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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No 1058/2/4/06

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

20<sup>th</sup> February 2006

Before:  
SIR CHRISTOPHER BELLAMY  
(President)

ANN KELLY  
PATRICIA QUIGLEY

Sitting as a Tribunal in England and Wales

BETWEEN:

**INDEPENDENT WATER CO LIMITED**

Appellant

and

**DIRECTOR GENERAL OF WATER SERVICES**

Respondent

Martin Palmer (of Independent Water Co. Limited) appeared for the Appellant.

George Peretz and Valentina Sloane (instructed by the Director of Legal Services, Ofwat) appeared for the Respondent.

Stephen Tupper (of Watson, Farley & Williams) appeared for the potential Intervener Bristol Water Plc.

Dr. Jeremy Bryan (of Albion Water Limited) appeared for the potential Intervener Albion Water Limited.

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**CASE MANAGEMENT CONFERENCE**

1 THE PRESIDENT: Good morning ladies and gentlemen. I am sorry we have kept you waiting.  
2 Could I just begin by establishing who we have here? I think we probably have Mr. Palmer for  
3 Independent Water? Yes, good morning, Mr. Palmer. We also have Dr. Bryan for Albion  
4 Water, good morning. Mr. Peretz for the Director, and Mr. Tupper for the potential intervener,  
5 Bristol Water.

6 The reason that we have put back the hearing is that we have spent some time  
7 thinking about this case; and in order to put you in the picture as to what our present first  
8 thoughts are I think I ought to say a few words at the beginning just so that we can all see  
9 where we are. The first thing to say is that we have very well in mind the question of the  
10 Tribunal's actual jurisdiction to hear this case, which of course depends on s.46 and 47 of the  
11 Competition Act, 1998 which we will have to look at in detail in due course.

12 Subject to that, it seems to us that there are a number of matters in this Appeal which,  
13 at first sight, do give rise to some concern on the part of the Tribunal. The first concern is the  
14 result of something that has actually occurred in this case. It would appear that a well known  
15 developer (George Wimpey) did not, for whatever reason, wish to avail itself of the services of  
16 Bristol Water to supply a site, it wished to choose another supplier and, for whatever reason, in  
17 the event that desire has become frustrated and the supply has in fact continued to be supplied  
18 by Bristol Water, the monopolist in the area. Therefore, we have a situation in which entry  
19 into this industry has been apparently frustrated which, at first sight, does give rise to some  
20 concern about how the Act is being applied in this kind of situation. I am putting the matter I  
21 hope in very neutral terms, no more than stating that here is a situation where an entrant  
22 wanted to come in and that did not, in fact, happen. That is the first general point.

23 The second general point, which I think we shall look to the parties to give us some  
24 help on here in due course, is one that does concern the Tribunal, and I can put it under the  
25 general heading of the "level playing field". In this Appeal we have unrepresented parties on  
26 the one hand and we have the Director with all his resources on the other, supported by Bristol  
27 Water, who also has substantial resources. There are important background issues in the case  
28 relating to the terms of supply to green field sites, the relationship between the 1998 Act and  
29 the Water Industry Act 1991, interim relief and other matters. In order to ensure justice and to  
30 see that the public interest under the Act is protected the Tribunal needs to go into these  
31 matters to some extent, but there is a situation of imbalance between the resources of the  
32 parties that raises obvious difficulties; and in due course we would like to explore whether or  
33 not there is any way of alleviating that particular problem.

34 There are further problems that arise: thirdly, there is the question of the two  
35 jurisdictions i.e. the jurisdiction of the Administrative Court – of which incidentally I am also a

1 Judge – and the Tribunal. There is to some extent a somewhat Dickensian situation – if people  
2 are being told they have come to the wrong court – in the 21st century. Fourthly, there is the  
3 interaction of the two statutory regimes, namely, s.40 of the Water Industry Act, and the  
4 Director’s other powers under that Act, and the Competition Act 1998, having regard among  
5 other things to the still extant guidance under OFT 422, and the way these two regimes are  
6 supposed to interact. That seems to us – if I may make one comment – to be highlighted by an  
7 observation by the Director in his letter of 4<sup>th</sup> March 2005, which appeared to suggest that the  
8 Director considered that it might be appropriate for him to decide under s.40 which was the  
9 most appropriate supplier to this green field site, rather than for the developer in question,  
10 George Wimpey, to be the primary decision maker in that regard.

11 Our fifth concern (and so far not explored in the papers) is what, if any, is the  
12 implication of Article 3 of Regulation 1 of 2003, which requires the Competition authorities  
13 when applying national competition law to also apply EC Competition law in a case that  
14 affects trade between Member States? That raises the question of whether, as a matter of  
15 Community law, is it open to the Director simply to put aside competition law and decide  
16 entirely under EC law which, of course, would include the sub-question of whether there is an  
17 effect on trade between Member States in these kinds of situations; and that is a matter that  
18 may well need to be argued because there is a considerable amount of learning on that subject,  
19 and the fact that there is no physical trade in water between Member States may not  
20 necessarily be the end of the matter.

21 We also have two other concerns: one is the apparent fact that the letter from Bristol  
22 Water of 29<sup>th</sup> September 2005 seems to have been obtained under the Freedom of Information  
23 Act, or so we are informed, which might suggest that the normal procedures of transparency in  
24 terms of the file and the normal processes for copying all parties in with relevant  
25 correspondence were not being wholly followed in that particular regard.

26 Lastly, and in our view most unfortunately, at the end of the day this matter seems to  
27 have given rise to a somewhat serious public health issue, and that led to what appears to be a  
28 particular comment by the Drinking Water Inspectorate as to the situation that had arisen.

29 So all those matters give us a degree of concern, and we look forward to having our  
30 minds put at rest on the matters we have mentioned, but the existing submission on behalf of  
31 the Director to the effect that there is no good reason to spend further time and money on this  
32 case does not seem to us at the moment entirely appropriate in the light of that background.

33 Coming then to the question of admissibility, our present view is that this is a matter  
34 that is going to need to be argued, I do not think we are in a position to decide it today and  
35 quite how it is argued partly depends upon whether there is a solution to what I have referred

1 to as the lack of the level playing field situation that we are confronted with in this case. We  
2 have noted, at least so far and non-exhaustively, a number of points that may or may not turn  
3 out to be relevant to the question of admissibility which include the Appellant's argument  
4 based on the letter of 4<sup>th</sup> March 2005, the possible effect of Article 3 of Regulation 1 of 2003,  
5 which I have just mentioned, the question of whether the refusal of consent to an Inset  
6 appointment as a potential abuse of a dominant position within the meaning of the Chapter II  
7 prohibition is an issue that is relevant to the question of admissibility. The various exchanges  
8 of correspondence on the question of interim measures and the overall question of whether,  
9 and in what circumstances the Tribunal should (or might) imply a decision which would be to  
10 the effect in this case that the Chapter II prohibition has not been infringed, for example, by  
11 reference to the elements in the file as a whole, and the strength or otherwise of the reasons  
12 given for not taking the matter any further. Our present view is that it does not seem to us at  
13 first sight that we can simply say (on the basis of what we have) that these proceedings should  
14 be effectively struck out.

