IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1058/2/4/06

Victoria House,
Bloomsbury Place,
London WC1A 2EB

9th June 2006

Before:

Marion Simmons QC
(Chairman)
Ann Kelly
Michael Blair QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INDEPENDENT WATER CO LIMITED — Appellant

and

WATER SERVICES REGULATION AUTHORITY — Respondent

supported by

BRISTOL WATER Plc

and

ALBION WATER LIMITED — Interveners

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

PRELIMINARY HEARING

APPEARANCES

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

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

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

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

———

THE CHAIRMAN: Good morning. Can I just thank everyone for their written submissions? There were two applications, one is on the admissibility question and the other is the protective costs' order. However, it does seem to us, Mr. Mercer, that the protective costs' order probably does not arise because we are here on admissibility, all the costs have been incurred and we ought to hear the admissibility application and then costs will follow; if anybody makes an application as to costs we can hear that at that stage on our usual order about costs after the case.

MR. MERCER: As a matter of logic, ma'am I could not fault you, except that if we should manage to mount the Everest of the admissibility application we will then continue to a substantive hearing.

THE CHAIRMAN: But you said that your protective costs order was limited to the admissibility.

MR. MERCER: The one that we made was, ma'am.

THE CHAIRMAN: Therefore if we said this application was admissible ----

MR. MERCER: We would have to re-apply, ma'am.

THE CHAIRMAN: -- the position would be that you would have to explain about your funding which you have not yet done properly, and we should then consider what the position was, but you are not there yet.

MR. MERCER: No, ma'am.

THE CHAIRMAN: So really today it is admissibility only, is it not?

MR. MERCER: Yes, ma'am, though if there are any questions that the Tribunal have concerning the arguments made concerning costs it would be useful to address those during the course of the day.

THE CHAIRMAN: Well I am not sure it is particularly useful to address those today if what you are thinking is that that will assist you in relation to a future application because I think one needs to look at it, and this is what I was possibly saying last time – a least that was what was in my mind – that one needed to look at a protective costs order against the merits of the case.

MR. MERCER: Very well, ma'am.

THE CHAIRMAN: Thank you. So the issue today is admissibility only.

MR. MERCER: Very well, ma'am.

THE CHAIRMAN: You are going to start, Mr. Mercer?

MR. MERCER: Yes, I will ma'am. There has been a few times when I have tried to start in this Tribunal, ma'am, only to have to sit down again because you have indicated a provisional view, so I was just waiting to see what was going to happen first really – it did not show a reluctance to get started on the arguments on my part.

I want to start with just a couple of points of background, because they are of general relevance. The first is to make it clear to this Tribunal that we are not overlapping in any way in what we are looking forward to in our substantive case from what Albion and Aquavitae are presently looking forward to. The Albion and Aquavitae cases presently going forward are in relation to what I call 'big user' inset, where there is a big user like the one at Shotton in the case of Albion, and we are looking at Greenfield sites essentially, inset by area and not inset by large user. We need to make it clear that there is not an overlap but that that this in fact, if we did get to the substantive matters, would be complementary to the other matters being considered.

THE CHAIRMAN: Having read the file there is quite a lot of Albion documents in that file, was Albion applying for a similar inset application in relation to this as well?

MR. MERCER: It was at one time, yes, when they came to our assistance to try and keep the matter going.

THE CHAIRMAN: What you are saying is that the cases that are going on here are nothing to do with it?

MR. MERCER: Yes.

THE CHAIRMAN: Of course, I have nothing to do with those cases and I do not know anything about them really.

MR. MERCER: But this is complementary and it simply looks at the rules relating to Greenfield sites.

THE CHAIRMAN: Yes.

MR. MERCER: And we are looking here at an inset provision which can only be made, the licence can really only be considered, if consent is given to by the incumbent – when I use the word 'incumbent' I do not mean the Vicar of Bristol, I mean Bristol Water as the incumbent dominant operator – or in respect of unserved sites. As a matter of background I would point out that there are no inset licences' applications been granted of the type looked for here in the United Kingdom, except to persons who are otherwise water industry incumbents. So if you look at Ofwat's website and the list of Greenfield inset licensees you will see Anglia perhaps in Northumbria's area, it is the same magic circle of water companies.

There are two statutes involved, we know ----

THE CHAIRMAN: Can I just understand? Is it because the new company has to link into the existing company's water supply that the incumbent has to consent?

MR. MERCER: No, they could just consent and then they might separately come to an arrangement about interconnection.

THE CHAIRMAN: Yes, there has to be an interconnection?

MR. MERCER: Yes. Well, actually there does not have to be an interconnection. There could, as in this case, be the provision of water from another source, or indeed the use of a static tank as occurred at Weston Road for a time at the relevant site near Bristol. But a way of doing it is to interconnect into the high pressure main of the incumbent at a level, we would say, higher than the leaks that have been referred to in all the papers recently. You go right to the high pressure part of the Bristol system, interconnect there and bring the water into the site. These applications, and people have been looking at this only sporadically in the last couple of years, but I would like the Tribunal to be in no doubt as to what the scale of inset provision might be as things go on.

On some estimates according to some commentators, with the decisions made about planning in the United Kingdom and the freeing up of planning land in the next few years, we will see two million homes in the next decade or so fall into the category that could become inset provision. Inset provision for water should not be seen necessarily in isolation of the provision of one utility because what the Lanara Group (of which Independent Water is a part) was the bundled provision of utilities. So, in other words George Wimpey would walk into one office near Bury St. Edmunds and that of my client, and they could get all the utilities put in and delivered to their site – gas, electricity, telecoms and water – in one hit. It is that kind of bundling and that kind of ease of being able to hand over responsibility for that part of the project to an experienced utility sub-provider, that encourages people like George Wimpey to use people like Independent Water.

THE CHAIRMAN: But am I right in thinking that the people who then buy the homes are then locked into that bundling system?

MR. MERCER: They will find a particular infrastructure there but they will have the normal choices as to choice between provider depending on the industry and the type of industry. So, for example, if they start off with Lanara as their gas provider they still have the right to be able change over to British Gas or ----

THE CHAIRMAN: They can unbundle it?

MR. MERCER: They can unbundle it. Looking at this matter in the round which is, as we will discover, how Ofwat said they had dealt with the application when they came to their Decision, this matter arises because the Appellant tried to get into the business. When you try to get into the business in the position that the industry is presently in, you have an awful chicken and egg scenario. Whether or not you have indeed got a business depends upon the interconnection price for the water you are going to buy, but you do not know that – well, you can ask Bristol –

but you have not got a regulator-determined price at the moment, and neither have you got a regulator-determined set of terms and conditions for interconnection. Before you have those basic building blocks, it is quite difficult even to prepare a business plan because you do not know in the end what margin you are going to get. There are several ways – as I hope the Tribunal will go on to hear about – of working out what that price should be: retail minus, cost plus, etc. What the parties got themselves into was a real tangle. There are some guidance notes for applicants for the relevant applications on the Ofwat website, though one would not describe them as fulsome. Indeed, looking at the terms of some of them it is all too easy to see why only people presently in the water industry have managed to get an inset application through.

The other problem that companies like the Appellant have is that there is only so long you can go on not earning any money and seeing no light at the end of the tunnel in respect of getting interconnection and having the terms of that determined. It is the constant cry of all of those who are start-ups in this industry that competition regulation never takes place fast enough, and procrastination is a weapon which has been excellently used by incumbents throughout all of the utility industries, the past master it being alleged being BT.

So we have another factor which we can only guess at which is that Ofwat, for whatever reason, appear to be to the Appellant more interested in preserving their five year agreement with the incumbent water companies than in the promotion of competition.

THE CHAIRMAN: Do we need to look at this agreement?

MR. MERCER: I do not think so, ma'am, it is that made pursuant, as I understand it, to the Water Industries' Act with the operators in regard to their costs and what they can charge. Now, as I have said there are two pieces of principal legislation, the Water Industries Act 1991 and the Competition Act 1998 and both, say Ofwat, will give rise to a solution for the Appellant's problem, but the Appellant says that is not so because the Water Industries Act imposes a regime on looking at how a dispute may be resolved, which will not give the most favourable, or indeed a result which necessarily leads to further competition.

So if you are having trouble with your incumbent dealing with an inset application you can go to Ofwat and there are two things you can ask for. One is a straightforward Chapter II prohibition, abuse of a dominant position, and by the way I will say this now for the first time, you better have a look at Article 82 as well while you are there, because we get quite a lot of our piping from Germany and other places. Secondly, you can look at the Water Industries Act and there is a mechanism in s.40 there for the regulator coming in and determining the terms of an agreement, including as to prices of interconnection. So if we look at the CA98 we

have an investigation which will look at not just an agreement being entered into but the total behaviour. If we look at the Water Industries Act we look at a much narrower remit, just looking at the terms of an agreement, and of course the Water Industries Act is replete with little duties, sub-duties, things that, when dealing with their duties under Water Industries Act, Ofwat must consider such as, for example, the financial security of existing incumbents or water operators. I have no need to take you there for the moment, but s.40 of the Water Industries Act is at tab 15 in the authorities' bundle.

To trigger s.40 of the Water Industries Act the person in Independent's position has to do something quite important, they actually have to make an application for the necessary licence inset authorisation, etc. Unless he has at least made the application there is no vires, the section just does not bite. And, Ofwat has to be satisfied that the giving or taking of such supply cannot be secured other than by what they are doing. They have to be sure that in order for everything to work properly they have to actually make a determination.

Now, there is a question which Ofwat itself started to examine and I will give you the reference, ma'am, but I do not think there is any need to turn it up for the moment, it is para.22 on p.8 of their outline submissions. They raised a question but gave no answer to it, as to the circumstances in which determinations could be made, and what they said was really, if you look at the wording of s.40, Ofwat has to be certain that the determination has to be necessary to secure efficient use or supply of water, and the Respondent gave no answer to the question what actually that meant, except that everybody assumed in this case that it was engaged.

MR. BLAIR: It is "necessary or expedient", is it not, rather than merely "necessary" – or does that not matter much?

MR. MERCER: I do not think that matters much, it is the "efficient" use of supply which is I think the interesting word. My submission on that is that it is engaged here because the most efficient way of providing water to this site by my client is to interconnect to the high pressure mains system of Bristol Water.

My submission is that the Water Industries Act provides a cautious or prescriptive remedy, subject to many caveats. If we were to look, for example, at OFT 422, which is tab 13 in the authorities' bundle ----

THE CHAIRMAN: Which part do you want us to look at?

MR. MERCER: I will find the reference, ma'am. Basically what it deals with is saying to Ofwat that when it is considering that as under the Competition Act then by virtue of para.54 of schedule 10 of CA98, its duties in respect of the Water Industries Act have to be dis-applied. Paragraph 5.4 of Schedule 10 of CA98 dis-applies the duties when it is considering

competition matters. So, for example, when it is setting a fine in relation to an enforcement matter it does not have to take into account the financial viability of the person it is fining, as it would do if it were making a fine under the Water Industries Act. Similarly, it does not have to look at the things it looks at in the Water Industries Act when it is considering Water Industries Act matters.

MR. PERETZ: To assist Mr. Mercer, I think the paragraph he is referring to is 2.7.

THE CHAIRMAN: Is it also in ---

MR. PERETZ: OFT 422.

THE CHAIRMAN: You are looking at the Purple Book?

MR. PERETZ: Yes.

THE CHAIRMAN: It is in the Purple Book, is it?

MR. PERETZ: It is, at p.604, 2.6 and 2.7.

MR. MERCER: 2.6 uses the example I have just done with financial penalties.

THE CHAIRMAN: I see, yes.

MR. MERCER: While we are there, ma'am, and you have the purple book open, if you look at 2.7 below, you will see the second sentence: "In such cases will make use of whichever statutory powers he judges to be the more appropriate to address the specific conduct." I will draw your attention to that later when we look at the letter which starts at p. 1019 in bundle 3, because the words "what is best for you" are used there, rather than "what is more appropriate".

THE CHAIRMAN: The next sentence: "… were he to act using his powers under the Act …", that is the Competition Act, "… his duty to take enforcement action under the Water Industries Act does not apply…." , what about the other way around? Then the next one is:

> "The Director may make use of information made available to him for the purposes of sector regulatory duties under the Water Industries Act in relation to the application of the Competition Act, and vice-versa."

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: Then:

> "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 initiation of an investigation under the Act."

Then there is 2.8, and then 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 powers under the Water Industries Act."

Is there anything else in here that helps us, where it says you apply the Competition Act you do not apply the Water Industries Act and whether it is vice-versa?

MR. MERCER: Not that I believe, ma'am.

THE CHAIRMAN: Well, Mr. Peretz may help us afterwards.

MR. MERCER: So, ma'am, what you can get is a very different result in two ways. First, as to the powers that apply; and secondly, as to what Ofwat has to take into account.

Now I would like to turn to s.47 of the CA98. What we have engaged is 47(1)(a) twice in respect of prohibition under Chapter II, and Article 82, and s.47(1)(e) decision of the Director not to make directions under s.35. We have dealt, and Ofwat has dealt at length in writing with the views of Tribunals in the past concerning what constitutes a Decision, and what they have said about a disability and I do not intend to go through that in any great detail, but just to come out to a couple of places that form the guiding lights for the Appellant in this matter.

The first thing so say is that this matter is slightly different because it is, as far as I can ascertain, the first time that a disability point has arisen in a choice of powers situation. I have to say it very nearly arose somewhere else but never became an issue – in a matter that already had enough issues to sink a battleship. But this is the first time this particular issue has come up.

The second point is, as I said before, to bear in mind when looking at these issues, that though some would say the introduction of competition into the water industry was a little overdue nobody has yet has performed the complex task that the next substantive stage would provide.

As to whether or not there has been a Decision, para.173 of the Aquavitae case which is in the authorities' bundle, which points to the Tribunal in *Bettercare*, and that quotation refers to whether or not a decision has been taken in a question of substance not form, and that is something to be determined objectively. I think that is important here because at least after a while in this matter the regulator, we would say, woke up to the fact of just how important this matter might be, and just what was at the background of things. This was not perhaps just an isolated inset site somewhere near Bristol, but it was looking at an industry substantially commencing, of a type I described with bundled utilities and a number of homes that there might be in the relevant category in the next few years. Ma'am, as I am sure you have done, you have read the correspondence, and you can suddenly see the points where Ofwat goes "Whoah, what is this really all about?"

From that moment onwards they attempted to impose a form of émoute on the words "Competition Act", and they were, it would seem, very careful to be seen trying not to take a decision. But by that time, I say, they had been dragged into the long grass of the Competition

Act 1998 and they were on the threshold of making and doing something which discloses their true position.

We have referred in paras. 7 of our submissions to a number of letters and other correspondence, where clearly Competition Act issues were discussed and came up. It was clearly in people's minds. It was clearly something in their contemplation. We gave examples in para.7, there are 13 pieces of substantial correspondence – notes or whatever – in the bundles kindly supplied by Ofwat that have references to CA98. This was something in people's minds from the beginning and Mr. Palmer, as I shall be submitting later, may not be a lawyer but he had a fair idea that it was the totality of behaviour that needed to be examined, that it was not just an agreement that he needed, but somebody laying down some guide laws as to how an incumbent should deal with it. I do not intend to recite the examples I have given in paras. 7 and 8 of the submissions.

THE CHAIRMAN: No, but I think what we need assistance with is what documents you say you rely on to show that there was a Decision. Just take us through those documents so we actually look at those documents and you can point out why you say they took a Decision.

MR. MERCER: I say they took a Decision, ma'am, because as a matter of logic – because of what they did they could not have done anything else – and we will just need to look at p.1019 in bundle 3. If you look at 1020, and the last sentence in the second paragraph, following the semi-colon.

THE CHAIRMAN: I think it might be helpful, just wait a minute, Mr. Mercer ----

(The Tribunal confer)

THE CHAIRMAN: Yes, Mr. Mercer, continue.

MR. MERCER: Nonetheless, looking at the matters that you and Albion Water have raised in the round we take the view, for the reasons that we have given, that our approach is the appropriate response. They have looked at this as they admit in the round, they have looked at it all from each direction.

THE CHAIRMAN: "Our approach" is what?

MR. MERCER: Our approach is the appropriate response to the issues you have raised.

THE CHAIRMAN: And what is the approach?

MR. MERCER: The approach is to proceed under the Water Industries Act, that being best. That is my next point.

THE CHAIRMAN: The next paragraph says: "In our letter of 25th November we refused your application for interim relief."

MR. MERCER: Yes, ma'am. I am coming on to interim relief.

THE CHAIRMAN: There is the amendment problem?

MR. MERCER: Yes.

THE CHAIRMAN: All right.

MR. MERCER: If you turn back a page to 1019 and if you look at the last sentence in the fourth paragraph:

> "Our view is it only concerns as to the price and terms which Bristol Water are prepared to offer a bulk supply and as to terms of connection to its network are better addressed by the Water Industries Act 1991."

So when you look at what they actually decided, they decided in the round that Water Industries Act was best. Now, as had by that time been pointed out to them the Appellant wanted the matter dealt with by CA98

THE CHAIRMAN: Is there not a slightly different construction of that, because what they are saying is they are leaving the Competition Act point on one side while they look at the bit under the Water Industries Act? It is not that they are not looking at the Competition Act.

MR. MERCER: Well, ma'am, I think this letter cannot necessarily be looked at other than in the context of a year's correspondence before it, even which, as we pointed out, there are many references to the CA98. These people are not coming at it anew in December 2005 and saying "Oh well we will take a decision now, we have not really looked at this before". They had looked at it before, they looked at all the questions and they came to a final view where actually it would be better if it went under Water Industries Act – and you have to say "better for whom?", of course. We assume it would be better for the Appellant, in which case they must take the decision that the prohibition had not been infringed, because otherwise patently it would have been better for the Appellant to proceed under the CA98.

THE CHAIRMAN: Well it may be that if you get within the door, to open the door of the CA so that you have the door of an investigation, then the regulator says to himself, "Well there is an application for interim relief" – I know that we have to somewhat put the interim relief aside – "but I could deal with this possibly under interim relief, or I could do it under the Water Act, I think that the relief that I can give would be quicker and speedier and more effective under the Water Act for the Appellants, therefore I will go down the Water Act line". That first sentence in the fourth paragraph of 7th December letter: "We will postpone our consideration of whether refusal to give consent should be considered under Chapter 2 of the Competition Act until we resolve the Water Act issue." "So we will park it".

MR. MERCER: Well it comes down, ma'am, to – my mother had a charming saying – "Don't do as I say, do as I do." It is a question of looking at what they are doing, and you can define what

in fact they have done, by looking at the fact they admit they have looked at the thing in the round. That does not imply that they have not given it consideration from every angle.

THE CHAIRMAN: No, but on this basis they will have considered it, they open the door and then they parked it. Now, parking it, you might argue there are some consequences of parking it, I do not know.

MR. MERCER: If, ma'am, you are able to comprehend from this letter that Ofwat had any intention whatsoever of taking an investigation, or making a public written decision about CA98 then that would be, I think, quite bold, ma'am, because I think that is exactly what they were trying to not do, to make a decision about CA98.

THE CHAIRMAN: Well if they did not make a decision about CA98, how do you get into s.47?

MR. MERCER: You get into s.47 because clearly they have considered all of these matters. If I just go on for a moment, ma'am, to the question of interim measures and then lead this back into this point.

THE CHAIRMAN: Do we have an application to amend before us in relation to the interim measures, or are you saying it is within the original application?

MR. MERCER: I am saying that it is within the original application, to the extent that it is not it is an application to amend. But there are two points about interim measures. One is the interim measures point itself. A decision not to give interim measures itself as a black letter law point – it is not often me arguing black letter law points before this Tribunal – as a black letter law point that gives my client the right to an Appeal. The scope, etc., of that Appeal I will come to later.

THE CHAIRMAN: It is not where you want to get to, that is the problem?

MR. MERCER: Well it may be, ma'am, by the time I have finished explaining what it involves. The second point about interim measures is the fact that they even considered them is a big give away as to their true intentions and what they were doing because s.35 of the CA98. "Subject to subsections (8) and (9) this section applies if the [Regulator] has begun an investigation under section 25 and not completed it, but only applies so long as the OFT has power under section 25 to conduct that investigation."

There are two things to note from that quotation. The section only applies if the regulator has begun an investigation under s.25; and secondly, continues only so long as the regulator has power under s.25 to conduct the investigation. In this case clearly the regulator purported to have that power, so it must therefore have made a decision and be minded that there was a prima facie case, otherwise you would not make the test under s.25.

THE CHAIRMAN: Hold on, let us break that down. First, s.35 requires that they have begun and are in the course of, i.e. not ended, the investigation.

MR. MERCER: Correct, ma'am.

THE CHAIRMAN: So the first question is were they actually considering interim measures or were they doing something preliminary to opening the investigation and in consequence opening an interim measures' consideration.

