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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

Case Nos 1045/2/4/04  
1046/2/4/04

21<sup>st</sup> September, 2004

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

Sitting as a Tribunal in England and Wales

BETWEEN:

AQUAVITAE (UK) LIMITED

Appellant

-v-

THE DIRECTOR GENERAL OF WATER SERVICES

Respondent

AND

ALBION WATER

Appellant

-v-

THE DIRECTOR GENERAL OF WATER SERVICES

Respondent

Mr. Michael O'Reilly (instructed by Messrs. McKinnells) appeared for the Appellants Aquavitae.

Mr. Rhodri Thompson QC and Dr. Jeremy Bryan appeared for the Appellants Albion Water.

Mr. Rupert Anderson QC, Miss Valentina Sloane and Miss Anneli Howard (instructed by the Director of Legal Services, OFWAT) appeared for the Respondent.

Mr. Aidan Robertson (instructed by Messrs. Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of the Intervener Dŵr Cymru.

Mr. Fergus Randolph appeared on behalf of the Intervener United Utilities.

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**CASE MANAGEMENT CONFERENCE**  
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1 THE PRESIDENT: Good morning, ladies and gentlemen. Just to set the scene, as far as we are  
2 aware this litigation has now one way or another provoked five cases before the Tribunal.  
3 Number 1031 was Albion Water's original Appeal against the original draft Decision  
4 produced by the Director. That Appeal, as far as we know, is still formally on the  
5 Registry's file, but it may very well be that no further steps are to be taken in relation to that  
6 Appeal.

7 Number 1034 was the interim measures Appeal in which we made an interim  
8 order by consent. That remains in force. Number 1045 is Aquavitae's Appeal against the  
9 Director's Decision of 26<sup>th</sup> May 2004; and number 1046 is Albion Water's appeal against  
10 that same Decision. One of the first matters we need to come to is the relationship between  
11 those two Appeals.

12 Number 1042 is Albion's separate Appeal against the Director's Bath House  
13 Decision that was introduced at a time when Albion was not at that stage aware of precisely  
14 what the contents of that Appeal were.

15 That being the procedural framework we suggest that we deal with Bath House  
16 associated points towards the end of today. I am just looking at my list of persons present –  
17 do we have Thames Water represented here today?

18 MR. TUPPER: Sir, we are representing Thames Water. I am Stephen Tupper of Watson, Farley  
19 & Williams, but we have not formally intervened yet, Sir.

20 THE PRESIDENT: No. Do you mind waiting for a little while, while we sort out all the other  
21 issues and then we will come to your intervention later on?

22 MR. TUPPER: I am happy to do so.

23 THE PRESIDENT: Thank you. Let us therefore begin with numbers 1045 and 1046 –  
24 Aquavitae's Appeal and Albion's Appeal against the Decision of 26<sup>th</sup> May 2004, in relation  
25 to which we have a procedural issue to sort out. The procedural situation, as we understand  
26 it, is that both OFWAT and Dŵr Cymru object to the admissibility of that Appeal on the  
27 grounds that Aquavitae does not have a sufficient interest to appeal that particular Decision.  
28 Aquavitae maintains that its Appeal is admissible, but by an application to intervene which  
29 we have just received today Aquavitae advances an alternative approach which is  
30 essentially that it should be permitted to intervene in Albion Water's case 1046 and that its  
31 Appeal in 1045 should be stayed in the meantime.

32 As to that, we have had the chance to have a preliminary discussion amongst  
33 ourselves. The question of more than one Appeal covering the same subject matter is a  
34 question of horizontal importance across the Tribunal – this is now the third case in which

1 the issue has arisen. We have had occasion to deal with it in particular earlier this week in  
2 relation to Appeals brought by the Racecourse Association and the British Horse Racing  
3 Board, which largely overlap, in circumstances where one of the parties had a much less  
4 direct interest than the other party. It seems to us in general we should exercise our case  
5 management powers in a way that does lead to the most efficient conduct of these cases.

6 There are essentially three alternatives. The first alternative is that one or other  
7 of the Appeals should simply be stayed. That alternative would apply to the Appeal that  
8 had the less direct interest. An order to that effect in circumstances that were admittedly not  
9 completely identical to the present circumstances was made in a case called *VIP*  
10 *Communications Limited* which awaited the outcome of an Appeal by a company called  
11 Floe Telecom which raised similar issues.

12 The second alternative is that the Appellant in the second case should be treated  
13 as an Intervener in the first case and play a subsidiary role as an Intervener in the first case,  
14 its Appeal being stayed in the meantime.

15 The third alternative is that both Appeals should proceed together, assuming they  
16 are admissible but with very tight control over the points that are to be argued before the  
17 Tribunal. That third alternative was effectively the outcome in the Racecourse  
18 Association/British Horseracing Board case to which I have just referred.

19 In this particular case our preliminary view is that there are attractions in the  
20 second course that I have just mentioned. In other words, having regard to Aquavitae's  
21 application to intervene in the Albion Water Appeal we can see that there may be  
22 procedural advantages in Aquavitae's Appeal 1045 being stayed, in Aquavitae being given  
23 permission to intervene out of time in the Albion Water Appeal, and Aquavitae's Appeal  
24 document standing as its Statement in Intervention in the Albion Water Appeal. That is the  
25 solution that we favour at the moment, but we will hear argument or objection on anyone's  
26 part as to whether they see that as a solution or not. I think perhaps, Dr. Bryan, formerly I  
27 should ask you first whether you have any observations on that?

28 DR. BRYAN: I have no objections.

29 THE PRESIDENT: Yes, thank you. The Director, I think, comes next. Yes, Mr. Anderson –  
30 good morning.

31 MR. ANDERSON: Good morning, Sir. Yes, we do have an objection to those three alternatives  
32 because there is a fourth alternative which we would submit is the appropriate way forward,  
33 and that is for the question of whether Aquavitae should play any role in these proceedings,  
34 whether by way of a separate Appeal, which we would submit is inadmissible, or by way of

1 an application to intervene, should be addressed as a preliminary issue at a separate hearing  
2 because, in our submission, for the reasons we have set out in our defence as to why  
3 Aquavitae's Appeal is inadmissible, we would submit that it is inappropriate for it to  
4 intervene its not having a sufficient interest, particularly given that it now intends to rely on  
5 its Notice of Appeal as its Statement in Intervention and we would therefore submit that  
6 that being the scope of its intervention it is an inappropriate intervention.

7 THE PRESIDENT: So you would have to argue that they did not have a sufficient interest to  
8 intervene, rather than ----

9 MR. ANDERSON: That they have not a sufficient interest in the outcome of the appeal.

10 THE PRESIDENT: To enable them to intervene?

11 MR. ANDERSON: Yes. The situation is further complicated by the fact that I saw this morning  
12 – I could not quite describe it as an “application to amend” – an indication that Aquavitae  
13 also wish to raise arguments on what I can perhaps refer to as “Arrow costs”, but hope that  
14 that matter can be dealt with informally without any formal application.

15 THE PRESIDENT: What document are you referring to, Mr. Anderson?

16 MR. ANDERSON: It is a document that was faxed through by McKinnells I think probably  
17 yesterday entitled “Re: Issues in the Appeal”, and then in parenthesis “(A Matter Arising  
18 From The Defence Dated 15<sup>th</sup> September)”.