15 I think that, in a word, summarises our first thoughts. We are particularly concerned  
16 to arrive at some solution to the question of the level playing field so that this matter is  
17 properly argued. It is very unsatisfactory for the Tribunal to have cases that are not properly  
18 argued. That, I think, is a point upon which we would invite suggestions from the parties and,  
19 indeed, we may have to investigate what (if any) powers the Tribunal itself has in relation to  
20 costs or otherwise in that particular regard.

21 Mr. Peretz, I think I probably look primarily towards you, would you like some time  
22 to consider our first reactions, as it were, or would you like to address us in any event?

23 MR. PERETZ: If I may address you on a preliminary basis, Sir?

24 THE PRESIDENT: Yes.

25 MR. PERETZ: If I can deal with your points in order, Sir? The first point that you made was to  
26 emphasise the Tribunal's concern about the result that occurred. Obviously this is a difficult  
27 point for us to deal with in detail today, but I would emphasise that our position is that a large  
28 part of the explanation for the period of time between the submission of the Inset proposal by  
29 IWC and the fact that it had not been determined by November – so the period from January to  
30 November of about 10 months – is explicable by the fact that IWC, in spite of a stream of  
31 feedback from Ofwat simply failed to provide a whole range of very important information  
32 that had been identified as being necessary. If the Tribunal wishes me to expand on that I can,  
33 but plainly these are points of which the Appellant does not have notice but I am in a position  
34 to say something more about them if the Tribunal wishes.

1 THE PRESIDENT: It might be helpful later, Mr. Peretz. At the moment the Tribunal, as in the early  
2 stages of all these cases, does not yet have the picture and it is very difficult to decide even a  
3 question of admissibility without having the picture and that is why we have taken the  
4 opportunity to expose our first impressions, as it were, with the very purpose of giving the  
5 Director the fullest opportunity to answer it.

6 MR. PERETZ: I can say something quickly about this, and it may be helpful. I think a clip of  
7 correspondence has been handed up and there is a chart – it may be in a separate document ---

8 THE PRESIDENT: I do not think it has come up to this desk, or at least if it has it has not reached  
9 us yet.

10 MR. PERETZ: It is behind the index in the clip of correspondence which has been handed up – I  
11 think you will find it is the plain black file.

12 THE PRESIDENT: Yes, now why do you not take us through whatever you want us to say?

13 MR. PERETZ: Yes. This chart provides a helpful background; it is on the Ofwat website. It is a  
14 chart that illustrates the procedure that needs to be gone through in connection with all  
15 applications for appointments under s.7 or s.8 in particular Inset appointments. You will see in  
16 the left hand column there is a series of steps; the right hand column gives you a timing for  
17 each of the steps and there is a flow chart. If one looks down the right hand column one can  
18 get a feel for the time that the process is likely to take from a satisfactory application for step 3,  
19 because steps 1 and 2 deal with pre-application procedure in which the applicant is invited to  
20 discuss with Ofwat exactly what is necessary. Each of these applications is different – the  
21 subject matter of the application is different, and the companies concerned are different.  
22 Plainly an application from an established water undertaker is unlikely to raise issues, for  
23 example, of financial backing because the applicant will already be familiar to Ofwat. An  
24 application from a company not known to Ofwat will inevitably involve a few more questions,  
25 so there are bound to be a number of differences.

26 What happens is that Ofwat discusses with the Applicant in detail and prepares  
27 detailed guidance in each case on what information is concerned. I can give you some  
28 examples of the sorts of information that IWC provided, or failed to provide in this case.

29 THE PRESIDENT: At a very quick look, and there may be one or two letters in here that we have  
30 not seen before – is that right?

31 MR. PERETZ: In the correspondence clip?

32 THE PRESIDENT: Yes.

33 MR. PERETZ: What I have attempted to do in the correspondence clip is simply put the  
34 correspondence in order, because it is not in order in the Notice of Appeal. I have inserted one  
35 letter. There are a couple of letters that the Tribunal may have seen before but they are

1 attached to our written submissions. There is one new letter, a letter of 23<sup>rd</sup> November. I put  
2 that in because it is actually the letter to which the 1<sup>st</sup> December letter, which is in the notice of  
3 appeal, replies to; so it seemed to us to be important to put that in to give the context.

4 THE PRESIDENT: That is at tab 6, is it?

5 MR. PERETZ: That is right. I will give some examples of the various problems that we  
6 encountered in dealing with IWC. There was persistent lack of detail about the financial  
7 relationships between IWC and other companies in the Lanara Group of which it formed part.

8 THE PRESIDENT: “Persistent lack of details about financial relationships”?

9 MR. PERETZ: Yes. There was a lack of explanation as to how important costs such as emergency  
10 costs and customer service costs were calculated. There were distinctly puzzling assumptions,  
11 for example, at one stage IWC appeared to calculate its overhead costs on the basis that it  
12 would be supplying 25,000 homes, not the 350-odd homes on the site. There was considerable  
13 delay in providing a sponsor statement.

14 THE PRESIDENT: As you are running through these points do you want to give us which  
15 document ----

16 THE PRESIDENT: Well the difficulty is there is a lot of correspondence – as I have said, there was  
17 extensive feedback by Ofwat. We could (and indeed will) in due course prepare and if  
18 necessary produce the correspondence as part of explanation for the dealings. What I am  
19 attempting to deal with is the Tribunal’s expression of concern as to the time that it took, I am  
20 simply wanting to flag up these ----

21 THE PRESIDENT: No, quite. These various points you are making, for example about the  
22 overhead costs that is in this clip of correspondence?

23 MR. PERETZ: It is not in the clip of correspondence, no.

24 THE PRESIDENT: It is not?

25 MR. PERETZ: No, I am making these points generally on the basis of fairly extensive  
26 correspondence. As I said, there was extensive feedback. The correspondence clip is there to  
27 deal with the question of admissibility which, as I go on to say, is really the question that the  
28 Tribunal needs to grapple with, but what I am trying to do in order is to deal with the matters  
29 of concern that the Tribunal flagged up. I am happy to stop at any point. All I am merely  
30 trying to do ----

31 THE PRESIDENT: Just do it in outline, I just want to be clear what it is. These various points you  
32 are making are in other correspondence we have not got yet.

