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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1031/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB
Wednesday, 2nd June 2004

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

Sitting as a Tribunal in England and Wales

B E T W E E N:

ALBION WATER LIMITED

Appellant

- and -

THE DIRECTOR GENERAL OF WATER SERVICES

Respondent

DR JEREMY BRYAN, MR MALCOLM JEFFERY and MR DAVID KNAGGS
appeared on behalf of Albion Water Limited.

MR GEORGE PERETZ and MS VALENTINE SLOANE appeared on behalf
of the Director General of Water Services.

DR FERGUS RANDOLPH and MR SIMON GARDINER appeared on behalf
of the Intervener United Utilities Limited.

MR AIDAN ROBERTSON and MS SUYANG KIM appeared on behalf of
the Intervener Dwr Cymru.

MR MICHAEL O'REILLY appeared on behalf of the Intervener
Aquavitae.

Transcript of the Shorthand notes of Harry Counsell & Co.
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PROCEEDINGS

1
2 THE PRESIDENT: Good morning, ladies and gentlemen. We are
3 sorry to have kept you waiting. As you can no doubt
4 understand, we have used the time to consider amongst
5 ourselves the issues that arise in this case.

6 I think that, rather than follow the agenda as
7 previously circulated, there are a number of issues that
8 we would like to address which are probably in, I am not
9 sure if it is ascending or descending order of difficulty.

10 We thought we would say something, first, about the
11 procedural situation that now exists in this case in the
12 light of the new decision; secondly, address a very
13 recently received application from Aquavitae Limited to
14 intervene; thirdly, to park, as far as today is concerned,
15 the question of disclosure of further documents in the
16 hope that that can be progressed as between the parties;
17 and then, fourthly, to have a discussion with the parties
18 on the situation as regards interim measures. If we
19 proceed roughly along those lines we will just see where
20 we get to. I think this hearing should, for the time
21 being, continue on a relatively informal basis to see how
22 far agreement can be reached on all those various matters.

23 Could we also start, if we may, by giving credit
24 where credit is due. We are indeed grateful to the
25 Director for the fact that he has been able to expedite
26 the decision, for the fact that that decision has been
27 taken and that a great deal of work has obviously gone
28 into the preparation of that document. So we feel that,
29 to that extent, progress has certainly been made.

30 We also note and are grateful for the fact that at
31 least some discussions have taken place between the
32 Appellant and Dwr Cymru with a view to arriving at a
33 possible holding solution, for which we are grateful and
34 to which we will return in a moment.

35 If we then take the first issue, the existing appeal
36 in the context of which this Case Management Conference is
37 technically taking place is against a number of alleged
38 previous decisions of the Director. We have now got the

1 new decision and it would seem to us, at first sight, that
2 procedurally the cleanest solution would be for Albion
3 Water, if so advised, to introduce a new appeal against
4 the new decision and then for the various procedural steps
5 that follow to take place in the context of the new
6 appeal, that is to say a defence from the Director,
7 interventions and so forth. We would not as of today, as
8 it were, vacate the existing appeal. That should stay in
9 the list for the time being, without any further steps
10 being taken in the existing appeal. But it may be, in due
11 course, that if we follow our suggestion, when there is a
12 new appeal then the existing appeals can be discontinued
13 by consent or something. We will see. That is
14 essentially how we see the procedural shape of these
15 proceedings so far as the future is concerned.

16 I wonder if it might be convenient on that issue just
17 to go round the parties represented here to see what their
18 position is. Before we do that, I perhaps just ought to
19 touch on the second question which is as far as Aquavitae
20 is concerned. They are present here today.

21 MR O'REILLY: Yes, sir.

22 THE PRESIDENT: Good morning, Mr O'Reilly. Our provisional
23 view, at the moment, is that in due course we would
24 probably be minded to permit Aquavitae to intervene,
25 although I think technically speaking that would be an
26 intervention in the new appeal still to come, though they
27 could intervene in the existing appeals for form's sake,
28 that is also true. However, we have not yet heard the
29 other parties on that question, so our preferred course as
30 far as today is concerned is simply to permit Aquavitae to
31 be heard today, if they have anything they wish to say
32 today -- since they are present it would seem
33 inappropriate not to hear them -- but to rule formally on
34 the intervention when we have had a chance to hear the
35 other parties if objection is taken to that intervention.

36 So I include you for the moment, Mr O'Reilly, in my
37 invitation to express a view on how you think things
38 should proceed when I invite comments from the parties.

39 If, however, we can just start with what I hope is

1 the relatively straightforward procedural issue and just
2 see what attitude the parties have to that. I think
3 probably I ought to start with you, Dr Bryan, if I may, to
4 see how you just see the procedural issue. Good morning.

5 DR BRYAN: Good morning, sir. Thank you. We had recognised
6 that the application would need substantial revision even
7 though the heart of the decision has not changed, so I am
8 quite content with the prospect of a new application,
9 subject only to my concerns about unnecessary delay.

10 THE PRESIDENT: Yes. It would be up to you to remould your
11 existing application, as it were, to take account of the
12 new decision and then the matter would roll forward
13 according to the Tribunal's normal timetable.

14 DR BRYAN: Indeed, sir, yes. It would be our ambition to
15 deliver a new application before the end of June.

16 THE PRESIDENT: Yes.

17 DR BRYAN: But obviously there is still more work to be done.

18 THE PRESIDENT: If we proceed on that basis you would
19 technically have the two months from the date that you
20 were served with the new decision, but it is obviously in
21 your interest to expedite that as far as possible.

22 Yes, Mr Peretz, I think we are broadly following the
23 Director's suggestion in this respect.

24 MR PERETZ: Yes, it appears to be entirely sensible. I do
25 not know whether now is the right moment to comment on the
26 prospect of the intervention?

27 THE PRESIDENT: Yes.

28 MR PERETZ: I think we would put down a couple of markers.
29 First of all, just as a practical suggestion, it seems to
30 us, if we may suggest this, that Aquavitae might quite
31 like to talk to Albion to see to what extent Albion is in
32 any event going to address the issues that Aquavitae
33 believes are important. It may turn out that Aquavitae,
34 having had discussions with Albion, may decide that it
35 does not need to intervene because Albion is proposing to
36 take the points it would have taken anyway. Intervention
37 should not be regarded as axiomatic in these situations
38 and there may be discussions going on between them. We
39 already have two interveners in this case, quite properly.

1 One gets slightly hesitant about a third. There are
2 obvious potential cost implications and implications for
3 the manageability of the proceedings. So if I could just
4 make that suggestion.

5 THE PRESIDENT: Are you formally or likely formally to object
6 in due course, or have you not taken a view yet?

7 MR PERETZ: A certain amount depends on the shape of the
8 appeal Albion puts forward. Subject to that, we are not
9 likely formally to object to the intervention, subject to
10 some concern, as I said, as to the manageability of the
11 proceedings.