19 THE PRESIDENT: Yes.

20 MR. ANDERSON: In that you will see, Sir, that Aquavitae is indicating that a strand of the  
21 argument that they intended to run in their Notice of Appeal did not find its way into the  
22 Notice of Appeal, but summarising broadly what they say in the remainder of that they say  
23 it does not matter because we can deal with it all in written submissions and we hope  
24 therefore there is no need to formally amend. In our submission that is not an appropriate  
25 way forward, clearly the case that Aquavitae wishes to run should be sent out in either its  
26 Notice of Appeal if it has been by way of Appeal, or in a Statement in Intervention  
27 properly, and that also therefore is an issue that should be addressed by way of preliminary  
28 issue, dealing overall with the role that Aquavitae should play, if any, in these proceedings.

29 What I would envisage that preliminary hearing covering would be whether or  
30 not the second Aquavitae Appeal is admissible. In the alternative, whether or not they  
31 should be entitled to intervene, and also whether or not they should be entitled to raise this  
32 further point. Those are matters, Sir, which in our submission should be dealt with by way  
33 of a preliminary hearing and can be dealt with pretty quickly I would have thought. It  
34 should have no impact on the timetable in the Albion Appeal. If, at the end of the day

1 Aquavitae are permitted to participate either by way of a separate appeal, or by way of  
2 intervention, they will soon be able to catch up with proceedings in the Albion Appeal  
3 because as they made quite clear they are directing themselves principally to legal  
4 arguments on specific areas. That is the Director's position.

5 THE PRESIDENT: Thank you. Dŵr Cymru I think comes next.

6 MR. ROBERTSON: Sir, Dŵr Cymru adopts OFWAT's submissions on that point. I think there  
7 is only one additional point that we would raise. If the Tribunal went down the route of the  
8 second of the options outlined we would want the scope of any intervention by Aquavitae to  
9 be very firmly circumscribed and the reason for that is that there will be some significant  
10 issues in relation, we think, to confidentiality of documents. This process at the moment of  
11 disclosure taking place, and these concern documents which are likely to be confidential to  
12 the current parties in the Albion Appeal and documents that Aquavitae should not be seeing.

13 THE PRESIDENT: Yes, thank you. Do you have a view for United Utilities, Mr. Randolph?

14 MR. RANDOLPH: Yes, we do, Sir. We would endorse OFWAT's approach and Dŵr Cymru's  
15 approach, and we would record that at the last CMC, Sir, you will recall that of all the  
16 parties we were most against the intervention of Aquavitae in the Albion case for reasons  
17 that we set out briefly there, and we say it would be wrong in those circumstances to  
18 proceed with any of the three alternatives which you put forward, Sir, without hearing us  
19 and indeed the other parties as to whether Aquavitae should be here at all.

20 THE PRESIDENT: Yes.

21 MR. RANDOLPH: Thank you.

22 THE PRESIDENT: Yes, Mr. O'Reilly?

23 MR. O'REILLY: Sir, you have our application, you have seen what it says. We note that the  
24 Director does not directly tackle the question of sufficient interest which we say we have,  
25 and relies on more procedural defects as he sees them. In relation to the second point about  
26 the intervention being firmly circumscribed, we actually would welcome that in the sense  
27 that we intend to make no long oral submissions.

28 THE PRESIDENT: "No oral submissions" did you say?

29 MR. O'REILLY: No **long** oral submissions.

30 THE PRESIDENT: No **long** oral submissions! [Laughter]

31 MR. O'REILLY: That our intervention will be primarily in writing.

32 THE PRESIDENT: When you say "primarily in writing" do you mean the document that you  
33 have already put in?

1 MR. O'REILLY: And any further submissions that we might make before the hearing, Sir.

2 Frankly, the way we see it, Sir, is that the second option is by far and away the tidiest way  
3 of proceeding. It does not prejudice any of the parties, particularly if no confidential  
4 documents come before us, as Mr. Robertson suggests, and we invite you to allow us in as  
5 interveners.

6 Unless there is anything I can help you with further, Sir?

7 THE PRESIDENT: No, thank you very much. The Tribunal will rise for a few minutes.

8 (The hearing adjourned at 11.24 a.m. and resumed at 11.30 a.m.)

9 THE PRESIDENT: We remain unenthusiastic about the proposition that Aquavitae should not be  
10 heard at all in these various proceedings. It is still, provisionally at least, our preference that  
11 Aquavitae's appeal should be stayed and that they should be permitted to intervene in the  
12 Albion Water Appeal. What, however, we would propose is as follows. Mr. O'Reilly, if  
13 you could reduce to two sides of paper the precise points upon which you would wish to be  
14 heard in your intervention we should then allow a chance to those that oppose your  
15 intervention to see whether they are prepared to agree to you being allowed to intervene on  
16 those particular points, on the further understanding that you seek no confidential  
17 information, and that the Tribunal itself, at the end of the day, will control the points on  
18 which they want to hear argument from you as an intervener.

19 If, on reflection, the opponents are prepared to proceed on the basis of a  
20 controlled intervention so much the better. If, at that stage, there is still a dispute then we  
21 will have to hear it, but depending on the then state of play in whatever direction it happens  
22 to be, please everybody bear in mind that unnecessary interlocutory proceedings may give  
23 rise to orders for costs where such orders are appropriate.

24 Do you understand my broad drift?

25 MR. O'REILLY: Yes, Sir.

26 THE PRESIDENT: If we could ask you – I do not know how long it might take you to put that  
27 short list together – would 14 days be sufficient?

28 MR. O'REILLY: Perfectly adequate, Sir.

29 THE PRESIDENT: If we can ask you to do that within 14 days and within a further 14 days ask  
30 the Director and the other Interveners to notify the Tribunal whether or not they agree the  
31 position. We will then proceed accordingly.

32 Now, how far can we get with the other matters affecting the future conduct of  
33 this case? I think that really takes us on to what may be some of the issues in the case, and  
34 how we are going to handle all those various issues.

1 Provisionally at least, as at present advised, the Tribunal does not feel that it should  
2 exclude from consideration any of the major issues that apparently arise, which seem to  
3 include – this is not an exhaustive list but seem to include:

- 4 \* the present statutory context,
- 5 \* the issue of dominance,
- 6 \* the issue of essential facilities; and
- 7 \* the issue of the bulk supply price to Albion.

8 I will not announce any figures in open court, obviously, but the difference between the  
9 price that Dŵr Cymru pays United Utilities for the water in question and the price that Dŵr  
10 Cymru charges Albion for the water appears to be significant and appears to raise issues  
11 that we would like very much to understand as fully as possible. Although we are not in  
12 this case self-evidently deciding what is (or might be) the legal position when the new  
13 legislation comes into force in 2005 as we understand it, it does seem to us that we do need  
14 to have some understanding of the future context of this case in order to see where these  
15 various matters are “going” – if I may put it like that. That being the Tribunal’s broad  
16 approach the next step I need to take is to seek from each of the parties in turn a general  
17 statement of how they see the rest of the case proceeding and an indication of particular  
18 issues that from their point of view are outstanding and which they invite us to decide,  
19 either today or as soon as possible.

20 I think, Dr. Bryan, it comes back to you as the Appellant to help us with your  
21 position as Albion Water. I am sorry, Mr. Thompson? I am really so used to seeing  
22 Dr. Bryan that I have completely ignored your presence up until now. Please forgive me.

23 MR. THOMPSON: Not at all. As you are aware, Sir, I had not anticipated being in this  
24 jurisdiction, or indeed in this Continent this morning, but as it turns out I am.

