is parked, and so I do not need to discuss it. If I can go backwards through
30 that list, dealing with dominance and then what course the case should take?

31 THE PRESIDENT: Yes.

32 MR. RANDOLPH: Just picking up on what you were saying, Sir, to my learned friend, Mr. Vajda,
33 this issue of the Notice of Appeal and given the fact that it is in the Notice of Appeal you need
34 to determine it. First, we support, we endorse strongly what Mr. Vajda has said as being his

1 primary position. Secondly, we would rely on the recent decision in the Court of Appeal on
2 *Football Shirts and Toys* with regard to the fact that this Tribunal, like indeed every other
3 Court and Tribunal, does not need to determine every single point that is raised before it.

4 THE PRESIDENT: No, and I do not think that is in dispute.

5 MR. RANDOLPH: No, well good, with respect, Sir, because it may well be that this is not an issue
6 – although it is raised in the Notice of Appeal, the issue of dominance and how the Authority
7 did or did not deal with it in terms of its assumption, it may not be an issue that needs to be
8 dealt with, and obviously that goes in line with Mr. Vajda’s primary submission.

9 THE PRESIDENT: Yes, I think as part of that, Mr. Randolph, we have to look horizontally across
10 the spectrum of regulatory decisions and decide whether to leave this untouched would (or
11 might) have adverse consequences for the workings of the Act as a whole.

12 MR. RANDOLPH: Indeed.

13 THE PRESIDENT: It is a factor to bear in mind.

14 MR. RANDOLPH: It is a factor, with all the other factors ----

15 THE PRESIDENT: With all the other factors.

16 MR. RANDOLPH: -- including public time, public expense, etc.

17 THE PRESIDENT: Of course.

18 MR. RANDOLPH: Is it worth it, or in the light of all the circumstances should ----

19 THE PRESIDENT: Should we just leave it where it is.

20 MR. RANDOLPH: Where it lies, and we would endorse that. But if, Sir, you were not minded to
21 accept that approach, which obviously has the benefit of speed because it would all be over,
22 and given the history of this case where, although obviously the Authority has taken some
23 time, equally this Tribunal – it is not a criticism at all – has taken some time. We are two and a
24 half years into this hearing ----

25 THE PRESIDENT: Absolutely.

26 MR. RANDOLPH: And it may be that that is another thing that goes into the mixing pot, the
27 question of the efficacious use of resources and bringing the matter to an end, and of course
28 that ties in quite nicely with the overriding objective in the CPR which, of course, you will be
29 bearing in mind.

30 The other point that you raised with Mr. Vajda was this issue of jurisdiction, I do not need to
31 repeat what Mr. Vajda said, but it seemed to us, Sir, that we would with respect differ if a firm
32 point was being made by the Tribunal with regard to when it could take jurisdiction. Our
33 strong submission is that jurisdiction is an issue which should be dealt with first as a
34 preliminary issue, and therefore the fact that the point raised by learned friend for Albion,

1 appears in the Notice of Appeal does not impinge on that primary point i.e. the question of
2 jurisdiction has to be dealt with first. The mere fact that a point appears in a Notice of Appeal
3 does not make that point admissible, or justiciable.

4 THE PRESIDENT: I have not got this yet, Mr. Randolph. The argument as elaborated by
5 Mr. Vajda was based, as I understood it, on Schedule 8, para.2(e), possibly (d) but mainly 2(e).
6 We may at some point reach that stage, but at the moment, mentally speaking, we are on
7 para.3(1).

8 MR. RANDOLPH: Yes.

9 THE PRESIDENT: I have not quite grasped why you say we have not got jurisdiction – whether we
10 exercise it or not is another matter, that is your balancing factor point – I cannot see why we
11 have not got jurisdiction to say whether or not the points raised in the Notice of Appeal on this
12 part of the case are right or wrong?

13 MR. RANDOLPH: In short, Sir, the point is simple I think, and Mr. Vajda will no doubt put me
14 right if I am wrong on this, but if the point being raised in the Appeal is simply not capable of
15 being determined by this Tribunal ----

16 THE PRESIDENT: Well why is it not capable of being determined by the Tribunal?

17 MR. RANDOLPH: Because for the very reason it has been set out by the Authority and
18 Mr. Vajda, indeed myself, because there was no decision by the Authority on this particular
19 point, it was a mere assumption.

20 THE PRESIDENT: But there are decisions, there are quite a lot of findings by the Authority, for
21 example, and I am now on Annex A to the Judgment, para.176, to the effect that the cost of
22 constructing new infrastructure to serve Shotton would not be sufficient to constitute a barrier
23 to entry; that it would not be uneconomic to duplicate the system, etc. etc., and it leaves open
24 the question of dominance, and the Appellant's position is that the question of dominance is the
25 wrong approach. I do not see why we cannot say whether or not that is the wrong approach.

26 MR. RANDOLPH: Well, you have read and seen the arguments, Sir, and they do not need to be
27 repeated.

28 THE PRESIDENT: It does not necessarily involve is taking any decision – it might eventually, I do
29 no want to rule that out – but it does not necessarily involve us making an infringement
30 decision ----

31 MR. RANDOLPH: No, no.

32 THE PRESIDENT: It might involve us making an infringement decision, in which case we would
33 have to face fairly and squarely the jurisdictional point.

34 MR. RANDOLPH: Exactly.

1 THE PRESIDENT: But at the moment, as far as I can see, we just need to have some argument on
2 these various points in the Decision to determine whether or not the Decision is on the right
3 lines on the dominance issue, or – to put it very baldly, as Mr. Thompson would probably put
4 it, rightly or wrongly – that the Decision has made a meal of what is actually a very simple
5 question.

6 MR. RANDOLPH: Of course you have our submissions on that particular point which is that it is
7 not, and with respect to the Authority they have not made a meal of anything. You have our
8 other point, which is that, with respect, we see that there is a difference and the mere fact that
9 there were various so-called facts found – I do not know whether we would accept that, certain
10 indications given – has to be seen in the light of the final conclusion, which was not a
11 conclusion, it was an assumption and on that basis there was no decision and therefore it
12 cannot be appealed to this Tribunal. That is the pure jurisdiction point, and you have that
13 firmly in mind.

14 THE PRESIDENT: Just so that I can expose our thinking, it is also true to say, is it not, that at
15 para.170 of the Defence, and again I am on to para.9 of Annex A, that the Director took the
16 view that it was appropriate to opine on the essential facilities question, that the case raised
17 important issues, and that it was important for the Appellant and the industry to know that his
18 detailed thinking was publicly available and open to challenge if necessary.

19 MR. RANDOLPH: Yes.

20 THE PRESIDENT: Well that is where we are, is it not?

21 MR. RANDOLPH: Yes, but of course, Sir, at the beginning of that paragraph:
22 “In the defence, the Director responds essentially that the issues of relevant market,
23 dominance and essential facility are, in his view, ancillary aspects of the Decision on
24 which he has not relied.”

25 THE PRESIDENT: Yes, but he cannot go on to say that it was important that is detailed thinking
26 should be publicly available and at the same time say that nobody can contest it.

27 MR. RANDOLPH: Yes, well I do not want to speak for the then Director, and now the Authority ---
28 -

29 THE PRESIDENT: I have in the back of my mind a similar letter written at the end of the first stage
30 of this case, at the stage when the first draft on essential facilities came out there was a letter
31 from the Director saying “Yes, we think we ought to go on and cover the waterfront” or words
32 to that effect.