12 THE PRESIDENT: So you may want some case management
13 directions on how the intervention proceeds?

14 MR PERETZ: Indeed. We note that the point on which there is
15 a proposed intervention is a relatively limited, at best,
16 aspect of the decision. The intervention is addressed to
17 the interpretation of section 66(e) of the 2003 Act. The
18 decision does not apply section 66(e) of the 2003 Act; it
19 is not in force. As the intervention itself rather fairly
20 puts it, section 66(e) comes in as a sort of test, because
21 if one turns to the paragraphs 323 of the decision----

22 THE PRESIDENT: The decision is obviously attempting to adopt
23 a line that is consistent with what it thinks the 2003 Act
24 will do when that comes into force.

25 MR PERETZ: Indeed. I put it this way: quite sensibly, out
26 the corner of our eye we wanted to see what would happen
27 if section 66(e) had been in force and was being applied,
28 and use that as a sort of check as to what we were doing
29 under the Competition Act. Because if there had been some
30 startling disparity between the two approaches, that might
31 have had implications, so it was a sensible thing to think
32 about. But it is very much a side issue to the decision
33 itself. We are slightly concerned about the prospect of
34 being dragged too much into what is a side issue, raising
35 issues which may be fascinating in theory but do not
36 really have much implication for the decision itself.

37 I think we just wanted to put those markers down and
38 we are concerned being dragged into this issue. What I
39 was going to suggest, and perhaps I could put this down as

1 a marker for when it comes, is that if there is an
2 intervention it should be in writing, it should be
3 confined to stating the arguments in writing and any
4 further steps that this intervener might want to take in
5 the litigation should be subject, in a sense, to prior
6 application to the Tribunal.

7 THE PRESIDENT: We will cross all those bridges a little later
8 on, I think.

9 MR PERETZ: I thought it might be helpful just to set out
10 our position briefly now.

11 THE PRESIDENT: Thank you very much. Yes, Mr Robertson for
12 Dwr Cymru.

13 MR ROBERTSON: Sir, on the first point on procedure our
14 biggest concern is that there should not be unnecessary
15 delay, so we would like to encourage Dr Bryan to put in
16 his application as soon as possible.

17 On the second point and Aquavitae, I think it is
18 likely that we will put in written submissions objecting
19 to their intervention. Points on interpretation of the
20 new legislation are under consideration in a number of
21 working groups in the industry and it may be that this
22 will encourage other interventions on other points in the
23 decision which have implications for the new legislation.

24 Obviously, that is something we need to consider. We
25 only saw the application last night. But we do have that
26 concern. If that is the case, then there may be other
27 similar applications to intervene, which really would
28 start bogging down this case.

29 THE PRESIDENT: We can always sort of manage that if there
30 were a number of interventions. We can always sort of
31 keep it within bounds through case management directions.

32 The threshold issue is whether Aquavitae can establish a
33 sufficient interest. On that that would be the issue to
34 concentrate on if you really did want to oppose it. But
35 we will not prejudge that issue at this stage.

36 MR ROBERTSON: That is noted.

37 THE PRESIDENT: Yes, thank you very much. Yes, Mr Randolph.

38 MR RANDOLPH: Sir, good morning.

39 THE PRESIDENT: Good morning.

1 MR RANDOLPH: With regard the first issue, we are entirely in
2 agreement with your suggestion. It was a suggestion we
3 put forward as well in our submissions and we are grateful
4 to hear from Dr Bryan that he can get his new notice of
5 appeal in before the end of June, because we too, like
6 everybody else, are keen for this matter to be progressed
7 as quickly as possible.

8 With regard to the second matter, we are going in
9 terms graduation here. My learned friend Mr Peretz said
10 he was fairly neutral on the issue. Mr Robertson said he
11 might. We will object, quite clearly. We do not think
12 that, by any stretch of the imagination, Aquavitae have a
13 sufficient interest. It is all predicated on what might
14 happen sometime in the future, what they might do and what
15 Government did or did not want. It has nothing to do with
16 the outcome of this case -- nothing.

17 So we are putting down a marker and we would be
18 grateful if the Tribunal could indicate deadlines in terms
19 of submissions. If, for example, this application for
20 intervention is going to be taken as ready as of now, for
21 example, then we would obviously want some time to respond
22 to that. But if it is going effectively to be adjourned
23 pending the new notice of appeal and then a fresh
24 application to intervene, then of course time would not
25 start running until that new application to intervene was
26 made with regard to the new notice of appeal. I wonder if
27 we could, if possible, possibly have some clarification as
28 to exactly when we are expected to get our written
29 submissions in on this point.

30 THE PRESIDENT: Yes, we will give thought to that. Technically
31 speaking, it would seem that this is an application to
32 intervene in this existing appeal, which is the only thing
33 that it could be at this stage.

34 MR RANDOLPH: Indeed, it is the only existing thing.

35 THE PRESIDENT: But the practicality is that if the
36 intervention were to be allowed, it should be allowed in
37 the context of the new appeal, so we need to sort out to
38 handle that, I agree with you.

39 MR RANDOLPH: Yes. Sir, one final point, which you have just

1 raised in my mind. In putting forward the approach of a
2 new notice of appeal we would obviously wish that our
3 present status be continued, i.e. as an existing and
4 allowed intervener, and we would not want to jeopardise
5 that.

6 THE PRESIDENT: Of course, yes. Technically speaking, we
7 would probably have to wait until we had the new appeal
8 and then just make consent orders continuing the existing
9 intervention.

10 MR RANDOLPH: Very grateful.

11 THE PRESIDENT: Mr O'Reilly, are you able to follow the
12 discussion so far?

13 MR O'REILLY: So far, sir, yes.

14 THE PRESIDENT: I think we are hearing you provisionally
15 today, **de bene esse**, as lawyers would say incomprehensibly
16 to everybody else in the room.

17 MR O'REILLY: As everyone else has indicated, a new appeal
18 may be the cleanest way of doing it, in which case perhaps
19 we should hold our application to intervene until the
20 appeal notice is lodged. We note what the parties say,
21 ranging from the completely ambivalent to hostile
22 approaches, and we concur with your interpretation, if I
23 might be so bold, to say that the question is whether we
24 have sufficient interest or not. Of course we do not know
25 precisely the form in which the new appeal will set out
26 the matters.

27 THE PRESIDENT: Yes, I am inclined to agree with you that it
28 would probably be better for the Tribunal today not to
29 make any order on your existing application in the
30 existing appeal and then you will need to consider, when
31 the new appeal is there, what, if any, steps you wish to
32 take.

33 MR O'REILLY: Indeed, sir.

34 THE PRESIDENT: The only thing I think we need to do is later
35 I think if we try to clarify a timetable -- probably we
36 will do that at the end of the discussion -- so that we do
37 not lose time unnecessarily while we are moving from one
38 set of appeals to the next set of appeals.

39 MR O'REILLY: Indeed, sir. Perhaps I could indicate that our

1 intention is to be a low maintenance intervener and we
2 will happily give our intervention in writing, with the
3 proviso, if I might, that we should be allowed to stand up
4 and say something, perhaps from the second row, if
5 necessary, in order to correct any errors that we perceive
6 have crept into the proceedings.