25 THE PRESIDENT: And we are delighted to see you.

26 MR. THOMPSON: It may be that Dr. Bryan will need to chip in if I show my ignorance of the  
27 case, but the gist of the position is, I think, that we would invite some consequential orders  
28 in relation to the conclusion of the pleading stage, and I understand there may be some  
29 statements of intervention in the offing. If there are we thought it might be appropriate for  
30 them to be made first and then for us to have an opportunity to respond both to those  
31 statements and to the Director’s defence, that would be the tidiest way forward. There is  
32 quite a lot of detail in the Director’s defence and hopefully some of it will be agreed, but I  
33 think it is inevitable that some of it will be fairly hotly disputed, and I suspect it will be

1 helpful for the Tribunal for Albion to define its position reasonably clearly on the issues of  
2 fact in particular.

3 THE PRESIDENT: So you would envisage essentially a reply that would deal with the defence  
4 and the statements in intervention?

5 MR. THOMPSON: Yes, and we were thinking tentatively of a period of 21 days for each, but  
6 whether that is too much or too little.

7 THE PRESIDENT: 21 days for interventions and then 21 days for your reply.

8 MR. THOMPSON: That was the suggestion we had.

9 THE PRESIDENT: Yes.

10 MR. THOMPSON: There are other issues, but is that a convenient place for me to sit down?

11 THE PRESIDENT: I think that is probably sufficient for the moment. Yes, the Director?

12 MR. ANDERSON: Sir, in terms of the timing, subject to reserving the right to respond to  
13 anything that may appear in any of those documents, we are happy with that timetable.

14 THE PRESIDENT: Yes. Well on the normal procedure that further response, if there is one,  
15 would come in the skeleton arguments and/or at the hearing, but we will see.

16 MR. ANDERSON: We will see what is in the documents.

17 THE PRESIDENT: We will see what is in the documents, there may still be important issues,  
18 who knows. Yes, Dŵr Cymru?

19 MR. ROBERTSON: I think we are happy with the broad outline of the sequence of pleadings.  
20 We would ask for 28 days not 21 days for the Statement in Intervention. The reason for  
21 that is we now have to accommodate the Aquavitae response, and that would be helpful to  
22 include that within a Statement in Intervention if no objection is going to be taken to  
23 Aquavitae intervening in this case – obviously that is not a decision we are yet in a position  
24 to take.

25 THE PRESIDENT: Yes. It would certainly be convenient if Aquavitae were to be in a position to  
26 identify the points it wanted to raise, and you were in a position to deal with them in your  
27 Statement in Intervention.

28 MR. ROBERTSON: Exactly, we would rather just do it all in one document. It would seem to be  
29 more helpful for all concerned. We do not think that is going to unduly delay it. The other  
30 point that obviously it would be sensible, now that Albion are represented, to have a reply  
31 and that may help focus in on the issues. Obviously the next stage after reply would be a  
32 further Case Management Conference ----

33 THE PRESIDENT: A further CMC, yes.



1 MR. ROBERTSON: -- for the Tribunal to review where it is on the issues that it then thinks  
2 ought to be concentrated on at the hearing so it can really narrow things down.

3 THE PRESIDENT: Yes, thank you. Yes, United Utilities.

4 MR. RANDOLPH: We would adopt Dŵr Cymru's approach, Sir.

5 THE PRESIDENT: Yes, thank you very much. Sorry, Mr. Thompson, were you rising to your  
6 feet?

7 MR. THOMPSON: I was merely going to suggest as a practical way forward that if Aquavitae  
8 were given the rest of the week to produce whatever document they want to produce, the  
9 time could start from then. That was simply the practical proposal I was going to make.

10 THE PRESIDENT: Yes, thank you. Mr. O'Reilly, how do you feel? Things seem to be broadly  
11 flowing slightly more favourably in your direction at the moment. I know the Director has  
12 reserved his position.

13 MR. O'REILLY: Well if that was an invitation for us to get our two page document out in seven  
14 days then we will endeavour to do that.

15 THE PRESIDENT: Very well.

16 (The Tribunal confer)

17 THE PRESIDENT: On the indication from Aquavitae that they will particularise the main points  
18 they want to raise within seven days then we will allow 28 days for the two Statements of  
19 Intervention and 21 days for reply by Albion Water thereafter. That may be as far as we  
20 can take the procedural structure of the case at this stage. I think, Mr. Thompson, you said  
21 there were other points and perhaps we ought to identify what other matters we need to  
22 decide, or can usefully give indications about at this stage.

23 MR. THOMPSON: I think there is an issue between the parties about disclosure. I understand  
24 from Mr. Anderson that there are some proposals in gestation from the Director and so I  
25 think it would be inappropriate to make any applications today.

26 THE PRESIDENT: Are you just able to sketch out or remind me what the nature of the dispute  
27 on disclosure is?

28 MR. THOMPSON: Well, this is an area where certainly Dr. Bryan will correct me if I am wrong,  
29 as I understand it we have sought disclosure on documents referred to in the Decision, and  
30 we would assume in the Defence. We do not believe that we have had the documents  
31 referred to in the Decision and the Defence, and we hope to get those as a matter of course.  
32 There are other, what one might call "categories" of document in relation to delay and the  
33 costs analysis which, once we have seen what comes in relation to the Defence and the  
34 Decision we might want to take further, but at the moment we would like to see the

1 documents referred to in the Defence and the Decision. I think that is what is in train at the  
2 moment.

3 THE PRESIDENT: Yes, let us see what Mr. Anderson is able to say about that.

4 MR. ANDERSON: Sir, our understanding of what is being sought in the Notice of Appeal is  
5 three categories of documents. One is a general request for everything since the inset  
6 application was made. The second is documents ----

7 THE PRESIDENT: The entire archive?

8 MR. ANDERSON: That would be my reading of those paragraphs of the Notice of Appeal. The  
9 other two categories are documents referred to in the Decision and/or Defence. Then there  
10 is a schedule of documents that Dr. Bryan annexed to his Notice of Appeal which he  
11 identifies as "Documents referred to or referred to in other documents". It is a long list. Not  
12 all the documents in that list, I have to say, exist. But what the Director is doing is creating  
13 two bundles. One is a bundle of documents identified in the Decision, the other is anything  
14 else set out in the schedule. What the Director is proposing is to go through an exercise of  
15 confidentiality with United Utilities and Welsh in relation to those documents. He will be  
16 submitting the documents identified in the Decision this week, and we hope the balance  
17 next week, and therefore those documents – once the exercise of confidentiality has been  
18 gone through – will be then served on Albion. That may then remove the need to trouble  
19 the Tribunal further with the question of disclosure – it may not. But until that exercise is  
20 done I would concur with my learned friend, Mr. Thompson, that there is not really much  
21 that we can ask the Tribunal to do today. Of course, we are led to believe that the Tribunal  
22 may well be handing down a Decision later this week relevant to issues of disclosure which  
23 may provide some guidance. But certainly the Director is well aware of the need to press on  
24 with this quickly, and in doing so will be in a position to serve a bundle of documents as  
25 soon as practicable.

26 THE PRESIDENT: That sounds very helpful, Mr. Anderson.

27 (The Tribunal Confer)

28 THE PRESIDENT: I am not sure that I quite understood, the end of this week and the balance  
29 next week is the stage at which the documents go to Dŵr Cymru and United Utilities for  
30 confidentiality. Have you any feel for how long that bit is going to take?

31 MR. ANDERSON: We will ask them to provide their comments back to as soon as possible. I  
32 think the difficulty at the moment is that we are faced with rather blanket requests for  
33 confidentiality in relation to whole categories of document. What we would ask is for  
34 Welsh and United Utilities to respond as soon as possible, identifying actual documents and

1 extracts from documents in which they claim confidentiality and there may well be  
2 documents that we can then let Albion have straight away, in relation to which no  
3 confidentiality is being maintained. But it is difficult for me to give an actual timetable  
4 because in part it depends on the nature of the comments and the speed at which the  
5 comments on confidentiality are returned to us.