MR. MERCER: Well I would say, ma'am, they were already in the middle of it.

THE CHAIRMAN: You need to show us that. My second point is if you look at 1020 under "Interim relief" it says: "In our letter of 25th November we refused your application for interim relief requiring Bristol Water to fund the cost of your complaint." So did they actually refuse a proper application for interim relief under s.35 which will assist you, or was it some other application there to do with funding?

MR. MERCER: No, they refused, and I think it is plain from Ofwat they refused s.35 relief.

THE CHAIRMAN: Was that in the 25th November letter?

MR. MERCER: Yes.

THE CHAIRMAN: Which page is that? Is that 979?

MR. MERCER: Yes.

THE CHAIRMAN: "We refuse your application for interim measures in that respect, i.e. in relation to this funding point".

MR. MERCER: Yes.

THE CHAIRMAN: Then the next one is "We have not reached a decision on your new application for interim …" and that is interim measures in a substantial matter, "… 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." I assume your submission is that by saying "We have not reached a decision on your new application" that is an application for interim measures and therefore they must have begun an investigation?

MR. MERCER: Correct, ma'am.

MR. BLAIR: Can I ask this? It sounds to me that what your case is that although the intention may have been that there should be no appellate machinery to control a threshold Decision between the two acts of 1991 and 1998 in OFT422, nonetheless if the regulator writes a letter that suggests that an investigation has been opened and therefore refused interim measures that actually makes the threshold decision appealable. Is that the substance of the ----

MR. MERCER: Well what one would have expected in the circumstances would have been Ofwat to write back in respect of an application for interim measures and say "We have not begun an

investigation." We have no power under s.35 because we have not started an investigation. It is not engaged – why are you asking us for interim measures?" When you go to s.25 and you see what has to be in their minds before they can begin an investigation, they have to suspect there are reasonable grounds for suspecting that there has been an infringement.

THE CHAIRMAN: This swings back to the question I asked right at the beginning about the position of Albion, because if you then turn to p.993, a letter of 30th November, which is after the letter that was written to your client, and you look at p.995, the paragraph below the title "Interim Measures": "In our letter of 18th November, we refused your application for interim measures in relation to the bulk supply issue." Now, am I right in thinking that the bulk supply issue is the real issue?

MR. MERCER: Yes.

THE CHAIRMAN: Then:

> "Nothing in your letter causes us to re-open that Decision … so in particular we do not … our principal point which is that we cannot proceed to grant an application for an inset appointment on the basis of interim terms of the bulk supply even if those are upheld by the Competition Appeal Tribunal which we would have to assume could well be substantially varied on final determination."

So in relation to Albion, not you of course, they clearly refused an application apparently – we may have to look at the 18th November letter – for interim measures in relation to the bulk supply issue, the main issue?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: Which is the same issue as you are suggesting they refused in relation to you?

MR. MERCER: Yes. I also point out, ma'am, one of the things that a regulator has to bear in mind when considering interim measures is whether or not it is a prima facie case and that issue, interestingly, is never raised in the correspondence by Ofwat. So, ma'am, leaving aside – I will come back to it shortly – the question of a black letter law appeal on s.35 interim measures' grounds, 47(1)(d), what Ofwat have done in this matter, through their actions is to show that they were conducting an investigation or they would not have the power to look at it in the first place and, in order to be conducting an investigation, they had, as s.25 makes so very clear, reasonable grounds for suspecting that the prohibition had been infringed. Now, they should not be looking at those decisions if they had not got that far.

THE CHAIRMAN: I think the point that Mr. Blair was just making is, if you look at p.953, which is the letter of 18th November to Albion – that is the clearer one on the decision – "Your application for interim measures … we assume for present purposes that there is a basis … and

on that assumption we do not think it is right for interim measures". It is not saying "We have opened an investigation, but even if we did we still do not think interim measures is the right way forward."

MR. MERCER: Well that may win the public sector weasel words of the year award, but look at what they actually had to do in respect of their duties? They cannot take that view. They cannot go doing that because they should not be taking the firm view that they have. Did they direct there should be interim measures? No, they did not. They were asked and they did not.

THE CHAIRMAN: They did not have to look at interim measures unless they had begun an investigation, and all they did in the letter which said that they were not going to look at interim measures in relation to Albion is to say "Well, if we assume that we have opened one just for that purpose we are not going to look." It does not say "We have opened." That is in relation to Albion, and it looked a moment ago as if Albion correspondence was stronger than your correspondence, but you might show something different.

MR. MERCER: But there is not that hesitation in the Appellant's correspondence.

THE CHAIRMAN: Well can we look at the Appellant's correspondence?

MR. MERCER: (After a pause) We are back to 979.

THE CHAIRMAN: They say the reason why they refused it is:

> "This is because your application insofar as it needs to be based on an area including the relevant premises, could not faithfully 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 public interest, because they would not materially assist your position."

So are you saying that the words: "If we found that its refusal of consent was not an infringement of the Chapter II prohibition …" was an indication that they had begun an investigation to find that?

MR. MERCER: Yes. (After a pause) Are you going to ask me a question, ma'am?

THE CHAIRMAN: No, I want to see where you are going next?

MR. MERCER: Well it is a nice day, I started meandering through the garden of the argument, but the next point I was going to stop off at, in fact, is the concurrent application to regulated industries document that you will find at tab 11 in your authorities.

THE CHAIRMAN: We will need actually to come back to those documents, but let us go on and see where you get to. We must remember to come back, I think. Tab 11?

MR. MERCER: Yes.
THE CHAIRMAN: How does this fit in with the other document you showed me?
MR. MERCER: This document, as the frontispiece shows, deals with ----
THE CHAIRMAN: All of the industries, and the other document deals with ----
MR. MERCER: All of the industries, 42 just deals with water, and this deals with the concurrent duties in respect of Articles 81 and 82.
THE CHAIRMAN: What would you like us to look at?
MR. MERCER: First, para.2.2 ma'am.
THE CHAIRMAN: (After a pause): Yes.
MR. MERCER: And then para. 4.4, ma'am.
THE CHAIRMAN: (After a pause) Yes.
MR. MERCER: Then tab 14 I merely refer to because that is where Article 3 of Council Regulation 1 of 2003 is.
THE CHAIRMAN: Yes.
MR. MERCER: What I say, ma'am, is that when you look at what that does and if you look at the advice given by the OFT it is clear that there is a recognition, that there is a duty placed on national competition authorities and regulators to apply Article 82. We say Article 82 is engaged, as it is so often, because of the threshold in relation to trading with Member States, and we have delivered some evidence which shows that, in fact, trading with other Member States is involved here.
THE CHAIRMAN: How does that fit in with the fact that s.25 gives them a power to investigate, not a duty to investigate?
MR. MERCER: I cannot reconcile that, ma'am. All I can say is that the clear wording of the regulation is that there is a duty to apply ----
THE CHAIRMAN: Duty to apply, so if you actually see a breach, but s.25 does not give them a duty to investigate to determine whether or not there is a breach.
MR. MERCER: But what I say here, ma'am, is that clearly because they looked at interim measures in the way they did s.25 must have been engaged, or they should not have been there in the first place.
THE CHAIRMAN: Yes, I understand that.
MR. MERCER: But, having engaged, **this** kicks in, and they have a duty to apply it.
THE CHAIRMAN: So what you say is that they cannot then decide that because of their priorities or for some other reason they no longer will continue with the investigation. Once they start an investigation there has to be a decision?

MR. MERCER: Yes, because they have to apply Article 82, and therefore either Ofwat have to say that they have breached their duty or, in fact, they did take the decision that the Appellant says that they took.

THE CHAIRMAN: Assume you are right, and assume that the position is, if you look at 1019, 7th December letter, that they parked the problem until after they had considered the Water Act. How do you get a decision out of that? (After a pause) Is that not where your submission is going, because on this basis they have begun an investigation, whatever happened to the interim measures they have decided to park it pending the Water Act. You say – and we will assume for present purposes that you are right – that they cannot abandon their Competition Act hat at that point.

MR. MERCER: Yes.

THE CHAIRMAN: They go down the Water Act route and what this letter says is that they are going to come back to it at the end of the Water Act, so that they have not abandoned it.

MR. MERCER: They have done because what the decision is that the infringement – whatever it is – can be rectified simply by the giving of the agreement, and they are cutting us off, at the least they are saying that the infringement is one which could be dealt with simply by the powers under Water Industries Act to enforce an agreement on the price.

THE CHAIRMAN: Well that is not what they say in 7th December letter. What they say is that they are going to take a step by step approach and the first thing is under the Water Act.

MR. MERCER: Well going back to the Council Regulation, there is a question as to whether they are entitled to do that one in the first place. We say that they are not, and ----

THE CHAIRMAN: But the Decision that you are considering, if you look at p.1019, the last paragraph on that page: "Nothing in your 1st December letter changes our view that this step by step approach …" which is what I have been, I think, putting,

> "… is the most appropriate. Our view remains that concerns about Bristol Water's refusal to give consent under s.7(4)(a) should not be addressed before it becomes clear that that refusal is likely to preclude an inset application for the site which would otherwise succeed."

So what they are saying is that they are not going to address the Competition Act point before the Water Act matter has been decided.

MR. MERCER: Well, correct, ma'am, but you are now looking at the interaction of complaints between Albion and the Appellant. As to s.7(4)(a), the paragraph about that, we have told Albion Water we shall postpone our consideration while we go through a step by step approach.

THE CHAIRMAN: And then they say "Nothing in your letter changes our view the step by step approach is most appropriate", so "most appropriate" to you as well.

MR. MERCER: Well, of course, that does assume, ma'am, that they had the vires to consider Water Industries Act at the time, which they did not.

THE CHAIRMAN: What happened to the Water Act?

MR. MERCER: Because the Water Act application had by that time been withdrawn by the Appellant.

THE CHAIRMAN: Because now Wimpey had decided to go elsewhere?

MR. MERCER: Yes.

THE CHAIRMAN: Hold on, I am not sure that is right.

MR. MERCER: (After a pause) Wimpey, we would say, were forced to go elsewhere.

THE CHAIRMAN: Oh right, but by then they had gone elsewhere?

MR. MERCER: Yes.

THE CHAIRMAN: So you withdrew?

MR. MERCER: We withdrew, we were trying to get Albion in at that time which is why Albion is making its complaint at that time, but at that moment we withdraw.

THE CHAIRMAN: And they know that?

MR. MERCER: Yes.

THE CHAIRMAN: So there is no Water Act application at this point and they are saying to you "We think that it has to be addressed under the Water Act and not the Competition Act", whereas at that point you say they knew that it could not be addressed under the Water Act because Wimpey had been forced to go elsewhere, and therefore you had withdrawn the application because that bit of business had gone?

MR. MERCER: Yes, ma'am.

MR. BLAIR: Was it that withdrawal of the application that brought the Water Act to a grinding halt, or did the Director have his own powers?

MR. MERCER: You may remember some time ago when I started I started with the terms under which s.40 is engaged when it comes into life. One of the things, there has to be an application, it has to have the power to make a s.40 termination. That only applies if you have got an inset authority, or you make an application for one.

THE CHAIRMAN: Yes, I think if we look at s.40, which is at divider 15, and it is p.14 of that document on the top, "… Where, on the application of any qualifying person it appears to the authority …" so the qualifying person would be you, is that right?

MR. MERCER: Yes.

THE CHAIRMAN: So an application has to be made to engage s.40, and you had made an application but then the application became of no point.

MR. MERCER: Yes.

THE CHAIRMAN: So the application was withdrawn. You are still complaining to Ofwat in relation to the Competition Act aspect, and your case is that Ofwat are continuing to say "Well, we want to address it under the Water Act" on your application which you have had to withdraw?

MR. MERCER: Correct. (After a pause) I also think, ma'am, we need to consider – if we go back to tab 13, which is OFT422 ----

THE CHAIRMAN: Yes.

MR. MERCER: -- and look at 2.7, I think you get the feel for the way in which it should work, which is that it is not a case of "Well, we will try one and then we will take a step by step approach." What the Director is supposed to do, according to 422, is decide between the two to see …

THE CHAIRMAN: Can we just go back to the 7th December letter?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: The situation is – just on your case – that they have opened an investigation because they could not have considered the interim measures if they had not, that they shelve, or park the investigation pending a Water Act application. On your case, as I understand it, because of the alleged breach of the Competition Act you have to withdraw your application?

MR. MERCER: Correct, ma'am.

THE CHAIRMAN: The letter of 7th December is written after that happens.

MR. MERCER: Because that happened on 1st December.

THE CHAIRMAN: Yes. The letter of 7th December is saying that unless and until we look at a Water Act application we are not going to look at the Competition Act. At the moment I get that far, I can see submissions that far, but I still have some difficulty in trying to see what your submission is as to how you get to a Decision under s.47?

MR. MERCER: Because they had no business to look at it under the Water Industries Act at that point. They had started the investigation under the CA98 – in order to begin an investigation they had to have suspected that there was an infringement, and now they must have changed their minds.

THE CHAIRMAN: Well that is the point, now they must have changed their mind. How do we get that out of this letter? How have they concluded – in other words, closed the door and said "No infringement." Who did the investigation?

MR. MERCER: Because they have looked at the matter in the round – they say that – and they have decided that the terms are better addressed, and we have to assume that is better addressed from our point of view.

THE CHAIRMAN: I think that is where I am having some difficulty at the moment. The fact that they think that it may be better addressed, does not mean that it is not addressed under both, and what they are saying is they have this step by step approach, and so had you not withdrawn your application they would have looked at it under the Water Act. You somehow – it seems to me but I may be putting your case wrongly – have to say that the door is closed to the Water Act so it cannot any longer be addressed under the Water Act. Therefore the only route they have is the Competition Act is that they have opened an investigation under the Competition Act and this letter of 7th December somehow closes the door to that investigation and therefore is tantamount to a Decision?

MR. MERCER: Yes, ma'am, it does close the door.

THE CHAIRMAN: Did you reply to this letter?

MR. MERCER: I think the reply to the letter, in fact, was the submission of the Appeal. The letter pushes together the two complaints, Albion and the Appellant, and says "We may well continue with the Water Act with Albion but you are not going to get anything."

THE CHAIRMAN: Well it may not make any difference where Albion got, but you had withdrawn, so they could not address the complaint under the Water Act?

MR. MERCER: Not as far as we were concerned.

THE CHAIRMAN: The question then goes back to s.25 as to whether they can suddenly stop an investigation and that is the end of it, or whether an investigation has to conclude with a decision, because it is left in the air in the letter of 7th December.

MR. MERCER: Our contention is that it is not left in the air as far as the Appellant is concerned. Let us look at the overall framework of this as a game. Ofwat do not want to admit that they are going to take a decision under CA98, they do not want to do that. They are trying hard to avoid that, but they are sucked in and when you look at the reality of what happened that is what they did. What they would say at that point is interesting, but undoubtedly heavily lawyered. Where they are because of what they have done is of more of import. What they have done here is they have not written back and said "Looking at interim measures is just ridiculous because we have not begun an investigation, we clearly have". They start to talk about the minutiae of interim measures, and you do not get that far unless you have engaged in an investigation, and to engage in an investigation you have to have reasonable grounds for suspecting. So they had reasonable grounds, and they took a Decision that far at that point.

THE CHAIRMAN: Does it help if we look at *Aquavitae* or *Bettercare* at this point, as to what a Decision is?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: Where is *Aquavitae*?

MR. MERCER: Tab 5.

THE CHAIRMAN: Paragraph 174 I think you said?

MR. MERCER: It is, ma'am.

THE CHAIRMAN: If you look at subparagraph 3:

> "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."

Now, if you take as an analogy, the European situation with the Water Act and Competition Act situation you might say that that might apply during that part of it. But I think what you are saying is that they had passed that stage because you have withdrawn the application, so there was no longer the European Act analogy.

MR. MERCER: Correct, ma'am, and I am not sure that that is really a good one anyway because on the advice given in 422, in, I think, paragraph 2.7 that I pointed out, the distinct impression is given that the Director is going to choose one or the other.

THE CHAIRMAN: But it is the other way around, it does not deal with this situation, it deals with the alternative situation.

MR. MERCER: Yes.

THE CHAIRMAN: "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 …"

MR. MERCER: If we can just go to para.175, ma'am, which is a quote from *Claymore*.

THE CHAIRMAN: Yes.

MR. MERCER: "In our view a useful approach is to pose two questions: did the Director ask himself whether the Chapter II prohibition has been infringed?"

THE CHAIRMAN: Let s assume that he did ask himself, for the time being.

MR. MERCER: I think it indubitably true that he probably did, ma'am, and did he communicate that? Yes.

THE CHAIRMAN: And where did he communicate it?
MR. MERCER: He communicated that in the 7th December letter.
THE CHAIRMAN: He says it should not be addressed, he is not going to address it?
MR. MERCER: Yes, ma'am.
THE CHAIRMAN: So the question is whether he is entitled to say "I am not going to address it", in other words say that he is not going to continue on your case the investigation under s.25?
MR. MERCER: Ma'am, it is a case of whether or not the actualité of the situation is more important than the words used. The actualité of the situation is that letter closed off my client's chances, and it closed it off by making it clear that he did not think there was an infringement and he was going to bother ----
THE CHAIRMAN: Well where do you say he does not think there is an infringement?
MR. MERCER: Well he is unlikely, ma'am, to come out and say that, given that his object has been to avoid actually putting that in writing.
THE CHAIRMAN: Right, if the situation was that your application for Water had still been going and your application for Water required under s.7 of the Water Act, the consent of Bristol Water?
MR. MERCER: Yes, ma'am.
THE CHAIRMAN: That is the crucial competition point as to whether or not they give their consent?
MR. MERCER: Yes, ma'am.
THE CHAIRMAN: There may be other points, I do not know, but that is certainly a crucial point for you to make your application under s.40. That is right is it?
MR. MERCER: It is, yes.
THE CHAIRMAN: I am asking questions although I am putting it in the positive.
MR. PERETZ: I hesitate to interrupt but s.7(1)(a) is actually nothing to do with a s.40 application. Section 7(1)(a) deals with a situation where there is an application for an inset appointment which is not Greenfield – to put it very shortly.
THE CHAIRMAN: So they are two different things?
MR. PERETZ: Yes.
THE CHAIRMAN: So, you say that if you got a s.40 – if your s.40 application had been approved there would not have been a complaint in relation to Competition Act because you would be in, because they would have had to supply you – is that right or not? Could you have a s.40 application, succeed on the s.40 application and you still do not get supplied by Bristol Water?

MR. MERCER: If you went for determination under s.40 and they did not do what the agreement enforcing them said they had to do then there would be a breach of contract claimed.

THE CHAIRMAN: Right, so they actually have to comply. You would not have a Competition Act problem if you got a s.40 ----

MR. MERCER: Well you might actually, you probably would.

THE CHAIRMAN: I think that may be part of – right. Section 40 does deal with competition but it deals with lots of other matters as well?

MR. MERCER: Yes.

THE CHAIRMAN: So Ofwat would consider the Competition Act aspect in some form by looking at the s.40 application – possibly in not quite the same form, but in some form, because I think it is to do with future competition rather than past conduct?

MR. MERCER: Yes. You have to also ----

THE CHAIRMAN: I do not think you heard what I just said because that would have been relevant. I think the s.40 competition point is to do with future conduct, whereas the Competition Act point is to do with past conduct – in a very general way.

MR. PERETZ: In a very general way that is right. Section 40 with future directives provides for an order to be mad which affects the conduct of the undertaking in the future.

THE CHAIRMAN: It looks at the competition in the future, whereas the Competition Act problem would look at the competition in the past.

MR. PERETZ: Well, with the wrinkle here that what was being complained of was essentially future supplies, or it is usual to give future supplies with the terms of future supplies.

THE CHAIRMAN: Yes, but it is the other side of the same coin ----

MR. PERETZ: Yes, one can see it like that, and I was hesitating a bit about it, but I think that will do as a generalisation.

MR. TUPPER: And I do not want to achieve the meeting of the minds, the only other thing that is probably worth mentioning is that an agreement was reached between the two parties, a price was agreed between the two parties. The s.40 review would have looked at the price that was agreed to determine whether or not it was in accordance with the Water Industries Act so it has a retrospective view as well. It would have achieved the full 360 degree dimension that was required, I think, but AWC.

THE CHAIRMAN: All right, well that is very helpful.

MR. MERCER: The problem, however, is that it does not achieve the same thing as review under CA98, because for example, when you are looking at s.40 you have to look at, I think the phrase is in terms of cost, Bristol Water getting its cost at a reasonable rate of return. So you

could only look at cost calculation from one interconnection type angle. You cannot look at the totality of things like margin squeeze and accept them, and that is built into the s.40 mechanism.