7 THE PRESIDENT: Yes.

8 MR O'REILLY: On the second point, the question has been put
9 that perhaps this is a side issue but, in our view, the
10 Director has clearly set this cost principle out as a test
11 by which he will triangulate the question whether or not
12 the price is a fair one. It is clearly our view that this
13 is not necessarily a necessary chain in his reasoning but
14 it is an element in his reasoning which is sufficient for
15 us to intervene.

16 THE PRESIDENT: Yes. I think we will just leave the question
17 of intervention there for the time being.

18 Then I just want to really kill two birds with one
19 stone by, first, discussing the procedure and also looking
20 at the question of intervention. In the course of that
21 discussion a number of points were made about the 2003 Act
22 and the 1998 Act and we are conscious of the various
23 procedures that exist under the 1991 Act. We would, at
24 this stage, like to make the general comment that it does
25 seem to us, provisionally at this stage, quite important
26 to have some view as to what the relationship between
27 these three statutes is or should be; in other words, what
28 is the relationship between the 1991 Act, the 1998 Act and
29 the forthcoming 2003 Act? Is there a conflict of some
30 kind between them? Do they interrelate to each other? If
31 so, in what way? In other words, it may be difficult to
32 approach this case in the right way without having some,
33 as it were, strategic feel for these different legislative
34 measures.

35 We feel that, at this stage, and it may be that it
36 will come through the new appeal, through the defence,
37 through other interventions, that we need a certain amount
38 of background material on precisely what these three
39 different legislative measures are aiming to achieve. We

1 were interested, for example, to hear a moment ago from
2 Dwr Cymru that there are various working groups in the
3 industry trying to work out how it is supposed to work.
4 The whole question of relationship particularly between
5 the 1998 and 2003 Act -- albeit that the latter is not yet
6 in force, it is on the statute book and it is taken into
7 account indirectly in the decision -- seems to us to be a
8 matter of some importance and that is likely to be an
9 issue upon which we would like some help from the parties
10 at some point in these proceedings. It may be, when we
11 have got the pleadings, we shall need to reflect further
12 on how we best acquire a full picture of the scene, what
13 the overall parliamentary intention really is. That, I
14 think, is a comment generally.

15 That, I think, now takes us on to what is probably
16 the most important live issues so far as today is
17 concerned which is the interim measures application. It
18 might help matters along a little if we expose to the
19 parties the very provisional state of our present
20 thinking, having had a chance to read the initial
21 submissions. This is extremely provisional, of course,
22 and is subject to further argument and discussion. I am
23 now putting it in in very broad terms, without getting
24 into detail or into close legal analysis, which we would
25 obviously have to do if we were to give a major judgment
26 on this issue.

27 Our starting position is that we would see Albion
28 continuing in business pending the determination of the
29 appeal as a major objective of any interim measures
30 decision the Tribunal might take. We would be extremely
31 concerned if there was a serious risk of Albion going out
32 of business before this appeal could be determined. That
33 is our first and basic starting point.

34 The second point is related to what the proper scope
35 of any interim measures order should be and what the
36 justification for that order should be. At present, we
37 are hesitating as to the strength of the argument put up
38 by Albion Water that it would be important for the interim
39 measures, if granted, to give Albion sufficient resources

1 to fund the appeal. As at present, and extremely
2 provisionally, we somehow doubt whether the contended need
3 to employ specialist counsel plus expert economic
4 investment analysis advice, as it is put in the
5 application, would be a proper consideration to take into
6 account in the Tribunal's interim measures jurisdiction.
7 That is, however, only a first view of the matter, but
8 that is at present our first view.

9 Moving on from there and leaving that aspect on one
10 side, we have next understood from the papers, and we
11 regard it in a positive light, that Dwr Cymru has been
12 prepared for the duration of the appeal and, subject to
13 questions of creditworthiness being sorted out, been
14 prepared to make what we understand to be an open offer.
15 Do I take it I am allowed to mention a figure in open
16 court, Mr Robertson, or would you prefer that I do not?

17 MR ROBERTSON: Yes, there is no objection to the figure being
18 mentioned.

19 THE PRESIDENT: The open offer, which I understand is still an
20 open offer, I will be corrected if I am wrong, is that
21 Welsh Water would reduce Albion's existing price by 1.5p
22 pending the hearing of this appeal. The rationale for
23 that is that, as we understand it, the present **ex gratia**
24 payment of 3p per cubic litre paid by Shotton is reduced
25 to 1.5p at the end of this current month and the offer of
26 1.5p from Dwr Cymru is intended to fill that gap until
27 this appeal can be heard.

28 The response, as we understand it, to Albion on that
29 point is that that does not quite go far enough, although
30 Albion contends that the company is still able to meet its
31 statute obligations as a water undertaker. The argument
32 as put is that the delay, so Albion contends, in taking
33 the decision has meant that a number of financial
34 resources that have so far been used to keep the company
35 going have been exhausted and that the directors are,
36 therefore, in a very difficult position as far as keeping
37 this company going further is concerned while the appeal
38 is continuing; and Albion itself is looking for an
39 allowance to be made to take account of that fact, which,

1 as we understand paragraph 42 of the present application,
2 would move the 1.5p voluntary contribution being offered
3 up to 2.6p per cubic litre. That is the gap between the
4 parties at the moment. Whether and to what extent that gap
5 should be bridged or could be bridged and whether or to
6 what extent the additional argument put forward by Albion
7 Water is a sound argument is a matter which we would like
8 to hear the parties on in a moment.

9 As far as the issue of creditworthiness is concerned,
10 it seems to us, and this is our preliminary view, that, in
11 principle, Dwr Cymru probably is entitled to reasonable
12 assurance as to payment for the water that it is
13 supplying. Exactly what form that reasonable assurance
14 could or should take is a matter that can, we would have
15 thought, be discussed with a view to seeking some sort of
16 solution. So that, in very general terms, is where we, the
17 Tribunal, are at the moment.

18 I think it will probably be fairly obvious to
19 everybody here that from the parties' point of view, from
20 the Tribunal's point of view and from the industry's
21 point of view it would be very much better if some agreed
22 solution could be arrived at by way of a holding
23 operation during this appeal, without prejudice to
24 anybody's argument or anybody's rights at the end of the
25 day, simply to keep the matter open on a holding basis
26 until the appeal can be heard. In that connection I think
27 I should add that one should never prejudge these things,
28 but, at least at present, if we can manage this appeal in
29 a way that does try to concentrate on the main points and
30 not try to get into points that we do not need to decide,
31 we should be able to bring this appeal on for hearing in
32 the latter part of the year. We are possibly looking to a
33 judgment on the principal issues in the early part of next
34 year if everybody can operate in a fairly disciplined and
35 responsible manner.

36 We are conscious that the approach that I have so far
37 outlined does leave one significant question mark which is
38 a matter of concern to the Tribunal, which is what
39 possibilities are open to Albion Water to seek some kind

1 of advice on the presentation of its appeal and the
2 prosecution of its case. Because the case does
3 potentially raise important issues for the industry, it
4 does seem to us desirable that the arguments on both sides
5 are presented in as balanced and full a way as possible.
6 We would not wish this case to be hampered by the fact
7 that one side was, if I may use the expression without any
8 particular overtones, "struggling along" by comparison
9 with the resources available to the other side. We, for
10 ourselves, would like to hear any observations the parties
11 might have, collectively or individually, on how that
12 particular problem should be approached as a matter of
13 approach in a case such as the present.

