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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1042/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11th February 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)

THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Appellant

And

DIRECTOR GENERAL OF WATER SERVICES

Respondent

supported by

THAMES WATER

Intervener

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

Mr. Jon Turner and Miss Valentina Sloane (instructed by the Director of Legal Services, OFWAT) appeared on behalf of the Respondent.

Mr. Stephen Tupper (of Watson, Farely & Williams) appeared on behalf of the Intervener.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. Before we get to the agenda for the
2 Case Management Conference the Tribunal has been reviewing the papers in this case and we
3 have a number of points that in accordance with our normal practice we would just like to put
4 on the table so that our thinking can be understood. Some of the points relate to practical
5 issues such as the timing of the present proceedings. Other points are not necessarily to be
6 dealt with today but may at some stage become relevant or be points that need to be dealt with
7 in argument at a later point in the case. So perhaps I can just give you the matters that we have
8 in mind and then we will see where we are.

9 The first question is really for Albion, and that is how far the issues in this case are
10 still live issues as far as Albion is concerned? In particular, we would be glad to know at some
11 point whether Albion is still active in the relevant business, who in fact owns the Albion Yard
12 and Bath House sites; and thirdly, what if anything became of the business that according to
13 the chart on p.4 of Dr. Bryan's witness statement related to Dulwich Hospital, Hammersmith
14 Hospital and a borehole in Hackney? That is the first set of questions and I am not necessarily
15 saying that we need the detail now, but we might like to get a feel for the essential question of
16 how far we are dealing with live issues.

17 That takes us to the second set of questions regarding in particular the question of
18 how urgent it is to bring this particular case on for hearing. There is clearly a timing issue as
19 between this case and the Shotton case and obviously one question is whether we should
20 decide Shotton first and then do this case. If we were to do that (the hearing in Shotton is set
21 down for the second week of May at the moment) on the most optimistic timetable it would not
22 seem possible realistically to bring this case on for hearing before the Summer break in July so
23 one is essentially looking at an Autumn date for a hearing in this case one would have thought
24 and the question is what is the reaction of the parties to that particular situation and how do the
25 three parties respectively see the timing issue?

26 In relation to that there is also the suggestion the papers of Albion Water in particular
27 that the outcome of this case may be affected by the decision in the Shotton case and we would
28 like to have a slightly better feel from Albion as to whether there is a relationship between this
29 case and the Shotton and, if so, what it is.

30 That takes us on to a different issue, which is an issue of fact. We read with interest
31 the background information about the situation in London regarding ground water and water
32 shortages and the risks of flooding and so forth. What we are slightly hazy about is the kind of
33 technology which is or might be relevant to the sort of operation that was envisaged in this
34 case for the Albion Yard and Bath House boreholes. Are those boreholes – or boreholes like

1 them – controlled in some way by a valve, or do they require a pump? How do they connect to
2 the rest of the system? How is the quality of the water ensured? All those sorts of background
3 things but not going into particular detail. We imagine that some background note on those
4 points would, at some stage probably be helpful to us simply to understand the issue. In
5 relation to that there is some relevance to what I call the “balancing and buffering” point. We
6 are somewhat unclear at the moment as to whether the supply of water from these boreholes
7 can actually be controlled or regulated by the person who is the owner of the borehole, or
8 whether the water necessarily has to enter the Thames’ system, or whether it can be dealt with
9 in some other way, particularly in a situation of over supply.

10 Moving on from that, and I apologise to the extent that some of these points are
11 slightly disparate points that bear on different issues, the next one in our minds concerns in
12 particular ground 1 of the present Appeal, which is essentially a margin squeeze price issue.
13 We feel we may need some help at some point on whether that issue was really within the
14 scope of the s.47 procedure that was followed in this particular case. For the purposes of this
15 case we are under the unamended s.47 and it is unclear whether at the time Albion, for
16 whatever reason, was mainly contesting the balancing and buffering issue and the costs of over
17 supply and under supply and how those were taken into account, rather than the actual price
18 itself or whether in fact the price issue always remained a live issue, especially the subsequent
19 increase in the access price that happened shortly after the revised price was issued. So some
20 help on that would be useful.

21 Next, and this is primarily for the respondent and a similar point arises in the Shotton
22 case, we may need some help on how we are to approach the relationship between the
23 Regulator’s powers under the Water Act and his powers under the Competition Act and, in
24 particular, the question of whether when enforcing the Competition Act the Regulator is in any
25 different position from other Regulators and whether in particular the same powers and duties
26 apply in the water sector as apply in other sectors.

27 Moving on, the next point, which I think swings back to Albion, is assuming
28 **hypothetically**, and I stress that word very emphatically at this stage, that there was something
29 in the points that Albion makes, what outcome would be envisaged if we were to refer this case
30 back to the Director, or to put it more directly what point would there be in remitting a matter
31 back to the Director at this stage. That, I think, is somewhat related to the first point that we
32 made which is how far the issues in this case are live issues as far as Albion is concerned?

33 One particular legal issue that arises, if I can now turn to the next point, is that in this
34 case – as far as we can see – we had in the early stages some kind of process of negotiation

1 between Thames and Albion, and one question that we may need to address at some point
2 probably later on, is at what point does a process of negotiation become conduct for the
3 purposes of the Chapter II prohibition and how far does a dominant firm in the position of
4 Thames have some duty to facilitate, or at least not obstruct competition.

5 There are finally, subject to my colleagues, two background questions – one for the
6 Regulator. By way of background it would be useful to the Tribunal to know to what extent
7 common carriage now exists as a phenomenon in this industry or whether there is very little
8 common carriage or a lot of common carriage, or whether it is increasing or static and what the
9 expectations are? Finally, there is reference in the papers and it was discussed on the last
10 occasion that we met, reference to a proposed case study and we would like an update, please
11 on what has happened to the case study – if anything has happened to it – and where one is on
12 that particular front.

