

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1058/2/4/06

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6th April 2006

Before:

Marion Simmons QC
(Chairman)
Ann Kelly
Michael Blair QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INDEPENDENT WATER COMPANY LIMITED

Appellant

supported by

ALBION WATER LIMITED

Intervener

and

WATER SERVICES REGULATION AUTHORITY
(formerly the Director General of Water Services)

Respondent

supported by

BRISTOL WATER Plc

Intervener

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Edward Mercer (of Taylor Wessing) appeared on behalf of the Appellant.

Mr. George Peretz and Ms. Valentina Sloane (instructed by the Head of Legal Services, OFWAT) appeared on behalf of the Respondent.

Mr. Stephen Tupper (of Watson, Farley & Williams) appeared on behalf of Bristol Water Plc.

Mr. Malcolm Jeffery appeared on behalf of Albion Water Limited.

1 THE CHAIRMAN: Good afternoon. Can I start by introducing the Tribunal because I think it has
2 changed since last time and some of you may not know who we are. You will realise that I am
3 Marion Simmons. Michael Blair is on my left, and Ann Kelly, who was on the Tribunal
4 previously is on my right.

5 Can I just make a few opening remarks. We are not today dealing with the merits or
6 the question of admissibility. We want to make clear that we have not looked at the papers
7 with that in mind today, and we have not read the three files which have been produced
8 containing the contemporaneous documents.

9 We understand that at the last hearing – and I suppose that is Michael Blair and
10 myself because Ann Kelly was at the last hearing – a decision was taken for a hearing on
11 admissibility and that that is the next procedural step. We have read the transcript. We
12 thought that it was important that we just set the scene in relation to that. On the basis of the
13 last hearing there is going to be a hearing on admissibility.

14 The Appellant is today, as we understand it, seeking what is, in effect, a pre-emptive
15 order that Ofwat pays its costs of the admissibility application and then, if they are successful
16 on the admissibility application, the substantive hearing, come what may. I think that is
17 your ----

18 MR. MERCER: That is correct, madam.

19 THE CHAIRMAN: On our present reading of the authorities, and of course subject to any
20 submissions as to those, the law in this area is very limited. Whether this Tribunal is bound by
21 or follows that law is perhaps a matter for submissions. However, it seems to us – of course
22 subject to any submissions today – that the evidence put before us by the Appellant in order for
23 us to decide that question is probably incomplete and it does not give us the material on which
24 we can consider whether the criteria set out in the law, as it now stands as applied to the courts,
25 is satisfied.

26 We have little information about the financial resources of the Appellant. We know
27 that there is a holding company which is in administration and we are told that the Appellant is
28 apparently wholly dependent on that holding company for finance. We have got no
29 information as to whether the proceedings will be discontinued if a costs order of some kind is
30 not made. It seems to us that we ought to have before us at least the accounts of the relevant
31 companies and perhaps a statement from the insolvency practitioner involved in the holding
32 company's financial situation. Also, if there is no money available, then we wonder whether
33 the Pro Bono Units of either the solicitors' profession or the barristers' profession would assist,
34 or possibly both. If they are not prepared to assist because of financial criteria then it may be

1 that representation could be obtained on a basis which limits the fee exposure of the Appellant.
2 We do not know whether that has been explored, whether any chambers have been approached
3 to see whether they provide that sort of service, such chambers being ones that specialise in
4 competition law, commercial law or even public law.

5 It seems to us at the moment, and subject to any submissions, that the appropriate
6 course today may be to fix a timetable for the hearing of the admissibility application and to
7 reserve the costs application to that hearing. At that hearing we would then be able to decide
8 admissibility and also as to whether the criteria on costs set out in the cases is fulfilled, or what
9 criteria are relevant to this Tribunal and whether those criteria are fulfilled. It does seem to us
10 – subject of course to any submissions today – that it is premature for us to consider the costs
11 application, particularly because we do not have the evidence on which we can hear it.

12 Those are our preliminary remarks and, Mr. Mercer, you might like to address us.

13 MR. MERCER: I have actually with me, and can hand it round, but you probably do not want to
14 read it now – in fact, the holding company is not in administration, it is subject to a CVA – we
15 have got a copy of the CVA statement that we have obtained from the holding company and
16 we can leave everybody with a copy of that today.

17 THE CHAIRMAN: What about the accounts of the company that you do represent?

18 MR. MERCER: We can get those within a day or so.

19 THE CHAIRMAN: Yes, but we do not have them here today, so we do not have the financial
20 information?

21 MR. MERCER: Can I take instructions for just a moment, madam. (After a pause) For what the
22 accounts are worth, we will provide them within a short period of time.

23 THE CHAIRMAN: You mean after today?

24 MR. MERCER: After today. All they will show is that the company is, in technical terms, dormant
25 and is being supported by its parent. The accounts will tell you very little, but, for what they
26 are worth, we will have those sent over.

27 You asked, madam, about *pro bono* and other means of funding representation; and
28 you also asked whether or not the case would be discontinued if the order were not made.

29 THE CHAIRMAN: That is one of the criteria in the authorities, the list.

30 MR. MERCER: The position, madam, is, as I understand it, and the question that was asked by the
31 President at the last CMC – I do not want to put words into his mouth – he was searching
32 towards, “This is a complex, difficult matter and how are we going to tackle this without
33 having professional representation on both sides?”

34 THE CHAIRMAN: I think we all have sympathy with that. We are very concerned about it.

1 MR. MERCER: It may not be the case that the matter will be discontinued, but there is a significant
2 difference between the case being proceeded with with what amounts to litigants in person and
3 it being proceeded with with the kind of assistance which the Tribunal might think it needs for
4 it to do its duty. I think there are some litigants in person who – and this is from my personal
5 experience and I have seen transcripts, and this is perhaps also within the Tribunal’s
6 experience – do perfectly well, but we are going to head towards some very complex issues,
7 such as the interconnection of water systems. We are going to be looking at issues like the
8 entire costs structure of part of the industry.

9 THE CHAIRMAN: Is that arising on the admissibility application?

10 MR. MERCER: No, that arises on the substantive hearing. We are going to be looking at things like
11 inset consent. Those are very complex issues. I am never one to say that one always needs a
12 solicitor or a barrister for everything, but those are the kinds of technical issues where directing
13 the information towards the Tribunal I think is quite important.

14 THE CHAIRMAN: The Tribunal, as the President said, has sympathy with that approach. The
15 question is whether legal representation could be provided at a cost which those involved in
16 these companies could meet, and if it could then the question of any other form of costs
17 protection becomes inappropriate to consider, and therefore we have to go step-by-step.

18 MR. MERCER: Yes, madam.

19 THE CHAIRMAN: That is the issue, and that is why we were mentioning the other areas like
20 *pro bono* and whether there can be some basis upon which either a barrister or a solicitor –
21 I know you are standing there – would be prepared to do this case on a fee that was
22 commensurate with the financial resources of the company.

23 MR. MERCER: My submissions are that that would mean doing it for free.

24 THE CHAIRMAN: If that is the case then the Pro Bono Unit would be prepared possibly to do it?

25 MR. MERCER: I have some experience of the costs of presenting cases before this Tribunal and
26 I would be surprised, because I do *pro bono* work myself, if this fell into the correct categories
27 because of the amount of time that would be necessary.

28 THE CHAIRMAN: If it has not been explored we do not know whether that is the position.

29 MR. MERCER: You would be right in saying, madam, that we have not asked the direct question
30 but I have compared it against the usual criteria, in the same way, madam, as you might ask,
31 “Is this the kind of case that a firm of solicitors or a barrister would take on on a conditional
32 fee basis?” The answer there also is that I do not believe that the majority of professional
33 services firms in law or barristers would take this on on a conditional fee basis. I will tell you

1 why that is: it is simply the amounts involved, in terms of the fees that are likely to be clocked
2 up and the investment, in an area which is extremely difficult.

3 One of the difficulties one might have with a CFA here is, suppose you win on some
4 points and you do not win on other points, or the matter is remitted, or there is no Decision.
5 The cuts off on your CFA basis arises. The usual basis of conditional fee work is that there is
6 some kind of uplift on success. The only person to suffer on uplift and success here would be
7 Ofwat, the new Authority. I do not see that this could possibly be regarded as being a case that
8 falls in for CFA, and I do not see that it falls within the usual criteria for *pro bono*, but you
9 would be right, madam, I have not actually asked the question and we can do that.

10 THE CHAIRMAN: There are arrangements with the Bar about limited fees?

11 MR. MERCER: Yes, madam, there are, but I would not, I have to say, myself regard this kind of
12 work as being a suitable subject for that kind of thing.

13 THE CHAIRMAN: But it has not been explored?

14 MR. MERCER: We will explore it, madam. I had assumed that that, by comparison with the usual
15 criteria, would have led to the same result that the Tribunal had come to, but if we want to be
16 sure about this we will make sure.

17 THE CHAIRMAN: If you are going to be making submissions that we should extend the criteria
18 which the Court of Appeal set out so that your case falls within it, or that the criteria that the
19 Court of Appeal have set out you fall within, then you need the evidence upon which you can
20 satisfy us that that is the case.

21 MR. MERCER: That assumes that you think that those criteria have to be applicable to this case.

22 THE CHAIRMAN: That is why I put it both ways: that either those criteria are applicable or that
23 we should have some other criteria, but either way we need to have the material on which we
24 can decide that and I do not think you have produced it.

