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IN THE COMPETITION  
APPEAL TRIBUNAL

Case No. 1031/2/4/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

29th April 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

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

**MS VALENTINA SLOANE and MR HUW BROOKER** appeared on behalf of  
the Director General of Water Services.

**MS SUYONG KIM and MS RONA BAR-ISAAC** appeared on behalf of the  
Intervener Dŵr Cymru.

**MR FERGUS RANDOLPH and MR SIMON GARDINER** appeared on behalf of  
the Intervener United Utilities Water plc.

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**PROCEEDINGS**  
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Thursday, 29th April 2004

1  
2 THE PRESIDENT: Good morning, ladies and gentlemen. Just let  
3 me see who we have got here. Have we got Dr Bryan here?

4 Good morning, Dr Bryan.

5 DR BRYAN: Good morning, sir.

6 THE PRESIDENT: And we have Ofwat, here. Good morning Ms  
7 Sloane.

8 MS SLOANE: Good morning, sir.

9 THE PRESIDENT: And we have, I imagine, United Utilities. Good  
10 morning, Mr Randolph.

11 MR RANDOLPH: Good morning, sir.

12 THE PRESIDENT: And Dŵr Cymru. Good morning, Ms Kim.

13 MS KIM: Good morning, sir.

14 THE PRESIDENT: Our normal procedure is it to take the agenda  
15 for this Case Management Conference and to, as it were,  
16 work through it. I think we just need to sort out two  
17 points at the outset.

18 First of all, we take it that there is no  
19 objection to Dr Bryan representing the Appellant, even  
20 though he is not legally qualified, for the purpose of  
21 these proceedings? **(No reply)** There being no objection,  
22 we take that as read.

23 DR BRYAN: Thank you.

24 THE PRESIDENT: Secondly, we are provisionally of the view  
25 that both Dŵr Cymru and United Utilities have status to  
26 intervene. Is there any objection to that intervention on  
27 your part?

28 DR BRYAN: No, sir.

29 THE PRESIDENT: Very well. We give both those parties  
30 permission to intervene. So we can now consider  
31 ourselves, as it were, properly constituted.

32 I think before we go to the detail of the rest  
33 of the agenda, we need to have now some general discussion  
34 -- I am looking more at the moment in the direction of  
35 Ofwat -- as to where we are in this case and what is the  
36 expected timetable for delivery of what is apparently now  
37 anticipated to be a final final decision, if I can put it  
38 like that, a draft of which was apparently sent out on 7th

1 April. Have you got an indicative timetable you can give  
2 us, Ms Sloane, for bringing this matter to a conclusion?  
3 MS SLOANE: Sir, I can give you a very broad timetable; I  
4 cannot give you any dates by which the final decision will  
5 be issued. The Tribunal will have seen from the papers  
6 put before you and from the written observations that this  
7 is a wide-ranging complaint. There has been voluminous  
8 correspondence and a thorough investigation of the issues.  
9 On 7th April, the very day (unbeknownst to the Director)  
10 that this appeal was lodged, approximately 200 pages of  
11 draft decision were sent to the Appellant and the  
12 Appellant has been invited to submit comments on that  
13 draft. Let me just take instructions on the date by which  
14 those are expected. **(Pause)** The recollection is that the  
15 Appellant has been invited to provide comments on that  
16 draft within four weeks. The draft has been sent to Dŵr  
17 Cymru as well, with the same invitation to provide  
18 comments within that time.  
19 THE PRESIDENT: Four weeks, is that right, Dr Bryan? That  
20 will take us to early May.  
21 DR BRYAN: That is correct, sir.  
22 MS SLOANE: The Director's position is then, taking into  
23 account the comments of either side----  
24 THE PRESIDENT: Sorry, just forgive me, for my note, that is  
25 Albion Water and Dŵr Cymru?  
26 MS SLOANE: Yes. The Director is then committed to producing  
27 the final decision as soon as practicable after that,  
28 obviously taking into account the need to take account of  
29 comments provided by Albion Water and Dŵr Cymru.  
30 THE PRESIDENT: Yes.  
31 MS SLOANE: I am instructed that there may also be extracts,  
32 which I think were sent or are due to be sent to United  
33 Utilities shortly, with an invitation for them to comment  
34 on those extracts within the same sort of time frame.  
35 THE PRESIDENT: What has been the reason for the delay in  
36 sending this to United Utilities?  
37 MS SLOANE: It has been a matter of confidentiality. The  
38 first draft was sent to Albion Water so they could comment  
39 on any confidential matters on that, the same with Dŵr

1 Cymru. So now, once confidentiality issues have been  
2 sorted out, the extracts have been sent to United  
3 Utilities. Sir, I should explain that, within a much  
4 shorter time frame, Albion Water and Dŵr Cymru were  
5 invited to come back to the Director and inform him of any  
6 confidentiality issues. I think the deadline for that has  
7 already passed. Yes, the deadline has passed for Albion  
8 Water and my understanding is that Dŵr Cymru is the due to  
9 respond by today.

10 MS KIM: If I can, I may add that we have discussed this and  
11 obtained an extension for letting the Director have our  
12 comments on confidentiality tomorrow.

13 THE PRESIDENT: I am sorry, I did not quite catch that?

14 MS KIM: They have agreed to have a short extension. We have  
15 agreed to supply our comments on confidentiality for  
16 tomorrow, with Ofwat's agreement.

17 THE PRESIDENT: Right. How long after you have got these  
18 comments in, on the assumption that by now quite a lot of  
19 issues have been fairly thrashed over, is it reasonable to  
20 suppose the Director might take a final decision?

21 MS SLOANE: I cannot give an undertaking on a date.

22 THE PRESIDENT: We are not seeking an undertaking, although we  
23 may in the course of morning ask for an undertaking. We  
24 want some feel for how long the Director needs to deal  
25 with this.

26 MS SLOANE: **(Pause)** My instructions are that it is very  
27 difficult to say. In the past when the Appellants have  
28 been asked to provide comments, voluminous comments have  
29 been received and the Director has been keen to address  
30 those. The Director can only say that he is committed to  
31 issuing the decision as soon as practicable, taking into  
32 account the comments received.

