Neutral citation [2007] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1042/2/4/04

Victoria House
Bloomsbury Place
London WC1A 2EB

8 January 2007

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

and

WATERLEVEL LIMITED

Appellants

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly DIRECTOR GENERAL OF WATER SERVICES)

Respondent

supported by

THAMES WATER UTILITIES LIMITED

Intervener

JUDGMENT ON COSTS (BATH HOUSE)

Rhodri Thompson QC and John O'Flaherty for Albion Water Limited

Jon Turner and Valentina Sloane (instructed by the Director of Legal Services, Ofwat) for the respondent

Stephen Tupper (of Watson, Farley & Williams) for the intervener

I INTRODUCTION

1. The Tribunal's judgment [2006] CAT 7 in this case (Case no. 1042) concerning the application of the Chapter II prohibition imposed by section 18 of the Competition Act 1998 ("the 1998 Act"), in relation to Albion's application to Thames for common carriage terms in relation to two boreholes in East London, was handed down on 31 March 2006 ("the judgment"). Written submissions on costs were made by the parties in the course of April 2006, with a further short exchange of correspondence in June 2006.

2. Having regard to a possible overlap of certain issues on costs, the Tribunal deferred its ruling on costs in this case pending the completion of Case no. 1046, *Albion Water v. Water Services Regulatory Authority* ("the *Shotton* case"), in which the Tribunal gave judgments on 22 December [2005] CAT 40, 6 October 2006 [2006] CAT 23 and 18 December 2006 [2006] CAT 36. The parties have reiterated their submissions on costs in this case, in parallel with the submissions on costs in Case no. 1046.

3. The respondent Authority's position is that, having regard to the outcome of this case, Albion should recover no costs. The Authority further submits that Albion should recover no costs, even if it would otherwise be entitled to do so, given its arrangements with its legal representatives, and the fact that Albion claims it is entitled to its "internal costs". The arguments of the parties, in that regard, and the Tribunal's views on the arguments, are set out in our decision on costs in the *Shotton* case [2007] CAT 1, and we do not repeat those arguments in this judgment.

4. We first determine the primary liability of the Authority, in principle, to pay costs to Albion. We then deal shortly with the Authority's further arguments, and the assessment of costs.

II THE BACKGROUND AND SUBMISSIONS OF THE PARTIES ON THE PRIMARY ISSUE OF LIABILITY FOR COSTS

5. Albion seeks its full costs in this case against "the Director[1] and/or Thames Water", on the basis that its appeal to the Tribunal was successful. Albion seeks counsels' fees and what it refers to as its "internal costs".

6. The procedural history of this case is set out in summary in the judgment at paragraphs 10 to 25 and, in more detail, at paragraphs 73 to 116 (the request for an access price covering the period from May 2000 to March 2002), paragraphs 117 to 141 (the Director's decision of 8 March 2002, the intervening correspondence and the subsequent decisions of 1 April 2004 and 11 May 2004) and paragraphs 142 to 144 (the procedure before the Tribunal).

7. In brief, Albion's amended notice of appeal of 7 December 2004 criticised the Director's decisions on various factual and legal grounds and contended in particular that the Director should have found three abuses of a dominant position against Thames, namely:

> "(1) setting prices for common carriage at a level that made it impossible for a provider of water resources and treatment services, that was both reasonably efficient and equally or more efficient than Thames Water, to compete with Thames Water in the supply of water within Thames Water's area of supply;
>
> (2) refusing to ascribe any value to the substantial additional water resources to be made available by Albion from the Bath House and Albion Yard boreholes; and
>
> (3) seeking to recover sums in respect of alleged balancing costs for surplus water that were wholly unproven."

Albion also asked that the matter be remitted to the Director under Schedule 8, paragraph 3(2) of the 1998 Act.

8. At the main hearing on 20 June 2005 the Tribunal rejected an attempt by Albion, via its skeleton argument, to raise the issue that Thames had abused a dominant position in delaying to quote an access price to Albion: [2005] CAT 23.

