Neutral citation [2007] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case No:1058/2/4/06

Victoria House
Bloomsbury Place
London WC1A 2EB

26 January 2007

Before:

Marion Simmons QC (Chairman)
Ann Kelly
Michael Blair QC

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT WATER COMPANY LIMITED

Appellant

supported by

ALBION WATER LIMITED

Intervener

-v-

WATER SERVICES REGULATION AUTHORITY

Respondent

supported by

BRISTOL WATER Plc

Intervener

Heard at Victoria House on 9 June 2006

JUDGMENT

APPEARANCES

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

Dr Jeremy Bryan, Managing Director of Albion Water Limited, appeared on behalf of Albion Water Limited.

Mr George Peretz and Miss Valentina Sloane (instructed by Head of Legal Services, Ofwat) appeared on behalf of the respondent.

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

I SUMMARY

1. In this appeal, Independent Water Company Limited ("IWC") seeks to challenge a decision of the Water Services Regulation Authority (the "Authority") contained in a letter of 7 December 2005 from the Authority to Lanara Group Limited ("Lanara", the parent company of IWC). According to IWC, that letter contains a decision to the effect that certain behaviour of Bristol Water Plc ("Bristol Water") did not infringe the prohibition set out in section 18 of the Competition Act 1998 ("the 1998 Act"). In the alternative, IWC seeks to challenge a decision by the Authority to refuse interim measures, contained in a letter from the Authority to Lanara dated 25 November 2005.

2. The Authority does not accept that it took any decision on the application of the 1998 Act falling within section 46 of the 1998 Act so as to be capable of being appealed to this Tribunal by IWC under section 47. In so far as IWC seeks to appeal the Authority's decision to refuse interim measures, the Authority submits, among other things, that this challenge was not mentioned in IWC's notice of appeal, and any subsequent submissions made to this Tribunal in that regard are out of time for the purposes of launching a new appeal against that decision.

3. Following submissions made by the Authority at a case management conference on 20 February 2006, it was decided that the issue of the admissibility of the appeal should be determined as a preliminary issue. Submissions on admissibility were heard at a preliminary hearing on 9 June 2006.

Summary of conclusions

4. In summary, the Tribunal has decided (i) that the Authority has not made a decision falling within the Tribunal's jurisdiction. This is a case where the Authority has abstained from expressing a view, one way or the other, on the question whether there has been an infringement of the Chapter II prohibition. As a result, the appeal is inadmissible; (ii) that the appeal in relation to interim

measures was not contained in the notice of appeal; and (iii) that there are no exceptional circumstances such as to justify giving permission to amend the notice of appeal under Rule 11 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372 ("the Tribunal's Rules").

II INTRODUCTION

The main participants

5. IWC is a UK registered company which was set up in March 2004 in order to provide water-related services to corporations involved in the development of land and the construction of new housing and industrial/commercial projects.

6. According to submissions made to this Tribunal, the parent company of IWC, Lanara, intended to provide a "bundled" offering of utilities, including gas, electricity and water services, to such corporations. IWC intended to fulfil its ambitions by seeking "inset appointments" under the Water Industry Act 1991 ("WIA91").

7. Lanara also had two other subsidiary companies, William Martin Associates Limited ("WMA") and Utiliserve Ltd ("UTS"). Each of these subsidiary companies was, at various points, involved in correspondence with the Office of Fair Trading ("the OFT") connected with the issues involved in this case. In this judgment we have referred to IWC, the company which has brought this appeal, except where it is clearly necessary to distinguish between the various group companies involved.

8. The development forming the background to this case was a new housing development to be built by George Wimpey Bristol Limited ("GWB") in Long Ashton, on both sides of a road called Weston Road. The development, which is sometimes referred to in the correspondence as the "Long Ashton site", is referred to throughout this judgment as the "Weston Road site". The development was intended to consist, for the most part, of residential housing.

The Tribunal understands that a number of houses have been built and are currently in occupation but that more building is also planned.

9. Bristol Water is the statutory water company within whose area of appointment the Weston Road site currently falls.

10. Albion Water Limited ("Albion") is a "new entrant" water company which was granted an inset appointment pursuant to section 7(5) as amended of the WIA91 on 1 May 1999.

IWC's intended arrangements for the Weston Road site

11. IWC states that in late December 2004 GWB verbally accepted an offer for IWC and UTS to construct and adopt the potable water network at the Weston Road site. In order to be in a position to adopt the network, IWC needed to apply for an "inset appointment" under section 7(4) of the WIA91, as explained at paragraph 22 below.

III THE STATUTORY FRAMEWORK

The 1998 Act

12. The jurisdiction of the Tribunal to hear appeals in respect of decisions taken under the 1998 Act is set out in sections 46 and 47 of that Act:

> "46 Appealable decisions
>
> (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the OFT—
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> (b) as to whether the prohibition in Article 81(1) has been infringed,

(c) as to whether the Chapter II prohibition has been infringed,

(d) as to whether the prohibition in Article 82 has been infringed,

(e) cancelling a block or parallel exemption,

(f) withdrawing the benefit of a regulation of the Commission pursuant to Article 29(2) of the EC Competition Regulation,

(g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i),

(h) releasing commitments under section 31A(4)(b)(ii),

(i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,

and includes a direction under section 32, 33 or 35 and such other decisions under this Part as may be prescribed.

(4) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates.

(5) Part I of Schedule 8 makes further provision about appeals.

47 Third party appeals

(1) A person who does not fall within section 46 (1) or (2) may appeal to the Tribunal with respect to—

(a) a decision falling within paragraphs (a) to (f) of section 46(3);

(b) a decision falling within paragraph (g) of section 46(3);

(c) a decision of the OFT to accept or release commitments under section 31A, or to accept a variation of such commitments other than a variation which is not material in any respect;

(d) a decision of the OFT to make directions under section 35;

(e) a decision of the OFT not to make directions under section 35; or

(f) such other decision of the OFT under this Part as may be prescribed.

(2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient

interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest.

(3) The making of an appeal under this section does not suspend the effect of the decision to which the appeal relates."

13. The appeal which IWC seeks to bring in this case concerns section 47(1)(a) and/or section 47(1)(e) of the 1998 Act. IWC submits that the Authority took a decision on the application of the 1998 Act which fell within section 46(3)(c), i.e. a decision as to whether the Chapter II prohibition had been infringed.

14. The Chapter II prohibition is set out in section 18 of the 1998 Act:

"(1) Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in -

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

…"

15. The Authority is granted concurrent powers with the OFT to apply the provisions of the 1998 Act to "commercial activities connected with the supply of water or the provision of sewerage services" under section 31 of the WIA91, as amended by the 1998 Act.

16. Under section 31(4A) of the WIA91, as amended by paragraph 5(8) of Schedule 10 to the 1998 Act and paragraph 25(8)(c) of Schedule 25 to the Enterprise Act

2002, references in sections 46 and 47 of the 1998 Act to the OFT are to be read as including a reference to the Authority.

The WIA91

17. At the time of the matters set out in the notice of appeal, responsibility for the economic regulation of the water industry in England and Wales was held, under the WIA91, by the Director General of Water Services (the "Director") and was exercised through the Office of Water Services ("Ofwat"). From April 2006, the Director was replaced, pursuant to section 34(1) of the Water Act 2003 ("WA03"), by the Authority. The Authority has indicated that it will continue to be known as Ofwat when exercising its functions, but in this judgment we refer to the body in question as "the Authority".

18. The main sections of the WIA91 which have been cited in argument before this Tribunal are set out below.

19. Section 2 of the WIA91 imposes general duties on the Secretary of State and the Authority as to when and how they should exercise and perform their powers and duties under the WIA91. This section was amended by the 1998 Act and, as from 1 April 2005, by the WA03. Subsequent to 1 April 2005, the section reads as follows:

> "2 General duties with respect to water industry
>
> (1) This section shall have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the following powers and duties, that is to say –
>
> (a) in the case of the Secretary of State, the powers and duties conferred or imposed on him by virtue of the provisions of this Act relating to the regulation of relevant undertakers and of licensed water suppliers; and
>
> (b) in the case of the Authority, the powers and duties conferred or imposed on it by virtue of any of those provisions, by the provisions relating to the financial conditions of requisitions or by the provisions relating to the movement of certain pipes.

(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated –

(a) to further the consumer objective;

(b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

(c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions; and

(d) to secure that the activities authorised by the licence of a licensed water supplier and any statutory functions imposed on it in consequence of the licence are properly carried out.

(2B) The consumer objective mentioned in subsection (2A)(a) above is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services.

(2C) For the purposes of subsection (2A)(a) above the Secretary of State or, as the case may be, the Authority shall have regard to the interests of –

(a) individuals who are disabled or chronically sick;

(b) individuals of pensionable age;

(c) individuals with low incomes;

(d) individuals residing in rural areas; and

(e) customers of companies holding an appointment under Chapter 1 of Part 2 of this Act, whose premises are not eligible to be supplied by a licensed water supplier,

but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer.

…

(3) Subject to subsection (2A) above, the Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection

(1) above in the manner which he or it considers is best calculated—

(a) to promote economy and efficiency on the part of companies holding an appointment under Chapter 1 of Part 2 of this Act in the carrying out of the functions of a relevant undertaker;

(b) to secure that no undue preference is shown, and that there is no undue discrimination in the fixing by such companies of water and drainage charges;

…

(6A) Subsections (2A) to (4) above […] do not apply in relation to anything done by the Authority in the exercise of functions assigned to it by section 31(3) below ("Competition Act functions").

(6B) The Authority may nevertheless, when exercising any Competition Act function, have regard to any matter in respect of which a duty is imposed by any of subsections (2A) to (4) above […], if it is a matter to which the Office of Fair Trading (in this Act referred to as "the OFT") could have regard when exercising that function.

(7) The duties imposed by subsections (2A) to (4) above […] do not affect the obligation of the Authority or, as the case may be, the Secretary of State to perform or comply with any other duty or requirement (whether arising under this Act or another enactment, by virtue of any Community obligation or otherwise)."

20. Section 31(3) provides:

"(3) The Authority shall be entitled to exercise, concurrently with the OFT, the functions of the OFT under the provisions of Part 1 of the Competition Act 1998 (other than sections 31D(1) to (6), 38(1) to (6) and 51), so far as relating to—

(a) agreements, decisions or concerted practices of the kind mentioned in section 2(1) of that Act,

(b) conduct of the kind mentioned in section 18(1) of that Act,

(c) agreements, decisions or concerted practices of the kind mentioned in Article 81(1) of the treaty establishing the European Community, or

(d) conduct which amounts to abuse of the kind mentioned in Article 82 of the treaty establishing the European Community, which relate to commercial activities connected with the supply of water or

> securing a supply of water or with the provision or securing of sewerage services."

Inset appointments

21. Following privatisation in 1989, the previously publicly owned water supply system operated by public water authorities was divided between a number of distinct companies, each of which was responsible for providing water services or water and sewerage services in a defined area of England and Wales. Each water undertaker, although privately owned, is now appointed by a written instrument setting out the conditions subject to which the appointment takes place (the "incumbent water companies").

22. Pursuant to section 7 of the WIA91, the Secretary of State has a duty to ensure that, for every area of England and Wales, there is, at all times (i) a company holding a statutory appointment as a water undertaker; and (ii) a company (which may or my not be the same company) holding an appointment as a sewerage undertaker. In certain circumstances, the Secretary of State and/or the Authority has the power to replace an existing statutory water undertaker with another statutory water undertaker by way of an "inset appointment", covering a specified geographical area. Section 7 (as amended) is set out in full below:

> "7 (1) It shall be the duty of the Secretary of State to secure that such appointments are made under this Chapter as will ensure that for every area of England and Wales there is at all times both –
>
> (a) a company holding an appointment under this Chapter as water undertaker; and
>
> (b) whether or not the same company in relation to the whole or any part of that area, a company holding an appointment as sewerage undertaker.
>
> (2) Subject to the following provisions of this section—
>
> (a) the Secretary of State; and
>
> (b) with the consent of or in accordance with a general authorisation given by the Secretary of State, the Authority,
>
> shall have power, by notice to a company holding an appointment under this Chapter, to terminate the appointment or to vary the area to which it relates.

(3) The appointment of a company to be a water undertaker or sewerage undertaker shall not be terminated or otherwise cease to relate to or to any part of any area except with effect from the coming into force of such appointments and variations replacing that company as a relevant undertaker as secure either—

(a) that another company becomes the water undertaker or, as the case may be, sewerage undertaker for that area or part or for an area that includes that area or part; or

(b) that two or more companies each become the water undertaker or, as the case may be, sewerage undertaker for one of a number of different areas that together constitute or include that area or part.