33 THE PRESIDENT: Dr Bryan, what sort of extent of comments on  
34 this draft that you have received do you anticipate  
35 making, bearing in mind that it is very much, I would have  
36 thought, in your interests to now have the final decision  
37 as soon as possible?

38 DR BRYAN: Indeed, sir. The observation is that it took  
39 twelve months from the acceptance of our section 47

1 application to produce the first draft decision of June  
2 last year. At that point, it was scheduled it would take  
3 a further six months, November last year, to produce the  
4 final decision. It has actually taken almost twelve  
5 months to produce a further draft decision, and that is  
6 clearly not in Albion Water's interests.

7 Were the Tribunal minded to require the Director  
8 to produce a final decision as the most expedient and fair  
9 way of dealing with this matter, then it would be our  
10 intention to offer no comment whatsoever on the basis that  
11 the revised draft is so flawed that any comment would be  
12 substantive and would delay the process still further.

13 THE PRESIDENT: So, for the purposes of today, are we to take  
14 it that, as at presently advised, you do not intend to  
15 make any comments?

16 DR BRYAN: That is true, sir. We would not intend to make  
17 any comments on the draft.

18 THE PRESIDENT: Right. There being no comments from Albion  
19 Water on the draft, is there any particular difficulty in  
20 the Director proceeding to take a decision pretty rapidly?  
21 If you want a moment to take instructions.

22 MS SLOANE: **(Pause)** Sir, if Albion Water is not going to  
23 make any further comments, that is obviously helpful and  
24 will help to expedite the issue of the final decision.  
25 The Director will obviously still have to take into  
26 account comments provided by the other parties to which  
27 the invitation has been sent.

28 THE PRESIDENT: Though we have not seen the draft, and we are  
29 not particularly asking to do so at this stage, our  
30 understanding is that this is a draft adverse to Albion  
31 Water and it is rather hard to see why you need much time  
32 to consider the comments of Dŵr Cymru and United  
33 Utilities.

34 MS SLOANE: No, it may be it will not be much time. But,  
35 having invited comments, the Director would of course wish  
36 to take into account any which are produced.

37 THE PRESIDENT: Shall we look at the situation we have got  
38 here at the moment provisionally in little more detail,  
39 looking at the appeal as we have got it? As I think

1 emerges from the Tribunal's previous case law -- I am  
2 thinking of decisions we have taken on admissibility and I  
3 am thinking also of the decision I took in Freeseerve on  
4 the extension of time -- the Tribunal attaches high  
5 importance to complaints being decided expeditiously and  
6 to a proper system of remedies being in place. The  
7 situation that emerges in this case is that, for whatever  
8 reason, and I am not taking a view on what the reasons are  
9 at the moment, this particular case seems to have taken a  
10 very long time to reach a point of decision. And there  
11 may be cases -- the Tribunal is not saying this is one --  
12 in which a reasonable time extends itself over into an  
13 inordinate delay. We, I think, as the Tribunal,  
14 therefore, have to consider, and I think would consider if  
15 this case as at presently constituted were to continue,  
16 what is the right legal framework for the Tribunal to  
17 exercise jurisdiction in a case such as the present? Do  
18 we accept that there is simply a gap in the legislation  
19 that the prospective Appellant has no way of extracting a  
20 decision from the regulator, or that the Appellant's only  
21 remedy is by some other route, or what?

22 If we look at this case, at least provisionally,  
23 despite the submissions that are made in the Director's  
24 observations for this conference today, it does not seem  
25 to us, at the moment, entirely clear that there is no  
26 decision at the moment and there are various routes, I  
27 think, that would need to be explored in argument as to  
28 how one might arrive at that view. One route is that  
29 there have, or it seems to emerge from the correspondence  
30 that there has, been a succession of promises to produce a  
31 decision by various dates, the latest one being by the end  
32 of March, and there may, it seems to us, come a time when  
33 it is right for the Tribunal simply to imply a decision if  
34 a decision is promised and is not taken. In that  
35 connection, this case potentially raises a very  
36 wide-ranging point, which is: at what point should the  
37 Tribunal deem the decision to have been taken so as to  
38 give rise to jurisdiction? We are now, as from Monday,  
39 even closer allied to the European regime than we have

1 | been before, with Regulation 1 of 2003 coming into force  
2 | which, under the EC laws, very clearly implies a procedure  
3 | for deeming decisions to be taken and giving the  
4 | prospective Appellant the right to go to the court to  
5 | challenge the decision; that, in turn, being a view that  
6 | is consistent with Article 6 of the Convention and so  
7 | forth. So if the appeal as constituted cannot, in our  
8 | view, be regarded, at this stage at least -- and, as I  
9 | say, we are not expressing any view -- at first sight it  
10 | does not seem to us to be regarded as manifestly unfounded  
11 | or not an appeal which is capable of giving rise to  
12 | jurisdiction. So there is that procedural aspect. It may  
13 | very well be that, in a case of extensive delay of this  
14 | kind, that is the right case in which this sort of issue  
15 | should be explored in the interests of seeing what sort of  
16 | system we have got, whether it gives rise to some remedy,  
17 | and, if it does not, whether anybody else should do  
18 | something about it by way of amendment to the rules, for  
19 | example. That is quite important.

20 |           Equally important from the Appellant's point of  
21 | view is to come to grips with the issues with which the  
22 | Appellant is concerned on the merits that are now  
23 | apparently the subject of this further draft. Given the  
24 | events that have happened, it is probably very much in the  
25 | Appellant's interests to want to come to grips with those  
26 | events as soon as possible.

27 |           So the question arises: what should the Tribunal  
28 | do? As at present advised, in many ways there are  
29 | considerable attractions in dealing with the procedural  
30 | issues that arise in the present case with a view to  
31 | taking a fairly wide-ranging decision of principle as to  
32 | the extent to which regulatory delay can continue without  
33 | any appealable decision being taken. From the point of  
34 | view of the system, there are attractions in that  
35 | approach.