THE CHAIRMAN: Tell me whether I am right, but I think that may be relevant if you were saying that they should have been looking at any event at the Competition Act, but since you had withdrawn your application, so between the 1st and 7th December we are at a stage where there is no Water Act application, so what is said in the last paragraph of p.1019 is an approach which does not fit in with the facts as they existed at that time.

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: We have a situation where they cannot be addressed under the Water Act, and had they been addressed under the Water Act they would have been looking at the competition matters. I still cannot quite get how you put your submission that we then have a figure under s.47 of an investigation under s.25, and that is why we were going to look at ----

MR. MERCER: *Bettercare*.

THE CHAIRMAN: That is where we got to the *Bettercare* point, and the credit from *Claymore*, well did the Director ask himself whether it has been infringed? Well he was asking himself that question at the time. What answer did he give? Well the problem is that he did not address it. Now, at the back of my mind there are some Inland Revenue cases, and I think there may be some VAT cases in which it has been held that if the Revenue do not make, I think it is an assessment but it may not be an assessment it may be something else under the Taxes Management Act, and I am not sure what it is under the VAT – I think Mr. Peretz is going to help me.

MR. PERETZ: The Value Added Tax Act, 1984.

THE CHAIRMAN: Yes, but I do not know what the provision is that it is treated. There is a common law rule that it is treated as a decision.

MR. PERETZ: Yes, there are some VAT Tribunal decisions, the names of which temporarily escape me, although Miss Sloane, who knows much more VAT than I do, may be able to recall, which say that where, for example, a claim for a VAT repayment is put into HM Revenue & Customs and no decision has been reached on it after a while, the Tribunal will assume that a decision has been taken to refuse the application.

THE CHAIRMAN: So the question that was going through my mind in relation to that was whether, by making a complaint under the Competition Act and if the case is, which we do not know at the moment, and we may have to decide, that an investigation had begun, and one uses the evidence of the interim application for that, that is as far as the interim application point goes,

then by writing this letter, and not being able to go on the Water Act basis because that had come to an end, the result of that is, under this common law principle (if there is such a common law principle) that that is taking a decision?

MR. MERCER: Yes, It seems clearer to me, ma'am, than to you – and that is my fault – that this is clearly a closure letter. They are closing it off, but the two things they give away are that they have looked at it in the round, so they have looked at it all the way 'round, and they say "Actually it is better if we go under Water Industries Act" – that has to be better for us and, as I say, it is a matter of logic to somebody in our position that means they have to have assumed that there was no infringement, because we had to be better off under CA98.

THE CHAIRMAN: I think where I do not quite follow your point is that you say they have to have assumed there is no infringement because it is better under the Water Act, but under the Water Act they have to take into consideration competition, and it is slightly confused in this case in that it is all to do with the future, even though the Competition Act is to deal effectively past conduct.

MR. MERCER: Yes, but ma'am ----

THE CHAIRMAN: Or current conduct.

MR. MERCER: -- without going back through all the correspondence, if you look at the nature of the complaint, it is not just about the terms in the agreement. All s.40 can do is to determine the terms of an agreement. That is all it can do. It does not deal with the conduct of the dominant party – what we would allege is the dominant party.

THE CHAIRMAN: I think that maybe what I was trying to get in my mind before when I said what is the difference between what they deal with in competition terms under the s. 40 application and what do they deal with – is it the same or is it different? Because I think what you are now saying is that because the two things were not equal, that it was not the same consideration. By writing this letter and saying that even if they had been proceeding under the Water Act, they must have been closing the door to those things which are not Water Act competition points.

MR. MERCER: Yes, ma'am, they are saying you cannot have those.

THE CHAIRMAN: Shall we look at the complaint on that basis? Is the complaint in a different file?

MR. MERCER: It is not in the authorities' file, and it is not in the bundles' file.

THE CHAIRMAN: The original complaint which you asked them to investigate?

MR. MERCER: Oh, the original complaint, sorry.

MR. PERETZ: The original complaint is at p.849, it is the letter of 8th November. As you can see, ma'am, that is a wide-ranging document.

THE CHAIRMAN: Absolutely, there is a summary of complaint on p.851. I understood this when I read it before, but I may have misunderstood it, that really what one was complaining about was the pricing, which is something that would be dealt with under the Water Act?

MR. MERCER: But if you look at para.3 in that section – that is essential facilities' arguments basically being made, 4 relates to the conduct of the Intervener.

THE CHAIRMAN: Sorry, 3 is "Refusal to allow access to an essential facility service", would that not be dealt with under the Water Act or not?

MR. MERCER: It could be, to the extent that it would be reasonable to put terms in the agreement about the physical ordering of its connection, but that does not deal with, for example, things like the conduct of the incumbent, etc.

THE CHAIRMAN: That is "4" – 'Other Items'?

MR. MERCER: That is 4.

THE CHAIRMAN: Of course, it does not deal with the interesting question that arose in this letter in respect of interim measures in relation to whether or not Ofwat could direct, pursuant to CA98 that Bristol gave consent for the inset. (After a pause) So you say on p.852 "Other Items", those matters are not Water Act matters, e.g. procrastination in them giving you the information so that you can make your application is not a Water Act matter, it is something that comes as a precursor to you making the application and you have asked them to investigate those matters, because if you look at half way down p.853: "We are therefore requesting that you investigate these activities"?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: So that the investigation under the Water Act and the investigation under the Competition Act are not totally equivalent?

MR. MERCER: Correct, ma'am, and I further say, although this is only apparent from an analysis of, say, para. 1 etc., is that when you are looking at the charging questions, for example, they can be determined pursuant to s.40, but when you are looking at s.40 you have to take into account all the things the Water Industries Act says you have to take into account if you are Ofwat in those circumstances, so you do not actually get the interconnection price that Competition law would provide.

MR. PERETZ: Necessarily.

THE CHAIRMAN: So your submission really is the 7th December letter, taking the substance of the letter rather than the form of it ----

MR. MERCER: Which … says we should do?

THE CHAIRMAN: Yes, in the round, is a decision that there is not a breach of the Competition Act Chapter II, or Article 82?

MR. MERCER: Yes ma'am. We know that – as a matter of logic in a sense – because if there had been an Article 82 breach they would have had to have done something about it because they had a duty to apply Article 82, and apply Article 82 means, I believe the context of the regulation, enforce it as well as have a look at it.

THE CHAIRMAN: That is why you say, I suppose, that the provisions you showed us in the document is the other way 'round ----

MR. MERCER: Yes.

THE CHAIRMAN: -- and not this way 'round because they have to apply it?

MR. MERCER: Yes. Taking my guidance from you, ma'am, do you think we have finished this little section? It has taken us a little wee while?

THE CHAIRMAN: Yes, sorry.

MR. MERCER: It is quite all right, it is my fault, ma'am, I am getting the late night visions again and not being able to express them publicly. I wonder if I might move on to interim measures *simpliciter*?

THE CHAIRMAN: Yes. I think there is a question from Mr. Blair.

MR. BLAIR: I am sorry, I do not want to hold you up but I think it is implicit in your submission that you have just made that the effect of your withdrawal on 1st December had two legal effects, the first of which was to knock out the Water Act which you have told us about?

MR. MERCER: Yes.

MR. BLAIR: But there is another point which I ought to put to you in case Mr. Peretz wants to think about it, which is that you also have to say that the effect of that letter of 1st December knocks out Article 3(3) of the Commission regulation which protects the Water Act from the duty to apply Article 82 instead, and it would be your submission, I suppose, that because you had taken the Water Act application away you had trumped that provision of Community Law – I assume?

MR. MERCER: Yes. At that point competition law is engaged at national level and therefore Article 82 kicks in as well because of the regulation.

Interim measures. I suppose the starting point on interim measures is one day, perhaps before I retire, I will actually see a regulator ever give interim measures – but I doubt it. I think I have more chance of seeing a giraffe rowing down the Thames outside of my office than I have of any regulator giving interim measures. I know because I have applied on oft

occasions for them, and received much the same kind of response as you always do – "Oh, a bit difficult", and that is kind of what happens here. I want to look for a moment at the process of engaging interim measures. Interim measures are really engaged when you are facing a serious and irreparable problem – I do not think anybody is going to doubt that. They engage where you have a prima facie case. Then you have a case of "What do you get?"

Here, my client alleges that what Bristol Water had done, together with Ofwat's handling of the matter leads to it being bled dry through having to maintain a static tank. This whole process has taken unbelievably longer, so far as my client is concerned than it should have done. So it asks for a particular type of financial help in respect of the costs of the static tank and respect of its professional costs to try and keep it going.

What this leads to is my submission as to what a regulator's approach should be when it is faced with that request. In a sense it should be almost as Ofwat did – or in fact as they partially did – to start making a few suggestions of their own, because as I understand it the suggestion about compulsory consent was actually first mooted by Ofwat. What the response has to be, when you are looking at interim measures is for the regulator to look at whether there is serious and irreparable harm likely to occur, well I always reckon that people going bust is quite serious and, in a sense, irreparable – despite being able to use insolvency law from time to time – and that is the position the client has got to. What do you do in those circumstances as a regulator? You look at what they have asked for, which is interesting, and you look at what would assist and what you think is right and proper that you can do in the circumstances.

I am approaching it this way because I want to get to what the scope of an Appeal about a failure to give directions for interim measures might be, because a question, I suspect, that could engage the Tribunal, is what use would it be allowing an Appeal under 47(1)(e)? I am just on the question of interim measures at this point. My view on that is that it would be extremely helpful because you have to look at these issues and have to approach things in the round – Oh Lord, there is that phrase again! On the merits this Tribunal would have to look at a prima facie case and what would be necessary to get my client back into this business.

Now, I am instructed that it would be possible to get it back in to Weston Road.

THE CHAIRMAN: This business is not in administration?

MR. MERCER: No, it is group holding companies in the CVI.

THE CHAIRMAN: Is the business still trading?

MR. MERCER: It is not trading, it is dormant at the moment.

THE CHAIRMAN: Was it set up for a particular purpose?

MR. MERCER: Yes, to provide bundled water services to people like George Wimpey. The situation in respect of Weston Road could still be salvaged, and this Tribunal could still set steps as interim measures that would enable my client to do what they wanted to do in the first place.

THE CHAIRMAN: You are making that submission, so you are effectively giving us evidence which we have not got, and as I understand it the houses have been sold, because we went through the static tank point. Is this something you can – if necessary, and I do not know what is going to be said about this – that you could give evidence about?

MR. MERCER: We could put something in the box, yes.

THE CHAIRMAN: It may not be appropriate to do that today, but you are asking us to assume a lot.

MR. MERCER: Yes, ma'am, but I am not sure that what I am asking you to assume for the present is not something that I would not have to prove at a subsequent substantive hearing.

THE CHAIRMAN: But you are asking us to assume it for the purposes of – I suppose what you are saying is that if you assume that that is correct, then it would be admissible?

MR. MERCER: Yes.

THE CHAIRMAN: "I may have to prove that that is correct hereafter"?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: And then the question is ----

MR. MERCER: What I am getting to is, is there a point in having an Appeal on a s.35 directions' point alone?

THE CHAIRMAN: But you are asking us to assume that they can get back in, which is quite a big assumption I would have thought? The houses have been sold.

MR. MERCER: The houses have been sold but the system will still be there, and they are still building.

THE CHAIRMAN: They are still building, right. Well we will see where that point goes in a minute, when Mr. Peretz makes his submissions.

MR. MERCER: As I said before, ma'am, s47 is quite clear, in 47(1)(e) a decision not to make directions under s.35.

THE CHAIRMAN: You still have to be right that they have opened an investigation, do you not?

MR. MERCER: Pardon?

THE CHAIRMAN: We still have to hold that you are right, that they have opened an investigation?

MR. MERCER: Well if they were not conducting an investigation, ma'am, what on earth were they doing entering into a dialogue about interim measures in the first place, because all you have to say is "There is no investigation. There is no prima facie argument, s.25 is not involved."

THE CHAIRMAN: That goes back to – we do not want to rehearse all the things that we have been rehearsing for the last two hours.

MR. MERCER: Yes, but it goes back to that point.

THE CHAIRMAN: And if they have opened an investigation, then the question is p.979, whether that is a decision, is it not?

MR. MERCER: Yes, it is, ma'am. It seems by the description of that letter by Ofwat itself on p.1020, but it describes it – "We refused your application, we see no reason to reopen our decision."

THE CHAIRMAN: But that is to fund the costs of your complaint. Now, the costs of your complaint is not this bit of it? Or is it?

MR. MERCER: Interim measures are interim measures are interim measures. If what you apply for is interim measures what the regulator should be looking at is you may not have asked for the right ones, but it may think of the right things it should give you. In this case it started to look at one point at whether or not something different is what it should give. Interim measures are involved here. The question of s.35 is engaged, and they take a decision that nothing is required.

THE CHAIRMAN: In the letter of 25th November on 979, they decide in relation to costs, but then they go on:

> "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 measures requiring Bristol Water's consent would not be appropriate."

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: What they are saying is that they cannot force Bristol Water to do something before they decided whether it is a breach of competition law that they are not doing it, because you cannot retrieve the situation after you have consented, or you have got them to consent. So that is their problem with the consent ones, as I understand it.

MR. MERCER: I thought their problem with complaint was simply ----

THE CHAIRMAN: No, consent.

MR. MERCER: Consent is once they have decided it ----

THE CHAIRMAN: That is the end of it.

MR. MERCER: -- that is the end of it, yes.

THE CHAIRMAN: But you have told us that this is to do with costs of the static tank, and is that the cost to the complainant, is that the bit that they refuse?

MR. MERCER: That is the bit they refuse, yes.

THE CHAIRMAN: No, can we just look and see what the interim measures that was asked for was?
MR. MERCER: Yes.
THE CHAIRMAN: Is it on p.853?
MR. PERETZ: It may assist if you look at p.914, the letter of November 13th. One sees there that there was in the original complaint letter a request relating to interim measures in relation to the static tank which you will see under the heading temporary water supply and static tank. We withdraw this interim measures request, so that has gone. The outstanding one was the one immediately below that headed "Special Advice".
THE CHAIRMAN: Yes, that is what I had understood, that it was actually to do with the legal costs or the expert costs of the complaint, not with the substance of the complaint, and that is what they were refusing.
MR. MERCER: Can I take you to p.853?
THE CHAIRMAN: Yes.
MR. MERCER: The points mentioned there: "The current costs maintaining the static tank" ---
THE CHAIRMAN: Which has gone by then, by the time of the refusal it has gone.
MR. MERCER: "The wrongful questioning of LG's technical competence, consumers …."
THE CHAIRMAN: Yes, but that is the persons at risk of serious or ---- therefore asking for interim measures is (1) and (2): "… to fully compensate IWC for the costs involved in providing the static tank supply of water including any safeguards and modifications required to secure the future supply of water on an interim basis …" well that has gone, apparently, "… and the costs of meeting DWI Standards until a connection with BRL has been effected. This relief to be effective from the date of the submission", and then fees, etc. So the only thing that was outstanding from this letter – there may have been something else that happened in the interim, is the cost of meeting DWI standards. Had that gone – because that is to do with the static tank, is it?
MR. MERCER: That is to do with the static tank?
THE CHAIRMAN: So what is left?
MR. MERCER: But the general question of interim measures – it is of interest what we apply for, but the whole question of the need for some interim measures to prevent seriously irreparable harm was considered and the Director General did not give anything.
THE CHAIRMAN: Mr. Mercer, wait a minute, let us just follow this through, because you asked for interim measures for two things – one related to the static tank, and one related to the legal and expert costs which you might incur in the future.
MR. MERCER: Yes.

THE CHAIRMAN: The legal and expert costs were refused on 25th November?

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: The static tank had been withdrawn by 25th November.

MR. MERCER: We were forced to give it up.

THE CHAIRMAN: No, I appreciate that but it was no longer something that you needed interim measures over because you had given it up.

MR. MERCER: But we could have brought it back. The tank was still there, ma'am.

THE CHAIRMAN: So you still could have had interim measures in relation to the static tank?

MR. MERCER: Yes.

THE CHAIRMAN: Mr. Peretz, what was that letter that you just referred me to?

MR. PERETZ: Page 914.

THE CHAIRMAN: You have withdrawn it on p.914. "We would therefore withdraw this interim measures request", so they cannot be considering that on 25th November.

MR. PERETZ: Madam, there is also letter at p.917 on 23rd November, with a heading "Interim Measures" and this is confirmation of the letter at 914, but the writer says "I can confirm that we are withdrawing our request for interim measures on this particular issue", that is to say relating to the static tank. It goes on to say that "We continue to seek interim measures with request for specialist advice and legal counsel as advocated by you in your letter dated 26th May.

THE CHAIRMAN: So the only thing that was outstanding that you were asked for was in relation to specialist advice and legal counsel, and that as I understand it has been refused in the first paragraph of 25th November letter. I am looking at the second paragraph in the letter of 25th November, because in the first paragraph they refuse the application in that respect. Then in the second paragraph:

> "You appear to request a further interim measure requiring 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. We have not reached a decision on your …"

So there is something happened at the 11th November meeting.

MR. PERETZ: Ma'am, I may be able to assist. If you go back to the letter at p.917, and the heading "Interim Measures" where I am afraid I stopped reading, if you go on to the next couple of paragraphs you will see the fourth paragraph headed "Therefore.." there is what looks like a request that Bristol undertake to allow an inset appointment by consent under s.7(4)(a) of the Water Industries Act 1991. If you recollect that is the provision which allows an inset

appointment to be made even when there are existing houses being served by an undertaker if the undertaker consents to that.

THE CHAIRMAN: But that is not interim measures.

MR. PERETZ: Well it is under the heading "Interim Measure" so at that stage we thought that was what was being asked for, so in the 25th November letter, we set out, as you have seen – we did not take a decision on it at that point – we set out some difficulties that we saw with that application. If you then go on to p.1000, really just to complete the story here, which is the end of their letter of 1st December 2005, under the heading "Interim Relief", the first paragraph, they call it the 'Inset via Consent' issue. They say: "For the record we do not recall specifically requesting such a measure to be considered as apart of our original competition complaint." It looks as if they are effectively either withdrawing it or saying that they never really meant to ask for one.

THE CHAIRMAN: I am not sure what interim measure – the only interim measure was in relation to the legal and special costs.

MR. MERCER: That is the only one they asked for, that they themselves referred to. Asking for interim measures is not a case of was it right or wrong that they got what they asked for, but should there be interim measures?

THE CHAIRMAN: I see what you mean.

MR. MERCER: You can see, because the issue comes up, we would say, and put into our minds by Ofwat that compulsory consent might be raised. They then go on to consider that and at least a preliminary review. But what they do, the effect of the end of the correspondence is no interim measures.

THE CHAIRMAN: What you are saying is it is not for you to ask for particular interim measures, it is for Ofwat to consider whether it is necessary to take any interim measures and what those interim measures should be ----

MR. MERCER: Yes.

THE CHAIRMAN: -- under s.35, and therefore this does not have to start by you making a request because it is something which they ought to be considering, because they have begun an investigation under s.35.

MR. MERCER: Correct, ma'am.

THE CHAIRMAN: The substance of the letter of 25th November you say says "We are not going to go down the interim measures route."

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: And therefore that is a decision, and that is a decision you can appeal, subject to the question of amending, if necessary, your Notice of Appeal?

MR. MERCER: Yes, and if you look at s.35 it is not something which is triggered by an application by the Appellant, it is something which if the regulator considers that it is necessary.

THE CHAIRMAN: So that leaves us with whether it is within your notice or not?

MR. MERCER: Yes.

THE CHAIRMAN: It is five past one, do you want to deal with that now, or do you want to deal with that at 2 o'clock?

MR. MERCER: I am in the hands of the Tribunal, ma'am.

THE CHAIRMAN: I think we will rise. 5 past 2.

(Adjourned for a short time)

MR. MERCER: A document very much in the raw – one which is clearly, with respect to my client, drafted by people who have really much of an idea about what it is about. It is a problem one has come across before, ma'am, in various ways and I think it would be fair to say that were the Appellant to be successful in the admissibility stakes it would be expected that an amended Notice of Appeal should be submitted before any substantive hearing and before a full Defence in the matter was thought to be prepared by the Respondent.

What the scope of it is can only, I think, be determined by looking at it in the round and by imagining that it is written by somebody who has no experience of having written one before, or of putting it into the matrix which the Tribunal might do – or Mr. Peretz or I might do – when pulling it together.

THE CHAIRMAN: Is there anything in that deals with the interim application? Is there anything that one can hook the ----

MR. MERCER: There is in the whole of it, ma'am ----

THE CHAIRMAN: Does it deal with the 7th December letter?

MR. MERCER: Yes, it does.

THE CHAIRMAN: 26.

MR. MERCER: It does. If you look at p.14 ----

THE CHAIRMAN: I was looking at 13 deals with it.