(4) An appointment or variation replacing a company as a relevant undertaker shall not be made in relation to the whole or any part of the area to which that company's appointment as water undertaker or, as the case may be, sewerage undertaker relates except where –

(a) that company consents to the appointment or variation;

(b) the appointment or variation relates only to parts of that area none of the premises in which is served by that company;

(bb) the appointment or variation relates only to parts of that area and the conditions mentioned in subsection (5) below are satisfied in relation to each of the premises in those parts which are served by that company; or

(c) the appointment or variation is made in such circumstances as may be set out for the purposes of this paragraph in the conditions of that company's appointment.

(5) The conditions are that—

(a) the premises are, or are likely to be, supplied with not less than the following quantity of water in any period of twelve months:

(i) if the area of the relevant undertaker concerned is wholly or mainly in Wales, 250 megalitres;

(ii) in all other cases, 50 megalitres; and

(b) the person who is the customer in relation to the premises consents in writing to the appointment or variation.

(6) The Secretary of State may, after consulting the Authority, make regulations amending subsection (5)(a) above by substituting, for the quantity of water for the time being specified there, such smaller quantity as he considers appropriate."

23. When an inset appointment is made, the appointee becomes the statutory water and/or sewerage undertaker for the specified area and has the same rights and obligations as other statutory undertakers under the WIA91, as well as the environmental and water quality obligations regulated by the Environment Agency and the Drinking Water Inspectorate ("DWI").

24. Section 8 of the WIA91 sets out the procedure to be followed by the Authority in relation to inset appointments:

"8(1) An application for an appointment or variation replacing a company as a relevant undertaker shall be made in such manner as may be prescribed.

(2) Within fourteen days after making an application under this section, the applicant shall—

(a) serve notice of the application on the existing appointee the NRA[1] and on every local authority whose area includes the whole or any part of the area to which the application relates; and

(b) publish a copy of the notice in such manner as may be prescribed.

(3) Before making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State or the Authority shall give notice—

(a) stating that he or it proposes to make the appointment or variation;

(b) stating the reasons why he or it proposes to make the appointment or variation; and

(c) specifying the period (not being less than twenty-eight days from the date of publication of the notice) within which representations or

[1] The National Rivers Authority. According to Halsbury's Statutes, Water (4th ed.), p. 730, this should be taken to refer to the Environmental Agency, which replaced the NRA in April 1996.

objections with respect to the proposed appointment or variation may be made.

(4) A notice under subsection (3) above shall be given—

(a) by publishing the notice in such manner as the Secretary of State or, as the case may be, the Authority considers appropriate for bringing it to the attention of persons likely to be affected by the making of the proposed appointment or variation; and

(b) by serving a copy of the notice on the existing appointee the NRA and on every local authority whose area includes the whole or any part of the area to which the proposed appointment or variation relates.

(5) As soon as practicable after making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State or the Authority shall—

(a) serve a copy of the appointment or variation on the existing appointee; and

(b) serve notice of the making of the appointment or variation on the NRA and on every local authority whose area includes the whole or any part of the area to which the appointment or variation relates,

and as soon as practicable after exercising any power to vary the area to which an appointment under this Chapter relates, the Secretary of State shall send a copy of the variation to the Authority.

(6) In this section "the existing appointee", in relation to an appointment or variation replacing a company as a relevant undertaker, means the company which is replaced in relation to the whole or any part of the area to which the appointment or variation relates or, where there is more than one such company, each of them.

(7) The Secretary of State may by regulations impose such additional procedural requirements as he considers appropriate for any case where the conditions mentioned in section 7(5) above are required to be satisfied in relation to an application for an appointment or variation replacing a company as a relevant undertaker."

25. Section 9 of the WIA91 sets out the duties of the Authority and the Secretary of State when making inset appointments:

> "9(1) Before making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State or the Authority shall consider any representations or objections which have been duly made in pursuance of the notice under section 8(3) above and have not been withdrawn.
>
> (2) Before making an appointment or variation replacing a company as a relevant undertaker, the Secretary of State shall consult the Authority.
>
> (3) In determining whether to make an appointment or variation by virtue of section 7(4)(b) or (bb) above in relation to any part of an area, the Secretary of State or, as the case may be, the Authority shall have regard, in particular, to any arrangements made or expenditure incurred by the existing appointee for the purpose of enabling premises in that part of that area to be served by that appointee.
>
> (4) It shall be the duty of the Secretary of State or, as the case may be, of the Authority –
>
> (a) in making an appointment or variation replacing a company as a relevant undertaker; and
>
> (b) where he or it makes such an appointment or variation, in determining what provision is to be made with respect to the fixing by the new appointee of any water or drainage charges,
>
> to ensure, so far as may be consistent with his or its duties under Part I of this Act, that the interests of the members and creditors of the existing appointee are not unfairly prejudiced as respects the terms on which the new appointee could accept transfers of property, rights and liabilities from the existing appointee.
>
> (5) In this section –
>
> "existing appointee", in relation to an appointment or variation replacing a company as a relevant undertaker in relation to any area or part of an area, means the company which is replaced by that appointment or variation;
>
> "new appointee", in relation to such an appointment or variation, means the company which by virtue of the appointment or variation becomes a relevant undertaker for the area or part of an area in question;

"water or drainage charges" means

(a) charges in respect of any services provided in the course of the carrying out of the functions of a water undertaker or sewerage undertaker; or

(b) amounts of any other description which such an undertaker is authorised by or under any enactment to require any person to pay."

26. A company which has been awarded an inset appointment by the Authority or which has applied for such an appointment may wish to seek a supply of water from one of the other statutory water undertakers in order to serve its customers. Such a supply of water is commonly referred to as a "bulk supply". Under section 40 of the WIA91 the Authority is empowered to order such a bulk supply to be made and to determine the conditions of such a supply in certain circumstances:

"40(1) Where, on the application of any qualifying person—

(a) it appears to the Authority that it is necessary or expedient for the purposes of securing the efficient use of water resources, or the efficient supply of water, that the water undertaker specified in the application ("the supplier") should give a supply of water in bulk to the applicant, and

(b) the Authority is satisfied that the giving and taking of such a supply cannot be secured by agreement,

the Authority may by order require the supplier to give and the applicant to take such a supply for such period and on such terms and conditions as may be provided in the order.

(2) In this section "qualifying person" means—

(a) a water undertaker; or

(b) a person who has made an application for an appointment or variation under section 8 above which has not been determined.

(3) Where the application is made by a person who is a qualifying person by virtue of subsection (2)(b) above, an order made under this section in response to that application shall be expressed not to come into force until the applicant becomes a water

undertaker for the area specified in the order, or for an area which includes that area.

(4) Subject to subsection (3) above, an order under this section shall have effect as an agreement between the supplier and the applicant.

(5) The Authority shall not make an order under this section unless it has first consulted the Environment Agency.

(6) In exercising his functions under this section, the Authority shall have regard to the desirability of—

(a) facilitating effective competition within the water supply industry;

(b) the supplier's recovering the expenses of complying with its obligations by virtue of this section and securing a reasonable return on its capital;

(c) the supplier's being able to meet its existing obligations, and likely future obligations, to supply water without having to incur unreasonable expenditure in carrying out works;

(d) not putting at risk the ability of the supplier to meet its existing obligations, or likely future obligations, to supply water."

27. Section 40A of the WIA91 provides for the variation and termination of bulk supply agreements.

OFT 422

28. The OFT and the Authority published guidance, *The Competition Act 1998: Application in the water and sewerage sectors*, OFT 422, which dealt with how the authorities intended to apply the provisions of the 1998 Act to the water and sewerage sectors in England and Wales.

29. Paragraphs 2.5 to 2.9 of OFT 422 set out how the authorities intended the relationship between the 1998 Act and sector specific legislation to work:

> "Relationship of concurrent powers with duties under the Water Industry Act 1991
>
> 2.5. The Director's general duties under the Water Industry Act 1991 remain unchanged in relation to his regulatory

functions in the water and sewerage industries. Instead, the Act amends his duty in relation to competition.

2.6. Specifically, the Act amends the Water Industry Act 1991 to provide that the Director should not have regard to his general duties when exercising any function under the Act, except that he may have regard to any matter to which the Director General of Fair Trading could have regard when exercising that function. This means, for example, that when imposing financial penalties under the Act the Director will take account of the statutory guidance issued by the Director General of Fair Trading, and will not have regard to his duty under the Water Industry Act 1991 to secure that undertakers are able to finance the proper carrying out of their functions.

2.7. Where a particular agreement or practice falls within the scope of the Water Industry Act 1991 as well as one of the prohibitions in the Act, the Director is able to decide to use his powers under either the Water Industry Act 1991 or the Act. In such cases he will make use of whichever statutory powers he judges to be the more appropriate to address the specific conduct. Where he takes action using his powers under the Act, his duty to take enforcement action under the Water Industry Act 1991 does not apply. The Director will keep concerned parties informed regarding the statutory basis for his approach in handling a case.

2.8. The Director may make use of information made available to him for the purposes of sector regulatory duties under the Water Industry Act 1991 in relation to the application of the Act, and vice versa. Information made available to the Director for sector regulatory duties may, for example, be material in providing reasonable grounds for suspecting an infringement prior to the initiation of an investigation under the Act. Where information obtained in performing any of his statutory duties gives rise to such reasonable grounds, the Director will initiate further investigations.

2.9. The Director will seek to apply consistent policy principles to related subject matter irrespective of whether a matter is addressed through powers under the Competition Act or through his powers under the Water Industry Act 1991."

IV THE FACTS

30. As set out above, IWC, with the support of GWB, the developer of the Weston Road site, intended to apply for an inset appointment under section 7(4)(b) of

the WIA91 (relating to greenfield sites) in order to be appointed the statutory water undertaker in relation to that site.

The period between January 2005 and November 2005

31. On 18 January 2005 IWC submitted a first draft inset application in relation to the Weston Road site to the Authority. On 19 January 2005 IWC held a meeting with Bristol Water to discuss the possibility of a private connection to Bristol Water's network and the possibility of bulk supply and an inset appointment.

32. Between January and May 2005 discussions took place in correspondence and at meetings between Bristol Water and IWC in connection with the price at which Bristol Water would supply IWC with water and in connection with Bristol Water's intention to charge IWC an infrastructure charge. IWC considered Bristol Water's attitude to both these matters to be unacceptable.

33. Also between January and May 2005 discussions took place in correspondence and at meetings between IWC and the Authority in relation to IWC's intended inset application. During this period IWC provided the Authority with various updated versions of a draft inset appointment application and business plan. The Authority indicated to IWC that these documents did not satisfy the Authority that IWC's proposals were financially viable. The Authority also indicated to IWC that among other things, it should inform the Authority of the bulk supply prices that would be acceptable to it and to produce sensitivity analyses based on such prices.

34. During this period January to May 2005 there were also discussions and correspondence between Bristol Water and the Authority in relation to IWC's proposed inset application and the price at which Bristol Water would supply water to IWC. Tripartite discussions also took place on these matters between IWC, Bristol Water and the Authority.

35. Included in the exchange of correspondence passing between the Authority and IWC is a letter from the Authority dated 4 March 2005. In that letter the Authority said, in relation to the possibility of using section 40 of the WIA91 in order to determine the appropriate price for a bulk supply, that:

> "…The Director would have to be satisfied that the terms of a bulk supply cannot be reached by agreement and that it appears that a bulk supply is necessary or expedient for the purpose of securing the efficient use of water resources or the efficient supply of water. Any party that approached us with a request for a determination under s40 WIA91 would have to come up with a strong case to support its arguments that the s40 criteria had been met. It is not clear to us that you have met this criteria and, from the information you have provided to date, whether the criteria are likely to be met by following your current line of reasoning. Our view is that it does not necessarily follow that a bulk supply in this case (as opposed to Bristol Water supplying the site direct) would be necessary or expedient for the purpose of securing the efficient use of water resources or the efficient supply of water."

