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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd January 2006

Before:

Sir Christopher Bellamy (The President)

The Honourable Antony Lewis

Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Supported by

AQUAVITAE (UK) LIMITED

Appellants

And

DIRECTOR GENERAL OF WATER SERVICES

Respondent

supported by

(1) DWR CYMRU CYFYNGEDIC

and

(2) UNITED UTILITIES WATER PLC

Interveners

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H E A R I N G

APPEARANCES

Mr. Rhodri Thompson QC and Mr. John O’Flaherty instructed by (Dr. Jeremy Bryan Managing Director, Albion Water Limited) appeared on behalf of the Appellant.

Mr. Michael O’Reilly (instructed by McKinnells, Leicester) appeared on behalf of Aquavitae (UK) Limited

Mr. Rupert Anderson QC (instructed by the Head of Legal Services, OFWAT) appeared on behalf of the Respondent.

Mr. Aidan Robertson (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of Dwr Cymru Cyfyngedig

Mr. Fergus Randolph (instructed by the Group Legal Manager, United Utilities) appeared on behalf of United Utilities.

1 THE PRESIDENT: Good afternoon ladies and gentlemen. We propose that we simply take the
2 agenda and work through it with the preliminary observation that this case does seem to be
3 important for the industry. It seems to us the practical situation is that we have a certain
4 imbalance of resources between the main parties that are before us, who are not, as far as we
5 can see, entirely on an equal footing from the point of view of resources. The Tribunal's
6 interest of course is that this matter should be as fully debated as necessary and that there is
7 a fair conclusion reached. That, as far as we can see, is also in the interest of the parties and
8 the industry without the case, as it were, spiralling out of control, or the costs escalating unduly
9 or undue delay taking place, so we have quite a number of different considerations to balance.
10 We very much look to the parties to co-operate and collaborate with each other and with
11 ourselves as far as possible to resolve those rather tricky issues.

12 So if we may go straight to agenda item 1. We have had a chance to read the written
13 submissions for which thanks. I would like to start by going round the parties to see where we
14 are on these things, whether any agreement is possible, and what the practical way forward is.
15 Yes, Mr. Thompson, would you like to start?

16 MR. THOMPSON: Yes, Sir, I am grateful. You will have seen that we have made various general
17 observations about the way in which this could go forward and I think that your initial remarks
18 probably refer to that, but we do think that it is necessary to have additional information and
19 we do think that in practice the most efficient way for that to proceed will be in the way that
20 we have set out in our draft order, which is essentially for the Director and Dwr Cymru to
21 produce further information in response to the issues set out primarily at para.302 of the
22 Interim Judgment. I do not know whether the Tribunal wants to go through the detail of what
23 we suggested, it is very heavily modelled on para.302 although there are one or two additional
24 items and clarifications that we put in which we think will be helpful, but I do not know
25 whether you want to go into that level of detail now?

26 THE PRESIDENT: What I think might be useful, Mr. Thompson, just to enable us to be clear as to
27 exactly how this is going to work would be to take one or two of the items that are listed in
28 para.302 and to see exactly what is meant by things like "disclose the information" or "provide
29 this or that data" or whatever.

30 At this stage I think we should make a couple of other points that are relevant as to
31 how this is to work. First, we are primarily interested in original information as it was at the
32 time, i.e. the original disclosed documents, i.e. disclosure in the conventional sense rather than
33 in worked up *ex post facto* arguments that may or may not have been around at the time, but
34 represent now original work that has recently been done. Secondly, there is the question of

1 whether any kind of verification is necessary for some of these items. If matters can be agreed
2 so much the better but if, at the end of the day, there is a dispute as to where these pipes are,
3 how long they are and what exactly is the difference between this or that factual aspect we may
4 need some kind of independent person with water industry expertise to help us on the dispute;
5 and then insofar there is argument over accounting figures then we may need some accounting
6 help to help us resolve any dispute, assuming it cannot be agreed.

7 MR. THOMPSON: Yes, with respect I think we very much support the Tribunal in I think each of
8 those two or three points.

9 THE PRESIDENT: Our present view is that we should probably go in a staged process as far as we
10 can without engaging more outside expertise than we need and, if things can be agreed, so
11 much the better. If we take, for example, para.302, which is the basic information about the
12 layout of the network and what is regarded as bulk supply, where the mains are and what is
13 a non-potable main and all the rest of it, how do you see that in practice being supplied?

14 MR. THOMPSON: Well insofar as we were talking about geographical whereabouts we had
15 imagined, at the least, some sort of map setting out at least four classes and possibly five,
16 namely, 600 mm. potable, 300 mm. potable, 600 mm. non-potable, 300 mm. non-potable,
17 possibly raw water aqueducts if they form a separate class and other sizes smaller than 300 as
18 a minimum, in the form of a map I would think. I am subject to correction from my right if
19 I go off message, because obviously there is a level of detail where Dr. Bryan is likely to have
20 a better understanding of what is realistic than I have, but I have not had any red flags as yet.
21 I would think that primarily that if it is an issue of location it may be necessary to have a table
22 of some sort to support some sort of map I would have imagined.

23 THE PRESIDENT: Yes. To some extent this list of issues is asking questions, and to some extent it
24 is just seeking, as it were, original information?

25 MR. THOMPSON: Yes, (b) and (c) is essentially probing the underlying basis for some assertions
26 made, particularly by the Director, which certainly we did not find entirely clear, and I think it
27 would be possible to set out the underlying information in a form that made it more readily
28 comprehensible. Likewise we thought (d) a matter which either the Director, or Dwr Cymru or
29 both would be able to cast light on – probably in a narrative form; likewise (e) and (f).

30 THE PRESIDENT: Yes, can we just pause on (d), (e) and (f). I think the situation we have at the
31 moment is that this system appears to be classified for some regulatory purposes as a raw water
32 aqueduct, and in at least one letter between the parties the relevant water being supplied is
33 regarded as raw water and on that basis, that being the evidence, we had been inclined to
34 assume that it is a raw water aqueduct unless there is some convincing reason why it is not

1 a raw water aqueduct. That is the sort of evidential situation that we are in at the moment. It
2 may be that someone wants to come along and say it is actually quite different, and then there
3 is the issue as to whether it would be different, whether it is essentially different from the
4 situation where you have a reservoir, and if we get into that sort of detail we may need some
5 kind of person with water industry expertise to help us sort that out if we need to resolve that.

6 MR. THOMPSON: Yes, I can see that, that is touched on to some extent in the pleadings already,
7 but it may be that it is necessary to have a tie breaker on that question.

8 THE PRESIDENT: But obviously if it can be agreed we do not need to concern ourselves so much.
9 (g) probably belongs to some of the earlier questions, it goes together I think with parts of (a),
10 (b) and (c). (h) is rather a tricky one; how do you see (h) unfolding, because that is a mixture of
11 fact, opinion, accountancy and other sorts of issues? It is fairly critical to the issues we have
12 before us at the moment.

13 MR. THOMPSON: Yes, we tried to couch it out in more specific terms in paras. 5, 6, 8 and 9 of
14 annex 2.

15 THE PRESIDENT: So in 5 you are focusing on MEA values and 6 you are focusing on maintenance
16 costs. 7 and 8 are slightly different points we have already touched on, and 9 is the large
17 industrial tariff and I suppose we could also add a calculation of the new non-potable tariff in
18 2002/3. What about some of the other issues which are surfacing in (h) like location, pressure
19 and/or throughput, distance and other factors? Are those supposed to be brought out by the
20 table?

21 MR. THOMPSON: Yes, I think that is right. Those are the principal comparators in terms of
22 non-potable. It is true that there is not here, and it maybe that that is an omission that there
23 should be an equivalent, at least for potable generally, in terms of those same categories under
24 the tables for both 600 and 300 potable pipes.

25 THE PRESIDENT: As far as I have understood it, at least imperfectly, the case so far has been that
26 – among other things – non-potable pipes tend to be in the countryside, do not tend to go under
27 roads and do not have to have such a high level of integrity, etc.

28 MR. THOMPSON: Yes.

29 THE PRESIDENT: How do we get evidence on those points in some suitably independent and
30 verifiable way before the Tribunal?

31 MR. THOMPSON: I think the map should give an indication of the geographical whereabouts.
32 Obviously it may be necessary to go down to a greater level of detail but if they are all located
33 in the middle of Cardiff then that would be one thing. If, in fact, the potable 600 mm. are
34 scattered about all over the country that will be something else. I think it is true that there is

1 nothing here specifically on pressure and throughput, and it may be that that is an omission
2 which ought to be rectified and perhaps in the table would be the obvious place for it to go,
3 600 and 300 potable as further subheadings in the table, because at the moment those are
4 comparators with the other major non-potable contracts.

5 THE PRESIDENT: We are not sure at the moment whether we need to look at the particular
6 contracts. That is another matter we may need to come back to. This is an area of the case it is
7 very much in your interest to produce to the Tribunal what evidence you think you can produce
8 and you have put in issue the Director's finding that there is no real difference between these
9 two and we are trying to get, as it were, beneath it to see whether there is something in what
10 you say?

11 MR. THOMPSON: Yes, absolutely. I think 6 is an absolutely key point in that in a sense all these
12 physical differences on our case feed into a financial difference because in the end we are
13 talking about money and so I think we would see 5 and 6 as crucial aspects of it and in a way if
14 there is a difference in throughput or pressure then that should be reflected in the financial
15 outturn in terms of maintenance, costs and valuations. So I think we would see the financial
16 figures as, as it were, the bottom line in both legal as well as financial terms. I think that was
17 our approach, but it does it does strike me, as you have put it to me, that there should really be
18 a line for potable 600 mm. and 300 mm. in terms of this table, given the issue that the Tribunal
19 is primarily concerned with. I think the reason why we have put this table in is because there
20 is, in the judgment, some questioning of whether or not the comparators are correctly made,
21 the comparisons that the Director relies on. It appeared to us that some objective statistics
22 might be of value there. Equally, I think it is true also of the large potable network that the
23 same issues would be relevant there, and if this table could be filled in for that I think that
24 would be also useful.

25 THE PRESIDENT: Your basic thrust is to compare potable and non-potable ----

26 MR. THOMPSON: It is.

27 THE PRESIDENT: -- rather than to compare different customers within non-potable at this stage?

28 MR. THOMPSON: That is correct, it is. But to some extent we have gone slightly outside 302
29 where we have seen substantial issues elsewhere in the judgment and I think the table reflects
30 that. Also, I could say that point 4 in our annex 2 is essentially directed to treatment, where the
31 Tribunal has made a provisional finding at para.276 in relation to treatment costs, but it
32 appeared to us that the logic of the Tribunal's reasoning elsewhere is that it would be helpful to
33 have the actual costs of Ashgrove identified, and we believe that that is the correct comparator.
34 It is a matter that was explored at the hearing, so that again goes slightly outside the scope of

1 para.302 of the judgment, but it appears to us to be a useful piece of information which there is
2 no good reason why it should not be before the Tribunal.