36 |           From the Appellant's point of view, however,  
37 | that may not be a particularly fruitful use of the  
38 | Appellant's time as the Appellant has no particular  
39 | abstract interest in seeing how the system works and

1 wants, we assume, to arrive at the decision of his case.

2 From the Appellant's point of view, it may be more  
3 desirable for the decision to be taken and for one to get  
4 on as fast as possible with the substantive issue. If a  
5 further decision was to be taken within a short time, then  
6 that might mean that we would not need to deal with the  
7 procedural issue and could wait for another case in which  
8 to deal with it.

9 There would then be a further issue which would  
10 be, if there were a further decision, whether that  
11 decision could be addressed in the context of this case by  
12 some procedural route to be explored or whether one would  
13 need a fresh appeal against that new decision. In  
14 Claymore, which is admittedly not completely analogous but  
15 has some resemblance to this case, effectively what we  
16 allowed the respondent authority to do was to plead in its  
17 defence the "decision" that he had taken but not really  
18 explained very well in the letter of rejection, so that  
19 the Appellant had, in the defence, the full bounds of the  
20 case against him, and we then allowed the Appellant to  
21 amend the Notice of Appeal to attack the relevant  
22 decision, thus obviating the need to go back to square  
23 one. On the other hand, depending on what the nature of  
24 this draft is -- it sounds, from what I gather, a fairly  
25 substantial document -- it may be cleaner just to restart  
26 the clock. I do not know.

27 But really I think it all depends, from the  
28 Tribunal's point of view, on when this final decision  
29 might be taken. I think it might be too difficult for us  
30 to simply do nothing until we are a bit clearer as to when  
31 specifically in relation to dates we might expect this  
32 matter to be concluded.

33 MS SLOANE: May I take instructions on that?

34 THE PRESIDENT: I do not know whether you would like us just  
35 to retire for a few minutes while you have a little  
36 discussion, Ms Sloane? I think what we are feeling for  
37 and looking for at the moment is some pretty concrete  
38 indication, in light of the fact that Albion is not going  
39 to make any comments, as to when a final decision can

1 reasonably be expected?

2 DR BRYAN: Sir, if I can make an observation about your  
3 comment about the procedural issues?

4 THE PRESIDENT: Yes.

5 DR BRYAN: Yes, of course it is in Albion's interests that  
6 this matter is resolved as soon as possible. However, I  
7 would draw to the Tribunal's attention the fact that there  
8 are several other similar cases which have been held up in  
9 Ofwat awaiting something which amounts to an appealable  
10 decision and where I think we and others in this area  
11 would welcome guidance from the Tribunal on this matter.  
12 I would also note that Ofwat, since the Act came into  
13 effect in 2000, and despite complaints which I think must  
14 number over one hundred, has only ever made one  
15 appealable decision in Albion -v- Thames Water. That was  
16 subject to a section 47 notice over a year ago and no word  
17 has come from Ofwat about that.

18 So, much as I would like to get to the substance  
19 of this specific case, I do believe that there are wider  
20 issues and that we need to take the wider interests both  
21 of Albion and the industry to heart.

22 THE PRESIDENT: I see. Just to take two points from that  
23 which you have just said there: there is one decision, as  
24 you rightly say, under the Competition Act, I think it is  
25 on the Director's website. You say there is a section 47  
26 request outstanding in relation to that.

27 DR BRYAN: Yes, sir. There was an initial section 47 request  
28 that gave rise to the formal decision----

29 THE PRESIDENT: I mean a request to vary.

30 DR BRYAN: Yes, indeed. Then, subsequent to the formal  
31 publication of that decision, there was a subsequent  
32 request brought to vary which I believe has now been  
33 outstanding for the best part of a year -- I do not have  
34 the precise date -- and no information is forthcoming on  
35 the progress of that.

36 THE PRESIDENT: Yes. I think perhaps I ought to ask the  
37 Interveners whether they have any position on the matters  
38 at the moment?

39 Mr Randolph, we are discussing quite informally

1 and I am not taking any position but just exploring  
2 parameters.

3 MR RANDOLPH: Absolutely, sir. I would need to take  
4 instructions. One thing I can assist the Tribunal with, I  
5 think, is with regards to the time it would take for my  
6 client to respond to the extracts -- not the 200 pages but  
7 the extracts. We were sent extracts before and they were  
8 fairly short extracts. A lot was excluded and there was  
9 relatively little for us to comment on. I deliberately  
10 specifically took instructions----

11 THE PRESIDENT: You are expecting to get some more, are you?

12 MR RANDOLPH: We will get some more. We have just been told  
13 we will get some sometime soon in the light of other  
14 comments from Albion and Dŵr Cymru. Just so that the  
15 Tribunal will know, we will turn that round as quickly as  
16 possible because Dŵr Cymru want this matter sorted, Albion  
17 want it sorted, Ofwat want it sorted and we want it  
18 sorted.

19 THE PRESIDENT: Yes, it is in your interests.

20 MR RANDOLPH: It is. The wider issue is obviously hugely  
21 important because it will range across the jurisdiction of  
22 this Tribunal in whatever area.

23 THE PRESIDENT: Yes.

24 MR RANDOLPH: I would like to take specific instructions, if  
25 I may, as to what my client's position is on that. It may  
26 well be we share common ground with Albion in terms of  
27 wanting to have clarification as to what Ofwat must and  
28 must not do and what does and does not constitute a  
29 decision. Obviously we are in the same industry and it  
30 may be in other areas we would like to press on and deal  
31 with matters we bring to their attention. However, I  
32 simply do not know. Those are my comments so far.

33 THE PRESIDENT: Thank you very much, Mr Randolph. Yes, Ms  
34 Kim.

35 MS KIM: Sir, on the issue of timing, the comments back from  
36 my client Dŵr Cymru, we also would like to push forward as  
37 fast as possible. Whilst we have been given formally a  
38 deadline of 21st May in which to give our comments on the  
39 draft decision, I have taken instructions just now and I

1 think we could also speed that up. We anticipate we would  
2 not need much more than a two-week period from now.