6 THE PRESIDENT: Yes. Mr. Robertson, it is very difficult for you to give any sort of indication  
7 as to how long this exercise is likely to take because you do not quite know what is coming,  
8 although you presumably have some knowledge of what the documents are, because if they  
9 relate to you you probably already know what we are talking about.

10 MR. ROBERTSON: I think until we see the scale of it, we cannot give any accurate estimate of  
11 the time it will take, but our approach to this Appeal is that we want to get this Appeal out  
12 of the way as quickly as possible, and therefore we will approach the exercise of identifying  
13 truly confidential documents in that spirit.

14 THE PRESIDENT: Yes. I imagine your position is the same, Mr. Randolph?

15 MR. RANDOLPH: It is, Sir, but there is an additional point. You will have noticed in perusing  
16 the skeletons that we made a point at para.12 of our skeleton with regard to the list – the list  
17 that the Director ----

18 THE PRESIDENT: The documents referred to in the documents?

19 MR. RANDOLPH: In the Notice of Appeal, it is documents specifically referred to by OFWAT,  
20 which is at pages 34 – 37, and it goes on, but that is the main list. Sir, we pointed out that  
21 this was exactly the same list that had been produced last time around in 1031. As far as I  
22 was aware I had understood that the list would be reviewed, certainly at the last CMC, the  
23 list would be reviewed in the light of ----

24 THE PRESIDENT: In the light of the Decision.

25 MR. RANDOLPH: Absolutely – well, it has not. The answer to the point that we made is set out  
26 at para.6 of Albion Water’s skeleton, where they say:

27 “Albion Water notes United Utilities’ observations. The source documents on  
28 which OFWAT based its final Decision appear to be identical on which it based  
29 the draft Decision that was subject to case 1031. No amendments to the  
30 discovery schedule are therefore necessary.”

31 Well, we take issue with that. First of all, they only state they “appear to be identical” –  
32 query whether or not they are. Secondly, as the Tribunal has just indicated there was this  
33 understanding by the parties present at the CMC that a review would be undertaken so as to  
34 amend the schedule and that has not been done. We think it would be useful, we have noted

1 *inter alia* two errors in the schedule, those are at p.36 of the Notice of Appeal with regard to  
2 the persons from whom documents apparently came, and those are third and fourth on that  
3 page – RDD115 and RDD116 – Oxera and Dŵr Cymru being the supposed makers of these  
4 documents. In fact, they were not, they were United Utility documents. That is just an  
5 example.

6 This is a Notice of Appeal with regard to an actual Decision, not a draft Decision  
7 made in April. We think it would be useful for everybody for this to be reviewed, especially  
8 in light of the fact that we now have legal representation, and so that we can all set off on  
9 the right basis. Sir, that is what we would ask for.

10 We note, incidentally, that Albion accepts our second point, which is that we  
11 complained somewhat about the width of the disclosure sought. Albion’s application for  
12 material in the Respondent’s possession that related to the investigation of the complaint we  
13 thought was too wide. Albion seems to agree with that approach saying that “yes” they are  
14 sure that OFWAT will abide by the relevant guidelines with regard to disclosure, so we are  
15 happy about that and we are sure that that will be the case.

16 Sir, those are my additional submissions on that particular point.

17 THE PRESIDENT: Thank you.

18 (The Tribunal confer)

19 THE PRESIDENT: I would have thought, Mr. Thompson, at this stage, the documents to which,  
20 at least at first sight, you are entitled are those that are mentioned in the Decision and/or the  
21 Defence, subject to the proper protection of confidentiality and we have not at this stage got  
22 as far as a confidentiality ring or anything of that sort, but at the moment let us assume that  
23 confidentiality remains protected.

24 As regards other documents, it may be appropriate now – in case it has not been  
25 done already – for you to see whether you really do need other documents beyond those that  
26 have already been identified in the Defence and the Decision, simply in order not to make  
27 the exercise any heavier than it already is. In other words, we would see somewhat more  
28 urgency and importance attaching to the disclosure of the documents that are referred to in  
29 the Decision and in the Defence, than in relation to the other documents. The other  
30 documents may be relevant still but they form in some ways a subsidiary category.

31 MR. THOMPSON: I understand what the position is, and I am reluctant to describe any  
32 submissions of Mr. Randolph as “barren”, but I understand that there is no great dispute, as  
33 a matter of principle, as to what category of documents the Director General has identified  
34 at the moment. Of course if, when the harvest is in, we are rather disappointed ----

1 THE PRESIDENT: Then you have to come back.

2 MR. THOMPSON: -- we may make some further observations. But I am not sure it is necessary  
3 to give any further guidance, the Director General – as I understand it – has taken a view.

4 In terms of confidentiality, we are slightly concerned that if we are subject to a  
5 timetable for what may be quite a specific pleading and the documents do not actually  
6 appear for several weeks that that may throw the whole timetable off, and I do wonder  
7 whether the Director General has any categories of documents which clearly do not raise  
8 confidentiality questions which could be disclosed straight away rather than delaying the  
9 whole exercise on the basis that one of the Interveners might have a confidentiality concern  
10 but probably does not.

11 THE PRESIDENT: What I would have thought we should aim at is the following. If the Director  
12 can stick to his intention to deal with his two bundles – one this week and the other next  
13 week – it may be reasonable to invite the Interveners to tackle the question of  
14 confidentiality with a degree of priority so that they are able to let the Director know what  
15 their position is within, let us say, seven days or a bit more, having received those  
16 documents, which after all are already identified, and you already know what they are, so  
17 that the exchange of documents, or the disclosure exercise is completed in good time before  
18 the Statements in Intervention are filed, and certainly well before the reply from Albion is  
19 due, so that if there are remaining disputes about documents or confidentiality we can, if  
20 necessary interpose a CMC to deal with that in order to enable the timetable relating to  
21 Albion's reply in particular to be kept to. I do not know that we are minded actually to make  
22 a specific order on the timetable for disclosure, but I think those indications as to how we  
23 would like it to proceed, if possible, would probably suffice for the moment.

24 MR. ROBERTSON: If it may assist I understand that the seven day turnaround is thought not to  
25 pose a problem.

26 THE PRESIDENT: That is very helpful, thank you, Mr. Robertson. I hope, Mr. Randolph, that  
27 Mr. Thompson's indications about the extent of a *de facto* agreement helped to address the  
28 point you were making about the list?

29 MR. RANDOLPH: Yes, I hope so too. If it does not then we will revert.

30 THE PRESIDENT: We will see.

31 MR. RANDOLPH: Also, Sir, I have taken instructions with regard to the seven day turnaround  
32 and we too would be able to cope with that.

1 THE PRESIDENT: I think, Mr. Thompson, we have to leave it to Albion to come back to the  
2 Tribunal if you are in difficulties in observing the timetable as a result of not having  
3 documents which you say you need.

4 That deals with documents, what other matters now remain to be decided? It is  
5 probably somewhat premature to make any indicative directions about hearings and so  
6 forth. What about the question of evidence? Has the Appellant got as far as thinking about  
7 how the evidence in this case might unfold?

8 MR. THOMPSON: We have thought about it. As I understand it, the Director General is not  
9 intending to call any witness or expert evidence. There does not seem to be anything  
10 attached to the defence of that kind, so unless issues of crucial importance emerge where we  
11 would invite the Tribunal to summon somebody it seems rather unlikely that there will be  
12 any cross-examination of witnesses on behalf of the Director General.