33 MR. RANDOLPH: Yes, that may well be the case.

34 THE PRESIDENT: Anyway, we have your submissions.

1 MR. RANDOLPH: You have our submissions. Of course, Sir, if you are right, and this is done, and
2 there is an inquiry carried out – this is obviously not our primary case, but if you decide that
3 this is something you want to deal with – and you look at the particular, what you described,
4 Sir, as “facts” in the Decision, and you seek to have them investigated by written and possibly
5 oral submission, then you determine that and then, on your analogy, Sir, we could raise the
6 issue of jurisdiction.

7 THE PRESIDENT: Yes.

8 MR. RANDOLPH: Well, Sir, what would happen if the issue of jurisdiction was raised, and you
9 found in favour of the point being made by my learned friend, Mr. Vajda?

10 THE PRESIDENT: Well you have raised the issue of jurisdiction.

11 MR. RANDOLPH: Yes, I know that, but effectively the hearing in the middle, the hearing on the so-
12 called facts would have been effectively a waste of time, because if you found there was no
13 jurisdiction to deal with the point and it should be dealt with elsewhere, then that “middle”
14 hearing – if I can put it that way ----

15 THE PRESIDENT: Well it depends what it is we are doing. As we see it at the moment, the
16 jurisdictional point that is raised is a 3(2) point, and we are still some way behind the game on
17 3(1).

18 MR. RANDOLPH: Yes.

19 THE PRESIDENT: And we do not at the moment see any basis for not acceding to the Appellant’s
20 request that we should determine the Appeal by reference to the grounds of Appeal. That is
21 our point on jurisdiction – if you want a Judgment on that point you can have one.

22 MR. RANDOLPH: Yes, well I hear what you say, Sir, and you have our submissions on that, so
23 there is no point – especially in light of the time.

24 THE PRESIDENT: Yes.

25 MR. RANDOLPH: Just a small point on the reference you made to Professor Pickering’s
26 intervention on the cart and horse point, and the unsuitability of things ending up in the air. It
27 is just a small point, obviously this is a practice that is adopted very frequently by the European
28 Commission in its Decisions, and I am not saying that that should be a reason for necessarily
29 blessing it, but it is something that you, Sir, will no doubt bear in mind. It is often the case –
30 especially in difficult decisions – and exactly because of administrative resources and the
31 scarcity of those resources and the importance of focusing them on things that really matter, it
32 is a – “device” is probably the wrong word – way in which resources are marshalled
33 effectively and economically, and the Commission certainly does it and I am pretty sure that
34 the Oft does it.

1 THE PRESIDENT: Yes, but in this particular case three years' resources went into the question that
2 is still on the table.

3 MR. RANDOLPH: Yes, well you have heard the Authority's submissions on that. Sir, the only
4 other point I wanted to raise was actually in reply to Mr. Thompson's submissions earlier this
5 morning, and it deals with the further course of this case, and in particular your suggestion, Sir,
6 about commercial realities and where one is. This Tribunal made it quite clear in its Judgment,
7 following on from submissions on behalf of United Utilities, that the company was willing and
8 able to enter into negotiations with Albion.

9 THE PRESIDENT: That was the position as we understood you had explained to us.

10 MR. RANDOLPH: Indeed, and it is.

11 THE PRESIDENT: That is still the position, is it?

12 MR. RANDOLPH: That is still the position, I want to reiterate that, and especially on the transcript,
13 because with respect the slightly unfortunate way in which it was put this morning by my
14 learned friend, Mr. Thompson, the fact that it was said that Albion was singularly unable to
15 reach agreement with United Utilities, and then I think a reference later on to the fact that
16 United Utilities wanted to charge three times the amount that is presently charged.

17 THE PRESIDENT: Yes.

18 MR. RANDOLPH: You will have well in mind, I am sure, the facts as you found them in you
19 Judgment with regard to, first of all, the fact that the 3p, that is presently the price to Dŵr
20 Cymru from us, is one that does not cover our costs.

21 THE PRESIDENT: I am not sure we have made a finding on that point. We have recorded your
22 submission to that effect.

23 MR. RANDOLPH: You have recorded the submission and there has been no ----

24 THE PRESIDENT: It has not been challenged.

25 MR. RANDOLPH: There has been no challenge to that. Indeed, Sir, I think it is fair to say at
26 para.782, footnote 68, which is probably at the forefront of the Tribunal's mind (p.231 of the
27 Judgment), the Tribunal noted:
28 "We note that, on the evidence before us, it appears that the cost to Albion of acquiring
29 water resources at Heronbridge is likely to be greater than the cost to Dŵr Cymru under
30 its present agreement with United Utilities."
31 There are various other references ----

32 THE PRESIDENT: Well you are seeking a higher price.

33 MR. RANDOLPH: Yes, and we say we are entitled to, that is a matter of commercial reality, and
34 competition law does not operate to force us to sell at a below cost figure, in fact it would

1 be ----

2 THE PRESIDENT: They say “we cannot resolve it”, they say “Nonetheless, you are asking a bit
3 much”.

4 MR. RANDOLPH: Exactly, but anyway that is not really a matter for you, but the point is that I
5 want it on the record United Utilities is perfectly willing and able to enter into proper
6 commercial negotiations, but equally we are not going to be forced down a path where we have
7 to sell at a below cost price.

8 THE PRESIDENT: No, but the willingness to enter into commercial negotiations pre-supposes a
9 willingness to reach an agreement at a reasonable price.

10 MR. RANDOLPH: Indeed, and that should not be in question – and I definitely want it on the
11 record – we do not seek an unreasonable price; we seek a reasonable commercial price for the -
12 ---

13 THE PRESIDENT: Given the introduction on 1st November 2005 of the new licensing regime, do
14 you see a route by which this commercial arrangement could be put into operation?

15 MR. RANDOLPH: That is a more complex issue, obviously, because the negotiations were started
16 prior to the operation of the new legislation and the position with the new water licensing
17 regime will be different. Nonetheless, insofar as a relationship is possible under the new
18 legislation again, we would be willing to enter into ordinary commercial negotiations with
19 Albion insofar as it is possible. If it is not possible, as a matter of legislative fact and operation
20 then there is not much we can do. We cannot say “We will agree a price for something that is
21 not legally possible”, but insofar as it is legally possible, then we will be happy to enter into
22 negotiations, but – I think this is right – it is not for United Utilities to say “The best way of
23 doing this would be X, Y and Z”. It is for Albion to sort itself out under the new legislation
24 and say “Okay, we have looked at the options, we would like to progress under Option B, and
25 on that basis we think lawfully we can carry out the proposed activities, and we will come to
26 you, United Utilities, to negotiate at arms’ length, in the normal commercial manner, a
27 reasonable price.” It is as simple as that, we would say. I wanted to underline the point based
28 on your suggestion this morning, Sir, that there is not a bar from the United Utilities’
29 standpoint in any event, to a commercial settlement, insofar as a relationship is possible under
30 the new legislation, but it will be subject to the normal commercial imperatives.

31 THE PRESIDENT: How feasible would it be – we do not necessarily require an immediate answer,
32 but perhaps in the not too distant future – for negotiations on price to recommence and for the
33 Tribunal to be informed within a relatively short period whether there was a reasonable
34 prospect of reaching agreement on price?