14 Now, that is probably quite a lot to take in, what I
15 have just been saying. I hope it is helpful. We would
16 normally at this stage I think now go round the table
17 again to see what parties' reactions to that are. It is
18 probably convenient to do that. But, on the other hand,
19 if anybody wanted to rise for a few minutes just to
20 reflect over what the position is, we would be happy to do
21 that as well.

22 Dr Bryan, would you like to react straightaway or
23 would you like us to retire for a minute to give you a
24 chance to think?

25 DR BRYAN: I think if I could have five minutes to collect my
26 thoughts, sir.

27 THE PRESIDENT: Just collect your thoughts and take your time.
28 We will retire until 11.30 unless anybody comes and asks
29 us for more time.

30 (Short Adjournment)

31 THE PRESIDENT: Yes, Dr Bryan.

32 DR BRYAN: Thank you, sir. I think our major concern is that
33 we face the prospect of fighting on two fronts at once,
34 which is difficult.

35 THE PRESIDENT: And the two fronts are what?

36 DR BRYAN: The two fronts being to maintain solvency within
37 Albion on water level and to sustain the very high
38 standards that we have set our ourselves as a licensed
39 undertaker; and, at the same time, fight what from your

1 words already this morning looks to be quite a complex
2 legal matter in terms of the relationship between the
3 three Acts that you referred to.

4 THE PRESIDENT: Yes.

5 DR BRYAN: I think taking the first issue, I believe that
6 with goodwill the gap between 1.5p, which with the best
7 will in the world will see us bleed to death slowly over
8 that period, and the 2.6p is bridgeable. Were it to be
9 bridged, then I think we would be fighting on the single
10 front and we could bring far more of our resources to bear
11 on that, albeit very much from a layman's point of view.

12 On the specific technical issue which Dwr Cymru have
13 raised on creditworthiness I think there is a solution and
14 it is a solution that we would be happy to offer them,
15 which involves our accountants, who are independent,
16 holding the ring and providing security of income flows
17 from our customer through to Welsh.

18 THE PRESIDENT: You mean the money goes to your accountants?

19 DR BRYAN: It is effectively an escrow arrangement but
20 without the complexity, particularly as the money comes in
21 and goes out within a matter of a few days. But I think
22 for the accountants to look after that and, obviously,
23 Welsh would need to satisfy themselves about the mechanism
24 proposed. But I see a mechanism there. I would hope
25 that, were we to sit down with Welsh, we could see how far
26 we could bridge the gap between the 1.5 and the 2.6.

27 That would then leave us, sir, with the issue of
28 addressing the legal complexities that the case is likely
29 to give rise to. On that I am afraid I am at a little of
30 a loss. I can inform the Tribunal we have been approached
31 by one set of chambers with the offer of a very small
32 amount of **pro bono** work from counsel who has appeared
33 before you recently. But I do not believe that that will
34 go any way towards addressing the complexity of the issues
35 with which we are faced. I am afraid that is all I can
36 offer at the moment, sir.

37 THE PRESIDENT: Yes. Right, thank you very much. The
38 Director.

39 MR PERETZ: Yes, can I deal really with the question of how

1 the legal case that Dr Bryan might wish to put might most
2 effectively be put?

3 THE PRESIDENT: Yes.

4 MR PERETZ: We have a number of comments to make about the
5 question of viability, but for the moment I will park
6 those. One suggestion that has gone through our mind -- at
7 the moment it is only a suggestion -- might be that you
8 could consider appointing an amicus curiae. For the
9 benefit of Dr Bryan who may not be familiar with that
10 expression -- I am afraid I have not had the opportunity
11 to raise this with Dr Bryan -- what that means is
12 essentially an independent counsel who would not formally
13 be instructed by you, in fact would probably be instructed
14 by the Treasury Solicitor, but would be in a position to
15 put forward any legal arguments that were not properly put
16 forward by you and in a sense act as an assistant to the
17 Tribunal in determining the case.

18 THE PRESIDENT: Yes.

19 MR PERETZ: It can only be a suggestion because between us
20 and those behind me we are not entirely certain how an
21 amicus would be funded. Those whose job it is to fund an
22 amicus might well have something to say on the matter, but
23 it is perhaps an avenue worth exploring.

24 THE PRESIDENT: In the main court system, Mr Peretz, I have
25 never been quite clear how these things are in fact
26 funded, but I have always assumed that if the Court
27 invites the Attorney-General, the Treasury Solicitor,
28 whoever it is, to appoint an amicus, that is a cost that
29 is borne out of public funds.

30 MR PERETZ: I think one way or the other the taxpayer ends up
31 paying for it. But like you, sir, I am afraid I am not
32 privy to----

33 THE PRESIDENT: Not completely sure what the exact machinery
34 is, no.

35 MR PERETZ: That is simply a suggestion. I understand
36 neither of my learned friends to my right have any
37 objection to that course.

38 THE PRESIDENT: We would need to think about it possibly at
39 the stage when the issues have crystallised a bit more

1 clearly.

2 MR PERETZ: As to the timing of it, it seems to us it would
3 have to follow, in a sense, Dr Bryan doing the best he
4 could with the materials and assistance that he has
5 available to him. He has indicated he has had some
6 approaches. CFA arrangements might be a way forward. I
7 simply do not know and it is not appropriate for us to
8 comment. If he can do his best and we then respond with
9 our defence statements and intervention, at that point it
10 may become sensible to appoint an amicus to ventilate the
11 legal arguments properly.

12 THE PRESIDENT: If we need to.

13 MR PERETZ: Yes. I mean, from our point of view as the
14 Regulator, we like to feel that to some extent we act as
15 an **amicus curiae** ourselves, but we quite see from Dr
16 Bryan's perspective we are not entirely impartial.

17 THE PRESIDENT: We will assume until the contrary emerges that
18 the case will be conducted with the normal independence
19 and probity that any regulator would conduct any case.

20 MR PERETZ: Indeed. But, no matter how independent we are,
21 one can see Dr Bryan might want somebody else to put
22 arguments to you that for various reasons we would not
23 want to put.

24 THE PRESIDENT: Yes. Thank you. Mr Robertson?

25 MR ROBERTSON: Sir, first of all, I am very grateful to Dr
26 Bryan's suggestion on dealing with the creditworthiness
27 issue. That had occurred to us as well as being the most
28 simple and straightforward way of dealing with this, an
29 escrow account, so I think we are really back to figures,
30 1.5 against 2.6. We are firmly of the view that 1.5 is a
31 very fair offer. It is standing in the shoes of Shotton
32 Paper who withdraw their funding at the end of this month.
33 Dr Bryan, of course, if this suggestion about an **amicus**
34 **curiae** being appointed does go forward, has some of the
35 heat taken off him as a result of that. We would suggest
36 we are sufficiently close together at present for the
37 interim measures application to be adjourned so that Dwr
38 Cymru and Dr Bryan can hold discussions as to funding and
39 the terms on which a creditworthiness check, an escrow

1 account could be put into place.