36. The Authority also responded, in the same letter, to the various points made by IWC concerning pricing:

> "Tariffs/Bulk Supply Price
>
> In your 25 January 2005 letter you tell us that Bristol Water intends to charge its standard domestic volumetric rate for supplies of less than 20 Ml and one household standing charge at the point of connection to the Weston Road site. I agree that Condition E does not apply to bulk supplies between undertakers. Nonetheless, it may well be relevant in calculating a bulk supply price to refer to what Bristol Water would otherwise have charged these customers if IWC had not become the inset appointee and what Bristol Water would charge customers who use a comparable amount of water.
>
> You suggest that Bristol Water avoids the need to invest in its network because IWC bears the cost of investing in the Weston Road site instead. You say that IWC, not Bristol Water, will adopt the new water infrastructure, and you argue that this should be reflected in a reduced volumetric charge to you for the water supply. We are not persuaded by this argument. At the periodic review, we have assumed in Bristol Water's case that the infrastructure charges and developer contributions pay for on-site and off-site costs of new developments. Mike King makes this point in his email of 2 March 2005 to you. Whilst Bristol Water would avoid the obligations of owning the on-site infrastructure, a reduction in the volumetric rate in the bulk supply price is not necessarily the right way to reflect this. It

may be more appropriately reflected as a reduction in the upfront charge (subject to my comments below) or expressed as an annual rate over a number of years.

Your points about undertakers needing to finance their functions and the Director's duty to ensure functions are carried out and can be financed, are separate. The duty applies to the entire undertaker, rather than each individual investment that the undertaker might make.

Infrastructure charges

You argue that infrastructure charges should not be payable. First, our view is that each bulk supply is different and has to be treated on its details. Second, we believe it is reasonable for an incumbent to make an upfront charge for insets involving bulk supplies and/or sewer connections where the network reinforcement costs imposed by the development are not altered by interposing an inset appointment at the point of connection. This charge should cover the costs to Bristol Water of enhancing the local network as a direct consequence of providing bulk supply to IWC. So the upfront charge may be equivalent to the whole or a proportion of any infrastructure charges or network reinforcement charges that the water undertaker would have levied if there had been an inset.

Finally, I understand that you intend to submit an updated draft inset application. I reiterate the comments made by Paul Morris in your telephone conversation of 18 February 2005. IWC should publish notice of the application once Ofwat has confirmed to it that the draft application is complete. To help move this forward we intend to write separately to IWC outlining outstanding information required to satisfy the application criteria. This will include the regulatory and operational issues that IWC will need to satisfy before we could recommend to the Director that he grants the inset appointment.

For example, I understand that infrastructure will be in place to enable the supply to the first houses (to be occupied at the end of April) and that more houses will be built at a later date in a phased approach. The spine main that will run through the centre of the site will be in place in about 18-24 months' time. As part of the inset application process, we need to know that the inset applicant has (amongst other things) the ability to supply water to end customers. A part of this process, we will need to know what impact the phasing of the development will have on IWC's ability to carry out and finance its functions as an undertaker."

37. On 20 May 2005 IWC submitted to the Authority a formal complaint against Bristol Water alleging infringement of the Chapter II prohibition. IWC requested an investigation into the behaviour of Bristol Water in relation to

Bristol Water's approach to setting prices for Bulk Supply Agreements to potential competitors. IWC requested the Authority to impose interim measures under section 35 of the 1998 Act.

38. On 24 May 2005 Ms Beryl Brown of the Authority requested a copy of Bristol Water's file concerning its dealings with IWC.

39. On 26 May 2005 the Authority responded to IWC's complaint under the 1998 Act and certain other issues. The Authority asked IWC to provide all documents in its possession that evidenced its allegations of abuse. It also asked IWC to clarify what interim measures it considered the Authority should impose. The Authority further indicated to IWC that as IWC and Bristol Water had failed to agree terms, it was now possible, subject to IWC satisfying the Authority that a bulk supply was necessary and expedient, for the Authority to make a determination under section 40(1) of the WIA91. The Authority noted that such a determination would appear to resolve the alleged abuses of the Chapter II prohibition set out in IWC's letter of 20 May 2005 and that it would "quite likely" take longer to prepare interim measures than it would to make a bulk supply determination. The Authority also pointed out that it could only give an inset appointment where the Director was satisfied that the applicant satisfied all of the relevant conditions and could fulfil the duties of a water undertaker, with responsibility for submitting a complete inset application resting with the applicant.

40. In parallel with correspondence concerning the complaint during May, June, July, August, September and October 2005, IWC and the Authority continued to correspond in relation to IWC's proposed inset application and business plan as well as the price at which Bristol Water would supply water to IWC. In parallel, discussions and correspondence continued between IWC and Bristol Water and between Bristol Water and the Authority, and tripartite discussions between IWC, Bristol Water and the Authority also continued to take place. Bristol Water continued to maintain throughout that it would only supply water to IWC under its retail tariff.

41. During May 2005 a meeting also took place between GWB, Bristol Water and IWC concerning the need for the water supply for the Weston Road site to fit in with the timescale for the development.

42. On 27 May 2005 IWC indicated to the Authority that Bristol Water had indicated an interest in reaching an "amicable agreement" on the issue of the bulk supply price. As a result of these renewed negotiations, IWC requested the Authority to suspend its consideration of IWC's complaint under the 1998 Act and its consideration of IWC's request for interim relief until IWC notified the Authority as to whether any additional action was required.

43. Also on 27 May 2005 IWC indicated to the Authority that it intended to provide a "temporary potable supply" using a static tank system to serve the occupants of the first houses.

44. It appears that IWC and Bristol Water agreed outline terms of supply on 6 June 2005.

45. On 8 June 2005 IWC confirmed to the Authority that it was prepared to withdraw its complaint under the 1998 Act and its request for interim measures. On 16 June 2005 IWC resubmitted its inset application and business plan to reflect the outline terms it had agreed with Bristol Water. Over the following two months the Authority gave IWC detailed feedback on what the Authority perceived to be continuing deficiencies in the application and business plan. On 2 September 2005 IWC resubmitted its application and business plan. A meeting took place on 6 October 2005 at which the Authority's concerns as to IWC's financial viability were again expressed.

46. It appears that on 5 August 2005 IWC and Bristol Water agreed terms of a bulk supply. IWC submits that it was forced to agree to the terms of that agreement because of the need for expedition caused by the impending occupation of the Weston Road site.

47. During the summer of 2005 IWC supplied water to the Weston Road site via a temporary potable supply using a static tank system to serve the occupants of the new houses.

48. In late September 2005 the DWI raised concerns with the Authority about the temporary water supply arrangements at the Weston Road site, and the possibility of contamination in the water supply. The DWI considered the arrangements to be unacceptable and to pose an unnecessary risk to public health. These concerns were communicated to IWC. At the same time Bristol Water also raised concerns with the Authority about the contamination risk of the temporary supply. Discussions took place between the DWI, GWB, Bristol Water and IWC, which culminated in the Weston Road site being connected to Bristol Water's water supply. The consequence of this was that the Weston Road site ceased to be a greenfield site.

49. In around October 2005 IWC and GWB approached Albion to take on the Weston Road site. Albion commenced discussions with the Authority and Bristol Water concerning this possibility. IWC indicated to the Authority that it was considering withdrawing its inset application.

50. On 25 October 2005 the Authority wrote to IWC indicating that it would not prepare any further feedback on IWC's inset application until IWC had clarified whether or not it was proceeding with its inset application.

The period from November 2005

51. On 2 November 2005 Albion lodged a complaint under the 1998 Act. Albion complained about a pattern of behaviour by Bristol Water which Albion believed constituted an abuse of a dominant position contrary to the Chapter II prohibition. Albion sought interim measures as part of that complaint, including: consent by Bristol Water to an inset appointment as and when the Authority approved a variation to Albion's instrument of appointment to include the site; bulk supply terms that were a reasonable reflection of Bristol Water's

actual costs of supply; and agreement from Bristol Water to provide an immediate mains connection to the site.

52. In November 2005 GWB stated that it remained interested in IWC becoming the appointed water company for the Weston Road site.

53. On 4 November 2005 the Authority wrote to Bristol Water suggesting, as "an immediate pragmatic solution to ensuring customers at Weston Road receive a mains supply of water as soon as is reasonably practicable", that Bristol Water agree to make a mains connection as soon as possible and subsequently provide "incumbent consent" to whomever GWB chose to supply the Weston Road site in the long term. However, the Authority recognised in the letter that Bristol Water did not have an obligation under the WIA91 to grant such incumbent consent and, indeed, that Bristol Water had decided not to offer incumbent consent.

54. On 7 November 2005 Bristol Water wrote to the Authority confirming that it had decided not to offer "incumbent consent" to "whomever GWB chooses to supply the site in the long term".

55. During November 2005, discussions continued between Bristol Water and GWB, between the Authority and IWC, between the Authority and Albion, and between Bristol Water and the Authority. Correspondence also took place between Bristol Water's solicitors (Watson Farley & Williams) and Albion concerning the Albion complaint.

56. On 8 November 2005 IWC, in a letter to the Authority, resubmitted its complaint under the 1998 Act with respect to Bristol Water's behaviour. Its summary of its complaint includes four points:

(a) "set-up charge": IWC argued that the development was, as a brownfield site, exempt from charges under section 146 of the WIA91 and that all costs of necessary local enhancements to the local distribution system had already been paid for by GWB. IWC further argued that the set-up charge imposed by Bristol Water did not reflect actual costs incurred or

the economic value of the services provided. IWC therefore submitted that the request for a set-up charge amounted to excessive pricing and predatory behaviour;

(b) "volumetric charge": IWC argued that Bristol Water was incorrect to treat IWC in the same manner as their other customers, rather than as a competitor of Bristol Water. IWC explains that Bristol Water, in denying that it would avoid costs because of IWC's inset appointment, had ignored that a new water undertaker is required by law to invest capital into a new water main and, if it did not retain the infrastructure charge, IWC would be discriminated against. As statutory undertaker, IWC would be responsible for bad debt from the houses within the development. Bristol Water would also no longer be responsible for costs, including operational costs such as customer service activities, billing, communications, handling complaints, publications, meter maintenance, reading and capital costs associated with meter replacements and network upgrades. IWC would also be responsible for leakage on the new network. Taking account of these factors, IWC argued that Bristol Water's insistence on charging the published tariff amounted to discriminatory and predatory behaviour;

(c) "refusal to allow access to an essential facility/service": IWC argued that Bristol Water's refusal to grant a connection as a connection to a "private water network" amounted to a refusal to grant access to an essential facility;

(d) "other items": IWC argued that Bristol Water had "obstructed the development of competition through a number of other methods", including: procrastination in responses to IWC, including delivery of the bulk supply agreement; outright refusal to assist UTS on the grounds that they would not help a company "competing with" Bristol Water; insistence on a boundary meter at the Weston Road site at the cost of IWC, which was discriminatory against IWC; attempting to thwart IWC's inset application through challenging IWC's technical competence with its customers and others in respect of the design and construction of the mains pipes laid at the site; attempting to influence

GWB and the Authority through adverse comment and obstructive interference; charging GWB a predatory and excessive price for the provision of its new water main connection; and providing a quote to UTS in relation to a mains connection for Manor Farm, Bradley, Stoke which was significantly higher than a quote submitted to Barrett Homes in relation to the same site.

57. In that letter IWC asked the Authority to investigate Bristol Water's activities using its powers under the 1998 Act. It also asked for interim measures, being:

(a) For Bristol Water to pay compensation for the costs involved in providing the static tank supply of water to the Weston Road site;

(b) For Bristol Water to pay for any fees of specialist and professional advice which may be required during the complaint.

58. On 9 November 2005 the Authority replied to IWC that it was currently considering the request for interim measures. It then set out certain points on which it wished to give IWC a chance to comment. As to the proposed interim measure for the costs of the static tanks, the Authority commented that it did not see any grounds for supposing that it was necessary to prevent serious or irreparable damage to IWC or to the public interest. It would be a matter which IWC might be entitled to pursue in damages if Bristol Water had infringed the 1998 Act and thereby caused loss to IWC but the Authority considered that it had no power to make such an award of damages. As to the request for the costs of professional advice, the Authority indicated that: (i) Parliament had conferred no such power for competition authorities to make a costs order in favour of complainants; (ii) the Authority did not consider that the 1998 Act could be interpreted so as to confer a power to make a costs order on an interim basis; (iii) IWC had not explained why the lack of a costs order would result in serious or irreparable damage and (iv) a complainant did not "require" specialist advice in order to bring a complaint.

59. On 10 November 2005 the Authority wrote to IWC, confirming that it had recommenced work on the detailed feedback in respect of IWC's draft inset

application when it received confirmation on 4 November 2005 that IWC wished to continue with that application.

60. On 11 November 2005 a meeting took place attended by the Authority, IWC, Albion, Bristol Water and GWB to discuss technical issues and to discuss seeking a resolution to the existing unsatisfactory temporary supply arrangement. At that meeting, Bristol Water agreed to provide a mains supply to the Weston Road site.