3 THE PRESIDENT: So your position at the moment is that you seek to get to where you want to be
4 through discovery of internal Dwr Cymru documents rather than through inviting us to hear
5 a person experienced in the water industry who will speak to this kind of issue?

6 MR. THOMPSON: It appears to us that the raw data must be most easily produced by Dwr Cymru
7 rather than by some expert trying to find their way through all this, but Dwr Cymru was
8 obviously fully informed and in possession of all the information. What we do say is that we
9 are reluctant to put off the issue of an expert as I think the Director invites you to do until,
10 I think, the beginning of April and we think that it would be sensible to have provision for an
11 expert built into the time table so that there will not be further delay and we have tried to come
12 up with a sensible solution for that, which is a timetable for the Director and Dwr Cymru to
13 come up with their information – another period for us to try and agree – and then for, as it
14 were, a referee in place to report to the Tribunal on any areas of disagreement because we have
15 to say that we are slightly pessimistic given the history of this case that everything will be
16 entirely agreed.

17 THE PRESIDENT: So just take me to where you are putting that, Mr. Thompson?

18 MR. THOMPSON: In terms of the draft order at para.4 we are suggesting that a Mr. X should be
19 appointed by the Tribunal to supervise the disclosure of information required to be disclosed,
20 and we see that primarily as an accountancy task, but the Tribunal put to me, and I can see the
21 sense of it, that there may be elements of water expertise, though whether they are likely to be
22 so wide-ranging that it is sensible to make a provision now – it seemed to us, prior to coming
23 into court today, that the main issues would be financial.

24 THE PRESIDENT: So why can we not supervise this process ourselves? Why do we need to
25 appoint someone to do that supervisory task?

26 MR. THOMPSON: Well that is a matter for the Tribunal. We saw the suggestion and if the
27 Tribunal obviously feels that it is sufficiently resourced to manage those two issues and, if
28 necessary, to form an expert view then I agree that point is not necessary.

29 THE PRESIDENT: Well it slightly depends what the ambit of the dispute may turn out to be.

30 MR. THOMPSON: Indeed it does. You spoke of conflicting interests. We have a strong interest in
31 trying to get this matter resolved as quickly as possible and we were somewhat concerned and
32 thought we might have to come back here and argue about what sort of expert we might need
33 in two months' time. We have erred on the side of trying to sort things out now, but the
34 Tribunal may say that is not possible.

1 THE PRESIDENT: But in general that is how you see the first item on the agenda?

2 MR. THOMPSON: Yes, it is the timetable we have set out at items 1, 2, 3, and 4. The issue of the
3 bottom up costs actually goes not only to item 1 but also to item 2; that is particularly para.3 of
4 annex 2.

5 THE PRESIDENT: How are you seeing that? Are you seeing that in terms of disclosure of original
6 documents, or are you seeing that in terms of some worked-up presentation of what these costs
7 are said to be?

8 MR. THOMPSON: Well they are obviously beyond what we have seen and likely what we have
9 disclosed. We are rather in the dark as to what there is, but we have assumed that Dwr Cymru
10 has a proper idea of what Ashgrove itself actually costs and of its regional average on the
11 appropriate comparative basis – non-potable and possibly raw water aqueducts if they say that
12 is relevant, which ever is the correct comparator.

13 THE PRESIDENT: And the timetable for this is 10th February on your approach?

14 MR. THOMPSON: Yes.

15 THE PRESIDENT: With agreement, with any luck, by the 17th which is about four weeks from
16 today – just under.

17 MR. THOMPSON: That is right. Obviously Dr. Bryan is very much apprised of the whole matter
18 and we would expect to be able to process the information – obviously the sooner we get it the
19 better, but we will do our best to agree whatever we can by that date.

20 THE PRESIDENT: Very well. Let us see what everyone else’s reaction is. Yes, Mr. Anderson?

21 MR. ANDERSON: Mr. President, in our view the appropriate way forward is to take the questions
22 and information requested by the Tribunal in para.302, which are, if I may respectfully say so,
23 well drafted, to the point, and identify very precisely the information the Tribunal wishes. In
24 all except one example, that is information or those are questions which, in the first instance,
25 should be answered by Welsh.

26 THE PRESIDENT: Yes.

27 MR. ANDERSON: The exception is item 302(e) which refers to the regulatory accounting
28 guidelines. It is a matter the Director would answer. So the first stage should be Welsh, and in
29 relation to that paragraph the Director answering the question and providing the information,
30 mindful of what the Tribunal has just said about original material. That material in the form
31 identified in that paragraph, rather than reworked in to Albion’s versions in their annexes
32 would then be made available to Albion and Albion could respond and identify the extent to
33 which that is in dispute. That exercise, in our submission, does not require the oversight of an
34 independent accountant. To the extent that it is necessary to make applications for further

1 disclosure that can, in the first instance, again be a matter between the parties and if necessary
2 come back to the Tribunal. But in our view it is a waste of time and money to engage an
3 expert for that process.

4 Some of the questions, of course, do involve judgment and differing views and again
5 we would say that that is ultimately likely to be a matter for this Tribunal – whether or not it is
6 a raw water aqueduct, or a reservoir and whether there are differences, those are matters which,
7 at the end of the day, ultimately it is for this Tribunal to decide whether they are relevant and
8 what the conclusions are to be drawn from it. In our view we think it unlikely you are going to
9 need any expert, either an accounting expert, or a water industry expert to answer item 1 and
10 indeed the same is true of item 2. That is how we would see this process advancing.

11 The same can be said in relation to item 2 – since I am on my feet – subject to this one
12 point, that is an exercise that will require original work. From our understanding there was no
13 such thing as a stand alone calculation of the costs of supplying Ashgrove. It is something that
14 would need to be done, no doubt there may be some material no doubt that would be disclosed
15 to support it, but it is an exercise that will require work and again it should be a matter for
16 Welsh in the first instance to do and to see the areas in that analysis that are then a matter of
17 dispute. That is how we would see this process advancing. We believe that first stage process,
18 namely the production of the information from Welsh, and the creation of the item 2 stand
19 alone Ashgrove analysis, bearing in mind that we reserve our position on whether that is
20 ultimately going to be a useful prospect, that is a matter for submission at a later date. We
21 believe that process could be completed within a month and then the parties can probably have
22 a meeting and identify the extent of the dispute. If there was a huge amount of dispute one
23 may wish to revisit the question of an expert but we do think it would be a waste of time and
24 money to appoint an expert now because one simply has no idea what that expert was going to
25 be having to look at until the level of disagreement (if any) is identified. We do not believe it
26 would waste a great deal of time using an expert at that stage, but we believe that this expert is
27 really going to be the Tribunal at the end of the day. That is the Director's position on those
28 items.

29 THE PRESIDENT: Thank you. Yes, Mr. Robertson, I think a lot of the focus does fall now on your
30 clients to help us as usefully as they can.

31 MR. ROBERTSON: Yes, absolutely.

32 THE PRESIDENT: It is very much in their interests as well as everyone else's interest that we do
33 now get a very full picture of these points.

1 MR. ROBERTSON: Yes, that is correct and that is what we intend to do. We intend to make sure
2 that the underlying contemporaneous material is there, supplied to the Tribunal with
3 explanations where necessary. We are fully in agreement with the Director as to the proposed
4 timetable for this. We actually think that quite a lot of the information is likely to be capable
5 of agreement because it is already in the public domain; it is being supplied to Ofwat as part of
6 the regulatory process. For example, some of the documents Albion has referred to in its
7 annex that it wants supplying – for example, capital submissions – they are already in the
8 Ofwat library in fact. This is a heavily regulated industry so a lot of the information is already
9 there and that is why we think it is capable of agreement. So we would say for both items
10 1 and 2, we will deal with item 2 later but whatever material is to be supplied in relation to
11 item 2 if we have four weeks from today to supply it we then have a process of seeking to
12 agree it where possible with Albion. We think it would be sensible to have a meeting with
13 Dwr Cymru’s officers and with Albion and its advisers so that we can go through each of the
14 answers to the questions and discuss their questions, their requests for further information and
15 what can be supplied, dealing with it as far as possible there and then with the aim of
16 producing a report to the Tribunal, as one would do in civil litigation where one has experts
17 identifying the areas of agreement and disagreement, and identifying to the Tribunal the
18 reasons for the disagreement. That will then put the Tribunal in a position of seeing whether
19 those are matters which are factual issues which can be resolved, as the Tribunal does, or
20 whether they are genuinely matters which do require some sort of expert opinion of advice. At
21 the moment we think that is unlikely but you never can tell.

22 THE PRESIDENT: Is this 20th February – is that four weeks from today?

23 MR. ROBERTSON: I believe it is.

24 THE PRESIDENT: To give you a “for instance”, our understanding, which may be completely
25 imperfect, is that when doing the work necessary for the regulatory accounting guidelines it is
26 necessary to take out some of the non-potable costs, for example. So presumably one might
27 suppose that there are already in existence some documents that illustrate how that is done
28 which might begin to throw some light on some of the background cost issues, for example.
29 So, as I say, we are not particularly enthusiastic about embarking on new worked up material
30 now rather than seeing what there is in terms of historical data already existing, both from
31 a point of view of saving costs, and from a point of view getting, as far as we can, a feel for
32 what the situation was at the time.

33 MR. ROBERTSON: Yes, that was our understanding that we are carrying on this exercise looking at
34 it historically.

1 THE PRESIDENT: It is primarily a disclosure exercise with perhaps some explanatory ----

2 MR. ROBERTSON: Some explanation where necessary.

3 THE PRESIDENT: -- exercise where necessary, so we are thinking along similar lines if that is how
4 you are seeing it.

5 MR. ROBERTSON: Yes, I think we are.

6 THE PRESIDENT: What about the point that Mr. Anderson has just made about the stand alone
7 costs of Ashgrove? We have at least one document that makes a stab at estimating the
8 Ashgrove costs?

9 MR. ROBERTSON: We were proposing to put in, again four weeks from today, a statement setting
10 out our calculation of the stand alone costs of Ashgrove.

11 THE PRESIDENT: What is the matter with the existing calculation?

12 MR. ROBERTSON: There is not a separate stand alone existing calculation. To do a calculation of
13 the costs of Ashgrove actually involves you looking at the 20-odd kilometres on a metre by
14 metre basis to see which ground they pass under, where it passes under canals, railway lines or
15 roads, because the modern equivalent asset value – the replacement value – will differ
16 depending on what you are having to put the pipe under. So that is an exercise, the Tribunal
17 having asked the question, that has been in the course of preparation so that we make sure that
18 we can meet the deadline the Tribunal set for answering this question. But it is not something
19 that we can just pick out of an archive from the year 2000, dust it off and say “That is it, that is
20 what it was”, because the exercise was not undertaken at that point.

