IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1166/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 November 2010

Before:
VIVIEN ROSE
(Chairman)

SHEILA HEWITT
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED Claimant

-v-

DŴR CYMRU CYFYNGEDIG Defendant

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Transcribed from tape by
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

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H E A R I N G

APPEARANCES

Mr. Rhodri Thompson QC and Mr. Christopher Brown (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Claimant.

Mr. Christopher Vajda QC and Mr. Meredith Pickford (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant

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THE CHAIRMAN: Good morning ladies and gentlemen. I do not have anything particular to say by way of preliminary remarks other than that you can assume that we have read the recommended reading that you referred to I think at the beginning of your skeleton, Mr. Vajda.

MR. VAJDA: I am grateful, madam chairman. As you will see from that skeleton I appear with Mr. Pickford, we are the respondent to what is a purported follow-on action for damages and the claimant in that case is represented by Mr. Thompson and Mr. Brown.

What I propose to do is to go straight in to the Rule 40 application. The Tribunal will have had, I think, yesterday, a letter about Mr. Brown's involvement in these proceedings. I was not proposing to deal with that orally today.

Turning to the Rule 40 application, it is of course well settled that one can bring follow-on actions in both the High Court and the Tribunal, but there is a fundamental difference between the two fora in that the Tribunal's jurisdiction is statutory and is circumscribed by the statute which is s.47A and the short point here is whether the claim as pleaded to which the Rule 40 application is directed falls outside the Tribunal's statutory and limited jurisdiction and, of course, there is no equivalent statutory limitation on the High Court's jurisdiction and the Tribunal may have picked up that in fact we have been notified of a potential claim in the High Court. If I could just take the Tribunal to that in bundle 1.

Happily the documentation has reduced considerably from previous hearings as, indeed, has the cast of people appearing in front of you.

If you have tab 9 of bundle 1 and this is a letter ----

THE CHAIRMAN: It seems to be bundle 2.

MR. VAJDA: There should be bundles 1 and 2 and then a supplementary bundle which is somewhat thinner. Tab 9 of bundle 1 should be a letter from Shepherd & Wedderburn to my solicitors, Hogan Lovells, dated 27th July. This is when they have been put on notice that we would be taking a point on whether or not this was within the jurisdiction of the Tribunal. If one goes to the end of the second page the claimant says that they note that:

> "… in the event that your client [us] is successful in its Rule 40 Application, it would still be open to our client to issue a claim in the High Court in respect of losses suffered pursuant to the Bulk Supply Agreement between your client and ours."

Of course, that, in a sense, neatly encapsulates the point, because, as we have indicated in our application and in our skeleton, what we say is that this claim is really a claim for an overcharge in relation to the bulk supply agreement which falls outside the jurisdiction of

this Tribunal. There we have it, they say, "It does not matter whether you succeed here because we can still go in the High Court".

The framework, as I said, is laid down by s.47A, and a very convenient place to pick that up is in the leading Court of Appeal case on the scope of s.47A, which is the *EWS v. Enron* case, which should be in volume 2, tab 21. As the Tribunal will appreciate this was an appeal, in fact, by both parties. The Tribunal produced a judgment which did not satisfy either party. Both appealed to the Court of Appeal and it was the follow on case brought in relation to infringement of competition law committed by EWS, and there was an application under Rule 40. I see Mr. Mather smiling. I believe you may have been party to the Tribunal decision in that case, and both parties went to the Court of Appeal.

The main judgment is given by Lord Justice Patten, and he sets out the section at p.37 of the report. Paragraph 29:

> "So far as material, section 47A provides as follows:
>
> […]
>
> (1) This section applies to – (a) any claim for damages, or (b) any other claim for a sum of money, which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom."

If we drop down to (5):

> "But no claim may be made in such proceedings – (a) until a decision mentioned in (6) has established that the relevant prohibition in question has been infringed …"

So we then go to (6):

> "The decisions which may be relied on for the purposes of the proceedings under this section are …"

and then if we go down to (c):

> "A decision of the tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition … has been infringed",

and that is what we have here because you will recall we had a non-infringement decision by the regulator, which was then appealed. There was an infringement decision found by this Tribunal.

Then (9):

"In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in (6) which establishes that the prohibition has been infringed."

Then (10), really for the avoidance of doubt:

"The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

Then we have some important observations by Lord Justice Patten on that section:

"The jurisdiction of the tribunal is therefore limited to determining what are commonly referred to as follow-on claims for damages based on a final infringement of the Chapter II prohibition … The existence of such a finding is not only a precondition to the making of a claim under section 47A(1). It also operates to determine and define the limits of that claim and the tribunal's jurisdiction in respect of it.

For there to be such a claim (and, with it, the jurisdiction of the tribunal to adjudicate upon it) the regulator must have made a decision of the kind described in 47A(6). The use of the word 'decision' makes it clear that section 47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant … to seek to recover damages through the medium of section 47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of section 47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue. We were not referred to any procedure for seeking clarification of any points of uncertainty from the decision maker."

Just pausing there, the problem that the Tribunal had in the *EWS* case was that there was an extremely lengthy decision by the regulator and there was then quite a lot of argument and discussion as to what the finding of infringement was. Happily in our case we say the

Tribunal does not face any of the difficulties that faced the Tribunal in *EWS* because we actually had, and I will come to that in the course of my submissions, we actually had a remedies hearing and a remedies order where there was quite a lot of detailed argument as to precisely what the Tribunal did or did not decide, and that, we say, is very important and gives this Tribunal a much better position to be in than the Tribunal was in in the *EWS* case. Now, if I just move on to some other general observations that he made, and if we can go then to p.44 – this is still the judgment of Lord Justice Patten – we can pick it up at para. 59. I am not going to get into the details of *EWS* which are really very, very complicated, and one has a lot of sympathy for the Tribunal trying to grapple with what the finding of infringement was in that case.

> "I have already explained what I consider to be the limits of the regulator's decision. The issues raised in paras 42 and 52 of the tribunal's decision neatly illustrate the dangers of not taking a sufficiently strict approach as to what findings of infringement the regulator has in fact made. The tribunal … ruled that the British Energy claim was not bound to fail because one could arguably spell out the paragraphs of the decision I have quoted a finding that the claimant was overcharged by not being offered the October/November rates in May."

Then going on to para. 60:

> "But nothing can change between the rule 40 hearing and the trial as to how to interpret the regulator's decision. The task for the tribunal remains the same: i.e. to identify the findings of infringement and award damages for any loss or damage which they have caused. On applications to strike out which turn on points of law or similarly limited issues that do not depend on evidence or require the resolution of any disputes of fact, the decision-making tribunal has nothing to gain from a trial. It will be faced with having to make the same decision on the same material. The tribunal should not therefore have allowed the British Energy claims to survive merely on the basis that they were arguable. It should have decided whether it was clear from the decision that a finding of infringement had been made which covered the pleaded points."

Then he says at 61:

> "For the reasons explained above, I do not consider that the decision contains such findings."

Then he said at the end of that paragraph:

"The question whether the defendant was obliged to alter its 1999 contract prices between May and November 2000 in response to the reduced rates offered to the generators for 2001 seems to me to be far more than simply an issue of causation and quantum."

So that is effectively him saying that what one is focusing on in a follow on action here in the CAT is causation and quantum. As I said, that is the leading judgment, Lord Justice Jacob agreed, and then we have a short judgment from Lord Justice Carnwath, who says in the fourth line:

"It is not enough to be able to point to findings in the decision from which an infringement might arguably be inferred." By the same token it is important in drafting such a decision the regulator should leave no doubt as to the nature of the infringement (if any) which has been found."

So what he is saying is really that there are two people in this work. There is the regulator and the regulator must clearly identify where the finding of infringement is. Of course, we have in this case precisely that happening in the remedies judgment.

What I now want to do is look at the judgments and the findings of infringement in this case so we can put away this bundle.

THE CHAIRMAN: What is the issue on this between you and Mr. Thompson? You say that there was no finding of infringement that the bulk supply price was abusive.

MR. VAJDA: Yes.

THE CHAIRMAN: And you say that the way they have pleaded their case the abusive nature of the bulk supply price is a plank on which they are building their claim, and is therefore not a legitimate plank – is that how you put it?

MR. VAJDA: Not entirely, madam. I will obviously go to the pleading, because the pleading is absolutely key. We say the pleading discloses a case that they have been overcharged on the bulk supply, and the overcharge is, and we will look at Annex 1 in the table, 8.8p in 2001, and they are seeking to recover that overcharge. That 8.8p does not, however, relate to any finding in relation to the bulk supply. There was a finding that something called the first access price, which was a price that was offered in March 2001 was excessive and that is where the 8.8p comes from. So what we are saying is that there is an attempt to bring the abuse that was found in relation to first access price which, as I say, was quoted (but never actually taken up) in March 2001, and it is said that that is the level of unlawful overcharge in relation to the bulk supply. What we say is that there was no finding made by the Tribunal in relation to any level of overcharge in respect of the bulk supply price.

THE CHAIRMAN: I do not understand Mr. Thompson to be saying that there was a finding of infringement that the bulk supply price was abusive. What they say is that their claim is not based on any allegation about the excessive or non-excessive nature of the bulk supply price. When they calculate their damages the input into that calculation that comes from the bulk supply is the volume of water, not the price of the water, and the volume of water is not affected.

MR. VAJDA: We will have to look at the pleading, Madam Chairman, but, with respect, that is not how we see that they put it.

THE CHAIRMAN: Is there any contention that there was a finding of infringement in relation to the bulk supply price, Mr. Thompson?

MR. THOMPSON: No, madam. It was actually exactly the same in the remedies judgment. The issue in the remedies judgment was not the scope of the finding, the issue was whether or not the Tribunal had jurisdiction, as we contend it to be, the Authority would have had jurisdiction to sort it out, as it were, and deal with the competitive situation on the ground. We considered, and continue to consider, that the Tribunal in the remedies judgment took an unduly cautious view of that question. We cannot really avoid this water under the bridge. In terms of this issue, we did not challenge the bulk supply price in our original complaint. We recognised that that was not a finding made during the appeal proceedings, and we have not based our claim on the bulk supply price. I am sure that the Tribunal will have seen that the finding that was made was that partial treatment and distribution was excessive and partial treatment and distribution is an element of the bulk supply price just as it is, in fact, it is the totality of the common carriage price and therefore we have calculated our damages on the basis, as, Madam Chairman, you have already put it to Mr. Vajda, of the volume of water that was actually passed through the pipeline during the period of the appeal proceedings on the basis that the charges there were excessive and would not have been paid if a non-abusive price had been charged for those services as should have been the case from March 2001. That is the essence of our case.

THE CHAIRMAN: I do not know if that helps you, Mr. Vajda, but let us continue.

MR. VAJDA: I think it is important that we do look at what the Tribunal decided, that we do look at the Remedies Judgment, that we do look at the pleadings, and I am sure the Tribunal will want to have a full grasp of the picture.

Just picking up what my friend has said, it is what I call the "common elements" aspect, which is a theme that runs through the pleading and indeed the skeleton, which is that because there is an element of commonality between the bulk supply and the first access

price you can then say that the bulk supply price was excessive. We say that you cannot do that unless there is a finding of infringement in relation to the bulk supply, which is a pretty simple point.

What I am going to do is do a bit of archaeology and go back to 2006. I am also conscious, Madam, I think you are the fourth Chairman to have had the privilege of dealing with this case. I think it might be helpful just to run through the previous judgments very, very quickly, because I am conscious that this is relatively new stuff.

Can we take up bundle 1 and go to flag 11, which is what I think has been called the "Main Judgment". These are actually critical documents, and what this Tribunal has to do is to identify what the findings of infringement are. Paragraph 1 sets out what the case is in a nutshell. You can see that this was an appeal to the Tribunal in relation to a non-infringement decision. The decision was to the effect that the price of 23.2p per cubic metre, the first access price, offered by Dŵr Cymru to Albion on 2nd March 2001 – again that is important to note and I will come back to that – was a price offered on a particular day – and that is important when one looks at the temporal aspect of what was found – for common carriage of non-potable water across what is known as the Ashgrove system, did not constitute an abuse. That is what we call in our skeleton the "dry service". That is not actually a supply of water; it is a supply of carriage, distribution and treatment.

Then at para. 4 the Tribunal set out the background. The background related to a company called Shotton Paper, and the Tribunal will be aware that in this case we have got a claim in relation to Shotton Paper and also a claim in relation to Corus. The case was concerned with Shotton Paper, and if we pick it up at para. 6, you see:

> "Until 1999, Shotton Paper was supplied by Dŵr Cymru at a retail price of [just below 27.5p] …
>
> 7 In 1999 Albion … obtained an inset appointment to operate as a statutory water undertaker in respect of the premises of Shotton Paper, and Shotton Paper transferred its custom from Dŵr Cymru to Albion. Under the various supply arrangements between the parties, Dŵr Cymru sells the water in question to Albion at the premises of Shotton Paper under an agreement known as the Second Bulk Supply Agreement at a price of 26 p/m^3 …"

That is what we call the "wet service". That is a supply of water. I will elaborate on this. Although it is true that there are common elements, there are also elements that are not common between the two. One of them obviously being the water. What Albion did was to re-sell the water that it bought from my clients to Shotton Paper.

Then what Albion sought was a different form of arrangement, and we see that at para. 8. It requested Dŵr Cymru to quote a common carriage price – that is a dry service – for partial treatment and transportation of water through the Ashgrove system:

> "Albion's proposal was, and still is, that Albion [that was in 2006] would buy the water directly from United Utilities at Heronbridge, and resell the water to Shotton Paper, paying Dŵr Cymru a reasonable price for the use of the Ashgrove system. In February 2001, Dŵr Cymru quoted Albion a common carriage price, known in these proceedings as the First Access Price [FAP] of 23.2 p/m^3."

We then see that there was a complaint by Albion to the Director on 8th March, and there were two aspects to that complaint. There was excessive pricing and the margin squeeze, and in relation to that we see that the allegation was that the margin squeeze arose because Albion could not acquire the water from United Utilities, pay the first access price of 23.2p and re-sell the water to Shotton Paper except at a price above Dŵr Cymru's retail price of 26p, then available. I emphasise the words "then available", because the conduct that was being challenged was conduct that took place at one moment in time and one of the aspects was that there was a squeeze between the input price and the retail price.

What one sees there is that the complaint to the Director was in relation to a service that Albion wished to have and, in fact, did not obtain. What the commercial arrangement between the parties was throughout the whole period was a different arrangement and was the bulk supply arrangement.

Then we go to p.120 of the judgment at, no, my reference is wrong. We can now move from this judgment which we looked at to the judgment of the 18th December, which is, if you like, the first infringement judgment and this is in relation to margin squeeze. That is why my references are wrong – because if we now go to p.105 of the judgment of 18th December 2006 (tab.12) we see the finding that was made in relation to margin squeeze that Dŵr Cymru abused its dominant position in the relevant market by quoting a FAP of 23.2p, that it in fact imposed on Albion a margin squeeze between that price and Dŵr Cymru's then retail price. The finding was simply limited to a margin squeeze as of that date.

And then we see, to the same effect, at p.120 of this judgment, the Conclusions; and the relevant conclusion is (iv) at para. 360:

> "declares that by quoting the First Access Price … at the same time as offering a retail price of … [26p], Dŵr Cymru imposed on Albion a margin squeeze …",

and that was conduct, they say, that took place in February and March 2001.

The next judgment that we need to look at in terms of finding is what we call "the unfair pricing judgment", and that is at tab.14. And if we go to p.3 of this judgment the Tribunal helpfully set out at para. 8 their conclusions. Again, you see that it is limited to the access price that was quoted in March 2001, it is para. 8(a):

> "The First Access Price specified by Dŵr Cymru in March 2001 materially exceeded the costs reasonably attributable to the service of the transportation and partial treatment",

and then, as you are aware, Madam Chairman, excessive is not enough. You do have to look at whether it is unfair, and the Tribunal concluded it was unfair and you see that in (d) that:

> "The First Access Price was unfair in itself and therefore an abuse of Dŵr Cymru's dominant position".

And then the Tribunal indicate:

> "In consequence of these conclusions, if necessary we shall hear further argument on the questions of relief and costs.",

and there was in fact a remedies hearing, which we say is of great importance in assisting the Tribunal in where we go from here. Now, just going to p.61 of the unfair pricing judgment, I would like to show you para. 197 because 197 is dealing with the question of excessiveness in relation to the first access price. There were three methodologies used, and in respect of all three there was a disparity between whether you used AAC+ or some fully local system — a disparity between the result of the methodology and the first access price. And we will see, when we come to the pleading in this case that heavy reliance is placed on para. 197. Now, para. 197 is, as is actually clear, simply focusing on the first access price as of, obviously, March 2001 figures.

We can then move to the Conclusion of the Tribunal.

THE CHAIRMAN: In that table, it said "Methodology for calculating the costs of the supply of non-potable water", but my understanding is that the 15·8p does not actually include any water as such.

MR. VAJDA: Yes, you are entirely right, in that with respect to the Tribunal the title of the first column is not correct, because what it is is the method for calculating —

THE CHAIRMAN: The common carriage, yes.

MR. VAJDA: I am grateful, madam. I am asked to read out 198.

"Even allowing for the unavoidable uncertainties in the costs calculation there is a clear disparity between the First Access Price and the cost of the services to be supplied".

THE CHAIRMAN: Yes, it is the "services to be supplied".

MR. VAJDA: Yes.

"We therefore find that the First Access Price exceeds the cost reasonably attributable to the service of the transportation and partial treatment of non-potable water by Dŵr Cymru generally and through the Ashgrove system in particular".

THE CHAIRMAN: Yes.

MR. VAJDA: And then we see the Conclusion of the Tribunal which is recorded at para. 275, p.85. And we see in the third sentence at 275:

"The Tribunal finds that Albion has established that [and, again, I emphasise the words] in March 2001 Dŵr Cymru abused its dominant position by quoting a First Access Price which was both excessive and unfair in itself".

Now, the Tribunal, as you saw from the unfair pricing judgment, hoped that the parties might be able to reach agreement as to the remedies and what the findings were. That did not prove possible, but we have an illuminating, we would say, remedies judgment which is the next tab, which we say is of particular assistance in this case and in defining what the scope of the infringements should be. And also you will see the rival orders that were put forward by the parties.

If we then go to p.4 of the remedies judgment, you see that "All parties", para. 5:

"All parties invited the Tribunal to issue a decision on final relief. In the light of the parties' submissions, we identified the following remaining questions:

(a) What Order should the Tribunal make to remedy the unfair pricing abuse?

(b) What Order should the Tribunal make to remedy the margin squeeze abuse?"

We also see that in a sense that summary, perhaps slightly over-brief because you will see, when we look at it, that it was not just a question of this being a forward looking document, this also — they also make declarations as to what the position was. And we can then pick it up at p.5, and they set out the order that, or the declaration indeed, that Albion wished the Tribunal to make which you see:

"1. In March 2001 and thereafter, Dŵr Cymru Cyfyngedig abused its dominant position …"

And then the Tribunal record:

"We were asked to Order that", and then we have an order in relation to common carriage. And then over the page (p.6) this is the proposed text:

> "… the bulk supply agreement between Dŵr Cymru and Albion shall remain in force and the price for bulk supply of non-potable water supplied by Dŵr Cymru to Albion through the Ashgrove System shall be based on:
>
> (1) 14·4p/m³".

Madam Chairman, the parties had agreed, or we had proposed and Albion accepted that, you remember there were the three methodologies we saw at para. 197, that we would take an average of that, which gave 14·4p, so that 14·4p is a figure which derives from para. 197 of the unfair pricing judgment.

> "… shall be based on … 14·4p/m³ as indexed [so there is an issue of how you index it] … plus … the costs of the Heronbridge bulk supply, as invoiced by United Utilities to Dŵr Cymru.
>
> For reasons which will become clear from the discussion below, Dŵr Cymru and the Authority strongly contested Albion's application for final relief in relation to the Bulk Supply Price".

Now, if we can then go to the summary of the parties' submissions, and pick that up at para. 16 on p.7, and this is important particularly, madam, for the intervention that my friend made earlier this morning on what I call "the common elements item" which has been a theme that has run through his case:

> "The case for Albion principally focused on the Bulk Supply Price since that is the price which it currently pays Dŵr Cymru for the supply of non-potable water. Albion accepted that the Bulk Supply Price was not part of its complaint, and was not the direct subject-matter of its appeal. However, Albion argued that the Tribunal has recognised 'the validity of the First Access Price, the validity of the Bulk Supply Price have [been] closely intertwined' in these proceedings [… and] The strong 'read across' between the two prices should confer jurisdiction on the Tribunal to remedy the unfair pricing abuse by setting the Bulk Supply Price".