13 I may have left something out – I will see if my colleagues are in agreement. (After
14 a pause) I think those are the main points we had in mind. With that probably somewhat dense
15 introduction we would propose to go to the agenda, but it may be that the easiest thing is just to
16 rise for a few minutes to let you take those points on board and think about them to the extent
17 that they are relevant to the agenda for today – there may be timing issues in particular. Does
18 that sound a convenient course, Mr. Thompson?

19 MR. THOMPSON: Certainly, Sir. I am just wondering how far you are hoping for answers to your
20 questions?

21 THE PRESIDENT: Well I am not hoping to answer the detailed factual or legal questions, but I am
22 hoping to get a feel, particularly for the timing issue, for the question of how far the issues in
23 this case are live, and for the relationship between this case and the Shotton case. I think those
24 are the particular points we have in mind at the moment.

25 MR. THOMPSON: I could probably have a go at that straight away, but it might be simpler
26 to ----

27 THE PRESIDENT: Well let us see what Mr. Turner says. Do you want to go straight on,
28 Mr. Turner, or do you want five minutes to collect your thoughts?

29 MR TURNER: Five minutes to discuss the points the Tribunal has raised would be welcome.

30 THE PRESIDENT: Right. Thames Water?

31 MR. TUPPER: Well if they would like five minutes I am happy to take five minutes.

32 THE PRESIDENT: Okay, well we will take ten minutes to be on the safe side! [Laughter]

33 (The hearing adjourned at 2.20 p.m. and resumed at 2.35 pm.)

1 MR. THOMPSON: I think the first point that it would probably be helpful to explain would be the
2 issue of how far this is a live commercial matter for my clients. As I understand it the Bath
3 and Albion sites themselves are actually owned by the people who own the buildings on top of
4 them. The plan was simply to take a lease of the relevant part where the boreholes are, install
5 a treatment works, which I understand to be really quite a modest entity – it is about a quarter
6 of the size of this room apparently, or somewhat smaller, and by reference to last week’s visit
7 the volumes involved are about 5 per cent. of the volumes going down the pipe that we saw at
8 Shotton, so it is a substantially smaller operation. As I understand it, it is basically a pipe
9 going into an underground river, extracting that and doing the necessary treatment to turn it
10 into potable water, which I understand can be done in sophisticated treatment works which are
11 relatively small. That is the basic model.

12 THE PRESIDENT: Yes.

13 MR. THOMPSON: The current position is that because of the pricing issues of which we complain
14 it is not regarded as a commercial proposition to take forward those two projects. There are
15 three projects which are in various conditions. The Dulwich project, as I understand, the
16 ownership is now in the hands of a hospital trust. There is a transfer of ownership going on
17 and my clients are watching that matter and have been in negotiations with the current owners
18 and would consider being in negotiations with the future owners. The position in
19 Hammersmith is that Pennon, whom you may recall is the parent company of what used to be
20 Enviro-Logic, are actually operating that for a hospital and could, I think, use it for a prison on
21 the site.

22 The position in Hackney is, I think, essentially the same as in Dulwich, that it is
23 owned by a hospital trust. It is not currently in use, but the idea is that a similar system could
24 be used for that site, so I think that is the current state of play. How far it is actually live – our
25 position is that because of the position on pricing of which we complain, it is not commercially
26 viable to undertake these projects but that if this appeal succeed in principle it would be
27 possible to undertake it, and we have set out the big picture benefits of such a project in our
28 Notice of Appeal. So from our point of view it is very much a live issue, that if the commercial
29 terms could be put right there is a very obvious large scale commercial rationale for this,
30 namely, that large amounts of water which are currently surplus under London could be used
31 to redress a balance of a deficit which currently exists, as it were, on the surface.

32 THE PRESIDENT: But Albion, so you submit, has a realistic business intention to proceed with the
33 Albion Yard, Bath House and possibly Hackney boreholes, assuming pricing issues could be
34 sorted out.

1 MR. THOMPSON: That is the position, yes, and in relation to Hammersmith our understanding is
2 that Pennon has no particular commitment to this and so were a favourable outcome to the
3 Shotton and/or this case to be reached this is being currently discussed between my clients and
4 Pennon, so that is ----

5 THE PRESIDENT: You mean that Pennon might come to some arrangement.

6 MR. THOMPSON: I do not think Pennon has any great commitment – that is what I understand.

7 THE PRESIDENT: I see, they may allow Albion to take it over in some way.

8 MR. THOMPSON: Here, as elsewhere, I think my clients are more vigorous in this respect than
9 some others.

10 THE PRESIDENT: Yes, thank you.

11 MR. THOMPSON: I think that is the position – in fact, I answered a number of points at once,
12 I think.

13 THE PRESIDENT: Yes, I think you did.

14 MR. THOMPSON: In terms of timing, it seems to us that although the issue here involves water
15 resources, and not simply water retailing, as in Shotton, the broad shape of the issues are
16 similar, and although they have been developed in more detail in the Shotton case and, in
17 particular the allocation of costs, and the correct approach both to costs and to benefits and the
18 Tribunal will be aware of the issue about the s.66(e) of the Water Act 2003, and the general
19 dispute about the correct approach to pricing issues.