61. By letter dated 13 November 2005 IWC informed the Authority that it was withdrawing its request for interim measures in relation to the costs involved in providing a static tank supply of water, saying that "In view of the fact that GWB were effectively given only one viable choice to enable the "early" connection of the consumers to a mains supply, this effectively has closed the door on our Inset Application."

62. In that letter IWC commented that, as regards the cost of specialist advice, its case would be unfairly prejudiced by a lack of proper and objective specialist advice.

63. On 15 November 2005 the Authority wrote two letters to IWC. In those letters:

(a) the Authority asked IWC to confirm whether its letter of 13 November 2005 was to be taken as meaning that IWC had withdrawn its inset application;

(b) the Authority offered to meet IWC to discuss IWC's general concerns about the inset application process;

(c) the Authority asked IWC to clarify its interim measures application.

64. On 16 November 2005 a meeting took place attended by the Authority, Bristol Water and Watson, Farley & Williams (solicitors for Bristol Water) at which the following two specific issues were raised:

(a) Whether or not it would be appropriate for interim measures to be adopted for the purposes of protecting the public interest in the

circumstances pertaining to the Weston Road site (the interim measures issue); and

(b) Whether or not there was any support for the proposition that the Authority was empowered by the 1998 Act to force Bristol Water to consent to an inset appointment for Albion (the forced consent point).

65. On 17 November 2005 IWC replied to the Authority's letter of 15 November 2005. In that letter IWC indicated that it considered that the documentation submitted on 2 September 2005 was a formal inset application but that it was proposing to resubmit an inset application under a different qualifying clause since, upon a mains connection being provided to the Weston Road site by Bristol Water, the "greenfield" criteria could no longer apply to the site. It reminded the Authority of what IWC considered to be the Authority's delay in providing the outstanding feedback and confirmed that it was not withdrawing its inset application.

66. Further detailed feedback on financial aspects of its inset application was provided by the Authority to IWC on 18 November 2005. This feedback identified what the Authority considered to be gaps and inconsistencies in that application.

67. On 18 November 2005 the Authority also wrote to Albion indicating, among other things, that it maintained its view that there were advantages, in terms of being able to deal with the bulk supply price issue effectively, of using its powers under section 40 of the WIA91 rather than under the 1998 Act. The Authority did not propose, therefore, to consider the application of the Chapter II prohibition to this aspect of Albion's complaint. That letter also responded to Albion's request for interim measures. In this response, the Authority made clear that its comments about interim measures were made on the assumptions that (i) there was a basis for an investigation under section 25 of the 1998 Act and (ii) the Authority would decide to open such an investigation, even though the Authority was by no means convinced of the validity of either of these assumptions.

68. On 22 November 2005 Watson, Farley & Williams wrote two letters to the Authority, confirming that it had been instructed by Bristol Water in connection with the complaint made by IWC under the 1998 Act and suggesting that both the substantive complaint and the interim measures application should be rejected.

69. On 23 November 2005 IWC wrote to the Authority:

(a) Confirming that it was withdrawing its request for interim measures to cover the cost of the temporary supply;

(b) Confirming that it continued with its request for interim measures to cover costs of specialist advice and legal counsel;

(c) Explaining that since IWC has been forced into a situation whereby a mains connection was required before the inset application had been properly considered and processed, IWC was no longer in a position to apply for an inset appointment under the greenfield criteria. IWC was therefore requesting that Bristol Water undertake to allow an inset appointment by consent under section 7(4)(a) of the WIA91;

(d) Reminding the Authority that IWC's competition complaint of 20 May 2005 included a complaint based on the methodology employed by Bristol Water in relation to the bulk supply agreement for the Weston Road site. On 6 June 2005 IWC had agreed to withdraw that complaint in exchange for expedition from Bristol Water in the creation of a bulk supply agreement, which was necessary for pursuance of its inset application. The final conditions offered by Bristol Water were identical to those described in the complaint.

70. On 23 November 2005 the Authority wrote to IWC in response to its complaint of 8 November 2005 under the 1998 Act. In relation to issues surrounding the terms of bulk supply offered by Bristol Water, the Authority requested IWC's comments as to why IWC considered the matter could not be satisfactorily dealt with under section 40 or section 40A of the WIA91. The Authority indicated that it considered the following matters to be relevant: (i) under the WIA91 it was not necessary to establish dominance; (ii) the WIA91 route was in principle

available as soon as IWC could demonstrate that it had tried and failed to reach agreement with Bristol Water; (iii) the WIA91 did not require a determination that the price offered by Bristol Water was excessive, nor would any determination be limited to imposing a maximum price set by reference to the concept of excessive pricing. In relation to the aspects of the complaint which concerned connection to a mains supply, the Authority considered that that concerned Bristol Water's supply duties under the WIA91 and could be resolved using that legislation.

71. On 25 November 2005 the Authority wrote to IWC offering a number of comments in response to IWC's letter of 17 November 2005. In particular, the Authority indicated that its feedback clearly showed that IWC's submissions to date had failed to meet the standards required and to satisfy the Authority that IWC was financially, operationally and technically viable. Until that threshold was reached, the Authority would not consider that IWC had submitted a complete and formal inset application and the timetable for inset appointments would not begin. The Authority asked IWC to clarify whether it intended to submit an inset application under an alternative qualifying criterion.

72. Also on 25 November 2005 the Authority wrote a further letter to IWC responding to IWC's application for interim measures:

> "**Interim measures**
>
> We do not consider that the Director has the power under section 35 of the Competition Act 1998 ("the CA98") to impose interim measures requiring an undertaking alleged to be infringing the CA98 to fund the costs of a complainant. We therefore refuse your application for interim measures in that respect. We further note that you have not demonstrated, or even produced any evidence, that such funding is necessary to enable you to pursue your complaint.
>
> You appear to request a further interim measure requiring Bristol Water plc ("Bristol Water") to consent to an inset appointment by you for the Weston Road site, including premises Bristol Water will be supplying when the connection requested at the 11 November meeting is made ("the Relevant Premises"). We have not reached a decision on your new application, but our current thinking, on which you are invited to comment, is that an interim measure requiring Bristol Water's consent would not be appropriate. This is because

your application (in so far as it needs to be based on an area including the Relevant Premises) could not safely be based on some form of interim consent by Bristol Water, which it could retract if we found that its refusal of consent was not an infringement of the Chapter II prohibition. It would follow that interim measures could not have the effect of preventing serious or irreparable damage to you or any other person or harm to the public interest because they would not materially assist your position.

In relation to the last paragraph of your letter, it is of course for you to establish your case for interim measures and it is not for us to prescribe the way(s) in which you have to do so. General guidance on interim measures is set out in the OFT guideline *Enforcement,* a copy of which is enclosed.

Clarification of your complaint

We note what you say about your complaint, although we have no record or knowledge of any telephone conversation with you on 14 November 2005. We of course accept that you are entitled to complain about the bulk supply terms you accepted this summer. However, as you yourself say, your original complaint was withdrawn on 6 June, and at least 3 months elapsed between your acceptance of the terms about which you now complain and your renewed complaint, it is plainly potentially relevant to questions of urgency."

73. A further letter was sent by Ofwat on 25 November 2005 to Watson, Farley & Williams (solicitors for Bristol Water) in the following terms:

"First, we do not agree with your argument that the existence of specific provisions in the Water Industry Act 1991 ("WIA91") to deal with the determination of bulk supply prices and terms precludes the Director from taking action, in relation to a water undertaker's conduct concerning a bulk supply, under the Competition Act 1998 ("CA98") where appropriate. In our view, the Director has discretion in such circumstances as to how to proceed. In relation to the complaint by Albion Water Limited ("Albion Water"), the Director has already told Albion Water that, for reasons explained to it and copied to you, he will not look at Albion Water's complaint about a bulk supply under the CA98; and in the present case he has also told Lanara Group plc ("Lanara"), subject to its comments, that he is minded to take the same approach in relation to its complaint. But in other circumstances, the Director might well decide to look at a complaint about a bulk supply under the CA98 even if the relevant provisions of the WIA also applied.

Secondly, we note that you have not explained what express or implied contractual terms you rely on as a basis for your assertion that Lanara are bound not to complain to the Director

about the terms of a bulk supply from Bristol Water. Nor have you explained what matters of fact you rely on to found an estoppel. In any event, we should say that we do not consider that it is legally possible for Lanara to waive its ability to complain to the Director about matters falling within his remit. Any such contractual term or waiver would, in our view, be void as a matter of public policy. It follows that Lanara could not be estopped from raising any such matters before the Director. Finally, no such contractual provision or estoppel could apply to the Director or prevent his taking such action as he considers appropriate."

74. On 1 December 2005 IWC wrote to the Authority indicating that it did not consider that, in its current status, it would be able to satisfy the Authority's "revised" financial status requirements for the proposed inset application until it had made appropriate financial arrangements. Furthermore, substantial delays had resulted in the site being disqualified as a greenfield site. IWC would therefore be formally withdrawing its inset application based on the greenfield site criterion but would reconsider its position once the full implications of the investigation under the 1998 Act had been identified, specifically in relation to the requirement for a dominant undertaker to allow inset appointments by consent. IWC also took the opportunity to clarify its complaint under the 1998 Act:

> "In your analysis of our complaint you seem to have omitted some crucial factors that define the nature of the complaint. Whilst you are correct in stating that it includes the terms of the Bulk Supply Agreement and issues surrounding the connection of the site to a mains water supply, there is far greater substance and breadth to our complaint than you seem to suggest.
>
> Our complaint, in fact, alleges a pattern of conduct by BRL that amounts to an abuse of its Super-Dominant position. In our letter of complaint we have outlined no less than 10 examples of conduct by BRL that warrant investigation, this is clearly a pattern. The two areas that you mention may be the most commercially obvious but are, in fact, only part of a string of incidents that make up our complaint. To limit the investigation to the two areas that you mention would, we believe, be an error of law or procedure as competition case law requires that an adequate investigation should consider a pattern of conduct.
>
> Whilst we recognise the differences in the requirements between a Determination under Sections 40 and 40A of the

WIA91 and an investigation under the CA98, we would like to bring to your attention a number of key points:

- Our complaint in respect of the commercial terms is not such that we are requesting you to determine a specific set of financial terms. We are complaining that the terms as offered by BRL and as a part of a pattern are anti-competitive and therefore an abuse of their super-dominant position. Because we are not seeking a specific price determination, we believe that consideration under the WIA is quite inappropriate.
- The powers of the Director under Sections 40 and 40A of the WIA91 would deal with the price issues and other conditions of the proposed Bulk Supply Agreement. However, it would not lead to an appropriate investigation of the pattern of abuse that has emerged over the last 11 months.
- You attempt to classify other elements of our complaint into the generic phrase "connection of the site to a mains water supply, and associate infrastructure issues". This is a complete misrepresentation of our complaint. Again, we have brought to your attention a pattern of behaviour exhibited by BRL that, we believe, amounts to an abuse of their Super-Dominant position.
- Considering the withdrawal of IWC's proposed Inset Application, there is no longer a Bulk Supply Agreement that could be the centre of a determination under Sections 40 and 40A of the WIA91. These sections are therefore no longer relevant.
- We note your preference for a more flexible remedy than would be available using the CA98 by proposing the use of powers under Section 30A of the WIA91. However, again, these powers are not adequate to investigate the pattern of abuse that has been disclosed to you by us.

I would therefore refer you back to our letter of complaint dated 7th November 2005 and request that you reconsider your apparent reluctance to use the Director's powers under the CA98.

In a letter written to you on 29th September 2005, Alan Parsons, the Chairman of BRL, stated that the margin offered by BRL to IWC in the Bulk Supply Agreement is insufficient for IWC to operate profitable, i.e. not meeting the costs of on-site leakage, water quality monitoring, customer services, overheads and maintenance.

We believe that this letter on its own constitutes clear evidence that an abuse of a dominant position has taken place."

75. IWC also indicated, in relation to interim measures, that:

> "Returning to your letter of the 25th November you ask us to specifically respond to paragraph two. The withdrawal of our Inset Application should now clarify our position in relation to the issue of an "Inset via Consent" as a possible interim measure. However for the record we do not recall specifically requesting such a measure to be considered as part of our original competition complaint.
>
> You state that we have not demonstrated, nor even produced any evidence, that any funding is necessary to pursue our complaint. However, we asked you in our letter of 13th November 2005 to provide us with some guidance as to what form of evidence would be suitable for demonstrating exactly that. Your observation that we have not produced any evidence is therefore merely a reflection of the fact that we have had no advice or guidance from you on this matter, and reinforces your previous advice that we obtain specialist legal advice.
>
> We are therefore again requesting that you offer us clear guidance as to what form of evidence you require for us to support our request for interim relief."