[1] Since 1 April 2006 the Director has been succeeded by the Water Services Regulatory Authority ("the Authority") pursuant to the Water Act 2003 ("WA03").

9. As appears from the judgment, the arguments concerning the live issues coalesced into two main groups: (i) issues concerning the initial access price of 27p/m³ quoted by Thames in 2000, and (ii) issues relating to the Director's findings in relation to the financial arrangements applicable in the event of the over/under supply of water by Albion into the Thames system.

10. As regards the first group of issues concerning the initial access price of 27p/m³, Albion submitted, principally, that the Director should have found that price to have been excessive, and also that that price gave rise to a margin squeeze. The Tribunal found: (a) that, formally speaking, the Director had impliedly concluded in his decision of 1 April 2004 that the access price of 27p/m³ did not infringe the Chapter II prohibition; (b) that that formal conclusion was inconsistent with the Director's view expressed to Thames in correspondence to the effect that that price was potentially in breach of the 1998 Act; (c) that, in consequence, the implied formal finding by the Director to the effect that there was no breach could not stand; but (d) that it was not appropriate for the Tribunal to make any formal order of remittal or otherwise on this aspect, since the initial access price had been superseded by the later access price of 13.6p/m³ quoted by Thames in 2002 after the Director's intervention; and (e) that it was not appropriate for the Tribunal to require the Director to reconsider the legality or otherwise of the earlier superseded price of 27p/m³ quoted by Thames in 2000. The Tribunal considered it unnecessary to address the margin squeeze issue raised by Albion in this case. In any event a similar issue was then pending before the Tribunal in the *Shotton* case (see paragraphs 172 to 178 of the judgment).

11. The second group of issues, essentially concerned Albion's contention that it was an abuse for Thames to require Albion to pay Thames when Thames made up any under-supply to Albion's customers, but not to give any credit in respect of over-supply, when Thames benefited from surplus water introduced into its system by Albion. Albion submitted that the Director's contrary conclusion was factually incorrect or inadequately reasoned.

12. The Tribunal found on analysis that Albion was making two separate submissions (i) that Thames should give Albion credit for the whole amount of water that Albion put into Thames' system (the "credit for total supply" issue); and (ii) that Thames should at

least give credit for "overs" – i.e. surpluses that arise when water is pumped into the system, but the customer's demand is less, for example during an off-peak period, given that Albion was to be charged for any under-provision against the demand from its customers (the "overs and unders" issue): see paragraphs 213 to 215 of the judgment.

13. As to the "credit for total supply" issue, the Tribunal found that Albion had not raised that matter in its complaint, and that the material placed before the Tribunal by Albion was sparse (paragraphs 220 and 221 of the judgment). The Tribunal did not rule on that issue.

14. As regards the "overs and unders" issue, the Tribunal held that the Director's reliance in his original decision letter of 8 March 2002 on "balancing and buffering costs" was unfounded in fact (paragraphs 228 to 232 of the judgment). The Tribunal further held that the Director's reasoning in his decision letter of 1 April 2004, which effectively relied on a statement made by Thames in a letter of 21 September 2001, did not deal adequately with the arguments advanced in the letter from Enviro-Logic, Albion's then parent company, of 6 August 2002: see in particular paragraphs 250 to 258. The Tribunal did not remit the issue to the Director since by the date of the judgment the matter was affected by the coming into force of the WA03, and for the other reasons set out in the judgment at paragraph 265. It is fair to add that there was also a degree of ambiguity as to what was the exact scope and significance of the disagreement between the parties on the "overs and unders" issue (paragraphs 239 and 240 of the judgment).

15. In those circumstances Albion seeks its costs on the basis (i) that the Tribunal found in its favour on the issue of the allegedly excessive price of 27p/m^3 at paragraphs 171 and 172 of the judgment, albeit that the Tribunal did not remit the matter; and (ii) that Albion had been successful on the "overs and unders" issue at paragraphs 250 to 264 of the judgment. Albion also relies on various comments the Tribunal made about the delay in the administrative procedure and the Director's handling of complaints (paragraphs 149 to 150, and 268 to 269), and contends that a combination of the administrative delay and the actions of Thames has caused Albion to lose various commercial opportunities.