13 In relation to our evidence I think it is likely that Dr. Bryan himself, who is  
14 probably the principal expert on the very specific facts of this case, is likely to want to put  
15 in a further statement responding to some of the factual issues raised in the Defence – or  
16 possibly one of his colleagues. It is relatively unlikely, particularly given the costs  
17 implications that any other expert will be called by the Appellant.

18 THE PRESIDENT: So probably no experts?

19 MR. THOMPSON: I think that is right, or no experts other than Dr. Bryan. In terms of item 3 –  
20 agreeing factual matters – the Director General has suggested that it might be useful to have  
21 an agreed statement of how the actual mechanics of this business work from the Dee to  
22 Shotton, and that may be possible. I think we are slightly more ambitious in that we would  
23 hope that once we had a chance to digest the defence it may be possible to agree certain  
24 background facts in terms of costs, etc. which might be useful in assessing whether or not  
25 there is excessive pricing here for example, but I think that is probably a matter to be  
26 addressed once the pleadings are sorted out to see if there is room for some form of  
27 agreement on the background facts. I think that is the other area which may be possible, but  
28 does not require a direction today.

29 (The Tribunal confer)

30 THE PRESIDENT: We think it not unlikely that the Tribunal will find it helpful to come up to  
31 Deeside and have a look at the *locus in quo* so as to get an understanding on the grounds  
32 how it works. The Registry will be in touch with the parties as to how we are going to  
33 organise that and at what stage. That may obviate the need for anyone to spend much time  
34 on agreeing a Statement of Facts, because we have already got quite a lot of the facts and it

1 is simply a question of relating what we have to what one sees on the ground, so that is one  
2 way of taking that matter forward. Let us see what the Director's position is on any of  
3 those last points.

4 MR. ANDERSON: Similarly, we do not at this stage think it likely that we will be calling any  
5 evidence. We have left open the question of expert evidence in our observations and you  
6 will recall from reading the observations we submitted that we were proposing that the  
7 Tribunal might like to consider whether it would be appropriate to limit the scope of the  
8 Appeal at an early stage by, for example, not considering in any detail issues such as  
9 dominance, essential facilities, relevant market and, for example, the bulk supply price from  
10 United Utilities, on the grounds that those are not necessary for the Director to take a view  
11 on in order to reach his Decision. We made that suggestion at a time when we did not  
12 appreciate there would be another round of pleadings, and we have addressed I hope quite  
13 clearly in our defence what those issues are (s.6 and s.7 of the Defence) and we say they do  
14 not arise, and we will wait and see what is said in relation to the reply. But a things stand at  
15 the moment we think it unlikely that we would wish to call expert economic evidence, but  
16 we do not rule it out at this stage.

17 In relation to agreeing facts and whether there is any factual oral testimony that  
18 we would wish to call, we think that is very unlikely. We would really look to Welsh to  
19 provide any facts in relation to what they do with that system (the Ashgrove system) rather  
20 than ourselves. However, we did identify, perhaps a little pessimistically in our  
21 observations, two areas where we thought there could be scope for agreeing facts, which  
22 were a description of the history and the nature of the Ashgrove treatment, and of pure  
23 chronology of correspondence and communications between the two protagonists. There  
24 may be scope for agreeing more but again it is very difficult for us to say at this stage, but  
25 certainly we are as keen as anyone to limit the scope of dispute. It may be in those kinds of  
26 areas that the facts, although very important, are not in terms of primary facts really what is  
27 at issue in this case – it is the inferences to be drawn from them. So yes, we believe there  
28 probably is scope to agree some of the facts. I have not put my mind to precisely what the  
29 process for doing that would be, but I have no doubt we can discuss it with the other legal  
30 representatives.

31 THE PRESIDENT: Yes, thank you. Mr. Robertson?

32 MR. ROBERTSON: Just to pick up on Mr. Anderson's reference to the facts that will be  
33 provided by Dŵr Cymru, those are matters that we would propose to cover in our statement

1 of intervention. We expect to be serving a witness statement attesting to those facts, along  
2 with the statement of intervention.

3 THE PRESIDENT: The facts you have in mind are what, exactly?

4 MR. THOMPSON: The description of the Ashgrove system, chronology of communications and  
5 arrangements between Albion and Dŵr Cymru. There may be other matters also to be  
6 included in the Statement in Intervention but we do not have a firm view at this stage.

7 THE PRESIDENT: Thank you.

8 MR. RANDOLPH: Sir, our position is slightly vague at the moment! [Laughter] That is simply,  
9 we would say, by virtue of the fact that our view as to the width of this Appeal I think  
10 mirrors that of the Director's, and therefore does not mirror that of Albion. We note what  
11 you, Sir, have said with regard to what the potential issues are and one of those obviously  
12 includes the bulk supply price to Albion. Without obviously going into figures there is, as  
13 you yourself said a moment ago, Sir, the difference between DC's purchase price and DC's  
14 on sale price, and you may want to go backwards in terms of looking at DC's purchase  
15 price. Now, if that is the case, and that does become a live issue, we would want ----

16 THE PRESIDENT: When you say we may want to "go backwards"?

17 MR. RANDOLPH: Backwards to the relationship between my client, United Utilities, and DC.

18 THE PRESIDENT: And DC, yes.

19 MR. RANDOLPH: Sorry, Dŵr Cymru, in terms of ----

20 THE PRESIDENT: Understanding it all.

21 MR. RANDOLPH: -- the purchase price, exactly, because otherwise you would be starting off in  
22 the middle which often is not the best place to start. So on that basis it might be necessary  
23 for the Tribunal to have some evidence on that issue, but it depends very much whether that  
24 is a live issue of course – it is rather "chicken and egg" unfortunately, because at the  
25 moment we have heard the Tribunal's preliminary view that these issues may be relevant,  
26 we have heard the Director's preliminary assessment which is "no", in fact it is more than a  
27 preliminary assessment because they have said in s.6 and s.7 of their Defence that, as far as  
28 they are concerned, they are not relevant. Our view is the same and that will be picked up  
29 in our Intervention. What I do not want to do is to close off the possibility for my clients to  
30 address the issue if it does become live, and I am not quite sure when we will know whether  
31 it becomes live. Will there be a Tribunal's determination on the Appeal at some stage, that  
32 this will be dealt with?

33 THE PRESIDENT: I think you can assume, for present purposes, that the difference between  
34 your selling price to Dŵr Cymru's and Dŵr Cymru's on price to Albion is in a general



1 sense an issue in the Appeal, and that therefore any background information as to how  
2 either end of that price was arrived at is potentially useful from that point of view.

3 MR. RANDOLPH: And also, I remind myself, that part of Albion's relief in their Notice of  
4 Appeal relates to the bulk price and so that is another issue which will need to be dealt with.  
5 So on that basis, in terms of evidence, on the basis of what you have just said, we would be  
6 seeking to elucidate the position for the Tribunal's assistance on that issue.

7 THE PRESIDENT: Yes, I think the historical circumstances from your point of view are useful  
8 background.

9 MR. RANDOLPH: Indeed.

10 THE PRESIDENT: Yes, I think that is probably as far as we can take evidence and witnesses at  
11 this stage. (After a pause) Are there any other issues that arise in relation to cases 1045 and  
12 1046, or can we then move to 1042 the Thames Water/Bath House Appeal?

13 MR. THOMPSON: I think there is simply the disposal of what you might call the preliminary  
14 actions, the interim measures action and the earlier action.

15 THE PRESIDENT: Yes.

16 MR. THOMPSON: I think our proposal would be that they should be stayed, simply for the  
17 purposes of whatever arises in relation to these actions and conceivably might have some  
18 bearing on, for example, issues of costs in relation to these earlier actions, so rather than  
19 simply dismiss them it would be appropriate to stay them so that they could be sorted out at  
20 the end of the principle action.