76. It appears from a note by the Authority of a conversation with Bristol Water that the houses at the Weston Road site were connected to Bristol Water's mains supply on 5 December 2005.

77. On 7 December 2005 the Authority sent two letters to IWC. The first acknowledged IWC's decision to withdraw its inset application and responded to IWC's comments as regards the Authority's financial requirements. The Authority insisted that its financial requirements had not changed during the process. The Authority considered that despite guidance and detailed feedback from the Authority, IWC had failed to meet the standards required of a water undertaker. The second letter, which is central to this appeal, responded to IWC's complaint about Bristol Water. The substance of that letter is set out below:

> "You complained about the terms and prices at which Bristol Water is prepared to offer a bulk supply and the terms of connection to its network. In your letter you also say that you will reconsider your decision to withdraw your inset appointment application if Bristol Water is required under CA98 to give consent to an inset appointment under section 7(4)(a) WIA91.

You are aware that a complaint has also been made against Bristol Water by Albion Water Limited (Albion Water) in relation to Albion Water's proposal to make an inset appointment application for this site. Albion Water has complained about Bristol Water's refusal to give consent to an inset appointment under section 7(4)(a) WIA91, as well as about bulk supply and connection terms from Bristol Water.

As to the section 7(4)(a) WIA91 issue, we have told Albion Water that we shall postpone our consideration of whether refusal to give consent should be considered under Chapter II of the CA98 until after resolution of the bulk supply issue and consideration of its inset application. We decided on that step by step approach because the issue of refusal of consent becomes essentially academic if there is in fact no prospect of a viable inset appointment in any event. Our view is that any concerns as to the terms and prices on which Bristol Water is prepared to offer a bulk supply and as to the terms of connection to its network are better addressed under WIA91.

Nothing in your 1 December letter changes our view that this step by step approach is most appropriate. Our view remains that concerns about Bristol Water's refusal to give consent under section 7(4)(a) WIA91 should not be addressed before it becomes clear that that refusal is likely to preclude an inset application for the site that would otherwise succeed.

As to issues involving the terms and prices at which Bristol Water is prepared to offer a bulk supply and connection to its network, we shall to some extent be considering the relevant issues that arise in our exercise of powers under the WIA91 in response to Albion Water's complaint. Against that background, and particularly as you have now withdrawn your application for an inset appointment, we do not regard it as appropriate at this stage to devote resources to considering whether Bristol Water has infringed the CA98 in its dealings with you on those matters.

You should note that we are not obliged to investigate every potential infringement of the CA98 that is drawn to our attention, particularly where, as here, other powers are available to us to deal with key aspects of the concerns that have been raised. In your 1 December letter you say that your concerns should be seen in the context of a number of other matters, which amount to a pattern of conduct by Bristol Water that infringes Chapter II of the CA98. We agree that as a general proposition it may well be appropriate in a case under Chapter II of the CA98 to look at allegedly infringing behaviour in the context of other behaviour by the same undertaking; nonetheless, looking at the matters that you and Albion Water have raised in the round, we take the view, for

the reasons we have given, that our approach is the appropriate response to the issues you have each raised.

Interim relief

In our letter of 25 November, we refused your application for interim relief requiring Bristol Water to fund the costs of your complaint. You do not address the first point we made in that letter, namely that the Director does not have the power to impose such a measure under section 35 CA98. We therefore see no reason to re-open our decision on that point.

As to our further point that you had produced no evidence that you needed such funding, it is not possible for us to give you further guidance as to how you might go about showing that such funding is necessary. You plainly consider that such funding is necessary, so you should be able to set out the basis on which you reached that view. However, it is a matter for you whether you wish to do so given our view that the Director has no power in any event to grant the interim measure you seek. General guidance on interim measures is set out in the OFT guideline *Enforcement,* a copy of which was sent to you under cover of my 25 November 2005 letter to you.

I would be grateful if you could inform me by 5pm on Thursday 8 December 2005 what, if any, concerns you have about us copying this letter and your letter dated 1 December to Bristol Water."

78. Albion's complaint made on 2 November 2005 was also the subject of correspondence between Albion and the Authority during this period, including letters from the Authority to Albion of 18 and 30 November 2005.

V THE PROCEDURE AND ISSUES BEFORE THE TRIBUNAL

79. IWC submitted a notice of appeal to the Tribunal on 12 January 2006. The appellant did not, at that stage of the proceedings, have the benefit of legal advice.

80. IWC summarised its grounds of appeal as follows:

> "1. That the Director General ("The Director") of the Office of Water Services ("Ofwat") has:
>
> (a) Refused to investigate the applicant's complaint against Bristol Water PLC under the terms of the Competition Act 1998.

(b) Decided to use his powers under the Water Industry Act 1991 to investigate only certain very limited aspects of the concerns raised by the applicant.

(c) As a result of the applicant withdrawing from the contended market, decided it would be inappropriate to devote resources to considering whether Bristol Water plc (BRL) has infringed the Chapter II Prohibition in the Competition Act 1998 in its dealings with the applicant.

2. The applicant contends that these decisions are incorrect from the point of view of (i) the reasons given, (ii) the law applied, (iii) the procedure followed.

3. The applicant contends that BRL's behaviour in this and related matters has effectively prevented the applicant from honouring its commitments to GWB Limited (GWB). The applicant believes that BRL have prevented any viable commercial arrangement that would allow it from becoming the statutory water undertaker for the development on Weston Road in Long Ashton, North Somerset.

4. Furthermore, the applicant also contends that, in preventing competition, BRL have severely damaged the financial viability of the applicant and its subsidiaries.

5. Therefore the applicant is unable to pursue its legitimate commercial objectives relating to this matter as a result of the Director's decisions in 1 above. The applicant consequently asks the tribunal to consider the validity of the decision by the Director not to investigate this matter under the Competition Act 1998."

81. IWC described the decision against which it was appealing as follows:

"The Decision

The Decision is contained in the letter from Ofwat's Head of Competition Policy dated 7th December 2005. It is clear that the Director does not intend to investigate the current complaint filed by the applicant, stating that they feel that using the Water Industry Act 1991 is the appropriate response. We believe that Ofwat's latter insistence to investigate, under the WIA 1991, the alleged abuses and concerns raised by the applicant is an error in law or fact, as the WIA 1991 does not provide sufficient jurisdiction to cover all the alleged abuses and would therefore not allow appropriate investigatory powers or result in a reasonable remedy.

The applicant believes that Ofwat's refusal to investigate such a clear apparent case of the abuse of a dominant position constitutes an error in process, fact and judgement."

82. In terms of relief, IWC requested:

> "Relief Sought
>
> The Applicant seeks the following relief:
>
> 1. That the Director General of Water Services reconsider his decision not to investigate the allegations made by the applicant against Bristol Water plc in their entirety and using his powers under the Competition Act 1998.
> 2. That, considering the length of time that he has been in possession of the facts of this case (since 20th May 2005) the Director General of Water Services agrees to investigate the matter fully within a three month period.
> 3. That the Tribunal offer guidance to the Director General of Water Services as to which areas would be most appropriate to investigate.
> 4. Such further and other relief as the Tribunal may consider appropriate."

83. A copy of the notice of appeal was served on the Authority on 16 January 2006. On 19 January 2006, the Authority wrote to the Registrar of the Tribunal indicating that, in its view, the notice of appeal was materially incomplete in that it failed to plead at all to the question of whether the matters appealed involve a decision appealable under sections 46 and 47 of the Act. The Authority requested the Tribunal to exercise its power under Rule 9(1) of the Tribunal's Rules to direct that the notice of appeal be put in order and if this was not done, for the Tribunal to reject the appeal in full under Rule 10(1)(a). In the Authority's view, any challenge by IWC to its decision not to open an investigation under the 1998 Act should be brought by way of judicial review in the Administrative Court. Given that the three-month time limit for judicial review was rapidly running out, the Authority submitted that it was in IWC's interests to know where it stood as soon as possible.

84. In essence, the Authority claimed that it was "absolutely plain" from its letter of 7 December 2005, on which the appeal was based, that it had not reached any view at all as to whether Bristol Water's position involved an infringement of the Chapter II prohibition. The Authority did not propose to investigate IWC's complaint under the 1998 Act on the basis that it would be looking at the terms

and conditions of bulk supply in relation to Albion's inset application under the WIA91.

85. In response to the Authority's letter, the Tribunal made an order, dated 23 January 2006, extending time for the service of a defence in the matter until further order. The Tribunal informed the parties that the first case management conference would take place on 20 February 2006. The Tribunal also indicated that IWC should consider whether it had any comments on the Authority's letter of 19 January 2006 or whether it wished to advance any facts or arguments in addition to those set out in the notice of appeal.

86. The Tribunal received applications to intervene from Bristol Water (on 6 February 2006) and from Albion (on 14 February 2006). Albion's application to intervene stated: "If this matter is beyond the jurisdiction of the Tribunal, there is no prospect that Albion, or a similar small entrant, would be able to afford judicial review and these injustices would remain unremedied" (paragraph 14).

87. The Tribunal also received submissions on 13 February 2006 from IWC responding to the Authority's letter of 19 January 2006. IWC was still, at that stage, unrepresented.

88. In its submissions prior to the case management conference on 20 February 2006, the Authority reiterated its request that the appeal should be rejected under Rule 10(1)(a).

89. At the case management conference on 22 February 2006 the Tribunal directed that the question of admissibility be determined as a preliminary issue.

90. On 23 March 2006 an application for a "pre-emptive costs order" was made on IWC's behalf by Taylor Wessing, who by this stage represented IWC. The application was for an order that the Authority should pay IWC's costs of the appeal on a "come what may – win or lose" basis. The Authority's essential response to this application was that it went entirely against the decision of the

Court of Appeal in the case of *Corner House v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 and was not an order that was within the Tribunal's powers to grant.

91. At a case management conference on 6 April 2006 the Tribunal indicated its preliminary view that the evidence relating to the application for a costs order was probably incomplete and did not provide the Tribunal with the material on which it could properly consider the application of the criteria relating to this area of the law.

92. It was agreed at that case management conference that the issue of costs would be deferred until the hearing on admissibility.

93. On 9 May 2006 IWC made a new application in which it sought protection from any award of costs which might be made against it in relation to the hearing on admissibility. In the event, that application was not heard at the hearing on 9 June 2006 as, by that stage, all relevant costs had been incurred.

V THE PARTIES' SUBMISSIONS ON ADMISSIBILITY

IWC's submissions

94. IWC submits that the Authority has taken an appealable decision under the 1998 Act in that it has decided that there was no infringement of the Chapter II prohibition, having considered IWC's complaint for the best part of a year.

95. IWC relies for its submission that the Authority has made an appealable decision on the comments made by the Authority in correspondence and meetings and in its actions including its consideration of the interim measures application. IWC relies in particular on the following documents:

(a) A letter from Ofwat to IWC of 4 March 2005;

(b) A note of a meeting between the Authority and Bristol Water on 30 March 2005;

(c) IWC's letter of 20 May 2005, headed "Complaint under Competition Act 1998 - Breach of Chapter II Prohibition";

(d) The exchanges between IWC and the Authority, commencing on 20 May 2005 in relation to the complaint which was subsequently withdrawn;

(e) The Authority's letter of 25 November 2005 dealing, in particular, with IWC's request for interim measures;

(f) The Authority's letter of 7 December 2005 (the case closure letter).

96. IWC relies on *Aquavitae v DGWS* [2003] CAT 17, in which the Tribunal said that whether or not a decision has been taken is a question of substance and not of form, and is something to be determined objectively. IWC submits that when the substance of the consideration which the Authority has given to this complaint is examined it amounts to a decision.

97. IWC referred to the Tribunal's judgment in *BetterCare Group v DGFT* [2002] CAT 6, at paragraph 78, in support of its position that it was not necessary for the Director to have carried out a full formal investigation before a decision could be reached. IWC also referred to the statement in OFT 422 to the effect that "The Director will seek to apply consistent policy principles to related subject matter irrespective of whether a matter is addressed through powers under the Competition Act or through his powers under the Water Industry Act 1991" (paragraph 2.9).

98. IWC submits that by concluding that the better course was to consider the matter under the WIA91, the Authority took a decision that there was no infringement of the Chapter II prohibition or Article 82 EC.