33 MR. PERETZ: In other correspondence you have not got. There was delay in providing a sponsor  
34 statement – that is a statement as to financial viability by a bank, accountant or similar. That  
35 requirement was clearly set out in the published guidance, and emphasised by Ofwat, and

1 when it arrived it was not satisfactory. There were numerous errors and discrepancies in the  
2 information provided.

3 The final point I want to mention is that at various points the IWC was asked for a  
4 sensitivity analysis in relation to various assumptions, in particular, in relation to bulk supply  
5 prices. Now, our line was and is that any prudent business would have worked out at a  
6 relatively early stage what its bottom line was in relation to bulk supply prices in terms of what  
7 bulk supply price was affordable in terms of its business model. Indeed, it is difficult to see  
8 how any business could prudently have gone into negotiations with Bristol Water without  
9 some notion of what its bottom line was, and what the implications on its financial viability of  
10 various possible bulk supply prices would have been. We wanted that information disclosed.  
11 We wanted that information made transparent to us and it was not.

12 That, we say, is a large part of the explanation for the delay, so that is our immediate  
13 response to your concern number one.

14 THE PRESIDENT: Yes.

15 MR. PERETZ: In relation to your question 2, the level playing field, what we would say is that the  
16 issue of admissibility really does need to be taken first. It is plain from what the Appellant has  
17 put in that it understands what the issues are in relation to admissibility, on the detailed  
18 submissions. It has had ample opportunity to go through the relevant correspondence, which it  
19 has. We say the Tribunal is in a position to deal with that issue of admissibility to day. The  
20 Appellant has had over a month to deal with this. If the issue of admissibility is determined  
21 against the Appellant, then the questions of whether it is reasonable to expect the Appellant to  
22 deal with complex economic regulatory issues falls away, and the Tribunal does not need to  
23 grapple with that.

24 THE PRESIDENT: Well it is the legal issue that is the difficult one.

25 MR. PERETZ: It seems to us, with respect to the Appellant, that it seems to have coped perfectly  
26 well with the legal issues. It appears to understand them, it has made a number of points. We  
27 say at the end of the day those points are all misconceived, but it has made a number of points  
28 and we are certainly not convinced that were it to receive any help of any form that it would  
29 necessarily do any better on the question of admissibility.

30 THE PRESIDENT: You have no practical suggestion to make?

31 MR. PERETZ: Not at present, I can take further instructions. There are plainly difficulties as far as  
32 we are concerned; the basic problem is a financial one. We have difficulties in offering public  
33 money to litigants on the other side. The Director, in his capacity as accounting officer has to  
34 be aware of those issues. We certainly cannot locate any power that we have to offer money  
35 for those purposes.

1 THE PRESIDENT: You see the difficulty from the Tribunal's point of view? It is very important  
2 for us that both sides of the argument are fairly presented, and fully presented.

3 MR. PERETZ: Yes, but plainly a matter of concern for any Tribunal. I would draw your attention,  
4 Dr. Bryan, who is plainly assisting the Applicant here, as you well know, Sir, is very familiar  
5 with the Tribunal's proceedings and has done a lot of work here.

6 THE PRESIDENT: Yes, but with all respect to Dr. Bryan, he is not a lawyer and he would not  
7 necessarily be expected to be on top of some of the technicalities that may or may not arise in  
8 the area of admissibility.

9 MR. PERETZ: I entirely accept there is a difficulty. As far as what you, Sir, described as the  
10 "Dickensian" situation in terms of there being different courts, and the Appellant being told  
11 essentially to go on to the wrong court, the short (and perhaps unhappy) answer to that point is  
12 that that is the situation in the legislation. Parliament has conferred upon this Tribunal  
13 jurisdiction to review Decisions as to whether or not the Competition Act has been infringed  
14 and jurisdiction over interim measures Decisions under the Competition Act. It has not  
15 conferred on this Tribunal jurisdiction over Decisions of the Director under the Water Industry  
16 Act, and it has not conferred on this Tribunal decisions not to look at a matter under the  
17 Competition Act at all.

18 What I think your point does illustrate, however, is that this is not a question of  
19 completely shutting the applicant out of any remedy. There is a remedy in the Administrative  
20 Court. As you pointed out, Sir, you sit as an Administrative Court Judge. There are other  
21 Administrative Court Judges who are well familiar with these types of issues. If the Appellant  
22 is told that he is in the wrong place then that is a viable option, and Judicial Review  
23 proceedings are not necessarily that expensive; the procedure is quite quick. The Tribunal is  
24 not in a situation of having to deny the Appellant justice. It is simply a question of sorting out  
25 where the Appellant could go, and in regard to that we say that the earlier that matter is sorted  
26 out the better for all concerned. What would be a very unhappy situation would be if the  
27 Appellant was taken a long way down the road here with a lot of matters looked at only, Sir,  
28 for you to end up concluding that there was no admissible Decision. That would be a waste of  
29 the Appellant's time and money, and we would suggest actually unfair to him.

30 THE PRESIDENT: The Appellant says it is not really a practical proposition to try to conduct  
31 unaided and by himself a Judicial Review, that is the submission.

32 MR. PERETZ: That is his submission. It certainly can be done. There is a possibility of finding  
33 various types of legal representation if necessary.

34 THE PRESIDENT: What do you mean by that?

1 MR. PERETZ: There may be a possibility of contingency fees – who knows what possibilities there  
2 may be? It is not entirely clear to what extent the Appellants conducted any thought at all as to  
3 what the possibilities of Judicial Review might be.

4 THE PRESIDENT: Yes.

5 MR. PERETZ: Sir, your fourth point was that this case involves the interaction of two regimes.  
6 Indeed, there are all sorts of interesting questions to be asked about the interaction of two  
7 regimes. I think we would simply say that the first question to grapple with is the question of  
8 whether this case is properly here before this tribunal at all.

9 THE PRESIDENT: Quite.

10 MR. PERETZ: As far Article 3 of the Council Regulation is concerned, yes again there is potentially  
11 an issue as to the application of Article 3, but that again is a secondary question – not  
12 necessarily of secondary importance, but secondary in terms of time – to the question of  
13 whether an appealable Decision has been taken here. Plainly, if there is no appealable  
14 Decision and the appropriate remedy is for the Appellant to go to the Administrative Court that  
15 is a matter for the Administrative Court to look at – and the Administrative Court is plainly  
16 capable of looking at. It is no doubt an interesting legal issue. But again, the question is  
17 whether it is a legal issue which is properly ventilated here.

18 Your sixth point was the reference to a letter from Bristol having been obtained under  
19 the Freedom of Information Act. I have not gone back through the relevant correspondence,  
20 but what I can say is that in general a lot of the correspondence has, so far as is possible,  
21 subject to confidentiality and so on been copied between the parties in relation to this case.  
22 The fact that a document has been obtained by invoking the Freedom of Information Act does  
23 not, of course, necessarily mean that it could not have been obtained by a simple request.