21 THE PRESIDENT: What we had in mind was document D21, which was your answer to the s.26
22 notice as a starting point.

23 MR. ROBERTSON: Yes.

24 THE PRESIDENT: Is there any reason not to accept that, or to go behind it?

25 MR. ROBERTSON: It is a starting point but there is more to it than that. When we supplied it the
26 idea is that we put this to Albion for their comments, because undoubtedly they will make
27 criticisms of what we have done. Again, the aim is to try and focus down for the Tribunal
28 those points of the calculation where we are agreed and those points where we are not agreed
29 and where it is going to have to be for the determination either of the Tribunal or of an
30 independently appointed expert – probably the determination of the Tribunal – as to what the
31 right answer is. Ultimately it is a factual issue.

32 Since we are into the scope of item 2, there has been reference, suggestions that
33 somehow one could do an average exercise for the other non-potable systems across Welsh’s
34 area ----

1 THE PRESIDENT: What, the individual systems, you mean?

2 MR. ROBERTSON: Yes, but we would not propose doing that; we do not think it is necessary given
3 that we are focusing upon Ashgrove; and secondly, it is actually quite a time consuming
4 undertaking to do that. We have done a sort of back of the envelope calculation, and we
5 would not get it completed this side of Easter, but we just do not see that it is necessary.

6 THE PRESIDENT: At the moment I think we are not particularly looking at the individual
7 circumstances of the other customers. We are looking at non-potable customers in the
8 generality, and then more specifically at Ashgrove, and that will give us a feel as to whether
9 Ashgrove is in line with everybody else, or is above or below, or where.

10 MR. ROBERTSON: I think the position of other non-potable customers is probably going to be
11 covered by the answers to some of the questions in 302. So I think, just to be clear, the
12 exercise that we will do as a discrete exercise – we have called it “agenda item 2 exercise”
13 – the costs of Ashgrove, we will do that for Ashgrove but we will not do it for the other nine
14 systems.

15 THE PRESIDENT: Not individually.

16 MR. ROBERTSON: Not individually, and there is no average figure that we can pluck down, you
17 would actually have to do it for each of the nine separately, so you actually have nine sets of
18 individual calculations.

19 THE PRESIDENT: But what we are trying to get at is the totality?

20 MR. ROBERTSON: We understand that and we will bear that in mind when answering the
21 questions.

22 THE PRESIDENT: An important part of the Director’s and your case is that we need to look at
23 regional averages and how are we going to get at it?

24 MR. ROBERTSON: Yes, that is well understood. On the timetable, we are in agreement with the
25 Director’s timetable, and we will provide our answers four weeks from today. We then have
26 this process of attempting to agree, identifying areas of disagreement, and then reporting back
27 to the Tribunal, and then it is really going to be for the Tribunal, having seen those answers, to
28 decide how it resolves the remaining areas of dispute – always assuming that the Tribunal finds
29 the answers to the questions sufficient for its purposes.

30 THE PRESIDENT: Well this may be one of those cases, which to some extent the early stages of
31 “Football Shirts” was another, where the Tribunal needs to meet with the parties fairly
32 regularly, perhaps at relatively short notice, to make sure this process is progressed and that
33 time does not slip by and that issues are resolved as we go along basically.

1 MR. ROBERTSON: Yes, well I think in common with all the parties we want to see this resolved
2 expeditiously as well, so we would welcome that.

3 THE PRESIDENT: Yes, thank you. Yes, Mr. Randolph? You are something of spectator ----

4 MR. RANDOLPH: We are something of a spectator, Sir ----

5 THE PRESIDENT: -- but you do make an interesting offer?

6 MR. RANDOLPH: We do. I am very grateful that you have described it as such; we think it is
7 interesting and hopefully useful. We are in a different position from Dwr Cymru and
8 obviously from the Director, but we are here to help. Obviously, it has been made clear I think
9 by both the Tribunal and indeed all the parties – I think this is something on which all the
10 parties are *ad idem*, and as you yourself said, Sir – this is an important case for the water
11 industry and there are certain issues in the interim judgment that give rise to concerns on our
12 part, but I will come to that in a moment. Obviously on item 1 we think we cannot assist
13 unfortunately.

14 THE PRESIDENT: Yes.

15 MR. RANDOLPH: We would like to but we cannot, and we agree with the Director and, indeed,
16 Dwr Cymru that effectively one should follow para.302, and we agree particularly with what
17 Mr. Anderson has said about the approach, but that is probably not going to carry a great deal
18 of weight given the fact that we are not going to be involved in the exercise.

19 As for item 2, the only reason we put forward our offer, which is found “interesting”,
20 is because of the word “generally” that is put in, and reference to para. 336 of the Judgment.

21 Of course, that makes it clear twice in that paragraph, and it may be helpful just to turn it up:

22 “However, we accept the Director’s submission that any “bottom-up costs”, whether for
23 the Ashgrove system or for supplies of non-potable users generally, would have to be reliable
24 and verifiable.”

25 Obviously that is right, and then the Tribunal makes the reference to document D21. Then further
26 down, with regard to further evidence, possible accounting evidence: “The same would be true of any
27 bottom-up calculation for non-potable users generally.” It was on that basis, having read that paragraph
28 that we thought if it would assist we could produce historic data with regard to what we have – our area
29 – on this understanding that of course there will be differences, but in the light of what Mr. Robertson
30 has just said about the fact that Dwr Cymru has quite a lot to do in whatever timetable you set, and we
31 were just talking about the other areas, and that is going to be very important with regard to the final
32 examination of this case, if we can assist by taking a bit of the burden, on the understanding that at the
33 end of the day it may not comparable – but it may be. If the Tribunal is looking at non-potable costs
34 generally then one would assume that costs in the neighbouring area (with regard to non-potable costs)
35 might be of assistance. What we do not want to do is to incur costs for the sake of incurring costs, but

1 we do want to assist the Tribunal, so it may be that the Tribunal will come to a view having heard the
2 parties. I do not know what Albion's view is, for example, on this, or indeed Ofwat's necessarily.

3 THE PRESIDENT: The impression I get from this, Mr. Randolph, is that it would not be unduly difficult for
4 you to supply the stand alone costs.

5 MR. RANDOLPH: No, I have taken specific instructions and the answer is "no", it would not be.

6 THE PRESIDENT: So they are fairly readily available ----

7 MR. RANDOLPH: On an historic basis.

8 THE PRESIDENT: On an historic basis.

9 MR. RANDOLPH: Which is what you have asked for.

10 THE PRESIDENT: Yes.

11 MR. RANDOLPH: We have the data, or the data could be made available within a relatively short time
12 frame.

13 THE PRESIDENT: Yes.

14 MR. RANDOLPH: As I say, I do not know what the other parties think.

15 THE PRESIDENT: We would obviously have to reserve our position as to the relevance or usefulness of the
16 data when it appears.

17 MR. RANDOLPH: Indeed.

18 THE PRESIDENT: But at first sight our first impression is that that could be useful data. We will see what
19 the others say.

20 MR. RANDOLPH: The other point is on the timetable, it is really not for me to add much. We put in our
21 twopence ha'penny worth on the overall timetable saying we had hoped to get it all done by Easter
22 – I am sure Albion are quite happy with that approach. Obviously we did not see the Director's
23 skeleton before we put that in, maybe we are being unduly optimistic, we do not have to produce a great
24 deal of the data, so maybe at the end of the day the weight to be attached to our suggestion should be
25 less than originally thought.

26 THE PRESIDENT: Let us see when Easter is this year.

27 MR. RANDOLPH: It is late this year.

28 THE PRESIDENT: 16th April – relatively late.

29 MR. RANDOLPH: Relatively late. Again, one might want to listen to the other parties on that given the fact
30 that we have not got a great deal to do.

31 THE PRESIDENT: Well let us come back to the timetable later.

32 MR. RANDOLPH: Thank you, Sir.

33 THE PRESIDENT: Yes, thank you. Yes, Mr. O'Reilly?

34 MR. O'REILLY: Sir, we have nothing to add on numbers 1 and 2, we simply echo Mr. Randolph's
35 encouragement in terms of timetable.

36 THE PRESIDENT: Yes. Yes, Mr. Thompson? Let me just try and summarise what has been said so far and
37 where I think we probably are. What is being said so far is that, at least as a first step, it is mainly Dwr

1 Cymru and the Director in one instance will stick fairly closely to the wording of the Tribunal's interim
2 Judgment. They will disclose, as far as possible, original documents that go to those issues in a way
3 that is as helpful as possible with clarificatory explanation where necessary. It may be necessary to
4 work up something on the stand alone costs of the Ashgrove system which may or may not be
5 considered by us to be a relevant exercise, but perhaps what they say is what they need to do at this
6 stage, and that when all that is available they anticipate being able to agree with you most of the
7 material and I think it was said, at least implicitly as we went along, that the specific documents that
8 you were identifying in your annex relating to MEA values, and the capital maintenance submissions as
9 well as various bits of material relating to raw water and so forth, are already available and would be
10 part of the disclosure. I may have left out important points, but that is roughly where we are so far.

11 MR. THOMPSON: Yes, if I could comment briefly ----

12 THE PRESIDENT: What points of disagreement have you got with that as an approach?

13 MR. THOMPSON: It does seem to us that points 5 and 6 in our annex do have the advantage of being
14 specific and I have not heard any reason why it would be difficult to produce those items.

15 THE PRESIDENT: Well I have the impression that those items (5 and 6) are mainly producible.

16 MR. THOMPSON: I think that is exactly what I mean. If they are concrete documents of the kind that the
17 Tribunal ----

18 THE PRESIDENT: They already return asset values under raw water non-potable and potable" – well maybe
19 they do not split it between raw water and non-potable, that is true. We had better look at that, it may
20 well turn up in answer to question 302(a). Yes, Mr. Robertson?

21 MR. ROBERTSON: If I can just confirm that? In relation to item 5 of annex 2, those details will be supplied
22 as part of the answer to 302(a). In relation to item 6 the capital maintenance submissions, those are
23 documents that I referred to that are actually already in the Ofwat Library. They are already in the
24 public domain.

25 THE PRESIDENT: I think the second part of item 6 is going to – we have the location, etc. – "Age, Location
26 and MEA value". How is that going to work? Does that do anything more than repeat item 5?

27 MR. ROBERTSON: I think that might be seen as merit in this procedure of us putting forward our answers,
28 and then once we have our answers in four weeks' time having this meeting so that if Albion say "No,
29 this important information has been left out, and this is what it will demonstrate" then hopefully having
30 the meeting there on our premises we can get hold of that information in pretty short order.

31 THE PRESIDENT: I am inclined to say, Mr. Robertson, you can I think understand what it is that we are
32 getting at.

33 MR. ROBERTSON: Yes.

34 THE PRESIDENT: We want your help and it is very much in your client's interest to help us as much as you
35 can on this.

36 MR. ROBERTSON: I am just concerned that we do not end up doing unnecessary exercises. That is my only
37 caution on this and that is why I think it is just better to play it that way. Obviously we have their

1 shopping list here, but I think it is much better to wait and see how the answers are presented, and then
2 once they have that then they can focus their requests for further information, further data, further
3 contemporaneous documents, and if they are not available they are not available, and we will deal with
4 it that way which seems to be a sensible way of dealing with the matter.