16. In addition, Albion complains notably that the Director's approach was "high handed"; that he espoused too readily and unquestioningly the reasoning of the incumbent monopolist in Thames' letter of 21 September 2001 (not disclosed to Albion in the administrative procedure); that this was a "David and Goliath" battle; that the issues were of public importance; and that minimal time was spent on issues such as the "credit for total supply" issue where Albion was not successful.

17. The Authority submits that costs should lie where they fall. According to the Authority, neither party "prevailed in a decisive way": *Institute of Insurance Brokers v. Director General of Fair Trading* ("the *GISC* case") [2002] CAT 2, paragraph 50. Albion's case shifted considerably during the proceedings, and it lost on significant points and abandoned others. The proceedings did not establish any point of significance, according to the Authority.

18. In particular, according to the Authority, Albion did not pursue the allegation in the amended notice of appeal that the revised access price of 13.6p/m³ gave rise to a margin squeeze, nor certain other grounds relating to Thames' allegedly exclusionary conduct, nor the cost of surplus water, nor Thames' allegation that Albion was not pursuing a serious commercial proposition. Neither the margin squeeze allegation relating to the price of 13.6p/m³, nor the "credit for total supply" issue, had figured in the administrative procedure. Albion failed to persuade the Tribunal that it should make a formal finding of abuse in relation to the price of 27p/m³, either in relation to excessive price or margin squeeze, or to rule on the issue of delay, or to rule on the "credit for total supply" issue, or to rule on certain other allegations. The Authority relies on *Hutchison 3G (UK) Limited v. Office of Communications* [2006] CAT 8, at paragraph 44, where the Tribunal ordered the costs to lie where they fall. The Authority further submits that Albion litigated – unsuccessfully – points on the access prices of 27p/m³ and 13.6p/m³ solely in order to lay the foundation for a claim to damages. Even on the "overs and unders" issue, the Tribunal refused to remit that matter for the reasons given in paragraph 265 of the judgment. According to the Authority, it was never clear whether the "overs and unders" issue was relevant to the commercial decision as to whether or not to develop the boreholes, or was a problem in practice. Albion did not reply to Thames' letter of 31 July 2002, to which we refer below. The Authority also refers to the efforts made by the Director's Head of Legal Services to alert Albion to

aspects of the legal position before deciding to go down the path of litigation without, however, putting any undue pressure on Albion whatever. According to the Authority, it was Albion who resisted the amicable resolution of these proceedings at the case management conference on 23 November 2004: see [2004] CAT 21.

19. In any event, the Authority contends that neither counsels' fees nor Albion's internal costs are recoverable. On these, the Authority advances the same arguments as it did on the issue of costs in the *Shotton* case.

III THE TRIBUNAL'S ANALYSIS OF WHETHER ALBION IS IN PRINCIPLE ENTITLED TO COSTS

20. Rule 55 of the Tribunal's Rules provides:

> "(1) For the purposes of these rules 'costs' means costs and expenses recoverable before the Supreme Court of England and Wales…
>
> (2) The Tribunal may at its discretion, subject to paragraph 3, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court…"

21. That Rule gives the Tribunal a wide discretion as to costs, as discussed in a number of previous decisions including *Hutchison*, cited above, and *Racecourse Association and British Horseracing Board v. OFT* [2006] CAT 1. There is no rule that costs follow the event but, subject to other considerations, the fact that a party has won is a starting point for considering the exercise of the Tribunal's discretion: the *Racecourse Association* case, cited above, at paragraphs 7 to 9. But other factors, such as the fact that the appellant succeeded only on a narrow point, and had advanced shifting and changing arguments, may point to a different conclusion: *Hutchison 3G*, cited above,

at paragraph 44. Each case will depend on its particular facts and circumstances: *Hutchison 3G*, at paragraph 42.