25 MR. MERCER: My submission is that the reality of the situation is that, as with the other cases in
26 which the Tribunal has dealt with costs, there is no rule, and we must choose the correct
27 criteria for this particular case on the merits of this particular application. I can see why the
28 Tribunal might want the information, madam. I am not necessarily submitting that you need it.
29 If I had thought that I needed it I would have provided it already.

30 THE CHAIRMAN: Our preliminary view is that we are concerned that we do not have that material,
31 that we do not have really the material on which we can consider whether this is an appropriate
32 case in which we have got to think about either whether it falls within the criteria of the Court
33 of Appeal or whether we ought to be going further.

1 MR. MERCER: That can be provided, madam. From what you said, am I able to deduce the total
2 list of the criteria that the Tribunal has in mind that it wants to hear about – financial, *pro bono*,
3 is it available elsewhere?

4 THE CHAIRMAN: One needs to go through the decision of the Court of Appeal where they have
5 set it out and make sure that one has all the evidence that deals with each of the criteria that is
6 listed, and then, if you think there are other criteria, whether there is any other evidence that
7 you need?

8 MR. MERCER: Would it be helpful if I actually started to look at the arguments as to where I am
9 coming from and what criteria apply?

10 THE CHAIRMAN: If you want to make your application today you can, but then we have indicated
11 the difficulties we see with that application. If one looks at para.73 of the *Corner House*
12 judgment.

13 MR. PERETZ: Tab 7 of the authorities bundle.

14 THE CHAIRMAN: If you look at, for example, sub-paras.(iv) and (v):

15 “(iv) Having regard to the financial resources of the applicant and the respondent(s)
16 and to the amount of costs that are likely to be involved it is fair and just to make the
17 order;

18 “(v) If the order is not made the applicant will probably discontinue proceedings
19 and will be acting reasonably in so doing.”

20 You are suggesting that you will not be discontinuing the proceedings, but the financial
21 resources – and that is financial resources – what is available? A company – I am not saying in
22 this case – may have no money but it may be able to raise the money from elsewhere. It may
23 be able to take a bank loan or it may be able to take a loan from its shareholders or directors.

24 MR. MERCER: My instructions are that in this case all of that has been explored.

25 THE CHAIRMAN: But we do not have any of that material to know whether that is right or not.

26 MR. MERCER: Very good, madam.

27 (The Tribunal conferred)

28 THE CHAIRMAN: Mr. Mercer, the other difficulty we have is that we do not have a breakdown of
29 your costs figure, do we? You have put a figure in, but there is no breakdown of how it is
30 made up. There is no *pro forma* bill in the same way as one does, for example, for a security
31 for costs hearing.

32 MR. MERCER: Yes, madam. I think that in making the application we did we wanted to give an
33 indication of the quantum we thought was involved. I had rather imagined that if the Tribunal

1 was minded to make the order they would probably want to set a cap based on a *pro forma*
2 detailed estimate in the form of, basically, a bill draft.

3 THE CHAIRMAN: That would mean coming back again, so one would again have to have two
4 bites of the cherry.

5 MR. MERCER: One might have thought that might have been dealt with on paper as a matter of
6 probably negotiation, if an order had been made, with the Respondent. Here we begin to get a
7 question on part of the nub of the problem, which is that when you are dealing with this kind of
8 application without access to fully funded resources you cannot just turn straight off and go
9 straight off to a costs draughtsman as one would normally do in such a matter.

10 THE CHAIRMAN: I do not think I am suggesting that you go off to a costs draughtsman. I do not
11 think that the estimates of fees that are done for assessment of one day hearings are often done
12 by a costs draughtsman, they are done by the legal representatives themselves.

13 MR. MERCER: We can provide a detailed estimate.

14 (The Tribunal conferred)

15 MR. MERCER: I am reminded that it will take at least three weeks to get an answer out of the Bar
16 Pro Bono Unit once it has been provided with the information it requires to consider an
17 application.

18 Madam, the other difficulty you give me, or you give someone, is if you proceed as
19 you outlined provisionally you intended to, you are going to consider the costs application ----

20 THE CHAIRMAN: With our thoughts as to where we were coming from at the moment?

21 MR. MERCER: Yes. Let us just look at the timetabling of this. If you consider the costs
22 application at the admissibility hearing, that is, in my submission, a bit late, because the work
23 for the admissibility hearing will have to have been done by then. That then limits the scope of
24 the application essentially to the substantive hearing following the admissibility hearing,
25 because there will not be any help for the admissibility hearing.

26 THE CHAIRMAN: We are still not in a position today to be able to deal with the costs application
27 because we have not got the material on which we can be satisfied in relation to the funding.
28 So we have not got to the first hurdle effectively to persuade us that we need to look at this and
29 that there is not any other means of financing this.

30 MR. MERCER: I wonder, madam, if the answer is not to deal with this costs issue prior to an
31 admissibility hearing.

32 THE CHAIRMAN: What I was suggesting, but subject to everyone, was that would fix a timetable
33 for the admissibility hearing. If it turned out that you wanted to make another application then
34 you could make that. There would be permission to apply. You could consider where you

1 were and it may be that representation is obtained. Then there is no problem, but at least there
2 would then be a timetable. If it becomes impossible and it is shown that you cannot get any
3 finance and it is not appropriate, or you submit that it is not appropriate, to have the
4 admissibility hearing without proper representation then we will have to think about it again,
5 but we would do that in the knowledge that it was impossible.

6 MR. MERCER: Yes, madam. Is there anything I can help you with further this afternoon?

7 THE CHAIRMAN: No, we had better see what Mr. Peretz says about all this. Mr. Peretz?

8 MR. PERETZ: Let me make our position clear.

9 THE CHAIRMAN: It is a very unsatisfactory position to be in.

10 MR. PERETZ: It is very unsatisfactory that we are here today given that we flagged up in our letter
11 of 17th March – I do not know if you have that to hand, it is attached to the application. If you
12 have a version that has been faxed there is a fax p.18 on the top right hand side and if you look
13 at sub-para.(iv) about two-thirds of the way down the page, we expressly say:

14 “We note that you did not provide any evidence to back up your assertion that IWC is
15 unable to afford legal representation. We would remind you that in 2005 IWC felt
16 able to apply for an inset appointment in respect of which financial viability was an
17 important criterion. Particularly against that background, IWC’s mere assertion that it
18 cannot now afford legal representation would not be enough, and nor would the mere
19 observation that IWC’s parent company is subject to a CVA. We would also expect
20 confirmation from that you that IWC has, to a reasonable extent, but unsuccessfully,
21 explored whether it might be able to obtain legal advice on a contingent fee basis and
22 that Taylor Wessing is not itself acting on such a basis.”

23 There we flagged up the two points that we were not convinced by IWC’s claim of ----

24 THE CHAIRMAN: Mr. Peretz, we are here today. We have both flagged it up, but we are here
25 today and I think we have to take it from today.

26 MR. PERETZ: The point I am making is that there is really no excuse for the applicant turning up
27 today without having addressed those points, when they are expressly flagged up for its
28 attention.

29 Our objections to this order which has been proposed are because whatever criteria it
30 is that one might regard as appropriate for the making of such an order, the evidence plainly is
31 not there, and that was a point I was going to make, but, madam, you have made my points for
32 me. Secondly, we have an objection of principle to the making of an order in the terms applied
33 for, and that objection is based on what we say is clear Court of Appeal authority in the *Corner*
34 *House* case, which binds this Tribunal, and clear authority that it is inappropriate for a court in

1 a public law matter to make an order in the terms sought. It is para.77 of the *Corner House*
2 judgment, and I think it is worth taking the Tribunal to it. At para.77 the Court of Appeal says:

3 “In this jurisdiction we do not consider that a court would have any power to make the
4 type of order which was made in the *Okanagan Band* case ...

5 – the Canadian Supreme Court case –

6 “... whereby the defendants were obliged to finance the claimant’s costs at first
7 instance as the litigation proceeded. This would be to trespass into judicial legislation
8 in a way which was proscribed by the House of Lords in the *Steele Ford v. Newton*
9 case.”

10 A clear statement of the Court of Appeal’s position in relation to the sort of order applied for.

11 The criteria laid down by the Court of Appeal for PCOs – that is to say protected costs
12 orders – earlier on in the judgment, such as at para.74, to which you were referring earlier,
13 madam, were in relation to an entirely different type of order, that is to say an order under
14 which the Claimant, or in this case the Appellant, is protected against the risk of having to pay
15 the Respondent’s costs if it loses. That is an entirely different type of order from the one that
16 is sought here today. Our fundamental point today is that the order which is applied for here is
17 simply not within the power of the Tribunal to make. It may well be helpful for the Tribunal to
18 make that observation, if it agrees with us, clear today, because it may save a certain amount of
19 time being wasted from the Appellant’s point of view in perhaps trying to gather further
20 evidence. If the position is, for example, that Messrs. Taylor Wessing are only prepared to act
21 on the basis that they get paid in any event, then there is a risk that costs are going to be wasted
22 in pursuing an order which, in fact, they have no chance whatsoever of getting because there is
23 an objection in principle and not just on the basis of the evidence.