21 THE PRESIDENT: I would have thought on that, Mr. Thompson, there is no reason not to stay  
22 the very first one, which I think was 1031. 1034, the interim measures case, I think just sits  
23 where it is because you have an interim order. There is liberty to apply under that order –  
24 circumstances may change at any moment, who knows. I think we just leave that where it  
25 is, but we stay the first appeal for the moment, and no doubt it can be formally disposed of,  
26 if that is appropriate, at some later date.

27 MR. THOMPSON: That would be my suggestion on that, Sir.

28 THE PRESIDENT: Any points on that, Mr. Anderson?

29 MR. ANDERSON: Simply, Sir, we believe that this new Appeal has now completely overtaken  
30 the original Appeal ----

31 THE PRESIDENT: Superseded the original Appeal.

32 MR. ANDERSON: -- and therefore the appropriate course would be for that case to be  
33 withdrawn with the Tribunal's consent, no order as to costs because, as we say in our  
34 written observations, the costs incurred in that action can, to all intents and purposes, be

1 attributable to this action. Therefore we think it would be tidier for that case to be disposed  
2 of formally rather than sitting waiting – it would serve no purpose in our view maintaining  
3 its existence.

4 So far as the interim measures case is concerned, of course, that needs to stay  
5 because of further applications.

6 THE PRESIDENT: Were you in the first case, Mr. Randolph?

7 MR. RANDOLPH: Yes, Sir, and we would adopt what the Director said with regard to  
8 withdrawal, we see absolutely no reason why this should be hanging around – the earlier  
9 appeal has been wholly superseded. We do not agree with the Director with regard to costs.  
10 We think costs should be reserved to this Tribunal in these proceedings. I do not see why  
11 we should have to pick up any costs that we incurred, because you will recall we made an  
12 application to intervene in that case. No order for costs, the costs would just lie where they  
13 fall. We say Albion brought the case knowing it was a draft Decision. It was pushed on, it  
14 was pushed off, and then a final Decision was taken. Let us see what the Tribunal  
15 determines with regard to that bundled Decision and then all issues relating to costs,  
16 including in relation to case 1031 can be determined at that time.

17 THE PRESIDENT: Mr. Robertson?

18 MR. RANDOLPH: We would adopt the Director's submissions.

19 (The Tribunal confer)

20 THE PRESIDENT: Mr. Thompson, do you really need the first Appeal? Can you be persuaded to  
21 withdraw it subject to the issue of costs which we will reserve, just from the point of view  
22 of tidy mindedness, as Mr. Anderson would say.

23 MR. THOMPSON: Well if it makes no difference I am perfectly happy either way, but I had  
24 understood it would be more convenient to deal with the costs of an Appeal if that Appeal  
25 was still on foot. It would be rather difficult to deal with it if it was withdrawn, but if we can  
26 deal with the costs of one Appeal in a different Appeal then I am obviously perfectly happy  
27 to do that. I had thought that my former position was essentially the same as the substance  
28 of Mr. Randolph, but if it does not make any difference then obviously I do not mind.

29 THE PRESIDENT: Yes! [Laughter] We seem to get conundrums every day. I think probably at  
30 this stage, for technical, procedural reasons, the safer course is actually to stay that first  
31 Appeal and just leave it where it is for the time being but on the understanding that nobody  
32 need take any steps at all in it, and we will deal with the costs at the appropriate moment. I  
33 think that is probably the simplest procedural solution for the time being.

34 Do we go on to Thames Water/Bath House?

1 MR. THOMPSON: Yes, I understand the position to be that formally there is very little dispute  
2 on the Notice of Appeal as it stands, in that the Director has effectively conceded that  
3 Albion does have sufficient standing to pursue the matter, and so the appropriate way  
4 forward is for Albion to define its position. The only difference seems to be that the  
5 Director seems to want to Albion to define its position, as it were, in an administrative form  
6 by writing a letter, whereas we take the view that since the Appeal has started against a  
7 specific Decision the correct approach is for us to amend our Notice of Appeal to raise the  
8 points that we take against that Decision. An administrative exercise now would be rather  
9 otiose. So we would suggest the correct way forward is for us to produce an amended  
10 Notice of Appeal and again we would suggest that 21 days would be an appropriate period  
11 to give us to do that. The issue of intervention – if the Tribunal would like me to deal with  
12 that?

13 THE PRESIDENT: Yes.

14 MR. THOMPSON: We have no substantive objection to Thames intervening but we see the  
15 procedural problem which has arisen because they are late and we are content to leave that  
16 to the Tribunal to decide how strictly it wishes to enforce the procedural Rules, but as a  
17 matter of substance we are neutral on the matter.

18 THE PRESIDENT: We will hear what Thames says about that in a moment but, at least  
19 provisionally, it does seem to us that at the time when the Tribunal's Notice was published  
20 on the Tribunal's website it was still not really clear to anybody what Albion was in the end  
21 going to say, because even then Albion had not seen the Decision and there had not yet  
22 been, as you say, an amended Notice of Appeal, so we can see that it probably is a bit  
23 exceptional from Thames Water's point of view as regards extending the time, to which as I  
24 understand it you do not formally object, you just leave it to us.

25 MR. THOMPSON: Yes, we cannot say that Thames have no interest in the question, it is a  
26 question really of having failed to comply with the procedural rules which we think is a  
27 matter for the Tribunal to enforce rather than us. We would simply be taking a litigation  
28 advantage and we are content to deal with the matter on the substance.

29 THE PRESIDENT: Yes, thank you, Mr. Thompson. Yes, Mr. Anderson, on Thames Water Bath  
30 House?

31 MR. ANDERSON: Yes, Sir. In fact, my learned friend, Miss Sloane, is far better able to assist  
32 the Tribunal on this particular matter than I.

33 THE PRESIDENT: Yes, Miss Sloane, good morning.

1 MISS SLOANE: Good morning, Sir. In short, the Director's position is as follows. The original  
2 Notice of Appeal, as the Tribunal recalls, was concerned with Albion getting hold of a copy  
3 of the Decision. That Notice of Appeal contained no grounds of challenge to the Decision  
4 itself. The Director was then keen that, if at all possible, further litigation on this matter  
5 should be avoided, and that is a very genuine desire. As the Tribunal will appreciate, this  
6 sort of litigation poses a great demand on OFWAT's resources. It has therefore requested,  
7 repeatedly Albion Water to put forward now, having seen the Decision and correspondence  
8 the Director has voluntarily disclosed, the critical points on which it disputes that Decision.  
9 Albion Water has so far not done that. What it has done is repeatedly requested background  
10 documents. In essence what Albion Water appears to want to do is audit the Director's work  
11 on the complaint and then decide whether or not it wants to appeal.

12 THE PRESIDENT: I am just taking a note – you say all they have done is ask for background  
13 documents.

14 MISS SLOANE: Yes.

15 THE PRESIDENT: In order to audit and then decide?

16 MISS SLOANE: Essentially to monitor what work the Director carried out and then see whether  
17 it wants to Appeal. That is the Director's understanding.

18 THE PRESIDENT: Yes.

19 MISS SLOANE: The Director's view is that it is absolutely critical and certainly in accordance  
20 with the modern spirit of pre-litigation procedure, that Albion Water should set out, at least  
21 in very succinct form, the critical issues on which it disputes the Decision so that the  
22 Director has a real opportunity to respond to those. The Director would say that quite apart  
23 from that being good procedure, and giving rise to the possibility at least of avoiding  
24 litigation, it may also be highly relevant to the issue of costs if Albion Water does press  
25 ahead with this litigation.