22. In this case, there were a number of issues on which Albion did not prevail, or did so only in a formal way. The issue of delay in quoting an access price, and the issue of "credit for total supply" were in effect excluded by the Tribunal because they had been raised too late in the day. As to the access price of 27p/m³ quoted by Thames in 2000, although formally speaking the Director's decision involved a finding of non-infringement, which the Tribunal found could not stand, that price had been superseded by the access price of 13.6p/m³, quoted in 2002, before these proceedings started, and was accepted by Albion. In those circumstances the Tribunal declined Albion's request to remit to the Director the question, by then academic, as to whether the earlier price of 27p/m³ was at the time excessive. Similarly it was not appropriate for the Tribunal to deal with the margin squeeze issue raised in the amended notice of appeal. Various other points raised by Albion were, in the end, not pursued for one reason or another.

23. In all those circumstances, this is not a case where, in the Tribunal's view, it would be appropriate for Albion to recover its full costs of the appeal.

24. On the other hand, Albion did succeed on a solid point in relation to the Director's reasoning on the "overs and unders" issue. In the letter of 6 August 2002, Enviro-Logic put to the Director a reasoned argument on this aspect based, among other things, on the difficulty that can arise where it is economically desirable to pump from a borehole at a constant rate, but the customer's demand inevitably has peaks and troughs (paragraph 234 of the judgment). The Tribunal found that the Director did not deal adequately with the arguments advanced in Enviro-Logic's letter of 6 August 2002, apparently relying unquestioningly on Thames' earlier letter of 21 September 2001. However, that letter of 21 September pre-dated by nearly a year Enviro-Logic's letter of 6 August 2002, and was not addressing the points which Albion was making. The Director's readiness to accept, unverified, the assertion of the incumbent supplier (Thames) was, in our view, unfortunate and led to the defect of reasoning in the Director's letter of 1 April 2004, which in turn led the Tribunal to set aside that part of the decision, for the reasons given at paragraphs 236 to 264 of the judgment. We note also that the Director's reliance in his letter of 8 March 2002 on "balancing and

buffering costs", which formed part of Enviro-Logic's argument in the letter of 6 August 2002, was effectively abandoned by the Director in the course of the proceedings.

25. In addition, as pointed out at paragraph 256 of the judgment, the Tribunal has reservations about the credibility of a number of the arguments advanced to it by the Director (and Thames) about the potential lack of value to Thames of water from borehole sources such as those here in question, including the suggestion that such water would "evaporate before it was needed" or would simply "slop over the side of the reservoir". As the events of the summer of 2006 unfolded, subsequent to the judgment, the full extent of the supply shortages in the London area became all too apparent.

26. We do not attach importance to the fact that Albion did not respond to Thames' letter of 31 July 2002, since on 6 August 2002 Albion had seized the Director with a formal request to deal with the "overs and unders" issue, and it was up to the Director to deal with that request and give proper reasons for rejecting it. Similarly, in our view, Albion's right to a reasoned answer to the arguments being advanced does not depend on the Tribunal taking a view as to the commercial viability or otherwise of these particular boreholes, which is a matter the Tribunal is not in a position to determine. Nor do we accept the Authority's submission that the question of the treatment of "overs and unders" in a common carriage context is without practical importance.

27. It is true that the Tribunal did not remit the "overs and unders" issue to the Director. This was principally because, by the date of the judgment, the provisions of the WA03 were in force: see paragraph 265. Notwithstanding the Director's suggestion that it was never clear whether Albion really intended to develop these boreholes, had the administrative procedure in this case not taken nearly four years, the issues would have been sorted out earlier and the question of a remittal would have arisen in a different context.

28. We also bear generally in mind that there is force in Albion's submission that this case involved a small company contending against the regulatory authority working in apparently close collaboration with an incumbent monopolist supplier. The disparity of

resources between the parties is very striking and that is a factor which distinguishes this case from the situation considered by the Tribunal in *Hutchison 3G*.

29. In section VII of the Tribunal's judgment dealing with the substantive issues, the question of "overs and unders", on which Albion succeeded, occupies a substantial part. Bearing that in mind, together with all the other considerations set out above, we have come to the conclusion that Albion should be awarded 50 per cent of its otherwise recoverable costs of these proceedings against the Director.