24 THE CHAIRMAN: The criteria which need to be satisfied would include that, and that is a matter
25 that Mr. Mercer on behalf of his clients needs to address, but I do not think he has addressed it
26 as yet in any of the submissions, and he ought to have an opportunity to consider how he
27 answers what you are saying.

28 MR. PERETZ: In our letter we make our position pretty clear. We quoted in full the paragraph that
29 I have just read from the Court of Appeal decision, so our fundamental point that this order is
30 simply outside the power of the Tribunal is one that I hope Mr. Mercer has fully on board.
31 Indeed, I think his application seeks to address it.

32 THE CHAIRMAN: Yes.

1 MR. PERETZ: Our concern, having incurred a certain amount of costs in preparing for a hearing
2 today, is that we end up having to come back to fight the issue of costs again, incurring further
3 costs, and we do not find that a satisfactory position.

4 THE CHAIRMAN: Yes, but hopefully that will be on a hearing on admissibility. One does not
5 know whether this costs application is the only method by which funding can be obtained,
6 because other matters have not been pursued so far. This clearly, as the President says, is a
7 case that needs to be considered by this Tribunal. It would be very unfortunate if the door was
8 closed merely because legal representation cannot be obtained; or if the door is partly open
9 and partly closed because it involves complex legal arguments which lawyers are used to
10 making submissions on and which one side, Ofwat, has the specialist knowledge, et cetera, to
11 do. On the other side there is a person who is a very experienced businessman, but is not used
12 to making submissions in a court of law, as this is. So there is an imbalance here and I think
13 we need to try to make sure that that imbalance does not remain. One appreciates what your
14 submissions are, and I am not going to make any comment as to whether you are right or
15 wrong. That is something we may have to consider.

16 It would be a very sad outcome if the situation is that legal representation cannot be
17 obtained because the Appellant is not in a position to pay for it. One then gets into questions
18 of access to justice. So it becomes very serious and one would have to look at what the Court
19 of Appeal said against that particular problem.

20 MR. PERETZ: Yes. I think I would make a couple of points, but, first of all, I would make it
21 entirely clear, we would obviously encourage the Appellant to seek legal representation in
22 whatever way is appropriate. You have made various suggestions, madam, as to ways
23 forward. We are disappointed and somewhat surprised that no steps appears to have been
24 taken to explore them so far, but there it is, that is where we are. For our part, we would be
25 delighted to find that the Appellant has secured proper legal representation through one of the
26 means that has been explored. We make that entirely clear.

27 THE CHAIRMAN: Yes, and what you are not doing, I am sure, is saying we have to decide it today
28 in order that the whole thing gets stopped. He is not in a position where he can do anything, so
29 we must give time for that to happen.

30 MR. PERETZ: Our concern was that what we do not want to find is that we come back on a second
31 occasion to have debate about whether an order of the sort now applied for is within the power
32 of the Tribunal. In a sense, we were prepared to have that debate. I think both of us are ready
33 to deal with it. Such a course would mean that the Appellant ends up spending further time
34 and Messrs. Taylor Wessing end up spending further time dealing with a case where, in the

1 end, that turns out to not to have been an appropriate way. That is the point I wanted to flag
2 up.

3 THE CHAIRMAN: That is a very important public law point as well, and it may be that if that is to
4 be dealt with, that matter, in itself, might be something on which representation – Mr. Mercer
5 is here to deal with it, but the public law considerations may be very great in that matter and
6 Mr. Mercer, I am sure, is the first one to acknowledge that it may be that it needs to be
7 considered in greater detail than he is prepared to do today – “prepared to do”, i.e. prepared for
8 today.

9 MR. PERETZ: I am sure Mr. Mercer is prepared very well indeed to deal with the points that have
10 been made in relation to the issue of principle. You have my concern on board.

11 I think the other point I would flag up – and, madam, you are aware of it anyway, it is
12 there in the cases – of course the point about access to justice is there. One finds it in the
13 House of Lords decision in *Steele Ford & Newton*, where Lord Bridge says in terms that he
14 recognises the very strong judicial feeling in that case, that the successful Appellant should get
15 their costs from somebody. That strong judicial feeling is simply not enough to confer a power
16 on the court to do something which it needs Parliamentary legislation to do. In a sense, my
17 answer to the point about access to justice is, yes, one sees the concern, but the brutal reality is
18 that there is no public legal aid scheme to fund litigants before this court, and the cautions in
19 the cases, both at the House of Lords and Court of Appeal level, are that it is not appropriate
20 for courts or tribunals to try to create a legal aid scheme where, perhaps unfortunately, none
21 exists.

22 THE CHAIRMAN: On the other hand, there is access to justice.

23 MR. PERETZ: Indeed, and I am conscious that is an unwelcome submission to make to any court,
24 that the situation may be unsatisfactory but there is no power to deal with it, but that is my
25 submission.

26 THE CHAIRMAN: If one has a case which has very, very complex legal points, which in a way this
27 one falls into, it may be that the only route to justice is to do it oneself, but that somehow is
28 somewhat inappropriate in a case that comes to this Tribunal, which is dealing with very
29 complicated public law matters, and I think it is necessary to explore whether there are other
30 routes.

31 MR. PERETZ: Yes, we are entirely happy for the Appellant to be given time, although it has had
32 quite a lot of time already – to be given more time – to explore further routes, and, as I said, we
33 would be delighted if some route was found to secure proper representation. As you know,
34 madam, in many ways it is easier if your opponent is legally represented in all sorts of ways. It

1 makes the conduct of litigation more straightforward and more cost effective. We, as a public
2 authority, certainly have no interest whatsoever in the Tribunal being anything other than fully
3 apprised of all the relevant arguments. If that can be achieved, so much the better.

4 It is, of course, as I am sure you understand, our duty, as a public authority charged
5 with the spending of public money, to safeguard public money very carefully, and when faced,
6 essentially, with a demand for a large cheque we will resist it unless we are satisfied that it is a
7 cheque that we should properly pay, and we are not so satisfied in this case. That is our duty
8 as a public authority charged with spending public money.

9 (The Tribunal conferred)

10 MR. BLAIR: I have a point for you on the merits, Mr. Peretz. You said a few minutes ago that it is
11 simply not within the power of the Tribunal to make an order of the kind that has been
12 suggested, a protective cost order. If we have to come back to this matter on another occasion
13 I would find it very helpful to know whether you are saying that there is a difference between
14 s.51 of the Supreme Court Act 1981, which gave the power to write the rules that were relevant
15 to the *Corner House* case on the one hand, and s.15 of the Enterprise Act, which gives us our
16 power to have rules, or whether you say there is not a difference between Rule 55 of our Rules
17 and Part 43 of the CPR. I think your submission would be that they are all the same and
18 therefore ----

19 MR. PERETZ: To put it shortly, there is no material difference between them. Plainly the wording
20 is different but differences of wording are, in our submission, entirely immaterial.

21 MR. BLAIR: Effectively this Tribunal is bound by the *Corner House* decision?

22 MR. PERETZ: Yes, given that these are public law matters and the Court of Appeal is dealing, in
23 general terms, with public law litigation. That is our broad submission, yes.

24 MR. BLAIR: It would be helpful to have argument on that, not now, but if we come back to it later
25 on.

26 MR. PERETZ: Indeed. I was going to go through the House of Lords case, the *Steele Ford &*
27 *Newton* case to show ----

28 MR. BLAIR: That is costs out of public funds.

29 MR. PERETZ: Indeed, but the Court of Appeal makes it clear in para.77 that the general point made
30 in *Steele Ford & Newton* applies to public law cases. Those are our submissions. We have
31 taken that point on board.

32 The final point I was going to make is this observation: in relation to admissibility
33 one has to recognise that, in a sense, the Appellant's difficulty here is of its own making. If it
34 had gone to the judicial review court, the Administrative Court, we would have had no

1 difficulty whatsoever in saying that the judicial review court had jurisdiction over the matter
2 and we would not have been arguing. The Appellant is perfectly entitled, and we make no
3 complaint about that, to come here if it believes that this is the appropriate tribunal or court to
4 hear its grievances. One has to be slightly careful, I think, about elevating this into a grand
5 access to justice issue, certainly in relation to the admissibility part of the Appellant's case.

6 THE CHAIRMAN: But the access to justice issue goes to costs and the costs problem would be the
7 same before the Administrative Court. In fact, it might be more serious because here we do
8 not have costs follow the event, whereas in the Administrative Court they do.

9 MR. PERETZ: Yes. In the Administrative Court we would have gone straight to the merits of the
10 case. There would have been no issue but that the Administrative Court has jurisdiction.

11 THE CHAIRMAN: Even so, there is a costs issue, so there is still an access to justice point. There
12 is still a problem as to representation. In fact, this point arises in any event and it would not be
13 circumvented by having taken the judicial review route. In fact, the judicial review route may
14 be more difficult.

15 MR. PERETZ: I think I would put the point this way: one of the factors that one sees in all the
16 cases, certainly all the public law cases, is that one factor to take into account is the general
17 public importance of the matter. In the Canadian case, the *Okanagan Indian Band* case, it was
18 absolutely fundamental. Issues of Aboriginal rights in Canada, Australia and New Zealand
19 are, as the Tribunal will know, are absolutely fundamental and politically charged cases of
20 vital public importance. A number of the domestic cases in which a different type of costs
21 order has been granted raise very fundamental questions – the Prime Minister's decision to
22 commit troops to Iraq, that is the *CND* case, and so on. These are big cases. That is a point
23 that it is plainly relevant to take on board.