26 So in its written observations the Director proposes that a practical, sensible way  
27 forward would be for Albion Water, prior to amending its Notice of Appeal, within a short  
28 period, setting out in writing the critical points on which it disputes the Decision, and the  
29 Director, within a further short period, have a chance to respond to those.

30 THE PRESIDENT: That is with a view to seeing whether the litigation can be avoided  
31 altogether?

32 MISS SLOANE: Absolutely. So in the Director's written submissions, as the Tribunal may  
33 recall, it is proposed that that swift procedure be followed prior to Albion Water receiving  
34 permission to amend its Appeal, if it should still wish to pursue that course.

1 THE PRESIDENT: Yes. There was a meeting apparently on 2<sup>nd</sup> September?

2 MISS SLOANE: There was, and following that there is a letter of 3<sup>rd</sup> September, from Albion  
3 Water making a request for disclosure, which was copied to the Tribunal. The Director's  
4 response to that, specifically on the issue of disclosure, because it was followed earlier on  
5 the other matters, is dated 20<sup>th</sup> September.

6 THE PRESIDENT: I am not sure that I have the Director's response.

7 MISS SLOANE: It was copied to James Aitken at the Tribunal and that was sent yesterday, 20<sup>th</sup>.

8 THE PRESIDENT: It may not have got through the system by today. (Document handed to the  
9 Tribunal) Can you just give us a moment to glance at this, Miss Sloane – we have not had a  
10 look at it yet.

11 (After a pause) I know you have not dealt with the points that have been raised,  
12 Mr. Thompson, but what we are minded to do is to say that we will give Albion 21 days to  
13 file an amended Notice of Appeal in the Thames Water Bath House case. I need to say for  
14 consistency with the Tribunal's general approach that we give that permission under Rule  
15 11(3) on the grounds that new matters of law or fact have come to light since the original  
16 Appeal was made, namely that in this particular case the Decision itself was only made  
17 available after the original Appeal was made, so the circumstances set out in Rule 11(3) are  
18 met.

19 We would, however, take this opportunity to remind the parties, and Albion in  
20 particular, that we would expect them to take all reasonable steps to narrow the issues prior  
21 to pursuing the amended Notice of Appeal, and that is a matter to which we may have  
22 regard when it comes to any costs orders that we make in the case itself.

23 MR. THOMPSON: Yes, Sir, we have obviously got that well in mind. To some extent we are in  
24 a chicken and egg situation. The Director says he does not know what we want and so will  
25 not give us any documents, and without the documents there may be a degree of vagueness  
26 which could be avoided if more documents were provided. I think the Director General  
27 recognises that he is under a possibly self-imposed obligation to be reasonably transparent  
28 in his decision making procedures, and the Tribunal is, of course, seized of the question of  
29 what rights of disclosure a party such as Albion may have in various cases.

30 If, as the Tribunal has indicated, Albion needs to be careful in narrowing the  
31 scope of any Notice of Appeal in my submission it would be equally helpful if the Director  
32 would consider carefully what material could be made available to Albion so that any  
33 amendment to the Notice of Appeal will be as accurate and expeditious as possible, so that  
34 the real issues between the parties can be joined effectively as quickly as possible, and

1 rather than go round and round the circle of who goes first, in my submission it would be  
2 useful for both parties to proceed positively to try and deal with this matter efficiently.

3 THE PRESIDENT: I would have thought the general principle is broadly as follows. If you are  
4 effectively in the stage of bringing your Appeal against the Decision as it were, the Tribunal  
5 would not normally make “pre-Appeal” disclosure orders – if I may put it like that – indeed,  
6 would not have any jurisdiction to do so. The Director’s general obligation, putting it in  
7 very broad terms, is probably to make available to the complainant the essential documents  
8 – I have not in my head the wording of the relevant EC Regulation that now governs  
9 rejections of complaints, but the gist of that is that the rejection decision should be  
10 accompanied by the essential documents subject to confidentiality. But if that, for whatever  
11 reason does not happen, or has not happened, that is a point to be taken in the Appeal. So I  
12 think from the Tribunal’s point of view, all we can at this stage do is to give you 21 days to  
13 amend, and hope that the parties are as sensible as they can be in the boxing and coxing that  
14 is going on, and if someone has been unreasonable on either side then we will deal with that  
15 in costs when the time comes.

16 MR. THOMPSON: I am grateful. I only raise it because of the extraordinary procedural history  
17 of this matter, in that although the Director General says that he is now seeking clarification  
18 of the case, the Tribunal will be aware that this is a case going back over three years in  
19 which a Decision was, in fact, taken on the basis of submissions that were made. So it  
20 strikes us as somewhat curious that he now says “What are your submissions?” effectively  
21 so he can have another look at the issue and see if he has a different point that he wants to  
22 make, as it were, after the Decision has already been made. That is the only reason I put it  
23 as I do and, of course, there is in fact an Appeal (albeit a rather limited one) already before  
24 the Tribunal.

25 THE PRESIDENT: Well I do not think we can take this particular somewhat disputed matter any  
26 further at the moment, we will see how it goes. That, I think, does however take us to the  
27 position of Thames Water finally. I am sorry, I do not think I have a note of your name?

28 MR. TUPPER: Stephen Tupper, Sir.

29 THE PRESIDENT: Thank you very much, Mr. Tupper. You presumably pursue your application  
30 to intervene in this Appeal.

31 MR. TUPPER: Sir, I think the first thing I should probably say is that I can confirm that we have  
32 been retained by Thames, but we have yet to take full instructions on the matter of the  
33 intervention, so I am unable to comment with authority, I suppose, on the subject of whether  
34 we might intervene and whether we might submit an application to intervene. We note,

1 obviously the favourable comments that have been made by the parties and the Tribunal  
2 with regard to an intervention and we are very grateful for that and I am sure Thames are  
3 delighted to hear that they still have an opportunity to intervene in this matter, but they have  
4 not taken the final decision to do so and I am not in a position to be able to confirm  
5 absolutely indeed that they will do so. Much will depend, obviously, on the resolution as  
6 regards the substance, and given that we appear – when I say “we”, the two principle  
7 protagonists are somewhat apart on that particular matter we would ask the Tribunal to have  
8 an opportunity to submit an application once the actual substance of the Appeal has been  
9 finalised. That would appear to be the most sensible route, that will give me plenty of time  
10 to obtain the necessary instructions from Thames then to be in a position to be able to make  
11 the appropriate application.

12 (The Tribunal confer)

13 THE PRESIDENT: Yes, I think, Mr. Tupper, in principle, subject to any comments from the  
14 other parties. I should say in this particular case that a somewhat unusual situation has  
15 arisen in that when the original Appeal was filed, it would have been extremely difficult for  
16 any potential intervener to have deduced from what was published under Rule 16 on the  
17 Tribunal’s website as to the nature of the Appeal, to work out whether they had a sufficient  
18 interest to intervene or what the grounds of that intervention would be. So in those very  
19 exceptional circumstances we are prepared to entertain a request by Thames Water to  
20 intervene in this case. We think the right procedure is for Albion Water to serve on Thames  
21 Water, if they would be so kind, a copy of the amended Notice of Appeal at the same time  
22 that they serve it on the Director, and we will give Thames Water 14 days thereafter to  
23 apply to intervene, and on that occasion you can set out what your interest is and what point  
24 it is that you feel is likely to affect you.

25 MR. TUPPER: We are grateful, Sir.

26 THE PRESIDENT: Yes, thank you. The further progress of the Bath House case I think had  
27 better await events. If you serve an amended Notice of Appeal I think in the ordinary  
28 course there would be an amended defence according to the normal timetable under the  
29 Rules.