I do not think we need take time with para. 17, although if my friend wants something from that I will read it. But, para. 18, they then record the submissions that I made and Miss Sloane for the Authority made, and if we can pick it up, sort of halfway down:

> "Whilst the Tribunal had made certain observations about the Bulk Supply Price, the Tribunal had recognised that the price was 'not, as such, under challenge in the

current proceedings' … We would be acting outside our jurisdiction if this Tribunal gave Directions in the form of para. 3 of Albion's draft order".

THE CHAIRMAN: Was that, in that paragraph, just recording what submissions —

MR. VAJDA: Yes, just recording my submission. And what I am going to do is, because I think it is helpful to see the submissions of the parties and then one sees what the Tribunal then decided. And then if you like the joint submissions recorded go on as follows:

"Even if there were now reasonable grounds to suspect the Bulk Supply Price of being an abuse, those grounds provided no jurisdiction for the Tribunal to give final Directions".

And we can then go to p.10, because the next part you see, this is now the Tribunal's conclusions. So, having listened patiently to myself and Mr. Thompson, they then reach their Conclusion. And what we need to do is focus on bulk supply and that starts at para. 24:

"After considering all the arguments, the Tribunal finds it does not have jurisdiction to set the level of the Bulk Supply Price in the manner proposed by Albion in its draft order".

I think we can omit para. 25.

"Pursuant to Schedule 8, paragraph 3(2)(d), this Tribunal may determine upon 'directions, or … such other steps, as the [authority] could itself have given or taken'",

so in other words the Tribunal has all the powers that the Regulator has:

"Section 33 permits the Authority to give such Directions as it considers appropriate to bring *the infringement* [of course that is the Tribunal's italics] to an end".

They then go on, at the top of p.11, to say:

"The Order sought by Albion is quoted in paragraph [9] above and required us to consider whether *the infringement* in this case extends to the Bulk Supply Price. The Tribunal has found that Dŵr Cymru infringed Chapter II by offering a First Access Price for (proposed) common carriage which (a) was excessive and unfair in itself, and (b) gave rise to an abusive margin squeeze. At no point did the Tribunal find that the Bulk Supply Price constituted an infringement of the Chapter II prohibition".

And then the Tribunal recalled the points that Mr. Thompson has just made orally this morning, which is that the bulk supply:

"was not the direct subject-matter of its complaint to the Authority or [the] appeal to the Tribunal".

And then, this is, again, very important in relation to the way that the case is pleaded here before this Tribunal. At para. 28:

> "Albion argued, however, that while its complaint concerned the First Access Price, these proceedings clearly show that the lawfulness of the Bulk Supply Price is as questionable as the First Access Price. In those circumstances, it would have been open to the Authority and (thus the Tribunal) to modify not only the First Access Price but also the Bulk Supply Price. The argument is in essence that the tribunal found the Bulk Supply Price was an infringement by necessary implication."

Then it could not be clearer than what the Tribunal say in the next sentence:

> "The Tribunal made no such finding".

The tribunal considered the relationship between the First Access Price and the Bulk Supply Price at various paragraphs of the further judgment.

> "We accept that the Tribunal had regard to the costs underlying the Bulk Supply Price, since the authority relied on the Bulk Supply Price as the basis for the ECPR calculation. In itself, however, this consideration has no bearing on the central issue as to whether the Bulk Supply Price was found to be an abuse of a dominant position.
>
> The parties agreed that, in this case, only two of the four elements constituting the Bulk Supply Price have been considered by the Tribunal."

- and this is what I call the 'common elements point' which was just as much at the forefront of Mr. Thompson's arguments at the remedies hearing as it is in the pleading today and it was rejected by the Tribunal then, and we say because it was rejected it does not form the basis of an action in this court. It may form the basis of an action in the High Court but not here.

So the parties agreed only two of the four elements were, if you like, common – the cost of partial treatment and secondly, the transportation costs of non-potable water through the Ashgrove System.

The third and fourth elements, that is the water resource cost, i.e. the abstraction of the raw water and any necessary pumping from source and the transport of raw water to a treatment works, and certain ancillary costs (such as the cost of back-up supply) have not been considered.

Just pausing there, without wanting to get too much into the detail in relation to supplies to Shotton Paper, which is an industrial unit which needs a continuous supply, one needs to have back up, and that is what this is talking about.

THE CHAIRMAN: The third and fourth elements, are those elements also common both to a common carriage service and a natural supply of potable water?

MR. VAJDA: No, because the third and fourth elements simply do not arise in relation to common carriage. I should say ----

THE CHAIRMAN: They would arise but they would be payable by Albion rather than ----

MR. VAJDA: Yes, because ----

THE CHAIRMAN: So they are not part of the common carriage service.

MR. VAJDA: Yes, because what happens with the common carriage is that Albion would go off and have a negotiation with, I think it is United Utilities, to say: "How much are you willing to sell us this water for?" and make its own arrangements for back up, and in relation to the cost of the water that United Utilities would sell to Albion you would have some of the elements that are here in the bracket, actually abstracting the water, the pumping and the transport of the raw water, because by the time it comes into the Ashgrove System it has already been treated to some extent.

The Tribunal may have picked up that in fact the question as to whether or not the price of the bulk supply agreement is too high or too low is something that is currently being determined by, I was going to say OFWAT, they are now the Water Services Regulatory Authority, and I understand they are going to produce a determination shortly in the New Year.

Moving back to the text, as the Tribunal noted in paras. 104 to 105 of its judgment refusing Dŵr Cymru permission to appeal against the main further judgments, and it is really that the second of those two paragraphs: "However, that does not imply …" and this is the Tribunal effectively analysing:

> "… that the Tribunal has taken any position, in its judgments or otherwise, in relation to what the level of any contemporaneous or future Bulk Supply Price should be."

Obviously, I will have to satisfy you, madam, on the pleading, because this is a pleading point – I make no bones about taking that point – because this Tribunal has a limited statutory jurisdiction. If my analysis of the pleading is right we say that is absolutely fatal to the way that the claim for the overcharging of the bulk supply is pleaded; that is our case.

Moving on, we can see what they say at paras. 31 and 32 – perhaps I could just ask the Tribunal to read those two paragraphs to themselves.

Paragraph 34, having acknowledged Mr. Thompson's ability as an advocate, they nonetheless reject his argument that final relief can be dealt with on what they call a 'sweeping basis', and they make the point which obviously is of critical importance in a 47A case:

> "Our conclusion can only relate to the infringements found by the Tribunal, and the statutory limits on the Tribunal's jurisdiction to give Directions. If the Bulk Supply Price cannot be agreed, it will have to be referred to …"

That is what I was referring to a moment ago, it has in fact been referred to the Authority. The other, if you like, contentious issue at this hearing – relatively contentious issue – was what I call the 'temporal aspect' of the finding, and that is dealt with at p.15. First of all, just to remind ourselves we are looking still here at the excessive price abuse. We can pick it up at para. 40, and the second issue is the wording of the declaratory relief, so this is not forward looking, this is actually what they found.

> "Albion originally sought an order that: "In March 2001" – again it is the Tribunal's italics "*and thereafter*, Dŵr Cymru Cyfyngedig abused its dominant position …" We have italicised the contentious words."

They then set out the rival submissions of the parties, Albion and Dŵr Cymru, and we perhaps I could ask the Tribunal to read paras. 41 and 42 to themselves. (After a pause) You will see that the Tribunal decide to remove the reference to "*and thereafter*" from its order. You can see the basis for that because the whole thrust of the case is what the position is at the particular moment in time, when you are looking at the margin squeeze you have to compare the FAP with the then retail price.

Then the same issue arose in relation to margin squeeze, that is to say the temporal aspect, and if we look at para. 45 at the bottom of p.15 you will see Albion invited the Tribunal to make a Declaration, again it is in similar form "In March 2001 and thereafter", although the "and thereafter" has not been italicised by the Tribunal, "(2) imposed a margin squeeze". There was a lot of other argument about margin squeeze that we do not need to trouble ourselves with, but if we go to para. 57 on p.19, I think we can look straight to the last sentence of para. 57:

> "In the event, the Tribunal's Declaration in relation to margin squeeze abuse omits any temporal aspect for the same reason as for the unfair pricing abuse."

Then we can go to the declaration that was made, and we see that at p.21, and this is the finding of infringement that is obviously critical in a 47A case.

> "Dŵr Cymru abused its dominant position in the market for the partial treatment and transportation, via the Ashgrove system, of non-potable water abstracted from the Heronbridge abstraction point for supply to Shotton Paper …"

- I will come on to that clause, that is relevant, we say, to the Corus claim –

"… within the meaning of section 18 by proposing …" and we see the words then:

> "… (in March 2001) to charge a price for the provision of such partial treatment and transportation which:
>
> (1) was both excessive and unfair in itself; and
>
> (2) imposed a margin squeeze."

So we say this is an absolutely key document and my friend, in his skeleton has sought, if I can put it like this, to play down the significance of the remedies judgment by saying that it is forward looking. Perhaps it would be just of assistance if we look very briefly at the relevant passage in his skeleton on that, which should be in tab 2.

THE CHAIRMAN: In which bundle?

MR. VAJDA: I think the skeletons arrived later, but there is a space, tab 1 should be our skeleton and tab 2 should be Albion – it may be that the Tribunal have it loose.

THE CHAIRMAN: Yes.

MR. VAJDA: Page 12, does the Tribunal have that?

THE CHAIRMAN: Yes.

MR. VAJDA: More than a side swipe is taken towards us where it is said at para. 36:

> "DC's reliance on the Remedies Judgment of the Tribunal is equally misguided. The Tribunal in that judgment was concerned with the appropriate forward looking remedy for the abuse as found in the earlier judgments."

That is plainly not right because I have shown the Tribunal the declaration and that is the finding of an infringement.

THE CHAIRMAN: Yes, the finding of infringement which founds our jurisdiction under s.47A is in those earlier judgments, it cannot be circumscribed by the remedies judgment – would you accept that. So what the Tribunal in the remedies judgment thought was the proper interpretation of the main judgment and the unfair pricing judgment, are we bound by that or do we need to look at the judgments ourselves?

MR. VAJDA: My submission is that you are bound by them, and that would be my first point in the Court of Appeal. If this Tribunal were to say: "we can forget about the remedies

judgment, we just need to look at the original judgments" because the problem was, and that is why we had the remedies hearing, was that there was a dispute as to precisely the scope of the infringement and that is why there was argument – I have shown the Tribunal there were different rival orders in relation to the declaration and in my submission it would be wholly unwarranted for this Tribunal now to say "We are going to ignore the remedies judgment, and we are simply going, in a sense, to start *de novo* going back to the original judgments because that would be completely, in my submission, unwarranted to effectively ignore a careful judgment which itself – the remedies judgment was not something that could be said to be on the hoof, not that any judgment of this Tribunal could be said to be on the hoof. There were detailed written submissions and I have only shown the Tribunal a fraction of the material before the Tribunal because not only were there skeleton arguments, as one might expect, and there was an oral hearing, but there were also further submissions made to the Tribunal after the hearing which I will take the Tribunal to in due course in relation to another point. There can be no suggestion that what the Tribunal did here was *per incuriam*, and indeed if either party had been ----

THE CHAIRMAN: No, I am not saying it is *per incuriam*, I am just saying that the declaration that the Tribunal makes, the remedy that is ordered, when deciding – we can decide, no, we are not going to order any remedy, but that does not mean you found there was no infringement. I think that was what I was saying.

MR. VAJDA: I fully accept that the remedies hearing had two aspects. It did have a forward looking aspect and there was the question as to whether in fact there should be a price fixed for the difference between the retail and the wholesale price, whether, in fact, bulk supply should be price fixed forward. I fully accept that that was an element of it, but what I do not accept, and what I submit is clearly wrong, is to dismiss the Remedies Judgment on the basis that it was simply looking at the matter formally.

THE CHAIRMAN: I understand that.

MR. VAJDA: It made declarations, and we had in a sense similar arguments to what we are having today – I hope today will be somewhat shorter – but effectively going through what, in fact, the Tribunal had decided previously. One can quite understand – and this is why I mentioned that passage in *EWS*, because when you then are faced with a follow-on action and we have effectively three judgments, we have the main judgment, we then have the Dominance and the Margin Squeeze Judgment, you then have the Unfair Pricing Judgment. Collectively they probably run to about 1,000 pages. It may be difficult to find out what

was the infringement that was actually found. Luckily in this case we have got the Remedies Judgment which sorts that out for us.

MR. MATHER: Just to clarify a little further the import of the remedies judgment, looking at the end of para. 57 on p.19, that final sentence, it says:

> "In the event, the Tribunal's Declaration in relation to the margin squeeze abuse omits any temporal aspect for the same reason as for the unfair price abuse (paragraph [43] above)."

Then if we go back to para. 43 above it says:

> "Following the oral hearing, in an attempt to agree the form of the final order, Albion removed the reference to "and thereafter". We have decided that our Declaration will omit any temporal aspect."

Can you interpret this a little further for us. Is that simply for convenience to avoid disputes about the form of the order? What is the import of that, in your opinion?

MR. VAJDA: The first point I would make is that there was, as I indicated a moment to Madam Chairman, subsequent correspondence with the Tribunal in relation to that. In that correspondence Albion said that they would remove the reference to "and thereafter". As I read the first sentence of para. 43, it is simply recording effectively an aspect of that correspondence. Then the last sentence is stating the conclusion of the Tribunal, which is that they have decided that the declaration will omit any temporal aspect. That was the order that they made. In my submission, it would be completely wrong if that were the suggestion, that somehow this Tribunal, the Tribunal constituted in relation to the s.47A case, could go somehow go behind that order to say that, actually, possibly it may have been simply as a result of a concession made by Albion, because you have to go on what the order was. It is not even clear, in my submission, that you could draw that conclusion. As I say, the first sentence simply records what Albion did. I would not accept that that was the reason why the Tribunal omitted any temporal aspect. It does not matter, because they did omit the temporal aspect and that is what we say this Tribunal is bound by. If this matter went higher, I cannot imagine that a higher court is going to say, "You can effectively revisit that", because what one is looking for in court decisions is what is the order that is made.

MR. MATHER: My second question was really right at the end. This may be difficult to answer, but I notice on p.21, the declaration, para. 1, "by proposing (in March 2001) to charge a price", the words "in March 2001" are in brackets. Is that significant in any way, do you think?

MR. VAJDA: What is significant is that the words are in the declaration. That was when the proposal was made, and indeed given that there was a dispute as to whether or not it should be temporal or not, the Tribunal made it clear by inserting the words "in March 2001" that they were focusing that the finding related to a proposal made in 2001.

MR. MATHER: If it was not in brackets would that make a difference?

MR. VAJDA: You mean, if it was "in March 2001" without being in brackets?

MR. MATHER: Yes. What is the point of the brackets?

MR. VAJDA: I would not accept that, but Mr. Pickford has sent me a very helpful note that if we actually go back to the Unfair Pricing Judgment itself, para. 275, we see that the finding is that Albion established that in March 2001, and there it is without a bracket. My submission is that you cannot draw anything from the fact that it is in a bracket in the declaration. The issue was, was there a continuing infringement or not, and what the Tribunal declared and found was that there was an infringement at a particular moment in time. Again, one has to bear in mind here that this is, if you like, an unusual case because the conduct that was found to be unlawful did not, in fact, give rise to any course of dealing. The course of dealing that went on, and this is obviously what a large part of the 47A claim was concerned about, was not the common carriage, because there was no common carriage, it was the bulk supply.

We say that it is very clear that the Remedies Judgment makes a finding of an infringement in relation to a price that was quoted in March 2001, and that alone.

THE CHAIRMAN: To make it a continuing infringement then, would the position have been different if every day from the day in March when – I do not know what day in March it was actually proposed. Is there an actual day on which it was proposed? 2nd March?

MR. VAJDA: Yes.

THE CHAIRMAN: If every day Albion had emailed Dŵr Cymru and said, "Have you changed your mind about the first access price that you are offering?" and Dŵr Cymru had said, "No, that is the price at which we are offering common carriage". How could the offer of an abusive price become a continuing abuse?

MR. VAJDA: There are two issues that your question has raised, to my mind. The first, which is not an answer to your question, but is a point that I make, is that the question of a continuing abuse was discussed and rejected. That is the first point. The second point ----

MR. THOMPSON: I am sorry, it is just not right. That is not the case. There was a concession and the word "omits" cannot be read to "include". It is just not right what is being said

here. I am sorry, but Mr. Vajda needs to deal with it at some point and he might as well deal with it now.

MR. VAJDA: I will continue. Mr. Thompson of course will be able to make his submissions. My submission is, on the basis that I have shown the Tribunal this morning, that it is quite clear that the declaration made by the Tribunal following argument as to whether it would be a continuing abuse, or what I would call a "one-off" abuse, was that it was a one-off abuse in March 2001. Therefore, it is not open to the Tribunal today on a 47A case to say that, actually, there was a finding of abuse which went beyond March 2001.

The second point which arises out of your question, Madam Chairman, is effectively what actually happened as a matter of fact, or what might have happened. Could I just invite you to take up the notice of appeal. This is the claimant's supplementary bundle. These are documents not put in by us, but put in by my friend, and if we look at tab 1 we have Albion's own notice of appeal to the Tribunal. Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR. VAJDA: If you go to what looks like 7055 you should get to a page which begins with para. 55 – do you have that?

THE CHAIRMAN: Yes.

MR. VAJDA: Could I just invite the Tribunal's attention to para. 57, and, as I say, this is Albion's notice of appeal:

> "On 16th January [2004], Dŵr Cymru provided Ofwat with an indicative 2003-04 access price for the treatment and transportation of non-potable water to Albion Water of 17.71 p/m^3, a 23.5% reduction compared to the March 2001 price."

We do not need to get into that because the Tribunal did not make a finding of a continuing infringement. That just emphasises the difficulty, and was something that the Tribunal would have had in mind last time, that you simply cannot assume that the state of affairs in March 2001 would have continued thereafter. So on Albion's own case there was a very significant reduction in the indicative access price between 2001/02 and 2003/04.

MR. THOMPSON: Can you read 58 as well?

MR. VAJDA: Yes:

> "Philip Fletcher's response to Dr. Bryan on 20 January made no mention of the new Dŵr Cymru access price but put back the date of the 'revised draft' decision to March 2004 and gave no target for a 'final' decision."

THE CHAIRMAN: Who is Philip Fletcher?

MR. VAJDA: He was at Ofwat.

I am not asking you whether or not the 17.74 figure cured the abuse or did not cure the abuse. We are within the confines of what the Tribunal declared by way of remedy. What they declared that there was an abuse as of March 2001. The Tribunal cannot proceed on the basis that there was a finding of an infringement which carried on beyond March 2001. I do not know whether, for instance, the 17.74p would or would not be abusive. It might have been, but that is certainly nothing that the Tribunal ever looked at, and it is certainly something that falls plainly outside 47A.

We do say that the Remedies Judgment is the key. It unlocks the door that Lord Justice Patten found so difficult in the *EWS* case. It has to be the starting point of the consideration of this Tribunal, whether it has jurisdiction or not.

With that, I would now like to come to the pleadings. I make no bones about it. What we are saying is that the case, as pleaded, does not fall within 47A. The pleadings are to be found in flag 3 of bundle 1, the claim form. I am going to go through this. There are probably less than ten passages that I want to go to. I shall make some comments and round up my submissions when we have been through them. Can we just begin on p.4, para. 4, which sets the scene:

> "The claim arises as a result of the findings made by the Competition Appeal Tribunal ('the Tribunal') … in relation to the provision of non-potable water supplies to the Claimant."

That is what is being said, and it is clear that there are no findings of infringement that have been made in relation to that.

Can we go to p.36. This is in the legal section of the claim. It is important because this is how the claim was formulated, and the Tribunal will recall that there is a restitution claim that is made as well, and what is said is that this restitution claim is not an accounts of profits claim, which was effectively dismissed by the Court of Appeal in *Devenish*. It is said that it is simply really more comparable to a conventional damages claim. That point is made at para. 94:

> "However, the ruling in *Devenish* was not concerned with claims in restitution in general. The Claimant submits that, in addition or in parallel to any claim for compensatory damages, it is entitled to recover the excessive payments that it has made to the Defendant from March 2001 to April 2009."

Just pausing there, on what basis are those payments said to be excessive? The only basis – we see this time and again – on which they are said to be excessive is by reason of the so-called "read across" from the First Access Price.

Then Mr. Thompson goes on at the bottom of that page to say:

> "In such a case, the claim in restitution is no greater than the loss suffered by the claimant as a result of the defendant's wrongdoing …"

Then para. 97:

> "The Claimant will therefore claim recovery of the amount of overcharge paid by it as a consequence of the Defendant's excessive pricing …"

It is excessive pricing in relation to the Second Bulk Supply Price, because that is the only price that the defendant actually charged the claimant for. That was under the bulk supply. Again, why is it excessive? The only basis on which it is said to be excessive is because of the read-across of the 8.8p.