20 THE PRESIDENT: Yes.

21 MR. THOMPSON: We would say that those issues are, at least in the background here, because
22 they effectively give shape to the debate between the parties about how these pricing and
23 benefit issues should be treated, and they will be addressed in the Shotton case, as I understand
24 it. So from our point of view it would seem to us quite sensible to hear Shotton debate those
25 questions with the Director in that case, reach a conclusion and either at least delay the hearing
26 until after that, or possibly delay the hearing until after Judgment in the Shotton case. We
27 would not see a particular problem with that because of the rather static position, as it were,
28 commercially, because of what has happened and what we say that we have been driven out of
29 the market.

30 THE PRESIDENT: So what do you say – hear this case after the hearing in Shotton, but before the
31 Judgment in Shotton? Or, hear this case after the hearing in Shotton and give two separate
32 Judgments following both hearings?

1 MR. THOMPSON: Possibly, I was not quite sure what the Tribunal was putting to me, whether we
2 were being asked to consider the possibility of putting off the hearing in this case until after the
3 Judgment in Shotton.

4 THE PRESIDENT: That was our original suggestion.

5 MR. THOMPSON: I think that would not cause us a problem because of the rather flat position that
6 there is commercially on this issue, but equally we would be perfectly content to attend the
7 hearing earlier if that was thought to be suitable, but one can see some sense in setting out the
8 ground rules in Shotton before fighting out some of these similar issues here.

9 THE PRESIDENT: Yes. That would mean that we would not get to a hearing in this case before the
10 Autumn, probably.

11 MR. THOMPSON: Yes, obviously one of our complaints is delay and so in a way it would be nice
12 to do it quicker, but in the round that seems probably to be the best way forward.

13 THE PRESIDENT: Yes.

14 MR. THOMPSON: There were two other points of information which were common carriage and
15 the case study. So far as we are aware there are very short answers to both. We do not believe
16 there is any common carriage within the UK water industry at the moment and we believe that
17 Thames is not enthusiastic about the case study – that is our understanding. We stand ready, as
18 it were, on both, but at the moment we feel a bit stymied. There was a more technical
19 question about ground 1 but I would prefer to hold fire on that.

20 THE PRESIDENT: You prefer to reserve on that.

21 MR. THOMPSON: If that is all right?

22 THE PRESIDENT: Yes, fine. Well I think the first issue which we ought to address from the
23 Agenda point of view is, in fact, issue 6 – the timetable of the case. I now look across I think to
24 the respondent. The Appellant seems to be suggesting that this case should effectively proceed
25 after the Judgment in Shotton. I do not know if you have a view on that Mr. Turner?

26 MR TURNER: We are not happy with that. We think that the case should be got on with quickly.
27 This was a case that was commenced by Notice of Appeal originally in July last year. It is
28 a case involving a small number of discrete issues. We do not see a read across to the Shotton
29 case, despite what Mr. Thompson has now said, and we emphasise that this is very much
30 dealing with a historic situation, namely, negotiations that took place between Thames and
31 Enviro-Logic or Albion in late 2000/2001. Unless you are persuaded that there is a sufficient
32 interlocking by reference to the detail rather than broad assertion this is a case that can, and
33 should be decided more quickly. So for those reasons we would prefer a hearing much more
34 quickly than that.

1 THE PRESIDENT: Yes. To tell you the truth, I am not sure that whatever we do is going to make
2 an enormous amount of difference, because if we hear Shotton in the second week of May, let
3 us assume that a Judgment in that case is available before the Summer break at the end of July
4 – let us assume that, it is not unreasonable but on the other hand still quite a favourable
5 assumption – we are not going to hear this case before we hear Shotton for calendar reasons, so
6 that even if we did hear this case before the Summer break it is unlikely that a Judgment would
7 have been available much before the Autumn – I would have thought – in fact, the two
8 Judgments might go together, because there are certain parallel issues, the background
9 statutory framework, for example, is the same.

10 MR TURNER: We certainly accept that.

11 THE PRESIDENT: So it may not accelerate things greatly to take this one after Shotton, and I
12 suppose – just because it is in my mind let me mention the possibility that we should hear this
13 one after we have heard Shotton, but not necessarily after we have given Judgment in Shotton,
14 so we have the argument in both cases, and then we can sort out whether there is any
15 relationship between the two and whether we should do one before the other or do them both
16 together.

17 MR TURNER: I can see the sense in that.

18 THE PRESIDENT: That is one possibility, I suppose. We only put in the other side of the
19 balance ----

20 THE PRESIDENT: But you want to get on because you say this is quite an old ----

21 MR TURNER: Stale.

22 THE PRESIDENT: -- stale case, and not that difficult and we should deal with it appropriately as
23 soon as we can. That is your position.

24 MR TURNER: I understand the Tribunal's perspective and, Sir, we are in your hands on this.

25 THE PRESIDENT: Yes, very well. Let us see what Mr. Tupper has to say. Good afternoon,
26 Mr. Tupper.

27 MR. TUPPER: Good afternoon, Sir. Just one more complicating factor, because if I have
28 understood the position that has been taken by the Appellant, the Appellant is saying that this
29 case will still be live and relevant because if there is a decision concerning pricing then
30 obviously that can be applied by the parties and then we can get on to a happy commercial
31 future. However, the Water Act is destined to become law of the land probably in July when
32 OFWAT finalises its guidance documents. So in fact what will have to happen at some point
33 shortly thereafter is that Albion will have to re-apply to us in accordance with the provisions of
34 the Water Act for access via 66(e). So in fact any decision concerning pricing will become

1 redundant very shortly thereafter because they will have to become a licensee, apply through
2 the process set out in the Water Act and any pricing arrangement that they have come to as
3 a result of this litigation will cease to have any relevance whatsoever. So I am interested to
4 hear what Albion may have to say about that conundrum.