99. IWC submits that since the Authority continued its consideration of the complaint subsequent to IWC withdrawing its inset application on 1 December 2005, the Authority was necessarily considering the complaint under the 1998 Act and not under the WIA91 when it wrote the letter of 7 December 2005, since without an inset application there is no application to consider under the provisions of the WIA91 and section 40 of the WIA91 is not engaged.

100. IWC further submits that the Authority had jurisdiction under section 35 of the 1998 Act to consider interim measures only if it had begun an investigation under section 25 and had not completed it. Since the Authority purported to have the power to make an interim measures direction and entered into correspondence with IWC on the subject of interim measures, it must, according to IWC, have begun an investigation under the 1998 Act.

101. IWC submits that under section 35 of the 1998 Act the Authority has a duty, in the course of an investigation, to satisfy itself whether or not there is a prima facie case, whether or not there is an urgent situation, whether the complainant is suffering or has suffered serious and irreparable damage, what is the likely effect on competition or on relevant third party interests of the grant or refusal of interim relief, and what is the balance of interest between the complainant and the effect on competition or on relevant third party interests. IWC submits that this duty is independent of any request for interim measures by an affected party. IWC submits that since the Authority said in its letter of 25 November 2005 that it was not going down the interim measures route, it had taken a decision in respect of interim measures which is appealable under section 47(1)(e).

102. IWC also relies on Article 3 of Regulation 1/2003, OJ 2003 L1/1, submitting that by virtue of Article 3 the Authority had a duty to apply Article 82 EC: a project such as that relating to the proposed inset site involves, according to IWC, trade between Member States in respect of components of the housing.

103. IWC submits that Article 3 of Regulation 1/2003 imposes a duty on the Authority, having begun an investigation, to continue the matter to a decision that either Article 82 EC did or did not apply. IWC submits that it follows that the substance of the Authority's conduct in investigating and deciding not to proceed is that the Authority must have made a non-infringement decision.

104. IWC submits that its appeal against the refusal of the Authority to make an interim measures direction is not out of time since the original notice of appeal dated 12 January 2006 was extremely broad in scope and was intended to appeal

against the totality of what had occurred to it at the hands of the Authority, i.e. to appeal the whole content of the case closure letter, which included reference to interim relief. IWC notes that the notice of appeal included a request for further and other relief and submits that these words should be read to embrace the Authority's refusal to grant interim relief. IWC relies on the content of its letter to the Registrar of the Tribunal dated 13 February 2006 to evidence IWC's intention with regard to the scope of the notice of appeal.

105. IWC submits in the alternative that if its notice of appeal is not considered to include an appeal against a decision refusing to give an interim measures direction, it should be permitted to amend its notice of appeal to include specific reference to that refusal because (i) IWC was not legally represented when it drafted its notice of appeal; (ii) IWC did not appreciate that specific mention of this ground was required and had proceeded on the basis that the broad scope of the notice of appeal included an appeal against the refusal to give an interim measures direction; and (iii) there are exceptional circumstances since this is one of the first times that the Tribunal has been asked to consider the competition law point in issue in this appeal.

106. In the further alternative, if the Tribunal does not grant permission to amend the notice of appeal, IWC seeks an extension of the time limit under Rule 19(2)(i) of the Tribunal's Rules for filing an appeal pursuant to section 47(1)(e) of the 1998 Act so as to permit the delivery of a new notice of appeal which can be consolidated with the present matter in relation to interim measures.

The Authority's submissions

107. The Authority submits that the appeal is plainly inadmissible and should be dismissed.

108. The Authority relies on paragraph 2.5 and 2.9 of OFT 422 in submitting first that the 1998 Act does not change the Authority's general duties under the WIA91 in relation to its regulatory functions in the water industry and, secondly, that the Authority will seek to apply consistent policy principles to

related subject matter under both the 1998 Act and the WIA91. However the Authority submits that because the legislative provisions are different, there can be no guarantee that the application of the WIA91 will necessarily produce an identical result to the application of the 1998 Act.

109. The Authority submits that there are the following differences between determining a bulk supply price under section 40 of the WIA91 and determining whether a particular price is excessive, or whether there is unlawful margin squeeze under the 1998 Act:

(a) In applying section 40, the Authority is required to take specific matters into account under section 40(6);

(b) A section 40 determination is not dependent on any finding of dominance or effect on trade;

(c) Whereas section 40(1) contemplates the setting of particular terms (including particular terms as to price), general competition law does not prescribe a particular price but rather sets a ceiling (excessive price/margin squeeze) or a floor (predatory pricing) on prices that a dominant undertaking may charge. So, for example, the Authority might impose a particular price in a section 40 determination on the basis of certain costs assumptions or allocations, even though it could not be said that a dominant company would not have been entitled to make different but reasonable costs assumptions or allocations, and charge a higher price or lower price, without thereby abusing its dominant position by excessive pricing/margin squeeze or predatory pricing.

110. The Authority relies on the terms of IWC's letter to the Authority of 1 December 2005, and in particular IWC's demand in that letter that the Authority begin an investigation under the 1998 Act within 6 days, for its submission that IWC accepted in that letter that the Authority had not begun any investigation under the 1998 Act.

111. The Authority submits that it did not at any time open an investigation under section 25. This was not therefore analogous to a case such as *Claymore*

Dairies v DGFT [2003] CAT 3, where the Authority had been investigating for some 2 to 3 years.

112. The Authority submits that a regulator has a wide discretion – though not "absolute" in the sense that it is immune from judicial scrutiny – as to whether to investigate issues under section 25 of the 1998 Act that are brought to its attention, whether to look at those matters under other powers, or not to take any action. The Authority submits that it is vital that that proposition be maintained in order to permit it to prioritise cases in accordance with its views as to the public interest and the resources available to it. The Authority relies in this regard on *Aquavitae*, cited above, at paragraph 205. It also points to Case T-24/90 *Automec II* [1992] ECR II-2223 at paragraphs 75 to 76.

113. The Authority submits that, in any event, if a view has not been reached on a matter under the 1998 Act – whether or not in some sense it ought to have been reached – then there is no appealable decision and this Tribunal has no jurisdiction.

114. The Authority submits that a decision not to investigate an infringement may involve an appealable decision only if that decision involves the Authority asking itself the question whether the prohibition(s) in the 1998 Act have been infringed and reaching a view on that question. In this case the Authority submits that there is no basis for any finding that it asked that question or reached a view as to the answer.

115. The Authority submits that what it said in its letter of 7 December 2005 simply does not involve any decision that can be "shoe-horned" into section 46(3)(c) or (d). The Authority submits that the question, referred to in the letter of 7 December 2005, of whether it would be an abuse of a dominant position for Bristol Water to refuse to consent under section 7(4)(a) of the WIA91 to an appointment of IWC or Albion as an inset appointee for that site was being held over (at that time there was no inset appointment application before the Authority, either by IWC or by Albion, but there was, according to the Authority, a "live expression of interest" from Albion).

116. The Authority also submits that the dicta of the Tribunal in *Aquavitae* can be distinguished from the facts of the present case since in *Aquavitae* an investigation had started and after a couple of months a decision was then taken by the Authority to stop the investigation. In any event, in *Aquavitae* the investigation was stopped because the matter was being overtaken by the Water Bill then going through Parliament.

117. In response to a submission made by IWC concerning the Authority's letter of 4 March 2005 that the Authority reached a view about the extent to which Bristol Water's savings in infrastructure costs as a result of an appointment of IWC should be reflected in bulk supply prices and that that view should be regarded as being held by the Authority for the purposes of the 1998 Act, the Authority submits:

(a) That argument is only relevant to the bulk supply aspect of the 8 November 2005 complaint. It cannot help in establishing an appealable decision in relation to the other heads of complaint.

(b) The 4 March letter was written in a context where the 1998 Act had not been invoked and the Authority was thinking solely in terms of a determination under section 40 of the WIA91. The letter therefore provides no evidence to support the proposition that the Authority asked itself a question under the 1998 Act or reached a view as to the application of that Act to the question of the appropriate bulk supply price.

(c) Further, it is simply wrong to assume that any view reached as to the way in which section 40 might apply (and it must be remembered that no section 40 determination was ever initiated) necessarily "reads across" to the 1998 Act. In applying section 40, the Authority is not to be regarded as bound to apply, or as necessarily applying, the same analysis that it would apply under the 1998 Act.

(d) Indeed, it would be extraordinary if the expression of a view as to the approach that might be adopted in relation to the exercise of a regulator's powers under sector specific legislation such as the WIA91 – in relation to which Parliament has not given the Tribunal any appellate role –

should be taken as indicating that the regulator must in some way automatically have reached the same view under the 1998 Act and hence that an appealable decision under the 1998 Act has been made. If such an argument were right, any view as to a competition related issue in the broadest sense taken by a regulator under its sectoral powers would automatically be converted into an appealable decision under the 1998 Act. Such an argument would entirely subvert the decision that has plainly been taken by Parliament not to confer an appellate role on the Tribunal in relation to that legislation.

(e) Further, any attempt to expand the jurisdiction of the Tribunal by such reasoning would inevitably create considerable uncertainty as to what decisions by regulators under sectoral regulation were appealable under section 46 of the 1998 Act and, as a result, make it difficult for those who wished to challenge such decisions to be sure how to proceed.

(f) IWC is guilty of selective quotation; it has omitted to quote the later part of the 4 March 2005 letter where it is made clear that the Authority's position at that point was simply that a reduction in the bulk supply price was "not necessarily the right way to reflect" the point that Bristol Water saved infrastructure costs if the Appellant was appointed as the undertaker for the site. That shows that the Authority had not, in any event, reached a decided view on the point.

118. The Authority submits that Article 3 of Regulation 1/2003 has no impact on the question of jurisdiction:

(a) The answer to the question of what impact Regulation 1/2003 might have on the Authority's duties in a situation such as the present cannot affect the answer to the question of jurisdiction now before the Tribunal, namely whether the Authority did reach a view as to the application of general competition law (not whether it ought to have done so).

(b) It is impossible to see how Regulation 1/2003 can affect the question of how, as a matter of national law, jurisdiction is split as between the Administrative Court and the Tribunal given in particular that on any

view the judicial supervision exercised by the Administrative Court is sufficient to meet the standards of Community law.

119. The Authority submits that there is no basis in this case for implying a decision. The Authority submits that the question is not whether there has been a decision, but whether the express decision that has been taken is the type of decision against which an appeal lies to the Tribunal.

120. The Authority submits that any concept of an implied decision would further blur the lines between appealable and non-appealable decisions and would make it more difficult for an appellant to work out which side of the line his complaint falls.

121. The Authority submits that although Community law, by virtue of Article 232 EC, confers a jurisdiction on the Community courts in respect of a failure to act, no equivalent jurisdiction is given to this Tribunal and in that respect it is an unsafe analogy.

122. The Authority submits that there is no substance in IWC's submission to the effect that, since the Authority thought about interim measures, it must have started an investigation.

123. The Authority submits that the only application that the Authority was actually being asked to decide was the application that essentially Bristol Water be asked to fund IWC's legal costs of pursuing its complaint. The Authority notes that a decision as to this was made on 25 November 2005.

124. The Authority submits that IWC made no reference whatsoever in its notice of appeal to the decision of 25 November 2005 to reject its application for interim measures or to any of the correspondence leading up to the interim measures decision, and only first raised the interim measures matter in its 13 February 2006 submissions, which were three weeks out of time for appealing any decision made on 25 November 2005.

125. The Authority refers to Rules 8 and 11 of the Tribunal's Rules, to the Tribunal's *Guide to Proceedings*, October 2005 at paragraph 6.14 and 6.44 and to the Order of the President in *Prater v OFT* [2006] CAT 11, all of which emphasise the exceptional nature of the discretion to extend time. The Authority submits that there is an underlying policy that it is important that any decision taken by a regulator either turns out to be final and unappealed, or is subject to appeal as soon as possible and within the two-month limitation period.

126. The Authority submits that there are no exceptional circumstances under Rule 8(2) of the Tribunal's Rules that could justify an extension of time for appealing against that decision. The Authority relies on the Tribunal's *Guide to Proceedings* at paragraph 6.14 and on *Hasbro UK Limited v DGFT* [2003] CAT 1, at paragraph 18.

127. The Authority submits that it is plain that the absence of legal representation cannot be regarded as an exceptional circumstance. The Authority submits that the absence of legal representation is not even an unusual circumstance and that to regard it as an exceptional circumstance would bestow a wholly unfair advantage on appellants who choose not to use legal representation (and would make it difficult for the Tribunal to distinguish appellants who choose not to employ lawyers from those who are unable to do so).