Can we go to the next section which is "Causation and quantum of loss", para. 99:

> "The Claimant relies on those findings …"

that is to say the findings the Tribunal made –

> "… in relation to the period of the complaint and the appeal proceedings from 2 March 2001 to 9 April 2009 …"

So that is a period of nearly eight years, and that obviously brings me back to the temporal point.

We then go to para. 100 over the page, and para. 100 is important:

> "In the light of the excessive pricing judgment and the remedy judgment, the Claimant submits that the Defendant has caused the Claimant loss that is recoverable either as a matter of compensatory damages or in restitution, on the following basis and subject to indexation:
>
> (1) from 2 March 2001 to 1 July 2004 at a rate of 8.8 p/m^3, being the average of the overcharge as found by the Tribunal at paragraph 197 of the unfair pricing judgment …"

That, Madam Chairman, was the paragraph we looked at where you identified the error in the title of the first column. What they are saying is, "There was an 8.8p overcharge found in relation to the FAP, and we are relying on that". That is the unlawful overcharge for the bulk supply, that is the read-across. What they then do at paras.(2) and (3) is they give credit for the fact that there were interim measures ordered by the Tribunal which effectively reduced the amount they had to pay under the bulk supply arrangement, and we do not need to worry about those.

THE CHAIRMAN: Where does it say that the reason why they quantify their damages as being 8.8 p/m^3 is because of the read-across from the FAP into the bulk supply price, or do you say that because of those earlier references to the fact that there is an overcharge paid by it?

MR. VAJDA: They do. Even if the pleadings stopped at para. 100, I would still make my point. We will look at the table in a moment, but the only place that the 8.8p comes from, and indeed they say so, is para. 197 of the Unfair Pricing Judgment, which did not relate to bulk supply, it related to the First Access Price. In fact, as we go through this pleading, I will show you passages which effectively seek to justify how they can proceed on this road. Indeed, one will see, and I will go to one or two passages in my friend's skeleton which make the same point.

Can we then go to the table which is set out in Annex 1 to this claim form. Annex 1 is to be found at p.49. There you see calculation of compensatory damages. This is all in relation to bulk supply. So you, first of all, have the period. You will see it is an eight year period. Then volume supplied, so this is water that actually was supplied, it is nothing to do with common carriage. You then have the excess figure. The 8.8 by my calculation is the difference between the FAP of 23.2 and the 14.4, which leaves you with 8.8. The overcharge is, "We have this amount of water supplied, this was the overcharge, this is what we are entitled to have".

THE CHAIRMAN: Is the volume of water supplied under the bulk supply agreement by Dŵr Cymru to Albion exactly the same as the volume of water supplied by Albion to Shotton Paper?

MR. VAJDA: Yes, it is. It is easiest to focus on the first period because you can see the figure. What then happens thereafter is that there is an index. They say, "8.8 was the overcharge found in 2001, we are then going to index it". Indeed, there was argument in front of the Tribunal in the remedies hearing whether we get into that. It was probably one of the reasons the Tribunal did not want to go there. It is then indexed. Just so the Tribunal ----

THE CHAIRMAN: It is indexed, and that is why it goes up, and then it goes down because of the interim relief.

MR. VAJDA: Precisely. Perhaps you can keep a hand in the annex. Do you have the skeletons loose or in the bundle?

THE CHAIRMAN: I have got it loose.

MR. VAJDA: Could you go to our skeleton at para. 16, that effectively records what I have just said orally to the Tribunal. That is, if you like, what annex 1 is doing. What we have done

to assist the Tribunal – I hope it assists the Tribunal – is set out para. 197 of the unfair pricing judgment just above.

Can we then go back into the body of the pleading, p.41. We now have a section headed "Excessive pricing", and they set out what I took the Tribunal to earlier this morning. This is para. 8 of the Excessive Pricing Judgment.

Then if we go to para. 115, and this, I hope, answers Madam Chairman's question, this is what I call the "Elements argument":

> "Further, while the excessive pricing judgment related to the costs underlying the First Access Price rather than the Second Bulk Supply Price …"

Just as regards terminology, the bulk supply agreement between my clients and Albion is called the Second Bulk Supply Agreement, hence the Second Bulk Supply Price –

> "… on the basis of which the Claimant has been charged since March 2001, the two elements in respect of which the Tribunal made detailed findings of fact were common to the First Access Price and the Second Bulk Supply Price, the calculation of the former by the Defendant having been made simply by deducting the resource costs …"

that is the water –

> "… paid by the Defendant to United Utilities from the latter.
>
> As such, the Claimant relies on the findings of the Tribunal at paragraph [197] of the excessive pricing judgment in respect of the charges that it paid for partial treatment and transportation of water through the Ashgrove system from 1 March 2001 to 9 April 2009, subject to indexation and the interim orders of the Tribunal."

That illustrates very clearly what we say is the fatal flaw in this case as pleaded. The commonality argument was exactly the same argument that was run at the remedies hearing. You will recall that the Tribunal did not accept that as a reason why they had jurisdiction to make any declarations in relation to bulk supply. Bulk supply, *inter alia*, required water, and what is not mentioned here at 115 is a back up. It is not just a question of a water resource, it is also a back up. And when you look at para. 116, it is simply wrong. Albion have not paid Dŵr Cymru anything for partial treatment and transportation. What they paid for is a bulk water supply. They did not operate a common carriage system and the bulk water supply, as I said, comprised a whole lot of things apart from transportation and partial treatment. There has been no finding at all that the bulk supply price was excessive, and therefore you simply cannot say, "Well, there is a finding that two elements of the part supply were excessive, namely the carriage and transportation at 8·8p, so we can then knock

8·8p off the bulk supply". And the point here is, we are not saying you cannot bring a follow on claim in the Tribunal. Of course you can. The question is whether this claim as pleaded, which is a claim for the over-charge for bulk supply on the back of the FAP is a permissible one under 47A, and we say "No, it is not. The High Court is the place".

THE CHAIRMAN: And you say that because of the way they have in this pleading, calculated their loss.

MR. VAJDA: Absolutely.

THE CHAIRMAN: Now, if the had calculated their loss as one might have expected to see it, as how it was done in *Genzyme*, for example, where they might say, "Well, look at the margin that we in fact earned, by comparing the price we charge to Shotton Paper with the bulk supply price plus any overheads", and come to the margin that they were in fact earning on the supply over the period and compared that with them saying, "Well, if we had been able to enter into this common carriage arrangement in 2001, we would have been paying the reasonable common carriage price", let us say that is 14·4p/m³, "we would have incurred some overheads, maybe would have had to pay United Utilities for the water, but we would have sold the water at the same price to Shotton Paper and therefore our margin would have been different. Bigger".

MR. VAJDA: Exactly.

THE CHAIRMAN: And the — subject to your temporal point, the loss would then be the difference in the margin in fact earned over the period and the difference in the margin they would have earned had they been able to enter into a common carriage arrangement and buy water from United Utilities.

MR. VAJDA: Precisely. It would be —

THE CHAIRMAN: A straightforward comparison of cost.

MR. VAJDA: – saying, "As a result of your abusive conduct we were not able to carry on with our Plan A which was going to be very profitable. We had to have Plan B, which was bulk supply. We did not want bulk supply, we actually wanted Plan A because that was where the bucks were, so what we want is the difference between the bucks that we would have earned on Plan A, with what we got under Plan B" because obviously they got something under Plan B because of the interim measures they —

THE CHAIRMAN: Yes.

MR. VAJDA: And if a claim, and indeed this is the point. I mean, if one —

THE CHAIRMAN: That is sort of what they do in relation to the Corus..

MR. VAJDA: Yes, I will come to that. But that is, at first blush the Corus —

THE CHAIRMAN: Some kind of margin.

MR. VAJDA: Yes, I will come to — but on the point of principle, madam Chairman, you are entirely right and if we, with respect, as it were, this is the point that we actually make at para. 28 of our skeleton on p.9.

THE CHAIRMAN: And the reason you say that they are not pursuing that rather more straightforward course, but are pursuing this claim based on the differential between the —

MR. VAJDA: What they are —

THE CHAIRMAN: – fact and a reasonable common carriage price, the justification for that, you say, that they make in their pleading is because that element is incorporated in the bulk supply price which is in fact the price they did pay over the period.

MR. VAJDA: Yes, I mean, their claim in one sense is very simple. It says, it is an overcharge claim in relation to the bulk supply. They say "We do not need to bother about counter factuals or anything like that. We just paid too much. How much was too much? It was 8·8p, why was 8·8p too much? Well, it was too much because the Tribunal found in 2007 that 8·8p was too much for partial treatment and common carriage". And, as pleaded, that is, sadly, outside 47A. Sadly, we say, for the claimant.

So, if we go back to, and I am coming to the end of this part of the case, I think I have shown the Tribunal 115 and 116 on p.42, and I think we can then move on to p.44, quantum. So far as the quantum of any award is concerned, the claimant relies on this famous para. 197, and the order of the Tribunal to claim the sum of 8·8p on all supplies of non-potable water from the defendants for the claimant for that period subject to indexation and the interim reductions made by order of the Tribunal. And then we see, again, para. 126, reference is made to the table we have seen at Annex 1. And then I think all I need show the Tribunal is if, we go to the relief section on p.46, just focusing at the moment on compensation. You see there is a sum there, and there is in a bracket, £4,328,696, and that, if the Tribunal want to write in that is Shotton, and the other figure is Corus.

THE CHAIRMAN: Shotton Paper.

MR. VAJDA: Sorry, yes, Shotton Paper. And, not surprisingly, the figure there in the bracket, the first figure, is identical to the overcharge figure that we see at p.49 in Annex 1. So, those are the relevant passages in the pleading, and what we say is that this is impermissible in the context of 47A, and I think that the Tribunal has my point on that and, subject to the Tribunal, I am now going to move on to the Corus point. Obviously I can come back in reply to see what Mr. Thompson has to say about that.

In relation to Corus, yet again, the starting point is obviously the pleading. And there is much less to look at in relation to Corus, and the first paragraph is on p.40, at 109. Perhaps I could just invite the Tribunal to read 109 to itself. (After a pause) So, one can see there that it is pleaded in a different way from the Shotton Paper claim. What is really said is, "Well, there is a loss of opportunity", that is the issue there.

Now, what we say is that you cannot assume that what you will be doing, that there was any infringement committed by Dŵr Cymru in relation to a potential supply to Corus from 1st April 2004. And if there is no such infringement, we say that there can be no 47A claim in relation to loss caused by such conduct.

There are really two points that arise here — first of all, there is the temporal point that I have mentioned; and the temporal point is important because in relation to Corus it is accepted that any claim would arise in relation to loss that occurred on 1st April 2004, because although Corus on the pleading indicate they are unhappy with the supply with my client, they had a contract until the end of March 2004. The other point is that there is no finding of infringement in relation to Corus. These are important points, and they did not escape the attention of Mr. Thompson, who sought to get a reference to Corus Shotton into the order, the remedies order. And to show you that, we need to take up bundle 2.

This was the correspondence I was threatening to take the Tribunal to. This is now — the intensity of debate was such that there were even submissions made to the Tribunal after the hearing, and Dr. Bryan sent a letter to Mr. Bailey, who was then Legal Secretary here, on 18th February 2009.

THE CHAIRMAN: Which tab are we in?

MR. VAJDA: Sorry, we are in tab.19. And he enclosed in that a draft order and that is five pages in. It is the fax header 18th February 2009, and you see there, it is **"Draft Order pursuant to the Court of Appeal judgment … and the Tribunal's judgment"**, and then, if one looks at the declaration: you will see in (1):

"… has abused its dominant position on the market … for supply to Shotton and Corus", do you see the word "Corus"? Do the Tribunal see that? Now, perhaps not surprisingly, those who instructed me were not very happy with this proposal, and they wrote a letter to Mr. Thompson, as it happened, yes, they wrote a letter. That letter is to be found six pages further on. A lot was happening on 18th February. This letter is written at, or it is faxed at 17.44, it is on Wilmer Hale paper and it is addressed to Rhodri Thompson QC, Matrix Chambers.

THE CHAIRMAN: What page?

MR. VAJDA: It is the second page of that letter. The fax, in terms of the fax, it is p.20 of 24. That is the best way of finding it, it is all one continuous fax. What happened was that Dr. Bryan then faxed – all this loose material that I am showing you went to the Tribunal under cover of the fax and if we then look p.20 of 24, does the Tribunal have that now?

THE CHAIRMAN: Yes.

MR. VAJDA: Paragraph 1 says

> "The New Order impermissibly seeks to widen the scope of the declaration, and goes beyond the Tribunal's infringement findings. Albion is entitled to a declaration in the terms set out in Dŵr Cymru's draft orders … i.e. a declaration that relates to the indicative access price quotes for common carriage services in 2001 in respect of the Shotton Paper site in accordance with the Tribunal's infringement findings. Furthermore, the New Order implies that Dŵr Cymru has committed abuse in relation to the supply of service in respect of *Corus*, which has not been found by the Tribunal. Indeed, Albion never asked for an access price in respect of Corus."

We do not need to concentrate on the last sentence, but what is important is that that was not part of the infringement, and as we have seen the Tribunal omitted any reference to Corus in its order. The consequence of that, we spell out – I can probably do no better and it may be quicker if we just look at our skeleton on this, at para. 35, p.11. We draw the conclusion that I have already made orally in relation to that letter and the order, that the finding of abuse relates only to a proposal made in March 2001, to offer a price for the partial treatment and transportation in relation to Shotton.

Then I have taken the Tribunal to the footnote 13, we have just looked at the documents there.

THE CHAIRMAN: If the declaration that was made at the end of the remedies judgment had simply said "Partial treatment and transportation via the Ashgrove System of non-potable water extracted from the Heronbridge abstraction point within the meaning of s.18" and had omitted the words "for supply to Shotton Paper", would that then in effect have covered Corus?

MR. VAJDA: I accept it might have covered Corus, I would not want to concede that it would have covered Corus because obviously one would have to analyse the ----

THE CHAIRMAN: Pipes.

MR. VAJDA: Certainly that is not the position that we are in today because of course there was a live issue: should it or should it not cover Corus? The answer the Tribunal reached was that

it should not. So again, we say that is *res judicata* and so one cannot speculate as to whether or not this would be within 47A had the declaration been in different terms. The point we then make, and although I accept that the Corus Shotton pleading looks, perhaps, on its face more like causation than the Shotton Paper one, that is not in fact the case and we explain that at paras. 36 onwards. We say to frame it as a matter of causation is unsustainable. It is implicit in Albion's case that, had it approached Dŵr Cymru in 2003/4 and requested the price for common carriage in relation to proposed supply to Corus the price then offered, (which of course would not have been the FAP) would also necessarily have constituted an abusive margin squeeze.

It is in exactly the same way that the case in relation to Shotton Paper proceeds on the basis that we can have the excess because that is made by the Tribunal, but in relation to different conduct.

In relation to margin squeeze, the point we make in relation to that is that you need to investigate effectively two lots of prices, because obviously we have to look at wholesale and retail, and there was never an investigation in relation to ----

THE CHAIRMAN: So are you saying that we do not know what price Dŵr Cymru was supplying Corus Shotton?

MR. VAJDA: There is evidence as to what price. My submission is not that there was no abuse in relation to Corus. My submission is that there was no finding of abuse. We then get into this impermissible *EWS* territory.

That is the point we make then at para. 38. Then we make the point at para. 39 that the claimant depends upon a finding of a new infringement which the Tribunal never made.

We say that this comes out very clearly in terms of the correspondence we had because in relation to the Corus matter what we said is we do not fully understand your pleading, could we be given some time before deciding whether or not to go for Rule 40. We then had a letter from Shepherd and Wedderburn which, in a sense, reveals what the claim is all about and we set that out at para. 40. I do not think we need to pick it up actually in the original.

> "Our clients' application could not proceed further while common carriage terms remained abusive."

That is para. 40 of our skeleton. That, of course, runs into the FAP point, when I showed you, simply by way of interest, the fact that even in relation to the point of fact you cannot assume that it was the same, because we see Albion said it was 17p in 2003/4 but whether that is right or wrong, whether that was abusive or not in a sense does not matter, the point is that no findings were made other than in March 2001.

That is why we say the Corus claim fails. I will just then by way of wrap up deal with two small points – I say "small points", Mr. Thompson may regard them as big points – two points made by Mr. Thompson in his skeleton, and I say again on this I have the right of reply.

First, he says that the service that would be supplied to Corus would be the same as to Shotton, but there is no finding to that effect, and that is the problem. That may be right, it may not be right, but there was no finding.

Secondly, there is a lot of what we would call extraneous material in bundle 3 – the Tribunal may or may not be taken to a lot of material as to negotiations and so on, in my submission that is completely irrelevant because what one is looking at is what is the finding? And then: is there a claim within that finding?

With that I then propose to move to the last head, which is exemplary damages. There are two submissions we make on this. The first submission is that no court, and that would include not just this Tribunal but also the High Court, has power to award exemplary damages in a follow-on case. The reason that we say that is because you have this speciality in competition law which you do not have in most other areas of the law, where you have public and private enforcement, side by side. Of course, as we know in competition law, where you have a public enforcer, the public enforcer will take an infringement decision and in taking that decision the enforcer will either decide to impose a fine, or decide not to impose a fine.

It is accepted by Mr. Thompson in the light of the *Devenish* case that where the public enforcer imposes a fine there is no jurisdiction or power for a court to award exemplary damages because the principle of *non bis in idem* but Mr. Thompson says we do not need to worry about that here because ----

THE CHAIRMAN: Wait a minute, do you accept that in relation to both a fine imposed by the European Commission and by the OFT, Mr. Thompson?

MR. THOMPSON: Yes, I think I accept that in principle once a regulator has exercised its discretion in terms of imposing a fine or commuting for leniency, I think those are the two examples considered by Mr. Justice Lewison, that at least the authority of *Devenish* which was not appealed, I think by Mr. Vajda, to the Court of Appeal would suggest that there can be no exemplary damages because effectively the deterrence and punitive issue has already been decided by the competent authority, whether it be the UK competent authority or the EC competent authority. Obviously, there are differences here.

MR. VAJDA: Yes, I had not understood Mr. Thompson to be saying there is some difference between domestic and EU law, *Devenish* was an EU case, as I read the case it applies across the board and Mr. Thompson has confirmed that. The area of dispute between us is that Mr. Thompson says that we can put *Devenish* to one side, because in this case there was no fine imposed and therefore the Tribunal or, indeed, the High Court in a follow on is at liberty to impose exemplary damages. Our short answer to that is "no" that is wrong as a matter of principle, because where the public enforcer has decided that there should be no punishment, no fine, it would be wrong in principle for the court in a private action to undermine that and reach a decision which ran counter to that by awarding exemplary damages, and I think again it is common ground that exemplary damages are punitive in nature – they are different from restitutionary damages.

In relation to that I would like to take the Tribunal to the judgment of Mr. Justice Lewison in *Devenish* which is in bundle 2 at tab 20. I was not in fact involved in the hearing in front of Mr. Justice Lewison, but Mr. Thompson is entirely right that there was no appeal from his decision on exemplary damages to the Court of Appeal so his words are, as it were, the last word on the subject.

If we can pick it up at p. 410 of the report. The Tribunal will know that we have two submissions on exemplary damages, so I am just going to direct the Tribunal's attention to the bits of this judgment which are relevant to the second point that I will be making shortly. This is a section headed "Community rules *Non bis in idem*" He sets out what that principle is. Then what I would like to do just for present purposes is to direct the Tribunal's attention to paras.42 and 43, because that is going to be relevant to my second submission on exemplary damages, that Mr. Layton who was then acting for Devenish said that:

> "There are additional facts that [need to] be proved in order to found liability [and the important word there is 'liability'] for exemplary damages",

and he then sets out what Mr. Layton pleaded, and the learned judge then said, at para. 43:

> "It is common ground that those pleaded facts bring the case within the second category identified in *Rookes v Barnard*".

I mean, basically, the second category is that you act in disregard of the claimant's right because you think, "I'm going to make more profit than the claimant is going to suffer loss". So, it is really a profits-based claim and that brings you within the second limb of *Rookes v Barnard*".

The *non bis in idem* point not being in dispute, we can go straight to the bottom of p.411, and just so the Tribunal has it recorded, there is conclusion at para. 48. For present purposes we need to focus on para. 51, because, what happened in this case which was one of the vitamins follow-on cases, and all the vitamins companies apart from Aventis got quite large fines; and Aventis as a leniency applicant, got zero. And the argument was, "Well, because there is no fine there, there is room for exemplary damages". That was rejected:

> "Mr. Layton also argued in the case of the Aventis companies the fine had been commuted to zero [with regard to] the application of leniency. Thus he said that these companies, at least, had not been sanctioned for the unlawful conduct at all. I do not accept this submission. The Commission decided in principle that fines should be imposed on the Aventis companies. It is true that by the application of the leniency notice, those fines were commuted to zero as a result of Aventis's conduct as whistleblower; but the starting point for the application of the leniency notice was the finding of unlawful conduct coupled with the imposition, in principle, of a fine. The application of the leniency notice serves the important policy aim that it is of even more importance to encourage whistleblowers than to punish participants in a cartel. In my judgment the national court should not undermine that policy by an award of exemplary damages against a person who has had his fine commuted as a result of the application of the leniency notice".