5 THE PRESIDENT: Mr. Thompson, as a matter of impression, at least speaking for myself, I think we are
6 a bit reluctant to be too prescriptive at this stage. We have the broad lines reasonably clear.

7 MR. THOMPSON: Yes, I am obviously pressing because in six weeks' time I do not want for them to say
8 "Oh why did they not ask for that six weeks ago".

9 THE PRESIDENT: Well you have asked for it and if you do not get it you will have a reasonable cause for
10 complaint and no doubt applications for costs, and complaints that you are prejudiced and all the rest of
11 it. It will not be very good from that point of view.

12 MR. THOMPSON: The other question about Ashgrove, I must say we found it somewhat difficult to
13 understand what exactly was being proposed or what it was that Dwr Cymru do not have. It seemed to
14 us surprising that they did not have an indication of the costs of Ashgrove, or the valuations of
15 Ashgrove. It did sound to us rather as if the exercise that was being engaged in was precisely of the
16 sort of *ex post facto* kind that I had understood the Tribunal not to be particularly enthusiastic about.
17 Indeed, it seemed to us that if they had totals and averages there must be some components of those
18 totals and averages, otherwise they cannot be very reliable totals or averages, and so it seemed to us
19 doubtful that the exercise was as difficult as Dwr Cymru was saying it was, and they ought to be able to
20 provide the component parts from which they reached those totals and averages reasonably quickly; so
21 we had doubts and difficulties about the way that was put to the Tribunal.

22 The third element was United, and we have two concerns there. First, you will have seen in
23 our written submissions that we obviously (and I think understandably) have concerns about costs, and
24 we do not, at the very least, wish to be liable for any expansion of the case probing issues about United.
25 We also candidly have some concerns about how relevant it is likely to be and, indeed, what exactly the
26 motivations of United may be in preparing its figures and it is obviously a very difficult issue to go into
27 and somewhat collateral to anything that the Tribunal is required to decide. We simply put that as
28 a caveat in being somewhat cautious about expanding the scope of the case to involve United further as
29 an Intervener in this case.

30 I think those are the three points we had. I have heard obviously what Mr. Anderson has said,
31 and what the Tribunal has indicated, and I think I have indicated what our general interest is here and
32 we are obviously content to leave it to the Tribunal to decide what the best way forward is.

33 THE PRESIDENT: Yes.

34 (The Tribunal confer)

35 THE PRESIDENT: I am sorry, Mr. Anderson, you wanted to make a point?

36 MR. ANDERSON: Just one point, Sir, on the question of United Utilities "interesting" offer. We believe that
37 offer should not be taken up by the Tribunal, principally because, as Mr. Thompson has said, it is

1 irrelevant, it is a different area with different costs, different distribution and we think it might
2 positively be distracting and confusing. But if the exercise comes up with a different figure one then
3 has to explore the reason why that figure is different. If it comes up with the same figure it does not
4 take you anywhere. We believe that the information you have requested from Welsh would be
5 sufficient to address the issues that you have been seeking and to engage them in a further exercise
6 looking average costs in another region is likely to be distracting and may well require further work on
7 explaining anything that arises out of the exercise, so we would oppose that.

8 MR. RANDOLPH: We seem to have come in for some criticism on our offer. As I made clear to start with
9 this was an offer made in good faith to assist the Tribunal, based on para.336. If it is the view of the
10 Director and, indeed, the original Complainant and Appellant, that it is not going to assist, then fine. At
11 the end of the day we have to put ourselves out to an extent to assist the Tribunal on this issue, if it is
12 not going to be of assistance then fine, but on the basis of para.336 it did appear to us that it might be of
13 relevance. Also, given the fact that this is a decision which will impact generally across the water
14 industry again it might assist to see comparators.

15 To deal with the point that Mr. Thompson raised about costs, obviously it is a self-contained
16 area and that can be dealt with at the end. Certainly, if it were deemed to be generally relevant there
17 would be no necessary reason why Albion would have to pick up any particular costs. There again, we
18 would be acting almost on an *amicus* basis trying to assist the Tribunal. But, as I say, if everybody
19 – apart from us – is not keen on our “interesting” offer, then we will withdraw it.

20 THE PRESIDENT: I think it is a bit late, Mr. Randolph! (Laughter)

21 MR. RANDOLPH: I do not want to push ourselves on other people, we were only trying to help, but there we
22 are, we will leave it there.

23 THE PRESIDENT: Yes, I think on the various points we have been discussing, if we can just address
24 ourselves to you, Mr. Robertson, on the questions of the worked-up costs of Ashgrove we will not stop
25 you embarking on the exercise that you want to embark on. However, we have the impression that
26 non-potable costs have to be broken out at some point in preparing the regulatory accounting guidelines
27 and that, as Mr. Thompson points out, in doing that there must be component parts of those costs in
28 which Ashgrove must figure as a substantial part of your non-potable customer base. Therefore, there
29 must be information of an historical nature around that gives historical and contemporaneous estimates
30 of what those costs are for regulatory purposes; that is relevant to our consideration. If, at the same
31 time, you want to put some gloss or development or explanation on that by saying “That is not the way
32 to look at it, there is another way you should look at it, that is another matter, but we want to get as far
33 as we can at the original information as it exists historically. So I think what we are hoping is that you
34 will provide at least both of those aspects so that we can see where we are.

35 On the United Utilities’ point we are at present ourselves minded to take up your offer, Mr.
36 Randolph, thank you very much, despite certain opposition from both parties. It is a somewhat curious
37 situation for an Intervener to find itself in, but bearing in mind that United Utilities is, after all, only on

1 the other side of the River it does seem to us not necessarily at this stage that we can exclude the
2 possible relevance of this information although we may, when we get it, simply park it and decide that
3 it is too difficult or too far away and it has nothing to do with the case. We may not actually use it or
4 even refer to it, but I think in the first instance let us see what you produce and see where we go from
5 there.

6 Subject to that, without trying to draft an order in my head, I think the timetable, Mr.
7 Thompson, sounds to me not entirely unreasonable – February 20th. It is slightly longer than you have,
8 I think you had February 10th, but if Dwr Cymru can improve on it so much the better, but I do not
9 think we will make any tighter timetable than four weeks from today. There should be disclosure by
10 Dwr Cymru, and in relation to one item by the Director, of the matters relevant to documents and facts
11 and matters relevant to the issues we have raised in para.302 with such accompanying material as is
12 necessary to help us understand what it is that has been disclosed. That is probably as far as we need go
13 on that aspect of the matter at the moment bearing in mind that Dwr Cymru will itself bear in mind that
14 there are specific requests that Albion has made for particular items of information.

15 I think an order along similar lines to deal with item 2 on the agenda is also appropriate.

16 Does that effectively deal with items 1 or 2, or have we left things out, up in the air, or unclear?

17 MR. THOMPSON: I think the only question is what happens next after 20th February – whether the Tribunal
18 wants to direct anything in particular in terms of a report to it.

19 THE PRESIDENT: I think we will come back to that at the end, Mr. Thompson, because although I know it
20 is expensive to have CMCs probably the only way we can actually progress this case is to do so, and
21 – I am looking across to my colleagues – I would have thought we are going to need another CMC at
22 the end of February at the latest to see where we are on this and other matters. Let us think aloud and
23 plan together as we go along. I do not know whether we have time to do it, but if we had second CMC
24 on, say, 28th February or around 1st March – that sort of time – whether that would give everybody
25 enough time to see whether there was significant disagreement and what further steps we ought to take
26 at that stage.

27 MR. THOMPSON: Speaking aloud, I suppose if the material is to be produced on Monday, 20th, it may need
28 a certain amount of digestion, so the week beginning 27th looks like the earliest possible date and it may
29 be that either the middle or even possibly towards the end of that week is the earliest realistic time. I do
30 not object to the 28th, but it may be ----

31 THE PRESIDENT: Well if we said “Thursday, 2nd March, for example?”

32 MR. THOMPSON: Yes, I think that would probably be about as early as we can manage, because the
33 Tribunal may have questions itself in which case you want to have submissions.

34 THE PRESIDENT: Yes, we have to absorb quite a lot but I think in the interests of pressing on we might
35 have to forego skeleton arguments and that sort of thing and just see where we are on the basis of what
36 we have on 2nd March.

1 MR. THOMPSON: It may be rather nit-picking, but I do not know whether it would be possible to re-open
2 the question and say that Dwr Cymru had to produce their material by the end of the week, 17th? It
3 would then at least give people the weekend to see what it is and then a full week for discussion.
4 Otherwise, if we do not get it until the end of Monday, it seems to me that week may rather collapse
5 into itself.

6 THE PRESIDENT: I think we will say mid-day on Monday. That will give you time to read it and time for
7 everyone just to come along and be sufficiently well armed in order to be able to discuss it when you
8 come back to the Tribunal on Thursday, March 2nd, without us expecting anything particularly
9 structured or prepared. How does that strike you, Mr. Randolph?

10 MR. RANDOLPH: Very well, save for the fact ----

11 THE PRESIDENT: That you are in difficulties?

12 MR. RANDOLPH: Yes, in the morning, 10.30, 2nd March.

13 THE PRESIDENT: For the whole day?

14 MR. RANDOLPH: Well it looks like a CMC, Sir – it is one of those unfortunate cases where CMCs seem to
15 drag out – but I am not on my own on that, so if it were to be 2 p.m. that would be of assistance. I do
16 not know whether that is problematic for the Tribunal?

17 THE PRESIDENT: No, not necessarily, I think that is probably all right. If we say 2 o'clock that gives
18 everybody a little bit more time.

19 MR. ANDERSON: Sir, could I just clarify one point with the Tribunal?

20 THE PRESIDENT: Yes, of course.

21 MR. ANDERSON: It is simply because the one item that the Director ----

22 THE PRESIDENT: Yes, we have not really addressed that, have we?

23 MR. ANDERSON: The only point I wish to make on it, it is not really a question of disclosing material, it is
24 answering a question, so we will answer the question within the timetable.

25 THE PRESIDENT: Yes, and I expect the origin goes back some way to when the guidelines were first being
26 developed.

27 MR. ANDERSON: Yes.

28 THE PRESIDENT: Yes, Mr. Thompson, the next point on the agenda is the Efficient Component Pricing
29 Rule and how we approach that. I think from our point of view, or from the point of view of the fair
30 handling of this case, the practical situation we are in is that the respondent and the Interveners are very
31 happy to provide expert evidence on this rule, both generally and its application in this particular case,
32 and in the water industry. The Appellant, and perhaps Aquavivae too, do not have the resources that the
33 other side has. We are particularly concerned that we get both points of view, from persons of
34 appropriate stature, first of all to confirm or otherwise our own provisional understanding as set out in
35 our Judgment of the broad principles; and secondly, how they are supposed to work in a case like this.
36 What we do not want to happen is to find a situation where we have expert evidence coming from only
37 one side.