1 MR. RANDOLPH: At the moment, Sir, you will recall that as a matter of fact negotiations broke
2 down obviously some time ago, I think prior to the Appeal being launched, and then as far as I
3 am aware there have been no further negotiations because the matter was before this Tribunal.
4 I think once the matter is resolved here, then it would be possible ----

5 THE PRESIDENT: Why do we have to wait for that?

6 MR. RANDOLPH: As far as I am aware we have not been approached?

7 (The Tribunal confer)

8 MR. RANDOLPH: If a suggestion is put to us then obviously we will listen.

9 THE PRESIDENT: We are trying to work out, among other things, what happens next. There are
10 several players and you are one of them and if there is in fact no commercial prospect of
11 agreement being reached in a commercial sense then that is one state of affairs. If there is a
12 commercial prospect of some agreement being reached, subject to whatever is necessary to
13 comply with the licensing regime that is another state of affairs.

14 MR. RANDOLPH: Indeed.

15 THE PRESIDENT: So what we are anxious to discover is which state of affairs it is?

16 MR. RANDOLPH: I think it would be difficult for me to say right now what the position ----

17 THE PRESIDENT: No, I am not asking you to say now.

18 MR. RANDOLPH: -- of the negotiations are given the fact there are not negotiations presently
19 afoot. All I can say is what I have said before, which is that United Utilities are perfectly
20 willing and able to enter into commercial negotiations based on a reasonable price. That is
21 where we are. I cannot say “yes, there is a more than 50 per cent. chance that they are going to
22 be successful”, or ----

23 THE PRESIDENT: No, I am not seeking that, but I just want to know whether there is a willingness
24 in good faith to enter into negotiations on a price and whether we can be told within a
25 reasonable time whether there is or is not the prospect of an agreement being reached?

26 MR. RANDOLPH: Well as to the first, yes, there is willingness and good faith on behalf of United
27 Utilities, that is clear. As to time and what is going to happen with regard to any such
28 negotiations it seems to me ----

29 THE PRESIDENT: That is more difficult.

30 MR. RANDOLPH: -- it is more difficult, but no doubt my learned friend and Dr. Bryan are listening
31 to this exchange and if they see fit to move forward, so be it, and we will listen to anything.

32 THE PRESIDENT: If you do not mind me asking – you are fully entitled to decline to answer if you
33 so wish – are there negotiations between you and Dŵr Cymru about revising the existing
34 agreement?

1 MR. RANDOLPH: No, they were on hold because of these proceedings. You will recall, Sir, that of
2 course we sought a re-determination from the authority as to the 3 pence we are being forced to
3 charge out our water at and they declined to accede to our application for a higher price, and
4 there we are. But my instructions are that there are no negotiations presently afoot as between
5 ourselves and Dŵr Cymru.

6 THE PRESIDENT: And is it still the case that you are managing the Ashgrove System on behalf of
7 Dŵr Cymru?

8 MR. RANDOLPH: Yes, absolutely, we are still where we are with this forced 3 pence. My last
9 point, Sir – and I am aware that time has passed – is an ancillary point on dominance. The
10 Tribunal will have taken on board, I am sure, our submissions with regard to the matters that
11 arise on dominance and in particular on alternative pipelines. We say, contrary to my learned
12 friend, Mr. Thompson, that the answer is not that simple, and you pointed it out, effectively,
13 Sir, the Decision makes some assertions, facts – however one wants to describe them – and
14 then the interim Judgment came to another view, there are different views.

15 THE PRESIDENT: I think that is the point we want some argument on.

16 MR. RANDOLPH: Exactly. If we have to go down that path, and obviously our primary case is no,
17 we do not need to go there, but if it is and if it is to be heard by this Tribunal rather than
18 remitted to the Authority then it is critical, we say – absolutely critical – that there is argument
19 on it, because we are affected as well; effectively the alternative pipeline is an issue for us, and
20 that is a big issue.

21 THE PRESIDENT: For example, you refer in your submissions to some answers I think you gave to
22 the Director that obviously bear on the position.

23 MR. RANDOLPH: Absolutely, we just cannot tell you at the moment, so how could the Authority
24 come to any stronger position than it did.

25 THE PRESIDENT: Yes, well that is what we want to bottom-out, if we can.

26 MR. RANDOLPH: If you have to go there.

27 THE PRESIDENT: If we have to go there, which you say we do not.

28 MR. RANDOLPH: Absolutely. Sir, unless you have any questions?

29 THE PRESIDENT: No, that is very helpful, thank you, Mr. Randolph. Yes, Mr. Thompson?

30 MR. THOMPSON: Good afternoon, Sir.

31 THE PRESIDENT: I think we are still troubled whether anything should be remitted back, as to how
32 realistic it is still to imagine this common carriage proposal actually taking effect in view of the
33 statutory obstacles there may or may not be. We will listen carefully to what you say, but we
34 may well need from Albion some more definite information on the steps that are (or could be)

1 taken in that regard to secure the position before we would consider whether further
2 investigation of some aspects of this case is or is not justified.

3 MR. THOMPSON: Yes, I will come straight in on that. There is obviously a very substantial ‘Catch
4 22’ for my clients if that is the position, because the whole problem here has always been the
5 pricing issue, which these proceedings were embarked on in the hope of resolving, and one
6 point that Dr. Bryan makes to me with some force is that the reason why he has an exemption
7 for his current position is because that was where the music stopped when this legislation came
8 into force. If this matter had been dealt with more expeditiously and his common carriage
9 proposal had been put into effect in 2000 or 2001, then he would have got an exception for
10 that. The reason why he is now into this regulatory morass is because he, as an inset appointee,
11 is trying to obtain common carriage after this legislation has come into force, and he is now
12 obliged to go through this regulatory hoop which I could show the Tribunal now – I think it
13 was the subject of questions from the Tribunal shortly before ----

14 THE PRESIDENT: It was, and forgive me for not having it all in the forefront of my mind.

15 MR. THOMPSON: I do not know if you have the Act there.

16 THE PRESIDENT: I think the Registrar has the Act, but we may not have a number of copies. We
17 have Halsbury’s vol. 49.

18 MR. THOMPSON: If you turn to p.915, this is the 2004 re-issue.

19 THE PRESIDENT: “Prohibition on Unauthorised Use”.

20 MR. THOMPSON: There are two prohibitions, one on 66(I)(1), which is a prohibition on using a
21 water undertaker’s supply system for the purpose of supplying water to any premises of a
22 customer, and so that is potentially relevant to the present situation. Then 66(J), the next
23 prohibition is that “No person shall introduce water into a water undertaker’s supply system
24 other than the undertaker itself”. So that is relevant to the issue of common carriage, because
25 potentially water will be injected into the Dŵr Cymru system, as it were, at the Heronbridge
26 end, or Ashgrove end, and so there are effectively two problems. If we take them in physical
27 order, 66(J) would come first, and there is a statutory exemption: “subsection (1) shall not
28 apply where the water is introduced by a licensed water supplier I pursuance of his licence”, so
29 it could be overcome by becoming a licensee, “... or by another water undertaker under an
30 agreement for a supply of water in bulk”. I think a suggestion we made was that United
31 Utilities could take responsibility for introducing the water into Dŵr Cymru network, but on
32 the basis that we would then take title of it within the network, and the statutory rule could then
33 be satisfied, but I believe that the Authority does not regard that as acceptable and therefore

1 there is the exposure to a criminal offence unless one gets regulator exception under, I think,
2 66(J)(3). That is one problem.

3 THE PRESIDENT: It is amazing if this legislation has the unintended result of preventing the only
4 competition that exists at the moment.