5 THE PRESIDENT: How firm is this information about when the 2003 Act is likely to come into
6 force?

7 MR. TUPPER: OFWAT has set itself a work programme and thus far has hit its marks. However, as
8 you know with work programmes things can go awry. But I think that OFWAT is keen – and
9 I would be interested to hear if there are any comments from the OFWAT team here – to make
10 sure that the guidance is finalised and that the systems are therefore activated in July of this
11 year, at which point there will have to be a process of licensing that Albion will need to go
12 through and then they will have re-apply to us and then we will have to do a recalculation of
13 the right access price in accordance with the rather complicated provisions set out in s.66(e) of
14 the Act. So the decision will be interesting and of course I would be fascinated to remain with
15 this case to see where it goes, but it will be for historic purposes only.

16 THE PRESIDENT: Yes. Do you want to come back on those points, Mr. Thompson?

17 MR. THOMPSON: On the procedural point I do not think we would have any particular objection to
18 the compromise position of having the hearing after Shotton but before Judgment in that case.
19 It might lead to a degree of duplication, which might be avoided but equally it may be that
20 given the same parties are involved one could avoid any re-arguing of points that have already
21 been argued in Shotton.

22 So far as the second point is concerned, I had a slight feeling of *déjà entendu* – I think
23 a similar issue arose in Shotton. I think the view that was taken there – I thought by the
24 Director as well as by the parties – was that there was a good deal of overlap between the
25 issues that arise under s.66(e) as a matter of principle, given the position that the Director has
26 taken, indeed in Shotton he has put in a detailed paper about the principles that apply and it
27 does appear to me that the issues that are debated will not be entirely historic in their
28 implications and indeed we may at least have a side look at 66(e), as I think Mr. Peretz said in
29 Shotton, in debating the issues of principle that arise in this case.

30 THE PRESIDENT: Yes.

31 MR. THOMPSON: And at least in principle there may be a question about what the implications of
32 any ruling are in this case for the rather lengthy period that has taken place when my clients
33 have been unable to supply water in London since 2000 when they hoped to do it. So it may be
34 not entirely academic anyway, even if it is historic.

1 THE PRESIDENT: Yes, thank you.

2 (The Tribunal confer)

3 THE PRESIDENT: We have come to the view that in principle it is desirable to have this hearing at
4 a point not too long after the Judgment in Shotton, but probably before we give Judgment in
5 Shotton so that we can see the whole scenario. From the point of view of Thames Water that
6 has the further advantage that although the parties in the two cases are substantially the same
7 they are not actually identical because we have different interveners in the different cases, and
8 that would give Thames the opportunity to make any relevant submissions to us without being
9 shut out by anything we said in Shotton, and/or Albion to make submissions to us in this case
10 without being shut out from anything we have said in Shotton that may be against Albion. So
11 I think that is probably the best course in this case.

12 Mr. Thompson, and indeed from the Director's point of view, I do not want to put
13 either of the principal parties under too much physical pressure to do two heavy cases close
14 together, which may be a strain on both organisations and it may be probably not feasible to try
15 to fix a date now, but if we were to aim for a date probably in the second half of June, that
16 might give both sides enough time to recover, as it were, from Shotton, and turn their minds to
17 this one. So I would suggest that we would list this case for hearing in the second half of June,
18 and the Registry will be in touch with the parties as to the precise date.

19 That probably now takes us to the question of what is to happen between now and
20 then, and logically I would have thought the first question is further pleadings, and in that
21 regard we have the intervention from Thames that we are awaiting. Just remind me,
22 Mr. Tupper, when you are asking for to get that in by?

23 MR. TUPPER: Sir, we had asked for four weeks, and I gather that Albion rather kindly calculated
24 that meant 11th March, I believe.

25 THE PRESIDENT: Yes. Is that acceptable, Mr. Thompson? Is that agreed?

26 MR. THOMPSON: Yes, Sir.

27 THE PRESIDENT: So 11th March for Thames Water's intervention. You are asking to put in
28 a reply, is that right?

29 MR. THOMPSON: Yes, I think that is likely to be the most convenient course. I think to some
30 extent the Director has thrown down a gauntlet on one or two points, about which we would
31 think it was suitable to put down our responses in a pleading, that is probably the clearest thing
32 to do, and it may also be possible to address some of the points that the Tribunal has raised this
33 afternoon as well. I would not anticipate it being a long document, but of course we do not
34 know what Thames will say and it may be suitable for us to have an opportunity to comment

1 on what Thames say as well; and possibly – if it would be useful – for Dr. Bryan to add one or
2 two factual points also in the light of the queries that have been raised and some of the points
3 raised by the Director.

4 THE PRESIDENT: If we say, as you suggest, 1st April for your reply.

5 MR. THOMPSON: Mr. O’Flaherty whispered along that if we are not going to be on until towards
6 the middle to end of June, whether perhaps another week for that, so that we would have four
7 weeks to respond to whatever Thames put in, so we would put it back until 8th April. I do not
8 know if that is possible.

9 THE PRESIDENT: I would have thought that is fine. So 8th April for the reply. Skeleton arguments
10 sequentially on some timetable to be fixed?

11 MR. THOMPSON: I think Mr. Turner suggested a three week sequence, so we would put in three
12 weeks before, he would put in two weeks before, and Mr. Tupper one week before. That
13 seems to us perfectly reasonable – in principle at least.

14 THE PRESIDENT: Yes. Mr. Turner that sounds practical?

15 MR TURNER: The timetable is acceptable, Sir. There is one point in relation to the question of
16 a reply and an additional witness statement which is that Mr. Thompson has helpfully clarified
17 that there are issues in the defence on which he will wish to respond, both in a witness
18 statement and in a further pleading but, despite our asking, he has not said what those are.