24 THE PRESIDENT: Sorry, you said in general the correspondence ----

25 MR. PERETZ: Has been copied. I have not been able to check every single example, and of course  
26 there are difficulties in copying correspondence in any event given confidentiality issues, but  
27 that has by and large gone on in this case.

28 THE PRESIDENT: Yes.

29 MR. PERETZ: Seven – the serious public health issue the Tribunal identified. Yes, that was a  
30 matter of considerable concern, and that is why, on 11<sup>th</sup> November, Ofwat organised a meeting  
31 between the parties to try and get the matter sorted out. As I have said, from our point of view,  
32 the root of the problem was that largely because of IWC's persistent failure to provide  
33 information sought in a satisfactory form, the Inset appointment process was taking a long  
34 time.

35 THE PRESIDENT: So you say IWC ----

1 MR. PERETZ: The timing issue was pointed out right throughout the application.

2 THE PRESIDENT: "IWC's delay in providing information."

3 MR. PERETZ: Yes. What I would like to do, Sir, if I may, is to take you through our submissions  
4 on admissibility as it now appears on the papers before us.

5 THE PRESIDENT: Well before we get to that – I think let us deal with that in a moment – I just  
6 want to see if Mr. Tupper and then Mr. Palmer or Dr. Bryan have any comments on those  
7 points so far and then we will come back to admissibility and see where we are on  
8 admissibility. Mr. Tupper, do you want to make any observations or reserve your position?  
9 Whatever is most convenient to you?

10 MR. TUPPER: I am going to do a little bit of both, if I may, Sir. First of all, obviously our  
11 application is still before the Tribunal and I am assuming that we are happy about Bristol's  
12 intervention?

13 THE PRESIDENT: Yes, there is certainly no difficulty about you intervening s far as I know, and  
14 no difficulty about you making representations.

15 MR. TUPPER: Well for the time being we are privy only to some of the applications that have been  
16 made to this court and the correspondence that has moved back and forth between the parties,  
17 so what we have to say ----

18 THE PRESIDENT: Yes, you do not have the main Notice of Appeal yet.

19 MR. TUPPER: So I think for the time being I will make two comments. Obviously, Bristol is  
20 sensitive to and would like to have an opportunity to exercise some lateral thought concerning  
21 the level playing field. But if I have two comments on that they are as follows: first, Bristol  
22 would like to suggest that the level playing field tilts probably against Bristol for the time  
23 being in this sense, Sir, that these parties have said various things and made allegations about  
24 Bristol Water in terms of its conduct. They have said some things which are somewhat  
25 scurrilous, and we are left in the position for the time being, Sir, of not being able to respond  
26 perhaps effectively or at all to the many allegations ----

27 THE PRESIDENT: Well you will have the fullest possible opportunity.

28 MR. TUPPER: I understand that, but there is that aspect that we are staked out for people to throw  
29 their allegations at us and we feel aggrieved that this should be the case.

30 They did also have an opportunity to pursue other lines of Appeal which they eschew,  
31 particularly the s.40 of the Water Industries Act line of appeal back to Ofwat was available to  
32 both the parties – something which they did not avail themselves of. So in many respects their  
33 presence before this Tribunal is very much a bed of their own making. They have come here  
34 before you because they have chosen to do so and I believe with that choice must come the  
35 consequences of that choice. Otherwise we would very much like to be in a position to support

1 the Director General as regards the arguments that they have made concerning jurisdiction, but  
2 until such time as we have seen those obviously the comments that we can make are going to  
3 be just of a general supportive nature.

4 For the time being there is not much else to add.

5 THE PRESIDENT: Well we will wait to see whether any of your lateral thinking produces any  
6 useful thoughts, but please be assured that your clients will have every opportunity to meet any  
7 criticism that may have been made.

8 Yes, now, Mr. Palmer, please feel as relaxed as you feel able to feel.

9 MR. PALMER: Thank you, Sir.

10 THE PRESIDENT: And tell us anything you would like to tell us.

11 MR. PALMER: Thank you very much. First, I would like to thank you all for allowing us to be  
12 here. As you are aware I am not a legal person. Although there is a good personal friendship  
13 with Dr. Bryan, there has been limited interface with him because, as you are well aware, he is  
14 busy on other matters and has a business to run.

15 What you and our colleagues here have had from us is produced purely by myself and  
16 my two colleagues here, neither of whom are in the legal profession. We have done our best,  
17 Sir.

18 THE PRESIDENT: Yes, thank you.

19 MR. PALMER: Trying to follow some of the order, Sir, we clearly have a totally different steer to  
20 the story that you are hearing from Ofwat regarding the information that has been needed, and  
21 has been submitted. The main basis of our problems has been the lack – and ongoing lack – of  
22 legal guidance. There is also the fact that it may seem to someone who has not had the  
23 opportunity to go through the Inset process in detail that there is a specified process on the  
24 chart but that requires a great deal of detail behind each item, and if you look for published  
25 guidance on some of them it is difficult to find and that is a question we have repeatedly asked.  
26 I think at this time we would probably like to refrain from taking that too much further because  
27 at a later date we feel we can demonstrate quite clearly that guidance has been quite weak in  
28 some very key areas, particularly on financial issues.

29 In general in relation financial issues as has been clearly shown on the chart and  
30 discussed that a viable financial business plan must depend on a suitable margin that will cover  
31 your cost, and this is the basis of our complaint in that the wholesale margin – if we should call  
32 it – that has been offered by Bristol Water does not permit a new entrant into the competitive  
33 environment to actually operate under a margin that we believe Ofwat would find acceptable,  
34 and I think it is that simple, Sir, and that is the basis of our complaint.

35 THE PRESIDENT: Yes.

1 MR. PALMER: The other problem associated with that, Sir, is that the Inset process cannot actually  
2 start until you have a viable business plan.

3 THE PRESIDENT: So it is a bit of a chicken and egg.

4 MR. PALMER: Very much so, Sir. As you are aware, we found the entry into the water  
5 competition arena somewhat different to other utilities.

6 THE PRESIDENT: Yes, you have a certain background in gas?

7 MR. PALMER: Yes, Sir. With regard to information I think we have certainly endeavoured in the  
8 spirit of things to be as genuinely helpful and co-operative as we can. Our strategy to dealing  
9 with regulators has always been one of co-operation. We do not believe that conflict is a good  
10 way forward and there have been certain comments by Ofwat after meetings that we have  
11 acted in that respect in that way. We think it is a far more productive way to go forward.

12 As you can see from the correspondence, in May when we put in the first competition  
13 complaint we were getting somewhat frustrated and so were our clients, George Wimpey.  
14 When we withdrew that we then realised that maybe we needed to know a lot more, and maybe  
15 our strategy of dealing with this in a friendly, open way was not working well. So we did file  
16 two or three questions under the Freedom of Information Act which, as you are fully aware,  
17 Sir, did produce **this** letter and some other things. But there was quite a lot of information that  
18 we think was not forthcoming, and may be helpful to us.