MR. MERCER: There is a reference in para.26 and on the next page when it comes to the Decision, which is appealed, it refers to the letter of 7th December. What the Appellant was seeking to do was to appeal against the course of events and what had happened to it at the hands of Ofwat. It did not realise the significance of interim measures being a separate head under 47(1)(e), it just said "This has happened to us, we want to appeal against it."

THE CHAIRMAN: Well if 7th December letter contains a decision in relation to interim measures, as well as a decision generally ----

MR. MERCER: Then it refers to it, ma'am, but I thought you were asking me to try and draw your attention to a specific reference to interim measures?

THE CHAIRMAN: I am, I am.

MR. MERCER: And that I find difficult to do, and I have inquired of my client why that is so and the answer I received was they simply did not know, it is a separate issue. They thought they were appealing what had happened to them, though – as I was about to come on to – fortuitously there is the reference to the 7th December letter. While we are talking about the 7th December letter, I just wanted to mention something I wanted to mention this morning. There is not one, there are two 7th December letters – both signed by a Miss Brown. The first one you will find just before the one we have been looking at so much this morning, and I will just draw your attention on that first one, ma'am, to what it deals with, which is "your proposed inset application." It says it is formal notification to us, "You have withdrawn your proposal, you do not need to write to us again on this." I mention this actually so as to come back to the context of the second 7th December letter, because the first letter deals with the inset application and the second one deals with complaints.

What I say is that the decision that was appealed was that set out, in fact, in the second 7th December letter and that clearly refers to a decision relating to interim measures.

THE CHAIRMAN: Well we dealt with that this morning.

MR. MERCER: Yes.

THE CHAIRMAN: And the question you are dealing with now ----

MR. MERCER: Is the scope of the Notice of Appeal.

THE CHAIRMAN: -- is the scope of the Notice of Appeal.

MR. MERCER: I am saying that if you look what is for the Notice of Appeal, a fairly crucial section, which is the description of the decision on p.14 it says that the decision which is appealed against is that set out in the letter of 7th December, which I say is the second one, which makes reference inter alia to interim measures.

THE CHAIRMAN: But it is the decision not to investigate that is set out in paras.26 and 27, is the way it is put which, of course, suggests that there is not a decision.

MR. MERCER: Well I think, ma'am, it is easier to examine this in a black letter law way and say "Well, what are they referring to? Has there been a decision? What decision is put?" What the laymen sees, ma'am, is a different picture. What they saw was an appeal against the totality of the way they had been treated by Ofwat. For whatever words that were chosen in

the letter of 7th December, it is clear that that is a letter of closure, like the first letter of 7th December it is a letter of closure on the issue of inset application. The second letter is a letter of closure on the investigation front and the decision front as far as they are concerned.

THE CHAIRMAN: Yes, but if you look at p.14 of the Notice of Appeal, under "The Decision", that is looking at it in the sense that there was an error of law or fact on the decision not to investigate. So generally it was not putting it in the way that you now put it, you having put your legal skills on what was considered by the clients to be the problem.

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: And that may or may not be something that we need to consider, but probably what you are saying, is it not, that one looks at the complaint, you have to look at the complaint in the round, because it was not drafted by lawyers who had the benefit of looking at the documents, looking at the law and understanding how one presents these things. It has the meat of it in is what you would say.

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: That it has this 7th December reference to the letter. One should look at the letter and see from that letter what actually is being appealed, because – and I assume you are saying this – what must have been intended was to appeal the 7th December letter, and if the 7th December letter includes a decision on interim relief then *a fortiori* I assume your submission is it must be included.

MR. MERCER: Yes, ma'am.

THE CHAIRMAN: Are you going any further than that?

MR. MERCER: No, I am not going any further than that, except to say that people operating water systems do not sometimes read every nuance into every paragraph of every letter, and they see what is the impression that comes out of that letter and I think they are entitled to see that without actually examining the import of every single word.

THE CHAIRMAN: What you say is that this Tribunal should not take too legalistic a view of notices of application put in by effectively litigants in person.

MR. MERCER: That is exactly how I might express it, ma'am. In the alternative I would argue that these are circumstances where the Tribunal should exercise its discretion to permit an amendment to the Notice of Appeal.

THE CHAIRMAN: If necessary and, as you say, probably the Notice of Appeal would need to be amended to put the case in the way that you have put it this morning?

MR. MERCER: To do that, and also because there would be a number of factors going forward to a substantive hearing that would require a degree of airing, and would need to be dealt with. On

my reckoning, ma'am, having dealt with s.35 and interim measures *simpliciter* I think I have come to the end of where I can usefully take you, given that I may get a second bite of the cherry ----

THE CHAIRMAN: Yes.

MR. MERCER: -- with your consent after the others have finished, and I think perhaps it might be useful if the Tribunal considered moving on now.

THE CHAIRMAN: Thank you very much, Mr. Mercer. Mr. Peretz?

MR. PERETZ: Yes, ma'am, just before I begin I have just one outstanding point I need to raise arising out of the costs' submissions, and that is that at para.18 of Mr. Mercer's latest submissions on costs he states, and I quote:

> "It is a clear tactic from both Respondents in proceedings like these, and Interveners, to attempt to rack up costs through the Tribunal particularly in preparation for hearings on substantive matters."

Those behind me feel that is, to put it mildly, a somewhat unwarranted assertion on Mr. Mercer's part, and we think it is an inappropriate suggestion which should not have been made.

THE CHAIRMAN: This is?

MR. PERETZ: This is para.18 of his submissions under "Facts of the 8th June".

THE CHAIRMAN: Yes, sorry.

MR. PERETZ: Para.18 on p.6, it is the third sentence in that paragraph, beginning: "It is a clear tactic ..."

THE CHAIRMAN: Well you have raised the matter.

MR. PERETZ: I have raised the matter. You understand, madam, it is a matter we feel that we had to raise and, with respect, I think Mr. Mercer should either substantiate it or withdraw it.

THE CHAIRMAN: Perhaps it could be dealt with in correspondence. Would that not be a more appropriate way of dealing with it?

MR. PERETZ: That is the end of that point. Yes. I can now turn to our submissions. What I propose to do first is to take the Tribunal through the relevant water legislation on applications for an appointment, and there are some Ofwat guidance documents that might be helpful quickly to look at, and explain how that relates to the bulk supply application process under s.40. Then I am going to look at the letters on which Mr. Mercer is relying. We have gone through them to some extent this morning, but I think it may be helpful if I take the Tribunal through them again to put them in their proper context.

THE CHAIRMAN: Are you going to take a point that it needs an amendment to the Notice of Application if the interim relief point comes in or are we just going to deal with it on the basis ----

MR. PERETZ: I was just about to come to that. In relation to interim measures the position is simply that first of all the only application that Ofwat was actually being asked to decide was, as we worked out this morning, the application essentially that Bristol be asked to fund IWC's legal costs of complaining. So that is the only outstanding interim measure. That decision, whether right or wrong, was made on 25th November, and it was first attacked by the Appellant 2006, so well over two months later and out of time. We will simply say, and we will come to the Notice of Appeal later, at the moment I am just putting our headline submissions. We will say that it is simply implausible to claim that the interim measures issue was covered at all in the Notice of Application. Indeed, as I will show you, the whole application for relief, the whole Notice of Appeal is conspicuous in the fact that it does not mention either the interim measures ----

THE CHAIRMAN: So you are going to take the point?

MR. PERETZ: Yes, we are going to take the point. Not only does it not mention the interim measures' decision it mentions none of the correspondence leading up to the interim measures' decision in what is, in general terms, a fairly comprehensive catalogue, so that when one reads it ----

THE CHAIRMAN: And you say it is out of time anyway?

MR. PERETZ: It is out of time anyway.

THE CHAIRMAN: It was out of time even if it had been taken in this Notice of Application.

MR. PERETZ: No, if it had been taken in the Notice of Application it would not have been out of time because the Notice of Application is ----

THE CHAIRMAN: I thought you said 25th ----

MR. PERETZ: Yes, the chronology of events, in relation to the application, is you have the Notice of Appeal which is, I think 12th January.

THE CHAIRMAN: So it would be within time. 25th December, so it would be within time.

MR. PERETZ: They would have been in time in relation to interim measures on 12th January had they raised it then, but they did not. The first mention one has of the interim measures' decision being a ground of complaint is on 13th February, and that was too late. On 13th February they were still unrepresented, they were not represented until a somewhat later stage. So what we say is essentially what they were trying to do on 13th February was to appeal the interim measures' decision out of time.

THE CHAIRMAN: How long do they have to appeal?

MR. PERETZ: That would have been 25th January was the latest date they could have appealed the interim measures decision, which was 25th November.

THE CHAIRMAN: They only have a month?

MR. PERETZ: No, 25th November ----

THE CHAIRMAN: Oh November, sorry, I wrote that down wrongly.

MR. PERETZ: 25th November is interim measures' decision, so 25th January – and if one thinks through the chronology – as we have seen and I will come to it later, the interim measures is discussed in a paragraph of 7th December letter, but even so 13th February would be out of time.

THE CHAIRMAN: All right, so you are taking the point?

MR. PERETZ: We are certainly taking the point. That is interim measures and we are also saying incidentally – it is not a matter for today – that the interim measures decision that we took was entirely reasonable and perhaps rather more to the point, as I think the Tribunal is beginning to spot from this morning's discussion, the decision on interim measures simply did not involve the commencement of an investigation under the Competition Act. The basis for the interim measures' decision was essentially that even if we were to conduct an investigation, and even if we were to find a prima facie case this interim measures which is proposed is not one that we have power to make – that may be right it may be wrong, but it is not a decision for the Tribunal today, or in any event would be inappropriate. So it simply does not do what Mr. Mercer says it does, provide a basis for him to speculate that the investigation was in fact commenced and somehow must have been ----

THE CHAIRMAN: Yes, well that does not go to the time problem. He uses the interim measures to hang the claim.

MR. PERETZ: Yes, it is brining me on to the main substantive claim now.

THE CHAIRMAN: So it is used in two ways.

MR. PERETZ: It is used in two ways, there is interim measures in itself and then as a basis on which to construct a theory that somehow or other Ofwat must have commenced an investigation. Then, on the substantive question, whether there was a decision under s.46(3)(c) or (d) of the Competition Act 1998, the question for the Tribunal here is, at the end of the day, a question of fact. The Appellant needs to demonstrate, on the basis of evidence that, as a matter of fact, Ofwat took a decision falling within the terms of that section, that is to say a decision as to whether or not the Chapter II prohibition or Article 82 was infringed.

We have seen it already and I will go back to it, the 7th December letter, the reason why Ofwat decided not to look at the complaint was based on the fact that, at that stage, the Appellant had withdrawn its interest in an inset appointment, it had withdrawn its proposal so that there was no longer from it a live possibility of entry capable of being obstructed by Bristol. What there was at that stage was a live expression of interest in an application from Albion Water and there was a complaint from Albion – all still at an early stage. As you have seen from 7th December letter, what Ofwat was saying at that point was that it would need to consider any allegation in relation to Bristol's conduct in relation to Albion's application and complaint in relation to that application and complaint as they proceeded. This is essentially the step by step approach that you picked up, madam Chairman, in the letter – it is a phrase we use. Our short point is that that reasoning, whether it is right or wrong or reasonable or unreasonable – and none of those questions arise today – that reasoning simply does not involve any decision that can be shoe horned in to s.46(3)(c) or (d).

The second headline point I want to make arises more I think out of Mr. Mercer's written submissions than what actually he said today, although it probably comes in in connection with what I will call the "Euro" point, a point based on Article 82. That is a point which essentially violates a principle that philosophers sometimes know as " Hume's Guillotine", that is the need to distinguish between "ought" propositions and "is" propositions. The question before the Tribunal today is an "is" proposition: what was the decision that Ofwat actually took. You cannot really get at that decision by trying to work out what decision Ofwat ought to have taken. I slightly anticipate ground I shall come on to, but even if Mr. Mercer is right to say that in some sense Ofwat ought to have taken the decision by virtue of the Council Regulation that does not get him very far, because that "ought" proposition does not lead to an is proposition. He needs to show what decision it was that Ofwat actually took, not what it ought to have done, which is a question really for another day.

Let me start by looking at the water specific legislation which really forms the background to this case.

THE CHAIRMAN: Divider 15.

MR. PERETZ: Yes I am going to work off my copy of Halsbury's.

THE CHAIRMAN: We have got it all in divider 15, have we?

MR. PERETZ: Yes, I will work off this, I am going to refer to section numbers so we should be fine. First, we go to s.7 of the 1991 Act. Section 7.1 sets out the basic rule, which is essentially that for every part of England and Wales – Scotland of course being subject to an entirely different regime – for every area of England and Wales there must be a company

holding an appointment as a water undertaker and as a sewerage undertaker; (a) deals with water undertaker, (b) deals with sewerage undertaker. So there a complete patchwork covering England and Wales of companies holding an appointment.

Then if you look at s.7.3 the appointment of a company to be a water undertaker continues until – if you look at para. (a) another company becomes the water undertaker for that area. Section 7.4 then sets out the circumstances in which another undertaker may be appointed to fill the shoes of the incumbent and those are: (a) where the incumbent, in this case Bristol Water, agrees to that appointment. Secondly, and this is of most relevance to the current case, the case where an appointment is made for an area which does not contain any premises served by the incumbent, and that is what Mr. Mercer refers to as a "Greenfield site." That is the basis of what are called inset appointments, although the term 'inset appointments' is not one found actually in the statute. But this sort of appointment is colloquially known as an 'inset appointment'.

Then para. (bb) deals with large users – that is a case that arises I think in the Shotton case, it does not arise here, and para.(c) is again irrelevant for the present case, that deals with situations where the instrument of appointment itself contemplates situations where another company will be appointed.

As we explain in our written submissions, and I do not think I need to elaborate here, it is there for the Tribunal to refer to, an appointed water undertaker assumes a large number of important statutory responsibilities, for example, water quality, promoting water efficiency, relations with consumers, etc. etc. These are important statutory tasks that they have to fulfil. No company should therefore be appointed unless Ofwat, as the regulator, can be confident that it has the financial, technical and managerial capacity to discharge those rather important duties properly. Moreover, in a case such as the current one we are looking at here, the Weston Road case, once an appointment is made and premises begin to be served – I think this his a point that you have already, ma'am – the inset appointee becomes the incumbent and so cannot in effect be displaced without its consent, at least as far as domestic users are concerned. That fact shows that it is possible to exaggerate the degree of competition that inset appointments can offer – it essentially, if you like, one shot competition after which those on the site are stuck with a choice which has been made in this case for them, because it was the developer that made the choice. So that is the background to inset appointments and it really explains why it is that a certain amount of care has to be taken before approving an inset appointment, and also why it is not just the choice of the developer in the regulatory decision to be made of some importance.

Now s. 8, if one then goes on to that, I can skim through this very lightly, it simply sets out, and the Tribunal can read it, a detailed procedure that has to be gone through before an appointment can be made, and there are procedures for notices to be served on the incumbent local authority, the environment agency and consideration of responses. Then if you go to s.9, those set out Ofwat's duties in making appointments and variations, and if I could just lightly touch on subsection 3 and 4. Subsection 3 requires the Authority to have regard to arrangements made or expenditure incurred by the existing appointee, so in this case Bristol Water, for the purpose of enabling premises in that part of the area to be served by that appointee. Then subsection 4, if one looks at the tailpiece after the two subparagraphs, the Authority has a duty to ensure that the interests of 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.

I just refer to those again just to make the point that it is possible to exaggerate the importance of competition on inset appointments. What this is rather showing is that Parliament had a certain amount of anxiety about the position of the incumbent appointee, and it imposes specific duties ----

THE CHAIRMAN: But that will all work itself out in competition because you can take those things into account, they can still be competition.

MR. PERETZ: Yes, it shows that Parliament was concerned to protect the position of the incumbent, to some extent – at least to have regard to them.

I do not know if the Tribunal has this, I handed it up to the Tribunal at one of the earlier case management conferences, I have some copies available if it is not here. It is the Ofwat Guidance for applicants on inset appointments, which is on the Ofwat website. Again, I will go through this relatively quickly, but you can see how the process is supposed to work. First of all, on p.2, about half way down the page, there is a reference to taking a period of time, between 16 and 30 weeks to process an application. That is repeated on p.3, and I would note at the bottom of p.3 emphasis which, of course, applied to Independent Water Company in this case, the emphasis being placed on the applicant having the onus on it to demonstrate its suitability, unless it is an established undertaker it will need to show support for its proposals by a sponsor, parent company or significant investor.

Then at the bottom of p.4 the point is made here: "Applications for inset appointments can involve new sources of water and new methods of treating effluent." Another point being made here is that if, for example, the inset appointment application is made in relation to a Greenfield site, that happens to be next to a major river, for example, there may well be no

need for a bulk supply from the surrounding incumbent, the Environment Agency can be applied to and water taken from the river. But in a case such as the present one it goes on to say:

> "However, inset appointments can be at least partially dependent on bulk supplies or sewer connection agreements. Before an application based on a bulk supply agreement is submitted, both the applicant and the incumbent should attempt to reach agreement on terms. If terms cannot be agreed the Director can be asked to make a determination."

THE CHAIRMAN: And that is a determination under s.40?

MR. PERETZ: That is a determination under s.40. That, I think, now brings me to s.40. Actually, I before I do that if I refer the Tribunal to p.10 of that, para.4(a). This deals with a situation where there has been contact between the proposed applicant and the incumbent and terms have not been agreed. If the parties cannot agree the terms of a bulk supply agreement the application will be accompanied by a request for the Director to determine the terms, so that goes in with the application. Then the Director may require up to eight weeks before making a decision.

If we go back to the Water Industry Act, to s.40(1), on the application of a qualifying person – we will come to that in a moment – defined in subsection (2) – 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 should give a supply of water in bulk to the applicant. So that is the first condition. Secondly, that the Authority is satisfied that that cannot be secured by agreement – "...the Director may by Order require the supplier to give and the applicant to take the supply."

I think we raised very briefly earlier the question of how that order is enforced – you see that over the page in my version, subsection (4), the order has effect as an agreement between the supplier and the applicant. So essentially there is a deemed contract between the supplier and the applicant that can be enforced as any other contract is by usual legal proceedings.

Then "Qualifying Person" means either a water undertaker or a person who has made an application for an appointment which has not yet been determined. So that if they put their application for a bulk supply determination in with their application for an inset appointment they clearly jump that threshold and they are a qualifying person.

I think I can probably deal, while we are at the Water Industry Act, with the question raised by the Tribunal in relation to OFT422 and para.27. This s the vice-versa point. If I can take you to s.18 -----

THE CHAIRMAN: Do we have that?

MR. PERETZ: You may not have that – I had not anticipated we would need to refer to it. I am sure the Tribunal can lay its hands on a copy, and the point I want to make is quite straight forward.

THE CHAIRMAN: Which volume are you referring to?

MR. PERETZ: I have Halsbury's.

THE CHAIRMAN: Yes, what volume, it is just outside, you see – volume 49 of Halsbury's, just outside, the statutes.

MR. PERETZ: Section 18 provides that the Director has a duty to enforce, for example, at s.18(1) a breach of a company's condition of appointment. How it actually reads is that where the Authority is satisfied that certain conditions are contravened, one of which being breach of a licence, the Director shall, by final enforcement order, make such provision as is requisite for the purpose of securing compliance with that conditional requirement. So under that 1991 Act the Director has specific duties to enforce, for example, a breach of a licence – or more accurately an appointment, a condition of appointment. One can plainly see a situation where, particular conduct by a water undertaker might both involve, for example, an abuse of a dominant position and be a breach of a condition of appointment. That is then dealt with in the statute in s.19(1)(a) and there it provides that the Authority shall not be required to make an enforcement order if it is satisfied that the most appropriate way of proceeding is under the Competition Act, 1998. It is that provision which OFT 422 is referring to, otherwise the Authority would be in the position in relation to the conduct that could fall under either head of being forced by s.18 to go down the enforcement order route.

THE CHAIRMAN: So this was writing out s.19 was it, effectively?

MR. PERETZ: It is dis-applying the general duty to enforce, for example, breach of a licensing condition and saying if you are going to use the Competition Act that general duty is dis-applied, so it does not get in the way of enforcing the Competition Act essentially. That is what is being referred to. Now, there is not a vice-versa because under the Competition Act there is no general duty to enforce – there is simply no equivalent of what one finds in s.18 where the Director is satisfied that certain conditions are contravened "he shall do" such and such. Instead, as you rightly pointed out, ma'am, s.25 confers in general terms a discretion – the Oft "may" conduct an investigation – so there is not a vice-versa. That then is the background legislation. I have taken it at a canter because at the end of the day we do not think the Tribunal needs to decide any issues arising under it, but it is plainly helpful

background to have in order to understand what is going on in this case. I think I can now go to the correspondence and I shall start with what is plainly the highlight at p.1019.