19 THE PRESIDENT: Yes.

20 MR TURNER: He should at least be in the position now, having considered our pleading, to tell us
21 what they are. This is a Case Management Conference at which that is meant to be aired and if
22 he is thinking of putting in new evidence on some new issue, prompted by something in our
23 Defence, we would wish to know what that is. It may, for one matter, save costs.

24 THE PRESIDENT: Thank you. Are you able to elucidate the matter, Mr. Thompson? Perhaps I said
25 rather hastily that ----

26 MR. THOMPSON: I find it a slightly curious approach. I am not quite sure why I should be put to
27 say what I am going to put in the pleading and ----

28 THE PRESIDENT: What is the issue? Perhaps I was over hasty in dealing with the question of a
29 reply – what is the issue upon which you want to reply? What is the general area in which
30 further evidence is useful at this stage, because one is always in a bit of a cleft stick in this
31 situation, the more you put in further evidence, the more the other side wants to reply to that
32 evidence, and we never stop, and there is a law of diminishing returns, at some point one just
33 has to say “Okay, well that is it”. So can you help us at all?

34 MR. THOMPSON: It is normally put to the good sense of the parties and I would claim that, but

1 I mean, for example, para. 30 there is an assertion made by the Director for the use of the
2 published LRMC figure is in this context of limited value. It rather hangs in the air and it is
3 precisely the sort of thing which I think we might wish to comment on. I do not really want to
4 go blow by blow through the Defence in saying “We are not sure about that, and we are not
5 very impressed about this”, but in my submission he makes sufficient contentious remarks
6 where we might well have something to say and I cannot see it would prejudice him in any
7 way for us to say it in a pleading before the skeleton rather than him only having a week to
8 respond if we put in our skeleton. I am not quite sure what is worrying Mr. Turner.

9 THE PRESIDENT: On the question of evidence?

10 MR. THOMPSON: Well precisely on that sort of thing. There is another point where Mr. Turner
11 asserts that something is theoretically uncontroversial, particularly in relation to pressure build-
12 up where water is suddenly injected under Bishopsgate. I think his point is that the pipes in
13 Bishopsgate might suddenly burst or somebody who is having a shower would suddenly have
14 water powering down on him and it seems to me which it might be helpful to the Tribunal to
15 have some evidence as to whether or not that is actually correct. At the moment the Director
16 asserts it, but he does not condescend to produce any evidence on the subject.

17 THE PRESIDENT: If we can rely on your good sense and the need for balance in these proceedings
18 to keep the Reply and any further evidence you feel compelled to put in as concise as possible
19 we would be grateful.

20 MR. THOMPSON: Yes, that is the sort of thing, to tighten rather than expand the Appeal.

21 THE PRESIDENT: Very well. As far as the hearing itself is concerned, there seems to be fairly
22 general agreement that we are unlikely to need further evidence, is that right?

23 MR. THOMPSON: I take it you mean oral or expert evidence? Sir, I think we think that we have
24 enough expertise between us.

25 THE PRESIDENT: I mean oral evidence, yes – expert or oral evidence.

26 MR. THOMPSON: And that it is unlikely that we will need to have witnesses called. I suspect by
27 the time you get to the hearing the issues will be well aired on paper.

28 THE PRESIDENT: Yes, I am not aware of any further request for disclosure – it is an almost
29 unprecedented situation.

30 MR. THOMPSON: I have an apology on behalf of Dr. Bryan, there was an excess of zeal on
31 Tuesday – I do not know if it reached you – whereby we put in a draft document which I had
32 not seen, but I replaced it with a document ----

33 THE PRESIDENT: These are your revised submission for today?

1 MR. THOMPSON: Yes. And we have no application for disclosure and, indeed, we have been
2 given a lot more documents today by the Director, which I have not had a chance to read
3 – I am not quite sure what they are but we have a lot more and we are grateful for that.

4 THE PRESIDENT: Good. At the moment at least I do not think we have to rule on any
5 confidentiality issue, do we – Mr. Turner? Sorry, did you want to come back on disclosure?

6 MR TURNER: Sir, only to inform the Tribunal, because you also should have received, I think this
7 morning, a pack to substitute into your bundles. Just so you know what that is, we have
8 essentially given you – so that the whole thing is there – pretty well the whole external file.
9 There are a few trivial things that are omitted, but we thought it would be better, and there are
10 within that a small number of documents, letters, that Mr. Thompson has not previously seen,
11 and I will indicate to him which those are.

12 THE PRESIDENT: Thank you very much, that is something we find very helpful indeed.

13 MR. THOMPSON: Sorry, Sir. I do not want to give any hostage to fortune here, I am not saying
14 that regardless of whatever Thames say, or whatever happens in the future there will never be
15 an application for disclosure here, but ----

16 THE PRESIDENT: I certainly was not suggesting that, it is just that we do not have one to deal with
17 today, nor at the moment at least any issue relating to confidentiality, and there seems to be,
18 I think, general agreement, that it is not going to be fruitful to agree particular facts. The only
19 point I would have in my mind, it comes back to one or two of the technical questions that we,
20 the Tribunal, were asking a minute or two ago.

21 MR. THOMPSON: Yes, Mr. Turner did suggest that it might be possible to agree on the basic
22 outline of how such a system works, and it did occur to me that some of the places involved
23 are not very far away.

24 THE PRESIDENT: You might want us to go and have a look at them!

25 MR. THOMPSON: If the Tribunal wanted to see them.

26 THE PRESIDENT: Less adventurous, perhaps, than going up to the site we went to last time.

27 MR. THOMPSON: I think the prime example would be the Hammersmith Hospital, where it is
28 actually working because it is actually serving the hospital, so you could actually see one
29 functioning and in use, but that does not necessarily need to be done today.