19 Regarding the public health issue, which is very, very serious as you pointed out.  
20 There is quite a lot of correspondence, and activities around that area that I think merit  
21 investigation, particularly with regard to the Drinking Water Inspectorate with whom we have  
22 had separate and parallel discussions. Let us say that they found that the way we were handling  
23 things were under the most unfortunate and undesirable circumstances the best that could be  
24 expected, and I think that we would like to have discovery on the correspondence that went on  
25 regarding all of that, Sir.

26 THE PRESIDENT: Discovery in relation to what? Between the Drinking Water Inspectorate and  
27 Ofwat?

28 MR. PALMER: Yes, Ofwat and Bristol Water. Thank you, Sir, unless you have any further  
29 questions at this moment.

30 THE PRESIDENT: No, thank you very much.

31 MR. PALMER: Thank you very much, Sir.

32 THE PRESIDENT: Dr. Bryan, do you want to add anything at this point?

33 DR. BRYAN: Thank you, Sir. I appear here with some regret. I do have other pressing matters, but  
34 I think it is perhaps the public health dimension here on which I do feel I am qualified to talk  
35 that marks this case out, and perhaps renders our application to intervene more important than

1 it would otherwise be. I think the view that Mr. Peretz put is perhaps slightly misleading with  
2 regard to public health matters. This was a strange case in that in terms of jurisdiction the  
3 Drinking Water Inspectorate had no jurisdiction. It was technically a private supply to the  
4 estate as it was being developed from June until late November when I believe the mains'  
5 connection was finally made. I know from discussions with DWI, although not wishing to put  
6 words into their mouth, that there was intense frustration at what they saw as an artificial and  
7 entirely unnecessary anomaly of the competitive process which gave rise to a clear increase in  
8 public health threat, although I fully ----

9 THE PRESIDENT: I do not want to go too far into the merits at this stage because we have not got  
10 past admissibility yet.

11 DR. BRYAN: I appreciate that, Sir.

12 THE PRESIDENT: But you are basically saying that there were some concerns about the tank and  
13 standpipe arrangement?

14 DR. BRYAN: There were concerns, Sir, that it was more vulnerable than a permanent mains'  
15 connection would have been, and that DWI had no authority to intervene, neither indeed did  
16 the local authority who might otherwise do so.

17 THE PRESIDENT: So is there nobody who can intervene?

18 DR. BRYAN: The only Regulator who had authority in that matter was Ofwat. Now Ofwat's  
19 powers do not ordinarily stretch to matters of drinking water quality but they do have as the  
20 core of their being, if you will, the requirement that they should protect the public interest and,  
21 in the absence of DWI, there was a duty on the Director to give that thought. What concerned  
22 me was that until we became involved in late October and, indeed, until I presented Ofwat with  
23 a very clear statement of concern that the current supply situation was, in my mind, untenable,  
24 it was only then following my letter I think of 2<sup>nd</sup> November that action was taken. I have to  
25 say in defence of the Director that from that point onwards they moved swiftly to ensure that  
26 the extra risks associated with the tank system were replaced with a more reliable mains'  
27 connection, but in the process effectively abandoned the competitive implications that gave  
28 rise to that situation at the start – and will give rise to that situation yet again where any new  
29 entrant seeks to supply any one of the 150,000 or more new homes a year which are required to  
30 be built and seeks a competitive alternative. That really brings me to my feet in this matter.

31 There are two other very brief points. As has been observed already I am no lawyer,  
32 but looking at OFT 422 I am struck by the primary responsibility (as I would see it) that the  
33 Director will use the powers to ensure that the competition process is unhindered by anti-  
34 competitive activity in the water and sewerage sectors.

35 THE PRESIDENT: That is which paragraph?

1 DR. BRYAN: This is para.2.1. Clearly the Director has discretion in how he uses his resources, and  
2 I believe that the issue of discretion was brought to the Tribunal's attention in the first  
3 *Aquavitae* Appeal. In the *Aquavitae* Appeal, if I remember correctly, the Director said  
4 effectively from the start that he had limited resources and he was employing them in another  
5 manner, namely the supply of the water supply licensing guidelines. Now the Director has not  
6 said that. In my mind, and looking at some of the correspondence, he clearly felt that there  
7 were grounds for if not an investigation then certainly the deployment of very significant  
8 resources over a protracted period of time.

9 THE PRESIDENT: In this case?

10 DR. BRYAN: In this case. The question then is how the Director dealt with that matter. Clearly he  
11 has concurrent powers under both the Act and the Water Industry Act 1991, and he is able to  
12 choose between those powers as I understand it reading 422. But para.2.7 of 422 is, in my  
13 mind, very clear. First, having already judged whether the matter is worthy of his attention at  
14 all, and I think the evidence is that he clearly did, he must then assess whether the pattern of  
15 behaviour that is being complained about falls within the scope of either his Water Industry  
16 Act powers, or his Competition Act powers. Only when he is satisfied that both those powers  
17 are adequate in scope, can he then choose between them. I think that the evidence I have seen  
18 and is now before the Tribunal shows rather clearly that on two major points, namely, the bulk  
19 supply pricing and the refusal of Bristol to consent to an Inset his Water Industry Act powers  
20 are at least suspect, and certainly Ofwat's own omission is that in terms of consent they are not  
21 adequate. I would have thought at the very earliest stage of this investigation (back in March)  
22 the Director should have come to that conclusion and concluded that he should have been  
23 using his Competition Act powers all along. I venture to suggest that had he done so we would  
24 not be here today, we would be much further advanced in an area which has significant  
25 implications both for competition in this sector and for public health.

26 In terms of a level playing field, if I may, I would suggest that the solution that I  
27 would find most acceptable and most practicable would be for the Director to reconsider that  
28 early exercise of his discretion and commit to a full Competition Act investigation of the  
29 matters complained about. That would effectively enable both IWC and Albion to stand down  
30 and to commit our resources to assisting the Director rather than in battling him.

31 Thank you, Sir.

32 THE PRESIDENT: Thank you, Dr. Bryan.

33 MR. PERETZ: If I may just reply briefly to some of those points?

34 THE PRESIDENT: Yes, of course.

1 MR. PERETZ: In terms of Mr. Palmer's criticism when he said the guidance was inadequate. The  
2 guidance is supplemented by detailed feedback. As I said to you earlier, every application is  
3 different, that is why there is a procedure for pre-application discussion and precisely what  
4 information is necessary in a particular case (and one can see this from the chart), and IWC  
5 was given that throughout the process.