3 THE PRESIDENT: Two weeks from now would take us...

4 MS KIM: I am being cautious on that and we may be able to do  
5 it faster than that.

6 THE PRESIDENT: That is an indicative indication. Today is  
7 the 29th, so that is May 13th.

8 MS KIM: In essence, we bring forward that deadline by one  
9 week. Possibly, if we are even more successful, it may be  
10 even sooner than that.

11 THE PRESIDENT: Yes. Are you expecting to get any more stuff  
12 so far covered by confidentiality or have you had  
13 everything you are expecting to get?

14 MS KIM: We have had everything we are expecting to get. We  
15 do have substantive comments on confidentiality we will go  
16 back to.

17 THE PRESIDENT: That is vis-à-vis United Utilities.

18 MS KIM: Yes, and in the sense of being a third party----

19 THE PRESIDENT: And for publication?

20 MS KIM: And for publication. There are also some  
21 confidentiality issues vis-à-vis Albion Water we might  
22 have.

23 THE PRESIDENT: Yes, I see. I do not know if you can help me,  
24 Ms Kim, or those with you, how much more are you expecting  
25 to send to United Utilities once you have sorted out  
26 confidentiality? **(Pause)** Ms Kim, when you said a moment  
27 ago you said you needed two weeks from now and you could  
28 speed up, we understood initially that the document had  
29 been sent out on 7th April with comments due in four  
30 weeks' time from that.

31 MS KIM: No, in fact that was the version of the draft  
32 decision that was sent to the Appellant. We in fact  
33 received ours later than that.

34 THE PRESIDENT: I see, so you have still got four weeks?

35 MS KIM: We received it on the 20th.

36 MS SLOANE: Sir, my instructions are that it will be a matter  
37 of a few pages which United Utilities would be unfamiliar  
38 with or not previously seen of the issues. There will be  
39 more actually sent to them, but the rest of this they

1 would be familiar with.

2 THE PRESIDENT: So not much? What are you saying: not much  
3 that they have not seen before?

4 MS SLOANE: Not much which is new for them to deal with.

5 THE PRESIDENT: Nothing really new; is that a fair paraphrase?  
6 I am just trying to understand.

7 MS SLOANE: A few pages of new issues which they might wish  
8 to address.

9 THE PRESIDENT: Right. Well, I suspect that what we are still  
10 looking for is whether there is any chance, at least this  
11 morning or whether before we all part for the purposes of  
12 today, for some indicative timetable for the final  
13 decision so that we can decide on an informed basis what  
14 to do about the existing appeal.

15 The options I think are, as far as today is  
16 concerned, to make no order today on the basis of some  
17 understanding as to the timetable; or to set this case  
18 down for a preliminary issue, which would involve  
19 canvassing the points I have indicated; or to indicate  
20 that we do not rule out the possibility of a preliminary  
21 issue but we will review that decision as and when the  
22 main substantive decision on the merits is available. It  
23 is an important point. But, on the other hand, if it  
24 becomes overtaken by events because there is a decision,  
25 the Tribunal may not, in the end, decide whether to deal  
26 with the procedural issue in an appeal that has become  
27 moot, as the Americans would say. We will have to see.

28 What I would suggest is that we rise now for  
29 about ten minutes or so at least -- you can have longer if  
30 you want it -- just for everybody to think a bit about  
31 what we have said. We will come back in fifteen minutes  
32 unless you call us earlier and just continue this  
33 discussion.

34 **(Short Adjournment)**

35 THE PRESIDENT: Yes, Ms Sloane, have you anything you can  
36 usefully add?

37 MS SLOANE: Sir, my instructions are that, without knowing  
38 precisely what Dŵr Cymru is going to state in relation to  
39 the draft decision, no guarantee can be given as to the

1 date. In this regard I would say that it is notable that  
2 the draft does query Dŵr Cymru's approach on certain  
3 matters.

4 THE PRESIDENT: Yes.

5 MS SLOANE: So there may well be substantive comments on  
6 those. But the Director estimates, if all observations  
7 are received by mid-May, and is grateful to the position  
8 of the parties on that, that the decision could be issued  
9 in July.

10 THE PRESIDENT: July?

11 MS SLOANE: But that is an estimate.

12 THE PRESIDENT: Why is it, in a case that began originally in  
13 December 2000, and I know it has evolved since then, that  
14 the Director still needs two more months from now in which  
15 to come to the final view? There seems to be some  
16 reluctance to grip the nettle and give the Appellant the  
17 right of appeal which he would normally have.

18 MS SLOANE: Sir, that would be a matter of approximately  
19 eight weeks to take into account the comments and then for  
20 the Director to review the final decision, finalise it and  
21 then issue it.

22 THE PRESIDENT: What is it? I mean, are there new matters  
23 that even at this stage are going to take that sort of  
24 time? It is a decision apparently rejecting Albion's  
25 complaint. Albion has no comment it is going to make on  
26 the decision. Why can you not just take the decision?

27 MS SLOANE: Because the draft has now been sent to Dŵr Cymru  
28 and United Utilities. As I have said, it does make  
29 criticisms of Dŵr Cymru's approach on certain matters and  
30 has invited that party to come back with comments. Those  
31 comments are going to be coming in by mid-May, but the  
32 Director will have to take those into consideration.

33 THE PRESIDENT: But he cannot possibly need two months in  
34 order to take comments of a party against whom the  
35 decision is not being taken, as it were, can he, really?

36 MS SLOANE: Those are my instructions.

37 THE PRESIDENT: Those are your instructions.

38 Right, let us go round the table and see the  
39 reaction.

1 DR BRYAN: I admit to disappointment but not surprise, sir.  
2 If the Director says July, then in our experience it will  
3 inevitably be 31st of or the early days of August. I say  
4 that without meaning to be at all spiteful. It is our  
5 experience.

6 I find it very difficult. My view was that if  
7 the other parties can produce responses by mid-May, I  
8 would expect a decision by the beginning of June and our  
9 inclination would be that that would be the best way of  
10 proceeding, to effectively start the appeal and to judge  
11 the matter on its merits at that point. But the end of  
12 July, which I think is what it will transpire, is  
13 something which with the best will in the world we cannot  
14 afford to do. I doubt we will be in a position to fight  
15 that appeal as strongly as we could now.