5 MR. THOMPSON: What the purpose of this legislation is is completely beyond me, but I have done
6 my best to try and understand what it means. Apparently there is another prohibition along the
7 lines of 66(I) that you cannot use Dŵr Cymru's supply system for the purpose of supplying
8 water to, for example, Shotton Paper unless you are the water undertaker, so Dŵr Cymru, or a
9 licensed water supplier in pursuance of its licence, and again has a regulator exception under
10 66(I)(3). As I understand it the current arrangements involving Albion Water are excepted
11 from this regime because they were pre-existing, or I have not been able to find the secondary
12 legislation that makes that good, but I am sure we must have told the Tribunal about that
13 before.

14 THE PRESIDENT: Yes.

15 MR. THOMPSON: But I think the statutory problems are these two statutory prohibitions which
16 would, at the very least, require some goodwill on the part of the Authority, United Utilities
17 and Dŵr Cymru to overcome the 66(J) prohibition, and apparently that goodwill is not
18 forthcoming. There would then need to be this rather technical problem of acquiring some
19 assets between Dŵr Cymru's supply system, and the end user, in order to overcome the 66(I)
20 prohibition. Alternatively, there would need to be some form of regulatory exemption under
21 66(I)(3) and 66(J)(3), that seems to be the problem.

22 THE PRESIDENT: Sorry, how would the acquisition of the assets help you? How would that then
23 work?

24 MR. THOMPSON: As we read it, we would no longer be using Dŵr Cymru's supply system for the
25 purposes of supplying water to Shotton Paper, but again there may be a statutory issue about
26 that, what exactly 66(I)(1) is directed at I cannot remember now, but I believe there may be an
27 issue about whether common carriage itself is regarded as infringing 66(I)(1) if, as it were, any
28 part of the carriage of the water is in Dŵr Cymru's pipeline. But I think we had understood
29 that as long as we were not using it directly for the supply then 66(I)(1) was not infringed. But
30 there may be a statutory construction point about that as well; I would have to go back to the
31 submissions that were made to the Tribunal before the first hearing, I think, possibly before the
32 Judgment, to remind myself what the issues are and what the state of argument is.

1 In any event, there appears to be a statutory inhibition on Albion pursuing its original plan,
2 which really has nothing much to do with the issues in this case, but has resulted from the
3 extreme delay that unfortunately has characterised this case.

4 PROFESSOR PICKERING: Mr. Thompson, I just wonder whether this would have any bearing on
5 the management contract by which United Utilities currently manages the system on behalf of
6 Dŵr Cymru?

7 MR. THOMPSON: I cannot help the Tribunal on that question.

8 MR. RANDOLPH: And for the avoidance of doubt, nor can I.

9 THE PRESIDENT: So where does that take us?

10 MR. THOMPSON: You asked me to clarify that ----

11 THE PRESIDENT: Yes, thank you and that is the problem.

12 MR. THOMPSON: I had a number of points in reply, shall I take them in order?

13 THE PRESIDENT: Yes, please. How is this going to be resolved, through the two possible routes
14 that you mentioned earlier, the exemption route or the asset purchase route?

15 MR. THOMPSON: Well at the moment, I think understandably, Albion Water is hanging on to its
16 inset appointment and bulk supply to avoid having to embark on yet more regulatory problems
17 in a situation where it has no commercial incentive to go forward because of the pricing issues
18 that have yet to be resolved by the Tribunal or by the Authority. So unless and until there is
19 some price incentive to pursue this, unless effectively the Tribunal directs that unless it goes
20 through these hoops this case is going to become arid, in which case no doubt it will become
21 more enthusiastic about doing it. At the moment it is effectively sticking to the commercial
22 arrangement that it has for better or worse, because that does not require it to jump through any
23 more regulatory hoops, because it got an exception from the Government for the present
24 regime.

25 THE PRESIDENT: If we take it in stages, this is relevant primarily to whether there should be any
26 further investigation of the excessive price issue and, if so, by whom and under what
27 mechanism? As I think as has been pointed out already, if there is to be some further
28 investigation of that, as distinct from just leaving things where they are, there probably has to
29 be some solid commercial reason for that work being undertaken, so we are somewhat back in
30 the chicken and egg situation, I think, that if for whatever reason – and it may be extremely bad
31 luck, and I am not saying otherwise – Albion is not pursuing the possibilities open to it to make
32 the common carriage operation work, the question of whether it is justifiable for the Tribunal to
33 order the Director to do any more on price on the hope that something might eventually work is
34 rather a difficult question.

1 MR. THOMPSON: Well, Sir, there are issues of cart and horse, and in my submission the blindingly
2 obvious reason why this matter has not been pursued is because of a zero margin combined
3 with the likelihood that United Utilities would actually charge more – substantially more – for
4 the water resource ----

5 THE PRESIDENT: Well the margin is a slightly different point from the level of the bulk supply
6 price. We have to keep excess price and margin in separate analytical compartments.

7 MR. THOMPSON: The point I am making is that if, for the sake of hypothesis and it is the only
8 figure I think we have been quoted, United Utilities will in fact only supply the water at 9p and
9 if Dŵr Cymru will only supply the carriage services at a zero margin then the only effect of the
10 common carriage would be to make my client 6p worse off than they are already.

11 THE PRESIDENT: I think we have probably – at least as far as the Tribunal is concerned – moved
12 beyond the zero margin point, but we cannot make commercially happen things that either
13 cannot commercially happen because there is a legislative bar, or because people cannot agree,
14 and if the failure to agree was in itself capable of being impugned under the 1998 Act that is
15 another case, it is not this case. We are in a bit of a bind at the moment; I am not quite sure I
16 see the way out.

17 MR. THOMPSON: As I understand it, Mr. Randolph has helpfully indicated that whereas our clear
18 impression until I think probably today was that United was not prepared to engage in any sort
19 of discussions with us – and indeed we raised it with them I think just before the 2005 hearing
20 and got a pretty well blank response, and so we thought that was a dead end – if in fact that will
21 prove a fertile area for discussion then obviously we can pursue that and then at least there
22 might be some movement on one aspect of the price problem. We are still, of course, subject
23 to any guidance from the Tribunal or order of the Tribunal, faced with the Dŵr Cymru price
24 problem but of course we can on a speculative basis pursue the regulatory position. There is no
25 particular attraction to do that while the commercial position is effectively impossible.

26 THE PRESIDENT: For example, what is the difficulty of inquiring of the Welsh Assembly
27 Government whether an exemption would be available if the commercial terms were
28 satisfactory?

29 MR. THOMPSON: First to continue as an inset appointee?

30 THE PRESIDENT: You continue as an inset appointee, and there is a further exemption to take you
31 out of the Act in relation to this additional United Utilities' element if that turns out to be
32 necessary. It seems to us rather strange that it does turn out to be necessary, but if it does turn
33 out to be necessary I cannot at the moment see any reason why you should not be exempted,

1 but until you have applied for it, it is rather difficult for us to order the Authority to do a lot of
2 work that may turn out to be completely hypothetical.

3 MR. THOMPSON: I do not think until today we had seen this as the stumbling block to progress,
4 but if it is then I am sure Dr. Bryan, as you will see, will be well capable of writing a letter by 9
5 o'clock tomorrow morning and sending it off. If that is the problem then I am sure we will
6 take it forward.