2 THE PRESIDENT: When you say "discussions as to funding" what
3 do you mean exactly? For what purpose would we be
4 adjourning, Mr Robertson, to have discussions on what
5 exactly?

6 MR ROBERTSON: To allow the parties to negotiate to see if we
7 can settle an agreement between the parties.

8 THE PRESIDENT: On the outstanding issues?

9 MR ROBERTSON: Yes. But it may be that that is not something
10 that one can just do at the door of the court today,
11 because the view as to the level of funding that Dr Bryan
12 is looking for may well be affected by information as to
13 whether an **amicus curiae** can be appointed by the Tribunal.

14 THE PRESIDENT: Yes. Now, on that point, whether that is
15 something the Tribunal would want to do is a bit difficult
16 to judge at this stage. It certainly an option which one
17 I think can probably consider in principle as a
18 possibility. But whether we would want to do that would
19 rather depend on what the nature of the issue finally is.
20 It might revolve around the relationship between the
21 legislative statutes in question; it might not. Although
22 we are now in a world of **amicus curiae**, with the passing
23 of EC modernisation regulation one would probably need to
24 be a bit cautious about embracing that solution before one
25 knew exactly what the point was.

26 MR ROBERTSON: We can appreciate that. At that point I think
27 we would submit that our offer of 1.5 is fair and is based
28 on the very obvious calculation----

29 THE PRESIDENT: Yes, we have understood your logic absolutely.

30 MR ROBERTSON: The Tribunal has indicated previously in the
31 Genzyme case that it takes a minimalist approach to the
32 grant of interim relief. We say that is the appropriate
33 minimalist approach at this stage. But it is relevant and
34 there is the possibility of an amicus in the future which
35 would take off some of the heavyweight legal research from
36 the Appellant in this case.

37 I am also reminded that we would need to discuss, in
38 any event, the details of the escrow arrangements that Dr
39 Bryan has in mind. That is not something, I do not think,

1 we can do at the door of the court today. That is why we
2 would invite the Tribunal to adjourn the interim measures
3 application, with liberty to the parties to restore if
4 they cannot reach an agreement. I think so far the
5 parties have adopted a pretty constructive approach on
6 this issue at the invitation of the Tribunal at the first
7 Case Management Conference.

8 THE PRESIDENT: We feel ourselves much better informed in that
9 this case is steadily assuming a structure and shape in
10 which we can come to grips with some of issues in a better
11 way perhaps than hitherto. That has been helpful and
12 positive and we are grateful for the role that everyone
13 has played in that.

14 So your suggestion is that it would still be worth
15 perhaps adjourning to see whether existing outstanding
16 issues can be resolved?

17 MR ROBERTSON: Yes, sir.

18 THE PRESIDENT: Yes. Thank you Mr Randolph?

19 MR RANDOLPH: Sir, we do not have a direct interest in this
20 and I make these submissions just in order to assist,
21 hopefully, the Tribunal. We fully agree, if we may be so
22 bold, with the Tribunal's point that it is in no one's
23 interests to see Albion go out of business. That is
24 obvious. So anything that can be done to keep the status
25 quo as is is obviously a good thing. It is in that light
26 that we put forward the following suggestion. My learned
27 friend Mr Peretz has put forward the idea of what I think
28 in more Woolfian terms would be known as a "friend of the
29 court". We would put forward another suggestion, which
30 may be either an alternative or in addition to that, and
31 that is some form of conditional fee arrangement. Dr
32 Bryan mentioned that one chambers and one counsel had
33 kindly agreed to donate his or her time **pro bono**. There
34 are now relatively frequent situations whereby even
35 large-scale litigation -- I speak from personal experience
36 on this -- involving competition matters have been dealt
37 with by way of conditional fee arrangements. One thinks
38 of the recent litigation in front of Colman J, the Arkin
39 litigation, as a matter of fact he ruled on that, where

1 indeed professional funders were found to be in a, if I
2 may put it this way, a win/win situation. If they won the
3 case or their clients won the case then obviously they
4 take a share of the damages. I think Dr Bryan has set out
5 in some document that if he is successful in this appeal
6 then he will be seeking damages. So that would be one
7 possibility. Following on from Colman J's judgment in the
8 Arkin matter, if professional funders' clients are
9 unsuccessful, then they are not liable to pay costs. They
10 cannot stand in the shoes of the client because otherwise
11 that would unfairly impede access to justice. That is the
12 present state of English law.

13 THE PRESIDENT: Just for the benefit of the Tribunal, when you
14 use the expression "professional funders" you are
15 referring to?

16 MR RANDOLPH: Companies that professionally fund litigation,
17 such, for example, and I am throwing this out as an
18 example because I happen to know of this company, M.P.C.
19 They have professionally funded for a considerable number
20 of years, starting off with pollution claims and moving
21 on. There are other companies, obviously, and one can
22 look at the websites generally to find out what
23 competition there is in the marketplace. But there are
24 these companies that are out there that do have,
25 effectively, solicitors, not on tap but they have
26 solicitors who they can deal with who will then
27 effectively professionally manage the litigation. One
28 comes to arrangements whereby either the solicitors and/or
29 counsel are CFA bound. There have been a number of recent
30 judgments by the Court of Appeal on the enforceability of
31 conditional fee arrangements to make sure that everybody
32 knows exactly what should and should not be in these
33 arrangements and this gives rise to the ability of a party
34 which cannot afford to properly fund its position and
35 cannot, through whatever reason, obtain legal assistance
36 -- it used to be known as Legal Aid -- in order to ensure
37 that, as the Tribunal has said, their case is best put.

38 Sir, again I have not had an opportunity of
39 discussing this with Dr Bryan, but it may be it is an

1 avenue that he could go down. That would hold the ring to
2 the extent that -- I do not want to get into price
3 differentials and the gap, but we have got the suggestion
4 or open offer from Welsh Water which effectively puts the
5 position back to where it was or is presently until the
6 end of June. That, taken with some form of funding under
7 a CFA arrangement, would deal with what appears to be a
8 serious issue or a serious concern raised by Dr Bryan,
9 that of the ability to prosecute his case to the best of
10 his abilities. In this way there would not need to be any
11 further movement. One could keep the 1.5 and move ahead
12 on the proper prosecution of the case. It may be in that
13 way, and I say it is either an alternative or possibly it
14 could be one could have a conditional fee arrangement and,
15 if need be, a friend of the court, but it would certainly
16 lessen the pressure to have, say, a friend of court
17 involved.