THE CHAIRMAN: Just one moment.

MR. PERETZ: Do you want to have a look at it?

THE CHAIRMAN: Yes, just to make sure we have the right ----

MR. PERETZ: The relevant page number is 780 – if that is the same edition as mine – s.18. Then s.19(1)(a) is on p.784.

THE CHAIRMAN: Yes.

MR. PERETZ: That is an amendment made by the 1988 Act I think, as I remember.

THE CHAIRMAN: Yes.

MR. PERETZ: Shall I now proceed?

THE CHAIRMAN: Yes, I am sorry, proceed through the correspondence.

MR. PERETZ: We are looking at p.1019 in the correspondence file, the letter of 7th December which we have already been through to some extent. I think perhaps what is most helpful if I just take the story through to see how we get to that point, just to pull together what we have been looking at this morning. We start off at p.849 with the complaint. The letter starts at p.849, but the complaint really gets going a couple of pages later at p.851, there is a heading "Summary of complaint" and then there are the four headed items. Ma'am, you said to Mr. Mercer this morning, and we respectfully agree that when one reads those four heads they are basically – though not exclusively – about bulk supply term issues ----

THE CHAIRMAN: Well three items, the fourth item is not, I think.

MR. PERETZ: Well the fourth item is to some extent in relation to that so that, for example, it says Bristol have procrastinated in their responses to Lanara Group on various occasions including bulks supply.

THE CHAIRMAN: It is relating to the procrastination though rather than to the ----

MR. PERETZ: Rather than to the terms of the agreement, not that is correct.

THE CHAIRMAN: So it is a different sort of complaint.

MR. PERETZ: If one reads through, there are some miscellaneous bits and pieces in head 4 but some of them are, with respect, pretty minor.

THE CHAIRMAN: But the procrastination, that is a way that an undertaking could abuse its position?

MR. PERETZ: I think I could accept that as a matter of principle.

THE CHAIRMAN: A matter of principle, yes.

MR. PERETZ: But the broad thrust of what this is about is about bulk supply and you said, ma'am, that was your overall impression and, with respect, we say that that is right. I

In relation to head 3, if I can just comment on that, "Refusal of access to an essential facility service", that really relates to a proposal that IWC – or rather its group – had explored at a rather earlier stage and I do not think I need to go into the details of it, it related to a private supply, but that was essentially alternative to an inset appointment. One can see from the date stamp that it is dealing with a somewhat earlier period. By the time that we are dealing with here in the early winter/late autumn of 2005 that issue was essentially by the bay. IWC had focused its attentions on getting an inset appointment.

THE CHAIRMAN: So again it is an example, so they say, of the sort of procrastination?

MR. PERETZ: Yes, they say it is an example of procrastination, yes.

THE CHAIRMAN: "This is how they are messing us around"?

MR. PERETZ: Yes, or had messed them around, they put it in the past tense, I think, by this stage.

THE CHAIRMAN: Yes.

MR. PERETZ: So that is the complaint. Then I think I can next go to 869, very briefly there is an immediate response by Ofwat in relation to interim measures but not the substantive heading – I will come back to that later – I do not think I need to take the Tribunal to any specific letter about that, but the next stage in the chronology is that on 11th November Wimpey decided to go to Bristol Water in order to supply the houses that were on the site, so that fits into the chronology.

Then if one goes to 972, this is Ofwat's initial response to the substantive matters in the 8th November complaint. The first paragraph points out it is not dealing with interim measures, and then one goes on towards the heading "Your complaint" and sets out the understanding of the complaint. It then goes on to a discussion about which powers are appropriate, and there, under the headings (i) to (iv) Ofwat sets out the various things that, in its view, it had to think about in deciding what powers were appropriate, and we would submit that those are entirely sensible things to think about. Then over the page on p.973 Ofwat's thinking is set out for comment.

The first point made is that under the Water Industry Act 1991 there is no issue that needed to be settled on whether Bristol Water is dominant. The Tribunal can take its own view – we all can – about the likelihood of establishing that Bristol Water is dominant but whatever view one takes about how easy that issue is likely to be resolved, it plainly would need to be resolved and could simply be assumed.

THE CHAIRMAN: I think, when I read this file last night, there are letters from Bristol Water effectively accepting that they are dominant.

MR. PERETZ: Yes, I would have to look at those letters, I am not sure, to be fair, what letters you are referring to – it might or might not be the case – I would Bristol Water would want to take advice before it concluded that it was dominant.

THE CHAIRMAN: I think Bristol Water is getting up.

MR. TUPPER: If it helps at all, I believe I was the author of those letters, and I do have a recollection that we made, basically on the principles, concession that in the circumstances of the complaint it would be safe to say that we were the dominant supplier of water in our own area. We would suggest it was somewhat a statement of the obvious. There will be other circumstances where, as water supplier we may not be dominant.

THE CHAIRMAN: But on this case you were accepting it?

MR. TUPPER: Yes.

THE CHAIRMAN: Yes, that is what I understood.

MR. PERETZ: Anyway, it is there and I do not place an enormous amount of weight on it. More important is paras. numbered there (ii) and (iii). The Water Industry Act 1991 route in principle would be available as soon as you can demonstrate that there had been a failure to reach agreement, and then at (iii) it does not require any determination that the bulk supply price offered by Bristol Water is excessive. We make the point, which I think is pretty uncontroversial, that the concept of excessive price is often difficult to apply. We also make the point that a determination would not, as a Competition Act decision necessarily would be, limited to imposing a maximum price set by reference to that concept, so that under the 1991 Act the Director can set a price that he regards as appropriate having regard to the matter set out in s.40.

THE CHAIRMAN: I think that is what Mr. Mercer was saying before, was it not, that the considerations for setting a price are different; that you may not have to take into account some of the Competition Act.

MR. PERETZ: That might be to the applicant's advantage because a price might be set that was below the excessive price threshold.

THE CHAIRMAN: Yes, so the considerations are different.

MR. PERETZ: The considerations are different, although they are broadly getting at the same theme. Then if one goes to p.997, the applicant first of all deals with it subsisting application proposal, and one sees under the heading "Independent Water Company's inset application. In reaching our conclusion, which I will come to shortly, we have had to take into account a

number of considerations which I would like to discuss." In order to relieve the suspense we an go straight to p.998. It says: "We are unable to proceed with our application in its current form", so they are withdrawing their inset application for Weston Road, Long Ashton. So that is their decision at that point. Then they go on, at the bottom of the page: "Complaint against Bristol Water", and they go on to clarify the nature of their complaint.

THE CHAIRMAN: It is quite important, is it not, the next paragraph: "However, we shall be reconsidering our position once the full implications in the investigation under the Competition Act have been identified." So it was not suggesting that the door was closed, whereas the December letter – your letter – is saying, "well, because you are not going on with it, that is one of the reasons why we are not going to look at the Competition Act aspects"?

MR. PERETZ: Well they were saying they would reconsider their position once the full implications of the investigation under the Competition Act 1998 have been identified. Of course, what we say in 7th December letter was that the particular issue that is flagged up here (the issue under s.7(4)(a)) was an issue that was still under active consideration by us in relation to Albion.

THE CHAIRMAN: Yes, this is the step by step ----

MR. PERETZ: The step by step approach.

THE CHAIRMAN: So it was all bundled together.

MR. PERETZ: It is all bundled together, indeed. Just so that we are sure that we understand what I mean by the s.7(4)(a) issue – it takes a little while to state it – the question here is whether, in the situation that one was by that stage in, that was that Bristol Water had become the supplier of premises on the site because of what George Wimpey had decided to do on 11th November, whether in that situation it would be an abuse of Bristol's dominant position for it to refuse under s.7(4)(a) consent to the appointment of, for example, Independent Water Company or Albion Water as an inset appointment for that site, and that was a question that was being held over at that time.

THE CHAIRMAN: A lot of information is coming, which I may get confused with – at that time Albion was applying for an inset appointment, but Independent Water had withdrawn that application or had never made it?

MR. PERETZ: Well, the situation in regard to Albion is that it had stated that it had proposed to make an inset application. I think the situation still is that Albion has not actually done that. It simply said that it was proposing to do so.

THE CHAIRMAN: Yes.

MR. PERETZ: I think also the position with IWC is that in technical terms it had not actually made an application, what it had put in were draft applications inviting comment.

THE CHAIRMAN: And they had withdrawn ----

MR. PERETZ: They were withdrawing their proposal I think is the more accurate way of putting it. What plainly there was on the table, and had been on the table since I think January 2005 was a draft proposal by IWC.

THE CHAIRMAN: Right, well whether it is a proposal or whether it is the real thing, which I do not think we will ----

MR. PERETZ: I do not think it matters enormously.

THE CHAIRMAN: Albion's was still on the table ----

MR. PERETZ: It was still on the table.

THE CHAIRMAN: -- but Independent Water's was not. What I think you are saying is that your clients had decided, in their step by step approach, to look at Albion's ----

MR. PERETZ: To look at Albion's.

THE CHAIRMAN: -- and then once Albion's is looked at, then according to this letter Independent Water were then going to look at whether they make some other ----

MR. PERETZ: They could decide what they wanted to do in the light of whatever it was that had been decided and, I suppose, if speculating somewhat hypothetically, if at some point a determination had been made (hypothetically) that Bristol Water were abusing its dominant position by refusing consent in relation to Albion, Independent Water might well have wanted to leap on that bandwagon. It is a perfectly proper stance for them to take.

THE CHAIRMAN: But they are competitors?

MR. PERETZ: Indeed, but quite often one gets the situation in competition law where one competitor makes a complaint and the other competitor stands back and waits to see what will happen with a view of taking advantage of it if the competitor succeeds.

THE CHAIRMAN: If Albion Water's proposal had succeeded under s.7, then that must have an adverse effect on Independent Water, must it not?

MR. PERETZ: I take that point. It is, perhaps fortunately, not my job to work out exactly what was in Independent Water's mind, but it had something in mind and I assume it was along those lines.

THE CHAIRMAN: I just wonder if that is what it means, if that is the result?

MR. PERETZ: Yes, well, we perhaps could spend quite a lot of time working out exactly what it meant. I think just putting it fairly and broadly, it was putting down a marker that this was

not necessarily for all time, that it might come back. But the current position was that its proposal was off the table – I think that is probably the fair way of putting it.

Over the page, p.999, that is Independent Water's response to what Ofwat had said about the advantages of the Water Industry Act 1991. I do not think any of this comes as a surprise, they essentially say that it does not offer them as good a remedy. It does not deal with some of the aspects of their complaint, those are essentially a summary of what they say there.

THE CHAIRMAN: So it is asking again for a Competition Act ----

MR. PERETZ: It is asking again for the Competition Act, and saying "We think this is the better route as far as we are concerned." So that is the correspondence that leads up to the 7th December letter. You have a dialogue between Ofwat and Independent Water as to what the best route forward is, and the 7th December letter represents the conclusion of that correspondence; we have been through that letter to some extent already. If one starts, perhaps, at the paragraph beginning: "As to the s.7(4)(a) Water Industry Act 1991 issue ..." that is the issue we have just been talking about, there is a reference there to what Albion Water has been told, and it the relevant letter there – if the Tribunal wishes to have a look at it – is p.994. What Albion Water were told was that the step by step way of approaching the issue as far as it was concerned was first of all to work out, given that this was all at a very early stage whether there was a viable inset application that it was likely to be able to make, and then if it looked as if it was – if I can put it this way – a viable entrant, for them to consider the s.7(4)(a) issue.

THE CHAIRMAN: But, of course, Independent Water would not have seen the letter of 30th November to Albion?

MR. PERETZ: Well it may or may not have done but, in any event, I refer you to ----

THE CHAIRMAN: It was not copied to them?

MR. PERETZ: I do not think it was copied to them, but in any event the relevant bit is summarised in that paragraph. I gave the reference to the letter at p.994 in case the Tribunal wants to look at exactly what Albion were told.

THE CHAIRMAN: No, that is absolutely right, but it is just that I wanted to make sure that it was not a letter that we ought to look at in detail.

MR. PERETZ: It may or may not have been. One gets the feeling that a certain amount of correspondence has been swapped between the parties, but it is not a matter ----

THE CHAIRMAN: There is nothing that suggests at that time that it was being swapped.

MR. PERETZ: In any event the point is summarised for Independent Water's benefit here. Then we deal with representations made on 1st December, which we say does not affect our view, and

the Tribunal has that. Probably the best way forward, given that we have all looked at this letter in some detail already, is to summarise what we say are the main points here. First, in relation to bulk supply the view was taken that in relation to the Appellant, Independent Water, this was essentially an academic issue because it no longer had an application on the table. In any event, the question of what bulk supply terms Bristol should offer would be looked at in the context of Albion's application and complaint.

Then in relation to the choice between the Water Industry Act and the Competition Act the key point for present purposes is simply that the view that we reached and you have seen in the correspondence, simply does not disclose any view at all about whether the Chapter II prohibition has been infringed or not and it is rather difficult to elaborate on that proposition because there is simply nothing there that suggests that any such view was taken.

Against that background, let me look at Mr. Mercer's submissions about all this.

Mr. Mercer's first submission I think puts it very broadly that the Competition Act 1998 was mentioned frequently in correspondence and Ofwat therefore, he says, must have considered it. But really this gets Mr. Mercer absolutely nowhere. It is simply not enough to show that officials within Ofwat are likely to have given perhaps some initial thought to the implications of the Competition Act 1998. Officials in competition authorities are constantly thinking about the possible application of competition law to problems that arise. What he has to show is that a definite view was taken of the application of the Competition Act 1998 to the matter. If I can put the matter in terms of the very concise summary of the law given in the *Claymore* case, that the questions one answers are "What questions did the Director ask himself?" and "What was the answer?" It may well be that at some point some official in Ofwat asked themselves the question, but as I think you were getting at, madam Chairman, it does not get Mr. Mercer home because he also has to show that an answer was given to those questions and he simply cannot do that.

THE CHAIRMAN: The question I have really is: just assume that you had started an investigation – and, of course, that is a matter we are going to have to decide but assume you have started an investigation – and assume that because of the interim measures and how you dealt with it that shows that you started an investigation. You then come on 7th December, and you say that having regard to all the circumstances and everything else you now take a different view about continuing the investigation and so you get to stop. That may be what you are saying, I do not know, in the second paragraph on p.1020.

MR. PERETZ: We are not saying quite that because, of course, ma'am, you are operating under the hypothesis which we reject when we started the investigation.

THE CHAIRMAN: No, but assuming on my hypothesis that that would be what you are effectively saying. You are saying that you did not even start it.

MR. PERETZ: We are saying we did not start it.

THE CHAIRMAN: But just assume the substance rather than form, that is the result.

MR. PERETZ: Yes.

THE CHAIRMAN: Now, the question that is going through my mind is, is it the position that once a regulator – and this is a broad question, really – once a regulatory starts an investigation it can stop it without making any decision at all?

MR. PERETZ: Yes.

THE CHAIRMAN: And whether if, when it does stop, that is the equivalent of saying that there is no infringement. Let me give you a possible example. An investigation is proceeding, and you are three years down the line in this investigation and the resources are an important problem, we all appreciate that, and it is at the forefront of regulators' minds, and they realise at that point that in order to continue this investigation – on the evidence they have at the moment – they do not think that they are going to find an infringement. There may still be a reasonable suspicion, but they do not think that they can find the evidence, and we know how difficult it is to find evidence.

MR. PERETZ: Yes.

THE CHAIRMAN: So they decide that this is not a case where they should continue because they should use those resources for another case. Now, at that stage, is it a decision that just closes the book, or is it actually a decision that is saying there is no infringement, because what they have really found at that stage is no infringement? At least, if one goes down that line, those who are victims have a remedy if that is wrong on the evidence as it stood at that time. Whereas, if you just close the book and that is the end of it, and it is not a decision, they have no remedy.

MR. PERETZ: Let me just start by qualifying that, there is always a remedy.

THE CHAIRMAN: What, Judicial Review.

MR. PERETZ: Yes, there is Judicial Review.

THE CHAIRMAN: But that is not the same sort of remedy as you get here, and clearly the legislation wanted people to have a remedy which was an Appeal on the merits.

MR. PERETZ: It may or may not be, a Judicial Review is a very flexible instrument. There are cases like ----

THE CHAIRMAN: Yes, the President made a remark in the first hearing and there is some force in that remark.

MR. PERETZ: I just felt that I needed to pick that point up, but ma'am you have asked me – if I can put it like this – a very good examination question, and the reason why it is a very good examination question is this: because the current state of the Tribunal's case law, if I can summarise how we see it, you have first of all got the *Claymore* case, which is a case I know about because I acted for the OFT in it. What happened in *Claymore* was that there was an investigation, it even got to the stage of dawn raids, and in fact went well beyond that, the OFT spent a couple of years looking at it and then a decision was taken to close the file. On the facts of *Claymore*, if one reads the Judgment, what the Tribunal concluded on the basis of both the letter and, in fact, the way in which I described things in the hearing – I think it was described as a concession and I did not regard it as such at the time, but in any event how I put the case. The Tribunal said "Well if that is the situation then there is a decision as to whether or not there is was an infringement", and essentially what I had told the Tribunal was that we had a lump of evidence and we took the view that that evidence was insufficient to prove the infringement, and the Tribunal said essentially that "... that is enough", though if you take the view that on the evidence before you it is insufficient to prove the evidence that is effectively a non-infringement finding. So that is *Claymore*.

THE CHAIRMAN: But they had your little speech?

MR. PERETZ: They had my speech and also ----

THE CHAIRMAN: Whereas I am proposing a situation where the Regulator just closes the file and does not say anything.

MR. PERETZ: Yes, they had my speech and also what *Claymore* was not, it was not a case where the OFT were saying that the prime consideration is resources, which is what you put to me, and in fact one of the questions I raised in the course of submissions to the Tribunal was that one of the difficulties with the Tribunal's approach is how one would treat a decision, as it were, of mixed motives. It is both a view of what the merits of the case were and a view as to what resources would be required to take it forward and, with respect, I still think that is a quite difficult question on the Tribunal's case law. That is why I said what you asked me was an examination question.

THE CHAIRMAN: That is why I asked it.

MR. PERETZ: One has that. I think the second case that I want very much to direct the Tribunal towards in this connection is the *Aquavitae* case, because in *Aquavitae* there was an investigation – an investigation started – and, after a couple of months, a decision was then taken by Ofwat to stop the investigation on the basis of the particular problem being dealt with was about, as it were, to be overtaken by the Water Bill that was then going through

Parliament. What the Tribunal said about that – picking up some remarks that are made in *Claymore* – was that in general terms when an Authority starts an investigation and goes some way down the line with it, it is possible to draw an inference that it has reached a view, and that, suppose is a broad proposition one can live with – there may be a scope for an inference, although I have to say my own experience of competition law is that sometimes the more one looks into a problem the less one feels capable of reaching a view about it, but it is perhaps an inference that can fairly be drawn.

THE CHAIRMAN: Well that is the inference.

MR. PERETZ: That is the inference, but the inference can be displaced and in *Aquavitae* it was displaced because it was clear that something else had come from outside and had just changed the surrounding picture.

This is all very interesting – it is, as you said, madam, hypothetical in this case because we say we never started an investigation at all and I suppose we should know whether we had done it or not. There is certainly no bass for saying that we had conducted an investigation of the two three year period that was the *Claymore* case. So with respect, even if the Tribunal were *quod non* to conclude that we had started an investigation, we would say simply this is not a case where one can really safely draw that sort of inference. It is not really a *Claymore* case, but I think our fundamental disagreement is that we do not agree that we started an investigation.

THE CHAIRMAN: No, I appreciate that, and if you have not opened it, you have not opened it. But if you have opened it ----

MR. PERETZ: Well, if we had opened it ----

THE CHAIRMAN: I think you say there is a sliding scale, do you not? That at some point it may well be that one says there is a decision because that can be the only reason why you have withdrawn, but if you find some other reason, or if you have just started so you could not have actually come to any conclusion, then you say "In those circumstances you cannot say there is a decision", and it is a matter for the Tribunal on the evidence.

MR. PERETZ: It is a question of looking at the facts of each particular case. One can certainly conceive of a possibility where an investigation is started for a year or a couple of years, and it is not that there is any legislative change, but simply a view is taken high up within the Regulator, that "Actually, what are we spending time doing this for? We would be better off doing something else", and the case is then closed for, if I can put it this way, straight resources reasons and there is simply no view taken on the merits. One can well see the complainant may well seek to argue in such a case that somehow a view must have been

taken, "well we have had to have the argument", but you have to look at the facts of the individual case.

THE CHAIRMAN: Mr. Mercer will say that you cannot just close it for the resources' reason because if you do so you must be saying there is no infringement, because otherwise Article 3 comes into play?

MR. PERETZ: Can I deal with that point in a moment?

THE CHAIRMAN: Yes, you can, you can, as long as you deal with it.