24 I think the point I was making about the access to justice issue here is that it is
25 relevant, when one is looking at the admissibility issue, which is of course the first stage, to
26 bear in mind that in a sense the admissibility issue, thinking of its general public importance, is
27 a point of the Appellant's own making.

28 THE CHAIRMAN: It is rather sad though, if that is right, that national issues of great public
29 importance, issues which involve small companies and might involve the way a regulator
30 considers matters which are brought before it by small companies, and those matters being
31 general and not particular to any particular decision, those are of great importance to the small
32 company that is involved, or to the small companies that are involved, and to people who deal
33 with that regulator. To them it is just as, if not more, important than the question of the Prime
34 Minister sending troops to Iraq.

1 MR. PERETZ: Indeed, it is, but one of the criteria laid out – again it is a different type of pre-
2 preemptive costs order in the *Corner House* decision – is that the appellant, it is criteria number 3,
3 has no private interest in the outcome of the case. It is put in very blunt and absolute terms by
4 the Court of Appeal, who presumably meant what they said about that, but one might speculate
5 as to precisely what the rationale is. One supposes that the rationale is that in general terms, if
6 there is a commercial interest at stake, a means will be found to find alternative means of
7 funding. That may have been at the back of the Court of Appeal’s mind.

8 In this particular case the point has been made – it is made in Taylor Wessing’s
9 submissions today – we do not know whether this is true, but the point is asserted, that behind
10 this Applicant are a number of other companies who are in some way interested in the point.

11 THE CHAIRMAN: Which is where my remarks just now were pointing.

12 MR. PERETZ: That point, with respect, cuts both ways. If the Tribunal is considering whether there
13 is a block on the point coming to this Tribunal at all, it would, in our submission, be relevant to
14 say that it may be that this Applicant is not in a commercial position to bring it but if there are
15 other ones who can then the point will turn up at some point and we will deal with it in a
16 different case. It is not a case like, for example, the *CND* case where there was simply nobody
17 else around who was likely to be able to bring the case.

18 THE CHAIRMAN: But it is very sad that you have to wait until somebody can afford to bring the
19 case, so we are back to access to justice, are we not? It is not private law between two parties
20 and if one cannot afford it, well ----

21 MR. PERETZ: Yes.

22 THE CHAIRMAN: It is rather unfortunate that a public body who may have acted inappropriately –
23 and I am not saying whether you have or you have not because, as I have said, we have not
24 looked at it – can say to a private citizen, “Well, if you cannot afford to bring the case, then
25 I am afraid we can continue to act like this until somebody else can afford to bring the case” –
26 not a very attractive solution, but it may be the result. A court would have to be very careful
27 before it decides something which actually has that result.

28 MR. PERETZ: I would simply make the observation that every public law case raises points about –
29 public law in general terms – the conduct of the regulator, and the Court of Appeal is plainly
30 aware of that, yet nonetheless it says as one of the markers that one should not make a pre-
31 preemptive costs order in a case where there is private interest.

32 THE CHAIRMAN: It may be the regulator acting only in relation to that particular person, not the
33 regulator acting in the circumstances with everyone. I am not saying whether you do or you do
34 not, but that may be the difference. A lot of public law cases are public law, but only relate to

1 the particular individual who is bringing the case because something has gone wrong with the
2 decision-making process in relation to them that has not gone wrongly generally.

3 MR. PERETZ: Yes, that is true, but there are also cases where there are very strong private interests
4 which may be shared by other people, and perhaps because one case is brought they do not
5 need, themselves, to bother.

6 Those are the points I make at this stage. As I say, I am in a position today, if the
7 Tribunal wishes me to, to go through the reasoning behind our broad submission, that the
8 Tribunal simply does not have power to make the order sought. That is our position. We are
9 prepared to argue it today and we are not desperately happy to be told that we may end up
10 having to argue it on some other occasion because obviously costs have been incurred in
11 preparing it today. To be blunt, Mr. Mercer was put on notice of the points that you made right
12 at the beginning of this hearing and we are, to put it mildly, not entirely happy that he does not
13 appear to have made any attempt whatsoever to address them.

14 (The Tribunal conferred)

15 THE CHAIRMAN: Mr. Mercer, do you have anything to say?

16 MR. MERCER: Yes, madam. I think it would be fair to say that Mr. Peretz and I are not close on
17 our view. Do you remember the beginning of “*Porridge*”, the television series, madam, where
18 you watch Norman Stanley Fletcher being taken to the cells and it is the voice of the Crown
19 Court judge who says, “Norman Stanley Fletcher, you are a habitual criminal and you regard
20 going to prison as just the price of your crime” – just something you have to face up to. Well,
21 Ofwat, as they were, the new authority, as they now are, have got to face up to the fact that
22 they are going to have to be here, and they have got to see people’s rights – I do not like to call
23 it access to justice, it is just getting your fair desserts – in terms of a number of points.

24 The point here is a fascinating one in terms of admissibility because it arises quite
25 often, which is where a regulator is faced two possibilities – the sector law and competition.
26 You throw in on top of that, of course, their rights under European law. They are competition
27 regulator and therefore they should be applying European law on competition. I think there is
28 a very important general point that arises on admissibility.

29 Where Mr. Peretz and I differ again, and I think, sadly, madam, may differ from the
30 Tribunal, is that I think that this whole area is similar to *McWhirter* rather than to *Corner*
31 *House*. I think *Corner House* deals with what happens in court, and you do not look at costs in
32 the same way. The President and Chairman in this Tribunal, madam, have made it eminently
33 clear on so many occasions that you do not look at it in the same way.

1 I also look at the plain black letter law of rule 55, and to get to where Mr. Peretz is
2 going you have got to import quite a lot of caveats. It gives you a tremendous discretion to
3 award costs at any stage of the proceedings for whole or part. That is what it says, so how can
4 you read into that the qualifications that Mr. Peretz wants to put in? Is there something you are
5 bound by? Well, if you look at the *Corner House* case and you look at para.77 you will see
6 that the comment made by the Lord Justice is *obiter*. It is not binding, even on a court, in this
7 country.

8 THE CHAIRMAN: Mr. Mercer ----

9 MR. MERCER: What I am getting to, madam, is that one of the other things that has been said by
10 the President and others in this Tribunal, is that – and it is said, I think, in the *GISC* case – that
11 the position of regulators is a very particular one. You may well be taking the view, madam,
12 and I think you are, that come what may you would like to know about the financial position,
13 et cetera. I take a slightly different stance, I have to say, which is that the CVA is as a matter
14 of public record. The company is penniless and I do not think ----

15 THE CHAIRMAN: It may well be that because of the funding of the CVA the company is not
16 penniless. That is the whole point of a CVA. It is a voluntary arrangement so that the
17 company can continue to trade. There should be some funds in it. In order to have a CVA, the
18 creditors are prepared to sponsor the company, so we ought to see the arrangements that are
19 being made.

20 MR. MERCER: You are quite right, madam, but if you take that as read for a moment and ----

21 THE CHAIRMAN: One cannot take it as read because one has to read it. One has to know what the
22 arrangements are. In a CVA it may well be that those involved in the CVA, those who are
23 parties to the CVA, may well consider it is worthwhile to bring these proceedings and that they
24 will fund them.

25 MR. MERCER: Yes, madam. I know that is not the case, but you of course do not. That is
26 something I hold my hands up to.

27 Madam, I come back to this: taking that point into account, it is the case, I think, that
28 if Mr. Peretz's clients' costs are funded by the water industry then so should the Appellant be.
29 Mr. Peretz's client is funded entirely, as I understand it, from licence fees.

30 THE CHAIRMAN: This is getting into the merits of the application. If we are going to look at the
31 merits then my opening remarks apply, that we would like to look at it against the situation as
32 to whether there is any funding and what that position is, because I think that does have an
33 effect on the whole matter, and how we look at it. To look at it in little bites of the cherry may
34 not be fair to everyone.

1 MR. MERCER: Yes, madam. I just want to explain that I take a different view and that probably
2 colours what I thought the Tribunal should have before it today when assessing the application.
3 We come back, just to mention it again, to timetabling and how we sequentially order this in
4 order to get things sorted.

5 THE CHAIRMAN: What we were thinking was to fix a hearing. I do not know how long you think
6 the admissibility hearing is going to take?

7 MR. PERETZ: It might be prudent to allow two days.

8 THE CHAIRMAN: You are joking, two days?

9 MR. PERETZ: There is one difficulty, which is ----

10 THE CHAIRMAN: Could not the whole thing be heard in that time?

11 MR. PERETZ: I am conscious that there are, because we have made extensive disclosure of a
12 volume of correspondence. There are three lever arch files of correspondence. My hope is,
13 and you will see this from the submissions ---- One point, madam, I did not mention is that we
14 have put the submissions in. I suppose I had better just check that the Tribunal is aware that
15 we have prepared written submissions on the question of admissibility which are there in front
16 of the Tribunal.