18 I throw that out, I put that down simply as some form
19 of assistance.

20 THE PRESIDENT: Thank you. Mr O'Reilly, do you have any
21 submissions on this part of the discussion?

22 MR O'REILLY: No, sir.

23 THE PRESIDENT: Yes, Dr Bryan?

24 DR BRYAN: Sir, I think there is a degree of confusion about
25 the difference between the 1.5 and the 2.6. None of that
26 is, in our mind, allocated to----

27 THE PRESIDENT: Not related to the cost of the appeal?

28 DR BRYAN: Indeed, sir.

29 THE PRESIDENT: Yes. (**Pause**) We are going to retire for a
30 moment and have a think about what we should do next.

31 (**Short Adjournment**)

32 THE PRESIDENT: Could I just, first of all, make one comment
33 which I think is probably directed towards Mr Peretz and
34 the Director more than anyone else, Mr Peretz, which is
35 this. We are aware of the fact that part of the
36 complexity of the case results from the fact that Dwr
37 Cymru have now made an application to the Director to
38 determine a bulk water price. I do not know what the
39 timetable for that issue is, but plainly the Tribunal

1 would be somewhat unhappy if that side of things were to
2 develop in a way that might be seen as some preemption of
3 the way the appeal is unfolding, if I may put it like
4 that. Can I just make that comment on the record so that
5 that is something that everybody is aware of and we would
6 expect to be kept in touch with any developments there
7 were in that respect. No doubt the Director will wish to
8 begin to consider the issues that that raises, but we
9 would hope that the matters would develop in a way
10 consistently with the fair determination of the appeal.

11 MR PERETZ: In that connection may I make a brief confession,
12 as it were. In paragraph 12 of our submissions we
13 slightly overstated the position because what we said
14 there was that the Director was going to determine to the
15 application. The Director has not yet decided whether he
16 is going to determine the application. In fact that is
17 clear from the letter of 28th May that we wrote. One of
18 factors which was very much in our mind is that the
19 subject of interim measures is before this Tribunal and,
20 as you rightly say, the subjects are interrelated in
21 various ways, so I do not think from our point of view
22 there is any difficulty with saying we will keep the
23 Tribunal informed of what is happening in that area, if
24 anything does happen. We very much are conscious of the
25 interrelationship between those issues and we would not
26 want to poke a stick into a hornet's nest, or whatever the
27 correct metaphor is, by making a determination in
28 circumstances where that would be rather unhelpful.

29 THE PRESIDENT: Thank you very much.

30 Coming to the outstanding issue, which is effectively
31 the gap between the 1.5 and the 2.6 and the detail of the
32 credit side of things, we would, for ourselves, be quite
33 anxious to see that the parties made a further effort to
34 reach agreement while we are all foregathered here, even
35 though I fully appreciate the door of the court is not
36 always the best circumstances in which to make progress.
37 Nonetheless, there are certain countervailing
38 psychological and other advantages in everybody being
39 present at a time when at least matters can be discussed

1 in principle.

2 It so happens that the Tribunal continues to be
3 available and what we are proposing to do in a moment is
4 to rise and reconvene at 1.45 in the hope that the parties
5 could at least explore in the interim whether there really
6 is scope for further progress or not; and, if there is,
7 what kind of progress might be envisaged without
8 necessarily reaching a complete solution, though that
9 would be highly desirable if they could. We do think we
10 should use this time now to best advantage, if we possibly
11 can, with a view to reaching a consent order, if that is
12 possible.

13 On the issue of the bridge, putting it very broadly
14 and succinctly, not really doing justice to the underlying
15 issue, our present preliminary view is that we have not
16 yet seen in the papers that we have got perhaps a full
17 justification for the figure of 2.6. On the other hand,
18 as we have understood it so far, we do have sympathy for
19 what appears to be the personal position of the principal
20 director, Dr Bryan, who does not appear to be in a
21 position to draw any salary whatever from the companies
22 concerned while this appeal is pending. That might well
23 be a factor that the Tribunal would wish to take into
24 account were it to have to rule on the interim measures
25 application. Those are preliminary views. As I say, it
26 is stated without hearing full argument from the parties
27 beyond what we have got in the papers.

28 What I would suggest is, if we can maintain the
29 developing spirit of helpfulness that has been apparent
30 this morning a little longer, we would now propose to rise
31 and reconvene at 1.45 and we would hope the parties would
32 then be in a position to report back to us on what, if
33 any, further progress has been made in the interim and to
34 use that time for a discussion. There are telephones,
35 there are means of communication back to base, and so on
36 and so forth, and it should not be too difficult to
37 establish what the parameters are. So that would be what
38 we propose to do unless anybody has any further
39 submissions to make at this stage. (**No reply**) Very well.

1 else who could offer them better terms, and it is fairly
2 obvious that anyone can offer them better terms, not least
3 Dwr Cymru itself, at present. I am uncomfortable about
4 the extra risk that we will be exposed to if I am forced
5 to go to UPM and ask them to enter into a further legal
6 undertaking which is required because of fundamental
7 concerns about our creditworthiness. I think that that
8 exposes us to additional risk at a time when we are
9 seeking to manage risk down. I will be corrected if I am
10 mistaken, but I think that is the main substantive issue.

11 There is a further minor issue that Dwr Cymru brought
12 to our attention just a minute ago. What I had said in
13 our application for interim measures was that if we were
14 to be granted relief that equated to our operating costs
15 in effect, the 2.6p, then any income that we managed to
16 earn by dint of other efforts during the period would
17 reduce that support pound for pound. The offer does not
18 cover our full costs but Dwr Cymru are saying that we
19 should still reduce has relief pound for pound for any
20 income we receive. I merely observe that if that is to be
21 the case, there is absolutely no incentive on us to go out
22 and try to earn any additional income, income that could,
23 if we were able to deploy it ourselves, be used to fund at
24 least a modicum of legal advice.

25 So those, sir, are the two issues on which we have
26 failed to agree.

27 THE PRESIDENT: Thank you. Just help me one minute, Dr Bryan.

28 What exactly is your suggestion on the creditworthiness
29 solution?

30 DR BRYAN: I think we would be happy with any mechanism that
31 stopped short of requiring UPM to enter into a further
32 binding legal obligation, a tripartite legal obligation,
33 when there is already in place a customer supply agreement
34 which is sound, which is pretty much exactly the same as
35 the one which existed when Welsh were supplying Shotton
36 Paper, and which has been honoured in full ever since it
37 started on 1st May 1999.

38 THE PRESIDENT: Yes, thank you. Yes, Mr Robertson. I think
39 the Tribunal is appreciative of the way in which Dwr Cymru

1 has approached the issue of price.

2 MR ROBERTSON: We are grateful for that. There is one
3 further point that I think we are agreed on which is just
4 detail for the consent order that we will be drafting up
5 after this, and that is obviously this arrangement will
6 continue until further order.

7 THE PRESIDENT: Yes.

8 MR ROBERTSON: Before I come to creditworthiness, which
9 obviously is its biggest problem, Albion did offer in its
10 interim measures application and said it is "prepared to
11 reduce this relief pound for pound in the event that it is
12 able to generate other income during the course of the
13 appeal and to use all other reasonable endeavours to
14 generate such income as resources allow." We think that
15 was a fair and reasonable offer for them to make and that
16 would mean that if they do find themselves in a
17 financially advantageous position as a result of some
18 other efforts, then this relief which is meant to secure
19 for them on a minimalist approach a basic level of
20 protection will no longer be necessary and would have some
21 element of windfall in it. We thought that was a sensible
22 offer for them to make and we would like to take advantage
23 of that.