MR. PERETZ: I have certainly got that point on board. The short answer for present purposes is it is the Hume's Guillotine point, it confuses "ought" with "is" and one notes in passing that Article 82, and I think Mr. Mercer freely conceded, has only just turned up, it was certainly not a point that was ever thrown at Ofwat at the time.

What I want to take the Tribunal to next is the Notice of Appeal, which really illustrates how the Applicant saw the case at the time, and p.15 of the Notice of Appeal, which is the relief sought. One quite accepts that this is a lay person's reading of what was happening, but it demonstrates something, we say. What is said here is that the relief claimed is that the Director, as he then was, "... reconsider his decision not to investigate the allegations made". Then para.2 as relief that the Authority should agree to investigate the matter fully, and then the Tribunal offer guidance. The key one there is para.1. So that is how the Applicant itself saw the decision here.

THE CHAIRMAN: But since you and I have difficulties about these propositions, it is very difficult for a lay person to understand what this is all about.

MR. PERETZ: Well we say it is an entirely fair way of putting what had actually happened. We had decided not to investigate. At one level this is a question of evidence and of fact, and the fact that the applicant itself saw the matter that way is perhaps helpful. Indeed, I draw attention to the following difficulty. If it were to be decided that in some sense a decision has been taken by Ofwat as to whether or not the Chapter II prohibition has been infringed, that involves the very real danger, I put it this way, that Ofwat simply does not recognise that that is a decision that is actually taken, and one ends up with proceedings in front of this Tribunal on an entirely false basis. What is being attacked is some decision on the merits which Ofwat says we never took at all. I think that illustrates the basic point that it is a question of fact and that the Tribunal has to be very clear that a particular view has been taken and be confident that on the evidence and on the facts that you can be sure that that has happened, because otherwise we are frankly in a somewhat Alice in Wonderland position in dealing with the substantive hearing. Now, let me come on to the Euro point, and that point was inspired, and there is

nothing wrong in that – it is good advocacy – by the President's question at the first case management conference abut the application of Article 3 of Regulation 1. As I said, our initial response to that is what I have called "Hume's Guillotine" – the question of whether we ought to have looked at it under Article 82 does not really address the question that this Tribunal has to ask itself which is what did Ofwat actually decide?

We can have quite a lot of interesting debate about whether Article 82 applies as a matter of fact. I do not really have any submissions to make on that, I would be perfectly prepared to concede for the sake of argument that it might have applied; and, if so, whether Ofwat was under a duty to look at any complaint raising Article 82 issues.

For present purposes I think I would make the following observations on that: First of all, Article 3 applies only where national competition authorities apply national competition law. It does not create a duty always to apply Article 82 whenever those words are encountered or wherever a complaint comes through the door saying "We complain about Article 82." It does not give rise to any such duty. It says that when a national competition authority chooses to apply its own competition law where Article 82 applies, because of Inter-State trade, it must apply Article 82 at the same time.

THE CHAIRMAN: But that is the case here.

MR. PERETZ: Yes, it could be the case here. Well, the point I am ----

THE CHAIRMAN: You say but the water law trumps the competition law?

MR. PERETZ: No, I do not think we say that.

THE CHAIRMAN: No, you do not say that.

MR. PERETZ: It is a slightly difficult question actually as to whether the Water Industry Act is competition law, which probably for present purposes is not one we want to engage in.

THE CHAIRMAN: They probably thought it was because they have got the competition provision in it.

MR. PERETZ: One could argue it either way, maybe different bits of the Water Industry Act are competition law and bits are not. It is not an easy issue, and I think we would want to reserve our position on that. There is nothing in Article 3 of the Regulation which forces the Regulator to apply it to the facts of this case – not to take the sort of step by step approach that we decided to take.

THE CHAIRMAN: If it does not know whether or not there is a breach of Article 82 – does Article 3 go as far as that they have to investigate, which would mean that s.25 does not work?

MR. PERETZ: No.

THE CHAIRMAN: Do you see what I mean?

MR. PERETZ: It does not. If a complaint comes through the door saying "We alleged a breach of Article 82" we would submit and it is no doubt a law which may be developed ----

THE CHAIRMAN: That Article 3 is not engaged?

MR. PERETZ: -- but our understanding of the law is that we are entitled to say "no", it is not of sufficient interest and precisely what our duties are in that situation is a matter of discussion. In other cases the President I think has raised in the course of argument the possibility that similar duties might apply to national regulators as apply to the Commission when a complaint comes through its door, and there is quite a bit of case law about what the Commissions' duties are, but those are all with respect very interesting debates, but debates for another day. The only point I want to make for present purposes is that what Article 3 simply does not do is mean that every time a complaint comes through the door with Article 82 written in it that the Regulator, as it were, had to jump and has had to reach a decision as to the application of Article 82. That is simply not what it says. And, in any event, my prior point is that even if that were right, it does not help the Tribunal just with the limited issue, which we are dealing with today, which is the question of admissibility and that is simply a question of fact: what did Ofwat decide? Mr. Mercer wants to run an argument that we should have looked at the Article 82 issue ----

THE CHAIRMAN: And we must assume ----

MR. PERETZ: -- we say he can go to the Administrative Court for that.

THE CHAIRMAN: I think what he say is that we must assume that you did look at it because you have a duty under Article 3 to do so, and therefore you must have decided that there was not an infringement because we should not assume that you were not obeying the law?

MR. PERETZ: Yes, well one big hole in that is that we do not think that is what Article 3 means in any event and, even if he were right and in a sense we were wrong, we took the wrong legal view, it does not help him with the question of admissibility because even if we misdirected ourselves and took the wrong legal view, we nonetheless reached the decision which we did, and he has to grapple with the decision we did reach for these purposes not with the decision that he thinks we ought to have reached. The decision we ought to have reached is a question for another day.

THE CHAIRMAN: It is very unattractive to say "There may be something there, but if there is something there we are in the wrong room."

MR. PERETZ: Well that is the point made I think again by, I call it the 'Dickensian point' because that is the point made by the President at the very first CMC, which is that there is something Dickensian about telling any litigant that they are in the wrong court. Our response to that is

that in a sense whether we in this room like or not, the Tribunal has a limited jurisdiction; that is not something that necessarily had to happen, Parliament could have given the Tribunal jurisdiction over every decision taken by Ofwat.

THE CHAIRMAN: This may be an example of a situation where it needs to be looked at.

MR. PERETZ: What we say is the key to avoiding Dickensian outcomes is to make the test for admissibility as straight forward as possible, because if one makes it too complicated, or insists on asking questions which can only be answered by very, very detailed and intensive facts on inquiry one ends up having very long debates at the end of which the applicant may be told that they are in the wrong place, and that is with respect even more Dickensian than a situation where the applicant be told very quickly that they are in the wrong place; and, as you will recollect, ma'am, we tried our best to say very quickly to the applicant we thought they were in the wrong place, and suggested that they would be rather better off down the road and the actually chose not to respond to that ----

THE CHAIRMAN: But of course the costs' implications ----

MR. PERETZ: -- but that is its decision.

THE CHAIRMAN: The costs' implications are different because down the road costs follow the event and in here costs do not follow the event.

MR. PERETZ: Well they may or may not.

THE CHAIRMAN: But they are more likely to follow the event down the road. They do have that rule.

MR. PERETZ: They do have that general rule, although in relation to admissibility – leaving aside *Aquavitae* the rule has been that the loser pays, in all the other cases apart from *Aquavitae*.

THE CHAIRMAN: But it is not a rule?

MR. PERETZ: It is not a rule, to be more accurate the 'practice' has been ----

THE CHAIRMAN: Well, the cases have gone that way, I do not think we can say there is a practice yet. There have not been enough cases for a practice I do not think.

MR. PERETZ: At this point can I pick up your point, ma'am, about the implied decision?

THE CHAIRMAN: Yes.

MR. PERETZ: You rightly referred to a number of revenue cases which I am afraid I do not know about and VAT cases, where I do know at least one, but I simply cannot remember its name. I can email the Tribunal with the reference if that would help.

THE CHAIRMAN: Yes.

MR. PERETZ: But those are cases where the Tribunal – and I am familiar with the VAT case – the VAT Tribunal has held that Her Majesty's Revenue and Customs have sat on an application

for a VAT refund for such a long time that it should be regarded as having taken a decision to refuse it. I think what we would say about the implied decision way of thinking is this, first of all there is no need to imply a decision here, there is an express one. The VAT cases, as I recollect, deal with the situation where there is effectively silence from customs, or questions are asked, but certainly nothing which suggests any decision being taken. Here there is an express one. Secondly, and perhaps more importantly, unlike the VAT and tax situation where the HMRC has only two options – it can either accept the request for refund and pay over the money, or it can refuse it, there is no sort of *tertium quid*, there is nothing in the middle that it can do. However, here there is because the response of a regulator to a complaint is not necessarily accept it and find an infringement, or reject it and find no infringement, it can be a priority resources, step by step, whatever it is approach. Since that is a legitimate option the case is simply not parallel with at all the Revenue and VAT cases.

THE CHAIRMAN: Because in those cases you have to take a decision.

MR. PERETZ: In those cases there is no choice, you either pay ----

THE CHAIRMAN: You have to make ----

MR. PERETZ: You have to make a decision.

THE CHAIRMAN: The Revenue at some point have to make a decision, whereas here they do not.

MR. PERETZ: Customs either comes up with the money or it does not.

THE CHAIRMAN: Yes.

MR. PERETZ: There is no sort of intermediate solution.

THE CHAIRMAN: But the Judicial Review point would arise, would it not because those VAT payers could have gone to the Administrative Court and said "They are not exercising their powers properly, they are not making decisions here"?

MR. PERETZ: Yes, on the basis that no decision had been taken, yes, I think, subject to checking the terms of the legislation, strictly that would be right, as I recollect how s.84 of the VAT Act works, there is an appeal against a category of decisions, and you cannot appeal against no decision, so that is how the Tribunal has implied a decision. Yes, there would be another route, but in that case, because it is an either/or – you either accept or reject – the Tribunal has readily implied a decision and frankly one can see why. There is a point at which one says that if an administrative authority has to jump one way or the other, it is not allowed to stay on the fence, the point at which you say: "If it has not come down **that** side, it must have come down **this** side." My recollection of those cases as well is that they tended to be against the background noise of questions having been asked by Customs which rather indicate sceptical view of the application, and so on. That is simply a different category of case.

THE CHAIRMAN: Well perhaps you could let us know what those cases are, and if somebody could find the Revenue case as well.

MR. PERETZ: Yes, that is rather less within our field of ----

THE CHAIRMAN: Well we may find the Revenue case for you.

MR. PERETZ: I was not, I have to say, aware of the Revenue cases until you pointed them out, ma'am.

THE CHAIRMAN: Yes, it is quite an old case, the Revenue case.

MR. PERETZ: They may conceivably be referred to in the Customs' cases.

MR. BLAIR: Can I ask you a question or two about the *tertium quid*?

MR. PERETZ: Yes.

MR. BLAIR: I understand the concept. You mentioned resource – have you got other examples?

MR. PERETZ: One example is the step by step approach that we have got to here.

MR. BLAIR: That is my second question. What about priority?

MR. PERETZ: Priority could well be one, yes.

MR. BLAIR: What about policy change, or would that provoke a decision?

MR. PERETZ: Well policy change could cover a number of things. If it was a change in approach to the interpretation of the competition legislation then one could see that that might involve forming a view about whether or not there was an infringement. If it was a policy change in relation to the importance of particular sectors, e.g. the OFT at the moment prioritises particular sectors – construction, financial services, etc. – that is obviously not set in stone for all time. At some point it might decide that another sector was a priority and abandon, or take up investigations accordingly, so that sort of policy change in my view, off the cuff, would not involve an appealable decision. So it depends on the policy change.

MR. BLAIR: And as to step by step, is it in the same class as those?

MR. PERETZ: Yes, it is essentially a timing and handling decision – "We are going to look at the big issues in the following order and at the following times" – so it really is on all fours with the priorities' case.

MR. BLAIR: So it is a "not yet" really.

MR. PERETZ: Well it may be a "not yet", it may be "This is premature, we will cross that bridge when we come to it", which I think is one way of characterising what we said (particularly in regards to the s.7(4)(a) issue) that it was "cross that bridge when we come to it" – we might not get there.

MR. BLAIR: Yes, but of course, one of the rungs of the ladder has been pulled out from you, the step does not exist any longer because they had abandoned the alternative application had they not, so is there anything left of step by step as from 1st December?

MR. PERETZ: I have to say that I am not sure I follow that.

MR. BLAIR: Perhaps I do not either! When you were operating step by step it was because you had not yet decided which was the better way to proceed and, as it were, put the Competition Act on the back burner, but then the front burner was turned off on 1st December.

MR. PERETZ: Because they withdrew their ----

MR. BLAIR: Exactly.

MR. PERETZ: -- their application in the Water Industry Act route ----

MR. BLAIR: Exactly.

MR. PERETZ: But going on, as it were, in another part of the forest, was the Albion application which was still very much there, and we refer expressly in the letter of 7th December to that other part of the forest.

MR. BLAIR: There was another ladder which still had all its steps?

MR. PERETZ: Yes.

MR. BLAIR: Thank you, that is fine.

THE CHAIRMAN: The difficulty with that is that you are mixing two competitors' applications together, so you are getting a bit into the arena as an independent regulator. I do not know what effect that has but I do not know whether they were connected or not, but if they were two independent applications, and you said "You have withdrawn yours" and they say "We want a Competition Act investigation" and you say "No, we will wait until we see whether we allow the other one

MR. PERETZ: That was in relation to a particular issue, yes.

THE CHAIRMAN: But that is where the step has gone? I do not know if it has any effect legally, but it just seems possibly ----

MR. PERETZ: I think I would leave it there, I am not sure that it has any effect legally. That, I think, is what I want to say about the s.46(3)(c) and (d) parts of this. Probably the best thing is if I now look at interim measures because there is an overlapping point which is Mr. Mercer's point about the interim measures' decision feeds back into the s.46 analysis when I come to that, but perhaps the best thing to do before I get there is just to go back to the correspondence files again to trace through the interim measures' correspondence. I hope I can do this pretty quickly, and I hope it is helpful for me to go through it again because we were rather jumping about this morning.

THE CHAIRMAN: Give us the references, it is helpful.

MR. PERETZ: If we start at p.853, which is the back of the original complaint letter of 8th November, and, as you rightly said, ma'am, the meat of this – 853 starts off with four bullet points all about serious and irreparable harm, but the meat of what is applied for is on page 854, numbered paragraphs 1 and 2. Paragraph 1 is all about the static tank, and 2 is the interim order to pay our legal costs of making a complaint. So that is what is applied for.

Then the very next day, p.869, we write back dealing with interim measures only. I think I can skip the paragraph starting: "In relation to your proposed interim measure", because as we have established that was eventually withdrawn, so we can go on to interim measure 2, and we set out there our reasons for saying that we do not think s.35 gives us power to make such an order. We note that Parliament has not made any provision for competition authorities to award costs and we also note, and this may ring a bit of a bell with this Tribunal, given various events that have happened in relation to costs' applications. We note that there has been no evidence that they need the funding, it simply is an assertion.

Then if we go to p.914, first of all one sees they withdraw the interim measures request in relation to the static tank – that is just above the heading "Special Advice". Then under the heading "Special Advice" the only point they make there is that they feel that specialist advice is necessary in order to file a complaint, so they do not deal with the point that we make about the legal power not existing under s.35, and they remain rather coy about their financial situation.

Then at 970, in the paragraph beginning: "I can also confirm", they repeat their request for interim measure with respect to, as the put it, specialist advice and legal counsel. Then 979 that is our final decision we do not consider that we have the power and we note that they have not demonstrated any evidence that funding is necessary to enable them to continue to pursue the complaint.

Just for completeness, the following paragraph relates to a suggestion made in previous correspondence that they wanted an interim measure relating to the 7(4)(a) point. If one goes to p.1000 under the heading "Interim Relief", they tell us that they did not actually request such a measure at all. Mr. Mercer said in relation to this paragraph beginning: "You appear to request a further interim measure", he focuses on the sentence, I think about two-thirds of the way down and says that if we found that Bristol's refusal of consent was not an infringement of the Chapter II prohibition some how means that we must have started an investigation. With respect, that is a ludicrous submission. It is plain from this sentence, that this is purely

hypothetical. It is an "if" statement. If we were to find, and is on the basis of a hypothetical investigation that we have not started.

THE CHAIRMAN: But even if you have started you would say that you had not got sufficiently down the road, and there is not that sort of evidence to say that any approach that you then had – I have tried not to use the word 'decision' – not to continue could not be implied to mean that you must have taken a view that the evidence that you had was that there is no infringement?

MR. PERETZ: Yes, I think that is right. I see Mr. Mercer's difficulty, he has to scrabble around to try and find some evidence on which some other decision – other than the one in the correspondence – can be inferred. He has sensibly seized on the jurisprudence of the Tribunal to the effect that once an investigation has started it maybe possible to draw inferences – maybe possible to draw inferences – depending on the facts, so he is keen to establish that we started an investigation and I can see that. Our way of dealing with that is first of all to say "No, we did not", but secondly – and this is somewhat difficult, because it is a hypothesis that we reject, that you were inviting me to go down that route – even if we had started an investigation there still is not enough, and it is plain from *Aquavitae* that it is possible to say that even when an investigation has started.

MR. BLAIR: But there is a dog in all this correspondence that is not barking, which is you could easily have said "Steady on, we do not have the power to give interim measures because we have not started to investigate yet", and nowhere in these letters is that said.

MR. PERETZ: No, we do not say that. The approach we are taking is, even if it started an investigation, even if we did that, there still would not be a power to give this particular interim measure which you have sought. It may be helpful if I just turn this letter up. The point actually emerges rather more clearly if you turn to p.953, which is a letter which we sent to Albion. I perfectly well concede that this was not necessarily a letter that Independent Water saw, but it illustrates ----

THE CHAIRMAN: Well you clearly did not intend them to see it whether they saw it or not, so ----

MR. PERETZ: Well they may or may not have seen it, yes.

THE CHAIRMAN: You did not intend them to see it?

MR. PERETZ: No, but it illustrates how our thinking was going at that time. Under the heading "Your application for interim measures" we start off: "We assume for present purposes that there is a basis for an investigation and the Director would decide to open such an investigation." So there we are making it clear that this is on a hypothetical basis. I accept that in relation ----

MR. BLAIR: The dog barks in relation to Albion.

MR. PERETZ: That is where the dog barks. I accept there is nothing quite as crystal clear as that on the point in the Independent Water correspondence, but it is wholly unreal to suggest that we were taking a different approach really on very similar matters to applicants, and this illustrates how we were thinking. That really disposes of Mr. Mercer's point because he is trying to say that because we thought about interim measures at all we must have started an investigation. Well no, it does not show that at all.

I think I can get on to, as it were, interim measures *simpliciter*, and that is what we describe as the late attempt to appeal against the interim measures' decision.

THE CHAIRMAN: The question of whether they can amend?

MR. PERETZ: The question of whether they can amend, and we say it is simply out of time. Can I take the Tribunal in this context to the very recent case which you, ma'am, will be very familiar with as you are now sitting on the Tribunal in the case, the *Prater* decision.

THE CHAIRMAN: I did not make the decision that is in **there**.

MR. PERETZ: I know you did not make the decision, Sir Christopher made the decision, but I hope you will be the familiar with the decision since you are now sitting on the case.

THE CHAIRMAN: Not yet, not yet.

MR. PERETZ: It is tab 7 of the authorities' bundle. It is convenient because it has all the relevant material in it. At p.4, para.13 the President cites the Tribunal's Rules, Rule 8: "An Appeal must be made ... so that it is received within two months of the date upon which the appellant was notified of the disputed decision." Then para.2 of the Rule:

"The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.

Then p.7 there is an extract from the Tribunal's guidance, and at para.6.14:

> "Under Rule 8(2), the Tribunal may not extend the two-month time limit for appealing 'unless satisfied that the circumstances are exceptional'. The possibilities of obtaining an extension of the time limit for appealing are thus **extremely limited**. (The comparable rule in the Rules of Procedure of the CFI, which is to be found in Article 42 of the Statute (EC) of the Court of Justice, requires the party concerned to prove the existence of unforeseen circumstances or of force majeure: see *Hasbro v DGFT* [2003] CAT 1).

Madam, as I am sure you aware, the rules of the Court of First Instance in terms of time limits are extremely strict.

THE CHAIRMAN: Yes.

MR. PERETZ: I think very recently the Commission was debarred from running a defence because it got it in a few hours late.

THE CHAIRMAN: Are we not looking at the wrong rule, though?

MR. PERETZ: Well it is important, I think, to have the rules on Appeal.

THE CHAIRMAN: Because there is quite a lot of Tribunal authority on Rule 11 as well, is there not?