IV ASSESSMENT OF COSTS

Counsels' fees

30. In this case, Albion claims counsels' fees in the sum of £49,700 (excluding VAT) in respect of Mr Thompson and £28,750 in respect of Mr O'Flaherty (excluding VAT), mainly at the rates of £400 and £200 per hour respectively.[2]

31. For the reasons given in our parallel judgment on costs in *Shotton*, we consider that counsels' fees are in principle recoverable. The total quantum sought is £78,450. Since most of the costs in this case were incurred prior to January 2006, we consider it appropriate to make only small adjustments as regard the increases in counsels' fees which occurred after that date. The hours claimed (some 123 hours for leading counsel and 142 hours for junior counsel) relate principally to preparing the notice of appeal and reply, preparing the skeleton argument, preparing and conducting the two day hearing in June 2005, and considering generally the papers and submissions of the other parties.

32. In our judgment, those hours worked lie within a reasonable range. As regards the rates charged, given that the global amount of costs which we consider Albion is properly entitled to is not, comparatively speaking, a large sum, we do not propose to reduce counsels' fees in this case substantially by way of assessment. A reduction of the order of 10 per cent would give a figure of some £71,000.

[2] A small number of Mr O'Flaherty's hours prior to February 2005 should have been charged at £150 an hour. A small number of hours were charged at increased rates after 23 January 2006. We take account of this in our assessment.

Albion's internal costs

33. In a schedule dated 24 November 2006 Albion further claims its internal costs in the sum of some £32,800, in round figures. That is substantially made up of the contention that Dr Bryan (£20,350), Mr Jeffery (£6,750) and Mr Knaggs (£3,350) were acting as experts, and that the costs of that work are reasonably calculated at an hourly rate based on their normal salaries. In addition, £1,100 is claimed for legal work undertaken by Dr Bryan of the kind normally done by a solicitor and some £1,660 is claimed for disbursements.

Work done as experts

34. As to the sums claimed in this case in respect of "expert work", in its schedule dated 24 November 2006 Albion claims to recover costs in respect of 359 hours of work by Dr Bryan and 175 hours of work by Mr Jeffery and Mr Knaggs on the basis that this was work of an expert nature. The basis of the claim is essentially the same as that considered by the Tribunal in its parallel judgment in the *Shotton* case: [2007] CAT 1. For the reasons given in that judgment, we do not accept that Mr. Jeffery or Mr Knaggs can be considered as "experts" in this context.

35. In our view, some of Dr. Bryan's evidence in this case regarding the incongruous situation in London where there is a supply shortage, notwithstanding rising ground water levels, was to some extent in the nature of 'expert' evidence. However, that was essentially background material. The essential issues in the case related to whether the Director had properly considered the various arguments put forward by Albion/Enviro-Logic on the "overs and unders" issue. Those arguments were, in our view, based on matters of fact and industry knowledge which we have difficulty in categorising as "expert" evidence, for the reasons given in our *Shotton* judgment on costs. In particular, we have difficulty in distinguishing the facts and evidence put forward by Dr. Bryan on behalf of Albion from the evidence on various factual and technical issues supplied in this case by four employees of Thames Water. Essentially for the reasons given in the *Shotton* judgment, we are unable to characterise the kind of evidence in this case, whether given by Albion or Thames Water, on the basis of industry knowledge and technical experience, as 'expert' evidence for the purposes of

recovering costs before the Tribunal. To do so would, in our view, open up too large a category of uncertain, ill-defined and difficult-to-quantify "costs".

Work as a legal representative

36. In addition, Dr Bryan claims 19 hours at the rate of £56.65 an hour for work that would ordinarily be done by a solicitor, including giving advice to counsel, and as an advocate for Albion prior to counsel being instructed. We note, however, that Dr Bryan has included "the preparation of witness statements and the examination and analysis of evidence" under the different heading of "expert work".