7 THE PRESIDENT: If, for example, the situation was – and here I am back to our magic wand,
8 which is being rather overworked at the moment, I know – that if by magic wand it was clear
9 that the Welsh Assembly Government, in light of all the circumstances, including the Judgment
10 and these proceedings and all the rest of it, was prepared to extend the formal cover which you
11 need for this arrangement, which only needs a licence as you rightly say because of the long
12 time it has taken to get this done, and if you were able to reach some commercial agreement
13 with United Utilities so that the operation was commercially feasible, the only thing left would
14 be a question of a margin and it may not be beyond the wit of man to arrive at some
15 accommodation with Dŵr Cymru on that in the context of what is left of these proceedings, in
16 which case everything is done and dusted. That is one scenario.

17 If, on the other hand, there is no prospect of reaching agreement with United Utilities, there is
18 no prospect of an exemption being forthcoming, or the asset route being done, there is not
19 much point in the Tribunal requiring a lot more work to be done, or fixing a margin or
20 whatever. They are not going to do it just hypothetically.

21 MR. THOMPSON: If I may say so, respectfully, these are very helpful indications. There has
22 obviously been a somewhat uncertain situation awaiting first of all one, and then the second
23 Judgment, and obviously we have been concentrating on that Judgment.

24 THE PRESIDENT: Yes, I see that.

25 MR. THOMPSON: But given the indications coming out today I am sure my clients will take them
26 away and pursue them with their usual energy.

27 If I may move on to another point, I did wish to remind the Tribunal respectfully, if issues are
28 going to be determined as a result of this hearing, of para.55 of our skeleton argument which,
29 in my submission, was not really reflected in the approach of the Authority. You may recall it
30 is a sort of sweep up point, but it is, in my submission, relevant to any view about the way
31 forward. This is not simply a case where there has been a few problems at the edges, it is a
32 case where there are a series of serious planks missing in the Decision, and in my submission
33 that is a reasonable summary of the four principal aspects where it is defective. That is
34 relevant in deciding how this case could go forward and whether or not it should be remitted

1 and, indeed, what remedy should be granted given that one is, on any view, dealing with a very
2 vulnerable competitor faced with a monopolist and a regulator whom the Tribunal has found to
3 be effectively opposed to introduction of competition notwithstanding the terms of the
4 legislation under which he operates. In my submission that is a major policy issue that has to
5 be in the mind of the Tribunal in addressing all the technicalities with which we have been
6 concerned today.

7 If I could then turn to the question of the relationship between the second bulk supply price and
8 the First Access Price where the Tribunal will recall the submissions of Mr. Anderson that they
9 were not really related to one another, and that there was no read across as Mr. Vajda said. I
10 would just like to remind the Tribunal of the terms of the actual calculations undertaken by
11 Dŵr Cymru. I think we looked at them last year, but if we look at tab 9 of the bundle attached
12 to the Notice of Appeal at p.31, this is the letter from Dŵr Cymru to Miss Griffiths of Ofwat,
13 in relation to the common carriage application by Albion Water. You will see the figure
14 minded to be charged at para.1, 23.2p. Then over the page, para.3:

15 “The attached appendix shows how the price has been calculated as well as the
16 relationship between the potable large industrial tariff and the non-potable price. The
17 latter is the price which should currently be charged for Albion bulk supply, any
18 difference is due to the annual price adjustment clause in the agreement.”

19 Then, when one turns to p.34, one sees a table and the column “Non-potable” effectively is the
20 price then applicable and the common carriage price is beside it. The only difference is that
21 3.9p resource is not present, exactly the same figures are used otherwise. You will recall that
22 the 7.2 figure that appears in both columns is the figure that the Authority found to be 4p too
23 high on the basis of Dŵr Cymru’s own figures. So the suggestion that there is no read across
24 or that they are not closely related in my submission is really an impossible one, and the figures
25 really are very closely related and indeed were relied on by Dŵr Cymru itself in its notification
26 to Ofwat. As I understand it essentially those figures are updated figures, figures approved by
27 Ofwat in 1996.

28 If we turn then to Mr. Vajda’s three routes if you recall?

29 THE PRESIDENT: Yes.

30 MR. THOMPSON: It is probably my fault that I was not sufficiently clear this morning, but in my
31 submission there are not three routes, there are the routes laid down in Rule 61. Rule 61 has
32 two limbs for interim relief, 61(1)(c) and 61(2). The reference I made was to 61(1)(c) which,
33 like 61(2), is subject to the relevant circumstances set out in 61(3).

1 THE PRESIDENT: I am sorry, Mr. Thompson, I am just turning it up; this is important, we need to
2 get it right.

3 MR. THOMPSON: Yes.

4 THE PRESIDENT: 61(1)(c).

5 MR. THOMPSON: That is "...granting any remedy which the Tribunal would have the power to
6 grant in its final decision." So the question is what is the power of the Tribunal in its final
7 decision? That is the question for that purpose.

8 THE PRESIDENT: And its final decision is its decision in this Appeal.

9 MR. THOMPSON: Exactly. And it is subject then to 61(3)(a), (b) and (c), the relevant
10 circumstances. I think Mr. Vajda took you to 61(3) by reference to 61(2), but 61(3) applies:
11 "... shall exercise its power under this rule ..." so it applies to 62(1) as well as to 61(2). So the
12 point I made was that (b) and (c) under 61(3) would both militate strongly in favour of a
13 remedy here, provided the 61(1)(c) power was sufficiently wide to cover it. The point I was
14 making was that if you then look at what the powers of the Tribunal were in relation to its final
15 decision, they are set out in Schedule 8, para.3 of the 1998 Act, which is on p.102 of the
16 Butterworths' handbook, and in particular it is 3(2)(a), (b), (d) and (e). So the power of the
17 Tribunal at 3(2)(e) is to "... make any other decision which the [OFT] could [itself] have
18 made", and the powers which the OFT could make, or the Authority could make are those set
19 out in s.33 of the Act. Mr. Vajda took you to s.35, but I am not sure what that had to do with
20 it, that is to do with the interim measures' power of the OFT and we are talking here about a
21 final Decision, and so the point is to give such directions as the Authority considers appropriate
22 to bring the infringement to an end, and the point I was making was that in the circumstances
23 which now prevail it would have been within the power of the Authority to give Dŵr Cymru
24 directions that it considered appropriate to bring the current agreement to an end and, given the
25 regulatory problems that would be involved in sorting this out by way of common carriage, in
26 my submission it would be within the powers of the OFT or the Authority in the particular
27 circumstances of this case, at least on an interim basis, to hold the ring by making a variation --
28 --

29 THE PRESIDENT: Well, wait a minute, are we slipping back into an interim basis or a final basis,
30 because 33 is a final basis, and it is 35 if you want an interim basis?

31 MR. THOMPSON: Yes, there is a risk of confusion here.

32 THE PRESIDENT: Yes.

33 MR. THOMPSON: A final order must be final, that is certainly true, but the Tribunal will, of
34 course, I think be aware that there are a number of cases where the case is resolved on the basis

1 of an ongoing supervisory role for the Authority or for, in this case, the Tribunal, and I think
2 *Genzyme* was such a case, and it may be perfectly reasonable to include a provision in relation
3 to a contingency, for example, if the regulatory regime changes, or if the commercial position
4 changes in a final order, so that the order is final but is subject to a contingency, and that would
5 be a perfectly reasonable approach to take.

6 THE PRESIDENT: How is this going to work? Under s.33 the Director – let us assume just for the
7 sake of hypothesis – could have given such directions as he considers appropriate to bring the
8 infringement to an end. His change of reasoning would have to be, if I have understood your
9 argument, “I found the first access price to be excessive, that means the bulk supply price
10 cannot stand either; the read over point is not a good point because there plainly is a read over
11 contrary to submissions”, this is how you would put it, “... therefore I can give a direction to
12 reduce the bulk supply price”. But how does the Tribunal do that, because we would then have
13 to determine what the bulk supply price would be, or should be? That matter is rather difficult
14 for the Tribunal to determine.

