



Neutral citation [2013] CAT 6

Case No.: 1166/5/7/10

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

28 March 2013

Before:

VIVIEN ROSE
(Chairman)
TIM COWEN
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

B E T W E E N:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

Heard at Victoria House on
15, 16, 17, 18, 19, 22, 23, 24, 25 and 26 October 2012, and on 5 and 6 November
2012

JUDGMENT

60. The Tribunal must, therefore, decide what would have happened in the counterfactual, or ‘but for’ world, had Dŵr Cymru not committed the abuses on which this claim is based. We must then compare the money that Albion would have made in that counterfactual world with the money it in fact made from the supply to Shotton Paper to see if Albion has suffered any loss as a result of Dŵr Cymru’s abuse of its dominant position. The parties dispute many of the elements that go to make up the counterfactual world.
61. The Tribunal has undertaken a similar exercise in two other follow-on damages claims, namely in *Enron Coal and 2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (‘2 Travel’). In *Enron Coal*, the Tribunal held that the counterfactual is ‘purged’ not only of the abusive conduct and its consequences but also of any other unlawful conduct on the Defendant’s part: see paragraph 90. We can, therefore, assume, for the purposes of the counterfactual that, in addition to offering a lawful First Access Price, the *dramatis personae* in this counterfactual would not have engaged in any illegal behaviour, including any violation of competition law.
62. We have already set out above some parts of the guidance given by Ofwat in the MD letters and in the February 2000 guidance, issued jointly with the OFT. Each party placed substantial, albeit of course differing, reliance on this guidance as supporting its case. Implicit in that reliance is a recognition that in the counterfactual world we are entitled to assume that Dŵr Cymru would comply with a reasonable interpretation of that Ofwat guidance.
63. It is also the case that in the counterfactual world all the parties would bear in mind that they were subject not only to competition rules but also to sections 40 and 40A of the Water Industry Act. Those sections provide, so far as relevant:

‘40 Bulk supplies

- (1) Where, on the application of any qualifying person—
- (a) it appears to [Ofwat] that it is necessary or expedient for the purposes of securing the efficient use of water resources, or the efficient supply of water, that the water undertaker specified in the application (“the supplier”) should give a supply of water in bulk to the applicant, and
 - (b) [Ofwat] is satisfied that the giving and taking of such a supply cannot be secured by agreement,

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

...

40A Variation and termination of bulk supply agreements

(1) This section applies where, on the application of any party to a bulk supply agreement—

(a) it appears to [Ofwat] that it is necessary or expedient for the purpose of securing the efficient use of water resources, or the efficient supply of water, to vary the agreement or to terminate it, and

(b) [Ofwat] is satisfied that that cannot be achieved by agreement between the parties to the agreement.

(2) [Ofwat] may by order—

(a) vary the agreement by—

(i) varying the period for which the supply of water is to be given; or

(ii) varying any of the terms or conditions on which that supply is to be given; or

(b) terminate the agreement.’

64. Section 40 thus gives Ofwat the power, on an application by a party to a bulk supply agreement, to require a supplier to give, and the applicant to take, such a supply for such period and on such terms and conditions as may be provided in the order. Similarly, on an application by a party to a bulk supply agreement, section 40A provides that Ofwat may vary the duration or terms of, or terminate, any bulk supply agreement. In the background to the negotiations would be the knowledge on all sides that referring the matter to Ofwat for its determination was an option open to each of them if they were not satisfied with what was on offer from the other party. It is clear from the correspondence that the parties did act on this basis and, indeed, that it was an option pursued.

65. Finally, though subject to one important exception, the parties are agreed that the Tribunal is also entitled to assume, when constructing the counterfactual, that the relevant people would have approached any negotiations between them reasonably, rather than with a view to obstructing progress. As Mr Pickford, acting for Dŵr Cymru, put it, the parties would ‘not necessarily [be] falling over backwards to accommodate each other, just acting in a normal commercial manner’. The exception relates to the question as to what the common carriage price should be in the counterfactual world.

66. The issues that we have to decide under this head of claim can be grouped as follows:

- (a) Albion's costs of supply in the counterfactual world. This involves identifying the costs Albion would have incurred in order to supply water to Shotton Paper, including the cost of the raw water itself, the common carriage price and, according to Dŵr Cymru, various additional costs such as augmentation of capacity at the Heronbridge pumping station and the reservation of a back-up supply of potable water.
- (b) Albion's income from Shotton Paper in the counterfactual world. In order to compare Albion's position in the real and counterfactual worlds, we must work out how the supply agreement between Albion and Shotton Paper would have operated as regards the price that Shotton Paper would have paid Albion for the water.
- (c) Is there a loss which is attributable to Dŵr Cymru's infringement? We must then compute the difference between the actual monies earned by Albion in the real world over the period and the monies it would have earned in the counterfactual world and, in particular, consider what part of that difference should be treated as having been caused by Dŵr Cymru's abusive conduct? This involves a consideration of the length of the period during which the effect of the abusive conduct continued to be felt.

A. The counterfactual common carriage price

i. The test to apply to find the common carriage price for the counterfactual

67. The first 'input' into the costs incurred by Albion to supply Shotton Paper is, of course, the cost of common carriage itself. Dŵr Cymru argued that the Tribunal's task here was not to find a reasonable access price but rather to find the highest price that Dŵr Cymru could have charged without committing an infringement of the Chapter II prohibition. That, Dŵr Cymru says, is because the Tribunal should strip out of the counterfactual only the unlawful element of Dŵr Cymru's actual behaviour. Dŵr Cymru accepts that the 14.4p/m³ may be a reasonable access price. It argues, however, that the Tribunal in Case 1046 did not rule that any price above 14.4p/m³ would be unlawful. As the Unfair Pricing Judgment makes clear, an abusive price is a price which is not only excessive (that is too high in comparison with costs) but also unfair (in terms of the economic value of the product or