24 When it comes to creditworthiness----

25 THE PRESIDENT: Just before we leave that point, if I can make
26 an observation, probably unwisely, and without having
27 discussed it with my colleagues, an interim order of this
28 kind, by definition, is always subject to modification if
29 circumstances change as we go along. I am just wondering
30 whether you would be covered by some sort of obligation on
31 Albion Water to keep us informed of developments which
32 would or would not give rise to an need to modify the
33 order.

34 MR ROBERTSON: We would be happy to accept that undertaking.

35 THE PRESIDENT: Something along those lines. Rather than try
36 and in an order deal with all foreseeable combinations of
37 circumstances, one might foresee something along those
38 lines. I am not quite sure how we would work it and the
39 mechanics, Dr Bryan, but something along those lines, I

1 would have thought, would be probably fair to Dwr Cymru.
2 DR BRYAN: That seems like an eminently sensible solution.
3 MR ROBERTSON: I think we have probably reached agreement
4 subject to drafting on that.
5 Creditworthiness, the problem is that once the money
6 leaves UPM and arrives at Albion Water we are at risk.
7 THE PRESIDENT: Yes.
8 MR ROBERTSON: We had thought that it must be possible to put
9 a simple arrangement in place whereby UPM at Shotton
10 Paper, instead of sending off one payment of the bill,
11 split the bill. That does involve contacting them so that
12 they change their banking arrangements. But it is only
13 really one payment on a BACS scheme that would come direct
14 to us. Obviously one can set up more complicated escrow
15 arrangements than that, but it really is no more difficult
16 than that.
17 Protecting credit concerns or legitimate credit
18 concerns, which is what Albion says, I do not think it can
19 just be dealt with by Albion saying, "We will deal with
20 the money when it arrives" and that is because we are at
21 risk then. So that is what I propose as a simple way of
22 doing this; that they make arrangements with UPM so that
23 under their contract they send off two lots of money, that
24 which is owed to Albion and that which is owed to us.
25 UPM, a large reputable organisation that honours its
26 contracts, I cannot imagine there is going to be a problem
27 with that.
28 THE PRESIDENT: I think as I hope I said before, the Tribunal
29 does feel that Dwr Cymru does need to be reasonably
30 assured that it will get its money. We do not want any
31 slip to take even the risk. I know you will say there is
32 not a risk, but we should have arrangements in place to
33 make sure there is no risk, no unacceptable risk at least,
34 of this money simply vanishing as a result of some
35 unforeseen catastrophe occurring.
36 MR ROBERTSON: Yes, and there are quite substantial sums at
37 stake as well.
38 THE PRESIDENT: There are, absolutely. So your desire, in
39 principle, is a reasonable one, I would say for myself, Mr

1 Robertson. The question is how we actually do it
2 mechanically with the least disruption of existing and
3 perhaps sensitive commercial arrangements. As I
4 understood it, as you have just explained to me, not some
5 form of legal document, which I think was the phrase Dr
6 Bryan used, emanating from UPM but some sort of mechanical
7 change in the money arrangements that would simply make
8 sure that money got to some account where it was safe in
9 the meantime.

10 MR ROBERTSON: When Shotton pays its bills, if it sends off
11 two payments instead of one, two payments on BACS instead
12 of one. That must be a very simple change for UPM to
13 make.

14 THE PRESIDENT: Yes. Have you had a chance to consider this,
15 Dr Bryan?

16 DR BRYAN: I have had a little chance. I think that my
17 concern about that, and I am not sure if I am correct in
18 drawing parallels with Genzyme and the concern that, if I
19 remember the Tribunal's ruling in that case correctly
20 relating to the market expectations where I think the
21 concern that Genzyme had was that the NHS as a customer
22 would see a lower price, i.e. that which was being offered
23 to the Home Services Company. I think in the suggestion
24 just made the problem that I foresee there is that it
25 would be entirely transparent to all within UPM. I say in
26 passing that the senior management has just changed there
27 so we are dealing with an entirely new Managing Director;
28 that what they would see very transparently was
29 effectively the wholesale price, and I know it is only an
30 interim measure but it would nevertheless be seen, I think
31 with some understanding, as a wholesale price payable to
32 Dwr Cymru, and then the balance, a somewhat larger balance
33 than perhaps they had hitherto been used to, coming to
34 Albion. I think that such an arrangement would indeed add
35 to our risk and would add to the risk that their internal
36 auditors or others would say: "What is all that money
37 being paid for? It is not the water. We are paying Welsh
38 for that." I think that I would wish to avoid that
39 situation, if at all possible, without in my way wishing

1 to deny Welsh's reasonable expectations of some degree of
2 credit security.

3 As they said to us in their original letter of offer
4 and as they have repeated today, they are looking for the
5 equivalent of 14 days' unsecured credit. I am not quite
6 sure how you compare 14 days' unsecured credit with the
7 terms that are being suggested, but I would hope, and we
8 are entirely flexible in this matter, that we could reach
9 arrangements which did not involve UPM's relationship with
10 us being exposed to more risk by the clearer definition of
11 what it is actually costing them.

12 THE PRESIDENT: What is your view on the original request for
13 14 days' credit?

14 DR BRYAN: The problem is that we would have to find an
15 additional £250,000 working capital because we are bound
16 to a ten year supply agreement which still has five years
17 to run with Shotton Paper on 45 day terms and to seek to
18 renegotiate that at this stage down to 14 days to give us
19 comparable terms would again be a source of additional
20 risk, something we would wish to avoid while we got to the
21 merits of this particular appeal.

22 THE PRESIDENT: This is a somewhat technical debate now as to
23 how we actually do this and I am not sure, without going
24 back to my textbooks on Garnishee orders and all the rest
25 of it, as how one could work out a solution. I am again
26 just thinking aloud here. If one were to establish some
27 joint account into which the revenue from UPM was paid and
28 that account was to carry approved instructions whereby a
29 certain sum would be paid out to Albion and a certain sum
30 would be paid on to UPM and while in the account was being
31 held to the order of UPM, would something along those
32 lines work or not? I just do not know.

33 DR BRYAN: I think that that was the gist of our suggestion
34 to Dwr Cymru, that an arrangement which as a layman looks
35 like the requirements that we have been asked to provide:
36 effectively, our bankers, or indeed our independent
37 accountant holding the ring, holding the cheque books and
38 making sure that those funds were indeed trackable; that
39 Dwr Cymru had access to and were satisfied with the

1 conditions; and being entirely flexible as to how that
2 arrangement would work. Dwr Cymru's response was that
3 they sought a mechanism over and above that which would
4 avoid a situation where UPM, for reasons that we are not
5 clear, would want to try and bypass that and make payments
6 directly to another account as a way of, one assumes,
7 disadvantaging Dwr Cymru. We pointed out were that to
8 happen not only would UPM be in breach of our supply
9 agreement with them, but Dwr Cymru would be quite entitled
10 to cut off the supply of water. It struck me that therein
11 lay the remedy to such a course of action. I cannot
12 conceive that UPM would want to embark on such a course of
13 action anyway. There seems no merit in it.

14 MR ROBERTSON: In the light of those comments those behind me
15 say with another ten minutes we might just crack it.

16 THE PRESIDENT: It struck me that it might be fruitful to have
17 a break now and everybody can think about the mechanism.
18 We will rise until 2.30 and see if you have cracked
19 anything.