MR. PERETZ: I will come to Rule 11 in a minute, but we say Rule 8 is the one that one looks at first here.

THE CHAIRMAN: Right.

MR. PERETZ: Paragraph 6.44:

> "Having regard to the timetable for the determination of the appeal, and the very limited possibilities of introducing new issues, the Tribunal may be obliged to exclude from consideration material which could reasonably have been included with the notice of appeal but which was not."

They are making a separate point about the Notice of Appeal – "it had better well be complete" is the message, and it is emphasised in bold type in the guidance. So really the guidance is intended to be read by anybody who is thinking of appealing to this Tribunal. I think an appropriate approach for the Tribunal to adopt is that any appellant, before this Tribunal, to adopt a slight legalism, is 'fixed with knowledge' of this guidance, and should take it into account. This particular point is emphasised. You must get your Notice of Appeal in time and it must be complete because it will be very difficult to deal with later if it is not. That is the message being given.

I am not sure that it is actually in *Prater* – perhaps we can just have a quick look at Rule 11.

THE CHAIRMAN: I do not think he was considering Rule 11, because this was a completely different case.

MR. PERETZ: Oh, *Prater* on the facts was different.

THE CHAIRMAN: Totally different.

MR. PERETZ: Getting a Notice of Appeal in 40 minutes late. I went to it essentially because it contains ----

THE CHAIRMAN: And the circumstances, what happened in telephone conversations.

MR. PERETZ: Yes, the only point I would draw from *Prater*, and you are familiar with the facts, ma'am, I need not go through them, at a high level I would draw these points from it. It emphasises the exceptional nature of discretion to extend time, and the President delivered a 15 page Judgment about a 40 minute delay, which really speaks for itself in terms of showing

what importance the Tribunal places on this time limit, and it is right that it do so, because the time limit is point at which legal certainty is achieved in relation to decisions taken by Regulators, some of which are of fundamental economic importance, not just to those who lose by them, but also those who benefit from them. It is vital that at some point the absence of an appeal enables those who need then to plan the future can say "Fine, there is now no appeal, we can get on with our lives, assuming this decision is now final", so it is very important.

THE CHAIRMAN: I am not sure the same applies to amendments.

MR. PERETZ: With respect, ma'am, we would say that it does.

THE CHAIRMAN: I know you are going to say that, so I think we ought to look at Rule 11 and the cases that have been decided under Rule 11, *Floe* being one of them.

MR. PERETZ: *Floe* being one of them. The point I would make first of all is that the Tribunal has to be very careful indeed about allowing a situation to arise when an Appellant is permitted to put in a vague Notice of Appeal which supposedly covers various things and then to, as it were, amend later, to catch other decisions that are not immediately the subject of the Notice of Appeal. I want to make some points actually about the Notice of Appeal itself, because it is actually quite startling in the Notice of Appeal the extent to which we would say the impression given here is that a deliberate decision has been taken not to appeal the interim measures' decision.

If I can take you to pages 10 and 11? What is happening at pages 10 and 11 of the Notice of Appeal is that the Appellant is setting out in some detail the relevant correspondence, and one can see that this starts quite a way back, going through events, May, June and August. By the time I get to para.22 it is talking about its complaint of 8th November. You will remember, because we have just been through this correspondence, the next letter in the sequence of what actually happened was the letter of 9th November from Ofwat, which is the one at para.869. Is that mentioned? No, it is not mentioned. The next event mentioned is 11th November. The next event in the chronological sequence is the letter of 13th November from the Appellant, the letter we have looked at at p.914 – is that mentioned? No, it is not mentioned, because the next letter mentioned is the letter of 23rd November. That is then dealt with.

The next in the chronological sequence is the letter of the same date, 23rd November from the Appellant to Ofwat, the one that we have seen at p.970, that is not mentioned. The other letter of 23rd November is, **this** one is not.

Then finally, and most conspicuously, the decision letter (the letter of 25th November) is not mentioned. The next letter that one sees actually on this piece of paper is the letter of 1st December 2005. So what one sees is that there is a thorough survey of the correspondence, but all the correspondence relating to interim measures has been left out, so it is a deliberate decision it looks like not to deal with it.

Then if one goes on to para.26, the 7th December letter, the Applicant received notification from Ofwat that it did not intend to commit resources into investigating the complaint. That is fine, but again no mention at all is made of the reference in the 7th December letter to interim measures. The legal point about that is, what we would say in terms of legal analysis of the 7th December letter in relation to interim measures is it is not a decision letter at all, it refers back to an earlier decision letter, and simply declines to re-open the decision that had already been taken. That is perhaps a slightly lawyerly point, but if one goes on to p.14 and looks at how the Decision is described, you can read the paragraph here. It talks about the substantive Water Industry Act, or Competition Act decision, to characterise it very briefly in those terms, but it simply does not refer at all to interim measures, as you noted madam Chairman when Mr. Mercer took you to that paragraph.

Then again, if one looks at the relief sought there is no relief sought in relation to interim measures. So we say the only sensible interpretation of this Notice of Appeal is that the Appellant by that stage had decided not to pursue the interim measure, and that is not particularly surprising when one recognises just how limited the interim measure was, which was to provide funding of its complaint. Indeed, I think Mr. Mercer slightly touched on that, it is slightly difficult to see what an appeal about that decision in front of this Tribunal will actually be about. That is largely a debate for another day, but it makes sense of the Appellant's decision not to refer to it at all, and we say it was a deliberate decision as one can see from the Notice of Appeal.

THE CHAIRMAN: I think, to be fair to Mr. Mercer, he has a different point, because once one recognises that the actual interim measure that was being requested may be a difficult approach, he then said that in fact it is not for the victim to tell you what interim measures they want and then you respond, but it is for you to look at the complaint and decide whether or not there should be interim measures and what those are and if you look at s.35 that is the way s.35 I think is drafted.

MR. PERETZ: Yes, I have to say I slightly struggle with the where that point gets Mr. Mercer.

THE CHAIRMAN: Well he is saying that you made a decision not to make any interim measures.

MR. PERETZ: Well that, with respect, is not correct if one looks at the 25th November letter, because as you will recollect – we can go to it if necessary – it carefully distinguishes between what, at that stage, we thought were two interim measures that were being proposed. One relating to 7(4)(a), we were told later that that was not an actually a reply – we were careful to say, because it was a newer point, "This is our initial thinking, please comment on it", and then the interim measure in relation to legal costs where we say 'we have heard your arguments on it, we can now reach a firm view, and we decide we are not going to give you that interim measure". So with respect I do not think Mr. Mercer's argument works.

In terms of the possibility of amendment, we would say the Tribunal has to be rather careful about this because, as you know, ma'am, in ordinary civil litigation the problem with amendment is that it can be used potentially to bring in claims that if they were brought at the time there was an amendment are statute barred, or limitation barred, and there are specific rules that deal with that.

THE CHAIRMAN: They would always do that – or nearly always, anyway – in this Tribunal because by the time somebody decides to amend the two months is probably over, because unfortunately the practice is – it is very unfortunate – that people leave it until the last moment, as you can see by the 40 minutes, and do not think to come right at the beginning, as soon as a decision is taken. It seems to take two months to get off the ground, and so they come right at the end of two months and then any amendment is going to be met by the submission you are making.

MR. PERETZ: Yes, well that reflects the underlying policy, which I referred to earlier, which is 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.

THE CHAIRMAN: But the original Tribunal in *Floe* did allow the amendment, and there are other cases where amendments have been allowed.

MR. PERETZ: Well I think the Tribunal needs to take account of a deliberate decision taken at an earlier stage - we have said the only reading of the Notice of Appeal is not to appeal interim measures. What actually happened, almost certainly, just reading how the correspondence worked, was that on I think 19th January we wrote to the Tribunal and to Independent Water saying "We think this is a plainly inadmissible appeal". At that stage, actually, on 18th January, they could still have appealed within time against 25th November decision, but they did not because nothing happened until 13th February. But it was plain that the Decision - we say it can be properly inferred that their decision to start raising interim measures was an attempt to meet what we say – (we would, wouldn't we?) – was a very powerful case on

admissibility, certainly one that caused them some concern, because they felt the need to address it with extensive submissions. We say it was a reaction to that and, frankly, to be blunt, they should not be allowed to get away with it. They took their decision on interim measures. Almost certainly, we say, looking at the Notice of Appeal, it was a deliberate and conscious decision, and they cannot back out of that now.

THE CHAIRMAN: Well we are going to have to look at the authorities of the Tribunal as to how we approach amendments.

MR. PERETZ: Well if we look at the rule itself.

THE CHAIRMAN: "... may do so on such terms as it thinks fit and shall give such further or consequential directions." "... shall not grant permission to amend in order to add a new ground for contesting the decision unless it is based on matters of law or fact which have come to light since the appeal" ----

MR. PERETZ: Since the appeal was made.

THE CHAIRMAN: "... or it was not practical to include or the circumstances were exceptional."

MR. PERETZ: Yes, if one addresses all of those. First of all, it is not a question of ----

THE CHAIRMAN: You say it falls within (a) and (b)?

MR. PERETZ: Well just take them backwards. It cannot fall within (c) because that is exceptional and one is back to the case law and ---

THE CHAIRMAN: Well we need to look and see what the case law ---

MR. PERETZ: -- and Notice of Appeal.

THE CHAIRMAN: No, I think case law on "exceptional" in amendments.

MR. PERETZ: Well my recollection of it is that it makes the same point. Plainly the same word is used "exceptional".

THE CHAIRMAN: I do not think they put it – it says "exceptional" yes, but the way that "exceptional" has been construed I am not sure, it does no relate back to the fact that you are out of time and therefore that is it. I think there has been a slightly broader ----

MR. PERETZ: Let us look at what Mr. Mercer actually says was an exceptional circumstance here. Essentially what he is saying is that "exceptional circumstance" is that these were unrepresented litigants who did not quite know what they were doing, and did not realise the importance of the point.

THE CHAIRMAN: You say that is not exceptional in the Tribunal.

MR. PERETZ: Well it is not even unusual, let alone exceptional, the first point. The second point is that Mr. Mercer – I can see why he did it – but he was very rude about his client's Notice of Appeal and it is not actually that bad. So Mr. Palmer, to be fair on him, has clearly looked at

the relevant jurisprudence and rules. He tries to address the various questions that arise, it is not a bad stab at it.

THE CHAIRMAN: It is a nicely drafted document, but it does not focus on the appropriate points.

MR. PERETZ: Well it focuses on what Mr. Palmer decided was the appropriate decision, which is the decision of 7th December and it will not matter to repeat again, the only way of reading it in relation to interim measures is that Mr. Palmer decided, for whatever reason, that it was not something that he wanted to take any further because he is silent about it. If he had even exhibited the relevant correspondence, or mentioned the words "interim measures" one would have more sympathy, but it is the 'dog that did not bark'; it is completely silent on the point. We say there is nothing exceptional here. A decision has been taken to focus on a particular decision and not on another one, and the fact that having appreciated the difficulties of their position subsequently in relation to admissibility they thought well, perhaps tactically we might try and drag this in, is not an exceptional circumstance – it is simply not enough.

In relation to (b) that it was not practical to include such ground in the Notice of Appeal, well plainly that is hopeless because they certainly could have done, and based on matters of law or fact which have come to light since the appeal was made, well, they knew all the facts when they made the Notice of Appeal and this is not a point of law that has changed, it is not a new decided case or something like that. So (a) does apply either. The only thing that applies is (c) and it is simply not exceptional.

As I say, I would caution the Tribunal against allowing too wide a latitude here because there is scope for this to be abused. One of the problems with accepting being unrepresented, as it were, an excuse for not doing things properly, first of all it discourages people from employing lawyers which, of course, I would wholly deprecate – we must not go down that road. It also discourages people from being frank about whether they have legal advice, because of course legal advice is not always apparent on the face of the record, and one does not want to encourage that either.

So those are my submissions. Unless there is anything further I can help the Tribunal with, I have said my piece.

THE CHAIRMAN: Thank you very much.

MR. TUPPER: I believe it is my turn next.

THE CHAIRMAN: Yes.

MR. TUPPER: There are, I know, at least two Interveners. Just on this one topic, before I actually request just a few moments, if I may, a comfort break more than anything else, when you examine all of these matters, please do not assume that there is not a downside cost. This is

not a victimless decision that you will be taking in terms of moving the rules, looking at the rules, trying to see whether or not there is a way for this Appeal to stand. The cost of having me here could well be spent by Bristol Water improving its services, improving its infrastructure, and providing a service as a water company. If this is stretched and twisted to make room for an Appeal in these sorts of circumstances, then Bristol will have to attend, against its will and in circumstances where it will be totally inappropriate for it to have to answer these charges. Now, on that rather impassioned ----

THE CHAIRMAN: But we do not know that until we have heard the whole of the ----

MR. TUPPER: With that impassioned plea to one side, a five minute break would be extremely useful for me.

THE CHAIRMAN: Can just inquire, Dr. Bryan, are you intending to follow or not?

DR. BRYAN: If I may say a few words, madam -----

THE CHAIRMAN: It will only be a few words?

DR. BRYAN: It will only be a few words.

THE CHAIRMAN: Mr. Mercer, how long do you think you will be in reply?

MR. MERCER: It depends, of course, to some extent on what I hear after our break, but I would imagine about 15 to 20 minutes. How long do you think you are going to be when we have had the comfort break?

MR. TUPPER: I am anticipating no more than 20 minutes, that would the maximum, I hope.

THE CHAIRMAN: I think we must try and finish by 5.

MR. TUPPER: Okay, well then I will make it a two minute comfort break.

THE CHAIRMAN: We will rise; let us know when you are ready.

(Short break)

MR. TUPPER: Thank you for your indulgence. If I may I am going to separate my remarks into two categories. Obviously we have spent a day listening to many things said and I am going to try and see if I can pick over one or two of those things and maybe perhaps assist the Tribunal as regards certain issues that have been mentioned by advocates for both sides. Then if I may I may have to come back to my rather emotional plea about the predicament that Bristol finds itself in.

THE CHAIRMAN: Well you have decided to intervene.

MR. TUPPER: Yes.

THE CHAIRMAN: You did not have to intervene, you do not have to be here, and if we decide to go on you can decide whether or not you want to continue to intervene. It is up to you.

MR. TUPPER: With the greatest respect, the allegations that have been made at the core concern the actions of my client. The allegations are exceptionally serious. Leaving aside phraseology like "petty-fogging" and "procrastination", to the extent that a case is ever made successfully against my client, the implications are extremely severe.

THE CHAIRMAN: And if that case is justified, if there is reasonable suspicion and it ought to be here then you ought to answer it.

MR. TUPPER: Absolutely, and this is a continuation of having to answer it. I suppose what we will be seeking, in fact, what Mr. Peretz has sought to persuade you this afternoon, is that this case is wrong, it is before the wrong Tribunal, it makes incorrect allegations about the actions of my client which were for the entirety of this matter entirely above board and correct. Unfortunately in those circumstances we have no alternative -----

THE CHAIRMAN: It is a question of whether we have jurisdiction over this matter or not. If we have jurisdiction over it then you can choose to be here or not; the allegations can be made. If the situation is that we have no jurisdiction, then we have no jurisdiction.

MR. TUPPER: Absolutely, and obviously we stand full square behind ----

THE CHAIRMAN: It has nothing to do with whether your clients could better use their money or time on something else.

MR. TUPPER: To the extent that we can help the Tribunal to reach decisions concerning its own discretion, particularly regarding, for example, the issue as to whether or not the pleadings could be amended, to the extent that we can show that an improper or an unacceptable amendment would lead to unnecessary time being spent discussing this matter, then obviously I think that would be helpful.

THE CHAIRMAN: Well if we decide that it should be amended, then that is a proper amendment.

MR. TUPPER: Well we are here to discuss that, and we are here obviously to assist you in that process. We feel that we have no choice, we were dragged here – intervention is entirely natural in these circumstances, and we feel that because people are talking about us in the third person it is only appropriate for us to come and put our case.

THE CHAIRMAN: I am not saying it is not appropriate for you to be here, I am just saying that you cannot whinge when you are here.

MR. TUPPER: I think the Australians would suggest that "whingeing is what the English do for sport", so obviously that may or may not be correct.

The very first question of the day which came from your good self was whether or not, having taken possession of the property at this particular site, the customers and the property owners would be able to unbundled, and I believe at that point Mr. Mercer said "Absolutely." He is,

of course, entirely wrong. they will not be entitled to unbundle the water arrangements. The water arrangement will be in perpetuity. There are a number of reasons why that is the case, but I think it is important, just for a moment, to look at the legislation which sits over the top of the water industry, and in particular if I may draw your attention to the Water Industry Act, 17(a).

THE CHAIRMAN: Do we have that?

MR. TUPPER: Well I do apologise. I must say the bundles came to me this morning and there was probably not a proper process in terms of agreeing bundles, and for that, obviously for my part I do apologise.

THE CHAIRMAN: I do not think we have 17.

MR. PERETZ: Page 751 of Halsbury's.

THE CHAIRMAN: I know, but I have given Halsbury back because it was actually being used. Read it out.

MR. TUPPER: Well, unfortunately it is a very long provision, but I will get to the nub, how about that? If I go straight to the nub, and basically 17(a)(3) – just by way of background, competition in the water industry was dealt with byway of the Water Bill, which was obviously discussed the context of *Aquavitae* and Parliament took roughly five years to decide what kind of competition should be appropriate, or is appropriate in the water industry bearing in mind the particular characteristics of the water industry, and it is different for many other utilities. I will just give you an example: picking up the telephone will generally not kill you; drinking the wrong kind of water will. There are health considerations that apply to water that do not apply for many of the other utilities, and Parliament decided over a period of time what kind of competition would be appropriate.

THE CHAIRMAN: You can be electrocuted with electricity.

MR. TUPPER: Only if you lick your fingers and put them in appropriate places. Generally speaking water is the only utility that supplies a product which is ingested by the consumer and therefore there are health concerns, considerations that simply do not apply as regards other utilities. That is just one of several considerations that Parliament has taken into account, but it has now decreed that there will be no competition in the retail market. "The following requirements must be satisfied in relation to each of the premises supplied by the company. The requirement that the premises are not household premises." So there can be no competition for water on a house by house basis. It goes on, 17(a) to 17(d) which then sets out a threshold that applies to competition and water, and basically Parliament has said that to the extent that a premises does not use in excess of 15 megalitres there will be no

competition. There will be no competition – not even a little – none whatsoever. The only exception to this rule is the s.7 processes that we were discussing as regards insets. As regards insets there are three different forms of competition for three different sets of circumstance, the first being Greenfield site we have discussed, the second being large user which we have not discussed, but basically the threshold there is 100 megalitres, and then there is the issue of consent.

I am going to deal with this issue of consent because it is absolutely crucial that it be understood, because the Water Industry Act puts it in there as an exception to the other rules. In other words, Parliament has specifically stated that competition must be restricted to only large users. It has said so in terms. The exception, as regards consent is where the water company decides that it would be acceptable, appropriate, in its view it would make sense for it to agree for someone else to come into its area and to provide that service, it does happen. many of the inset appointments have been by way of consent and, as Mr. Mercer has pointed out, those have been inter-incumbent agreements, but the key point is that in all of those circumstances the consent is freely given, and given in circumstances where the water company considers it to be appropriate to do so. It is an exception to the rule.

We have said and pointed out the concerns that we have as regards this idea that there could be forced consent. If I may refer you to page 964 of the bundle, we have pointed out the obvious flaws to any idea that there could be forced consent by the Competition Act in the water industry. The consequences of forced consent is that all of those provisions that Parliament has so carefully designed in terms of thresholds and where there should be competition, will be rendered nugatory, to the extent that anybody can come to a water incumbent and say "Here is the consent provision, it is not just about whether or not you want to consent, because competition law requires you to consent, and so therefore we require you to consent to the provision of water services to this householder or, indeed, ..." taking it to its absurd conclusion, "... to the whole of the city of Bristol." It is a concept as regards competition law that is beyond anything that I have ever conceived of as regards what may be possible under s.18 or s.82, because it will override specific provisions that will have been established by Parliament in these circumstances.

THE CHAIRMAN: But Parliament allows for Greenfield sites.

MR. TUPPER: Parliament allows for Greenfield sites because in those circumstances, given that there is no provision of water, there is no water infrastructure, technically ----

THE CHAIRMAN: But this is a Greenfield site, is it not?

MR. TUPPER: This was a Greenfield site until the infrastructure was put in ----

THE CHAIRMAN: Yes.

MR. TUPPER: -- and there remain Greenfield sites elsewhere in the United Kingdom.

THE CHAIRMAN: And what we are talking about is Greenfield sites.

MR. TUPPER: And in those circumstances then there can be competition via the inset proposal route. However, Mr. Mercer, I believe suggested that (a) there could be unbundling – absolutely not.