And then this is the important passage for present purposes:

> "If Mr. Layton's submission were correct, then a more guilty wrongdoer would escape liability for exemplary damages, while a less guilty wrongdoer, whose [fine has] been commuted would not. [That] seems to me to be wrong in principle".

Now, what Mr. Thompson said — and this is the area of dispute, he says, ["]? Well, that is all well and good if you are a leniency applicant, and my client never made an application for leniency, so it is hard luck on them we do not fall within this provision. But, with the greatest respect, that totally ignores the principled approach of the judge. What the judge is saying is that it is wrong for a less guilty wrongdoer to have exemplary damages than a more guilty wrongdoer. Now, he was simply looking at that by reference to a specific circumstance which was the one in front of him, which was leniency. But, let us just test the argument. Supposing there is a case where there is no leniency application, and we know there have been cases like this and there have been cases like this in the field, for instance of abuse of a dominant position. But, as you know, the infringement needs to be

committed negligently or intentionally for a fine. The Commission, or the OFT for that matter, take the view, "We are not going to impose a fine". Is such a person more or less guilty than somebody who has participated in a 20-year secret cartel, who then whistle blows to the Commission? In my submission, looking at this in terms of competition, he is less guilty and if this argument were taking place in front of Mr. Justice Lewison I think he would be astonished, and one can see that, in a sense, with his last sentence, to suggest that such a person should then face the possibility of exemplary damages. And that is really what lies at the heart of our submission, which is that where no fine is imposed by the public enforcement, I will come on in a moment to the question as to what the — how the Tribunal approach the issue of fines and so on, but I am just looking at the moment at the matter of principle, that where a public enforcer decides not to impose a fine, it follows from the logic and the principle of Mr. Justice Lewison says at the last sentence of 51, that it is not open for a private claimant then to seek to punish the infringer when the public authority has chosen not to punish the infringer.

THE CHAIRMAN: I am not quite sure, though, how this translates to the domestic sphere, because Mr. Justice Lewison went on to consider whether under domestic law the imposition of a fine precluded a claim for exemplary damages, and seems to find, at para. 64, he says:

> "In my judgment the fact that a defendant has been fined for his conduct is a powerful factor against the award of exemplary damages, although it may not be conclusive in itself".

So there he seems to be drawing a contrast between a position under European law, where Article 16 of Regulation 1 [2003] comes into operation, with the position under domestic law where he does not seem to think that even the imposition of a fine precludes an award of exemplary damages.

MR. VAJDA: In my submission the way one needs to look at his judgment is, he is looking at it in terms of competition law, and the relevant competition law in that case was EU competition law and then, if you like, non competition law, which is because all the cases in relation to domestic law are not competition cases.

THE CHAIRMAN: But he does not seem to be rejecting them as relevant on that —

MR. VAJDA: No, but what I am saying, we have a well established competition law regime which has public and private enforcement going hand in hand, and true it is that the competition law that was being looked at in *Devenish* was European competition law, but in my submission it would not be right to say, "Well, I am going to depart from what

Mr. Justice Lewison said because it simply applies to European competition law", and indeed, I mean, just reading para. 51, we are well aware of the fact that you can get leniency in the context of OFT proceedings and it would be, in my submission, quite a bold submission to say, "Well, actually, we can put para. 51 in the waste paper basket because it only applies to EU competition law, not domestic competition law".

So, we say that it would be wrong, and indeed Mr. Thompson has not — I am not saying that this was the reason for the Tribunal not going down, there is another point that Mr. Thompson has made that somehow you can pass the buck — you can have one result for EU competition law and another for domestic competition law and, with respect, that there is nothing in para. 51 that provides in my submission any basis for such a distinction. And, as I said, you test it, supposing it was the construction cartels, which was an OFT decision, and leniency is given, there is then a claim for exemplary damages. In our submission it would not be open to a health authority to seek exemplary damages against somebody in the construction cartel, either that person would have been fined, in which case the *non bis in idem* rule applies, or the person would not have been fined, there may have been leniency, in which case the principled approach applies which is that there had been a decision, not to, no punishment, and therefore it would be wrong for the — so it would be wrong for the private enforcement to effectively go in a way that was contrary to public enforcement.

THE CHAIRMAN: Yes.

MR. VAJDA: And I am reminded by Mr. Pickford that the submissions I make are supported, of course, by s.60 of our domestic Act, principles to be applied in determining a question that relates to Part I of the Competition Act within which 47A has been inserted by the Enterprise Act 2002. So, that reinforces —

THE CHAIRMAN: What about the *Manfredi* case? Was that not a case where, had there been a fine imposed, or there had been a — it was a follow on action, was it not?

MR. VAJDA: It was a follow on action, but the issue in *Manfredi* was an issue of the principle of equivalence, effectively, is that —

THE CHAIRMAN: Yes, but, so what they were saying was that in a follow on action there they did not say, "Well, because it is a follow on action that must mean that there had been the potential for a fine to be imposed, either a fine was imposed or it was not imposed, therefore the question of exemplary damages cannot arise". They did seem to be dealing with the question of whether there could be a claim for exemplary damages under the principle of

equivalence, even in a follow on action. Or are you saying that the Italian authority that made the finding of infringement did not have a power to enforce?

MR. VAJDA: No, *Manfredi* is not in the bundle. We can obviously look at *Manfredi*, but my recollection of *Manfredi* was it was simply a question effectively of the issue of principle of equivalence and that in Italy, which may be the only continental country which has exemplary damages — (Mr. Bailey tells me it actually does not).

THE CHAIRMAN: My attention was drawn —

MR. VAJDA: Part of having these well qualified legal secretaries who can assist us all.

THE CHAIRMAN: Hear hear to that. Yes, I see, there the point was that they did not have exemplary damages available, and the question was whether they needed to. And they said, "Well, no, you do not need to invent it if you do not already have it", and that is what led Lewison to say, "Well, this is a question of equivalence rather than effectiveness".

MR. VAJDA: Yes.

THE CHAIRMAN: But it does still seem to me to be the case that the discussion, but maybe we need to look at it over the short adjournment, the discussion in *Manfredi* does not seem to proceed on the basis that actually, in a follow on claim there is no question of exemplary damages arising.

MR. VAJDA: No, well, we obviously will look at it; but my submission on that is that that point the court was not focused on that point, otherwise it would be very odd, because you would have, what one would have to conclude is that, although *Manfredi* was not only cited but referred to by Mr. Justice Lewison, that in some way his conclusions at 51 are passed down with *Manfredi*.

THE CHAIRMAN: No, no. I do not think that is right, because you are seeking to expand his conclusion from the specific example of a leniency application applicant having its fine being commuted to a much more general principle, as you first enunciated it, which is the bald principle that in a follow on action there can be no claim for exemplary damages because either a fine was imposed or it was imposed and then commuted, or else it was not imposed.

MR. VAJDA: Yes.

THE CHAIRMAN: And in all those three instances there can be no claim for exemplary damages, but what I am saying is that does not seem to be the basis on which *Manfredi* is argued or decided.

MR. VAJDA: That is precisely my point. *Manfredi* does not touch on this point. But what does touch on this point is the last sentence of para. 51 of Mr. Justice Lewison, and it is not just, when I say last sentence, it is the last two sentences:

"This seems to me to be wrong in principle".

That is what he is saying, it is wrong in principle, and when something is wrong in principle you look at what the principle is, you do not look at — I mean, the specific fact that he was looking at was leniency, but that is simply an illustration of the principle that he applies in the penultimate sentence.

THE CHAIRMAN: But, to what extent you do accept that it is fact specific? Because, as I recall, the particulars of claim list a whole range of quotations from various judgments.

MR. VAJDA: They do indeed. Yes.

THE CHAIRMAN: And refer to your client's conduct, from which Mr. Thompson may be going to say, "Well, far from it being the case that the Tribunal found that your clients were not particularly guilty in these circumstances, or their conduct was not, may have been infringing, but was not otherwise generally culpable, but that the Tribunal actually had not come to that view, albeit that it did not impose a fine, for reasons which you are about to come to.

MR. VAJDA: Yes.

THE CHAIRMAN: Are you saying that this is a principle which is independent of that kind of consideration?

MR. VAJDA: Yes. This part of it is not fact sensitive at all. It is based on the principled approach of Mr. Justice Lewison and we all know that public and private enforcement work in harmony.

THE CHAIRMAN: But how far do you go with that? Suppose someone made a complaint to the OFT, and the OFT writes back and says, "Well, we have looked at this, but we do not consider it is sufficiently serious for us to take any action", and so they then bring a damages claim in the High Court without an infringement to follow on. Do you then say, "Well, you can't get exemplary damages because obviously the OFT thought that this was not a terribly serious infringement, and therefore you are going to be treating these people more seriously than you would treat somebody where the OFT had investigated it and had found an infringement and decided not to impose a fine". Where does this end?

MR. VAJDA: Well, of course, madam Chair, we are speculating in relation to situations that are not in front of us. But, I am not fudging the question. I will answer it. We know following *Cityhook* that where you have a complaint to a Regulator and the Regulator does not want to

take it, what they now have, I think, is the jargon called a case closure decision. They may make a few observations but they say basically "It's not our priority. We don't have the resources", and so on like that, so, effectively, they are washing their hands of it, and in such a situation if you then, there is no possibility of public enforcement, the public enforcer in a sense has not spoken because the problem which the Regulator has, and this is what *Cityhook* was about, if they need to take a decision which does not really go into the merits of the case, because otherwise they can be challenged here in the CAT, so, if you go along and you complain and you are told, "Well, you know, this is not a sector that we are very interested in", or "There's not a huge amount of potential consumer harm", or something like that, that is effectively saying, "Very sorry, we can't do it, go off to the High Court", or whatever, and I can see in that situation, which of course is not this situation at all, that you would not be in a follow on case, because you could not in that case rely on a finding that the OFT had made of infringement, because they had made no finding. And Mr. Pickford reminds me, obviously, in terms of the OFT's priorities, I mean, one of the factors is whether you have a private remedy. But, what we are dealing with here is, we say, an analogous situation that Mr. Justice Lewison was dealing with in *Devenish* where there has been public enforcement, and there has been a decision taken by the Tribunal, we say, and that is our position, but I say, even if the Tribunal had not ruled on it, the result would be the same, and that precludes a claim being brought as a follow on. And there is also another — there is an important policy reason here. Can I just take the Tribunal to what the Court of Appeal said, it is not in relation to exemplary damages, but it is in relation to restitution. If one goes to -----

MR. MATHER: Sorry, Mr. Vajda, just before you move on to that — it seems, on the face of Mr. Justice Lewison is saying — that he is addressing the very specific case of where there has been a decision to commute the fine. And at first glance it does not seem to me that you can separate that from his conclusion; his conclusion that this seems to be wrong in principle is referring back to his previous paragraph, at which at every stage he seems to me to be mentioning a person who has had his fine commuted. Can you point us to any other authority?

MR. VAJDA: Well with respect, I would simply not accept that as a correct analysis of the last two sentences. If Mr. Layton's submission were correct, then a more guilty wrongdoer would escape liability for exemplary damages, while a less guilty wrongdoer whose fine had been commuted would not. I mean, you take the case of somebody who is fined €50 who on this basis can have no exemplary damages than somebody who is not fined at all.

What Mr. Justice Lewison is saying is that the person who has not been fined should not be in a worse position than somebody who has been fined.

THE CHAIRMAN: But you are also then saying "And, what's more, regardless of the actual facts, we have to treat someone in respect of whom an infringement decision has been made but who was not fined as necessarily being a less guilty wrongdoer".

MR. VAJDA: Yes, because he has not been fined. He is less guilty.

THE CHAIRMAN: That is rather assuming, though, is it not that the decision not to fine was based on a decision that he is a less guilty wrongdoer?

MR. VAJDA: No, with respect —

THE CHAIRMAN: You cannot argue backwards from the —

MR. VAJDA: No, that is not right, madam. No, it is simply on the simple basis that – and Mr. Justice Lewison, he is not a competition lawyer, he is looking at this in simple terms – that people who are fined are more guilty than people who are not fined. It is as simple as that. And, for whatever reason, if the decision is no fine, that is it. And a no fine person is plainly less guilty than a fine person. The argument that Mr. Layton was making was, "Well, actually, that is over simplistic, because in fact Aventis were, they were really quite wicked" and the judge said "Well, I do not agree with that and in fact there is a policy of, you know, encouraging whistle blowers". But there would be force in what Mr. Mather says if, in fact, we did not have the last two sentences. Indeed force in what you, madam Chairman, have put to me. But we have the last two sentences which are —

THE CHAIRMAN: We have to make —

MR. MATHER: Yes, but, not want to carry this on indefinitely, but I think he is referring to the specific case of whistle blowers the guilt or the degree of guilt. The fact he is a less guilty wrongdoer is because it is a whistle blower whose fine has been commuted. Is not that the obvious import? And if one looks at the symmetry of the English language here, we are talking about on the one hand a more guilty wrongdoer. And then he mentions a less guilty wrongdoer. And then suddenly we break the symmetry to add those words "whose fines had been commuted". If he was making a more general principle, why add those words at that point?

MR. VAJDA: There are two points here. Point 1, that the judge takes the view that somebody whose fine has been commuted is less guilty than somebody who does not. We are all agreed on that. The second point is that the judge, in my submission makes a principled approach to this in saying that in follow on damages actions you should not treat less guilty wrongdoers more harshly than more guilty wrongdoers, and when one was asking the

question, "How do you distinguish which category you go into?" the more guilty wrongdoer must be somebody who is fined, because we know that somebody who is fined, there is a bar for exemplary damages, and he is saying this is completely perverse, it would be Wednesbury irrational to then say, "Oh well, because you have not been fined, we can go against you for exemplary damages".

THE CHAIRMAN: But what about the words in parenthesis in para. 52, if he does not say: "In a case in which the defendants have already been fined" or where no fine has been imposed by the Commission, he says:

"(or had fines imposed and then reduced or commuted)".

MR. VAJDA: Yes, because that —

THE CHAIRMAN: That is the case that was —

MR. VAJDA: That was the case in point. And obviously what we cannot do is ring up Mr. Justice Lewison and ask him extra judicially what he meant, but in my submission it is very clear here, he is making the point that people who are not fined should not be in a worse position than people who are fined. And, I mean, "guilty wrongdoer" is simply referring to somebody who has been fined. It is not a term of, there is no statutory definition of what a guilty wrongdoer is. If I said this was a Chancery judge who looked at this on the principled approach in relation to a submission in respect of somebody who obtained leniency, but in my submission it is simply not right to say, "Well, you can confine that simply to a leniency applicant", because that totally annihilates the last sentence, which was:

"This seems to me to be wrong in principle".

THE CHAIRMAN: Well, I think we have your submissions.

MR. VAJDA: You have, yes. Now, what I wanted to do, and perhaps I can do this just before the short adjournment, is the — because I think the Tribunal are looking at this as a matter of policy, and in that respect we do get some assistance, I suggest, from what the Court of Appeal said, which was not to do with exemplary damages, but to do with restitution. Now, if we look at p.478, which is in the judgment of Lord Justice Longmore, it is the same tab. Now, the claim here, the exemplary damage claim is a sort of rolled up punitive plus account of profits claim, and this is what Lord Justice Longmore said, this is in relation to account of profits:

"The only real argument in favour or an order for account of profits is the argument of policy that cartels are a notorious evil and the civil courts should in some way provide an incentive for their eradication by making such an order. Mr. Vajda for Devenish

makes the same plea to this effect. But it does not seem to me to be right for the courts to take this step on their own initiative. Towards the end of his submissions, Mr. Brealey asked rhetorically whether a restitutionary system of damages was something which the courts would wish to encourage. I would, for my part, answer 'Not in general apart from proprietary or fiduciary claims and exceptional cases such as *Blake*'".

And he then quotes Lord Hobhouse, who gave a dissenting speech in *Blake*'s case. Now, what one sees there, and if we then go over the page to 480 in the judgment of Lord Justice Tuckey, at letter B:

"An account of profits of the kind advanced would give Devenish a windfall. I can see no justification for this. As LJ Longmore says, the law is not in the business of transferring monetary gains from one undeserving recipient to another".

So, what the Court of Appeal was saying, albeit in the context of restitution is, "Even when you have got a victim of a cartel, which in a sense is the most egregious form of competition infringement, we do not think it is right as a matter of policy that the victim should get any form of account of profits". Now, having accepted that that is restitution not exemplary damages, that reinforces the point I make about how one needs to pay full attention to what Mr. Justice Lewison said at first instance, that this is effectively a route the courts do not want to go down. Now, that might be a convenient moment.

THE CHAIRMAN: Yes. And what remains for you is to just —

MR. VAJDA: I am going to deal with, on exemplary damages there is a question whether the Tribunal had jurisdiction, what it actually said about it; and then I will deal very briefly with Mr. Thompson's points, that in fact they did not deal with it, and then I will sit down. So, I would hope that is going to take no more than twenty minutes.

THE CHAIRMAN: Yes, Mr. Thompson.

MR. THOMPSON: Can I just add that when the Tribunal asked me about the domestic EU difference, I had not got in my mind the different reasoning of Mr. Justice Lewison on the point, and so I can see that there is an issue in terms of authority, in that he did not make any clear finding one way or the other. But I think it is clear from my skeleton that is not the main point I take in relation to this issue.

THE CHAIRMAN: No. Thank you, we will come back at just after two o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Vajda?

MR. VAJDA: We were on exemplary damages, looking at the last passage in the judgment of Mr. Justice Lewison. The point that I was seeking to make before the short adjournment, one should not get too hung up as to what is meant by "guilty" or "less guilty". The point in relation to competition law is that punishment is dealt with by fines, and that is the public law matter which is dealt with by the regulators, and exemplary damages is rarely, if you like, used to fill a lacuna where you do not have that element of punishment, and we see that very clearly, if we can just look at *Rookes v Barnard* at tab 22, bundle 2, at 1225 at the bottom of the page, towards the end of that judgment. This is Lord Devlin speaking in 1964:

> "These authorities convince me of two things. First, that your Lordships could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of case in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are."

The pleading is in the second category which is effectively that you are seeking a greater profit which is bigger than the damages you would have to pay. What we say one gets out of *Devenish* and I would have made the same submission but I can now make it with judicial authority supporting that in the field of competition law there is a well established mechanism for punishment and that is fines, and that is the basis for the approach of Mr. Justice Lewison, that you look to see what the public law decision maker decides and if there is a fine imposed no exemplary damages, it will be double damages, and if there is no fine imposed you will respect the decision of the public enforcer.

We looked at *Manfredi* over the short adjournment and the relevant paragraph, perhaps I can just read it out because I do not want to spend much time on it, is para. 93 – this is in relation to the Article 81 question. Do the Tribunal now have copies?

THE CHAIRMAN: Yes.

MR. VAJDA: If you go to para. 83 of the judgment, the fourth question:

> "By this question, the national court asks, in essence, whether Article 82 EC must be interpreted as requiring national courts to award punitive damages, greater than the advantage obtained by the offending operator …"

Then I think the relevant paragraph, at least on my print out over the page, para. 93:

"In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law."

So the point that is there being made is that if you have a claim for exemplary damages, and we give the example in our skeleton that it may be the case that in a stand alone action there is an ability to go for exemplary damages, and what para. 93 of *Manfredi* is saying is that if you, as a matter of English law, can get exemplary damages for breach, say, of Chapter I the principle of equivalence required that you should always get it for a breach of 101. You cannot, as it were, discriminate against the EU plaintiff, but it begs the question as to whether or not exemplary damages are available at all. That is all I want to say on *Manfredi*.

What I am now going to do by way of wrap-up on this limb is just to deal with two points that my friend has dealt with in his skeleton and the first is whether the Tribunal has jurisdiction to impose a penalty at all. I think it is para. 49 of his skeleton.

The general point that my friend makes is that there is no jurisdiction to impose a penalty, and the way I propose to deal with it is maybe not entirely the way that he has dealt with it but first of all, as a matter of general principle is there jurisdiction in the Tribunal to impose a penalty; and secondly, was there jurisdiction in this case? You see at para. 49 Mr. Thompson says:

> "… it is at least doubtful that the Tribunal would have had any jurisdiction over the issue, whereas the Authority's investigation was vitiated by numerous errors …" etc.