128. The Authority submits that the Tribunal should be particularly reluctant to allow an extension of the time limit in an interim measures case where time is plainly of the essence. The Authority submits that the attempt to mount a late appeal against the interim measures decision made on 25 November 2005 should therefore be rejected as out of time.

Interveners' submissions

- Bristol Water

129. Bristol Water supports the Authority's key submission that no decision capable of being appealed under section 46 or section 47 was made in this case.

130. Bristol Water submits that Article 82 is not engaged in the circumstances of this case, which is concerned with the supply of water to a very small residential development near Bristol, and accordingly Article 3 of Regulation 1 is not engaged either.

- Albion Water

131. Albion supports IWC's submissions. Albion submits that, in *Aquavitae*, the reasons the Tribunal accepted that in the circumstances the Authority had not taken a decision were very exceptional. According to Albion, it was clear from the amount of paperwork that a considerable amount of resource was committed by the Authority right from the start of this case.

VI THE TRIBUNAL'S ANALYSIS

The WIA91

132. The question now before us requires an understanding of the relevant provisions of the WIA91.

133. Section 7(1)(a) requires that for every area of England and Wales there be, at all times, a company holding an appointment as a water undertaker.

134. In certain circumstances, an existing undertaker may be replaced by another as the supplier of water and/or sewerage services for one or more customers in a specified geographical area. Such an appointment is generally described as an "inset appointment".

135. Section 7(3) provides that the appointment as a water undertaker cannot be terminated or otherwise cease unless the incumbent water undertaker is replaced by another water undertaker.

136. Section 7(4) provides that an appointment or variation replacing an incumbent water undertaker shall not be made except in certain limited circumstances, including:

(a) where the incumbent undertaker does not serve any of the premises in the area to be covered by the additional appointment. This is referred to as the greenfield site exception.

(b) where the incumbent undertaker "consents to the appointment or variation". This is referred to as the "incumbent consent" exception.

137. Section 8 sets out the procedure to be followed with respect to appointments and variations for inset appointments.

138. Section 9 sets out the duties to be fulfilled by the Secretary of State and the Authority when they are considering making an appointment or variation. Included in these duties are the following:

(a) to have regard to any arrangements made or expenditure incurred by the existing appointee for the purpose of enabling premises in that part of that area to be served by that appointee;

(b) to ensure, so far as may be consistent with its duties under Part 1 of the WIA91, that the interests of the members and creditors of the existing appointee are not unfairly prejudiced as respects the terms on which the new appointee could accept transfers of property, rights and liabilities from the existing appointee.

139. A water undertaker or a person who has made an application under section 8 is termed a "qualifying person" for the purposes of section 40 (see section 40(2)).

140. Under section 40, on the application of a qualifying person the Authority may require a water undertaker to give, and the applicant to take, a supply of water for such period and on such terms and conditions as may be provided in the order. The Authority may make an order where (i) it appears to it that it is necessary or expedient for the purposes of securing the efficient use of water resources, or the efficient supply of water, that the water undertaker specified in the application should give a supply of water in bulk to the qualifying person; and (ii) it is satisfied that the giving and taking of such a supply cannot be secured by agreement. In exercising its functions under section 40, the

Authority has to have regard to the desirability of certain factors set out in section 40(6), including facilitating effective competition within the water supply industry.

141. For the purposes of this hearing it is accepted that the Weston Road site was, at the time when IWC submitted its various draft inset applications to the Authority, a greenfield site within the area in which Bristol Water was the existing/incumbent water undertaker. On the basis that it was a greenfield site, Bristol Water's consent was not required for an inset appointment restricted to this site. It was accordingly open to IWC to apply for an inset appointment. Such an application would have had to be dealt with in accordance with the procedures set out in section 8 WIA91.[2] Since, according to IWC, there were no other suitable sources of water available, if the application had been successful then IWC would have needed a supply of water from Bristol Water. This could have been achieved either by agreement between IWC and Bristol Water or, if a supply of water could not be secured by agreement, by application under section 40. It was open to IWC, once it had made an application under section 7, to make an application under section 40 for an order that Bristol Water give and IWC take a supply of water for such period and on such terms and conditions as may be provided by the order. It is a pre-requisite to the making of such an order by the Authority that the Authority is satisfied that the supply cannot be secured by agreement between IWC and Bristol Water.

142. Once any premises on the Weston Road site were being served by Bristol Water, it was no longer possible for an inset appointment to be granted under the greenfield criterion. The practical implication of this was that, in those circumstances, neither IWC nor any other undertaking could be appointed a water undertaker for that site under section 7 of the WIA91 in the absence of Bristol Water's consent.

[2] Whilst IWC submitted various documents purporting to be applications for an inset appointment in respect of the Weston Road site, it appears from the correspondence that the Authority treated them all as draft applications, on which it gave feedback which highlighted what the Authority considered to be deficiencies in the documents.

143. IWC has complained to the Authority that Bristol Water's conduct in connection with IWC's inset application infringed the Chapter II prohibition under the 1998 Act. IWC submitted a first formal complaint to the Authority on 20 May 2005, but subsequently withdrew this complaint. On 8 November 2005 IWC submitted a further complaint. That complaint was the subject of the case closure letter of 7 December 2005.

The 1998 Act

144. The Chapter II prohibition is contained in section 18 of the 1998 Act. We have set out section 18 at paragraph 14 above.

145. Under Chapter III of the 1998 Act (Investigation and Enforcement) the OFT and other sectoral regulators such as the Authority are given extensive powers to investigate and make decisions as to whether or not the Chapter II prohibition has been infringed. Section 31(3) of the WIA91 provides for the Authority to be entitled to exercise, concurrently with the OFT, the functions of the OFT under the provisions of the 1998 Act.

146. The Authority submits that the Tribunal does not have jurisdiction to hear IWC's appeal.

147. The jurisdiction of the Tribunal in respect of appeals to it against certain decisions made under the 1998 Act derives from sections 46 and 47 of the 1998 Act, as amended. These are set out at paragraph 12 above.

148. Section 46 of the 1998 Act is directed to appeals by the parties principally affected by a decision of the Authority, normally the parties to an agreement in respect of which the Authority has made a decision "as to whether the Chapter I prohibition has been infringed" (section 46(1) and (3)(a)); or any person in respect of whose conduct the Authority has made a decision "as to whether the Chapter II prohibition has been infringed" (section 46(2) and (3)(b)).

149. On the other hand, section 47 of the 1998 Act envisages appeals to the Tribunal by third parties who do not fall within section 46(1) and (2).

150. The notice of appeal focuses on the Authority's insistence that it should apply the provisions of the WIA91 instead of investigating whether or not Bristol Water had infringed the Chapter II prohibition contained in the 1998 Act. The notice of appeal does not mention interim measures, although these are referred to in the Authority's letter of 7 December 2005 on which IWC relies to demonstrate that the Authority has taken a decision capable of being appealed to this Tribunal. IWC submitted that the notice of appeal was broad enough to encompass an appeal against an interim measures decision, although it recognised that if the Tribunal did not accept this argument, it would have to apply for permission to amend the notice of appeal in respect of an appeal under section 47(1)(e), and it applies to the Tribunal for such permission.

Is there an appealable decision?

151. The first issue before us is whether there is a "decision" of the Authority which falls within section 47(1)(a) or 47(1)(e) of the 1998 Act. The Authority submits that it has not made any decision within the ambit of these provisions.

152. In this context it is important to note that under section 25 of the 1998 Act the Authority has a discretion whether or not to conduct an investigation. Notwithstanding that it may have reasonable grounds for suspecting an infringement, it does not have a duty to investigate. Whether the Authority has an absolute discretion to decline to investigate apparently *bona fide* complaints under the 1998 Act was a matter left open in *Aquavitae* and we do not need to decide that point here. Furthermore, the Authority's powers under section 35 of the 1998 Act to give directions concerning interim measures exist only once it has begun an investigation but before it has completed it.

153. In *Aquavitae* the Tribunal said:

> "206. In normal circumstances, where the OFT or a concurrent regulator has expressly indicated that they will consider a complaint on its merits, the Tribunal will expect that investigation to reach an outcome. If the outcome of that investigation is to close the file, the Tribunal will normally infer that that is because there is insufficient evidence of infringement. In most cases the result will be

> an appealable decision, in accordance with the principles now established in *BetterCare*, *Freeserve* and *Claymore*, cited at paragraph 5 above. As *Claymore* makes clear, at paragraphs 124 to 146, the drafting of the case closure letter is unlikely to deflect the Tribunal if the substance of the matter is a finding of insufficient evidence of infringement. Moreover, the inference that the case has been closed because the relevant regulator has concluded that an infringement is not established will normally be irresistible if, at an earlier stage, the regulator has already expressed a view to the effect that he sees little merit in the case."

154. IWC submits that the Authority did begin an investigation under section 25 of the 1998 Act. It rests this submission in part on a further submission that the Authority considered whether or not to impose interim measures and decided not to do so. According to IWC, it could not have taken that course had it not yet begun an investigation. IWC also relies on section 47(1)(e), which expressly provides for an appeal in respect of a decision not to make directions under section 35.

155. The Tribunal has considered in previous cases what amounts to an "appealable decision" for the purposes of sections 46 and 47. The principles derived from *BetterCare*, cited above, and *Freeserve.com PLC v Director General of Telecommunications* [2002] CAT 8 are summarised in *Claymore*, cited above.

156. In *Claymore*, the Tribunal summarised the principles to be applied as follows:

> "122. In our view the main principles to be derived from *BetterCare* and *Freeserve* are:
>
> (i) The question whether the Director has "made a decision as to whether the Chapter II prohibition is infringed" is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*BetterCare*, [24]).
>
> (ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*BetterCare*, [62], [84] to [87], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).

(iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement, (*BetterCare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition (*Freeserve*, [101] and [102]).”

157. In *Claymor*e the Tribunal decided that the Director’s conclusion that an infringement was not sufficiently established by the evidence before him gave rise to an appealable decision in the circumstances of that case. The Tribunal considered that a useful approach in that case was to ask two questions (see paragraphs 147 to 148):

(a) Did the Director ask himself whether the Chapter II prohibition has been infringed?

(b) What answer did the Director give to that question when making his decision?

158. In *Claymore* the Tribunal further remarked as follows:

“151. On that approach, the Director’s decision in this case is to be contrasted with other kinds of decisions to close the file, such as where the Director, without going into the merits, decides not to open an investigation because he has other cases to pursue in priority (the situation dealt with by the Court of First Instance in *Automec*, cited above); because he has decided to make a market investigation reference to the Competition Commission under the Enterprise Act 2002; because another competition authority is investigating the matter; because of the possible effect on criminal proceedings under section 188 of the Enterprise Act 2002; or for some other reason which does not involve him taking a considered position on the merits of the case.”

159. An example of the application of these principles is *Aquavitae*, cited above, where the Tribunal accepted that the Director’s decision to focus his resources

on the introduction of a statutory scheme for retail licensing envisaged by the Water Bill rather than pursuing a complaint under the 1998 Act constituted a genuine independent reason for closing the file and that no decision as to whether the Chapter II prohibition had been infringed had been taken.

160. We have set out at paragraphs 31 to 78 above the facts to the extent relevant to our consideration of whether as a matter of substance (as opposed to form) an appealable decision has been taken by the Authority.

161. The Authority's letter of 7 December 2005, on which IWC's appeal is founded, must be read against the following background:

(a) That the draft inset applications which had been submitted by IWC were founded on the Weston Road site being a greenfield site.

(b) IWC had submitted a number of versions of a draft inset appointment application to the Authority, but the Authority was not satisfied that IWC could meet the standards required by it to show that IWC was financially, operationally or technically viable on the basis of the drafts it had seen.

(c) That by November 2005, given that certain houses on the Weston Road site were by that stage occupied and needed to be provided with mains water (the DWI having raised serious concerns about provision of water via a static tank), there was no alternative but for Bristol Water to provide an immediate mains water supply to the site.

(d) As a result, GWB and Bristol Water agreed at the "all parties" meeting on 11 November 2005 that the latter would provide a water supply to the Weston Road site.

(e) Once Bristol Water provided a mains connection on 5 December 2005 it became the incumbent water undertaker.

(f) The site could therefore no longer be classified as a greenfield site.

(g) By December 2005 IWC's inset application as submitted was accordingly bound to fail and was therefore withdrawn.

(h) Any future inset appointment for the Weston Road site would require the consent of the incumbent water undertaker.