15 MR. THOMPSON: I am not sure I am proposing anything any more complex in theory than the
16 current interim measure. All I am proposing is a variation of the number.

17 THE PRESIDENT: Yes, but the variation of the number is not just a margin to keep Albion on its
18 life support machine, but a permanent, as I understand it, reduction in the bulk supply price,
19 because that is the s.33 direction, just as in *Genzyme* it was a permanent margin we were
20 fixing, not an interim margin. Now, how do you see this working? Do you see us making
21 some sort of interim decision and then inviting the Director to go to work to see what the right
22 level should be? Or do you see us taking a final decision on the bulk supply price, or what?

23 MR. THOMPSON: Well I think we tried to set it out in our written submissions that the proposal
24 would be that for an order in the form of the current interim order there would be provision for
25 it to be varied in the event that the regulatory structure changed.

26 THE PRESIDENT: So it would be final except that it could be varied in the event of a change of
27 circumstances?

28 MR. THOMPSON: Yes.

29 THE PRESIDENT: You are not asking us to make an interim order that will hold the ring until
30 something else happens, until there is a further investigation or a new decision, or something?

31 MR. THOMPSON: No, that is right, but it leaves open ----

32 THE PRESIDENT: It is just to decide, in other words you are inviting us to decide what the price in
33 the second bulk supply agreement should reasonably be, that is what you are asking us to
34 decide? Is that it?

1 MR. THOMPSON: It probably would come to that because for the purposes of the margin squeeze
2 abuse I think, as we discussed at the end of the hearing, it is likely that the number there is
3 going to be smaller than the number required to resolve the excess pricing – I think that is
4 reflected in the Judgment that the level of margin to resolve the margin ----

5 THE PRESIDENT: But it is one thing to say whatever the water price from United Utilities, and
6 whatever the access price there should be a margin in the middle of X, that is one thing, and
7 that is in the context of the proposed access arrangement, it is quite another thing to say that
8 under the existing second bulk supply agreement that stood from 1996, 11 years ago, the price
9 should now go down to X, whether or not the new common carriage arrangement ever comes
10 into effect. That is a quite different proposition.

11 MR. THOMPSON: Yes, and the reason why we get into this is the point that I started with in reply,
12 namely, that for better or worse – for worse, in fact – the Tribunal finds itself in a position
13 where the regulatory regime has changed as a result of the lengthy delays that have been
14 involved in this case since 2001. So that whereas from a regulatory point of view it was
15 relatively easy to step across to a common carriage regime, now it is not easy at all and, what is
16 more, there is a commercial impediment in addition to this one, arising from United Utilities’
17 position, which had not been anticipated in 2001 as I understand it. So unfortunately the
18 Tribunal has to put itself in the shoes of a hypothetical regulator who had taken so long to take
19 its decision that the entire regulatory landscape had changed. But, in my submission that is not
20 something for which my clients can be held responsible, or for which it should suffer
21 detriment.

22 THE PRESIDENT: No, but in order to give a direction under s.33 if we were the regulator, s.33 is
23 dealing effectively with final relief of some sort, in relation to your complaint about common
24 carriage, the regulator would have to decide (a) that there was dominance, (b) that above a
25 certain level the second bulk supply price was unfair; and (c) that he had the possibility to
26 pronounce on the second bulk supply price, notwithstanding that the case was about the first
27 access price; all of which is somewhat removed from the Decision which is under appeal.

28 MR. THOMPSON: Yes, to that all I can say is the point that I have made already that this is a very
29 extraordinary case, which I think is true on any view.

30 THE PRESIDENT: Yes, I think we can all sign up to that last comment.

31 MR. THOMPSON: That does lead on to the question of whether there is an interim stage, in fact,
32 here.

33 THE PRESIDENT: But that was 61(1)(c)a and 61(3) route.

1 MR. THOMPSON: In my submission there are only two routes, 61(1) and 61(2), and the suggestion
2 that somehow looking at s.33 takes you outside Rule 61 in my submission is just misconceived.
3 61 leads you back into what the powers of the Tribunal are, which leads you into Schedule 8,
4 which leads you back to s.33, so in my submission there is no third route, it is simply that in
5 working out what 61(1)(c) means you have to look at the Act.

6 THE PRESIDENT: How does 61(3) play on your analysis – urgency, the effect if the relief is not
7 granted and the effect on competition if the relief is granted – how does that work?

8 MR. THOMPSON: Well given that the case has been going on so long I felt some inhibition in
9 relying on urgency because the Tribunal has been well seized of this matter for a long time.
10 But “... the effect on the party making the request if the relief sought is not granted”, that is that
11 Albion will have to stumble on as best it can on its current margin. The “effect on competition
12 if the relief is granted”, it would act as a major sign to the market that something was finally
13 going to happen in this market, and in my submission both those things would be reasons why
14 a remedy should be granted.

15 THE PRESIDENT: Sorry, just help me again, this is all on the basis of an interim order, and it is an
16 interim order pending what exactly?

17 MR. THOMPSON: Well I think pending in particular, given the indications from the Tribunal, the
18 further hearing on dominance. If the Tribunal were minded to make any more firm findings in
19 relation to abuse then it would be pending those, that would be one possibility. The alternative
20 would be if the issues that Mr. Vajda and Mr. Anderson raised about partial remission, they
21 would be holding the ring pending the outcome of that partial remission.

22 THE PRESIDENT: Yes. But those are the only interim circumstances you can envisage at the
23 moment?

24 MR. THOMPSON: Well there are obviously the issues of costs and Appeal which at the moment
25 are still at large.

26 THE PRESIDENT: Yes, well if there is an Appeal then there is an interim stage until the Appeal is
27 determined, that is true. It might be difficult to grant what is effectively some kind of final
28 relief under the guise of making an interim order.

29 MR. THOMPSON: I appreciate that, but I think the question of the nature of any final order in
30 relation to a margin or a discounted price inevitably raises somewhat similar issues in practice,
31 if not in terms of jurisdiction, to these questions in relation to interim relief.

32 THE PRESIDENT: But at the moment the relief you are seeking is under 61, you are not directly
33 seeking relief, or are you – maybe you are seeking direct relief under Schedule 8, para.3(2)
34 saying “just make an order, it is the relief we seek”, and it is final relief under s.33. There is no

1 match at the moment between s.33 to which you draw our attention, and Rule 61 which you
2 rely on because s.33 is final, and Rule 61 is interim?

3 MR. THOMPSON: Yes, I only refer to it because 61(1)(c) defines the scope of the power to grant
4 an interim relief by reference to the final decision of the Tribunal which relates then back to the
5 final decision of the OFT or the Authority, so the scope of the interim jurisdiction is based on
6 the final jurisdiction of the Tribunal and the Authority.

7 THE PRESIDENT: But I think you are effectively inviting us to go straight to the final jurisdiction?

8 MR. THOMPSON: As the basis for the 61(1)(c) power because that is what it says.

9 THE PRESIDENT: Yes, I see.

10 MR. THOMPSON: The other points I had are really much smaller ones, at least in terms of today.

11 The question of excessive pricing, I think some scepticism was perhaps expressed by the
12 Tribunal about the two stage test which Mr. Vajda says is now firmly entrenched in the law. In
13 my submission, the summary of the law at paras 267 to 273 of the interim Judgment remains, if
14 I may say so, precisely correct, and one can see the relevant passage of *United Brands* set out
15 at para.268, and in particular para.250 of the ECJ Judgment gives the general statement of :

16 “In this case charging a price which is excessive because it has no reasonable relation
17 to the economic value of the product supplied would be such an abuse.”