We say that there can be no dispute that the CAT in an appeal is a public enforcer, and we refer to the powers of the CAT in schedule 8, para. 3 of the 1998 Act, and I am not going to go back to them in view of the time, but it is footnote 17 of our skeleton, para. 48 of our skeleton and footnotes 19 and 20. We would point out that this is not actually in our skeleton but one of the issues that we appealed unsuccessfully to the Court of Appeal on was what the scope of the powers of the CAT were on appeal, and again I will just give the Tribunal the reference – bundle 1, tab 13, paras. 126 to 127 where the Court of Appeal indicate in very clear language that the CAT has all the powers that the regulator would have, which we say includes the power to impose a penalty.

One then comes to the slightly narrower point which is taken, which is: was this something they were able to do in the course of these proceedings? The first point that is made, it is said "No", they were not able to do that because the proceedings are confined by the notice

of appeal and our notice of appeal did not include anything on this. We do not accept that that is in fact correct. Happily, my friend has put in his notice of appeal in his supplementary bundle, if we can go to that. It is the very last page, 7080, do you have that? It is para. 223 right at the bottom:

> "Such further and other relief as the Tribunal may consider appropriate."

It has been accepted that Mr. Thompson did make submissions on penalty and if we can just look at that very briefly, that is bundle 2, tab 17, p.55 "Other Matters".

> "The only outstanding issue of which Albion is aware is the question of penalty. Albion makes no submissions in this regard save as to invite the Tribunal to consider whether it is appropriate to remit this matter …"

- and that must be the matter of penalty –

> "... to the Authority on the subject of penalty or whether it wishes to reserve the future of this case to itself."

So what is being said is there are two ways of dealing with this, either you remit it to the Authority or you retain it for yourself, and there is nothing in this submission to suggest that the Tribunal does not have jurisdiction to deal with the question of penalty.

The issue of penalty was then a subject which was a subject of discussion. These submissions were for the CMC. If you go to the first page of the skeleton, it says: "Submissions on behalf of the Appellant for the hearing on 24th October 2006", p.1. There was then a hearing on 24th October, and the transcript of that hearing is at flag 18. If we can go to p.36, Mr. Anderson, who was in those days representing the Authority, at line 30 says: "We have nothing to say on this question of penalty" to which the President (Sir Christopher Bellamy) said: "I do not think that arises." We say that it is plain that the Tribunal had jurisdiction there. It is true that the observation of the President was short, but he plainly addressed his mind to it and he concluded that it did not arise. One of the factors that the President would undoubtedly have had consideration to was that these prices – the First Access Price – is completely different from a secret cartel, this was not anything that was done in smoke-filled rooms. These were figures that were in fact communicated by my client to Ofwat and in fact we see that again in two places. If we look first of all in this bundle 2, and we go to the decision of the Authority, which is at tab 15.

THE CHAIRMAN: I think the strike-out application has to be decided on the basis of pleaded facts.

MR. VAJDA: I am saying a lot is made, and I am conscious first of all I am not addressing a jury, I am addressing the Competition Appeal Tribunal but a lot has been made in my

friend's application about how wicked we are. I am not putting it on the basis that this Tribunal has to decide how wicked we are, but those behind me are concerned about these allegations. All I am simply saying is that the Tribunal should bear in mind, although this is not relevant I accept to the Rule 40 application, that we do not accept that the facts are remotely comparable to a cartel, that in fact, as you will see from the decision, these prices were communicated to the Authority, indeed, you know that the Authority found that there was no infringement. The reason I am saying that is that nobody can suggest that when the President said: "I do not think that arises", that was some remark that there is absolutely no basis for, because effectively, as I say, this was something that was shown to the Regulator, the Regulator as it turned out was wrong in law, but the Regulator took the view that there was no infringement; that is the short point I am making. That, we therefore say, is the end of the matter. In other words, it is the end of the matter because the matter was raised and there was a decision not to impose a fine. Mr. Thompson says in his skeleton that this all took place on 24th October 2006, it is all overtaken by events, there is then a remission back to the authority, and so on and so forth. True, but the President could very well have said, "I am going to remit the question of penalty back to the authority". He chose not to do so. We say that it is very clear on these facts that they are not in dispute, that the public enforcer here chose not to impose a penalty.

We would go on to say, and this is a "moreover" point, that even if the point had not been pleaded, we would still say the same result follows because it could have been raised. As we know from the *Burgess* line of cases in this Tribunal, provided that the rights of defence are exercised the Tribunal – and indeed in this case they moved from a non-infringement decision to an actual infringement decision. What we say, and this comes back to the point I made a moment ago, the key issue here is that this is a follow on action where you have had a decision of a public enforcer and there is, therefore, for the exemplary damages because there is no lacuna to be filled.

That is all I need to say on that submission, and I have got four minutes to deal with the second submission on exemplary damages which is based on the approach of the Court of Appeal in *EWS*. Perhaps I can take the Tribunal back to *EWS*. We have seen some of these passages already this morning. It is in bundle 2, flag 21. Can we go to p.37 (we looked at this this morning), para. 28, what Lord Justice Patten was saying, and this was the argument of Mr. Beard, was that you should not strike out where there is a developing area of the law. Attractively though no doubt Mr. Beard made that point, what the Court of Appeal said is that that point will not arise in a s.47A case because what you are concerned with are simply

issues of causation and quantum. One sees that, if we go forward to p.49 of the judgment at para. 61. I think I read this out this morning:

> "The question whether the defendant was obliged to alter its 1999 contract prices between May and November 2000 in response to the reduced rates offered to the generators for 2001 seems to me to be far more than simply an issue of causation and quantum."

Our short point on this limb of the exemplary damages case is that it is pleaded under the second category of *Rookes v. Barnard*, which is the oppressive and cynical disregard conduct. Indeed, as you indicated before the short adjournment, obviously those issues would have to be proved because there would have to be a trial in relation to that. Unless you can show some form of cynical disregard you are not able to claim exemplary damages. You have got to plead and define the facts that bring yourself within the second category of *Rookes v. Barnard*. That is, we say, completely different from the type of exercise that Lord Justice Patten had in mind in *EWS*. It is not a question of finding facts which are relevant to causation and quantum, it is actually finding facts to give you an entitlement to a particular form of damages. Again, we say that this simply arises from the jurisdiction of the Tribunal. There would to stop my friend running this case, subject obviously to the point that if we are right on the first point then he cannot run it in the High Court. In relation to this second point, this is a point which relates back to the jurisdiction of the Tribunal under s.47A.

THE CHAIRMAN: I am sorry, Mr. Vajda, I have not followed that point at all. What is the point that you are making, that the findings of the Tribunal as to cynical disregard or whatever are not binding on us. Is that a point you are making? They would have to be re-litigated?

MR. VAJDA: Effectively the point is that the Tribunal in the 47A follow on is limited to making findings of fact in relation to causation and quantum, and when you are looking at exemplary damages you are going beyond causation and quantum because you are going to have to make findings that bring the case within, or do not bring the case within, the second category of *Rookes v. Barnard*. So it is an exercise that falls outside the scope of the Tribunal's jurisdiction under s.47A. It is different, because exemplary damages are not concerned with loss, as we know, they are punitive damages. You cannot say, "I want punitive damages", unless you can prove in the first place the degree of cynical harm, or whatever you call it, to bring yourself within the second category. We say that that is something you cannot do in the Tribunal. If you want to do it you have to do it in the High Court.

THE CHAIRMAN: I see, because the findings of cynical disregard or whatever are not inherent in the finding of infringement?

MR. VAJDA: No, you have got an infringement finding. You then look at causation and quantum. What you do not do is look, as Lord Justice Patten says, at new and developing areas of the law. Therefore, exemplary damages, if we are wrong on our first point, we say that it is not appropriate for that to be dealt with in the Tribunal. The place to bring that is the High Court.

Our first point on exemplary damages applies to all follow on, the second simply to follow on in the Tribunal.

THE CHAIRMAN: Yes, I understand.

MR. MATHER: You said it was not appropriate for them to be brought in the Tribunal. I thought, from reading it, he said it would not normally arise before the Tribunal.

MR. VAJDA: Yes, what Lord Justice Patten said is that it would not normally arise, that is right. The reason he said it would not normally arise is because the Tribunal, itself, would be limited to looking at issues of quantum and causation. Plainly there might be a developing point in relation to causation, for example, or quantum. I think what he is saying is, "That is unlikely, but I cannot exclude it".

THE CHAIRMAN: Why does the same point not arise in relation to the aggravated damages claim here, to which you have not taken exception?

MR. VAJDA: In relation to the aggravated damages point, the first point I would make is that we have not brought anything in relation to aggravated damages at the moment, because the way that we regard the aggravated damage claim is that it is, if you like, parasitic on the compensatory claim and, in a sense, Madam Chairman, you have anticipated what I was going to say about the order that the Tribunal should draw up here. We have not dealt with aggravated damages and we are not asking the Tribunal to deal with them. They are not part of our application. We reserve our position, as it were, that if we are successful in relation to our compensation claim, that there is then no room for aggravated damages. That is the way we sought to deal with aggravated damages. I would not accept that because we have not, if you like, taken this point in relation to aggravated damages, that we have waived anything vis-à-vis exemplary damages. We are taking the point in relation to exemplary damages, and the fact that the point has not been taken in relation to aggravated damages should not be held against us. Aggravated damages is much more a quantum analysis. I can probably show you the passage that my friend has in his skeleton in relation to what aggravated damages are. It is conceptually ----

THE CHAIRMAN: I do not wish to make you anticipate the points you are going to make. It was just a point that occurred to me. What you are saying is that actually under s.47A our jurisdiction as regards the heads of damage that we can award in a follow on action are, in fact, narrower than the heads of damage that the High Court could award also in a follow on action?

MR. VAJDA: Yes.

THE CHAIRMAN: Because they are limited to compensatory ----

MR. VAJDA: Compensatory, yes, and ----

THE CHAIRMAN: Which might include aggravated but certainly does not include exemplary.

MR. VAJDA: And may include, in so far as I understand it, restitution as my friend has pleaded it, because I think my friend has pleaded restitution not on the basis of an account of profits definition, because that is precluded by the Court of Appeal, but as I understand it what he is saying in relation to his restitution claim is that if, for some reason ----

THE CHAIRMAN: Did the Court of Appeal leave it open in *Devenish* that there might be a case in which it was so difficult to quantify the actual loss that one might be pushed to some kind of restitutionary measure? Did they leave that possibility open?

MR. VAJDA: I am not sure they did. I think what they said was that – and indeed this was the expression that my friend used in his skeleton – we could use the broad axe. Effectively that was their answer, "If it is all very difficult we have got a broad axe which will do justice where appropriate".

THE CHAIRMAN: Anyway, let us see what Mr. Thompson says and maybe you will have to come back to it.

MR. VAJDA: Yes, Mr. Thompson refers to what I might call the broad axe approach in his skeleton. We are not saying that the Tribunal cannot exercise a broad axe. I am not saying that in relation to the second submission on exemplary damages. In so far as the broad axe approach has a generous approach to compensatory damages and/or aggravated damages, we accept that the Tribunal's jurisdiction is not limited to a narrow axe, it has a broad axe.

THE CHAIRMAN: Yes.

MR. VAJDA: I think those are my submissions. What we would invite the Tribunal to do is to deliver a judgment and then we can consider the position and possibly we might even reach agreement with my friends as to any order that would be drawn up. Therefore, I am not going to address the Tribunal in detail now as to what paragraphs should be struck out. The Tribunal has our case which is that the compensatory claim should go in total, both in

relation to Shotton Paper and Corus and the exemplary damage claim should go in toto. Those are the two that we are ----

THE CHAIRMAN: I can see that exemplary damages and Corus/Shotton are discrete chunks of the particulars of claim and can stand or fall. The rest of the pleading is made up of compensatory damages, then the same amount of amount of money claimed as a restitutionary remedy for Shotton Paper and then the aggravated damages. Presumably if your temporal point is right, that in fact what they are limiting it to is damages suffered on 2nd March or in March 2001, then that effectively is the end of the claim for compensation other than some very small amount. Your other point though about the reliance on there being an abuse within the bulk supply price, if I can put it like that. You have accepted that if they had pleaded differently there may have been a claim which is not capable of being struck out. Then we have the aggravated damages claim which you have not attacked but which you have hinted that you regard as parasitic upon there being some legitimate claim for compensation. At the moment you say you are not at this point that actually the whole ----

MR. VAJDA: It may be helpful if one just looks at the last page of the pleading of the points of claim, p.46, of flag 3. The order that we would be seeking in broad terms if we are successful in toto would be for the claim under sub-para.(1) to go, which is compensation and/or restitution – that is Corus and Shotton; and sub-para.(3), exemplary damages. That is what we have been arguing about today. I think you, Madam Chairman, have raised the point as to what happens if you find for us in relation to some of our arguments but not all of our arguments, where that leaves the compensatory claim. That is, I think, a very good reason to, in a sense, defer that discussion, because until one sees the judgment it is difficult for anybody to say how that would affect the points of claim. As I say, if we were successful in toto, we would say that sub-paras.(1) and (3) would go in toto.

THE CHAIRMAN: I can see that, looking at para. (1), you would say the amounts go, because you say that the basis on which they purported to calculate those amounts is an impermissible basis. As I understood it, you were not saying, and in fact you particularly did not say, that there is no claim for compensatory damages in such sum as the Tribunal considers appropriate, which might be under some other method of calculation.

MR. VAJDA: We are having this discussion now. There is no basis for that. That is not what has been pleaded.

THE CHAIRMAN: I understand that.

MR. VAJDA: We say that this claim should go. It may then be, and I do not want to anticipate things, that Mr. Thompson will produce out of his back pocket in five minutes a new pleading, I do not, but obviously if and when that were to happen we would have to consider our position, and so on and so forth. All we are going against is as pleaded and the damage as sought here.

THE CHAIRMAN: Yes, thank you. Is there anything else you want to add. Thank you very much, Mr. Vajda. Yes, Mr. Thompson?

MR. THOMPSON: Madam Chairman, members of the Tribunal, just to sketch out where we are going, in relation to the vexed issue of Mr. Brown, Mr. Vajda has not pursued it today. The Tribunal will have seen a letter that we wrote to Hogan Lovells earlier this week, that we might well wish to say something more if this is an issue of concern to the Tribunal. I do not know how the Tribunal proposes to deal with that, whether today or in writing. If it is not particularly of concern then obviously ----

THE CHAIRMAN: Mr. Vajda said he did not want to deal with it today, so we were not planning to say anything particular about it.

MR. THOMPSON: I am grateful, and I will just say no more on that.

In relation to the compensation point and the restitutionary point, indeed the two compensation points, as we understand it, the position of the defendant has now dwindled somewhat and this is essentially a pleading issue. If that were a matter of concern to the Tribunal then Albion could presumably seek to remedy the defect as perceived by the Tribunal in the light of any guidance of the Tribunal. In so far as there are other, what might be called slips of the pen, and one sees that – I do not think Mr. Vajda particularly pursued that, but he did actually raise it in paras.197 and 198 of the unfair pricing judgment – in my submission, they do not go to the substance of the case, and if there are some infelicities of expression in the particulars of claim, in my submission they have nothing really to do with the substance of what is at issue here. The Tribunal will be aware, of course, of its jurisdiction under Rule 40, which to strike out where it finds that there are no grounds for the case. Obviously that is not simply a question of pleading.

However, our main point is that the compensation point in relation to Shotton and the restitutionary point, and indeed the Corus consequential claim, are reasonable and conservative claims which fall well within the scope of the Tribunal's jurisdiction.

So far as exemplary damages goes, we say there is nothing wrong in principle with our case, that Mr. Justice Lewison did not rule this type of claim out either in terms or *obiter* or as a matter of principle, it is a question of fact for trial. Dŵr Cymru can, of course, make points

in relation to the facts and the Tribunal can make findings of fact, and indeed we would say is bound by earlier findings of fact made in the earlier judgment.

What I was proposing to do, and obviously I am in the Tribunal's hands, given that there is not that much time left today, was to hand up a short one page note which essentially sets out the key points made in the skeleton arguments. In fact, maybe this is really my skeleton argument and what has been filed before is the detail. If I can hand that up, I think that will speed things along.

I hope I can take some of these points fairly quickly. I do not know if the Tribunal wants to read them all now, or as I go along.

THE CHAIRMAN: I think carry on, Mr. Thompson.

MR. THOMPSON: The first point is essentially para. 2 of our skeleton argument, that the relevant decisions are at the further judgment, section 9, and the excessive pricing judgment, sections 10, 11(d), and 12. The references for the transcript – the skeleton argument, para. 2, is at tab 2 of the Dŵr Cymru bundle, pp.1 to 2, and the relevant sections of the further judgment are at tab 12, pp.95 to 105 and 120, and in the excessive pricing judgment at tab 14, pp.59 to 62, and 79 to 85. So our basic point is that - that is the foundation for the jurisdiction of the Tribunal in this case and we make the point in our skeleton, and I think the same is true of today, that Dŵr Cymru has been very shy of actually looking at what were the findings actually made by the Tribunal on the issues of abuse which fall within the scope of s.47A(6) of the 1998 Act.

The s.47A(1)(a) claim (this is the second point) is based on four heads of damages, and we say in parenthesis that "damages" is in, general terms, in the Act and there is nothing in the point that Mr. Vajda appeared to suggest that somehow exemplary damages do not fall within the scope of s.47A(1)(a). They are a well recognised form of damages and indeed recognised as such by the Court of Appeal in *Devenish* at para. 143 of the judgment of Lord Justice Longmore. The reference there is para. 9.1 of our skeleton argument, tab 2, p.3, with reference to paras.124 to 125 and 136 to 7 of the particulars of claim, which is at tab 3, pp.44 and 46.

The s.47A(1)(b) claim is based on a claim for restitution of excessive sums paid by Albion to Dŵr Cymru and that is para. 9.2 of our skeleton, tab 2, p.3, and paras.93 to 97 of our particulars of claim, tab 3, pp.36 to 7.

That is by way of introduction, and we say that the Shotton damages claim is based on harm caused to Albion by the abusive price offered for partial treatment and distribution of services in 2001 and maintained throughout the administrative and appeal proceedings, and

one finds that stated at paras.18 and 19 of the skeleton, and 103 to 119 of the particulars. That is tab 2, pp.5 to 7, and tab 3, pp.39 to 40. Perhaps, more importantly, that I the basis of the findings in the Tribunal's earlier judgments. Can I just take the Tribunal briefly to those passages. First of all, paras.229 to 230 of the main judgment, tab 11, pp.64 to 65. This effectively is a passage where the Tribunal is summarising the economic effect of the charges set out, and they are summarised at para. 228. Then the consequences are set out at 229, and in particular there is a reference to the indicative price of 9 p/m^3 quoted by United Utilities, and therefore a total price of 33.2 p/m^3, which is actually higher than the retail price. Then at the end the Tribunal says:

> "Whichever assumption is made about United Utilities' price, the First Access Price for common carriage left no effective margin for Albion, given that the *de facto* retail price being offered by Dŵr Cymru to Shotton Paper was 26 p/m^3."

Then it goes on over the page at 230.

Then the point was picked up in the further judgment at paras.289 and 312, which is the next tab:

> "Moreover, it is plain, on the evidence before the Tribunal, that in this case the First Access Price would, in practice, not merely offer a zero margin, but a substantially negative margin. That is because, in practice, Albion would not be able to obtain the water from United Utilities at anything like the below-cost price of 3.3 p/m^3 enjoyed by Dŵr Cymru. The facts of this case thus give rise to a serious and severe margin squeeze."

Then again at 312, the finding of abuse, and that is the conclusion, and in particular at the end of the paragraph:

> "Had that margin squeeze succeeded, Dŵr Cymru would have, thereby, prevented any competition, preserved its monopoly, and eliminated Albion as a competitor, to the prejudice, notably, of the ultimate consumer Shotton Paper."

Then, in relation to excessive pricing, the principal findings are at paras. 274 to 275, p.85 of tab 14. The Tribunal will be aware that para. 274 is the conclusion on unfairness, and needs to be read with paras. 197 and 198 which set out the conclusion on excessive pricing, and I think the Tribunal will recall at 198 the excessive price related to the charges for partial treatment and distribution of water.

What we would note in relation to this is that the common carriage access price was in fact the same as the charge for partial treatment and distribution services, and those are two of the elements and, in fact, in price terms the two main elements of the bulk supply price.

One sees the nature of the common carriage price and the issue that the Tribunal was concerned with, not only at para. 198 of the excessive pricing judgment, but also in the further judgment – I do not think you need to turn it up – in terms of the terms of what was remitted back to the Authority for investigation (para. 360(3) p.120, tab 12 of the Dŵr Cymru bundles). That was not in fact the common carriage price but it was the price for partial treatment and distribution for work that was passed back.

The second point that I would stress, and this is obviously important to the temporal issue that Mr. Vajda laid some stress on by reference to the judgment of the Tribunal in the remedies' hearing, is that it is, in my submission, clear from the further judgment in particular that the findings of the Tribunal were not temporarily limited in the decision judgments themselves. Obviously one has to be a bit selective because of the volume of paper in this case, but in particular if one looks at paras. 287 and 343 of the further judgment.