6 Mr. Palmer identified what he called a "chicken and egg" problem in relation to bulk  
7 supply. That, with respect, is misconceived. If you look at the chart it is plain from the chart  
8 that it contemplates once an application has been put in ----

9 THE PRESIDENT: I am sorry, just let me go back to the chart. Yes.

10 MR. PERETZ: -- and this is entirely sensible and consistent with s.40, which I will take the  
11 Tribunal to when I address them on admissibility, s.40 contemplates first an attempt to reach  
12 agreement between the parties which is in the Statute and is obviously sensible, so that is the  
13 step at 2(a) before the application is prepared. The application will then be put in. You will  
14 then see at step 4(a) on the right hand side that, if necessary, the Director will determine the  
15 terms of a bulk supply. So it is clear from that that it is well contemplated that an application  
16 at step 3 may be put in where there has been no agreement as to bulk supply.

17 THE PRESIDENT: I thought the point he was making was that in this particular case he had an  
18 intimation to the effect that he should reach agreement first.

19 MR. PERETZ: Indeed, he should attempt to reach agreement first, that is step 2(a) "negotiate terms  
20 of bulk supply", also a connection agreement. As I said that requirement is not invented by  
21 Ofwat it is actually in s.40. Section 40 is only triggered when the Director is satisfied that  
22 there is a failure to reach agreement, so negotiation first and that is sensible. Obviously  
23 negotiations do not always succeed.

24 THE PRESIDENT: How is it supposed to work, Mr. Peretz? The Director is saying the applicant  
25 has to produce a financial plan and all the rest of it, but Mr. Palmer points out that it is very  
26 difficult to produce a financial plan until you have a bulk supply price, and if you cannot get a  
27 bulk supply price until you are told the Director has determined it, you cannot really progress  
28 your Inset application until he has determined it. There was never a determination, I do not  
29 think, in this case.

30 MR. PERETZ: Well it is not, with respect, a chicken and egg situation for this reason ----

31 THE PRESIDENT: So what do you say should have happened that did not happen?

32 MR. PERETZ: What should have been put in – and this was explained to IWC – is a series of  
33 assumptions as to bulk supply price. One recognises that in a situation where negotiation has  
34 failed then an application will have to be put in without a bulk supply price having been  
35 agreed.

1 THE PRESIDENT: You say there is some correspondence that explains all this?

2 MR. PERETZ: Yes. What one would expect any prudent business man who is developing a  
3 proposal along these lines to have in his or her mind is essentially a sensitivity analysis – what  
4 sort of bulk supply price do they need to make it viable? What are the implications for  
5 profitability of various different possible bulk supply prices? It simply beggars belief that any  
6 prudent business man would go into the expense of dealing with an application without having  
7 thought those issues through. What is required is for him to share that thinking with Ofwat.  
8 Plainly no final business plan can be prepared until the bulk supply price is determined and  
9 that is not insisted upon, and that is clear from the chart. The application is submitted – step 3;  
10 step 4(a) if necessary – that is why it is in dashed lines – Ofwat proceeds to determine the  
11 terms of a bulk supply. Of course at that stage, and one can see further down 4(b) that once  
12 the bulk supply price is determined the Applicant will have to think about whether that bulk  
13 supply price is consistent with a viable business plan and if it is not they will withdraw; if it is  
14 they will continue. So that is the process. It is quite clear from the chart, it is clear from the  
15 guidance, and it was explained repeatedly to IWC and there is no chicken and egg situation  
16 here.

17 The other point to bear in mind in looking at Inset applications is this: an Inset  
18 application is an application to be appointed the statutory monopolist for a particular area for  
19 practical purposes I say “forever” but for the foreseeable future. A statutory water undertaker  
20 has a number of very important responsibilities particularly where (as here) they are going to  
21 supply a number of individual consumers, who have no choice. In a case where the developer  
22 (as here) has gone to somebody else the consumers who then buy houses from that developer  
23 are lumbered with that choice as a statutory monopolist. It is important to get that in  
24 perspective.

25 THE PRESIDENT: Well they are also lumbered with the choice of Bristol Water ----

26 MR. PERETZ: Or they are lumbered with the choice of Bristol Water.

27 THE PRESIDENT: -- whatever way round it is they are lumbered with someone.

28 MR. PERETZ: That is right, and it is largely because the consumer is stuck with the water supply  
29 that great care has to be taken to make sure that the water supplier is capable financially,  
30 technically and operationally of discharging their functions, which relate to water quality,  
31 matters such as leakages, financial viability. It would clearly be very unfortunate if a statutory  
32 water undertaker goes bust, there are various arrangements to deal with insolvency in the Act,  
33 it is clearly an unfortunate situation. They have to be prepared to discharge their  
34 responsibility. They also have some very important powers, rights of entry on to land, for  
35 example, and again it is important that great care is taken before a company unknown to Ofwat

1 is appointed – a number of steps have to be taken. This is not bureaucracy run mad, this is an  
2 important safeguard for the consumers who will be lumbered with in this case IWC as the  
3 statutory undertaker.

4 The second point I want to come back on very quickly is the level playing field point.  
5 It is difficult and perhaps it goes without saying but I shall say it anyway, in a situation where  
6 the Director, as a public Body, is represented by counsel great care will be taken, in accordance  
7 with the duties of counsel with an unrepresented Applicant, to make sure that the Tribunal has  
8 the full picture.

9 THE PRESIDENT: I am sure it does go without saying, Mr. Peretz, we have every confidence.

10 MR. PERETZ: That needs to be borne in mind, and this is not an unfamiliar situation in public law  
11 that you have an individual against a Government Department. It may be unsatisfactory but  
12 the way our procedure works generally is that Parliament decided, save in certain  
13 circumstances, legal aid probably is not available here to a corporate applicant in any event.  
14 That is a choice made by Parliament – it may be unsatisfactory but the courts, by and large,  
15 cope with it as best they can.

16 THE PRESIDENT: There are some interesting decisions in Canada, are there not, on the  
17 circumstances in which the defendant Government can actually be required to pay the costs of  
18 the Applicants in relation to the Indian Reservations and so forth.

19 MR. PERETZ: Yes, I have to say we find it very difficult here to see any basis where we can spend  
20 money supporting the Applicant if that were to be suggested.

21 THE PRESIDENT: No, the question would not be whether you could spend money but whether we  
22 would have the power to require you to, and that would take us back to our cost rules and quite  
23 a complicated argument that the Court of Appeal has not found able to accept in the terms of  
24 the Civil Procedure Rules, but in terms of the Tribunal Rules there may be an argument there, I  
25 just do not know.