17 THE CHAIRMAN: I appreciate that.

18 MR. PERETZ: You will see that in those submissions we have summarised what we think is the
19 relevant material in that correspondence and, in our submission, those three lever arch files can
20 be gone through fairly lightly. I can say that, but obviously I cannot be confident that the
21 Appellant says that. We may spend some time dealing with matters there.

22 THE CHAIRMAN: If we have written submissions and we therefore know what documents are
23 being referred to by either party and why they are relying on them then that does not need to be
24 repeated in the oral submissions.

25 MR. PERETZ: Speaking for myself, I would not anticipate spending more than a couple of hours
26 making oral submissions on this matter. There are obviously no witnesses, or anything like
27 that.

28 THE CHAIRMAN: It is of concern that one is having a preliminary bite of the cherry that would
29 take as long as having the full bite of the cherry.

30 MR. PERETZ: A day may be sensible, given those uncertainties and that there is a volume of
31 correspondence. What I might suggest as a way forward is to say a day, but if it was possible
32 for it to be arranged on a day where, if necessary, the Members of the Tribunal were not
33 engaged somewhere else the next day that might be helpful. The worst thing would be for
34 something like this to go part-heard and we have to come back.

1 THE CHAIRMAN: Yes, for a two day hearing on admissibility ----

2 MR. PERETZ: One day, I would hope, would be enough, but given the uncertainties that I have
3 mentioned that there are – although most of it is on analysis not of any great relevance – three
4 lever arch files of correspondence. There are, and you will have seen that from our
5 submissions. a number of statutory provisions which lie behind part of the legal background to
6 this matter, but again they need to be gone through. It is not entirely straightforward.

7 THE CHAIRMAN: This Tribunal does a lot of work behind the scenes.

8 MR. PERETZ: Indeed.

9 THE CHAIRMAN: Hopefully a lot of that can be done behind the scenes so that it does not have to
10 be rehearsed in court.

11 MR. PERETZ: Indeed. A day may well be enough. The hesitation is that obviously you will want
12 to hear from the Appellant as well, but a day I would have hoped would be enough.

13 THE CHAIRMAN: Mr. Mercer?

14 MR. MERCER: Can I immediately revise the cost estimates in the application!

15 THE CHAIRMAN: You were not anticipating it was going to take two days!

16 MR. MERCER: I would have thought two-thirds of a day and to ask the staff of the Tribunal if they
17 would not mind awfully staying until 5.30 if things got a bit heated.

18 THE CHAIRMAN: That is only two-thirds of a day, is it?

19 MR. MERCER: It is for a City solicitor, madam, yes! We are just beginning the night shift by then,
20 so clearly life is more steady at the Bar! I think two-thirds of a day ought to clear it.

21 THE CHAIRMAN: Shall we say a day?

22 MR. MERCER: My understanding is – because I have not actually read the substantive points
23 except in so far as it is necessary to make the application – that we have not actually got a full
24 copy of the file yet.

25 THE CHAIRMAN: You have not got the three lever arch files that we have got?

26 MR. MERCER: No.

27 MR. PERETZ: I am instructed that they have, but doubtless this matter can be sorted out ----

28 MR. MERCER: We need to take that up.

29 THE CHAIRMAN: That needs to be taken up.

30 MR. PERETZ: There were some issues, which I think have been sorted out, relating to
31 confidentiality because obviously there was correspondence between both Bristol Water and
32 the Appellant. My impression was that that had all been sorted out and the Appellants should
33 have a copy.

34 MR. MERCER: I think that may need to be resolved in correspondence between the solicitors.

1 MR. PERETZ: I am sure we can deal with that outside this Tribunal.
2 (The Tribunal conferred)
3 THE CHAIRMAN: Mr. Mercer, you think you have not received these three files?
4 MR. MERCER: We think there are pages missing.
5 THE CHAIRMAN: There is redacted material?
6 MR. MERCER: We probably need to correspond between the solicitors to make sure that everything
7 is there that we think should be there and get some idea of what is missing.
8 MR. PERETZ: As far as we are concerned we think they should have everything.
9 THE CHAIRMAN: I suspect is something to do with redaction.
10 MR. PERETZ: If there is a problem, I am sure that is it. We do not think there is a problem, but let
11 us try and clear it up in correspondence.
12 THE CHAIRMAN: Yes. If there is a problem then you may have to come back.
13 MR. PERETZ: I am sure that will not be necessary. If there is a problem, I am sure it is a
14 misunderstanding.
15 THE CHAIRMAN: Hopefully that can be dealt with in the next few days.
16 MR. MERCER: Yes, madam.
17 THE CHAIRMAN: That leaves the question of when there could be a hearing on admissibility as
18 you will take three weeks, if you are going to go to the Bar Pro Bono Unit. One can also make
19 other enquiries in that time. This disclosure point will have to be sorted out, which also can be
20 done simultaneously, I assume?
21 MR. MERCER: Yes, madam.
22 THE CHAIRMAN: When do you think that it would be appropriate?
23 MR. MERCER: After the middle of May, madam, I would have thought.
24 THE CHAIRMAN: Six to eight weeks?
25 MR. MERCER: Yes.
26 MR. PERETZ: Obviously we have done our written submissions and, in a sense, are more or less
27 ready to go.
28 THE CHAIRMAN: I appreciate that, but the Appellants have not.
29 MR. PERETZ: Indeed.
30 THE CHAIRMAN: Eight weeks is 22nd May.
31 MR. PERETZ: I am told my learned junior is not free on 22nd May.
32 THE CHAIRMAN: I was just using 22nd May as a starting date.
33 (The Tribunal conferred)
34 THE CHAIRMAN: I understand that the *Albion Water* case is 30th May.

1 MR. PERETZ: Yes, indeed, and my learned junior is appearing for Ofwat in that, and a lot of the
2 Ofwat lawyers are very heavily involved in that matter.

3 THE CHAIRMAN: I suspect one does not want the *Albion Water* case to be going on in one of our
4 court rooms and this to be going on in the other!

5 MR. PERETZ: I think that would cause apoplexy behind me, madam!

6 MR. MERCER: I can see some advantages!

7 THE CHAIRMAN: On that basis, does this have to go off until after the *Albion Water* case?

8 MR. PERETZ: It sounds like it. I think Ms. Sloane has a problem the week before.

9 THE CHAIRMAN: I do not know how many of your group are involved in the *Albion Water* case.

10 MR. PERETZ: The week before Ms. Sloane has a difficulty in any event on another case. From
11 Ofwat's point of view the *Shotton* case is a heavy case, which will require quite a lot of work.

12 THE CHAIRMAN: It is the same team, is it?

13 MR. PERETZ: I think essentially, yes. Ofwat is not equipped with vast numbers of lawyers who
14 can be pulled from other tasks.

15 THE CHAIRMAN: And Mr. Bryan, who is an Intervener here for Albion Water, is involved, of
16 course, in the *Albion Water* case.

17 MR. JEFFERY: Malcolm Jeffery from Albion Water. I can confirm that all of Albion's resources
18 are likely to be tied up on that case, madam.

19 THE CHAIRMAN: So it would be better to be afterwards?

20 MR. PERETZ: I think it sounds like it, yes.

21 THE CHAIRMAN: That is on 30th May, is it?

22 MR. PERETZ: The whole week.

23 THE CHAIRMAN: It is the whole week? So we are then into June.

24 MR. PERETZ: Are we looking at any particular week?

25 THE CHAIRMAN: It would be the week of 5th June.

26 MR. PERETZ: Ms. Sloane has a hearing at the beginning of the week, so the 8th or 9th would be best
27 for us.

28 THE CHAIRMAN: Friday, 9th June?

29 MR. PERETZ: Yes.

30 THE CHAIRMAN: Friday, 9th June. On the basis that it is Friday, 9th June, which is quite a long
31 way away, we need to make sure that it does not go off on that date and that everything is
32 sorted out before then.

33 MR. PERETZ: Indeed. The ball is not really in our court. I think I would just make this
34 observation: it would obviously be helpful ----

1 THE CHAIRMAN: I know I have been looking at you, but I was trying ----

2 MR. PERETZ: I would simply make the request that in very broad terms – obviously we have no
3 interest and probably should not be told of enquiries being made – if arrangements are being
4 made it would be helpful – one point that I am very conscious of is that one prepares for a
5 hearing somewhat differently if the applicant is represented, as opposed to its being
6 unrepresented, because of one’s duties in relation to unrepresented applicants. If I may make a
7 personal plea, it is helpful to me to know as early as possible what the position is.

8 THE CHAIRMAN: If we work back from 9th June, you need to put in submissions, because you
9 have not done that yet, on the admissibility.

10 MR. MERCER: Yes, madam.

11 THE CHAIRMAN: Friday, 26th May would be a fortnight before. Would that be feasible?

12 MR. MERCER: Yes, madam.

13 THE CHAIRMAN: So Friday, 26th May for Appellant’s submissions or skeleton argument on
14 admissibility. That gives you quite a lot of time to investigate funding. I think the Tribunal
15 would be concerned if we turned up in June to discover that you were not able to argue the
16 admissibility point. Do you see what I mean?

17 MR. MERCER: Yes, I see where you are.

18 THE CHAIRMAN: We ought to do this on the basis that Friday, 9th June is sacrosanct for the
19 admissibility argument. If there is a problem on costs and if the admissibility argument cannot
20 be presented then that needs to be dealt with before. Where we started this afternoon was the
21 idea that we did admissibility and costs at the same time. If we did then that could be done on
22 Friday, 9th June.