18 Then 251 sets out a way of determining it objectively by reference to a comparison between
19 price and costs, which the Commission has not done. Then at 252:

20 “The questions therefore to be determined are whether the difference between the costs
21 actually incurred and the price actually charged is excessive, and, if the answer to this
22 question is in the affirmative, whether a price has been imposed which is either unfair
23 in itself or when compared to competing products.”

24 Then it goes on:

25 “Other ways may be devised – and economic theorists have not failed to think up
26 several – of selecting the rules for determining whether the price of a product is unfair.”

27 So the point is that 250 is the guiding light, 251-252 sets out some considerations in relation
28 not costs, and then 253 says that is not the only way you could do it. So the Tribunal, quite
29 correctly in my respectful submission, summarises the point at the end of 269, whether or not
30 the price in question has no reasonable relation to the economic value of the product supplied.
31 So there is effectively a unitary test, although one way you can test it is by looking a the
32 relationship between costs and price, and then looking at the question of whether or not it is
33 unfair in itself, and it is a question of what that adds to the question of whether it is excessive,
34 or by comparison to competing products. So those are two possible ways of seeing whether or

1 not the price is unfair. But the suggestion that you must always follow this two stage test does
2 not appear to be reflected in the Judgment itself, and does not seem to reflect the approach of
3 the Tribunal in *Napp* or in the interim Judgment, and in my submission that is not necessarily
4 the best way to look at it, and it is effectively an issue in the round.

5 I would also say in relation to excessive pricing, and I think it is a point that the Tribunal made
6 this morning, it does appear to us that the Tribunal may actually have found the existence of
7 excessive pricing, at least on the balance of probabilities, although not what the level of that
8 excess is – for example, the paragraph we referred to where quite a substantial range of
9 possible prices is indicated, and the various places in the Judgment where it is said to be likely
10 that the prices contain some degree of excess, so we would not necessarily accept that there is
11 no finding on excessive pricing.

12 In relation to dominance, I must confess we have difficulty with the question about jurisdiction.
13 It is clear from our Notice of Appeal that we are seeking a finding on an infringement of
14 Chapter II which includes the abuse of a dominant position, or is defined as the abuse of a
15 dominant position. We now have in effect a margin squeeze finding and we say that there
16 should be a dominance finding, and we cannot really see how that can be said to be outside of
17 the scope of this Appeal or the jurisdiction of the Tribunal merely because the Authority
18 effectively ducked the issue.

19 Mr. Vajda made various points about 19(2)(j), the only one I would comment on specifically is
20 whether or not 19(2)(j) should only be used for small or uncontroversial points. In my
21 submission that is not necessarily the case and it may be most appropriate for it to be used for a
22 substantial issue where the Tribunal considers that it needs to give careful directions to the
23 Authority to pursue a specific but possibly quite substantial issue. That is not particularly what
24 we are seeking here. We tend to favour matters being resolved by the Tribunal, but we would
25 not say that the 16(2)(j) power is limited only to relatively trivial points.

26 There are obviously a number of points in relation to United but I suspect that they can be dealt
27 with hopefully in a spirit of co-operation in the negotiations which the Tribunal has suggested,
28 or else in relation to the question of dominance and the extent to which however technically
29 possible it may be to construct a pipeline to replace or to complement Ashgrove, that as a
30 matter of commercial reality our understanding is the United Utility – certainly in recent years
31 – has never shown any interest in doing it, and nor indeed has anybody else so far as we are
32 aware.

33 I think those were the points that we had to make.

34 THE PRESIDENT: Thank you, Mr. Thompson.

1 MR. THOMPSON: I am grateful, Sir.

2 THE PRESIDENT: I think we will just rise for a few moments and consider where we are, if you
3 will bear with us, ladies and gentlemen. Thank you.

4 (The hearing adjourned at 4.50 p.m and resumed at 5.25 p.m.)

5 (For Judgment see separate transcript)

6 MR. RANDOLPH: Sir, just one small point, the 14th November, yesterday Marion Simmons QC,
7 sitting as the Chairman or Chairwoman of a hearing in the “Cityhook” case, fixed a hearing on
8 that very day and I am in that case.

9 THE PRESIDENT: Right, we will see if we can sort that out, Mr. Randolph.

10 MR. RANDOLPH: I am very grateful.

11 MR. VAJDA: In relation to the 14th November, I just raise this, I, myself, am going to be away for
12 two weeks before then, and my Junior is on paternity leave – nowadays one has to treat men
13 equally to women – I raise that because the Tribunal may in the light of that consider another
14 date, but I know ----

15 THE PRESIDENT: We have not got a great deal of room for manoeuvre is the problem,
16 Mr. Vajda. When do you get back? This is a break, is it?

17 MR. VAJDA: Yes, I get back on 13th November, which is the Monday. I assume from the fact that
18 nobody else, apart from Mr. Randolph has got up, that that date suits everybody else.

19 MR. RANDOLPH: Sorry to put a fly in the ointment again, Sir, but as of the Thursday in that week
20 I am in the Falkland Islands on a case for 10 days, I physically cannot get back – I would love
21 to get back from the Falklands earlier, but I physically cannot fly back earlier than the
22 following Friday.

23 THE PRESIDENT: You set out for the Falklands on what date?

24 MR. RANDOLPH: On the Thursday at midnight.

25 THE PRESIDENT: On the Thursday?

26 MR. RANDOLPH: At midnight, and I come back on the Friday – not at midnight.

27 MR. VAJDA: Obviously this case has taken a long time, but to fix a date which is three weeks away
28 now in the light of all the time that this case has taken, in my respectful submission – obviously
29 one wants to get this case done – it would be fairer if one could have a date when proper
30 preparation on one issue that the Tribunal itself recognises is important can be done, because
31 certainly my team are going to be without Leading and Junior counsel for that period.

32 THE PRESIDENT: Well Mr. Randolph is going to be away for the following fortnight.

33 MR. RANDOLPH: Week.

1 THE PRESIDENT: The following week, Sir. So if we slipped it a week – the Tribunal’s diary is a
2 nightmare. Let us just see if we can sort this out.

3 (The Tribunal confer)

4 THE PRESIDENT: Let us see where we are, we do not really want it to slip two weeks if we can
5 help it. The ideal would be to slip it until the 21st, which would give Mr. Vajda to consider the
6 no doubt excellent work that extremely experienced and competent instructing solicitors would
7 have done in the meantime, but that raises a problem for Mr. Randolph.

8 MR. RANDOLPH: It does indeed, because I will be in Stanley.

9 THE PRESIDENT: I cannot do the 28th so it would have to be the 27th, but that is leaving it rather a
10 long time. (After a pause) We are struggling a bit at the moment.

11 MR. VAJDA: There are three points really. First, effectively what I call ‘procedural fairness’ in
12 terms of time. The second is actually fixing a hearing, and in relation to that – I am just
13 floating this – it may be that this is something that could be done simply by way of written
14 submission. I am just floating that as a possibility.

15 THE PRESIDENT: Well we would be delighted to do it by way of written submission if that was
16 acceptable to the parties, that would simplify everybody’s task.