26 MR. PERETZ: A final point I want to make is responding quickly to what Dr. Bryan was saying  
27 about the public health issues. With respect this illustrates the dangers of getting into this case  
28 without first working out the issue of what the Tribunal's jurisdiction is in relation to particular  
29 questions. I put it bluntly: before the Tribunal starts digging it had better be sure that it is its  
30 garden that it is digging in. We have seen absolutely no case whatsoever for saying that the  
31 various matters connected with the powers of the Drinking Water Inspectorate in relation to  
32 questions of public health involve an appealable Decision or are in any way relevant to an  
33 appealable Decision. They are no doubt interesting matters – all sorts of matters are interesting  
34 – but the question the Tribunal must ask is whether they fall within its jurisdiction and whether  
35 there is a legal question there to which digging is necessary in order to provide the answer.

1 THE PRESIDENT: That is, of course, absolutely right, Mr. Peretz, but you cannot expect us to put  
2 on blinkers when we read about public health risks arising out of what has happened in this  
3 case. It is obviously a matter any court would want to know about.

4 MR. PERETZ: Indeed, Dr. Bryan said “late” which we would reject, but he said very fairly he is  
5 prepared to accept that at least at one stage we moved very fast to deal with the issue, and we  
6 were well aware of those issues.

7 Dr. Bryan also made a number of points about admissibility. What I really would like  
8 to do is to take the Tribunal through the case on admissibility as it stands because in our  
9 submission as it stands the case is plainly hopeless on admissibility, and I would like to explain  
10 why.

11 THE PRESIDENT: Well that is the question that I am not sure we are necessarily ready to deal with  
12 today.

13 MR. PERETZ: Well I think it might assist the Tribunal if I went through it because it may be that  
14 the Tribunal feels that some other question needs to be answered or some further documents  
15 need to be produced before it can answer the question but it may well focus discussion if we  
16 can see exactly what those issues might be. Our concern is in this case that we end up going a  
17 long way down the road spending both public money on our part, and Mr. Palmer’s and IWC’s  
18 time – if not money – on their part, only to find at the end of the day that we all find that we  
19 are in the wrong place.

20 THE PRESIDENT: Well I should not worry about Mr. Palmer it is up to him to decide what he  
21 wants to do. You are not there to protect ----

22 MR. PERETZ: I am not there to protect Mr. Palmer, but I am there certainly to protect the Director  
23 and public money and we have a certain legitimate interest on our part in seeing that we start  
24 off in the right place.

25 THE PRESIDENT: I think before we get into admissibility we would want to know whether there is  
26 any practical solution to the level playing field point.

27 MR. PERETZ: We have considered the matter to some extent ourselves. We have not, I am afraid  
28 been able to identify on our part any solution to the problem. Sir, if you think it is appropriate  
29 we can pause for five minutes and see if any further ideas occur to us.

30 THE PRESIDENT: That would be a good idea because I think we would want to pause as well,  
31 having had this interchange, to see where we are in the light of all this and those useful  
32 submissions you have just been making to us. However, we are very anxious that there should  
33 be some solution to this level playing field point and it does not seem impossible, and I will not  
34 say any more than that, but let us see whether there is one before we get into more detail.

35 MR. PERETZ: Yes.

1 THE PRESIDENT: We will rise for at least 10 minutes and then see where we are.

2 (The hearing adjourned at 12.35 p.m. and resumed at 12.50 p.m.)

3 THE PRESIDENT: Yes, Mr. Peretz?

4 MR. PERETZ: Sir, I have two things to say, one positive and one negative; I shall start with the  
5 positive suggestion and that is that one way forward might be for the Tribunal to consider  
6 appointing an *amicus* in order to assist it on questions that arise.

7 THE PRESIDENT: And how would we pay for that?

8 MR. PERETZ: Well unfortunately neither I nor those behind us have any personal experience of  
9 funding of *amicae curiae*, but what we understand the procedure to be is that it is funded either  
10 by the Tribunal itself or by the Treasury Solicitor's Department, the Treasury Solicitor having  
11 a role as formally instructing the *amicus*. I do not think at the moment we can take that much  
12 further. That is the positive suggestion.

13 I am afraid the negative point that I have to make is that first of all we see no power  
14 under our own statutes, and of course the Director is a creature of the statute, to fund an  
15 Appellant. This is not something that we could properly agree to do, and in terms of the  
16 Tribunal's powers to order costs we simply have to say this, which is that an order on us to pay  
17 costs towards an Appellant in this situation would, in our view, raise an important question of  
18 principle ----

19 THE PRESIDENT: Yes, it would.

20 MR. PERETZ: -- which, subject to further instructions and considerations is one that we might well  
21 have to take to the Court of Appeal.

22 THE PRESIDENT: Well it is the *Corner House* Decision, is it not, para.55.

23 MR. PERETZ: Indeed, and perhaps that is not something that is calculated to speed up the present  
24 proceedings at all, but it is a reflection that we might well have to take.

25 THE PRESIDENT: Ofcom I think has done a similar thing in the *Floe* case, at least in terms of  
26 ensuring representation for the Appellant, I think both in front of the Tribunal and in front of  
27 the Court of Appeal. I think in the end they agreed to meet the costs of representation on  
28 behalf of the Appellant who was a company in liquidation. I may not have the complete  
29 details at the forefront of my mind, but there is some agreement.

30 MR. PERETZ: I am afraid it is not a case I am involved in and it is a case that I am afraid I have not  
31 followed the twists and turns of myself so I cannot assist the Tribunal now on that. That is  
32 really all I can say at the moment.

33 THE PRESIDENT: Yes. Any lateral thinking, Mr. Tupper?

34 MR. TUPPER: I am afraid, Sir, our attempts to think laterally have not come up with any particular  
35 solutions. As I stated before, we are obviously not particularly well disposed to assist in such

1 circumstances given the gravity of the allegations that are made against our client, and also  
2 given the underlying tone, I suppose, of the presentations that have been made, on paper at  
3 least, to the Tribunal. We will, of course, do what we can to be accommodating and flexible,  
4 but certainly any suggestion that we should fund litigation of this sort obviously would have to  
5 be rejected, even though I do understand the implications of it. We have talked in the past  
6 about *pro bono* initiatives and we are in the process of trying to set one up – this is more a  
7 remark perhaps “off the record”, but we are still a long way from being in a situation where  
8 that can be offered to the Applicants in these circumstances.

9 Unless I can assist further?

10 THE PRESIDENT: No. Thank you. Have you any observations or further comments on the  
11 situation, Mr. Palmer? Or do you leave it to the Tribunal to decide what to do next?

12 MR. PALMER: Thank you, Sir, no, I do not think I have anything to add to that, if I can leave it to  
13 the Tribunal, Sir. Thank you.