30 THE PRESIDENT: Yes, in principle we probably would be interested in a visit of that kind.

31 MR. THOMPSON: I suspect it is owned by Pennon, but I do not know whether Dr. Brown is on
32 good enough terms to arrange it, but perhaps that is something we could discuss with the
33 Registry.

1 THE PRESIDENT: I think it is, and if we could have, certainly no later than the service of the
2 skeleton arguments, but preferably around the time of close of pleadings, a short and
3 preferably agreed short note on the technical background to these boreholes that would be
4 helpful.

5 MR. THOMPSON: I am grateful.

6 THE PRESIDENT: If somebody could very kindly consider whether it would be useful for us to
7 visit one of these sites we would endeavour to do that before the hearing in the second case.

8 MR. TUPPER: Sir, if I may just intervene at this point?

9 THE PRESIDENT: Yes, please do, Mr. Tupper.

10 MR. TUPPER: As regards any additional agreed facts, one thing that we were going to try, if
11 possible, is as regards your technical document, that may be something that we can, as
12 a triumvirate agree on what kind of spriggets and widgets are required to run a borehole.

13 THE PRESIDENT: Yes.

14 MR. TUPPER: As regards a site visit, we believe that because this case is about Bath House and
15 Albion Yard it might be preferable if the Tribunal were to come and visit those two sites rather
16 than one which is not at issue in this particular case, because in fact the state of those particular
17 sites may well be an issue in terms of the full hearing and I am sure that between three of us we
18 should be able to arrange for a visit to either both or one of those two sites. If, in addition, you
19 would like to see a fully pristine and running site, then we can do that and spend some time on
20 the Circle Line.

21 THE PRESIDENT: What we did in our visit to North Wales recently was to look at the particular
22 water treatment system in question, which was essentially a system for supplying non-potable
23 water, but in the course of the visit it was very kindly arranged that we should see a potable
24 treatment plant as well so that we could make a rough comparison between the two sorts of
25 operation. So it may well be of some use to consider whether we could look at least one of the
26 two sites actually in issue and, as a comparator, just to get a general background impression,
27 look at another different working site, of which Hammersmith might be one. So could we
28 leave it to the parties to make a suggestion to the Registry and come back to us on that?

29 MR TURNER: Just to follow up on the question of the agreed facts. We thought it might be
30 convenient for Thames in its intervention statement to cover the issue.

31 THE PRESIDENT: Yes, that would certainly be helpful, I think. Thank you very much. I think,
32 Mr. Tupper, particularly from your point of view, if you could help us in your intervention
33 statement as to what you say the effect of the 2003 Water Act is, and any latest information on

1 when it is going to be effective, or the build-up to it, the background that has been done, and
2 all that sort of thing, the more fully informed we feel the better, really.

3 Are there further issues that now arise from anyone's point of view? Mr. Thompson,
4 do you have anything else that you want to raise? There were one or two points that we, as it
5 were, tossed out at the beginning of this meeting, and insofar as they are not already dealt with
6 in the pleadings, it is probably convenient for the party to whom they were directed to deal
7 with them in their skeleton argument so that for example Mr. Turner, as Mr. Lewis is just
8 reminding me, the question of the relationship between the powers under the Water Act and
9 the Competition Act powers, or indeed whether there is any relationship, is something that you
10 could probably usefully make some short comments on in your skeleton if you feel the need to
11 do so.

12 MR TURNER: Sir, in relation to that it has been pointed out to me that in our Defence in the
13 Shotton case, at annex 1 and annex 2, there is a discussion of this issue and it would be helpful
14 if we had some further clarification of whether there was anything else that was needed,
15 perhaps not now, or whether you had something particular in mind, because otherwise that was
16 what that annex was meant to achieve.

17 THE PRESIDENT: I think what we have in mind is the question of whether this Regulator in this
18 industry is approaching (or should approach) the application of the Competition Act with the
19 same attitude, the same powers and functions as other Regulators? He is exercising
20 a concurrent power with the OFT. We can see that the particular circumstances of the water
21 industry may give rise to particular considerations, but in terms of how the Director goes about
22 dealing with a Competition Act issue, is there any difference between this Regulator and any
23 other Regulator?

24 MR TURNER: Yes, Sir, that is very helpful.

25 THE PRESIDENT: Yes, I do not think I should elaborate any more than that – I think you have
26 probably got the point. Mr. Thompson, anything else?

27 MR. THOMPSON: No, those were the two or three specific queries which my learned friend wants
28 to deal with later and we will await their answers then.

29 THE PRESIDENT: Very well, anything else, Mr. Turner, you would like to draw to our attention?

30 MR TURNER: Sir, as briefly as possible three issues, live issues: the case studies which you asked
31 about and the extent of common carriage

32 THE PRESIDENT: Yes, thank you.

33 MR TURNER: In relation to the question of live issues, we support what Mr. Tupper was saying,
34 because although this case is said to raise important issues of principle relating to water

1 competition and although Mr. Thompson wants the matter to be remitted, we are distinctly
2 puzzled about both of those assertions. Briefly, the case is about negotiations in late
3 2000/2001, and a decision originally taken in March 2002. The specific point which we
4 would draw to your attention is that the discussions were based on an average accounting
5 approach to setting the price, the access price. That approach, which nobody quarrelled with,
6 is not the approach which would be used today. It is not the approach which will be used at
7 any time in the future when Albion Water wishes to apply for access to an undertaker's system.