THE CHAIRMAN: Which tab is that?

MR. THOMPSON: Tab 12, p.95 and at para. 286 the Tribunal finds that there is no doubt that a margin squeeze exists as a matter of fact. Then the Tribunal goes on:

> "287. The effect of that margin squeeze is, and was, to prevent Albion from entering into a common carriage arrangement, and to eliminate Albion as a competitor."

In my submission, that is a clear finding of a continuing impact of the common carriage price, and the Tribunal will be aware that that is on 12th December 2006, so some five and a half years after the original quote, and the same point can be made by reference to para. 343, which is at p.114, in the middle of that paragraph there is a sentence beginning:

> "Against the background of this case, we are very reluctant to refuse Albion interim measures on the ground that it should have entered into the suggested agreement with Dŵr Cymru. Dŵr Cymru has now obstructed Albion's proposals for six years, has made many procedural objections and has on occasions adopted a denigratory stance towards Albion's arguments."

In my submission again that is a clear finding by the Tribunal that not only the effect, but the conduct of Dŵr Cymru extended throughout the period of the appeal and, in my submission, nothing changed between that date and the date of the remedies judgment and final order in April 2009.

The third point which, in my submission, is very material to the way in which the case is pleaded, and to which Mr. Vajda takes exception, is that the alternatives facing Albion as at

March 2001 were three fold: either to exit the market, or to accept the common carriage price and trade at a severely negative margin or else to continue with the bulk supply agreement and, in a sense, to take advantage of the bargaining power of Dŵr Cymru in relation to the resource costs element of the price in relation to United Utilities, and one finds that, I think we have already looked at the relevant passages in the further judgment, paras. 286, 288, 289 and 330, but there is also at paras. 87 and 102 of the main judgment (tab 11, p..22 and 25) a finding that had the effect of the margin squeeze or abusive price been that Albion had accepted the common carriage price and then accepted the 9p that was on offer from the United Utilities, that Albion would have been significantly worse off than it was under the existing second bulk supply agreement.

So that takes us to our fourth point, that Albion had three options in the light of the abusive conduct of Dŵr Cymru, of which continued supply under the second bulk supply agreement was the least harmful and therefore constituted reasonable mitigation of loss, which is required as a basic principle of tort law under English law. We set that out in some detail at paras. 20 to 30 of our skeleton argument.

Mr. Vajda says that our approach is contrary to principle, but we would say that that is not the case and was effectively recognised as a reasonable approach in the main judgment, for example at para. 87, and we note in particular ----

THE CHAIRMAN: What approach are you talking about now?

MR. THOMPSON: The approach that was taken of persisting with the supply under the bulk supply agreement, rather than either exiting the market or ----

THE CHAIRMAN: I do not see anyone has taken exception to that. I can see that if you had been suffering a loss in your supply under the bulk supply agreement, and then tried to claim that loss then it could be argued that you should not have carried on but I do not think it is open to doubt that you mitigated your loss by continuing to supply Shotton Paper on the basis of the second bulk supply price; that must be right. The question is why do you claim as the quantification of your loss not the difference in profit between what you in fact made and what you would have made if you had been offered a 14.4p per cubic metre common carriage price in 2001, why do you not claim that difference? Why are you claiming the difference between the 14.4p and the price offered? Mr. Vajda says it is because you are relying on that element being incorporated in the bulk supply price, but is that right?

MR. THOMPSON: We are complaining about the price charged for partial treatment and distribution on the basis of the finding of the Tribunal that that charge was excessive and abusive. But it just so happens ----

THE CHAIRMAN: So you are saying because the Tribunal, in deciding whether the first access price was abusive, examined the elements that made up the costs for providing that service and found that those costs were actually much less than the charge that was being offered to you that we can then read across to say they also must have been excessive insofar as they were elements in the bulk supply price?

MR. THOMPSON: What we are saying is that we were quoted the price of 23.2p. It has now been found or partially agreed that the non-abusive price would have been 14.4p so 8.8p less.

The next question is what follows from that? We say what could we have done differently had we been offered the 14.4p instead of the 23.2p, and there are essentially two options. We could have entered into a common carriage agreement, and it would have been down to us to negotiate the resource cost price with United, and we know from the contemporary documents and the references in the judgment that United were prepared to supply us at 9p ----

THE CHAIRMAN: Mr. Thompson, I am sorry to interrupt, but nobody is suggesting that you should have done that rather than do what you did, which is carry on with the second bulk supply price; that seems to me to have been the sensible thing for you to have done to mitigate your loss, and I do not think anyone is arguing differently. The question is why is the measure of your loss the difference between the offered FAP and the reasonable common carriage price, why do you say that is the measure of your loss when, at no point, did you in fact pay the first access price. Nobody is saying that it was unreasonable of you not to agree to pay it, but in fact you never paid that price to Dŵr Cymru.

MR. THOMPSON: We did pay that price for the services that were offered, because the point in relation into the bulk supply price and this issue of overlap is that the only services that Dŵr Cymru were supplying under the bulk supply price were in fact partial treatment and distribution, and those were the very same services and one can see it from the contemporary documents and the basis of charging, that we were seeking a quote from in relation to common carriage. The only difference was that under the bulk supply price we were additionally charged 3.2 or 3.3p for the water supplied by United, whereas if we had accepted the common carriage we would have been on our own to go and buy that same water from United at possibly something up to 9p per metre cubed. That would have made us worse off and so we say that in those circumstances there were essentially two options for us at a non-abusive price. We could have then gone forward on the basis of a negotiated price with United or those self same services would in effect have had to have been supplied

to us by Dŵr Cymru at the self-same price and there was nothing compelling us to go ahead with the common carriage arrangement if it was in our economic interests to continue with the same arrangement at a significantly lower price for distribution and treatment.

I think the essential point you are being asked is why we do not recalculate that figure in some way to generate a profit figure, and I think the reason why we do not is because in our submission the only thing that would have changed under a common carriage arrangement from the perspective of Dŵr Cymru and Albion is that we would have been charged a lower price for treatment and distribution. The point we refer to at para. 26 of our skeleton is in principle it would be open to Dŵr Cymru to come forward and say that if you had accepted that you would have incurred some additional costs, but we say that that is a matter for Dŵr Cymru to put forward in defence, and we do not necessarily accept that as a matter of fact. We do not see why, at the stage of pleading that we should, as it were, speculate as to additional costs or any reductions in our margins that would have been achieved. On the face of it all that would have change was that we would have been charged a lower price for treatment and distribution.

THE CHAIRMAN: This treatment and distribution charge that you are talking about, that is part of the common carriage or is that the whole? It may be that my unfamiliarity with nomenclature in this case.

MR. THOMPSON: It may assist if we simply look at two rather simple documents.

MR. VAJDA: My understanding is that that is the whole of the common carriage, the distribution and partial treatment.

THE CHAIRMAN: Well can we call things by one tag please, otherwise we are going to get more confused. Is this the point then, that the bulk supply price was 23.2p

MR. VAJDA: It was 26.

THE CHAIRMAN: The bulk supply price was 26p per cubic metre – Mr. Vajda may take issue with this – but suppose we found or we were bound to find that the reasonable common carriage price was 14.4p. In order to supply Shotton Paper you would have to add to that 14.4 the cost of the water at some price, we do not know what it would have been, and something for overheads, I do not know whether there would have been any, but an amount "X" for additional costs over and above common carriage and water; you may say they were zero, they may be something. That then gives you what it costs you to supply Shotton Paper. You supply Shotton Paper, let us say they would have been prepared to pay – what did they actually pay you? They paid you over the period is that a publicly known amount?

MR. THOMPSON: Effectively the same amount as we were charged by Dŵr Cymru but they paid us a subvention for a while initially of 3p and then 1½ p and part of our claim, which I do not think we need to worry about today is that in a sense we will have to pay that money back and so we have not included that in any credit or ----

THE CHAIRMAN: All right, so if, in 2001 you had been offered a common carriage price of 14.4p you would have gone to United Utilities, negotiated some price for the water and you would have supplied Shotton Paper and you would have been making a certain amount of money over that period?

MR. THOMPSON: Yes.

THE CHAIRMAN: What in fact happened was that you had to buy both the water and the common carriage from Dŵr Cymru at the bulk supply price which was 26p or as reduced by the Tribunal under its interim measures – let us say it was an average of 23p over the period.

MR. THOMPSON: Yes, well obviously for the period from March 2001 until the Tribunal became involved there was no question of interim relief, it was simply a question of the support from Shotton.

THE CHAIRMAN: Averaging the bulk supply price over the period, let us say it was 24p and then you sell that to Shotton Paper for the same amount over the period, so you would say "We have made less money". I do not understand at the moment why that is not the quantification of your loss, and why the quantification of your loss is instead the difference between the 14.4 and the 23.2 which was the FAP.

MR. VAJDA: The figure is 8.8.

THE CHAIRMAN: Why is that 8.8, because you never paid the FAP.

MR. THOMPSON: I think it may assist – I think it certainly assisted your predecessors in this role – if we look at the actual offer that was made by Dŵr Cymru, or at least the predecessor to it which was the notification to Ofwat, which is at tab 8 of the third bundle that was put in.. It is a letter to Julie Griffiths of Ofwat, and there is an explanation of the common carriage price, but if one turns through you find some schedules, in particular schedule A. You will see that the Albion common carriage price, if you have it, in the table is exactly the same as the treatment and bulk distribution element of what is called the large industrial non-potable charge. The resource cost is slightly higher because it is an average figure, I think. But the basic point is that the common carriage price that was offered to Albion was simply the treatment and bulk distribution elements of the total price that was charged by Dŵr Cymru to its large industrial customers. So the point we are making is simply that that 7.2 and 16 numbers were wrong and should have totalled somewhere in the region of 14.4

as found by the Tribunal. What actually happened is that we paid essentially the non-potable column only with the resource cost being the actual resource cost paid to United rather than that average figure. So we simply overpaid by precisely the amount that was found by the Tribunal in the excessive pricing judgment, and so our claim is precisely for that sum. It is not a question of muddling up what the abuse was, it is simply saying what was the cause or consequence of the over charge, it was the very same overcharge that would have been the case if we had accepted common carriage ----

THE CHAIRMAN: But if you have accepted common carriage, you would not have necessarily been able to buy the water from United Utilities for the same amount as Dŵr Cymru.

MR. THOMPSON: That is true so if and when Mr. Vajda pleads his defence he may well say that it would be 9p and I think we have put in footnote 4 that even if it were 9p we would still have a claim of £200,000 a year but we would strongly argue that it should not be 9p because United would itself have been subject to the Chapter II prohibition and they would have needed to explain why it was that having supplied Dŵr Cymru at 3p for years it suddenly wished to charge a very small market entrant three times as much for exactly the same water. So we certainly would not accept that anything like 9p should be the number that should be put into the box.

THE CHAIRMAN: I quite see that. We do not know, in fact, what United Utilities would have charged you, but I do not see how you can say that the overall bulk, putting aside the question of whether this was an infringement found by the Tribunal and putting aside therefore Mr. Vajda's actual point, how you can disaggregate elements within the bulk supply price and say that some elements are abusive, and that you are then entitled to a reduction because of that and yet with the other element you assume that it would be the same?

MR. THOMPSON: It is more straightforward if I may respectfully say so. There were specific findings made both in relation to partial treatment and distribution at some length in the judgment of the Tribunal in the excessive pricing judgment, and those very same services were provided by Dŵr Cymru under the bulk supply agreement, and we are simply saying that those were overcharged for. The position is not quite as the Tribunal has put to me because there was no obligation on us to enter into the common carriage agreement. Supposing United had taken the same stance as Dŵr Cymru and had said we are going to charge 9p and you can complain to the Tribunal. We have been fighting two appeals, maybe still going on. In my submission we could perfectly well have carried on under the second supply agreement, and in those circumstances the charges for distribution and partial

treatment would necessarily have been the same 14.4p because it was exactly the same services provided by the same dominant supplier and it would have been abusive for them to have charged more for those services in the context of bulk supply than they charge in the context of common carriage.

MR. MATHER: So when it was argued against you that you were wrongly reading across from one category to another, your argument to us now is that you are not actually reading across, these figures are one and the same.

MR. THOMPSON: Indeed, and that was the finding of the Tribunal in its first incarnation under Sir Christopher Bellamy in the further judgment, and we have given a number of references to that, that they were identical prices subject only to the elimination of the resource costs, and that was not some coincidence, it was because they were for the very same services.

MR. MATHER: And these figures have been provided by Dŵr Cymru in the schedule to Ofwat?

MR. THOMPSON: Yes, and they have also been explained by the managing director of Dŵr Cymru. One finds that at tab 11 in the same bundle, on 10th August 2001, on the third page Mr. Brooker says:

> "As a result of the pricing methodology adopted by Dŵr Cymru there is *consistency* between the common carriage price offered to Albion Water and the bulk distribution and non-potable treatment components of the prices charged to other customers. In particular, the proposed access price for common carriage has the same basis as the current bulk supply price for the inset appointment to the Shotton Paper site, less the water resource component. … There are no material differences from the supply characterisation of the proposed common carriage arrangement as compared to the 1999 bulk supply arrangement."

So at that point Dŵr Cymru was making a positive virtue of the fact that it was exactly the same.

THE CHAIRMAN: Nonetheless, the actual bulk supply price is a price that is offered for the whole supply and it may be built up of different elements, but it is not open to you to pick and choose which elements of that you receive. I am just struggling with the idea that you can characterise a price as being abusive because some of the costs that go to make up that price are overcharged, even though there is no finding that the price overall is an excessive price, I think that is what I am struggling with.

MR. THOMPSON: We are not saying that the second bulk supply price was abusive. What we are saying is that we were overcharged for treatment and distribution for the reasons set out in detail in the judgments of the Tribunal.

MR. MATHER: The only other element is the water itself, the resource, there are no other elements lurking about in this?

MR. THOMPSON: It appears, I think it is para. 114 of our particulars of claim. We note that once the wind started to blow somewhat against Dŵr Cymru in this Tribunal they suddenly discovered that it cost them £1 million a year to provide a back up supply. We found that a rather convenient discovery for them to have made and have contested it and, so far as we understand it, Ofwat currently does not intend to allow anything like that sum. I think Mr. Vajda referred to the back up supply charge, and I think in November 2007 Dŵr Cymru suddenly discovered that they should be charging us £1 million a year for a back up supply which they had previously provided without charge.

MR. VAJDA: Just in relation to Mr. Mather's question I did take the Tribunal this morning to para. 30 of the remedies judgment, which is a clear statement, the parties agreed that there were four elements, one of which was the back up so it is not just the water resources.

THE CHAIRMAN: Yes, go on.

MR. THOMPSON: Essentially, and I think it was a point that the Tribunal was impressed by at the stage of the further judgment, the only difference between the bulk supply price and the common carriage price, and one sees that from the box we just looked at, was the exclusion of the resource cost, and I do not think this is referred to in our skeleton argument, but it is set out in some detail in the further judgment at paras. 260 to 268 and then at 330 and 335. The reason the Tribunal looked at that point was that it was in the context of remitting the matter back to the Authority and the relationship between the findings that were going to be made by the Authority in relation to excessive pricing and the findings in relation to the bulk supply price, that is pp.88 to 90 of the further judgment. For example, at para. 262:

> "In those circumstances, the determination of the Bulk Supply Price and the investigation of the costs to which we have already referred will, to a large extent, cover common ground. A different time period is unlikely to affect the underlying principles."

Then they refer to the letter which I have referred the Tribunal to at para. 265, and summarise it at 264:

> "… it is plain on the evidence before the Tribunal that, historically, the Bulk Supply Price was set on the same cost basis as the First Access Price."

Then the conclusion at 268:

> "That correspondence shows very clearly that the existing Bulk Supply Price and the First Access Price were arrived at on exactly the same basis, the latter being arrived at simply by deducting the water resource cost from the former."

So they were in effect exactly the same, and that was the finding of the Tribunal. I think this is not controversial but the first access price was set at a level that rendered Albion's common carriage proposal hopelessly uneconomic. One finds that, for example, at 102, 229 and 230 of the main judgment and was indeed recognised by Dŵr Cymru itself in its internal minute which one finds at tab 7 of the third bundle – so just before the document we were looking at already. It is a minute of a meeting that was held just before the access price was offered, and the last page of that minute under paras 5.5 to 5.7, under the heading "Consequences", Dŵr Cymru's internal management say:

> "On publication, these prices will be the Dŵr Cymru Common Carriage prices. The price is based on whole company average prices and is therefore not particular to the Ashgrove application."

Then they go on:

> "The quantum of the prices means that Envirologic cannot beat the current price they are paying for the bulk supply of Shotton Paper, especially if North West Water …"

That is now United

> "… charge their indicative price of 9p/m^3 for bulk supply at Heronbridge. It is therefore to be expected that Envirologic [Albion] will lodge a formal complaint with Ofwat."

So it was recognised throughout that the common carriage proposal was dead, and that is how it is put at para. 772 of the main judgment which is quoted at paras. 287 to 289 of the further judgment at tab 12, pp. 95 to 96.

Going back to the little note, and I think this deals with the point that is put to me. We say that it will be a matter for Dŵr Cymru's defence and evidence at trial whether the claim falls to be reduced by some degree by reference to any benefit obtained by Albion under the second bulk supply agreement, but would not have been available if Dŵr Cymru had not abused its dominant position.

We say that there is no reason why there should be such benefits. The only obvious one would be the resource costs, but we have two answers to that. First, we certainly would not accept 9p as the right figure and we would not necessarily accept that if we had been unable to agree terms with United that we could not have continued under the bulk supply

agreement, but with the distribution and treatment price at the non-abusive level by necessary implication from the first access price, because it was for the very same services. Had Dŵr Cymru agreed that 14.4p was the right price for those services in isolation in my submission they would have had no argument whatsoever why there should not be those prices as part of the bulk supply agreement. We set that out in some detail at paras. 23 to 26 and, as I think I have already referred to at footnote 4 to our skeleton, we point out that even if you assume that 9p would have been the amount we had had to charge there would still be a substantial claim for damages of about £200,000 a year, even on the most adverse assumption as to the United Utilities charge.

We also say that, given the common elements there is nothing that would have compelled Albion to have switched to common carriage if it was not in its economic interests to do so, given the common elements the non-abusive common carriage price would necessarily have led to a substantial and equivalent reduction in the second bulk supply agreement price and we refer in that respect to paras. 260 to 268 of the further judgment to which I have just referred the Tribunal.

I should perhaps say that we do recognise the need for some adjustment, and we have set that out in relation to interim relief at paras. 120 to 123 and 128 to 134 of our particulars, but we say it is a matter for Dŵr Cymru to show that any other adjustment is appropriate.

So far as the restitutionary claim is concerned, we say that that is conventional and conservative, although in a sense it does not add anything in quantum to the damages claim, it is simply that in this case we happened to have paid the money, that we say is excessive, to Dŵr Cymru so in one sense we are simply asking for our excessive payment back, but it is, in fact, the same amount of money as if we claimed it in damages, but in one sense it is a logical way of looking at the case but it is simply a restitution for money paid unlawfully and so we should recover that money. But it does not add a great deal to the case.

I think Mr. Vajda primarily relies on the *EWS v Enron* and the remedies judgment and so I need to deal with those. We say that *EWS* does not assist Dŵr Cymru for the reasons we set out at paras. 33 to 35 of our skeleton argument, and that is pp. 11 and 12 of tab 2. If we look at *EWS* briefly, I think it is important to emphasise, which Mr. Vajda conspicuously failed to do, that this was a case that turned on quite particular facts, namely that the claimant was seeking damages in relation to conduct that predated the period found to have been abusive by the ORR, and so in my submission it raised quite an acute problem of causation because it is difficult to see how events that took place before the abuse could

have been caused by the abuse. One sees that, for example, at para. 34, you see the submission made by Mr. Brealey:

> "The rule 40 application was based on the submission that the abuse found by the regulator consisted of the defendant quoting charges to the claimant from May to November 2000 which were discriminatory and uncompetitive. Mr. Brealey submitted … that the regulator did not examine whether the prices agreed in 1999 for the Edison flows and in April 2000 for the British Energy flows placed the claimant at a competitive disadvantage and were a market abuse. The fact that its finding that uncompetitive pricing occurred was limited to the period between May and November 2000 is sufficient in itself, he says, to indicate that it did not decide that the December 1999 and April 2000 contract prices were themselves an infringement."

So, in my submission, that approach, which was very largely accepted by the Court of Appeal makes it pretty clear what the basis for the judgment was, and you see that at para 40, for example:

> "But we are not concerned on this application with how the regulator should have approached this issue. The regulator expressly addressed the question of competitive disadvantage in its decision and made specific findings about it. The only question for the Tribunal … is whether the regulator made a finding of competitive disadvantage in relation to overcharging of the kind alleged in the claim form in these proceedings. In my view, it did not."