23 MR. MERCER: The costs information will be with you, I would hope, some time before any
24 skeleton argument on admissibility.

25 THE CHAIRMAN: Yes.

26 (The Tribunal conferred)

27 THE CHAIRMAN: What we are just discussing is whether, if costs and admissibility are to be dealt
28 with on Friday, 9th June, we have enough time on the 9th to do that.

29 MR. PERETZ: We do not even know that costs are going to be an issue at all, because if they find
30 some other form of funding or representation then the issue that we planned to discuss today
31 simply will not turn up.

32 THE CHAIRMAN: Which, of course, one hopes ----

33 MR. PERETZ: So I would be reluctant to put it at risk of adjournment. One wants to get on with
34 this case.

1 THE CHAIRMAN: Since we are hoping that it will take less than a day, hopefully the rest of the
2 time, if it is necessary, can be used for costs.

3 MR. PERETZ: I think there is no real alternative on costs but to see where we get to. If necessary –
4 I have obviously prepared today oral submissions – if the point looks as if it is still
5 outstanding, I can turn them into written submissions and hopefully that will save some time.
6 There is no point in my doing that now, because we do not know that the issue is live. If it
7 becomes clear that it is a live issue that is something that can then be done.

8 THE CHAIRMAN: We have got written submissions on costs from the Appellant.

9 MR. PERETZ: Yes, you have, and those enclosed the letter that I took you, which says something.

10 THE CHAIRMAN: Why do I not make an order that, if appropriate, if required, you put in written
11 submissions or a skeleton argument on costs by Friday, 26th May as well, because by then one
12 will know what the position is.

13 MR. PERETZ: Yes. I think I am happy with that, subject to our getting notice that the point is still
14 live in sufficient time.

15 THE CHAIRMAN: Yes. Mr. Mercer, how do you think we should deal with some sort of timetable
16 on costs?

17 MR. MERCER: What we need, madam, is some kind of trigger to give Mr. Peretz enough time if he
18 needs to turn his oral submissions into a skeleton argument by 26th May. If one looked for a
19 date two weeks perhaps before that ----

20 THE CHAIRMAN: Can I suggest – as you say, it takes about three weeks for the Pro Bono Unit –
21 that we work on the basis of three weeks. You would be able to tell us where you have got to
22 by something like 2nd May, would you not?

23 MR. MERCER: Yes, madam.

24 THE CHAIRMAN: If you were able to update the position so that one knew either that you were
25 still pursuing the matter or what the position was by 2nd May, that would give Mr. Peretz three
26 weeks to deal with that.

27 MR. MERCER: Yes.

28 THE CHAIRMAN: Hopefully, some arrangement will, by then, have been sorted out, or is likely to
29 be sorted out so that the costs issue does not arise.

30 MR. MERCER: I am a little more pessimistic than you are, madam, but, yes, I would have thought
31 by then. Sometimes these things are a little fluid but we will undertake, come what may, to let
32 Mr. Peretz know the current position on 2nd May. Sometimes things take a little longer.

33 THE CHAIRMAN: Absolutely, but if you would ----

34 MR. MERCER: We will report back to Mr. Peretz with a copy to the Tribunal on that date.

1 THE CHAIRMAN: ---- report back and to the Tribunal by 2nd May as to the costs position.

2 MR. MERCER: Yes, madam.

3 MR. PERETZ: I think we obviously need more than simply an indication from them that the costs
4 issue is still alive. As you referred to, madam, there are ----

5 THE CHAIRMAN: We need the evidence.

6 MR. PERETZ: Whatever the criteria are, and there is obviously a certain amount of dispute, we
7 need the evidence and we will need a little bit of time to look at it.

8 THE CHAIRMAN: So why do we not make an order that you report back by the 2nd and any
9 additional evidence is in by the 9th. That will give you two weeks.

10 MR. PERETZ: That will give us two weeks, yes.

11 MR. MERCER: I am content with that, madam.

12 THE CHAIRMAN: Right, additional evidence and any additional skeleton argument to be filed by
13 9th May. From what you have heard today you may want to ----

14 MR. MERCER: There are one or two words I might want to put together, yes.

15 MR. PERETZ: I think Mr. Tupper wishes to say something.

16 THE CHAIRMAN: I was very conscious that you had been left out of this, Mr. Tupper.

17 MR. TUPPER: And I think I have been very good so far!

18 THE CHAIRMAN: You have!

19 MR. TUPPER: We are somewhat the water company in the middle on these issues. Obviously we
20 have not got a tremendous amount to contribute but to the extent – I have noted down that my
21 learned friend will be putting in a skeleton argument on 26th May – we feel we have something
22 that we could usefully add to the equation, could we have seven days from that date to
23 comment?

24 THE CHAIRMAN: That will be 2nd June.

25 THE CHAIRMAN: Mr. Tupper, I am very conscious about Interveners not duplicating. So unless
26 you are providing something which is additional and important, it causes added costs to
27 everybody. It has got to have added value as well.

28 MR. TUPPER: My client is sitting behind me and I am sure he is applauding quietly those views.
29 He will be very keen obviously for me to keep it relevant, fresh, new, et cetera.

30 THE CHAIRMAN: Are you thinking about the admissibility issue?

31 MR. TUPPER: We have already submitted a paper on admissibility. On the costs issue there are
32 certain, how shall I say it, curious problems for us, in that, as has already been mentioned,
33 Ofwat is, in fact, funded by licence fees that they obtain from water companies and obviously
34 we contribute to the coffers of Ofwat. If the other side is going to be able to dip into that

1 money in order to make a case against us, which is *quasi* criminal in nature, it does put us in a
2 rather curious position.

3 THE CHAIRMAN: That does happen if one of your group happens to be in the same situation as the
4 Appellants here and appeals a Decision. Then you are in that situation as part of the group.

5 MR. TUPPER: Yes, granted. I think that Mr. Peretz will do an excellent job in pointing out how
6 this application is obviously groundless and should not be granted.

7 THE CHAIRMAN: We have considered, though it is *obiter*, the position in relation to OFCOM,
8 where they are funded, in relation to a costs order that was made. I do not think it is very
9 helpful but you might want to look at it.

10 MR. PERETZ: I think this is a point that I should, in fairness to Mr. Mercer, make. We were a bit
11 concerned by para.24 of his application because it is not entirely accurate as to what the
12 situation in the Court of Appeal actually was.

13 THE CHAIRMAN: Sorry, this is?

14 MR. PERETZ: This is of his application.

15 THE CHAIRMAN: Are you talking about *Floe*?

16 MR. PERETZ: I am talking about *Floe*.

17 THE CHAIRMAN: I was not talking about *Floe*. I think it is in one of the *BT* cases. One of the
18 considerations that we were looking at was the fact that they also have funding by the operator
19 rather than public funding. We made one or two remarks. I do not think it is very helpful, but
20 you might want to look at that. The *Floe* situation is very different. There has been no order
21 made in the *Floe* case.

22 MR. PERETZ: Indeed, that is the very short point about it.

23 The short answer to the point about the funding by the water industry is that in the end
24 what the water companies pay in licence fees in the end gets passed on to all of us in this room
25 and outside as customers of water. We are, to put it mildly, not at all convinced there is any
26 difference in principle between the cases which discuss the burdens on the taxpayer and picks
27 up all the public funded cases and the burdens on the water consumer that would pick up the
28 cases here. They are effectively the same people, all of us in this room and outside, wearing a
29 different hat.

30 THE CHAIRMAN: Yes. I have not got it in front of me, but you might like to look. I think there
31 was some *dicta* in one of the *BT* cases on costs.

32 MR. PERETZ: I am conscious of that.

33 MR. JEFFERY: Albion Water is one of the water companies which would endure a supplementary
34 levy from Ofwat ----

1 THE CHAIRMAN: You are part of this membership?

2 MR. JEFFERY: Yes – to any costs which it incurs in relation to proceedings such as these. So we
3 have no great desire to add to the burden of the Tribunal or the customer base.

4 I am conscious that under the terms of the order made on 20th February our
5 intervention is limited to the question of admissibility and that we are not entitled to make any
6 further representations on that subject without the permission of the Tribunal.

7 In Dr. Bryan’s absence I am a little unsighted as to the nature of the three lever arch
8 files of material that have been referred to earlier in the proceedings, and I am not sure whether
9 they go to admissibility. If they do I think we ought to see them and I am not sure we have, in
10 Dr. Bryan’s absence.

11 THE CHAIRMAN: Thank you very much. Mr. Peretz, if they were redacted were they delivered to
12 the Interveners?

13 MR. PERETZ: They have not.

14 THE CHAIRMAN: What is the position?

15 MR. PERETZ: Bristol Water raised a number of objections to Albion Water seeing quite a lot of the
16 correspondence. Quite a lot of the correspondence is with Bristol Water and Bristol Water was
17 not prepared to consent to disclosure to Albion Water of that material.