14 THE PRESIDENT: Dr. Bryan?

15 DR. BRYAN: No, Sir.

16 (The Tribunal confer)

17 THE PRESIDENT: Our present view, Mr. Peretz, is that we should still try to explore whether or  
18 not there is some solution to the level playing field problem, either via an *amicus* or by some  
19 other route. Speaking at least for myself I am hesitant as to whether we should go into  
20 admissibility until we have seen what the result of all that is, which would mean effectively  
21 what we would do today is to adjourn the issue of admissibility and/or strike-out of the  
22 application to a date to be fixed in the fairly near future, with a view to seeing whether we can  
23 solve this particular problem, and if we cannot the Tribunal will have to go on as best it can. I  
24 know that leaves the matter open, but if I have understood the Appellant’s position their view  
25 is that they have staked their case on coming before the Tribunal and they do not see Judicial  
26 Review as a practical alternative and that is up to them, they could at any time start a Judicial  
27 Review case if they wished – they could have already done so – but I do not think that is really  
28 a material consideration from our point of view. I think we should just try to grapple with the  
29 issue of admissibility under the best conditions that we can construct, because there are some  
30 quite important issues on admissibility and it may not be at all clear cut, but we have not yet  
31 heard any argument on it and it is probably better that we do not until we see where we are.

32 MR. PERETZ: If you would just give me a moment, Sir?

33 THE PRESIDENT: Yes.

34 MR. PERETZ: (After a pause) Sir, what we would therefore suggest – we have emphasised that the  
35 question of admissibility does need to be grappled with ----

1 THE PRESIDENT: Absolutely.

2 MR. PERETZ: -- and needs to be grappled with at an early stage.

3 THE PRESIDENT: Yes.

4 MR. PERETZ: There is obviously a timing problem in relation to Judicial Review as far as Mr.

5 Palmer is concerned ----

6 THE PRESIDENT: Well that is in Mr. Palmer's hands.

7 MR. PERETZ: -- which is in Mr. Palmer's hands. But in fairness to all concerned, if this Appeal is

8 plainly inadmissible (as we say it is) that needs to be sorted out at the earliest possible stage,

9 and if Mr. Palmer then chooses to go to Judicial Review, and if he is lucky enough to find the

10 Judge is Sir Christopher Bellamy QC sitting as a Deputy High Court Judge, then we can all

11 take it from there, at least we know we are in the right place.

12 I have obviously prepared submissions on admissibility and we would suggest that at

13 the next hearing that we deal with that. We can turn my prepared oral submissions into written

14 submissions which take the Tribunal through the corresponding including one, I think possibly

15 two, extra letters in the correspondence clip which the Tribunal now has, and demonstrate that

16 if one looks at the material it is crystal clear that there is no appealable Decision.

17 THE PRESIDENT: I think that would anyway be a useful approach, Mr. Peretz.

18 MR. PERETZ: The bottom line – and Dr. Bryan revealed it when he was speaking earlier – is that

19 the discussion is constantly in terms that we should have looked at the matter under the

20 Competition Act but did not. However, “should” is not good enough, one needs to establish

21 that we did consider the matter under the Competition Act, and it is really inherent in the

22 Appellant's own Appeal, on what Dr. Bryan says, that we did not in fact that is the subject of

23 their complaint. The point is in the end that simple. But what we can do is to take the Tribunal

24 through the relevant correspondence and written submissions and then everyone will know

25 where we stand.

26 THE PRESIDENT: What would be most helpful from our point of view – I am just thinking aloud –

27 I know we have to deal formally with the interventions in a moment, I have not forgotten that,

28 but what we would formally do is to say that we would deal with the question of admissibility

29 and/or the application to strike out as preliminary issues. We will do that on a date to be fixed,

30 the date to be fixed as soon as convenient.

31 MR. PERETZ: Yes.

32 THE PRESIDENT: And in that regard if you are able to convert your oral submissions into a

33 skeleton and file it with the Tribunal in – it is up to you – 7 days, 14 days, something of that

34 kind, that would enable us to be getting on with it.

1 MR. PERETZ: I am perfectly happy to do that. Indeed, if an *amicus* were to be instructed, or some  
2 other solution adopted which affords legal representation, then the lawyer would have the  
3 benefit of looking at what we say ----

4 THE PRESIDENT: That would help focus everybody's mind on it.

5 MR. PERETZ: We would submit it is a quite likely proposition that the lawyer looking at it will see  
6 the case as unarguable on their part then they can say so and so advise Mr. Palmer.

7 THE PRESIDENT: Yes, well let us see how we go.

8 MR. PERETZ: That may be too optimistic but, in any event, we will all know where we stand. I  
9 will just look behind me, but I think we can live with that.

10 THE PRESIDENT: Very well. We have to deal, formally speaking, with the interventions. I think  
11 we formally admit Bristol Water. What is the position as regards Albion? Is there an objection  
12 to that?

13 MR. PERETZ: Well we put in a letter to the Tribunal, I think sent last Friday.

14 THE PRESIDENT: Sorry, Mr. Peretz, if it was sent last Friday I may not be on top of it.

15 MR. PERETZ: It is a letter dated 17<sup>th</sup> February signed by Mr. Brooker on behalf of Ofwat.

16 THE PRESIDENT: Yes.

17 MR. PERETZ: (After a pause) The matter to be addressed at the moment, given that we are  
18 thinking in terms of taking admissibility as a preliminary issue, the question whether Albion  
19 might or might not have anything to contribute, as it were, on the merits of the case, is a  
20 question that can be parked at this stage.

21 THE PRESIDENT: Well we would not be dealing with the merits. At the moment I cannot see any  
22 real objection to Albion being permitted to intervene on the basis that permission is limited to  
23 the question of admissibility.

24 MR. PERETZ: Well I think the question then has to be asked as to what Albion has to add of any  
25 value on the question of admissibility. One sees the two sitting next to each other over **there**.  
26 It is plain that any points that Albion wishes to make can be made to IWC – probably have  
27 been made to IWC – and if IWC think that they are appropriate they can take them. It is  
28 obviously somewhat unsatisfactory from our point of view that we will have to deal with a  
29 chorus on the other side rather than soloist.

30 THE PRESIDENT: What I would suggest, Mr. Peretz, and I think you would be sufficiently  
31 protected if we say that Albion Water is formally admitted to intervene limited to the question  
32 of admissibility, but not without the Tribunal's permission to file any further Statement of  
33 Intervention, or anything of that kind, so that they are formally entitled to be here.

34 MR. PERETZ: Yes.

1 THE PRESIDENT: Then since part at least of the case in the correspondence, as I have understood  
2 it was that we are going to look at Albion's complaint rather than your complaint it seems to  
3 me that their presence here is, to a certain extent, logical, and please feel free to intervene if  
4 you think at any stage Albion Water oversteps the mark of the extremely limited status I am  
5 proposing to accord it.

6 MR. PERETZ: I am happy with that.

7 THE PRESIDENT: Dr. Bryan?

8 DR. BRYAN: I am entirely content, Sir.

9 THE PRESIDENT: Yes, very well. We will adjourn for today. Thank you very much.

10 (The hearing concluded at 1.05 p.m)