Likewise at para. 42 there is specific reference in the second paragraph quoted, B24:

> "The assessment demonstrates that, between May 2000 and November 2000 [the defendant] applied dissimilar conditions to equivalent transactions, with its customers for coal haulage by rail, and placed [the claimant] at a competitive disadvantage."

Then at paras. 50 and 61 the Court of Appeal draws its conclusions so, for example, at 50:

> "It is not possible to read these paragraphs as including a decision that the contract rates agreed in December 1999 and April 2000 were (when agreed or subsequently) discriminatory in themselves. The determination that the defendant pursued discriminatory prices against the claimant between May and November 2000 is sufficient in itself to exclude any such finding."

And then the same point is made effectively at para. 61, the reference to the dates being essentially conclusive. So we say the present case does not require any retrospective

causation argument, but I think under pressure Mr. Vajda effectively conceded that there was nothing in principle wrong with the case, the question is simply whether the abuses found in the two judgments to which I have referred in relation to charging for the distribution and treatment, and included in the first access price caused Albion loss and, if so, how much, during the period of the administrative and appellate proceedings.

We say there is nothing in principle in *EWS* that assists Dŵr Cymru.

Likewise, we say nothing assists out of the remedies judgment either in relation to the substantive scope of what was found, or in relation to the temporal scope. In my submission, it is perhaps slightly unfortunate that the words that were put into my mouth at para. 28 of the judgment are not actually quite accurate – I do not criticise – but it was in fact common ground that there had been no finding of abuse in relation to the second bulk supply price.

THE CHAIRMAN: Where are we now, sorry?

MR. THOMPSON: It is tab 15.

> "Albion argued, however, that while its complaint concerned the First Access Price these proceedings clearly show the lawfulness of the Bulk Supply Price is as questionable as the First Access Price … The argument is, in essence, that the Tribunal found the Bulk Supply Price was an infringement by necessary implication."

Then at 30, there is an agreement that: "… only two of the four elements constituting the Bulk Supply Price have been considered by the Tribunal …" If that is correct, and I am not quite sure why Mr. Vajda said that that point had been rejected, it was actually common ground that partial treatment and distribution or transportation were the only issues decided by the Tribunal.

THE CHAIRMAN: Just so I am clear on it. The cost of partial treatment and the transportation cost are the two elements of the bulk supply price, that they are the totality of the common carriage, is that right?

MR. THOMPSON: Yes. They are, in fact, the totality of what Dŵr Cymru contributes, because even under the bulk supply price the water comes from United Utilities.

THE CHAIRMAN: But the price of the water from United Utilities, they may say is something also they contribute. The third and fourth elements are the bulk supply price of the water costs and the ancillary costs?

MR. THOMPSON: Yes, and the ancillary costs, in our submission, are something of an afterthought. They were not really present in March 2001, but they became quite prominent in about November 2007.

The argument that the Tribunal found the bulk supply price was an infringement by necessary implication is not one I particularly recognise. The point that we were seeking to pursue was whether the scope of the Tribunal's jurisdiction was limited by the scope of the abuse, as found, or whether, as it had already found both in relation to its own interim powers and those of the authority, you could take a broader view of what was necessary to resolve the underlying competition issues. The Tribunal on that issue simply refused to generalise its findings at para. 1 of the declaration, which are, in fact, in general terms in relation to partial treatment and transportation, but limited its order to only common carriage and refused to entertain any control over those elements of the bulk supply price, distribution and transportation so far as they related to the bulk supply price, which is what Albion had been seeking. You see that at paras. 1 and 3 of the order.

The declaration is in general terms that:

> "… Dŵr Cymru abused its dominant position in the market for the partial treatment and transportation, via the Ashgrove system, of non-potable water abstracted from the Heronbridge abstraction point for supply to Shotton Paper … to charge a price for the provision of such partial treatment and transportation which:
>
> (1) was both excessive and unfair in itself; and
>
> (2) imposed a margin squeeze."

Then, when it came to the substantive order, the Tribunal limited its order to a rather limited restriction in para. 3:

> "Any common carriage access price offered by Dŵr Cymru to Albion … not exceeding 14.4 p/m^3 … shall not be conduct having the same or equivalent effect as the infringement identified in paragraph 1 of this Order."

We argued that the common carriage access price was not the only relevant target and that they should have controlled the distribution and treatment elements of the bulk supply price because we said that that was effectively within the scope of the substance of the abuse. In my submission, that does not assist Dŵr Cymru in arguing whether or not the losses in this case were caused by the abuse as found.

The other important point is the temporal scope point. Although Mr. Vajda took the Tribunal to paras.41 to 43, as I understood it, he was inviting the Tribunal to find the last

sentence of 43 where it says, "We have decided that our Declaration will omit any temporal aspect", that that should be interpreted as meaning, "We have decided that our Declaration will include a restrictive temporal element". As I understood it, Mr. Mather was putting that to Mr. Vajda by reference to the terms of the order as made, and whether or not there was significance in the brackets. In my submission, it is quite clear from paras.41 and 42 that there were submissions made on both sides. Paragraph 41 is very much the same point that I have put to the Tribunal now by reference to the findings of continuous breach, in particular in the further judgment, the six years and the "is" and "was", whereas Mr. Vajda made some rather different submissions about the position ongoing. No findings were made on those competing submissions and the Tribunal deliberately excluded any finding as to the temporal scope of the decisions.

THE CHAIRMAN: Where does that leave us in terms of s.47A in so far as the period over which we can consider the loss suffered by Albion if there is no finding by the Tribunal as to how long the abuse lasted? Mr. Vajda says there is a finding, the finding is that it was as at March 2001. I think you are saying there was no temporal aspect to it, either in terms of a limit or in terms of a time period, but in order to quantify a loss there has to be some temporal aspect. One has to multiply the figure per cubic metres, whatever we decide that is, by something, by some volume of water supplied over some period. How do we decide how much water, how much of Albion's business, has been affected by this abuse?

MR. THOMPSON: We make two points. First of all, we say that in the further judgment, in particular at paras.287 and 343, the Tribunal did make findings that the abuse was ongoing, and that is presumably why the words "is" and "was" were used and why Dŵr Cymru is now obstructed for six years, why that expression was used. It was not the fact that Dŵr Cymru had quoted a price in March 2001 and then the music had stopped. The reality was that this was an ongoing issue and that Dŵr Cymru never changed its position. I think, Madam Chairman, you put that to Mr. Vajda, was it necessary for us to go back every day and say, "Are you going to change your price today, are you going to change your price tomorrow, are you going to change it next week?" The reality was, Dŵr Cymru knew very well that this was a matter under challenge and they never offered us a different price.

THE CHAIRMAN: But Mr. Vajda answered my question by pointing to something in your notice of appeal in the earlier proceedings, in which you seemed to say that they had at some point offered you a 17 something pence p/m^3. What concerns me is that if, during this substantive hearing case of this case, we have to hear evidence as to whether or not there were offers of a reduced access price at some point along the way or were there offers, were

they realistic offers, for how long were they available, and was that price that was then offered also abusive? Is that taking us beyond the actual findings from which compensation is supposed to flow?

MR. THOMPSON: In relation to that specific issue, I think the Tribunal will have noticed that this was actually some information that was given to Ofwat rather than to us. So far as I am aware no offer was ever made for a different common carriage price to us, and indeed at the time of the October 2006, or possibly after the December 2006 judgment, the Tribunal Chair, the President, specifically invited Dŵr Cymru to take part in a mediation conducted by David Edward, the former Judge at the Court of Justice, with a view to resolving this matter, and Dŵr Cymru consistently refused to do anything of that kind. The only time that we have been offered a different price was after the unfair pricing agreement when this 14.4 figure was effectively agreed between us as a reasonable average of the three prices found. The suggestion that Dŵr Cymru was offering other prices, possibly non-abusive prices, to us during the period of this case would have come as news to Sir Christopher Bellamy in December 2006, and came as news to us. The mere fact that from time to time figures are put to Ofwat as part of its regulatory function, rather than in terms of offers to us, in my submission is neither nor there. Of course it is open to Dŵr Cymru to advance that as a point of fact, but at the moment we see nothing in the evidence that we are aware of that casts doubt on the way that we put the matter, which is that it was simply taken forward subject to indexation from month to month and year to year.

We would not accept that the temporal issue is all or nothing, because, in essence, this whole unhappy saga was triggered by the offer that was made in March 2001 and the complaint was made on the basis of that and defended on the basis of that. All the causation and everything that has happened since then essentially flowed from that event. In my submission, the onus, and indeed the commercial possibility, was obviously for Dŵr Cymru to resolve this at any time. They could have changed the position, they could have made a different offer, they could have given commitments of Ofwat. They may say, "That is all right because Ofwat did not mind". The reality was that this was all within their control and they never sought to change the position.

I see the time. I think I should say about the consequential loss claim and the exemplary damages claim. In relation to the consequential loss claim, we say that it is a conventional claim. I think, to some extent, that was accepted by Mr. Vajda.

THE CHAIRMAN: This is the Corus point?

MR. THOMPSON: Yes, subject to issues of fact and causation, and we set it out at paras.57 and 58 of our skeleton by reference to paras.109, 125 and 62 of the particulars, and the letter setting out greater details of 20th August, which is at tab 10 of the Dŵr Cymru bundle. We say, and this is our tenth bullet point, that the claim is conservative, both in scope and quantum. The scope issue comes both to personal and geographic scope and also temporal scope. I do not know that this actually challenged. It was not at the forefront of Mr. Vajda's case. I am not quite sure what his objection was to the Corus claim. At one point he referred to a letter that I had written which included the words "and Corus" in part of the declaration. In my submission, that really does not go anywhere because that wording was simply taken from para. 116 of the further judgment, which is at tab 12, p.39, which sets out the market on which Dŵr Cymru was said to be dominant, which was said to be the market for partial treatment and distribution on the Ashgrove system to Shotton and Corus. That is why that wording was used, but when Mr. Vajda's clients, perhaps not surprisingly, threw up their hands in horror the words "and Corus" were taken out. It was simply a question of what the market was in which Dŵr Cymru was dominant, and that was the finding that the Tribunal made.

So far as the scope of the consequential claim goes, it is obviously limited to Corus, whereas, for example, at para. 11 of the main judgment the Tribunal expressed concerns about the implications of this case for the wider market. I do not think it is necessary to turn it up, it is p.3 of tab 11.

In terms of geographic scope, it is also conservative, and one sees that, for example, from the letter to which we refer which is at tab 3 of the first bundle, p.52A. That is the annex to the claim form, the last page of the tab. You will see that the request is for us to confirm that we are "able to bid for the supply of water to three of our larger plants situated in Wales, namely, Llanwern, Trostre and Shotton". I think Shotton was the second largest, but these are all substantial plants and the request was in relation to all three, whereas our claim, of course, is limited to Shotton. The same point emerges from the litigation that is referred to in our particulars of claim, and the judgment is at the back of the third bundle, litigation between Dŵr Cymru and Corus, about the introduction of much higher prices with effect from 1st April 2004. We find that at tab 22 of that bundle, and in particular at paras.1, 4 and 6 of the judgment. It is rather small typing, but one sees reference in para. 1 to:

> "The defendant operates steel processing businesses at three sites within that area, namely Shotton … Llanwern … and Trostre … (together the 'Corus Sites').

> Dŵr Cymru's claim is for payment of outstanding charges for water it has supplied since 1st April 2004 to the Corus sites in Wales …"

So what happened in parallel to the appeal proceedings was that there was a battle between Corus and Dŵr Cymru about these very same prices. You will see on p.3 of that judgment, para. 16.4.2, that the charges that Corus thought were appropriate were very substantially lower than those that they were being charged, Llanwern, 4.8p, Shotton, 3.7 and Trostre, 4p. So, in my submission, there is certainly a case that we were excluded from a much wider market, but we have limited our scope to the Shotton case, and we have also limited it from 1st April 2004 for the reasons set out in our skeleton.

So far as quantum is concerned, that is explained in some detail at para. 67 of the skeleton argument by reference to the letter which appears at tab 10 of the first bundle. It may be worth just looking at that for a moment. It is really pp.2 and 3, this relatively complex table, but the gist of the point appears in the paragraph following the table. It may be worth looking at column F, but for the purposes of this claim we have accepted the United Utilities' resource cost as 12p and then rising to 13.25p. Given the figures for Dŵr Cymru there would nonetheless be a substantial margin at a competitive price for common carriage. We then say:

> "The key finding from this exercise is that the available margin (notwithstanding United Utilities' very high bulk supply price) is always greater than the highest claimed necessary margin of 5 p/m^3. It should also be noted that the margin (post 2007/8) is sufficient to cope with any errors in the indexation of United Utilities' bulk supply price. The implications of this analysis are that there would have been an adequate margin for our clients and a price incentive for Corus, even allowing for further Heronbridge cost increases."

This is, as it were, setting out the workings of the figures that appear attached to the particulars of claim, and the point that we make is that we have made a number of conservative assumptions in relation to quantum for the purposes of this claim.

THE CHAIRMAN: It does still depend on the assumption that the access price, the common carriage price, which you would have been offered for supply to Corus/Shotton would have been the same as the access price which was found to be abusive by the Tribunal?

MR. THOMPSON: We have two points on that. First of all, these were the very same services and it was the same pipeline and the same treatment, so they would have been obliged by principles, I think, of regulatory law but also under Chapter II to have offered the same prices for the same services and indeed to the same customer, namely us.

The other point, and we make it by reference to the document that we looked at briefly, the internal minute from, I think, February 2001, one sees it in the little box that we looked at as well, that the basis for this common access price was stated to be common not only for Ashgrove but to be the common carriage access price for the whole of the Welsh water area, and the justification for it that was put to the authority was that this was the common carriage price for all purposes. So the suggestion that some other higher common carriage price might have been charged to us in relation to Corus is simply fanciful and excluded as a matter of law.

Madam, so far as it is a question of a temporal issue, I think the Tribunal already has my submissions on that, that the Tribunal found that it was an ongoing position that Dŵr Cymru could have, but never did, remedy throughout the administrative or appellate proceedings. Indeed, it stubbornly refused to do anything of the kind.

I see the time, so I should say something about the exemplary damages claims, which is an important part of the case. We say that it is a strong case as a matter of fact and falls squarely within the scope of the cynical disregard and the profit in excess of any likely loss points made by Lord Devlin in the classic statement in *Rookes v. Barnard*, and one finds that at paras.39 and 40 of our skeleton, and the points that we set out in some detail at para. 50 of the particulars of claim. We also rely on this again in the internal memo where Dŵr Cymru clearly recognise, even before it offered us the price, that the effect of that price would be kill off the prospect of common carriage, which I think was the only independent common carriage application that had at that stage ever been made within the UK water industry.

We say that it is a strong case as a matter of fact. The essential question, is the claim contrary to the principles outlined by Mr. Justice Lewison in *Devenish*, and we say it is not, either on the terms of the judgment or any *obiter dicta* in the judgment or as a question of principle. The Tribunal has obviously looked at the judgment with some care already, but I think it may be worth just turning it up briefly. It is at tab 20, paras.40 to 52 of the judgment in particular. I do not think para. 52 was particularly emphasised by Mr. Vajda, but, in my submission, the finding in the judgment is quite clear and says:

> "… the principle of *non bis in idem* precludes the award of exemplary damages in a case in which the defendants have already been fined (or had fined imposed and then reduced or commuted) by the commission."

That was the finding and does not cover the present case because this is not a case where a fine has been imposed, or where it has been imposed and then commuted.

We say, as a question of *obiter dictum*, there is a reference to the more guilty, less guilty point, and we say that there is nothing for Mr. Vajda to find in that *dictum* here. There is no finding that Dŵr Cymru was less guilty than somebody else, for example Severn Trent or United Utilities. On the contrary, there are some fairly stern adverse findings peppered throughout the relevant judgments. So we say there is nothing in the *obiter dictum*.

Mr. Vajda eventually has to resort to a point of principle saying that there must be some underlying principle here which excludes follow-on actions generally, just because there was a sort of potentiality for a fine to be imposed. We say it is not really a question of principle at all, it is really a question of fact. As I think the Tribunal has put to Mr. Vajda, and as I have just said, as a question of fact there is nothing to suggest that there is any less guilty issue here.

If you look at the question of principle then, as I think, Madam Chairman, you put to Mr. Vajda in argument, it is difficult to control the principle that Mr. Vajda seems to want to rely upon because there is at least a contingent exposure of anybody to a fine, including when you are the defendant in an action for damages in the High Court, so why is exemplary damages not excluded in such cases. Just because the OFT has not got round to pursuing this particular case or has decided, in the exercise of its discretion, that its resources do not justify pursuing this case, why can Mr. Vajda not turn up and say, "Well, this cannot be a very important case because the OFT did not pursue it and therefore there should not be a case of exemplary damages". This is an even weaker case, the OFT has not even got round to starting proceedings.

We say that one can see the good sense of the principle laid down by Mr. Justice Lewison where a fine has actually been imposed, and one might extend it to the case where a very trivial infringement or novel infringement has been found and no fine has been imposed, whereas, as it were, the regulator has gone through the full process of saying, "Is this a reason why a fine should be imposed?" Then, as for policy reasons, said, "We do not think in this novel case there should be a fine". But that does not cover the case where, for whatever reason, the regulator has not even addressed their minds to the point.

Here one has the unusual situation, which I think could not arise in an EC or EU context, of the regulator making a mess of it, and therefore not thinking of imposing a fine because they have not even spotted that there are two abuses here.

Then the matter was battling up and down the Tribunal for a period of years under a separate regime which does not naturally fit itself to a fine because at the initial stage no infringement had been found, and then the Tribunal neither remitting the matter of a fine

back to the regulator, nor claiming or even considering the question of whether it has jurisdiction to impose a fine during the appeal proceedings, and then Dŵr Cymru coming along and saying, "There must be some sort of implied finding either by the regulator or by the Tribunal that this was not a serious enough case for a fine". In my submission, both as a matter of principle and as a question of fact, there is nothing to exclude exemplary damages in that rather exceptional situation.

Likewise, we say there is nothing in *EWS* to exclude this possibility, or indeed in *Devenish*. On the contrary, in *Devenish* there is express recognition in a passage that Mr. Vajda did not take the Tribunal to in the judgment of Lord Justice Longmore, which is at tab 20, para. 143, p.65 of the print-out. As I think Mr. Vajda recognises, this is not a case about exemplary damages, it is a case about an account of profits going beyond damages caused. Lord Justice Longmore says:

> "There are also some instances when a claimant can recover more than his loss. The most obvious example is a case in which a claimant is entitled to exemplary damages which are intended to penalise a defendant for tortious conduct, particularly if he has calculated that the profit he is likely to make from his wrongful conduct will exceed any damages for which he is likely to be liable to the claimant within the second category of such of damages identified by Lord Devlin in *Rookes v. Barnard* …"

In my submission, that is hardly a strong ground for suggesting that there is something wrong in principle for exemplary damages in this case.

So far as *EWS* goes, in my submission, there were two points that the Court of Appeal was making in that case: one, that the Tribunal had to be careful not to expand the scope of the abuse and to use findings of fact, which have not been found to constitute abuse as the basis for a follow-on action, and one can see the good sense in that and that the particular facts of *EWS* were quite a strong example where effectively the Tribunal were being asked to go back in time behind the period of the abuse.

The second point they were making was that the point of the s.47A jurisdiction was, in general terms, to provide a relatively quick and simple way in which damages could be recovered in a follow-on case. Normally the implication of that is that there should not be complicated points of law, but I do not think it would be fair to suggest that the Court of Appeal was saying that that could never happen, and one can think of at least two examples where it might happen. It is well known that there are issues about pass-through damages and whether or not they are recoverable. Those issues have only been partially addressed

by the English courts so far and one could well imagine that difficult points of law might have to be resolved by the Tribunal in that sort of area.

The other area is precisely the one with which we are concerned today, namely the scope of exemplary damages in competition cases, where again the case law to date in the English courts, and I believe throughout Europe, is very sketchy and where, Madam Chairman, you have already put it to Mr. Vajda that the Court of Justice in *Manfredi* has at least left it open by saying that indeed there must be a claim for exemplary damages for breaches of EU competition law where that is available for other breaches of law under the domestic system. On the face of it, that would suggest that there has to be, at least in EU cases, the possibility of exemplary damages in this jurisdiction in follow-on actions after an EU infringement because they are available for other forms of infringement, and so the suggestion that that gives some support to a wide reading of the judgment of Mr. Justice Lewison is, in my submission, impossible, and even more so in the domestic context where those principles have been set out in a rather more limited way by the domestic courts.

We say there is nothing either in the judgment of Mr. Justice Lewison in *Devenish* or of the Court of Appeal or of the Court of Appeal in *EWS* that suggests that the exemplary damages is contrary to principle in this case or must be excluded as a question of principle rather than debated on the facts.