8 As the Tribunal knows, this case was also on the point of being settled when it was
9 last before the Tribunal in November, and Albion at that time, in principle, did not want to
10 pursue the Appeal, instead of litigating it wanted to pursue the case study.

11 THE PRESIDENT: Because there was the suggestion of the case study.

12 MR TURNER: That, in our submission, demonstrates that it is the case study which relates to the
13 mechanics of how access pricing under the Water Act will work, which is relevant. The
14 proposal fell through because Albion clarified that its intention was to keep the Appeal alive
15 until the case study had been completed satisfactorily, and that led to some dissent. But we
16 now have an Appeal back on course which, with a heavy heart, we feel does not raise live
17 issues today, and we do not understand why Albion is asking you to remit this matter to
18 OFWAT so that it can investigate issues between it and Thames in 2000/2001 in detail all over
19 again. So far as we can see, this case has no continuing relevance. Albion does not own either
20 of the boreholes which are in dispute and, as Mr. Tupper says, whose condition is relevant to
21 the issues which will be before you. If it does want to supply customers using boreholes the
22 access pricing under a new and different regime will apply. It will be based on what has been
23 called the "efficient component pricing rule" approach, ECPR which this was not. It will be in
24 accordance with the Cost Principle under the Water Act. It will be carried out importantly in
25 accordance with procedures and protocols, which are the subject of fine tuning now, and which
26 will be crystallised in guidance which is due to be published in the Spring – I am afraid
27 I cannot be more precise than that.

28 THE PRESIDENT: Mr. Tupper was suggesting it was all going to be finished by July but that
29 sounds a bit optimistic on what you have just said.

30 MR TURNER: The timetable, which we were discussing before the hearing, is that the Guidance is
31 to be published in the Spring. The provisions in question will be coming into force in the
32 Autumn, and we do not have a clearer idea than that from the relevant authorities.

33 THE PRESIDENT: The Guidance – are there consultation documents and preliminary drafts and all
34 that sort of thing?

1 MR TURNER: Oh yes, it is out to consultation. The case studies were intended to inform the
2 consultation process by having pilots in which people would apply in relation, I believe, to
3 boreholes and river abstraction, and approach some undertakers and try to negotiate or arrive at
4 an access price to see how the process would work. That is what has happened in the case
5 studies which have taken place and which Albion Water unfortunately has now not been
6 a party to with two other undertakers, United Utilities and Northumbrian Water.

7 THE PRESIDENT: Statutory water undertakers who have asked for common carriage from other
8 water undertakers?

9 MR TURNER: No, from those two undertakers, certain potential licensees under the new regime
10 have been involved. I believe that it was only Aquavitae who was involved in these case
11 studies. Yes, Aquavitae was the licensee involved in those case studies.

12 THE PRESIDENT: Right, and those are documents that exist, are they?

13 MR TURNER: I believe they are close to completion.

14 THE PRESIDENT: I think some of this background is relevant to us, is it not, Mr. Turner?

15 MR TURNER: It is relevant certainly insofar as it shows ----

16 THE PRESIDENT: Relevant in the sense of deciding how far the present case is still relevant?

17 MR TURNER: Yes, that is so.

18 THE PRESIDENT: Not necessarily relevant to deciding an issue which arises in this case, though it
19 may be I just do not know.

20 MR TURNER: But the point I desire to make, which we thought was uncontroversial, is that any
21 application for access that Albion water makes, whether through an associated company or not,
22 will be conducted under a different regime. That is why, looking backwards, to these specific
23 and rather peculiar circumstances three to four years ago, maybe within the Tribunal's
24 jurisdiction we do not doubt that, but it is not a live issue and it is wrong to say that it raises
25 important principles relating to water competition. We will be spending time on something
26 which is stale.

27 THE PRESIDENT: And it does not raise important principles because whatever they were at the
28 time are now being superseded by the new regime?

29 MR TURNER: Yes, because in this case there was an application for an indicative price for access
30 to Thames's network, using an average accounting approach to the costs. Now, it would be
31 done differently – it will be done differently – and people are thinking towards an entirely
32 different approach. That is the approach which will apply if and when Albion Water applies to
33 any of the water companies for access in the future. We simply cannot see how there can be
34 any doubt about that.

1 PROFESSOR PICKERING: Could I ask, Mr. Turner, about this? I understand that in a sense
2 Albion is where it is and a new application would be dealt with under new procedures.
3 However, the original complaint by Albion was of a Chapter II abuse under the Competition
4 Act. Without wishing to argue their case which they are well able to do, I imagine that in this
5 case one cannot just say bygones are bygones?

6 MR TURNER: No.

7 PROFESSOR PICKERING: And there is a sense, or a claim, of a residual damage, which has
8 affected the development of that business. I can understand if you are saying that there is not
9 an urgency about bringing this case on, but I do not understand could not take the point if you
10 were arguing that there was not a need to resolve this?

11 MR TURNER: Yes, we do not doubt that the Tribunal has a full jurisdiction to consider this matter.
12 That is absolutely right. The point we take issue with is whether or not that will affect the
13 business going forward in terms of the application to water companies for licences. I say that
14 because Mr. Thompson repeated this morning that because of the approach to pricing in this
15 case, they are thwarted in their attempts to get into the market. That is not so. There is no
16 basis for saying that at all. Similarly, with this case – what will they get out of it? They are
17 asking for it to be sent back to the Office so that it can be investigated again? What will be the
18 purpose of that? That is the issue that we are puzzled by rather than any question of whether
19 the Tribunal has power to look into whether there was an abuse in the past. We fully accept
20 that you have power to look into that issue, and whether OFWAT approach that question
21 correctly.