16 THE PRESIDENT: Do you want to just elaborate a little on  
17 that?

18 DR BRYAN: Yes, sir, thank you. At the moment, indeed since  
19 1st May 1999 when the inset appointment came into effect,  
20 Albion has been deprived of any margin at all on sales of  
21 almost £2 million worth of water. We have, through the  
22 course of this, complained and, indeed, prior to 1999,  
23 under the provisions of the Water Industry Act, tried to  
24 get what we would see as a fair price. We failed in that  
25 matter.

26 The ability for Albion to fight this case has,  
27 in the first instance, been made possible by its former  
28 parent, Enviro-Logic. Enviro-Logic could not stand the  
29 strain and has now withdrawn from the competitive market.

30 Albion, since late February, has now been acquired by  
31 Waterlevel -- the major shareholder of which you see  
32 before you -- and we are totally dependent in terms of  
33 income on the voluntary additional payments made by our  
34 principal customer, Shotton Paper, who pay currently a 3  
35 pence per cubic metre voluntary uplift on our buying price  
36 for water, which also happens to be the market selling  
37 price.

38 Under the agreement that we have with Shotton  
39 Paper it was anticipated that this appeal would be

1 launched immediately following the decision that we were  
2 promised, the final decision that we were promised for  
3 November 2003, some three years after the complaint was  
4 lodged. That level of support lasts until June, at which  
5 point it was anticipated that the appeal would be complete  
6 or almost complete for a period of some seven months, and  
7 at that point the level of support halves to a point where  
8 we will still be able to meet Albion's statutory  
9 obligations as a water undertaker, but only that, and  
10 there will be no further funds available for the payment  
11 of the directors, who are already, and have been since  
12 Waterlevel became active in July, subsisting on a thirty  
13 per cent reduction on their previous salary and I have  
14 drawn no salary at all for the period July to March this  
15 year.

16 It is under those circumstances that this  
17 continuing delay is going to grievously damage Albion  
18 still further.

19 THE PRESIDENT: To what extent is the Director, according to  
20 you, on notice of these particular instances?

21 DR BRYAN: He is privy to them in a great deal of detail,  
22 sir. The process of extracting Albion from the ownership  
23 of Pennon, Enviro-Logic's joint venture partner, was  
24 something which Pennon insisted had Ofwat's blessing, and  
25 as part of that process Ofwat required a detailed business  
26 plan showing how Albion would finance its funding. As  
27 part of that business plan we made it very clear, and it  
28 is included in the skeleton that was handed round  
29 before----

30 THE PRESIDENT: I am sorry, we have not had a chance to read  
31 that.

32 DR BRYAN: I do apologise for the lateness of that.

33 THE PRESIDENT: Do not apologise, it is just we have not had a  
34 chance to look at it yet.

35 DR BRYAN: The complete business plan is appended there.

36 THE PRESIDENT: Yes. What I am just searching for is  
37 information about the fact that the level of support goes  
38 down.

39 DR BRYAN: If you turn to page 25, sir, in that skeleton pack

1 you will see a spreadsheet. What I would do is draw your  
2 attention, first of all, to the line immediately above  
3 "Total Revenue" in the first block of figures. That line  
4 reads "non-Tariff contribution to CA98 complaint costs".  
5 THE PRESIDENT: Oh yes.  
6 DR BRYAN: That is the voluntary contribution that UPM,  
7 Shotton Paper, have made. You will notice, sir, that from  
8 May to June that contribution drops. It varies month by  
9 month because it is based on the volume of water used and  
10 that tends to vary. You will also see, if you look down  
11 at the first item under "Overheads", there is a figure  
12 there of a little short of £4,000. Those are the direct  
13 costs of the full-time employee that we have at Shotton  
14 and a contribution to the costs of another employee who  
15 looks after water quality matters, plus a small amount of  
16 input from the directors on higher level matters. But if  
17 you then look at the bottom line, and this is for Albion  
18 Water rather than Waterlevel, you will see that the  
19 contribution that Albion Water can make to Waterlevel  
20 drops to something in the region of £2,500 a month beyond  
21 June. With the efforts that we are putting into fighting  
22 the appeal, that represents pretty much the totality of  
23 Waterlevel's income.  
24 THE PRESIDENT: Yes.  
25 DR BRYAN: Ofwat were aware of this in November last year.  
26 Indeed before then they were the ones who asked us to  
27 refine this model. They further asked us, as you will see  
28 in the attachments, page 11 through to 13 of the  
29 skeleton, for the correspondence between UPM and Ofwat  
30 confirming that level of support. I have to say----  
31 THE PRESIDENT: Just let me catch up. I am sorry. **(Pause)**  
32 That is the letter of 10th December?  
33 DR BRYAN: Yes, sir.  
34 THE PRESIDENT: Yes. That was provided to the Director when?  
35 DR BRYAN: The correspondence on this matter began with the  
36 Director in September 2003.  
37 THE PRESIDENT: There is a letter of 24th January, it is on  
38 the following page, your page 12, in which Mr Mason,  
39 apparently on behalf of the Director, referred to the

1 letter of 10th December. Is that the one?

2 DR BRYAN: That is correct, sir. At that point, Ofwat were  
3 not entirely satisfied with the level of commitment given  
4 by the Managing Director of UPM and required him to  
5 confirm that he had board approval for such commitment.

6 THE PRESIDENT: Yes.

7 DR BRYAN: I think, sir, that having spent the adjournment  
8 considering the wider issues, we are also of the view, no  
9 matter how important the procedural issues are that you  
10 have elaborated on, we cannot afford to delay resolution  
11 of this matter by exploring those. What we would,  
12 however, say is that there are other cases that I alluded  
13 to earlier which would make better candidates from our  
14 point of view for the exploration of these procedural  
15 issues and would have less immediate impact on the  
16 financing of the company.