1 As far as the Tribunal itself appointing an expert is concerned, there is another possible risk
2 – or at least a consideration – we would like to put on the table, that if the Tribunal had its own expert
3 and in due course, having heard all the argument, then finds in favour of its own expert that is another
4 procedural situation that we do not want to find being open to criticism at some later stage. So it is not
5 quite clear to us at the moment how we should tackle these rather difficult points. So let us hear what
6 everybody has to say. We notice, I think, in Aquavitae’s helpful observations there is some suggestion
7 that Aquavitae might be in a position to instruct an expert even if Albion is not.

8 So what do you suggest we do about all this?

9 MR. THOMPSON: Yes, I am sorry, I had not initially recognised that characterisation of Aquavitae, but ----

10 THE PRESIDENT: I may have misunderstood it. I thought there was a hint to that effect in their ----

11 MR. THOMPSON: It is not their preferred course, but I see that they do suggest that. We dealt with it in
12 some detail at para. 19 through to 28 of our written submissions.

13 THE PRESIDENT: Well remind us what you have said there.

14 MR. THOMPSON: Initially we have confirmed that the points were not debated fully before the Tribunal, or
15 indeed at all before the Tribunal. Then given our general characterisation of the Judgment, that this is
16 a Decision in effect to retain the matter within the Tribunal rather than remit it back to the Director for
17 further consideration, then we can see that the Tribunal may well wish to inform itself on a matter of
18 general importance of this kind before reaching a Ruling – that is para.20 of our submissions.

19 THE PRESIDENT: There is a certain amount of argument in these submissions about what the Tribunal has
20 or has not decided which is not entirely appropriate at this stage because we had not, as I said when
21 handing down Judgment, decided anything. So I think the question really comes to your paras. 26 and
22 27.

23 MR. THOMPSON: We make some general remarks about the germ of what our submission is likely to be at
24 21 et seq., but the proposal we make is at para.27 where we suggest there are four elements which an
25 expert could properly do to cover, under instruction from the Tribunal, and in the light of the interim
26 ruling from the Tribunal:

27 “(1) to survey the literature on ECPR

28 (2) to consider the appropriateness of the application of ECPR in the water industry in
29 England and Wales

30 (3) to examine the impacts for competition of application of ECPR in the water industry;

31 (4) to consider the correct application of ECPR to the specific circumstances of this case.”

32 Then we suggest that the remaining questions could then be a matter for submission. I think that is
33 essentially the position Aquavitae take.

34 In the annex to our draft order, on p.8 of that document, we add a fifth point – the
35 compatibility of the application of ECPR with Chapter II of the Competition Act 1998, now p.2 of the
36 EC Treaty and it may be that it is that point where the Tribunal would feel that it was perhaps

1 undesirable to have an expert opine on that question because that might to some extent prejudice the
2 Tribunal's own consideration of what after all is the issue in the case.

3 THE PRESIDENT: It seemed to us that that was not a matter for expert evidence, that is a legal question
4 frankly.

5 MR. THOMPSON: With respect, I agree. I think perhaps the main text of our submissions is better put than
6 that. On the other hand, it did seem to us that certainly (1) was a relatively objective matter that
7 a suitably qualified independent expert could provide useful advice to the Tribunal, essentially fleshing
8 out the paragraph in the Judgment referring to the New Zealand case, etc.

9 THE PRESIDENT: Yes.

10 MR. THOMPSON: In (2), (3) and (4) obviously there is an element of value Judgment there, but if it does not
11 actually go as far as seeking to decide for the Tribunal whether or not it is a good thing, there are
12 a number of characteristics of the water industry (and some of them are referred to in the interim
13 Judgment) which may or may not make it appropriate for ECPR to be applied, and it seemed to us that
14 those characteristics could be described via a suitably qualified, independent expert. Obviously our
15 concern is not only one of resources, but also for example the NERA Report for Northumbrian Water,
16 and it seemed to us a material risk, perhaps we would say close to a certainty, that were the matter to be
17 explored at large some variant of such an expert report would be produced and commissioned by the
18 Director and/or Dwr Cymru, no doubt at some length, and our rather small resources might then
19 effectively have to take on really quite a heavy burden in trying to deal with that, and the only way of
20 avoiding that risk would be for the Tribunal to take this matter to itself. I heard what you said, but
21 obviously from our point of view there were two possible outcomes to this case – the matter could have
22 been remitted or the matter could be retained by the Tribunal – and although nothing has finally been
23 decided, so much has been decided that the Tribunal will investigate this matter further and, as such, we
24 would say that this was an exceptional circumstance where the Tribunal could properly appoint its own
25 expert in order to carry out that function.

26 THE PRESIDENT: Yes, and if we appoint our own expert apart from the question of whether we are in
27 difficulties from the point of view of deciding whether we prefer our own expert to somebody else's
28 expert – to put it rather crudely – appointing our own expert only moves one stage further down the line
29 the question of the cost. The Tribunal does not carry a budget for appointing expert witnesses, so the
30 cost has to come out of the parties one way or another.

31 MR. THOMPSON: Indeed, and you will have seen our submissions on the issue of costs and in my
32 submission the clear implication of the Judgment, whatever may or may not have been ruled, is that this
33 was an unsatisfactory position and that the matter now has to be dealt with properly by the Tribunal.
34 The implication of that is that the cost of that exercise, which is effectively a public function, should not
35 be borne by a new inset appointee such as Albion, particularly where its lack of resources, as indeed the
36 Tribunal has indeed found, are partly caused by the matters at issue in this case. So we do have

1 a submission in relation to costs which the Tribunal may or may not be prepared to entertain at this
2 stage. But at least in relation to the ongoing conduct of this case it is a matter which I think cannot be
3 completely ignored because it does impact on the fairness of the procedure.

4 THE PRESIDENT: Yes, well in the only comparable circumstances I think which we face so far in the
5 Tribunal, which is the ongoing and long running proceedings in *Floe Telecom*, the position finally
6 arrived at was that Ofcom agreed to pay for Floe to be represented and has agreed to pay for Floe's
7 costs in front of the Court of Appeal. The Tribunal appointed an expert to deal with one particular
8 technical issue in that case and the expert duly reported. Since Floe is in liquidation it must have been
9 on the implicit assumption that the cost of the expert would be picked up by the Regulator in due course
10 if there was no other source from which those costs could be met.

11 MR. ANDERSON: Sir, I appeared for Ofcom in that matter, and that is not precisely the situation. The
12 Regulator has not agreed to pay for the cost of the expert.

13 THE PRESIDENT: How is the expert going to be paid for?

14 MR. ANDERSON: The legal representative of Floe indicated that if there were to be a joint expert he would
15 be in a position to appoint his own, and was able to finance the conduct of the proceedings. There are
16 obviously provisions under insolvency legislation that mean any award that may be made or any costs
17 that may be awarded in relation to that aspect of the case could not be enforced without some court
18 order. But it is a matter between the liquidator and ----

19 THE PRESIDENT: Well thank you for putting me right on that point, yes. However, we have to grapple with
20 this question of costs. In relation to the identity of any particular expert you have made one suggestion
21 – I do not know whether you have considered a number of names, or what? Have you any further
22 development of your thoughts on whom you might want us to approach – if we did approach anybody
23 – from your point of view?

24 MR. THOMPSON: It seemed to us that somebody of undisputed expertise and independence in the area was
25 obviously a prerequisite, and in order to ensure independence it appeared to us that a recently involved
26 Regulator was the most likely person who would fulfil those requirements and, of those, it seemed to us
27 that there was one obvious candidate, the one that we ----

28 THE PRESIDENT: But you have not approached or spoken to?

29 MR. THOMPSON: We have not, no, because we did not feel it was for us to do so, given that we were not
30 – unless forced to do so – proposing to instruct experts of our own. Obviously, we will have to review
31 the situation in the light of any order from the Tribunal, but at the moment we do not see that as
32 a practical possibility.

33 THE PRESIDENT: Yes, very well, thank you. I think, Mr. O'Reilly, it would be helpful to have your
34 position on this next – you are an interested party here. To what extent are you able to help us on this?

35 MR. O'REILLY: First, we have said that we are able to appoint an expert because we did not want to be
36 disingenuous and say that we could not afford it and then to turn up with an expert at court. But it is
37 our primary position that the Tribunal should appoint its own expert. Can I say, with respect, that we

1 do not fully understand what difficulty the Tribunal would be in if it had to follow the indications given
2 by its own expert because of course the expert would be a neutral. The Tribunal has, in fact, indicated
3 several points that the expert might look at in para.347 of the Interim Judgment. A number of concerns
4 about ECPR are expressed, for example, the risk of entrenching monopoly and so on. So there is
5 a fairly clear framework that the Tribunal appointed expert, if that were to be the case, would work to.

6 THE PRESIDENT: On the first point our very provisional thinking, and we are thinking aloud very much and
7 look for help from the parties, is it is one thing for the Tribunal to appoint one expert who is an expert;
8 it might be another thing for the Tribunal's appointed expert to get into a contradictory position with
9 experts that another party has appointed – to some extent the Tribunal's appointee is down in the mêlée
10 with the other parties – they are slightly different situations. We are conscious of the need to make sure
11 that we had exposed the problem and had a discussion about it, in order to see where there was
12 a problem, before we considered going down that route.

13 MR. O'REILLY: It may be that the expert, once he has prepared his report, can then take questions which
14 may be informed by experts appointed by the parties individually, but those experts may not, as it were,
15 put their heads above the parapet and invite the Tribunal appointed expert to become involved directly.
16 That is the way we saw that working. One of the concerns we have, and Albion also suggested that this
17 might be a problem, is that we may have not only an inner quality of resources that we might the
18 equivalent of a NERA Report again, with all the resources of that organisation, but also that we may
19 end up with a battle of the experts when really what the Tribunal is looking for is for guidance about the
20 literature and an independent and informed view rather than both sides of the spectre of argument that
21 are possible. We know it is possible to argue for ECPR and to argue against it, and it is not clear to us
22 that having two polar perspectives is necessarily going to assist the Tribunal.

23 THE PRESIDENT: Well, if I may just elaborate a little bit, what we are looking for – among other things
24 – are first, to see how far our provisional understanding of the broad issues, as set out in the judgment,
25 is a reasonable explanation of what the issues are. Secondly, to see how it works in the specific
26 circumstances of this particular case which I think is less easy perhaps for an expert of world renown to
27 pronounce a problem because we are looking at a micro situation. Thirdly, and this probably is where
28 the literature comes in, some feel for whether there are other examples in which this sort of pricing
29 approach has been operated in another industry, for example (or even in this industry) and what
30 happened – did it work? Did it not work? Was it accepted? Was it a good idea? What lessons can one
31 draw? I think you in your observations mentioned, for example, the gas industry and, I think,
32 electricity; and you mentioned the Scottish Regulator – I do not know of what relevance that is, or even
33 whether they have common carriage in Scotland – if it is a relevant parallel it is the sort of thing we
34 need to have a feel for.

35 MR. O'REILLY: Indeed.

36 THE PRESIDENT: That is what we are getting at. How we get to what we are getting at is another matter.

1 MR. O'REILLY: Perhaps I can just leave it that the idea of a Tribunal appointed expert remains our preferred
2 course of action? If the Tribunal feels that there are insuperable difficulties then we will appoint an
3 expert to give us advice and to prepare a report if that is what the order eventually is.