18 THE CHAIRMAN: But waived it to Independent?

19 MR. PERETZ: Yes.

20 THE CHAIRMAN: How is that confidentiality going to be policed or monitored?

21 MR. PERETZ: I may not be the appropriate person to whom to put that question, but that is the
22 position.

23 THE CHAIRMAN: Have they been disclosed on the basis that they must not be disclosed to
24 anybody else? I suppose it is because of the litigation that they have been ----

25 MR. PERETZ: The usual basis. We wrote to the Tribunal, it is a letter of 24th February which sets
26 the position out. It was copied to Dr. Bryan and to Mr. Palmer and Mr. Tupper. We say in that
27 letter at the bottom of the first page:

28 “We should flag up that disclosure of the correspondence bundle to Albion Water
29 which was not involved in the matter at all until very late in the day may pose issues
30 for both Bristol Water and IWC ...”

31 – because IWC and Albion are competing companies.

32 “... We would suggest in particular in view of Albion Water’s limited role in this case
33 that unless both Bristol Water and IWC confirm they have no objection to a complete

1 bundle being disclosed to Albion Water, it should not receive a copy of the
2 correspondence bundle, at least at this stage.”

3 That is what our position was there. Bristol Water subsequently did raise an objection to
4 Albion having a copy of the correspondence bundle and that is where matters stand.

5 THE CHAIRMAN: The whole bundle or just parts of it?

6 MR. PERETZ: The whole bundle. Albion Water, of course, was not involved in the ----

7 THE CHAIRMAN: How are we going to deal with the hearing?

8 MR. PERETZ: Both IWC and Bristol Water have – there may be the odd redaction – effectively the
9 whole bundle. They are the Appellant and the water company that is alleged ----

10 THE CHAIRMAN: I understand that. I am just raising the question, I have not thought about it, if
11 the bundle is, for the most part, non-confidential between Bristol Water and IWC and, of
12 course, you, then if Albion was not here there would be no problem because one deal with it.
13 If it is being claimed that it is confidential vis-à-vis Albion Water, the whole bundle, then that
14 does raise difficulties about the hearing. It means that all the documentation in that bundle is
15 being said not to be in the public domain. I would have thought that we need to deal with that
16 because otherwise there is going to be a problem at the hearing because you cannot refer to
17 anything.

18 MR. PERETZ: I do not want to put words into Mr. Tupper’s mouth, but as far as Bristol Water and
19 indeed IWC are concerned, a lot of the correspondence that one has in the three files was
20 copied at the time between themselves. It essentially involved the relationship between IWC
21 and Bristol Water, so there was correspondence copied to both of them. That explains why,
22 from both Bristol’s and IWC’s point of view, there is little objection to the other seeing the
23 correspondence. In most cases they have already seen it. Albion Water, however, is a
24 completely different story because they were not involved at all until a very late stage in the
25 matter, and there is for both Bristol Water and potentially IWC questions of going through the
26 correspondence and working out what, if anything, they object to Albion Water seeing.

27 I think, to be frank, matters got any further since we wrote that letter. We were
28 concerned at the time we wrote the letter, because we were preparing the correspondence
29 bundle, to let everybody know what we proposed to do as a first stage.

30 THE CHAIRMAN: You have not gone further than that.

31 MR. PERETZ: We have not gone further than that.

32 THE CHAIRMAN: It does sound as if it needs to be resolved.

33 MR. PERETZ: It is a bit difficult for us to take the matter much further.

34 THE CHAIRMAN: It is Bristol Water, is it? Yes, it is.

1 MR. PERETZ: We are not the people who have confidentiality problems. It is not just Bristol
2 Water, it is also potentially IWC.

3 THE CHAIRMAN: Mr. Tupper you probably do not know anything about this.

4 MR. PERETZ: Madam, you are looking at me expectantly. I am more than happy to agree that we
5 will go through the bundles and, to the extent that there is material which can be disclosed to
6 Albion on a selective basis then we will. We will focus our minds on the confidential nature of
7 each of the documents if that is what Albion Water would like.

8 THE CHAIRMAN: That is what is required, is it not, and then, if there is a problem, one will have
9 to come back for us to resolve it. Does IWC have a problem with this?

10 MR. MERCER: No problem at all, madam.

11 THE CHAIRMAN: There is no confidentiality?

12 MR. MERCER: I am instructed that there is nothing that we would want to keep back, particularly
13 from Albion.

14 (The Tribunal conferred)

15 THE CHAIRMAN: This raises all sorts of interesting issues about preparation. First of all, the
16 bundles used in court and the bundle that is used for preparation and the bundle from which we
17 prepare needs to be properly edited so that the Tribunal knows what is confidential and what is
18 not, and that needs to be done in accordance with our Guidelines.

19 MR. TUPPER: I think, once again, by the time we have been through the bundles there will be
20 precious little that we will have identified as being necessary for total quarantine. To a certain
21 extent, there is a bit of a game being played because I am relatively confident, given the
22 closeness of the relationship between the two parties to my right, that much of this material has
23 already been exchanged, so *de facto* ----

24 THE CHAIRMAN: That is the sort of thing I was ----

25 MR. TUPPER: I am sure that is so, and if we need to formalise what is already informally the case,
26 i.e. both parties have most of the important correspondence, then I am more than happy to
27 undertake that task and ensure that on the day there are not any secrets, as it were.

28 THE CHAIRMAN: There may be, but they have to be properly identified.

29 MR. TUPPER: I understand.

30 THE CHAIRMAN: Normally, we get a bundle of the documents which has the redacted material in
31 square brackets so we refer what to refer to and what not to refer to.

32 MR. PERETZ: In infringement cases one has a whole pile of documents where confidentiality has
33 been explored in great detail during the administrative procedure because everybody is
34 conscious of where the case is heading. The access to the files, and so on, would all be

1 prepared with appropriate redactions, so work has already been done. This is obviously not
2 that sort of case. At the time when all this correspondence was being written people were not
3 thinking, “Oh, this may turn up in the Competition Appeal Tribunal” – one is tempted to add,
4 “for the very good reason that it was not an appealable Decision”, but I do not expect
5 everybody to agree with me on that one.

6 We were simply confronted with the issue that we had a whole lot of documents to
7 disclose, a limited time to do it, and we wrote the letter of 24th February simply to say that
8 “This seemed a sensible first cut, it is simply to get the documents out”. There is plainly
9 another step that now needs to be taken which is, I am afraid, not for us but for Mr. Tupper
10 essentially to go through the documents, identify what, if anything, he regards as confidential
11 vis-à-vis, one, Albion Water; and two, potentially separately, the public as a whole – identify
12 that and tell the rest of us what it is. I am afraid the ball is simply in Mr. Tupper’s court on that
13 one.

14 THE CHAIRMAN: The bundles that have been provided to the Tribunal, which hopefully also been
15 provided to the Appellants, have redacted material in them, but I do not know on what basis
16 that material has been redacted. Has it been redacted on the basis of irrelevant, or has it been
17 redacted on the basis that it is confidential to Bristol Water or somebody else?

18 MR. PERETZ: The redactions relate to a number of documents – what one might describe as
19 “mixed” documents, whether internal notes of a meeting ----

20 THE CHAIRMAN: Internal to Ofwat?

21 MR. PERETZ: Internal to Ofwat.

22 THE CHAIRMAN: Is Ofwat changing its title?

23 MR. PERETZ: Ofwat is now the Water Services Regulatory Authority.

24 THE CHAIRMAN: I cannot quite work out what the acronym for that is.

25 MR. PERETZ: The WSRA, which is not entirely user friendly, and indeed the title of this case is
26 now IWC v. WSRA.

27 THE CHAIRMAN: We have to forget about Ofwat, do we?

28 MR. PERETZ: Ofwat continues to be the trading name, and you will see in subsequent
29 correspondence, I am sure, that Ofwat remains on the letter paper.

30 THE CHAIRMAN: We can still refer to Ofwat?

31 MR. PERETZ: Particularly in this case where we have the Director and then the authorities. It is
32 probably easier if we just call it Ofwat throughout, although legally that has never been its title
33 and is not now, but it is probably the right way of referring to it.

34 THE CHAIRMAN: It is going to continue to trade under Ofwat?

1 MR. PERETZ: It will continue to trade under Ofwat.

2 THE CHAIRMAN: So we can still call it Ofwat?

3 MR. PERETZ: We can talk about Ofwat. I was saying, there is some mixed documentation which
4 contains comments by officials – one can imagine, one takes an internal note of a meeting and
5 sometimes there are some extra comments made by officials on perhaps irrelevant matters. We
6 have simply removed those and what one has is a record of the correspondence.

7 THE CHAIRMAN: Do we not need a schedule both from Bristol Water and from you as to what
8 you are claiming is either confidential or irrelevant?

9 MR. PERETZ: In relation to the material that has been redacted we simply say it is not within the
10 scope of our obligation to disclose. It is not really a question of having to claim that it is
11 confidential.

12 THE CHAIRMAN: One does not know which is that and which is Bristol Water's confidentiality.

13 MR. PERETZ: What you have got, none of it is excised by Bristol Water on grounds of
14 confidentiality because that exercise had not gone through. If there are redactions in what you
15 have got it is material that has not been disclosed because it is irrelevant. It just happens to be
16 in a document that contains relevant material and it was thought right to remove it.

17 THE CHAIRMAN: When the bundles are prepared for the purposes of the hearing and/or
18 preparation, what we have got at the moment will be in square brackets with lots of dots
19 because of relevance; and any other material that is redacted on the grounds of confidentiality
20 will be left in but in square brackets, so one knows that it is confidential.