22 PROFESSOR PICKERING: But presumably what Albion want is OFWAT to reconsider that
23 Decision and, if OFWAT were to come to a different conclusion, namely, that Thames had in
24 2000/2001 abused its dominant position then other openings may then arise in terms of
25 damages, actions or whatever, for Albion to pursue. Is this not the point?

26 MR TURNER: They are entitled to bring a private action for damages anyway. To the extent that
27 what stands in their way because it may be of some persuasive influence, is the file closure
28 decision made by OFWAT then yes, a ruling by the Tribunal on that may be of some
29 assistance in relation to some proposed private damages action. Beyond that, as I say, in
30 relation to the business and the working of the business, we cannot see that there is a relevance
31 and moreover, for that purpose the question of remitting the matter back to OFWAT to divert
32 its resources to investigating rather than live matters, we would say would in case be a mistake
33 and something we would resist.

1 THE PRESIDENT: I think you are saying, Mr. Turner, from your perspective, putting it at the very
2 highest from Albion's point of view, the most they could hope for would or could be some sort
3 of declaratory Judgment that you say would have no relevance for the future because of the
4 new regime, but which I think they say might have some relevance for the future because of
5 the new regime, because some similar issues and some points of statutory construction might
6 come into the determination of this case which might have some spill-over effect on the way
7 the new regime works.

8 MR TURNER: They say that in very general terms.

9 THE PRESIDENT: They say it more clearly, I think, in "Shotton", and in "Shotton" to some extent
10 both parties have brought in the new regime, at least tangentially.

11 MR TURNER: But here we cannot see how it has any relevance, that has not been explained.

12 THE PRESIDENT: No, I see.

13 MR TURNER: The final point relates to the extent that there is common carriage, and I am able to
14 assist the Tribunal in relation to that.

15 THE PRESIDENT: Yes, thank you.

16 MR TURNER: We do not believe at the moment that there is any incidence of common carriage. It
17 is in relation to that that the new regime is designed to facilitate competition. I understand that
18 there are a number of potentially interested parties who have recently formed a group, the
19 potential licences group, comprising about five or so members, but that once the new regime
20 gets going it is expected that there may be others. That is as far as we are aware that common
21 carriage is working or will work in the future.

22 THE PRESIDENT: To be absolutely frank, I think we are a bit puzzled to know why there has not
23 been any common carriage, because it is a matter that is dealt with in the Director's Guidance
24 under the Competition Act; that Act has now been in force for five years but nothing has
25 happened. So we just have generally in the back of our mind a question of what is going on.

26 MR TURNER: That is very helpful, Sir, I understand that, but it may be difficult for us to comment
27 on that.

28 THE PRESIDENT: Yes. Well you are the Regulator you should probably be in a position to give us
29 an informed view as to why nothing has happened.

30 MR TURNER: What we may be able to do, and I will investigate this, is to see what other
31 applications for common carriage there have been in the past and where those have got to, to
32 inform the Tribunal.

33 THE PRESIDENT: Yes, thank you.

1 MR. TUPPER: Sir, somewhat impertinently, I have actually written an article on this very subject
2 which was published in "Utility Week" as to why there are these glass walls, glass ceilings to
3 competition in Water. I am happy to dig that out for you.

4 THE PRESIDENT: Well if you want to annex some useful academic study to your intervention that
5 is entirely up to you. Yes, Mr. Thompson?

6 MR. THOMPSON: I do not know whether the Tribunal wants any more from me. I must say I am
7 completely bemused by Mr. Turner's sudden flip over. I thought we were basically agreed and
8 that he, indeed, was puzzled as to why we needed a Reply, whereas he now seems to want to
9 make a vigorous submission. I am not sure that he is actually seeking to strike out our
10 case ----

11 THE PRESIDENT: No, he is not.

12 MR. THOMPSON: -- but he has strong objections which seem to me quite good reasons why we
13 should make a reply answering them. If I may just say briefly, the main point I think that
14 should be borne in mind is that whatever is happening to the Water Act, as far as I am aware
15 the Competition Act is going to stay in the same form throughout this year, and that this is
16 a case under the Competition Act, and the issues that have been relevant since March 2000, in
17 my submission will remain relevant going forwards, and indeed one core issue in both this case
18 and the Shotton case is whether or not the Director's approach under the new regime to be
19 introduced in 2003 is any more compliant with the Competition Act than his conduct since
20 2000. In my submission, that is very much a live issue and I think is implicit in some of the
21 questioning of Mr. Turner this afternoon. I am sure Dr. Bryan has various documents he could
22 put in about why competition has not happened if that is to be done, but I suspect it is better to
23 do it by reference to the Pleadings and skeleton arguments.

24 THE PRESIDENT: I am not sure it is going to be fruitful to carry this particular debate much further
25 this afternoon in the context of a Case Management Conference.

26 MR TURNER: Sir, there is only one matter which Miss Sloane has reminded me I omitted to
27 mention. In relation to the case studies, if we may just hand up two letters which will inform
28 you of the fate of the case studies in relation to Albion. The first you may have already
29 seen – it is a letter from October 2004 in which the potential entry into a case study with
30 Thames was mentioned. If you look behind that on the last sheet of paper, there is a very brief
31 letter dated 4th January 2005 in which you will see there that Thames was dropping out, which
32 they did as I understand it, but Albion was invited to contact United Utilities or Northumbrian
33 about working with them in the case study and was asked to get back because the case study

1 timetable was tight. However, they did not take that offer up, and that is just to complete the
2 picture.

3 THE PRESIDENT: Very well, unless there are any other points. I think we can adjourn this Case
4 Management Conference there and the Registry will be in touch with the parties on the details
5 that are still outstanding. Thank you all very much.

6 (The hearing concluded at 3.30 p.m.)