4 THE PRESIDENT: I am not asking you for details, but have you had any provisional thoughts or made any
5 initial inquiries as to persons?

6 MR. O'REILLY: No, Sir. In terms of making suggestions we had rather refrained from that, although the
7 Tribunal has limited resources for going out and finding experts, it does have some people on its staff
8 and perhaps that would be the appropriate avenue for recruiting an expert, rather than the party
9 suggesting one.

10 In terms of costs, if the Tribunal were to appoint an expert I have no instructions on that, but
11 it would be my submission that we have made it very clear that we will not ask for our costs whatever
12 the outcome. We say the mere fact that this discussion is now going on shows that our presence has
13 been to some extent vindicated and we would ask that we would be relieved of the burden of paying for
14 an expert if one were to be appointed, but if the Tribunal decides otherwise then we are prepared to
15 carry a proportion.

16 THE PRESIDENT: Yes, thank you very much. Yes, Mr. Anderson?

17 MR. ANDERSON: Sir, I believe all parties are agreed that this is an important issue of principle, namely of
18 relevance far wider than the specific facts of this case. It is also quite clear that it is likely to be
19 a controversial area – “controversial” is the word Albion uses at para.23 of its own submissions. I think
20 my learned friend has just indicated that it is possible to argue both for and against. The Tribunal has
21 raised a number of very important points about both the application of ECPR in principle, and in
22 relation to these particular facts. In our submission the appropriate course, if it is affordable, is for there
23 to be two experts – one called by Ofwat and one effectively called by the Albion/Aquavitae camp – if
24 I may refer to them as that. It is my understanding that neither Welsh nor United intend to call their
25 own experts, so it will only be a question of two experts for the Tribunal and, given the significance of
26 the point and the possibility of differing views between experts it is clearly appropriate for the Tribunal
27 to have the benefit of the opinions of two experts rather than seek to rely on the view of one expert only
28 who may fall into one camp or the other. Clearly if the two experts come to the same view your job is
29 made easier.

30 THE PRESIDENT: Yes.

31 MR. ANDERSON: If the two experts have different views it simply underlines how important it was to have
32 two experts in the first place. Aquavitae have indicated that they could afford an expert, and they
33 would be prepared to appoint one. There is no need for Albion to appoint another one. So the position
34 that the Tribunal is faced with is that both sides are in a position to and are prepared to appoint experts
35 on this topic and we would urge that way forward on the Tribunal. I was not proposing today to get
36 into the question of costs – we believe Mr. Thompson’s application is premature and I can go through
37 the details of his submissions at some point if that is what the Tribunal wishes – we prefer to do it in

1 writing in view of the time, but we just do not think that is an appropriate matter this afternoon. We do
2 not share his characterisation of your Judgment as effectively deciding that our Decision was
3 inadequate. Undoubtedly ECPR, which was a cross-check the Director relied on, is now an issue on
4 which the Tribunal wishes to hear more and formulate views. In our submission the clear way forward
5 is for two experts. There is not a great deal between us on what that expert will cover. We would not
6 formulate our terms of reference in quite the way that Albion have – for example, asking him to opine
7 on compatibility with the Article 82. We can see that there may well be merit in looking at the
8 telecoms' industry. There may be merit in looking at the position in Scotland, we do not know. We
9 believe that those are essentially matters for the expert to decide what is relevant. The issues are fairly
10 clear from your interim Judgment.

11 So that is the course that we would urge upon the Tribunal, that each side – Albion, the
12 Intervener, Aquavitae on the one hand and the Director on the other – be at liberty to call expert
13 evidence on the issues of ECPR and the associated issues of market squeeze, we could not avoid that
14 entirely because of the points the Tribunal makes in its decision. We believe that those expert reports,
15 which do have to cover quite a lot of ground, could be available for exchange within eight weeks – that
16 is the Director's position.

17 We would sympathise with the Tribunal's concerns about having its own expert. Clearly
18 there are issues raised in that section of the interim judgment dealing with ECPR on which we would
19 wish to make submissions at the very least. We believe we should be allowed to call expert evidence.
20 Under those circumstances we can see the difficulty the Tribunal would be in if it had to choose
21 between the Director's expert on the one hand and its own expert on the other.

22 THE PRESIDENT: We are not proposing to prevent you from calling your expert, whatever expert witness
23 you want to call. Our concern is simply, and it is a rather unusual situation to ensure that both sides of
24 the coin are fairly argued and fairly presented. That is our only interest.

25 MR. ANDERSON: I see that and I recognise that there is, of course, an imbalance. It is not without
26 precedent that parties can have slightly different levels of resource, but given that Aquavitae have
27 indicated that they could and would appoint an expert that seems to us to address the issue – it is not an
28 insurmountable problem in those circumstances. That course is certainly preferable in our view than
29 the Tribunal finding itself in the position of having appointed its own expert which, as you point out,
30 does not get round the question of costs and resources at this stage, it simply defers it. Of course, the
31 position in the *Floe* case is very different because there the expert is not to be called upon to provide
32 opinion on large areas of controversy. It is simply to provide a level of technical assistance ----

33 THE PRESIDENT: It is a narrower point, in fact.

34 MR. ANDERSON: A much narrower point.

35 THE PRESIDENT: But in the *Floe* case I suppose the point could be made that the Director, or Ofcom as it is
36 in that case, at least in a very public spirited way has agreed to help *Floe* out on its legal representation
37 again to ensure that ----

1 MR. ANDERSON: Not in the proceedings before the CAT, unless something has been agreed that I know
2 nothing about. I believe in the Court of Appeal case, which is a question of broader application in
3 which the OFT has intervened on the question of when is a Judgment final or not?

4 THE PRESIDENT: I had thought that in the proceedings in front of the Tribunal on the jurisdiction point
5 where Floe was represented by leading counsel on that point Ofcom had very fairly agreed to support
6 the ----

7 MR. ANDERSON: That is not the CAT. As I understand it Floe is not represented by leading counsel in
8 front of the CAT. It is represented on the jurisdiction point in proceedings before the Court of Appeal.

9 THE PRESIDENT: Just a moment, Mr. Anderson. (After a pause) In the proceedings leading up to the
10 Judgment that is now being appealed to the Court of Appeal, Floe was represented by leading counsel
11 in the Tribunal.

12 MR. ANDERSON: On the question of jurisdiction?

13 THE PRESIDENT: On the question of jurisdiction and on that question Ofcom, in a very statesman-like way,
14 given the general public interest in the point, accepted that they would support Floe's cost of arguing
15 the jurisdiction point.

16 MR. ANDERSON: I see that, that may well be right. But now it has, of course, come back to the CAT on the
17 new Decision ----

18 THE PRESIDENT: On the new Decision it is a different situation.

19 MR. ANDERSON: It is in the context of the new Decision that a joint expert has been appointed, and in that
20 case each party is paying its own share of the costs of that expert.

21 THE PRESIDENT: Yes, I see.

22 MR. ANDERSON: But, as I say, that is a very different case as to why the view was taken that the better use
23 of resources was a single joint expert for all, as it turns out, five parties in that case on that technical
24 issue to provide assistance to the Tribunal. Here, when one is dealing with a controversial point of
25 principle, on which there are likely to be different views throughout the industry we would certainly
26 urge upon the Tribunal the course that ----

27 THE PRESIDENT: Well a single expert would not seem to us to be the optimum solution in a case like this.

28 MR. ANDERSON: We would endorse that.

29 THE PRESIDENT: Very well, thank you. What is your view, Mr. Robertson? Do you have anything to add
30 to that?

31 MR. ROBERTSON: We do not have anything to add to that.

32 THE PRESIDENT: I imagine you are neutral on this, are you, Mr. Randolph?

33 MR. RANDOLPH: No, I do not think we are neutral, we support the Director.

34 THE PRESIDENT: No, it is an unfair characterisation to say that you are neutral.

35 MR. RANDOLPH: Just to endorse what I think you said when you started dealing with this topic, that Ofwat
36 and the interveners were happy to provide information or experts and, as the Director's counsel has
37 made clear, effectively it would only be from the Director, from that side, it seems to us on that basis

1 that would be much the best way of dealing with it, therefore getting rid of the idea about having some
2 kind of joint expert, because of course you would not have a joint expert if you had two experts.

3 The only other point is something that we raise in our skeleton that does not seem to be raised
4 elsewhere, this issue about how the evidence is actually challenged or dealt with. We suggest that it
5 may be sensible to have some form of challenge by way of cross-examination. Otherwise, if you have
6 two contrasting experts on this issue of general public importance to the water industry, it is going to be
7 rather difficult if there are two different views taken for the parties to get across their concerns, save by
8 way of written submissions. In the usual way, Sir, as you are aware, expert evidence is perfectly
9 capable of being challenged and it can be done in a very prescribed manner – one can allow a time. We
10 would submit that that would be helpful given the fact that here are obviously at least two sides to the
11 argument, and if we are going to try and assist the Tribunal and not have a joint expert then we would
12 submit that it would be helpful to challenge that evidence by way of limited, restricted cross-
13 examination.

14 THE PRESIDENT: Yes, well at the moment we have not got that far yet, but we note that point.

15 MR. THOMPSON: Sir, I obviously heard the indication that you gave on behalf of the Tribunal that you were
16 not minded to have a single expert. It remains our submission that that would be the best course in the
17 light of the Judgment which, in our submission, gives a clear indication of the nature of the assistance
18 that the Tribunal requires. However, if the Tribunal is not inclined in that direction then it obviously
19 raises the issue of the financing of this further progress of the case in a very stark form, because the
20 Tribunal has been aware for nearly two years of the financial position of my clients.

21 We have, I think on any view, achieved quite a substantial degree of success in the Interim
22 Judgment and yet it appears that we are to be faced with a further round of potentially extremely
23 expensive debate about a point of high theory in economic regulation, and the associated costs of
24 instructing suitably qualified experts who, by their nature, have to be of the highest calibre if they are to
25 be of any value to what could be achieved by the people in this room reading stuff off the internet or in
26 suitable textbooks. Therefore we are confronted in a very stark form with the cost implications of the
27 Interim Judgment both looking backwards and looking forward, and the Tribunal has seen our
28 submissions in relation to all three elements – the position looking backwards, where we say that we are
29 entitled to some form of interim order to reflect the reality of what has happened, and the position
30 looking forward both in terms of the costs of the experts and further legal representation. So I am
31 afraid that those issues are before the Tribunal and some appropriate order needs to be made to ensure
32 that these proceedings can go forward in a reasonably well ordered way if, as Mr. Anderson is now
33 suggesting, there needs to be effectively a full blown battle of the experts – let alone if there is to be
34 cross-examination of experts as Mr. Randolph seems to be suggesting.

35 THE PRESIDENT: If this is an embarrassing question you can not answer it, or have a moment to think
36 about it, but how difficult would it be for you in collaboration with Aquavita to ascribe to the
37 production of expert evidence which Aquavita would effectively pay for?