20 (Short Adjournment)

21 MR ROBERTSON: Sir, I think we may have reached agreement.

22 THE PRESIDENT: Yes, good.

23 MR ROBERTSON: On creditworthiness the agreed form of wording
24 is:

25 "An arrangement which guarantees that bill payments
26 made by UPM to Albion Water are paid into an account under
27 the joint control of Albion Water and Dwr Cymru at a
28 financial institution agreed between both parties which
29 guarantees that Dwr Cymru's bill has first call on
30 payments by UPM."

31 There is one other piece of drafting which because of
32 the frenzy of drafting which has just taken place I have
33 not run past Dr Bryan just yet, but it is the undertaking
34 we discussed before the last adjournment and I would
35 suggest the following wording:

36 "Albion Water undertakes to inform the Tribunal on a
37 timely basis of any material change in its financial
38 circumstances from the date of this order."

39 Then we finish off with:

1 "These arrangements to continue until further order."
2 DR BRYAN: I am quite content with that, sir, and it actually
3 mirrors the duty we have to report to Ofwat on our ongoing
4 fitness to act as a licensed undertaker.
5 THE PRESIDENT: Very well. I would like to express the
6 Tribunal's appreciation to the parties for having arrived
7 at a workable solution to hold the line while the appeal
8 is progressing.
9 It sounds to me that, on that basis, the right
10 technical result is that the Tribunal makes no order on
11 Albion Water's request for interim measures on the basis
12 that the parties have by consent agreed: one, that
13 pending the hearing of the appeal Dwr Cymru will allow a
14 discount of 2.5p, I think you said.
15 MR ROBERTSON: 2.05!
16 THE PRESIDENT: I have written down 2.05, it is just my
17 spectacles had not quite connected with what I had written
18 down! 2.05, let there be no mistake about that, until the
19 disposal of the appeal or further order; that arrangements
20 will be made to establish an appropriate bank account
21 along the lines of the wording that Mr Robertson just read
22 to the Tribunal; and that Albion Water will undertake to
23 inform the Tribunal of any material change in
24 circumstances in accordance with the wording that has just
25 been read out to us. That will all be incorporated in an
26 order of the Tribunal so it takes effect as an order of
27 the Tribunal. There will, of course, be liberty to apply
28 to any party if there is any change of circumstances.
29 That probably deals with the matter so far as today
30 is concerned. Mr Robertson, is that right?
31 MR ROBERTSON: Yes, I think so. We will supply the Tribunal
32 with the wording that was agreed.
33 THE PRESIDENT: Between the two of you, but since Dr Bryan is
34 not represented if you could kindly take the lead on
35 supplying the Tribunal with a form of words that we can
36 then incorporate into a consent order so that we all know
37 where we are, we will make an order by consent along the
38 lines of the discussion we have had today. If you would
39 let us have that either today or tomorrow so that that

1 can be dealt with by the end of week at least, so we can
2 sign it off, so much the better.

3 Dr Bryan, is there anything else you would like to
4 say at this stage?

5 DR BRYAN: No, sir, I think that covers it.

6 THE PRESIDENT: Good. Therefore we will make an order by
7 consent as indicated. Again we would like to thank
8 everybody else for their assistance on this hearing.

9 Could I just say one other thing, Dr Bryan. The
10 Tribunal's Registry is making inquiries of something
11 called the Bar **Pro Bono** Unit which is a separate
12 organisation run by the Bar to deal with litigants who do
13 not have immediate access to advice. Whether has unit,
14 which is on the whole geared up for a somewhat different
15 sort of case than this case, would be able to help I just
16 do not know. But if you would like to keep in touch with
17 the Registry on that point and telephone in in couple of
18 days' time. I just do not know whether that presents any
19 possible avenue for you or not.

20 DR BRYAN: I am most grateful to you.

21 MR RANDOLPH: Sorry, sir, may I just raise one point?

22 THE PRESIDENT: Of course, Mr Randolph.

23 THE PRESIDENT: The issue of timetabling, we have not actually
24 come to any decisions on that.

25 THE PRESIDENT: We did say we would park it, did we not?

26 MR RANDOLPH: We can make a little bit of progress because it
27 depends, obviously, on whether Dr Bryan is going to make a
28 fresh appeal but I am going to act on the basis that he
29 is. I think that is a fairly reasonable assumption.

30 THE PRESIDENT: Yes, I think that is so.

31 MR RANDOLPH: You will, sir, have seen from our skeleton that
32 we suggested a certain timetable. You will also have
33 noted from Ofwat's skeleton that they suggested a certain
34 timetable. The two do not marry exactly. There are
35 differences with regard to the amount of time they have to
36 respond as a defendant to any new notice of application
37 and how long we as interveners would have. We suggest
38 that the delay should be 28 days, 28 days, 28 days
39 following, so every party has 28 days, excluding Dr Bryan

1 who would effectively----

2 THE PRESIDENT: So you are suggesting the appeal, 28 days for
3 the defence and then 28 days for the two interveners?

4 MR RANDOLPH: Indeed. That was our suggestion. Ofwat's
5 suggestion was Ofwat gets six weeks and we get three. We
6 do not quite see why there is going to be so much of a
7 discrepancy between Ofwat and the interveners, especially
8 given the fact that Ofwat obviously wrote the decision
9 that is being appealed, therefore they will know all about
10 it, or at least they will be presumed to know all about
11 it. So we would find it helpful, sir, if some form of
12 debate and/or preliminary determination on that were made
13 today simply because of this practical matter: if Dr
14 Bryan is going to serve his notice of appeal by the end of
15 June or before, we are then going to get into holiday
16 periods -- not necessarily for the counsel and solicitor
17 but for clients.

18 THE PRESIDENT: And for the Tribunal too!

19 MR RANDOLPH: I am always around and available! So it may be
20 useful if we could have a preliminary discussion while we
21 are all gathered here because otherwise there will not be
22 another Case Management Conference until after the
23 pleadings have been filed.

24 THE PRESIDENT: My initial reaction to that is that it is a
25 bit difficult at the moment to make much progress on the
26 timing of a new appeal that has not yet arrived. Ofwat
27 has formally got six weeks under the Rules, but this is
28 probably a case, without actually fixing a date now, where
29 we ought to think in terms of a fairly early Case
30 Management Conference after the new appeal has arrived so
31 that we can sort out then the timing of the defence and
32 timing of the interventions.

33 MR RANDOLPH: And, indeed, sir, the application to intervene.

34 THE PRESIDENT: And, indeed, we need to deal with Mr
35 O'Reilly's application to intervene.

36 MR RANDOLPH: Yes.

37 THE PRESIDENT: So if we were to indicate, in principle, our
38 preparedness to hold such a Case Management Conference in
39 early course, that event should, all being well, take

1 place in July and we will all then have a better idea what
2 the right timing is for the various documents and also
3 what the fate of the application to intervene is.

4 MR RANDOLPH: I am most grateful. That would meet my
5 concerns.

6 THE PRESIDENT: I think that is what we will try and do.
7 Right, thank you all very much indeed.

8