I think that covers most of the points. The question of aggravated damages sits ----

THE CHAIRMAN: Just on exemplary damages, there was the other point that Mr. Vajda made which is that where exemplary damages may be available in a follow-on action brought in the High Court, but it is not available in this Tribunal because the wording – I think this was the point – of s.47A, which confers our jurisdiction, refers to compensation for losses and damage arising out of the infringement, and exemplary damages is not that.

MR. THOMPSON: I think the wording of 47A, in my submission, is rather unpromising for such a submission, if we look at it for a moment. 47A(1)(a) and (b) are in very wide terms.

> "This section applies to – (a) any claim for damages [unlimited], or (b) any other claim for a sum of money, which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom."

So the gateway, as it were, is that the person must have suffered loss or damage as a result of the infringement of a relevant prohibition, but subject to that they can make any claim for damages or any other claim for a sum of money which they can make in civil proceedings brought in any part of the United Kingdom. On the face of it, it is a total nonsense, what

Mr. Vajda is saying because he is now saying that in the High Court you can make such a claim, but for some reason this statutory wording which says that any claim that can be made in the High Court can also be made in the Tribunal for some reason cannot be made in the Tribunal because of this very statutory wording. In my submission, that is just a nonsense as a matter of construction.

The only other two points are the question of aggravated damages. The references are para. 64 to 72 and 135 to 6 and 137.2 of the particulars of claim. That is pp.24 to 31 and 46 of tab 3. So far as we understand it, there has been no challenge to that, as a matter of principle, although Mr. Vajda held his fire on that, but it is rather late for him to do that. So far as we know, we have seen no challenge to it at all.

The only other point I thought I should perhaps mention is the position of Shotton Paper. That may be a question for ----

THE CHAIRMAN: Just on the aggravated damages point, whether or not Mr. Vajda chooses to hold his fire, I should perhaps indicate this, that as far as the Tribunal is concerned, we do have some concerns about the scope of the claim for aggravated damages. Those concerns are both legal and practical – legal in terms of the fact that the sole claimant in this case is Albion Water, and not the individual directors, and it seems to us questionable at the moment whether some of the losses claimed are truly losses of Albion rather than of the individual directors, and also whether there are *Prudential Assurance v. Newman* types about double claims for doubling up of claims of loss of the company and loss flowing from that to the directors. So there are those issues.

In practical terms, there is also the risk that any substantive hearing of this case, where the focus should be on the quantification of the loss which we have so far debated today, depending on what survives from today's proceedings, whether those points are going to be dwarfed by all sorts of factual and legal issues raised by the numerous grounds on which aggravated damages are sought. We are concerned that the way that the case is pleaded at the moment on aggravated damages threatens to unbalance and prolong these proceedings in a way which is rather unhelpful.

I do not want you to respond to that on your feet. It is not a point that Mr. Vajda has made. Since you alluded to it, I wanted to make those points for you to consider in due course.

MR. THOMPSON: I think I would say, if I could maybe by way of preliminary response although I will obviously be given instructions on it, I do not think it was ever envisaged that this would, as it were, be almost like a personal injury case that all sorts of complicated questions of fact would need to be taken into account. I think it was more that in the

Tribunal assessing this case, which I think at all stages, by the Court of Appeal and everybody else, has been seen as a most extraordinary David and Goliath type case, the features of this case not only involved, as it were, the corporate David and Goliath, but also the personal costs to three individuals who are, in reality, the entire substance of the company. In those particular circumstances, it seemed to us appropriate, whether as an aggravating aspect of the exemplary damages claim or as an aggravated damages claim pure and simple, to bring those issues to the attention of the Tribunal. They have been pleaded in that way and what I would envisage is that there would be witness statements explaining those things for those three individuals, and the extent to which any cross-examination would be necessary in relation to those points I do not know. Hitherto, when Dr. Bryan or Mr. Jeffery have made witness statements, both the authority and Dŵr Cymru have been rather chary of actually challenging them on that. Whether they would take a different approach here, I do not know, but we certainly would not intend this to be a major side show in a competition case. I will certainly take the points of law and also the point of principle on board in any future conduct of the case.

THE CHAIRMAN: Yes.

MR. THOMPSON: I was going to mention Shotton Paper. Perhaps it is not necessary to do so, because presumably if this case goes forward there will be a defence and then some sort of case management conference. The issue of whether or not Shotton Paper needs in some way to be represented before the Tribunal, particularly on the issue of the pass-through element because the Tribunal will have seen that there is a 70/30 split, and also there is the payment that Shotton Paper has made which we are claiming as part of the recovery, we say there is no real need for Shotton Paper to be here because those contingent liabilities, the repayment of the money and the 70/30 split, are effectively part of the costs to us of this litigation and are recoverable and we should not be out of pocket in those respects, and so we claim them on the basis that we will be liable for them. It is obviously a matter that the Tribunal may in due course wish to consider.

The other point is a question of pleadings. It has been at the forefront of Mr. Vajda's case, and I think it was at the forefront of the Tribunal's questioning of me, and I apologise if I did not make my position as clear as simple as I might have done. The one issue that I think we have been concerned with and which perhaps is a useful aspect of this application is whether or not our positive case is sufficiently clearly stated in the particulars of claim. I do not know whether that is a concern or whether the Tribunal considers that the particulars are sufficiently clearly formulated. It is just that you question whether or not they are correct as

a matter of principle. What we did do in the light of the concerns that have been expressed is prepare a positive statement which could go in or around 105 of the particulars of claim. I do not know whether it would be helpful for me to hand it up to the Tribunal, or whether it is, it is a matter of question how this —

THE CHAIRMAN: I do not really want to go down that route, I think. I think either you are applying to amend your particulars of claim, in which case I think it is, now is not an appropriate point at which to make such an application, or else you are not. But, let us not confuse matters. Let me just say that as far as I am concerned, today's discussions have clarified for me what your case is and how it is in fact being put; and we will have to decide whether we think that that is a correct way for it to be put. What the outcome is for your pleading, once we have decided all the matters that we have to decide today I think, as Mr. Vajda said, is something that we will come to as a second stage.

MR. THOMPSON: Yes, indeed. I mean, in that case I will simply say, as it were, in closing because obviously the compensatory claim is the core of the claim, the way that we are putting it is that in the absence of an abusive price or in the presence of a non-abusive price, which we say would have been 14·4p or thereabouts, we would have effectively had two commercial options from March 2001 onwards. One would have been to negotiate with United Utilities as was originally envisaged and, if we could achieve acceptable commercial terms, to have gone forward on that basis. And we say from that point of view, we pleaded it on the basis that we would have been able to effectively achieve the same price as we impliedly paid under the bulk supply price, but we recognise that there may be some issues of fact on that. But the alternative, and that is most clear, if United had not shifted at all and still stuck at the 9p, there would have been a strong commercial incentive for us to go ahead under the bulk supply agreement, but on the basis that the distribution and treatment costs were substantially lower than they were, and we say on that basis we would have been 8·8p/m³ better off for the period. And so we say either way the claim in terms of 8·8p is properly brought, though we recognise that our Dŵr Cymru in its defence may seek to argue that we had some contingent benefits from the way that things went forward; and that either because we would have had to have paid United Utilities more money for the water or because of some other aspect of the factual situation as it would have developed, that maybe we would not have got the full 8·8p, but we say for the purposes of our pleading that is a proper way to put our case. Can I just see if anybody wants me to say anything else?

THE CHAIRMAN: No, thank you very much, Mr. Thompson.

MR. THOMPSON: I am grateful.

MR. VAJDA: Madam Chairman, I hope to finish by four-thirty, if I am permitted ten or twelve minutes. First of all, to sum up about this application, Mr. Thompson suggested that this was now just "now", and I stress the word "now" just a pleading point. It has always been a pleading point. I am not going to, in view of the time, take the Tribunal to this, but I would ask the Tribunal to look at our application which is in bundle 1, flag 4, and you will see that we have taken there precisely the points I have taken today, and I have made the point this morning, because of the statutory jurisdiction of the Tribunal one has to examine the pleading very carefully. So, that is the first point.

Coming, now, to the Shotton Paper claim, which is where you have the overcharge in relation to the bulk supply, there are three simple points here. Point number one which is accepted, there was no infringement found in relation to the bulk supply price period. Point two, Mr. Thompson cannot say that the bulk supply price is excessive without a finding of a new infringement. He said, and I noted it in the course of this afternoon, "restitution for sums paid unlawfully". The question is, why were they unlawful? The best that he can do is say, "Well, there is an element of commonality, the partial treatment and distribution". But that is not what he was getting. What he was getting was the bulk supply price. And that is my third point, which is why this case is irretrievably bad as pleaded, because he did not pay for partial treatment and distribution, he paid for the bulk supply price. And that is the end of the case as pleaded, it is as simple as that.

And, of course, it is not for me to speculate as to why, if you like, a conventional damage claim along the lines that you, madam Chairman, suggested he might bring and possibly, may be, in his back pocket as I speak. He has not done so, and what he has done is, he says "It is overcharge, it is an unlawful over charge. I want my 8·8p difference", and we say that basis is flawed. And that is all I need to say on bulk supply.

Just on the law, if we go back to the *EWS* case, it is wrong to suggest that that case was all about a temporal point. That is not right, and if I could just trouble the Tribunal very briefly, that is at bundle 2, flag 21. It was also, if you like, a read-across point. And we see that if one looks to p.40 and 41 of the decision, where Lord Justice Patten quotes from the *Office of Rail Regulation* and it is B21 of the decision, and it is particularly B21(c) where there was a debate.

> "During the same period when active contractual negotiations between the two parties ceased, and the claimant was not offered price reductions similar to those offered to other customers of the defendants".

The point in that case was, true it was, that they were contracts that were entered into in December 1999 and April 2000, which is before the relevant infringement was found, but the question was whether when those contracts went on, the same reduction should have been offered as a result of the contract, and the answer was no, that was not the case, and one sees that from para. 56 of the judgment at p.47 and you see there Lord Justice Patten says:

> "They then applied this reasoning to the two overcharge claims. In the case of British Energy the overcharge claim is to be allowed to proceed to a full hearing [that is "they" that is the Tribunal] on the basis that it is arguable that the Regulator's decision that the lower prices quoted to British Energy in October and November should have been offered earlier to the claimant".

And then one sees in the bit that he quotes from para. 52 of the Tribunal, and this is quoting the Tribunal:

> "In order for the defendant to succeed in an application to have the whole British Energy overcharge claim rejected, he would have needed to satisfy us that it did not overcharge the claimant for any coal hauled to Eggborough for that whole period, and that period went beyond May 2000".

So you do not really need to get into fact, but it is simply wrong to suggest that this was simply a temporal point that affected the decision found of infringement in 2000 they were complaining about contracts.

MR. THOMPSON: Could you read out what the temporal period was?

MR. VAJDA: Yes. The temporal period was between May 2000 and November 2000. The point was that these were contracts that were ongoing. So, that is all I want to say on bulk. It is really very very simple. In relation to, and this is common, then, both to Shotton Paper and Corus, just in relation to the temporal aspect if I can bridge the gap. It is important to remember that our point is not that there was or was not an abuse post-2001, but there was no finding, we simply do not know. One cannot assume that there was an abuse. What we have is a finding of an abuse simply in March 2001. I am not saying that there was a finding that there was no abuse after March 2001, that is an open question. But if that were gone into, that would be the finding again of a new infringement which goes beyond the scope of the decision of the Tribunal.

Coming, then, to Corus, there are two points I want to make. First, there was no finding of a squeeze in relation to Corus. I made the point this morning, for there to be a squeeze you need to compare two prices. And that brings me back, if I may, to the question that you,

madam Chairman, asked me this morning, which is, "Supposing that in the declaration there be no reference either to Corus or Shotton Paper, and what would the position be?" In my submission, the position would still be as it is today, albeit I accept that there might have been an element of ambiguity because we would not have had the benefit of the remedies judgment, but what we would have had to do, which is in a sense the exercise the Court of Appeal would have had to do, did in *EWS*, we would have had to go and look at what the decision said. If I can just give you — again, because of the time I am not going to go back — which is the passages which I took the Tribunal to this morning, the main judgment which is at flag 11 of bundle 1, para. 9, and the further judgment which is at flag 12 of the bundle 1, para. 212. It is quite clear that the finding there is a margin squeeze in relation to the first access price and the price then available for Shotton Paper. So, we would have had to go back and we would have had to have an argument today whether or not it was limited to Shotton. We would have said, "Yes, it is". We have not had to have that argument today because that was an argument that was had in 2009 and we say that, with respect, it is not possible for this Tribunal to go behind that.

That then brings me finally to the question of exemplary damages. Now, the first point in a sense that the Tribunal has to grapple with is, should this be treated as a question of fact, which is effectively what my friend says, "Well it is all, you know, this is a very strong case we have got all these very nice findings or very nasty findings in relation to my clients. This is not a question of principle". My answer to that is "It is a question of principle". And what is clear from the judgment of Mr. Justice Lewison, is that he treated the question of exemplary damages as a matter of principle, and indeed in my respectful submission that is the proper approach of a court, because exemplary damages involves the type of investigation that indeed you, madam Chairman, were concerned about in relation to aggravated damages. It increases the length of a trial. All sorts of other issues come into play, and therefore quite rightly, as a matter of case management, if, in my submission this is a matter of law, and the court should treat it as a matter of law and rule one way or another and should not simply say, "Well this is all quite difficult developing. Let's put it off to another day".

So, I invite the Tribunal to deal with this as a matter of principle. If one looks at this as a matter of principle, we say that the position is clear. It is that competition law, uniquely, really, amongst all areas of mainstream English law, has this public and private enforcement angle to it. That means that — and this was the passage I took the Tribunal to from Lord Devlin in 1964 — exemplary damages are an anomaly, but they are in our law. They are

there to punish. And in most areas of English law one can see, and that is what the judges have said, that there may be, if you like, a lacuna where there is conduct worthy of punishment that should be punished by the civil law, albeit in a sense the punishment goes into the pocket, the fruits go into the pocket of the victim as opposed to the public purse. But here in competition law there is, we say, no lacuna because the punishment is — and this is a matter of principle and not a question of fact — the punishment, we say, is a matter for the public enforcer. The public enforcer either decides to punish or not to punish here. I am talking about an infringement decision, because we were only talking about infringement decisions, because I am talking about the follow on action. There is no issue in relation to the situation where the public enforcer says: "I am going to impose a fine", even Mr. Thompson accepts you cannot bring a claim in damages, in my submission, for the reason I mentioned this morning.

THE CHAIRMAN: Does not Mr. Justice Lewison, in the domestic section of his judgment, rely on I think it is an environmental health issue? You say this is unique in competition law but in the construction appeals that we heard over the summer people were referring us to cases about fine imposed for breaches of health & safety and that kind of thing, where there is this parallel criminal liability and potential for damages, it is not unique to competition law at all.

MR. VAJDA: Well competition law started off as effectively, if you like, in public enforcement, and the public enforcer, we would say, is in the best position to determine whether to punish or not to punish. What we have here, although we have the Tribunal sitting here today, but in my respectful submission the Tribunal sitting here, although we are physically in the same building the Tribunal is operating on a different basis from the basis that the Tribunal was operating on when it was hearing an appeal from the Authority and was acting in its public law function, and it was there that it was appropriate for the question – and indeed we say the question of penalty was raised and dealt with. We say it would be inappropriate in a follow on to revisit that issue. When I say "inappropriate" we say there is no jurisdiction to do so.

We say that is a point of law, it is not a question of fact, and we say that if we are right about that it must follow that the claim cannot proceed. This is not just a question of making a submission based on principle, we say that the observation of Mr. Justice Lewison at para. 51 adds support, but I do not need them for the proposition that I am making. We come back to the question of: "What do you mean by more or less guilty?" Indeed, that is the way we put it in our skeleton. That is the point of principle that we make, and we say

that this is not simply a point that was dreamt up amongst the Dŵr Cymru legal team, it derives support from the High Court, that is how we put it.

We do not think that *Manfredi* assists, and I made my submission in relation to *Manfredi*. *Manfredi* is simply on the question of equivalence, and the Court of Justice simply did not address its mind to the point that is being addressed to the Tribunal today. It says if it is available as a matter of domestic competition law it should be available as a matter of EU law, and we can all understand why.

Our point is that if Dŵr Cymru were to be punished, or should have been punished, it should have been punished by the Tribunal wearing its public law hat.

That brings me to the two last points. First, my friend referred to Lord Justice Longmore, para. 143 in relation to exemplary damages. If I could just ask the Tribunal to look at paras. 52 to 53 of our skeleton because we did deal with this, this was a point debated in writing, and therefore I did not repeat it orally, but the fact that it is not repeated orally does not mean we do not rely on it. This was in response to the particulars of claim, and we quote the passage that my friend has just referred to at para. 143. What we say at 53 is that all that [the learned Lord Justice] does in these paragraphs is to set out the background indicating that there are '*some instances'* where a claimant can recover more than his loss. [He] goes on at [148] to say that it is clear on the authorities that a recovery of more than the loss sustained by the claimant in the form of an account of profits is only to be made in exceptional cases and that cartels (which are clear competition law infringements) are <u>not</u> exceptional in that sense. We say that Lord Justice Longmore did not say that competition law claims are instances where a claimant can recover more than a loss, if anything he said quite the opposite. Then we refer to para. 149 which I took the Tribunal to before the short adjournment.

The last point relates to the second limb of the exemplary damages claim, and it is really in relation to what I call Mr. Thompson's gateway point, and he has accepted – perhaps I could just turn up the *Enron* case because it helpfully sets out s.47, that is at tab 21 of bundle 2 at para. 29. 47A(1) "(a) any claim for damages, or (b) any other claim for a sum of money, which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition."

Mr. Thompson made the point with which I agree that if you do not suffer if you have no claim for loss or damage as a result of the infringement, you then do not fall within (b) and therefore we say, and I accept that this is a point that I did not make in opening, but Mr. Thompson drew it to my attention, we say that he is right, that if in fact there is no valid

compensation claim under 47A it must mean that the claim for exemplary damages fails, because again this comes back ----

THE CHAIRMAN: Are you making a point – I do not think a claim for exemplary damages could necessarily be pursued by itself in the High Court, could it?

MR. VAJDA: Probably not.

THE CHAIRMAN: I may have mischaracterised when I was talking with Mr. Thompson, I thought that your point was that because of the wording of 47A it was that there was some narrower class of heads of damages that could be claimed in the Tribunal in a follow on action than there could be in the High Court.

MR. VAJDA: You are entirely right, madam chairman. The submission we have made in writing and orally is to that effect, and I think the way I put it before lunch was that our first submission which is what I might call the 'lacuna' point applies whether it is High Court or Tribunal. The second submission I made was that the jurisdiction of the Tribunal was narrower, and that was made as a self-standing submission, in other words even assuming it was not linked, at least it was not linked expressly, to the success or failure of the compensation claim.

THE CHAIRMAN: Is that narrowing point a point which turns on the proper construction of s.47A(1) of the Act?

MR. VAJDA: Yes, obviously it does. The point that I was advancing this morning and is in the written material is effectively s.47A as construed and applied by Lord Justice Patten. The point that has emerged this afternoon is a related but different point which is, if you like, of a parasitic nature.

THE CHAIRMAN: Yes.

MR. VAJDA: Those are my submissions in reply.

MR. MATHER: On that last point, just to be absolutely clear, you are saying we should construe 47A(1) as a valid claim for damages?

MR. VAJDA: Yes.

MR. MATHER: And not any claim that would be bound to fail?

MR. VAJDA: Yes, any claim over which the Tribunal has jurisdiction.

THE CHAIRMAN: Thank you very much indeed, everyone. It has been a long day but extremely useful as far as we are concerned. Before we rise there is one other practical point we want to make which is a point about when next year the substantive hearing (if, as a result of what has happened to day, there is to be a substantive hearing) is going to take place, given the commitments of the Tribunal in the course of next year and issues that have

arisen in other cases about overlapping counsel – by which I mean counsel who are appearing in a number of different sets of proceedings before the Tribunal. As some of you in the court will know there are two very long fixtures next year – the Pay TV case which is going to be heard at some point during May to July next year, and then the Tobacco hearing which will be heard at some point during September and November next year. Just thinking about how long this case would take to be heard and when that could be slotted in we just want to flag up the possibility that, depending on how many more steps there are in this case and how long they take, it may be necessary for this case to come on to be heard at the same time as the Pay TV case is going to be heard unless we can get this over and done with before that case. I simply raise that as something which the parties may wish to bear in mind.

Again, thank you very much to everybody for your submissions today and we will let you know the outcome in due course. We will, of course, try and come up with a decision as quickly as possible, and then raise with you, if necessary, what further timetabling can be settled in order to move the case forward. Thank you very much.

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