17 MR. VAJDA: But obviously it is important, if one has had a case going on this length of time that
18 one has time to consider that. Speaking completely off the cuff at the moment, without
19 instructions – leaving aside our jurisdiction point, which is a point of law – we may well say
20 “This can be dealt with simply in writing”. I do not know what the position of the other parties
21 is, but for my part I would not insist on a hearing if we thought it was unnecessary.

22 THE PRESIDENT: Well we do not think it was unnecessary, we simply offer it to those who feel it
23 is necessary.

24 MR. VAJDA: Yes. What I would say is that we need to have sufficient ----

25 THE PRESIDENT: If it were the case that parties were content for us to deal with it on the papers,
26 we could perhaps give a little more time for the papers, as it were.

27 MR. VAJDA: That is the thought that is going through my head, certainly that is a possibility and if,
28 in a sense, we were put on Morton’s Fork, as it were, to choose between a longer time to put
29 something in and a hearing, I think we would certainly take the former rather than the latter.

30 THE PRESIDENT: Let us go round – I am sorry it has taken so long, but it is probably important to
31 sort it while everyone is here.

32 MR. THOMPSON: I think the point as this evolved I was becoming concerned there were quite a
33 number of other issues which the Tribunal has left hanging and which, I suspect, will need a
34 hearing at some point. I had understood the Tribunal’s indication to be that they were hoping to

1 deal with all these things at once, and so if we lose a hearing on dominance I think we are
2 going to have to find a hearing at some point to address all these other issues.

3 THE PRESIDENT: Yes. When did you say you were back, Mr. Vajda?

4 MR. VAJDA: Back on 13th November, which is the Monday. As I say, it is unfortunate that my
5 Junior is away.

6 THE PRESIDENT: Yes, quite.

7 MR. VAJDA: But you are absolutely right that we have superb solicitors who are instructing us and
8 obviously work will be done. I would have thought that if we could put it in, say, on Monday
9 20th, which gives the weekend in case there is an overrun ----

10 THE PRESIDENT: Our preferred course, if it is acceptable to all the parties, would be to have
11 written submissions on dominance to be lodged by, let us say, Friday, 17th, and to assume that
12 it is unnecessary to have an oral hearing on that point, but there will be other points that we
13 need probably to address in general meeting, as it were, which we should try to deal with on
14 Monday, 27th November by which time we hope that everybody would be back and available.
15 Is that a fond hope?

16 MR. VAJDA: I am starting a five day case in the Chancery Division on 27th November.

17 THE PRESIDENT: Then it will have to come back to the 24th, or 23rd. 28th or 29th is difficult for the
18 Tribunal, the 30th is a possibility – at least as far as I am concerned.

19 MR. VAJDA: That week I am in the Chancery Division. What about a week in December, is that
20 not possible, 4th December? I do not know how the Tribunal is fixed on Monday 4th, or indeed
21 any day that week?

22 MR. VAJDA: One has to bear in mind also, if there is going to be an Appeal and there is going to be
23 work on costs, so there is quite a lot going on and again in terms ----

24 MR. THOMPSON: If we get into the beginning of December it starts to become difficult for me,
25 and obviously from a policy point of view I have a slightly different agenda from Mr. Vajda
26 and so I have not heard any particular objection to 24th at the moment.

27 PROFESSOR PICKERING: I am sorry, I am not available.

28 MR. THOMPSON: Oh, I am sorry.

29 THE PRESIDENT: I think we had better work out our own diaries.

30 (The Tribunal confer)

31 THE PRESIDENT: We have a miraculous slot on the 20th. Is Mr. Randolph still in Port Stanley?

32 MR. RANDOLPH: I am just starting my case on Monday, 20th, unfortunately.

33 THE PRESIDENT: We may not be able to please everybody. What was the matter with 27th?

1 MR. VAJDA: 27th that is the start of my case. With respect to Mr. Thompson, given the length of
2 time that this case takes, obviously if he cannot do 4th December because he has a fixture I
3 understand that, but I cannot see in terms of a hearing, as it were, wrapping this case
4 up ----

5 THE PRESIDENT: We are not very willing to lose the whole of November when we only have to
6 wrap the case up as it were. We would much prefer to do something in November than not,
7 and I am just wondering if something has to give whether, if we have your full written
8 submissions, Mr. Randolph, whether it should not be United Utilities? You have a somewhat
9 ancillary role, if I may use that rather overworked word, and perhaps your instructing solicitor
10 could stand in?

11 MR. RANDOLPH: I certainly do not want to be the only reason why the hearing could not take
12 place in November, it just happens unfortunately by dint of circumstance ----

13 THE PRESIDENT: I think we ought to aim for the week beginning 20th if we can. It has to be the
14 20th according to Mr. Lewis. How are people placed on 20th November? Right, let us say 20th
15 November before anybody says anything else. Thank you very much.

16 MR. ANDERSON: Before you rise, just on the question of the Appeal, given that we are now
17 putting in written submissions not on the 9th but on the 17th, could we have another seven days
18 to consider the question of appeal, because of course a request to seek permission would be
19 taken at Board level and it really is a matter to which we would want to give careful
20 consideration rather than take a quick decision. We will of course make the submissions on
21 costs within the 14 days, but if we could also have 14 days in which to seek permission to
22 Appeal, if that is the decision, that would be of great assistance. (After a pause) Perhaps to
23 the 17th rather than 14 days on top of the 6th.

24 THE PRESIDENT: Yes, I think you mean to the 17th.

25 MR. ANDERSON: So you get it before the hearing on the 20th.

26 MR. THOMPSON: It may be Mr. Anderson was making the same point, that we will then be
27 making submissions on the Friday and then all convening on the Monday ----

28 THE PRESIDENT: These are written submissions.

29 MR. THOMPSON: But nevertheless whatever issues, it does strike me that it may be convenient to
30 have a working day where everybody can digest whatever anybody has put in so that it would
31 be sensible to have the written submissions in on the 16th if we are going to be convening on
32 20th.

33 THE PRESIDENT: I think there is some force in that. Can you possibly manage the 16th, Mr. Vajda
34 – 5 o'clock on the 16th.

1 MR. VAJDA: What about 1 p.m. on Friday? (Laughter)
2 THE PRESIDENT: All right, shall we settle for 1 p.m. on Friday.
3 MR. THOMPSON: It shows the spirit of negation is breaking out between the parties.
4 THE PRESIDENT: Well let us carry on in that vein. 1 p.m. on Friday, hearing on the 20th.
5 MR. VAJDA: Can I raise one last issue?
6 THE PRESIDENT: Yes, of course.
7 MR. VAJDA: In relation effectively to the Judgment that you, Sir, have just given, all I want to say
8 on that is that we may or may wish not to appeal that but what I would like to do is to try and
9 deal with it in a sensible way which is if effectively the Tribunal could, as it were, extend time
10 in relation to that because I do not think that we are going to want to rush off to the Court of
11 Appeal on that now. On the other hand, we do not want somebody to say at some point “You
12 are out of time because you should have appealed this decision”.
13 THE PRESIDENT: Well you have a month, which takes us beyond the 20th.
14 MR. VAJDA: Yes.
15 THE PRESIDENT: So I do not think you need an extension at the moment, come back if something
16 crops up.
17 MR. VAJDA: Yes, fair enough.
18 THE PRESIDENT: All time is extended until 1 o’clock on 17th November, i.e. permission to appeal
19 and date for the written submissions and so forth. Thank you very much indeed.

20 (The hearing adjourned at 6 p.m.)
21