17 That, with your permission, in due course, would  
18 be the route that we are likely to take.

19 THE PRESIDENT: Yes, I see. Forgive me for not having picked  
20 it up if you have, but have you applied to the Director  
21 for any kind of interim relief pending his decision?

22 DR BRYAN: We did explore the matter with Ofwat. I do not  
23 have the documentation to hand.

24 THE PRESIDENT: No.

25 DR BRYAN: It was made clear to us that such an application  
26 would delay the decision and it was clear from the  
27 response we got from Ofwat that such an application was  
28 unlikely to succeed. But I can indeed dig out that  
29 correspondence and submit it to the Tribunal.

30 THE PRESIDENT: Yes. In that regard it is probably worth  
31 observing in passing that quite a lot of things happen on  
32 1st May 2004, and one of the things that happens is  
33 that the Tribunal has jurisdiction in a case where the  
34 Director has refused interim measures if they have been  
35 asked for, which is a new provision. However, thank you  
36 for that.

37 Ms Sloane, in making this time estimate that you  
38 have just given us how far has the Director taken into  
39 account the fact that the support of UPM, the parent, goes

1 down substantially at the end of June?

2 MS SLOANE: **(Pause)** I am instructed that the Director is  
3 aware of the pressure that Albion Water is under and, as I  
4 have already stated, is committed to issuing the decision  
5 as soon as practicable. If there are no substantial  
6 comments from Dŵr Cymru, it may well be that the decision  
7 can be expedited, can come out before the end of July.  
8 Without knowing what those comments are, no guarantee can  
9 be given.

10 THE PRESIDENT: Interveners?

11 MR RANDOLPH: Sir, obviously, as I have already said, my  
12 client would like this decision as soon as possible. With  
13 regard, sir, to your three options----

14 THE PRESIDENT: Yes.

15 MR RANDOLPH: ----we, too, having reflected outside court,  
16 have come to the decision that we would prefer to press on  
17 and deal with the matter on the merits when a new decision  
18 is taken, on the basis that the new decision, the final  
19 decision, is taken relatively rapidly. What we do not  
20 want to have is there to be some form of new delay, not  
21 deal with the interesting and important point on  
22 admissibility and issues of when is a decision not a  
23 decision, wait for the decision to come out and lose quite  
24 a lot of time thereby. Because I think, sir, you said your  
25 option three was you would not rule out the possibility of  
26 looking at the issue of the admissibility of the appeal,  
27 when a decision is not a decision, it might be moot, it  
28 might not be, but let us wait and see.

29 THE PRESIDENT: Yes.

30 MR RANDOLPH: We would prefer to go down that route on the  
31 basis that a decision taken, obviously it impacts on --  
32 the continuing uncertainty on this particular issue  
33 impacts directly on us because we abstract the water which  
34 eventually gets sent down to Shotton. That is not helpful  
35 in terms of planning and things like that.

36 So I think, on the basis that a decision is  
37 taken relatively quickly, that would make the most sense  
38 to us, it seems, because if there is a final decision  
39 which everyone agrees, Ofwat agrees is the final

1 decision----

2 THE PRESIDENT: You want to guard against the risk that,  
3 despite everybody's declarations, the final decision  
4 somehow slips.

5 MR RANDOLPH: Indeed.

6 THE PRESIDENT: By the end of July we are into the holiday  
7 period, then it is September and, before we know where we  
8 are, another six months has gone by.

9 MR RANDOLPH: Indeed. Of course, the Tribunal has the  
10 jurisdiction to call the parties back to the Case  
11 Management Conference if there is direction from the  
12 Director that he will not be able to keep to the timetable  
13 he has set out and the Tribunal could then come to a  
14 decision.

15 THE PRESIDENT: On a better informed basis.

16 MR RANDOLPH: On a better informed basis. It is rather  
17 difficult at the moment and I understand my learned  
18 friend's difficulties because obviously she does not know  
19 what Dŵr Cymru are going to say.

20 THE PRESIDENT: No, quite.

21 MR RANDOLPH: It does make it very difficult to set down  
22 something in stone when there are uncertainties flying  
23 around. That, sir, is our preferred course.

24 THE PRESIDENT: Thank you very much. Yes, Ms Kim.

25 MS KIM: I think we echo the comments of United Utilities. We  
26 believe also that an appeal on the substantive decision  
27 would by far be the cleanest course as long as, clearly,  
28 the interests of the Appellant are observed in having a  
29 relatively speedy decision.

30 As I mentioned before we adjourned, on Dŵr  
31 Cymru's side clearly we could be a potential log jam if we  
32 had a massive number of comments on the draft decision.  
33 As I indicated, we would hope to deal relatively swiftly  
34 with those -- I already indicated within the period of two  
35 weeks and possibly shorter if we can come to it quicker  
36 than this. We have clearly had the benefit of a very quick  
37 look at the draft decision and there are some issues on  
38 which we may well have comments, but we would hope not to  
39 have a vast array of comments.

1 THE PRESIDENT: I am just asking the question, I am not trying  
2 to suggest the answer -- the answer may be fairly obvious:  
3 to what extent can you assure the Tribunal that, from Dŵr  
4 Cymru's point of view, that company is anxious to  
5 cooperate as far as possible to enable the Director to  
6 arrive at a speedy final decision?

7 MS KIM: As you have had stated, sir, the draft decision  
8 currently is in the company's favour. It is a decision  
9 which finds that there has been no infringement. There is  
10 no reason why we would wish to delay the decision coming  
11 out and being issued. So, on the part of Dŵr Cymru, all  
12 expedition is what we would also be in support of.

13 THE PRESIDENT: Yes, very well. Right, do you want to come  
14 back on any of that, Ms Sloane, or have I effectively got  
15 your submissions?

16 MS SLOANE: **(Pause)** No, sir. No further comment.

17 THE PRESIDENT: Thank you. **(Pause)** The Tribunal will rise  
18 and then we will decide what we are going to do.

19 **(Short Adjournment)**

20 THE PRESIDENT: Before we finally decide what we are going to  
21 do, we have come to the view we do actually need a little  
22 bit more information to fit in one missing piece of this  
23 particular jigsaw, which does relate to Albion Water's  
24 application for interim relief and the financial situation  
25 of the company as just explained to us by Dr Bryan.