21 MR. PERETZ: Mr. Tupper and I both know what the Tribunal is looking for and we will make sure
22 that the Tribunal gets it. It plainly does not have it at the moment. First of all, you need the
23 bundle with ----

24 THE CHAIRMAN: I am very pleased we can read it!

25 MR. PERETZ: You need to have a bundle with the controversial material marked as such but so that
26 you can still read it, the square bracketed material.

27 THE CHAIRMAN: And one needs to know whether other material has been taken out.

28 MR. PERETZ: If it is other material which simply has not disclosed, which is the status of the other
29 one, that will simply be blank in your bundle. So it will be clear to the Tribunal what falls into
30 what.

31 THE CHAIRMAN: It has to be clear so that anybody can make a claim if your disclosure is not
32 sufficient.

33 MR. PERETZ: Indeed, yes.

1 THE CHAIRMAN: So it has to comply with what is in paras.13.12 and following of the Guide to
2 Proceedings. When can that all be done?

3 MR. PERETZ: I am going the baton over to Mr. Tupper, because I think the ball is rather in his
4 court, to mix sporting metaphors.

5 MR. TUPPER: I will see if I can bat it back across the net. As I understand it, we have already
6 undertaken a confidentiality exercise, but we were invited by our good friends at Ofwat to take
7 their lead in terms of the information being provided to Albion, and we just went with the flow,
8 if you can excuse the pun in the circumstances of this case. We have done the exercise, so we
9 think we will be able to do what is being requested of us in a very short period of time, we are
10 going to offer seven days.

11 THE CHAIRMAN: So you are going to produce a schedule of confidentiality within seven days?

12 MR. TUPPER: Yes, within seven days. (After a pause) I was getting some negative vibrations
13 from behind, but I thought that was what I was being told.

14 THE CHAIRMAN: (After a pause) Before Easter?

15 MR. TUPPER: Before Easter, yes. It should not be a problem to deliver those bundles with any
16 indications of ----

17 THE CHAIRMAN: That is 13th April?

18 MR. TUPPER: Yes.

19 THE CHAIRMAN: So schedule of confidentiality by Bristol, 13th April – yes?

20 MR. TUPPER: Yes.

21 THE CHAIRMAN: Then everybody does need a bundle to work from.

22 MR. PERETZ: Yes.

23 THE CHAIRMAN: When can that be provided? Mr. Tupper, is there going to be a problem if there
24 is different confidentiality in relation to Albion and in relation to IWC?

25 MR. TUPPER: There may be some. I am hoping there will only be a limited number of documents
26 where we will be making a differing type of claim, so there could be confidentiality as regards
27 the general public and then confidentiality as regards Albion.

28 THE CHAIRMAN: You will make sure they deal with it?

29 MR. TUPPER: I promise to indicate thoroughly.

30 MR. PERETZ: Obviously the sensible thing to do is for us to collect the bundles that the Tribunal
31 has.

32 THE CHAIRMAN: Yes, we only have one set.

33 MR. PERETZ: As long as they not marked.

34 THE CHAIRMAN: They may be.

1 MR. PERETZ: If they are marked we may need to just prepare another set.

2 THE CHAIRMAN: It would be easier to prepare another set anyway because they might be marked.

3 You must have a set. You are going to do the redactions, et cetera, and then you put the whole

4 lot in the photocopier.

5 MR. PERETZ: That may be the sensible way of dealing with it.

6 THE CHAIRMAN: You do not really need those, so maybe you should just ----

7 MR. PERETZ: We will prepare a fresh set.

8 THE CHAIRMAN: If Bristol Water has different redactions for IWC and for Albion you are going

9 to have to make sure that you indicate where those are.

10 MR. PERETZ: We know what Bristol's redactions for IWC are, that has already been sorted.

11 I think the decision may be public redactions and Albion redactions. It is conceivable that

12 Bristol Water may have no objection to Albion seeing something but might have objection to it

13 being on the front page of *The Sun*, were that unlikely even to occur.

14 THE CHAIRMAN: We need to know exactly what the redactions are.

15 MR. PERETZ: Bristol Water will produce a schedule, we will then organise a bundle with

16 appropriate ----

17 THE CHAIRMAN: When can you do that by?

18 MR. PERETZ: We think we need a week to do that.

19 THE CHAIRMAN: A week after the 13th?

20 MR. PERETZ: It is, of course, Easter, so let us say – it is a short week, of course, after Easter and

21 people are not around ----

22 THE CHAIRMAN: The 25th or 26th?

23 MR. PERETZ: Let us say the 26th, the Wednesday. We will prepare three marked up bundles for

24 the Tribunal.

25 THE CHAIRMAN: We need more than three, do we not, at least four?

26 MR. PERETZ: Four, and also we will need to do a blacked out version for Albion.

27 THE CHAIRMAN: IWC will not have a blacked out version?

28 MR. PERETZ: IWC has already got its version which Bristol has already agreed to, so I do not think

29 there is a problem for IWC.

30 THE CHAIRMAN: You will do a version for Albion, and you will serve on IWC the version that

31 you are serving on us.

32 MR. PERETZ: On the Tribunal, yes, so that IWC can see what the ----

33 THE CHAIRMAN: So it is four bundles for the Tribunal and one for IWC, unless of course they ask

34 you for more, and a special for Albion.

1 MR. PERETZ: A special version, which will have ----

2 THE CHAIRMAN: And the four bundles for us and the IWC will indicate where the special version
3 for Albion is?

4 MR. PERETZ: Yes, indeed, it will mark with square brackets so that you can see the material that is
5 confidential but also read it. In the Albion version it will be in put in black-out so that they
6 cannot read it.

7 THE CHAIRMAN: Yes, but there may be a difference between the two. Is there no confidentiality
8 claimed in relation to IWC? I thought there was something.

9 MR. PERETZ: I think there are some, yes, we will have to mark those up.

10 THE CHAIRMAN: That needs to be differentiated from Albion.

11 MR. PERETZ: Yes, of course it does, so that we all know where we are. We will sort it out. These
12 things are always more complicated to describe than they are actually to do.

13 THE CHAIRMAN: Yes, but as long as everybody understands what they are doing.

14 MR. PERETZ: Yes, I think we all understand what needs to be done.

15 THE CHAIRMAN: That will be done by 26th April.

16 MR. PERETZ: Yes.

17 THE CHAIRMAN: Is there anything else that we will need for this hearing?

18 MR. PERETZ: Not I think that I can think of at the moment. A possible bundle of authorities, but
19 we can cross that bridge when we get to it. I think our submission is relatively light on
20 authorities.

21 THE CHAIRMAN: If there are any more authorities you can put them into the existing bundle and
22 tell us where to put them.

23 MR. PERETZ: Yes, the existing bundle which I got to you yesterday deals entirely with costs and
24 we can all hang on to that because it may turn out to be useful. It does not deal with
25 admissibility.

26 THE CHAIRMAN: Mr. Mercer, the bundle of authorities on costs, were you going to put in more?

27 MR. MERCER: No, we discussed that yesterday and that contains everything.

28 THE CHAIRMAN: That is an agreed bundle?

29 MR. MERCER: That is an agreed bundle.

30 THE CHAIRMAN: Are you happy with the arrangements that are being made about the documents?

31 MR. JEFFERY: Thank you, madam. Yes, I believe Albion is content with those arrangements,
32 albeit they sound somewhat complicated. I am sure they will be better in the reading than they
33 are in the description.

1 THE CHAIRMAN: If it turns out that there is a problem I am sure you will alert everybody to the
2 problem.

3 MR. JEFFERY: We will do our best, madam.

4 THE CHAIRMAN: The first thing is to alert Ofwat and if there is not any satisfaction, and if you
5 copy us in on that, then you can make an application.

6 MR. JEFFERY: I am grateful to the Tribunal and the other parties, thank you.

7 (The Tribunal conferred)

8 THE CHAIRMAN: I thought I had dealt with whether you may need to add to your skeleton
9 argument in relation to costs having regard to what was said today.

10 MR. MERCER: Yes, madam, I had anticipated that we would have to ----

11 THE CHAIRMAN: Additional evidence and any additional skeleton argument to be filed by
12 9th May.

13 MR. MERCER: I think there is already a date set for that.

14 THE CHAIRMAN: Yes, I have dealt with it. Is there anything else? (After a pause) Mr. Mercer,
15 I hope the costs position can be sorted out on admissibility at least, so that we can hear the
16 admissibility with representation.

17 MR. MERCER: So do I, madam, none more, you might say, than myself!

18 THE CHAIRMAN: I am sure that is right.

19 MR. MERCER: Mind you, I am still grappling with the concept that there are going to be no secrets
20 in this case, which I think was an undertaking given by one of the advocates for the other side,
21 and not something I would be familiar with! Yes, madam, we will try and resolve that as
22 quickly as we can.

23 THE CHAIRMAN: Yes, and hopefully there will not be a problem, but if there is perhaps you could
24 make any application that needs to be made as early as possible, because I think the date of that
25 admissibility hearing is really sacrosanct and should not go off, because it has been pushed
26 back quite a long way.

27 MR. MERCER: Yes, madam, I think we appreciate that, however much one might disagree that it
28 should have been separated out in the first place. We will do our best to try and get that sorted
29 as quickly as we can.

30 THE CHAIRMAN: Thank you very much.

31