30 MR. THOMPSON: I think it is probably just a Defence.

31 THE PRESIDENT: Yes, just a Defence, not an amended Defence. Mr. Thompson, is there any  
32 reason for the Bath House case to be proceeding in tandem with the other cases, or should it  
33 really go at a different pace and have a life of its own, as it were?

1 MR. THOMPSON: My impression is that there are some overlaps, but it is a distinct case, so I do  
2 not think there is any particular need at this stage for them to be joined together. That  
3 would be my impression, but obviously there would be certain economies in linking ----

4 THE PRESIDENT: One can see that the timetable in the two cases, assuming that the second  
5 case is a live case, may get slightly out of sync. And we have different parties in the second  
6 case, so it may not be sensible to have all the Case Management Conferences on the same  
7 day and so forth and so on.

8 MR. THOMPSON: I think that might be right. It may be convenient, and it looks like that is  
9 going to be the case if the same Tribunal hears both, in which case if there are any  
10 economies that can be achieved by putting them together, maybe the Tribunal can achieve  
11 that at a future Case Management Conference, but at the moment my impression is that the  
12 issues are relatively distinct, although they are obviously part of a single broad dispute  
13 between Albion and the Director General.

14 THE PRESIDENT: Yes, well there would be no reason, as far as at least I can see at the moment,  
15 to actually join the cases or, indeed, even hear them together. It may be in terms of case  
16 management conferences, we ought to list them one after the other, rather than, as it were,  
17 together.

18 MR. THOMPSON: I think that is right. I mean one area where there might be similarities, I  
19 suppose, are in relation to issues such as market definition and dominance, although the  
20 factual situation for each would be quite distinct, although there may be common issues of  
21 principle, but that is rather thinking on my feet. At the moment, the factual issues are  
22 obviously completely distinct.

23 THE PRESIDENT: Well, let us see how we get on. Is there anything else we need to decide in  
24 that case at the moment?

25 MR. THOMPSON: I do not think so. I think the onus is on us to try and define what our case is  
26 within the next 21 days.

27 THE PRESIDENT: Then I think we ought to think in terms of a date for a follow-up Case  
28 Management Conference, which had better be when we have all the new and further  
29 pleadings in. So 28 days takes us through to the third week of October, and then we need to  
30 allow 21 days after that.

31 (The Tribunal confer)

32 THE PRESIDENT: We have in mind the afternoon of 23<sup>rd</sup> November at 2 o'clock.

33 MR. RANDOLPH: I have instructions with regard to the Tribunal's visit to the site. Obviously  
34 my client has one end of the site, the starting point and apparently it is undergoing quite



1 serious works at the moment which would mean, first of all that the Tribunal would not be  
2 able to see it very clearly; and secondly, you may not be able to get in there in any event for  
3 health and safety reasons. So we would ask if the Registry, or the powers that be could give  
4 my client as much notice as possible as to the possible dates that would be helpful. I cannot  
5 give an undertaking that the work would be stopped for the purpose of the visit.

6 THE PRESIDENT: We would not expect it. How long is the work likely to go on for?

7 MR. RANDOLPH: It is difficult to say – I asked the very same question. It is a bit like the North  
8 West railway line, it can go on and on.

9 THE PRESIDENT: I sincerely hope not! [Laughter]

10 MR. RANDOLPH: Yes, we have seen yesterday the record being broken for rail travel from  
11 Manchester to London. It is difficult to say, Sir, but I hope by the end of this year the works  
12 should be complete. My client would hope so. But if the Tribunal could give us as much  
13 notice as possible.

14 THE PRESIDENT: It may affect our decision whether we want to do it at all.

15 MR. RANDOLPH: Or whether you want to do it this year – you might want to do it in the Spring  
16 when it is possibly better weather. The other point is slightly more substantial and is with  
17 regard to Aquavita's intervention. The Director has made it clear that they have set out in  
18 some detail in their defence to the Aquavita appeal why they think Aquavita should not  
19 be entitled to appeal, they do not have sufficient interest to intervene. The Statement of  
20 Intervention and Notice of Appeal are pretty much the same.

21 We are in an unusual position because although we are an Intervener in the  
22 Albion Water Appeal, we are not an Intervener in the Aquavita Appeal, and that was done  
23 deliberately. But in the light of the particular way in which the Tribunal has directed matters  
24 should progress in particular with regard to the issue of intervention and now with  
25 Aquavita's change in position, wanting to stay the Notice of Appeal and start the  
26 intervention, we thought it might be sensible to ask the Tribunal – we have not had the  
27 opportunity to ask the Director yet – whether or not it would be possible to see that extract  
28 of the Defence relating to their position on Aquavita's Appeal on admissibility grounds.  
29 Then we could simply say that for the reasons set out in the Defence we adopt a position  
30 and would be opposed. Or it may well be that in the light of Aquavita's two page statement  
31 of restricted issues that we take the view that, yes, we can live with the intervention and we  
32 will not oppose it. On the other hand, we have a relatively short period in which to deal  
33 with this. One assumes, obviously, if there was anything confidential that could be excised.  
34 That approach, we suggest, would be in line with good case management.

1 THE PRESIDENT: I think it is up to the Director, really.

2 MR. ANDERSON: I am perfectly happy to do that.

3 MR. ROBERTSON: Sir, even if you are unable to visit United Utilities, Dŵr Cymru would like  
4 you to visit because you could see part of the Ashgrove Treatment System – you could  
5 certainly see that when you come to visit us.

6 DR. BRYAN: If I may interrupt my colleague, relating to the visit, I think it would be a shame if  
7 you cannot visit. I think the pumping station that United Utilities referred to is a fairly basic  
8 structure which does not require a great deal of imagination, whereas the treatment works  
9 does. I think in that context it might be helpful if the Tribunal were able to see a treatment  
10 plant operating properly as part of the potable treatment process - this is the model that the  
11 Director has used to underpin his calculations – and you will then be able to contrast that  
12 with the operation of Ashgrove as it is. Without that I think it would be difficult to get an  
13 accurate measure of the two.

14 THE PRESIDENT: What we did in another case was effectively to invite the parties to see if they  
15 could agree a suitable itinerary for the visit, and perhaps a non-controversial basic  
16 introduction as to what it is one is going to see and so we can go on from there. We do not  
17 see these occasions as occasions for advocacy, but as an occasion for us, and indeed the  
18 parties and their representative advisers, having a good grasp of what it is we are talking  
19 about. We will get the Registry to write to the parties about that possibility.

20 On Mr. Randolph's last point, the question of whether Aquavitae has a sufficient  
21 interest to intervene on the somewhat limited basis we have indicated, and whether or not a  
22 sufficient interest in that respect is the same as a sufficient interest for the purpose of filing  
23 an Appeal, are matters that are still open at the moment – hopefully they may be agreed but  
24 at the moment they are still open.

25 MR. O'REILLY: I am sorry, Sir. Can I clarify what I am expected to produce within two pages?

26 It is just a list ----

27 THE PRESIDENT: It is points you wish to be heard on briefly.

28 MR. O'REILLY: You do not wish us to expand on why we think we have sufficient interest?

29 THE PRESIDENT: Not at this stage. If that is still a live issue you will have to have it argued,  
30 but not at this stage, I think.

31 MR. O'REILLY: Thank you.

32 THE PRESIDENT: Any other points anybody wishes to raise, or any other clarifications we can  
33 usefully make? (After a pause) No. Thank you all very much indeed.

34 (The hearing concluded at 12.50 p.m.)