(i) Bristol Water had decided not to offer "incumbent consent" to whomever GWB chose to supply the site in the long term.

(j) Accordingly, any future inset application by IWC was also now bound to fail, even if IWC could satisfy the Authority of its suitability to be a water undertaker, unless Bristol Water could be required to offer "incumbent consent".

162. Incumbent consent was, however, not the only matter in issue in the Authority's consideration of an inset application. The procedure set out in section 8 had to be fulfilled, in connection with which the Authority also had to fulfil its duties under section 9. As part of satisfying the Authority that IWC was in a position to be appointed the water supplier for the Weston Road site, IWC would need to negotiate a bulk supply of water from Bristol Water. If IWC and Bristol Water could not agree the terms on which such a supply should be made, IWC could apply to the Authority for a determination under section 40 of the WIA91. The bulk supply price was an essential ingredient in the business plan which IWC had to provide the Authority as part of its inset appointment application.

163. IWC's complaint embraced an alleged pattern of abuse over 11 months by Bristol Water of which the bulk price issue was only one aspect. In its letter of 8 November 2005 IWC referred to the following matters as requiring investigation:

(a) whether Bristol Water's request for a set up charge amounted to excessive pricing and predatory behaviour prohibited by Chapter II of the 1998 Act.

(b) whether Bristol Water's insistence on charging the published tariff amounted to discriminatory and predatory behaviour.

(c) whether Bristol Water's behaviour during the 11 months in its dealings with IWC amounted to an infringement of the Chapter II prohibition.

164. IWC considered that the powers under the WIA91 were not adequate to investigate the various matters of which it had complained and that an investigation should be opened under the 1998 Act. The Authority's preferred route, however, was to consider any inset appointment application first. IWC had, by that stage, withdrawn from the inset appointment process. However, there was still, in the Authority's view, a live "expression of interest" from Albion. The Authority preferred to consider any such application, the process for which would, in its view, encompass the pricing issues of which IWC had complained. Only if any such application were successful, and if "incumbent consent" remained an issue at that point, would it turn to consider whether it should investigate using its powers under the 1998 Act. That was what was termed by the Authority its "step by step approach".

165. The Authority preferred its step by step approach because "the issue of refusal of consent becomes essentially academic if there is in fact no prospect of a viable inset appointment in any event" (letter of 7 December 2005).

166. In coming to this conclusion, the Authority took the view that any concerns as to the terms and prices on which Bristol Water was prepared to offer a bulk supply and as to the terms of connection to its network were better addressed under the WIA91 than under the 1998 Act and, particularly since IWC had withdrawn its inset appointment application, the Authority did not regard it as appropriate to devote resources to considering whether Bristol Water had infringed the 1998 Act in its dealings with IWC on those matters.

167. Essentially, two issues are dealt with in the letter of 7 December 2005, namely "incumbent consent" and the terms of supply and connection. It appears from that letter that the Authority has reserved its position as to the incumbent consent issue pending its consideration of any application from Albion for an inset appointment. The Authority considered that it was not appropriate to consider IWC's complaint as to Bristol Water's proposed terms of supply and connection, given that (i) it would be considering similar matters under the WIA91 in relation to Albion's own complaint and (ii) IWC had withdrawn its own inset application.

168. Having withdrawn its inset application founded on a greenfield site, IWC had not submitted a new application pending resolution under the 1998 Act of the "incumbent consent" issue. There were, however, a number of other outstanding issues in relation to any inset application, including: (i) whether IWC as a company could satisfy the Authority in relation to IWC's financial viability and (ii) what the price would be for a bulk supply from Bristol Water to IWC.

169. It is clear that the Authority wished to focus on whether Albion (or IWC for that matter) could satisfy the Authority that it was able to meet the requirements for appointment as undertaker for the Weston Road site. As to demonstrating financial viability, the Authority suggested to Albion that it should supply with its application different scenarios as to the bulk supply price, for example the price offered by Bristol Water and Albion's preferred rate (i.e. not just, for example, the terms Bristol Water had agreed with IWC in August 2005): see e.g. letter from the Authority to Albion of 30 November 2005. The Authority's view, set out in its letter of 7 December 2005, was that the question of the bulk supply price, and the associated pricing and connection issues, should be considered under the WIA91 once an application for an inset appointment had been made.

170. On the issue of incumbent consent, the Authority's approach was to cross that bridge at a later stage. Whilst Albion and IWC have criticised that approach, suggesting that there was no point in either of them making a formal application for an inset appointment unless Bristol Water could ultimately be forced by the Authority to offer incumbent consent, the correctness of that approach is not a matter affecting the question of admissibility and so, in the circumstances of this case, is not a matter for this Tribunal.

171. Having regard to all the circumstances, we consider that the Authority cannot be said to have made a decision as to whether the Chapter II prohibition has been infringed.

Implications of proceeding to consider interim measures

172. In support of its argument that the Authority took an appealable decision, IWC submitted that the Authority had considered whether to adopt interim measures under section 35 of the 1998 Act, which implies that it had opened an investigation under section 25 of that Act; the fact that the Authority "dropped out" from a consideration of interim measures must mean that it changed its mind on the question of whether there were reasonable grounds to suspect an infringement, which necessarily implies that the Authority came to the conclusion that Bristol Water had not committed an infringement.

173. The Authority submitted to us that since it had not begun an investigation it had no jurisdiction to make a decision under section 35 in any event.

174. We consider that on the material before us no investigation under section 25 had begun. We do not consider that, by engaging in correspondence relating to IWC's application for interim measures, the Authority must be taken to have opened an investigation under section 25. We note from the correspondence that the Authority were, in particular, explaining that even had an investigation been opened it did not consider that it had power to order the type of interim measure sought by IWC (namely payment of fees for specialist advice).

Regulation 1/2003

175. IWC submitted that it was inconceivable that Article 82 EC did not apply to the issues in this case. It submitted that having reached the point of opening an investigation under section 25 of the 1998 Act, the Authority was obliged, by virtue of Article 3 of Regulation 1/2003, to continue investigating until it reached a decision on the question of Article 82 EC.

176. We can deal with this submission shortly. Article 3(1) of Regulation 1/2003 provides, so far as relevant:

> "Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may

> affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty."

177. Whether or not an investigation under section 25 was commenced, we do not read Article 3(1) of Regulation 1/2003 as imposing any obligation on a competition authority to proceed to a decision on the application of Article 82 once it has opened such an investigation. Article 3(1) says nothing more than if an authority applies domestic competition law in relation to an agreement or conduct which may affect inter-state trade, it must also apply Article 81 or 82 EC (as the case may be). Accordingly, Article 3 of Regulation 1/2003 is irrelevant to the question of whether the Authority took an appealable decision.

Conclusion on the question of appealable decision

178. In our judgment, on the material provided to us this is a case where the Authority has abstained from expressing a view, one way or the other, on the question whether there has been an infringement of the Chapter II prohibition. This case is clearly distinguishable from *Claymore*, where the Director had investigated the matter exhaustively for the purpose of reaching a conclusion on whether the Chapter II prohibition had been infringed. In that case, the Tribunal held that the Director had concluded in effect that such an infringement could not be established on the evidence before him (see paragraph 152 of *Claymore*).

179. We should mention that IWC submitted to us that since there was no active inset appointment application by IWC before the Authority the step-by-step approach was no longer appropriate. Whether the step-by-step approach was or was not appropriate is, however, irrelevant to the question before the Tribunal, which is whether the Authority has made an appealable decision under the 1998 Act.

IWC's attempt to appeal in respect of interim measures

180. We now turn to the second part of IWC's submissions. IWC seeks to challenge what it characterises as a decision by the Authority to refuse interim measures under section 35 of the 1998 Act. It explains that it made several requests to the Authority to adopt interim measures and submits that the Authority refused to do so. It submits that the Authority's letters of 25 November and/or 7 December 2005 contain a refusal to give directions under section 35.

181. The Authority submits as follows: (i) IWC did not raise this point in its notice of appeal but, rather, for the first time in a letter of 13 February 2006. The appeal on this point is therefore out of time. There are no exceptional circumstances in this case such as to warrant the Tribunal exercising its discretion to extend time; (ii) in any event, the Authority did not make a decision to refuse to give an interim measures direction. It had not opened an investigation under section 25 and so would have had no jurisdiction to give such a direction; (iii) all the Authority did was to inform IWC that it had no power, in any event, to give the directions sought.

182. In response, IWC submits (i) the notice of appeal was very broad in scope. IWC was appealing the totality of the Authority's handling of the matters raised by IWC, and there is reference in the notice of appeal to the Authority's letter of 7 December 2005, which itself refers to interim measures; (ii) the Tribunal should not take too legalistic a view of notices of appeal submitted by litigants in person. IWC essentially sought to overturn the Authority's decision and actions; alternatively (iii) in the circumstances IWC should be permitted to amend its notice of appeal to include specific reference to interim measures.

183. As to whether the notice of appeal itself raises the issue of a refusal to grant interim measures, IWC relied only on the reference made in the notice of appeal to the letter of 7 December 2005, which itself refers to interim measures. It is therefore common ground that the notice of appeal does not refer in terms to interim measures or to any refusal to adopt interim measures.

184. Although IWC was not legally represented at the time that it prepared the notice of appeal, the document clearly sets out the essence of IWC's complaint. However, there is no mention of IWC's request to the Authority that Bristol Water pay the fees of specialist advisers in relation to the IWC complaint or of the Authority declining this request (which, as we explain below, was the only 'live' request then before the Authority). It is clear to us, therefore, that the notice of appeal does not contain a ground of appeal relating to a refusal to adopt interim measures.

185. We now turn to the question of whether we should give IWC permission to amend the notice of appeal to include a ground relating to an alleged refusal to give an interim measures direction under section 35 of the 1998 Act.

186. It is clear from the correspondence as summarised above that there was no request by IWC for interim measures to deal with Bristol Water having declined to give incumbent consent. Similarly the request for interim measures concerning the costs of the alternative supply (i.e. from the static tank IWC had caused to be installed) had been superseded by the mains water connection to the site. It therefore follows that these two matters are not themselves in issue before the Tribunal.

187. The only matter raised by IWC in relation to interim measures in its correspondence with the Authority which remained 'live' was the request that Bristol Water be directed to pay the fees of specialist advisers for IWC in relation to its complaint. However, as set out above this matter does not feature at all in the body of the Notice of Application.

188. Rule 11 of the Tribunal's Rules, cited above, is in the following terms:

> "11 (1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.

> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless—
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include such ground in the notice of appeal; or
>
> (c) the circumstances are exceptional."

189. We do not consider, in the circumstances of the present case, that either of paragraphs (a) or (b) of Rule 11(3) is applicable. The question then arises as to whether "the circumstances are exceptional".

190. We have reminded ourselves of what the Tribunal stated in *Floe Telecom Limited (in administration) v Ofcom* [2004] CAT 7**,** at paragraphs 30 *et seq*., in respect of amendments to notices of appeal. As we explain above, although IWC was not legally represented at the time that it prepared the notice of appeal, the document clearly sets out the essence of IWC's complaint. However no mention is made in the body of the notice of appeal of the Authority's refusal to make a direction under section 35. More simply put, there is no mention of IWC's request to the Authority that Bristol Water pay the fees of specialist advisers in relation to the IWC complaint; nor does the notice of appeal mention the Authority declining this request. No mention is made at all of these matters in the notice of appeal.

191. Although in this developing jurisdiction the Tribunal must retain a degree of flexibility sufficient to ensure that cases are disposed of appropriately and fairly, balanced against this is the philosophy behind Rule 11 which is to limit the possibilities of amendment after an appeal has been introduced. Although an unrepresented party may not have the specialist knowledge and experience to be able, in its notice of appeal, to define its complaint within a legal structure, the essence of the complaint, derived from the facts relied upon, should be ascertainable from the notice of appeal. As set out above, we have not been able to discern from the body of the notice of appeal in this case any complaint regarding the request for or the failure of the Authority to provide interim measures to IWC. Nor has any explanation been given to us for the omission of

this complaint which might give rise to exceptional circumstances. Accordingly, we do not consider it appropriate to permit IWC to amend its notice of appeal to include a ground of appeal relating to a refusal to give an interim measures direction under section 35.

VII CONCLUSION

192. For the reasons set out above we unanimously conclude that this appeal is inadmissible as it falls outside the jurisdiction of this Tribunal.

Marion Simmons QC Michael Blair QC Ann Kelly

Charles Dhanowa 26 January 2007
Registrar