1 MR. THOMPSON: We have not, I am afraid, discussed with Aquavitae what level of resource they would be
2 prepared to put into an expert report of this kind, but it appears to us that it would quite a substantial
3 undertaking and we do not know whether Aquavitae is prepared to underwrite this matter to that degree.
4 That is the simple answer, we have not discussed it.

5 THE PRESIDENT: Not yet discussed. So from your point of view your primary position is that we should
6 have one expert and it is a single expert.

7 MR. THOMPSON: Yes.

8 THE PRESIDENT: Can we really shut the Director out if he wants to give us some expert evidence?

9 MR. THOMPSON: Well he has had decades to consider this question, and he has raised the matter and
10 referred to an expert report prepared on behalf of an industry incumbent. It is hard to see any great
11 injustice to him if he is held to the position that he has adopted which, after all, has been considered by
12 Government departments, by his own department and is the subject of guidelines, so it is hard to see
13 why he falls into a particularly deserving class in terms of fair procedure if, as would obviously be the
14 case, he could make whatever submissions he liked about the quality of any independent expertise that
15 may be put forward to assist the Tribunal.

16 THE PRESIDENT: Yes. Very well, we need to think about this. We will rise, we shall be at least 10 minutes
17 if not slightly longer.

18 (The hearing adjourned at 3.40 p.m. and resumed at 3.55 p.m.)

19 THE PRESIDENT: We are faced with a rather difficult problem regarding the handling of expert evidence in
20 this case having regard to the disparity of resources between the parties. This is a case in which it is
21 particularly important that both sides of an important issue for the industry in relation to the ECPR
22 pricing approach are very fully ventilated in front of the Tribunal.

23 At this stage our preference would be, if it is feasible, for there to be two experts who present
24 the respective views on both sides of the argument. It seems to us that the best that could be done is to
25 say that there should be one expert on behalf of the Director and the Interveners collectively (though
26 I think it will in fact be an expert on behalf of the Director) who should prepare and file his expert
27 evidence first. There should then be an opportunity for Albion and Aquavitae to reply to that expert
28 evidence. At the moment the situation appears to be that Albion is not in a position to afford an expert,
29 but Aquavitae has very helpfully said that it is in a position to afford an expert. Let us hope that there
30 can be some collaboration between Albion and Aquavitae so that the case for the other side is to an
31 extent jointly presented, but at the moment we would hope that there could be found by one route or
32 another, an Albion/Aquavitae (or perhaps I should say an Aquavitae/Albion) expert who would reply to
33 the Director's evidence.

34 If that, for any reason does not work, or does not work sufficiently effectively in the sense
35 that the Tribunal feels that notwithstanding best efforts it has not had fully explained to it both sides of
36 the coin, of course the Tribunal still has power under its Rules to appoint its own expert to advise it and,
37 indeed, it may be more convenient for the Tribunal to take that course if it becomes necessary at a stage

1 when we have seen what the expert evidence is and to what extent there is disagreement between the
2 parties. It may, for example, be the case that the experts are in general not in major disagreement as to
3 the abstract and academic advantages and disadvantages of this particular pricing rule and that the only
4 difference is how it should be operated in the circumstances of this particular case. In other words, we
5 cannot quite decide to what extent we are going to need further expert help until we have had an
6 opportunity to see what comes out of this next exchange of expert evidence. That being our present
7 view, the matter we need now to discuss is the timetable and practicalities of putting that into effect.

8 Mr. Anderson, I think you suggested eight weeks originally, but I think that was probably on
9 the basis of a simultaneous exchange?

10 MR. ANDERSON: It was on the basis that that is how long we believe it would take an expert to be
11 instructed, to produce a draft, to have that draft reviewed and to produce a report in final form for
12 service and exchange. We would stand by that. We do not think realistically it is possible to get
13 through that whole process and have a proper job done in less than eight weeks.

14 THE PRESIDENT: Let us see where we are, because I am going to ask you in a moment to see whether there
15 is any hope of improving on that timetable. That would take us up to approximately 24th March.

16 MR. ANDERSON: About 20th March, yes.

17 THE PRESIDENT: We said that Easter was ----

18 MR. ANDERSON: Friday 14th is Good Friday.

19 THE PRESIDENT: It is a lot further time but of course we know that this is part of the case that we do not
20 particularly want to rush and it is not going to be easy to adopt an accelerated timetable for this sort of
21 exercise.

22 MR. ANDERSON: Sir, we would agree with that. Clearly we want to ensure that the Tribunal has a thorough
23 job done that presents and then reviews everything that is relevant, all the relevant material, presents the
24 arguments – it is not as if the case will not be progressing in parallel on other issues at the same time.

25 THE PRESIDENT: Yes.

26 MR. ANDERSON: So we do have the process of items 1 and 2 that will be progressing. In a sense this
27 expert is not dependent upon resolution of the other aspects on that case, so the case is still proceeding
28 while this expert evidence is being produced.

29 THE PRESIDENT: It is perfectly true – let me say it out loud and then you can all shout me down and say
30 I have got it wrong – that this case has two relatively distinct arms to it, one is the average accounting
31 cost approach, and the other is the ECPR approach, although there are points where they connect in
32 various ways. You are saying that while discovery is going on in the other case and all that is being
33 sorted out and we can be giving our mind to those sorts of various issues, all that can be being done, or
34 got out of the way while the ECPR expert evidence is being prepared and in the end we will not lose
35 that much time because we can do useful work.

36 MR. ANDERSON: Absolutely.

37 THE PRESIDENT: It is not as if the whole case comes to an end while this is being prepared.

1 MR. ANDERSON: No, that was the very purpose of our proposal. Our belief would be that once the four
2 week process has been gone through with Welsh producing the information, and us producing the
3 information, and then there are meetings between the parties, a possible CMC, one will have got to
4 about the point at which the expert will be serving his final report.

5 THE PRESIDENT: So you might have been able to sort out how many kilometres of non-potable mains there
6 are while all this is going on.

7 MR. ANDERSON: Yes, and even if you have not the two limbs of the case will then have caught up and be
8 in parallel for the parties then to prepare their submissions and come back before you.

9 THE PRESIDENT: Yes, I see. I think Professor Pickering has a question.

10 PROFESSOR PICKERING: Mr. Anderson, forgive me for asking this, but would I be unreasonable if
11 I were to imagine that the Director would already have on his files quite substantial consideration of the
12 economic implications of ECPR, which would therefore serve as the basis for taking this forward?
13 Surely the Director would not be starting from scratch on this?

14 MR. ANDERSON: I have no doubt, though it is not for me to say I would need to take instructions from
15 those behind me, I am quite sure that the Director has some material that he will be putting forward to
16 the expert to assist the expert, because there is some element of overlap between ECPR and the cost
17 principles debated under the new regime, so I suspect, Professor, you are right, but quite what that
18 material is and to what extent the expert would find it relevant I cannot say today.

19 PROFESSOR PICKERING: No, but insofar as we have expressed an interest in contemporaneous material
20 on the first two points, and given that ECPR was indicated by the Director to be an acceptable basis of
21 pricing then certainly I would find it quite interesting to know on what basis he had reached that view at
22 the earlier stage in his dealings on access pricing issues with the industry.

23 MR. ANDERSON: Well we hear what you say, Professor, and we will certainly have a look at what there is
24 on the files about the consideration of the economic issues, make that available to the expert and,
25 indeed, make it even available to the Tribunal if the Tribunal would like it, but what it is I cannot say.

26 THE PRESIDENT: I think that might be helpful, Mr. Anderson, because certainly in other cases with
27 Regulators, it is comparatively rare for the Regulator to want to call an expert. Normally the Regulator
28 says “Well I am an expert, I know what this industry is about. My chief economist has advised me,
29 and this is what I say” without needing newly created expert views to support what he has said.

30 MR. ANDERSON: I understand that, Sir. We are where we are, the Director relied on ECPR. Some
31 criticisms were made of it by Albion and Aquavitae, but clearly those criticisms were not persuasive
32 enough to make the Tribunal decide to set aside the Decision on ECPR on that basis. The Tribunal has
33 set out complex views which have wide implications for the industry and clearly the appropriate course
34 is now for the Tribunal to consider that expert evidence.

35 THE PRESIDENT: It may well be that expert evidence may well be helpful, but what we need eventually to
36 get at is what the Director’s own views are and why this consideration, for example, outweighs some
37 other consideration in going down the path that he has chosen at the material time.

1 MR. ANDERSON: Certainly I envisage the furtherance of this Appeal to involve submissions being made by
2 all the parties once this material, including expert evidence, is produced. Amongst those submissions,
3 I am sure we will have plenty to say on ECPR and margin squeeze, and why we took the view we took,
4 and why we justified it in the light of the observations the Tribunal has indicated in its Interim
5 Judgment.

6 THE PRESIDENT: Yes, thank you. Yes, Mr. Thompson, it is not entirely satisfactory from your point of
7 view, that I can see, but the various other alternatives are not very satisfactory either, I think?

8 MR. THOMPSON: I have to say that we do have some reservations about how things are panning out, not
9 least the issue of delay because I think our proposal was a four week timetable or, in fact, less than four
10 weeks. The four week timetable has already been accepted for the accounting issue, but we have now
11 effectively got a further four weeks' delay before a first round of expert reports, and presumably there
12 would then be a further round of delay while we sought to respond to what may be quite a substantial
13 piece of work produced in the middle of March. It does look like we will be pushed to deal with that
14 before Easter and so we will be pushing on into the Summer before the matter can be heard, which is
15 obviously something we were seeking to avoid if at all possible given that the hearing in this matter was
16 getting on for a year ago by that stage, and the matter was started over two years before. So we are
17 somewhat concerned about the issue of delay in addition to the points I have already made about the
18 imbalance of firepower, and our slight concern that we should be relying on the goodwill of an
19 Intervener to contest the position of a Regulator.

20 THE PRESIDENT: I see that. The best we can do, I think, on the delay point, is to make sure that while this
21 is going on the rest of the case is being progressed as fast as possible, and I think there may be
22 something to be said for Mr. Anderson's point of view, that by the end of next month we should be
23 much closer towards sorting out the first raft of issues in the case, in fact, we might nearly have got to
24 the position where we are perhaps in a position almost to take a view on those first raft of issues. I do
25 not know that we are yet in the situation where we can decide whether or not the next substantive
26 hearing is split in some way between the cost and technical issues on the one hand, and the ECPR
27 issues on the other, but that is certainly something we can be continuing to progress while the expert
28 evidence catches up. As between the date for the next CMC on 2nd March and 20th for the filing of the
29 Director's expert evidence, that is two and a half weeks, which is I think a price that just has to be paid
30 to get it right.

31 MR. THOMPSON: I think our concern is the comparison between the date for Dwr Cymru producing its first
32 round of material four weeks from today and effectively the Director producing his first round of ECPR
33 material four weeks later. It seems to us that the timetable is likely to come apart rather than to come
34 together.