26 We notice, and this question is more for Dŵr  
27 Cymru, that there is a letter from Albion Water to Dŵr  
28 Cymru of the 21st April which invites Dŵr Cymru's comments  
29 on the question of interim relief. What we would like to  
30 know is whether there has been any response to that letter  
31 and, if so, what it is? Are you able to help us on that  
32 at all, Ms Kim?

33 MS KIM: I hope to a degree I can. If I may make one  
34 prefatory remark, which is that the position of Dŵr Cymru  
35 on the application for interim measures is that the bulk  
36 supplier agreement that had expired back in May 2003 has  
37 continued in effect, because the Applicants have been  
38 continuing to receive water under the terms of that old  
39 agreement and negotiations for a new agreement have been

1 ongoing for some time. There are clearly issues which now  
2 the Appellants have raised in relation to those  
3 negotiations, but, from our point of view, they are not  
4 the subject of the original complaint to Ofwat, nor are  
5 they, in our view, subject to any purported decision by  
6 Ofwat.

7 THE PRESIDENT: Not subject of the original complaint.

8 MS KIM: No.

9 THE PRESIDENT: Nor subject to a decision, including,  
10 presumably, the envisaged draft decision?

11 MS KIM: That is right. Clearly, we are talking about a  
12 supply of water and there may be some links between an  
13 access price and the bulk supply price as well, but they  
14 are not one and the same thing. We would say that the  
15 issue of the bulk supply is not part of the decision and,  
16 therefore, we would say, under Rule 61, it is not a proper  
17 subject of interim measures before this Tribunal.

18 THE PRESIDENT: Sorry, I just need to look up Rule 61. **(Pause)**  
19 What about Rule 61(2)?

20 MS KIM: Well, on that matter we would say that the Applicant  
21 has not pleaded to date. Insofar as we have not yet  
22 clearly seen the full notice of application, I, first of  
23 all, say that----

24 THE PRESIDENT: No, I see, you are not in the picture yet.

25 MS KIM: But we would dispute that they have a prima facie  
26 case in the first place, and they have not shown the  
27 relevant grave and irreparable harm that is required.

28 THE PRESIDENT: Not met the threshold.

29 MS KIM: That would be our position on that.

30 On the question of response to the letter from  
31 Albion Water, my understanding is that Dŵr Cymru has  
32 responded and the bottom line is that they have invited  
33 Albion Water to apply for the determination from the  
34 Director because it seems to us that that has not been  
35 pursued.

36 THE PRESIDENT: A determination as to the bulk price, you  
37 mean?

38 MS KIM: Yes, that was the route that was pursued when the  
39 original appointment came into being. Although the

1 Director did not have to issue a determination because  
2 the parties in effect went to the price he had discussed  
3 with them, there was a determination de facto of the  
4 original price. We think that is the appropriate route in  
5 relation to this current bulk supply renegotiation, so we  
6 believe it is not a matter that is relevant to the  
7 allegations on common carriage access.

8 THE PRESIDENT: Yes, I see. Do you have any comment on that,  
9 Dr Bryan?

10 DR BRYAN: If I may respond, sir. The original  
11 determination, or the Director has not called it a  
12 determination, it was the price he was minded to  
13 determine, it was made very clear to us that the only way  
14 we were going to proceed with the inset prior to 1999 was  
15 to accept that price. There was no negotiation about it.  
16 Subsequent to that decision, we did try to appeal that  
17 price with the Director under the provisions of the Water  
18 Industry Act that my friend has just referred to. The  
19 Director declined to do so, effectively saying: "That was  
20 the price I decided back then and I am not going to  
21 revisit it now." Our view is that were we to agree to  
22 Welsh Water's request to ask the Director to determine the  
23 bulk supply price under the Water Industry Act, we would  
24 be back where we started with a price that we have always  
25 deemed to be inherently unfair.

26 It might help the Tribunal if I were to show the  
27 train of thought which led us to claim this particular  
28 interim relief. I will try and do so as clearly and  
29 concisely as possible. First of all----

30 MS KIM: If I may interrupt, there may be items here that are  
31 confidential.

32 THE PRESIDENT: Yes. Would you be careful not to mention any  
33 figures.

34 DR BRYAN: I will be careful.

35 THE PRESIDENT: Do not mention any figures and do not trespass  
36 on confidentiality.

37 DR BRYAN: If you would care to look at the enclosures file,  
38 tab 7, page 32, this document relates to the justification  
39 for the access price that lies at the heart of the

1 complaint.

2 THE PRESIDENT: Tab 7, page 32?

3 DR BRYAN: Tab 7, page 32. At paragraph 3 on that page----

4 THE PRESIDENT: The attached appendix?

5 DR BRYAN: Indeed, and I do not think that there is any  
6 confidentiality associated with this, the second sentence  
7 in this provides the linkage between the access price and  
8 the bulk supply price. Fundamentally the difference  
9 between the two is that the bulk supply price includes the  
10 price that Dŵr Cymru paid to United Utilities for their  
11 water. It is their water at the start of the process.  
12 The access price excludes that cost, because the basis of  
13 our proposal is that we buy that water directly from  
14 United Utilities and use the Ashgrove system to transport  
15 it. So therein lies the linkage.

16 That is made very clear on page 34 of the same  
17 document, Schedule A. I will not refer to the figures,  
18 but if you look at the column headed "Non potable" and the  
19 column "Albion Water Common Carriage", you will see that  
20 linkage that I have just described. I would ask you in  
21 particular to reflect or remember the figures that are  
22 quoted there for the treatment and bulk distribution  
23 component; in other words, the two components which  
24 together comprise the common carriage access price.

25 Could I then ask you, sir, to turn to page 47 of  
26 the same tab -- sir, I am relying solely on evidence  
27 provided by Dŵr Cymru -- a letter to Beryl Brown of 16th  
28 January. This was withheld from us for a period of a  
29 further two months, but I am not sure what inference to  
30 draw from that. If you look at the body of that letter you  
31 will see that there are revised figures given for both the  
32 treatment costs and the transport costs.