37. For the reasons given in our judgment on costs in the *Shotton* case, we consider that Albion is properly to be regarded as a litigant in person in this case, and is entitled to be treated as such in terms of CPR 48.6, which, in our view, is applicable by virtue of Rule 55(1) of the Tribunal's Rules. Under CPR Rule 48.6(3)(i)(a) Albion is entitled to recover the costs of doing work that would have been done on Albion's behalf by a legal representative, had Albion had one. We apply, in this regard, the same analysis as we have applied in the *Shotton* judgment on costs.

38. As indicated in the *Shotton* case, we are of the view that Dr Bryan has understated the work that he has undertaken that would have been done by a legal representative on Albion's behalf. We make the following broad assessment. Dr Bryan prepared the notice of appeal and its annexes, dated 12 July 2004, which was done under time pressure because the contested Decision of 11 May 2004 had been notified to Peninsula Water, Enviro-Logic's then parent company, rather than Albion, with the result that Albion feared an appeal would be time-barred. Thereafter Dr Bryan had to conduct correspondence and meetings with the Director on various procedural and other issues, be present at the case management conference on 21 September 2004 (which also dealt with the *Shotton* case), consider the potential intervention of Thames Water, consider further disclosure made by the Director, and the need to amend the notice of appeal. In November 2004, Albion was unsuccessful in obtaining further time for service of the amended notice of appeal, and that document, drafted by counsel, was served on 7 December 2004. Dr Bryan would have needed to attend the case management conference on 11 February 2005, consider the Director's defence and the statement of

intervention of Thames Water, and consider the draft reply proposed by counsel for Albion. Dr Bryan, on behalf of Albion, also sought, unsuccessfully, certain further disclosure. There was also the site visit of 26 May 2005, and the hearing before the Tribunal over two days in June 2005. There was only limited follow-up work until the Tribunal's judgment in March 2006, which was followed by a written exchange between the parties on costs.

39. It will be seen from the above that the work done by Dr Bryan as a legal representative in this case was significantly less than that undertaken by him in the *Shotton* case. On the basis of a broad assessment, and given that the total hours he claims are just under 400 hours, we are prepared to allow some 100 hours of Dr Bryan's time as work that would have been done by a legal representative, being some 50 hours up to the point where counsel were instructed, and some 50 hours thereafter. For the reasons given in the *Shotton* judgment, we accept the hourly rate of some £56. That gives a total sum of some £5,600 under this heading. Again, for the reasons given in the *Shotton* judgment, we are not in a position to make any allowance for the time spent by Mr Jeffery and Mr Knaggs.

40. As regards the point that Dr. Bryan's salary is met by Waterlevel, the sum in issue in that regard is small. We do not regard it as necessary to join Waterlevel as a party in order to ensure that that sum is recoverable, but we do so for the reasons given in the *Shotton* case.

Disbursements

41. As regards disbursements within the terms of CPR Rule 48.6(3)(a)(ii), the sum claimed is £1,663. We have no breakdown of that sum, but we assume the heads of claim are in essence the same as in the *Shotton* case. As far as travel and subsistence is concerned, Dr Bryan needed to attend some three case management conferences, the site visit in May 2005, and the 2 day hearing in June 2005. Mr Jeffery's presence was necessary at the latter hearing, as he was a witness. There would, in this case, have been some disbursements in respect of photocopying, fax, postage and telephone, which we are prepared to allow on the same basis as in *Shotton.* On the basis of a broad assessment, we allow a total of some £500 for disbursements.

Conclusions

42. On the above basis the total recoverable costs would amount, therefore, in broad terms to £71,000 for counsel's fees and some £6,100 for Albion's own costs including disbursements, making £77,100 in total.

43. In the result, and applying the reduction of 50 per cent which we consider appropriate, we assess the costs recoverable by Albion in this case, by way of a broad assessment, at £39,000.

44. In our view, and in accordance with the Tribunal's general approach, Thames as intervener should bear its own costs. We do not think it is appropriate to make an order in Albion's favour directly against Thames. The Authority has not sought to recover from Thames any contribution to the costs for which the Authority is liable to Albion.

45. It follows that the Authority should pay the sum of £39,000 (plus VAT where applicable) to Albion within 28 days.

Christopher Bellamy Antony Lewis John Pickering

Charles Dhanowa 8 January 2007
Registrar