35 THE PRESIDENT: It is a difficulty; we may go back to the Direction in a moment to see whether we can
36 improve upon that eight week period. It is, as you I think suggest, and Professor Pickering points out,
37 perhaps a little surprising if you are starting entirely from scratch, but then we all know the difficulties

1 of instructing an expert on a matter like this as it were from cold. But I think that is the practical
2 situation that we are in. If the ECPR side of the case is going to be litigated, and everybody is agreed
3 that we need some expert evidence, it is not practical to suppose that, even if we had a single expert,
4 that such an expert could be instructed, get up to speed, could read the literature and produce a report
5 within four weeks, it is just not practical; and eight weeks is going to be pushing it, I think, in practical
6 terms. So I think that is where we are on the issue of delay.

7 On the issue of Albion and Aquavitae it is a difficulty, but we have reserved the possibility of
8 having our own expert, but I think we want to allow things to unfold to see where the real issues are
9 before we go down that line. I know it is not ideal from your point of view, but I am not sure the
10 Tribunal can do anything more to help unless you have some specific suggestions to make.

11 MR. THOMPSON: Obviously there is the issue of finance, and the issue of where exactly the Director is
12 taking this, if this is a separate part of the case, and whether he actually takes the view that ECPR is
13 actually a derogation of the competition rules, supposing that, as I think the Tribunal indicated, one
14 might reach a conclusion on the average accounting costs point, if there is any question that ECPR
15 might be treated as some form of derogation of the competition rules I am not quite where this case is
16 heading.

17 THE PRESIDENT: The relevant provisions of the Water Act 2003 are not in force at the time this Decision is
18 taken. I think the classical analysis is that here is a Decision which applies the Chapter II prohibition
19 on two bases, one is an average accounting cost and the other is an ECPR approach, the question for the
20 Tribunal is whether either (or both) of those approaches were compatible with the Act and correctly
21 applied at the time.

22 If the conclusion on the ECPR side of it, entirely hypothetically, just for argument's sake, is
23 that ECPR is only with difficulty compatible with the Chapter II prohibition that would be the
24 conclusion we reached at a time when the Water Act 2003 was not in force. If then the question is what
25 effect does the Water Act 2003 have, which is a point that is at least tangentially raised by the Decision
26 but the Director may allege that it is not a point we should pronounce on, if that becomes and remains
27 an issue – as you submit – we then have to tackle the question of what is the relationship between the
28 Chapter II prohibition and the new legislation, and whether the latter has any effect on the former. Is
29 that not right?

30 MR. THOMPSON: Yes, I think I was merely trying to understand if the two parts of the case came apart
31 what the implications might be for the issues in the case.

32 THE PRESIDENT: We do not at the moment see the two parts of the case coming apart. They may be
33 proceeding at a slightly different pace but the case will remain, I hope, a single case without the one bit
34 getting divorced from the other bit. At this early stage we are boxing and coxing a bit in order to get
35 the next stage going, as it were.

36 MR. THOMPSON: I do not want to delay things any further; I do not think I have anything more to add.

1 THE PRESIDENT: No, I think that is the best we can do. Can you improve on this eight weeks a little bit,
2 Mr. Anderson?

3 MR. ANDERSON: When we formulated this timetable, we really formulated it as tightly as we possibly
4 could. We have not instructed an expert yet, but we do not believe that it is realistic to attempt to
5 produce this report in final form in a period of less than eight weeks. As you point out, Sir, that is only
6 two and half weeks after the CMC on the other two issues, and we would envisage the two sides of the
7 case which are proceeding in parallel not coming apart – proceeding in parallel and then converging
8 again – at a stage shortly thereafter, but with less than eight weeks we suspect we will simply be
9 making an application “Could we have a little longer, we are not quite there?” Eight weeks is not long
10 for the production of an expert report as significant as this, and we would really be hard pressed I am
11 afraid, I do not wish to appear uncooperative, but we have as I have said produced as tight a timetable
12 as we think is realistic for this case. We do not think it will result in undue delay. There are the two
13 parallel sides that can be progressing. If the report is produced and finalised earlier than that of course
14 we will serve it before then, but to have an order that it be served in period of less than that we would
15 respectfully submit is not realistic in the circumstances.

16 (The Tribunal confer)

17 THE PRESIDENT: Yes, I think we will say eight weeks for the Director’s expert evidence.

18 MR. ANDERSON: I am obliged, Sir.

19 THE PRESIDENT: Please do not expect any extension of time, Mr. Anderson, and please be kind enough to
20 report back to us at the CMC on 2nd March where you have got to.

21 MR. ANDERSON: Certainly, Sir.

22 MR. O’REILLY: Sir, the Director has very helpfully said that there may be material in his files that he could
23 provide to his expert and I was just wondering whether or not that could be provided to us as well.

24 THE PRESIDENT: That would normally be the case, but insofar as the Director puts material to his expert
25 I think the expert on the other side should have sight of the same material. Mr. Anderson, at the
26 moment my impression is that the Director operated largely on the basis of the NERA report that is
27 referred to in the Decision but there may be other material.

28 MR. ANDERSON: That is right. I am speaking from a position of complete ignorance, I have no idea what
29 is in the Director’s files. We hear what Professor Pickering has said, we will look; if that material is
30 relevant we will provide it to our expert and clearly we would not expect the other side to respond to
31 material that only our expert was privy to.

32 THE PRESIDENT: I think what we are expecting is that there would be disclosure by the Director of what he
33 has on his file in relation to ECPR as it stood at the time of the Decision if there is material that is
34 relevant beyond what is in the NERA report.

35 MR. ANDERSON: Well that may be a huge amount of material, it may be very little.

36 THE PRESIDENT: Well go back and find out what the situation is ----

37 MR. ANDERSON: I will, we were not able to do that this afternoon ----

1 THE PRESIDENT: No, no, of course, not. We will revert to this point at the next CMC.

2 MR. ANDERSON: I am obliged, Sir.

3 THE PRESIDENT: Now, what are the remaining points we need to discuss? Mr. Thompson, you have your
4 submissions on costs? Are there any other points that need to be aired? I am sorry, Mr. Randolph?

5 MR. RANDOLPH: What we do with the experts and how they are challenged, the point I raised and you
6 said ----

7 THE PRESIDENT: Well we will not decide that now.

8 MR. RANDOLPH: I see, you will not decide that at all now?

9 THE PRESIDENT: Our practice in this area is evolving at the moment. We have various situations in which
10 we have constructive discussions, or meetings between experts, or cross-examination or whatever, and
11 we will see where we are ----

12 MR. RANDOLPH: A moveable feast.

13 THE PRESIDENT: -- before we rule on that. Yes, Mr. Thompson?

14 MR. THOMPSON: I think probably the two issues outstanding are, first, the question of the Aquavitae
15 expert, whether you want to set a provisional timetable for that, how long after the Director's ----

16 THE PRESIDENT: Well we would hope that the Aquavitae expert can be instructed as soon as possible so he
17 can be getting up his views. We would hope that the Tribunal's judgment already gives a framework
18 for the sort of things we need some help on so that a great deal of work can be done pending the arrival
19 of the Director's report. If that is so then, thinking aloud, I think it would be convenient for everyone
20 for the Aquavitae report if we said four weeks after the Director's evidence on the basis that quite a lot
21 of work can be done in the interim. That would take us up to ----

22 MR. THOMPSON: It would take us to Easter Monday which would not be a convenient date.

23 THE PRESIDENT: Well we will allow another week for that, so that would be April 24, but we may want to
24 revisit that timetable, that is just a provisional indication at the moment, I am not going to make an
25 order because we may want to revisit the timetable when we see what the nature of the beast is.

26 MR. THOMPSON: Certainly, and in terms of the matter that was just raised about disclosure by the Director
27 of instructions to the expert I do not know whether it would be sensible to set the same date for that as
28 for Dwr Cymru's factual disclosure, so that anything could be raised at the CMC if there were any
29 points outstanding on that issue which might take the matter forward.

30 THE PRESIDENT: That is possibly not a bad idea.

31 MR. THOMPSON: The only other issue is the question of costs and I would not propose to expand on what
32 I have said already. I think the Tribunal is now well seized of the matter both in writing and we have
33 debated the various problems that my clients face in pursuing this Appeal and we have sought the
34 assistance of the Tribunal, as I think we did nearly two years ago, in the light of where we have got to
35 now in these proceedings, but it is very much a matter of impression and discretion for the Tribunal.
36 I very much leave it in the Tribunal's hands having put the matter forward as best we can in writing
37 and, in particular, the points where however provisionally the Tribunal appears to us to have found

1 fairly heavily in our favour and the general circumstances of the case which are very well known to the
2 Tribunal.

3 THE PRESIDENT: I think on this point, Mr. Thompson, we have every understanding of the situation in
4 which Albion finds itself but for all kinds of reasons there are various difficulties in making an interim
5 costs' order in your favour at this stage. We have already said that the Interim Judgment does not
6 determine the case, and that is what we said and that is what we meant. That opens up quite a large
7 debate about costs, including the width of the rule in the Tribunal's rules, parallel developments going
8 on in the civil courts in relation to costs in public interest cases, protected costs' orders and pre-emptive
9 costs' orders etc., about which there is a great deal of learning.

10 As at present advised we are not sure that it would be a good exercise of our discretion to
11 make the costs' order you seek at this stage. If, for example, however, it became necessary as this case
12 unfolds, for the Tribunal to have, for example, further expert assistance, and that the only way of
13 achieving that would be for some sort of cost order to be made for the Tribunal that might be a bridge
14 that we would be prepared to cross when we got there. But as far as what has happened up to now is
15 concerned, I know it is difficult and a question of a waiting period but I am not quite sure that we are
16 within the kind of jurisdiction that you invite us to exercise yet, so I am not sure that you can really
17 develop the point very much at this stage. We have given very careful sympathetic consideration but
18 we find ourselves in some difficulty in making the order that you seek.

19 MR. THOMPSON: I do not know whether the reference to protective costs' orders and restricted costs'
20 orders, such matters are in any sense an invitation for us to consider that question and raise it at a later
21 date, or whether you are saying that in the circumstances there is no point in raising such a matter until
22 final Judgment in this case?

23 THE PRESIDENT: I am not doing either, Mr. Thompson. I am neither inviting it nor excluding it. I am
24 simply saying that there are very big issues in relation to litigation with a public interest aspect which
25 this has that are (or have been) ventilated in the Court of Appeal and in the civil courts generally
26 – I have cases in mind like the *Cornerhouse Research* about a year ago – and the fact that courts are
27 now sometimes willing to take a broader view of costs than was once the case, but that is on the most
28 favourable view of where we are now in the civil court system. We are not at the moment wholly
29 persuaded that as far as past costs are concerned that we are quite in a position to make an order in your
30 favour at this stage.

31 MR. THOMPSON: I am grateful. I am sure we will think about this carefully and ----

32 THE PRESIDENT: But, as I say, my observations are intended in an entirely neutral sense; you should not
33 read anything into them.

34 MR. THOMPSON: No.

35 THE PRESIDENT: So, Mr. Anderson, on that basis we do not need to call upon you to reply to the costs'
36 application at this stage.

37