33 THE PRESIDENT: Just a moment. Yes.

34 DR BRYAN: The difference between those two sets of figures  
35 leads us to the sum we believe that we have been  
36 overcharged, using Welsh Water's own evidence, for the  
37 period that this latter tariff, the letter of 16th  
38 January, was deemed to apply, namely from 1st April 2003  
39 until 31st March 2004. That difference is significant.

1 We do not accept necessarily the validity of the latter  
2 figures, but what we do accept is that those figures  
3 demonstrate unequivocally that the earlier figures were  
4 too high. I think it is worth mentioning that Ofwat's  
5 draft decision makes it very clear -- this is the decision  
6 of 7th April -- that Welsh were in error in calculating  
7 those original figures that are the subject of complaint.  
8 Ofwat then goes on, in effect, to justify that action on  
9 behalf of Welsh and conclude that it was not breaching the  
10 Chapter II prohibition in so doing.

11 That, sir, is as clear as I can make the trail  
12 that leads us to the application.

13 THE PRESIDENT: Yes. Does Ofwat want to make any comment on  
14 this aspect?

15 MS SLOANE: **(Pause)** In short, Ofwat's position is, in  
16 essence, the same as that set out by Dŵr Cymru and as set  
17 in the Director's written observations. Taking very  
18 shortly the letter of 16th January which you have just  
19 been shown, I would draw to the Tribunal's attention the  
20 penultimate paragraph, which states:

21 "Should a similar application be made, the bulk  
22 prices that formed the basis of the start for any new  
23 applications would not include any other administrative  
24 and associated costs. It is not as clear-cut and as simple  
25 an issue as is being presented."

26 In any event, in Ofwat's position that is beside  
27 the point. These are not valid interim measures.

28 THE PRESIDENT: There is no presently valid request before the  
29 Tribunal giving us jurisdiction to grant interim measures  
30 because what, because this aspect of the matter, according  
31 to you, is not the subject of the original complaint and  
32 has not been----

33 MS SLOANE: Of any investigation or decision by the Director.

34 THE PRESIDENT: Not been the subject of an investigation.

35 MS SLOANE: Of a CA98 investigation by the Director. It is  
36 not even mentioned as the subject of any of the six  
37 identified and alleged matters of appeal in the Notice of  
38 Appeal.

39 THE PRESIDENT: That has clarified, I think, our minds on

1           that. We will retire again. We will not be back until  
2           shortly before lunch.  
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(see **R U L I N G** [separate document])

THE PRESIDENT: There may be other matters on the agenda that we have not yet canvassed or other matters parties wish to raise before we rise.

MR RANDOLPH: Sir, I wonder if I may. Strictly speaking, the present case continues in the light of your direction.

THE PRESIDENT: Yes.

MR RANDOLPH: The usual course of conduct with regard to Interveners, we would be able to see what pleadings have been submitted.

THE PRESIDENT: Yes.

MR RANDOLPH: It may be this is slightly premature but it may also save time. We have not seen any papers, obviously. If the decision has not varied very much, obviously the underlying appeal will not necessarily vary very much. If that is the decision, it may be we continue with the present one. Therefore, I would suggest on behalf of my clients that the appropriate and most efficient course of conduct here would be for the usual rule to apply, i.e. that the Interveners be entitled do see what is presently before the Court.

THE PRESIDENT: Absolutely. You are entitled to that.

MR RANDOLPH: We would be very grateful if an order could be made that we be entitled to see all the pleadings before the Court.

THE PRESIDENT: Yes. I am not sure you actually need an order to that effect. We just serve the pleadings on the Interveners in the ordinary way. Thank you for alerting me to that, Mr Randolph. What I suggest is we simply extend generally the Interveners' time for serving any pleadings in response and we will revisit that question again at the next Case Management Conference on 2nd June, if we have to.

DR BRYAN: Thank you, sir. I will indeed follow your guidance and be in touch with Ofwat.

THE PRESIDENT: Do not misunderstand, we have not given any

1 guidance, we have simply explained what the situation is.  
2 DR BRYAN: I do appreciate that and it makes a great deal of  
3 sense. I have some concerns about the speed with which  
4 Ofwat will respond. We can doubtless come back to you if  
5 we need to.

6 Given the issue of timing, there is an  
7 application for disclosure. There are many documents that  
8 Ofwat have that would be helpful in terms of speeding us  
9 up. I am aware that Ofwat is arguing that our net has  
10 been drawn too wide and, rather than detain the Tribunal  
11 any longer, I would like to make a suggestion that we  
12 write to Ofwat about the specific documents that they  
13 themselves have identified as source material in their  
14 various draft decisions but that we have not yet had sight  
15 of and invite them to copy those to us so that no time is  
16 wasted. I wonder whether you would have an opinion on  
17 that.

18 THE PRESIDENT: As a general rule, certainly as regards any  
19 documents that are referred to in the latest draft  
20 decision, documents that are referred to in a decision are  
21 normally relevant to the proceedings and normally  
22 discloseable, subject to the provisions of protecting  
23 confidentiality. So I hope that that issue can be sorted  
24 out by consent, with a reasonable attitude being adopted  
25 on both sides.

26 DR BRYAN: Thank you, sir.

27 MS SLOANE: Sir, taking the disclosure point first, it would  
28 be helpful if that letter could be copied to the  
29 Interveners in order to deal with the issues of  
30 confidentiality.

31 THE PRESIDENT: Yes.

32 MS SLOANE: The only other point outstanding is the service  
33 of the defence. We would seek an order, as perhaps would  
34 the Interveners, that that issue be decided, if necessary,  
35 at the CMC, but that time for service of the defence be  
36 extended until then.

37 THE PRESIDENT: We will extend the time proportionately,  
38 taking into account the further CMC.

39 Thank you very much for your help, everybody. I

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am sorry we have gone on through lunch and messed up  
everybody's lunch break. Thank you all very much for your  
help.

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