THE CHAIRMAN: What you are saying is that once whoever it is – whether it is Bristol Water or Albion or Independent Water, or some other organisation gets a licence, if we cal it a licence, then that is it until somebody comes in and takes it over.

MR. TUPPER: Yes.

THE CHAIRMAN: So it cannot be individual consumers, it is the site.

MR. TUPPER: Absolutely.

THE CHAIRMAN: It is the Greenfield site, but somebody else, say that Independent Water got it, then Albion could come along and say "Look, we have a different source here, we can provide this differently" and might be able to enter the market through – I assume it is s.40 is it? You are nodding, s.40, but they would have to take over the whole site?

MR. TUPPER: Either the whole site or there would be circumstances where if Independent Water and Albion were to come to an agreement then you could have a change in inset appointee by consent, so there could be a consent situation, but those things have not happened until now ----

THE CHAIRMAN: To be fair to Mr. Mercer, there is another aspect of unbundling, because the bundle was having all the utilities together, and that can be unbundled.

MR. TUPPER: Yes.

THE CHAIRMAN: And that can be unbundled because although the site is fixed with Bristol Water ----

MR. TUPPER: Yes.

THE CHAIRMAN: -- or with Albion or with which ever one it is, in relation to water, in relation to gas, electricity, etc. each consumer can come along and say "I want to go to somebody else"?

MR. TUPPER: Which is an eloquent way of putting the point I would want to put, okay, that other utilities are freely open to competition, and you can go into your house and you can decide whether it will be NTL or Sky, and you can make those decisions, because those decisions Parliament has decreed are entirely appropriate – no risk attached, there should be a totally free market. Parliament however has not been quite so liberal when it comes round to water.

Parliament has said that water is different and it must be regulated differently and there must be only competition in appropriate circumstances.

THE CHAIRMAN: Each consumer can only get what is offered to them, so it is exactly the same as cable television. If cable television is on the site then it is offered to you. If cable television is not on the site then you cannot get it.

MR. TUPPER: We could talk about this obviously for considerably longer. Everything now is possible in terms of what can be delivered to the house, and it does not necessarily have to come through cable, it can come through dishes. What is apart at the moment is water, that is what I am saying. So for Mr. Mercer rather glibly to say there are two million homes that could be open to competition, that is not correct. Two million homes are certainly not open to competition. Those homes, which may or may not be built on Greenfield site could be the subject of ----

THE CHAIRMAN: I think he was envisaging they were all Greenfield sites.

MR. TUPPER: Well I think that Mr. Mercer may actually have to then check his stats. because I do not believe that those two million homes will all be built on Greenfield sites. Unfortunately this country of ours is not quite as big as it perhaps could ----

THE CHAIRMAN: Well in relation to Greenfield sites I think we have your point.

MR. TUPPER: Yes, thank you. As I say, I was attempting to nail one of two of the comments that were made this morning and this afternoon.

THE CHAIRMAN: That is helpful.

MR. TUPPER: If I may, I am just going to deal briefly with the Article 82 point because that has come up and Regulation 3 has been dragged in. This morning we received a witness statement which appeared to suggest that Article 82 would be in play. I am sure that I do not need to repeat all of the various different provisions within Article 82, but an absolutely key element to it is that the activity, or the actions of the dominant undertaking must actually or potentially affect trade between Member States. What we are discussing here is the supply of water – the supply of water to a very small residential development near Bristol. It is beyond fancy to suggest, as regards the supply of water, that there is any possibility of there being any form of cross-border competition for the provision of water to this particular site unless it was Evian or Perrier that was going to put in the bid. So other than – and it was a facetious remark concerning bottled water – there is absolutely that we could have done in this particular case that could ever have actually or potentially affected competition between Member States. Now, the witness statement suggests ----

THE CHAIRMAN: Just hold on, if the Calais Water Company decided that it was going to

apply ----

MR. TUPPER: If the Calais Water Company had decided that it would apply to become an inset appointee in this particular case, which it did not, and remember that the allegations here as to what we did as regards Independent Water was an abuse of our dominant position, but if it had been them then it would not have involved the cross border supply of water, it would merely have involved them, as an incorporated entity applying via the inset appointment rules to become the inset appointee. But in these circumstances nothing we could have done to Independent Water could ever have had an impact on inter State trade, and the suggestion that somehow our actions may have led to some kind of deviation of construction product, which is I think what this witness statement is trying to suggest, the infrastructure was put in long before we made any decisions, or any decisions were taken with regard to bulk supply.

THE CHAIRMAN: Well no submissions were made on that witness statement, so I am not sure where it stands anyway.

MR. TUPPER: Well no, and indeed, actually, I must raise an eyebrow in terms of receiving pleadings on the day of a hearing and indeed, just the day before hearing which come completely unscheduled and without ----

THE CHAIRMAN: Well anyway no submissions were made on it.

MR. TUPPER: But the point that I am trying to make is that before you get to regulation 3 you have to get through a thicket – and I mean a thicket – of requirements for Article 82 to be in play, and I would suggest that if the Director General had ever been minded to turn his mind to this particular issue he could have dismissed an Article 82 claim on the basis of "How on earth can you tell me that this could possibly have had an effect on trade between Member States. It is just simply not in play.

It is also suggested by Mr. Mercer that at any moment Independent Water could return to the site and say "We are ready now, we are going to take it over" and I believe he was looking to his client to say that that would be the case. Since we came, and I mean rode to the rescue of Independent Water, because it was Independent Water's static tank that was causing the health concerns for those that were on site ----

MR. MERCER: I am sorry, I am going to have to object to that, ma'am.

THE CHAIRMAN: I think it is better to leave it neutral rather than say that you rode to the rescue of them, when they say that it was all your fault to start with.

MR. MERCER: I am not sure the Drinking Water Inspectorate would back up what Mr. Tupper has just said, ma'am.

MR. TUPPER: It certainly was not our idea, and it certainly was not our static tank. We were not the ones that were meant to be providing water to the residents on the site at that time because, as you know we were requested to stand back. Eventually, of course, we did step in upon the request of all of those concerns and, as a result of that, we have been hard at work rectifying the mistakes that were made as regards infrastructure on this site, and still to this day we have yet to correct all of the mistakes that have been made. As a result, what infrastructure is there now, which of course precludes the application of Article 7 because other than its consent issue, which as I have said is legally preposterous, no Greenfield site, no large user, most of the infrastructure that is on this site now is our infrastructure that we have repaired and brought up to an acceptable level. So the idea that at some point they could turn around and say "We are here now, we are ready" is of course not entirely correct.

If I may, there is one other point before I come back to I suppose my 'cri de coeur', as it were, we have talked about whether or not there was an alternative remedy as regards a Competition Act investigation. I do understand the problems that the Tribunal has because it does not want to be in a situation where it shuts down what might appear to be the only access that this particular entity has to justice. I come back to s.40, and I know there is the suggestion that because the s.40 request has been withdrawn s.40 somehow is no longer in play. But it is only no longer in play because Independent Water has decided it, because it is the one that has decided to withdraw its consent. It could always re-apply and, indeed, this is in fact set up in the correspondence if I can ask my assistant to get that correspondence. The letter, probably in reverse order, is on page 1019, which is a letter of 7th December.

> "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 r reconsider your decision to withdraw your inset appointment application."

Indeed, this carries on from a letter that was sent (p.998) which is a letter that was sent by Lanara on 1st December: "However, we shall be reconsidering our position once the full implications of the investigation under the Competition Act have been identified." Section 40 was not finished, it was not foreclosed. Section 40 could have been re-ignited at any moment. The wonder about s.40 is it is almost lawyer-free. It is quick, it deals with the nub of the issues which are all to do with pricing, as is set out in the complaint. It deals with the complicated issues in terms of volumetric pricing, of infrastructure charges. It would have taken the parties three quarters of the way to the resolution of this particular issue. It was by far the smartest way to go. They eschewed the opportunity to do that.

MR. BLAIR: Is that not inconsistent with what you have just been submitting to us that it is a one way street? Your first ten minutes said that. Now you are saying it should all be done again.

MR. TUPPER: I am sorry, the one way street – remind me of the few things that I have been saying in terms of a one way street?

MR. BLAIR: That once it is no longer a Greenfield site it is consent or nothing.

MR. TUPPER: And that is entirely correct. In terms of them returning to the site, that is no longer possible, because there is no mechanism to get there. In terms of trying to work out whether or not there is anything that Bristol has done that is incorrect and challengeable, the first step in that process must be to see whether or not what Bristol Water did and what we agreed with Independent Water and the bulk supply agreement is consistent and correct as regards water law, because if it is consistent and correct as regards water law it is very simple, we would have a straight objective justification for the pricing system that we presented to them. It is a natural, normal pre-cursor to any competition law discussion that they first get the price that we presented to them, checked in accordance with the overriding, straight forward specialist legislation that appears in the legislation that applies in this case. They could have done that and, if they had done that, they would have known whether or not they had any case under the Competition Act and at that point they could have then pursued it as they were invited to do.

THE CHAIRMAN: But, Mr. Tupper, if they are right, and if your clients did procrastinate and caused all this problem it got to a stage where the houses had been built, they needed a water supply and all they could do was allow that water supply to happen and you were the only people around that could provide that water supply. It does not really lie in your mouth to try and convince us that we should dismiss this case on the basis of the matters that you are referring to because if it is right that your company procrastinated, and that they did abuse their position and the result of abusing their position was to mean that Independent Water was not in a position to be able to proceed, then to say now the things that you are saying are, I would say, rather inappropriate.

MR. TUPPER: Well let me see if I can then put the right chronology into place, because let us think about the procrastination allegation which, by the way is merely a behavioural ----

THE CHAIRMAN: The only question today is whether this is admissible or not admissible, whether we have jurisdiction or not.

MR. TUPPER: Yes.

THE CHAIRMAN: That is the question, and the matters have been aired in relation to that. I do not see how the sort of submissions that you are making assist in that process. The sort of submissions you are making you can see the reaction that you are getting.

MR. TUPPER: I can see the reaction I am getting and I am trying very hard to see if I can change that reaction because the suggestion has been made that somehow if they do not get Competition Act they do not get anything and I would suggest that they had their opportunities to use the right approach and they actually decided themselves not to do that.

THE CHAIRMAN: But the reason they decided not to ----

MR. TUPPER: Well let us deal with procrastination, if I may, let us deal with procrastination, because you only get to procrastination to the extent that we have acted in a way which did slow down the process. The process in terms of people taking over these houses was not dictated by Bristol Water. We were not the ones who decided that people have to take or keep with the same. The people who decided the occupancy should take place are Wimpey. They are the ones that drove the pace of this. They were sold a pup. They were told that the inset appointment would be in place in time for the occupancy.

THE CHAIRMAN: But none of this is relevant. None of this is relevant to the question of whether we have jurisdiction.

MR. TUPPER: It is relevant to the issue – if I may be so bold, okay?

THE CHAIRMAN: Yes.

MR. TUPPER: - to the issue as to whether or not we could ever arguably have been responsible in terms of procrastination.

THE CHAIRMAN: But that is not the question before us.

MR. TUPPER: Because otherwise the issue in terms of price always needs to be determined in the first instance via the Water Industry Act, because that is the legislation that is set up to do that. The only issue left to one side is whether or not in arriving at our prices we somehow dragged our feet and what I am saying, and what we would say should this ever – and heaven forbid that it ever should – get to a full hearing, what we would say is that we did everything that we possibly could in the circumstances. The fact that occupancy was predetermined by Wimpey was not something that we had any control over.

THE CHAIRMAN: Mr. Tupper, we completely understand that your client will say they did not procrastinate, they did not abuse, they were not in breach of Chapter II, but that is not the question here.

MR. TUPPER: No, well, as I say, I was trying to deal with various points that were made this afternoon, and I felt that that was an important point for members of the Panel that there was this idea that somehow that would be it, that there would be this door slamming and Independent Water would not get its moment.

I was going to suggest to the Tribunal that Bristol Water is in a situation where it is here very much obviously against its will, that the costs that will be incurred by Bristol Water will inevitably lead to people in the Bristol area not receiving the benefit of that investment. So as the Tribunal and the Panel decide issues, which are complicated issues, concerning whether or not Independent Water should amend, whether or not Independent Water should be able to drag into these proceedings things that were not in there before, whether or not in fact this Tribunal is the right Tribunal to determine these issues, to the extent that they get a day in court unfortunately we have to experience that – this is unfortunately an area where it takes a minimum of two to participate in this litigation and we feel very strongly that there is no reason why this matter should be determined in this way before this court.

On that note, I close.

DR. BRYAN: Thank you, madam. I promised a very few points. The issue regarding investigation – whether there was one – I would observe that in the *Aquavitae* case, and I will not take you to it now, but at 209 the President in the Judgment made it clear that the reasons that he accepted from the Authority as to working on the new licensing regime were exceptional. I suggest in this case what is remarkable to us with over 12 years of trying to get competition into the water industry, is that it is clear from the amount of paper work that a considerable amount of resource was committed by Ofwat to this case right from the very start of that case, and I bear in mind that under the powers and duties of the Authority in OFT 422 the Director does not need a complaint to investigate a potential breach of the Act.

The second point I would make is that one thing that is common to both Albion Water's Competition Act complaint and that of Independent Water is that they are complaints about a pattern of potentially abusive behaviour, and this was a feature that also was familiar to a differently constituted Tribunal in the *Bathhouse* case. In that Judgment, and I apologise I do not have the reference, but towards the end the President there pointed out the dangers of dealing with a pattern of potentially abusive behaviour on a piecemeal basis, which is what the Authority did in that case.

What I would draw your attention to in this case is that when Ofwat refer to a step by step approach they are actually talking about a step by step approach to a pattern of potentially abusive behaviour that is the substance of the complaints, and it does not always follow that a pattern is best investigated stepwise. Particularly when one considers what the first step is. The first step for us now as the inheritors of this is that we have to demonstrate to Ofwat that an inset appointment would be viable for that site under the circumstances that pertain now, not when the application or the expression of interest was made, i.e. before houses were

connected, before Bristol got their connection, but now. We have to do that, and the Ofwat guidance that you have had handed up to you earlier today makes it very clear that those applications have to be complete.

The problem that we face there is not only is that site now served by Bristol and all the occupied houses are served by Bristol, we also have the problem that we are faced with a price, the price offer which is the retail price. So in other words, there is an immediate margin squeeze, there is a margin of zero and we would argue excessive pricing issues both with regard to the bulk supply price, but also with regard to other charge elements within the package infrastructure charges that have been mentioned.

So those are real problems, and Ofwat's solution to that problem is not to address the price issue, but to ask us to formulate a hypothetical price. My suggestion is that it is also questionable whether under para.2.7 of 422 Ofwat can exercise the discretion to go step by step or in a piecemeal fashion down the Water Industry Act route and only at the end of that process, assuming of course that we mount the very first hurdle, which is a huge one, only at that point would the Authority consider whether it is then worth looking at this in Competition Act terms. That, in my submission, with respect is consigning the Competition Act not only to the long grass, but out into the wilderness where it is unlikely ever to be used by the Authority, and I think the Tribunal will be aware that the Authority has been a reluctant user of the Competition Act, certainly as far as Albion's experience goes.

I would also, just as a very brief observation, take issue with Mr. Tupper's comment that s.40 determinations are almost lawyer-free. In my knowledge there has only been one s.40 determination since such determinations were allowed in 1991, and that was between two water companies and had nothing to do with competition and everything to do with maintaining supplies in areas which were shorter of water than the neighbouring area, and it related to the terms of those supplies. We did ask Ofwat to determine a bulk supply price using their s.40 powers in the Shotton Paper case. We asked them that in 1995, they gave us an answer in 1997. We are still fighting that answer and it has taken us a long time, but in essence that price we contest contained a margin squeeze, zero margin and embraced an excessive price. Now, another Tribunal is working on that, but for anyone to contest that that is lawyer-free when Welsh Water have, by their own admissions spent well in excess of a million pounds on their case as at the last hearing – not the most recent one – is I think a slight exaggeration.

At that point, thank you for your forbearance.

THE CHAIRMAN: Thank you very much. Mr. Mercer?

MR. MERCER: Thank you, ma'am. Dr. Bryan saved you a couple of minutes of my voice anyway because the first point I had written down was "*Aquavitae* and resources", and if you look at the resources that Ofwat were spending on this what makes it so different from *Aquavitae* just look at the "cc" lists on the copy correspondence in the bundles, and see how many people's initials appear on that list. Just looking at one page, the letter of 26th May, five internal people being copied. This is a substantial piece of resource being devoted to this question and yet we are still meant to believe that everything Mr. Peretz would have us believe was hypothetical – "if" we looked at something, and "if" we might do something, and the difficulty I find generally ma'am, with Mr. Peretz's argument is that I want to stand up and go "Let's get real about this shall we?" "Let's not play the pretty games of 'lawyery' words, let us deal with a real water industry, with a real independent water company, and they frankly come to you with a problem, and they think that you make a decision about that problem and then they discover that you say you have not made a decision. It is a way of dancing around the problem, and bouncing it on the point of a pin. If we get real about this, what was Ofwat doing? It was taking a decision about infringement. Look at what it did, and put all those building blocks together and you find what it was doing. It may have been trying to be doing something else, but that is, in fact, what it did.

Was there a decision? Well rather than "Hume's guillotine" let us take a smaller blade, "Occam's razor", and just look at the two letters of 7th December. One is a closure about the application and the other one is a terminal closure, end of correspondence: "We are kind of finished here with you" letter to Independent Water. I am not saying that it is not dressed up for the intention of preventing any matters coming before this Tribunal, but I am telling you that is what to anybody looking at this from the outside, it will look like. Let us also look at the time that was spent on this. Mr. Peretz, in taking you through correspondence, and to a certain extent myself, dwelt on the period from November through to December in 2005. If you look at the correspondence, you see the matter starts much earlier. There is a constant, constant dialogue for very many months about important issues like price, and when you look at the price, for example that was offered, it was the consumer tariff.

For those of us who have some familiarity with the ways in which interconnection appear in other utility industries I do not think I have ever thought in the telecoms' industry of somebody offering me BT Standard tariff as an interconnection rate – but that is what happened in this case, and remember all the time looking at these issues in a kind of tripartite discussion is Ofwat.

Mr. Peretz, indeed, would further downgrade what he says we did, because he says that it was really only a proposal for an inset application. It was not really a proper one. I wonder next if he is going to say "Well, if that is the case" you are going to have to be a bit careful because then I would lose my vires again because there has to be, as you recall, an application for an inset appointment before s. 40 clicks in at all. Mr. Peretz was suggesting that there was no proper application.

Then it is a question of looking at what constitutes a decision. Has the Director, and these are the words from *Aquavitae* "... genuinely abstained from expressing a view?" Or is the view not as plain as the nose on our face, but he just has not set it out in writing and called it that.

A lot of what we have talked about from time to time over the course of the day relates to the layman's view of language and the analysis that lawyers put to it. I just want to make it clear – I am very grateful and so is Mr. Palmer, for the compliments paid by Mr. Peretz about the Notice of Appeal but, as you so aptly pointed out, ma'am, you can have the most gorgeous prose in the country but if it does not actually deal with what it needs to then it is not actually much use. Sorry, Mr. Palmer. (Laughter) Plus you are going to do lawyers out of a job! That is true actually with this sort of case sorting it out afterwards is better than sorting it out from the beginning and you can never get sued for it.

The serious point, ma'am, is that you have to look at this from the point of view of where Mr. Palmer comes from and where Ofwat comes from. Mr. Palmer does not have a tame lawyer sitting down the corridor – or even an untamed lawyer sitting down the corridor looking at what he is doing. He is not regarding everything in the legalistic way that Mr. Peretz would like, and that is another example, ma'am, of we need to get real about what has been going on here.

Mr. Peretz dropped a couple of quick knives in the ribs about finances and being coy and I just want to deal with that. We have never been coy about Independent Water finances, the company is 'boracic, broke. From the first witness statement we put in relating to that we have acknowledged that.

What we want and what we have looked for is simply to have our position examined and to appeal against a decision we say was taken, and if you find, ma'am, that we did not bring that in to the four corners of the Notice of Appeal we say the circumstances are exceptional, because you are dealing here with an exceptionally technical matter. Not even every lawyer first time would spot the necessary points to make that all work.

I just want to finish, ma'am, by going back to the letter of 7th December, and the two things I started with, which are: looking at things in the round and what is better? I think that that letter clearly was a closure of the matter and it closed it having made a decision.

Now, ma'am, words fail me about Mr. Tupper's submissions so I can probably finish there, unless you have any questions for me, ma'am?

THE CHAIRMAN: No. Well thank you for finishing exactly on 5 o'clock. We will consider this matter and we will deliver Judgment in due course. Thank you very much, and thank you very much for all your submissions today.

(The hearing concluded at 5 p.m.)