



Neutral citation [2011] CAT 42

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Number: 1166/5/7/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 December 2011

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LTD

- and -

Appellant

DŴR CYMRU CYFYNGEDIG

Respondent

**RULING ON DŴR CYMRU'S APPLICATION
OF 28 OCTOBER 2011
ARISING OUT OF THE TRIBUNAL'S ORDER ON DISCLOSURE**

Introduction

1. Dŵr Cymru has challenged certain passages of the Amended Particulars of Claim served by Albion on 9 June 2011. Dŵr Cymru assert that the allegations made in those passages are irrelevant to the issues in this claim and they ask the Tribunal to direct that they do not need to give disclosure relating to those allegations, beyond the documents already listed in their disclosure statement of 28 October 2011. The Tribunal has already dealt with a number of interlocutory applications relating to the pleadings in this claim. Attached to this Ruling is a glossary brought forward from the Rulings on those earlier applications.
2. Dŵr Cymru put their application on two bases: they invite the Tribunal to strike out the disputed passages or, alternatively, to direct that no disclosure is required in respect of the allegations made in those passages. I will deal with the application on the second basis as part of the Tribunal's management of this claim in preparation for the final hearing of the issues. The Tribunal's powers to manage these proceedings are set out in Part IV of the Tribunal's Rules. Rule 44 provides that in determining claims for damages the Tribunal "shall actively exercise the Tribunal's powers" with a view to ensuring that the case is dealt with justly. Dealing with a case "justly" expressly includes saving expense, dealing with the case in ways which are proportionate, ensuring that it is dealt with expeditiously and fairly and allotting to it an appropriate share of the Tribunal's resources. The powers that the Tribunal may exercise in that way include the power under rule 19 to give a wide range of directions to secure the just, expeditious and economical conduct of the proceedings and the powers under rule 22 to give directions controlling the evidence.
3. The disputed passages in the Amended Particulars of Claim concern Albion's claim for exemplary damages. This part of the pleading starts at paragraph 63 with a description of the law relating to exemplary damages, referring to the well-known case of *Rookes v Barnard* [1964] AC 1129. Paragraph 69 of the Amended Particulars of Claim asserts that the facts of Albion's claim "fall squarely within the second category of claim identified by Lord Devlin in *Rookes v Barnard*: it is clear that the intention of the Defendant was to obtain supra-competitive profits in cynical disregard for the interests of the Claimant or its customer, Shotton Paper".

4. Although Dŵr Cymru contests the factual and legal basis for the claim for exemplary damages, for present purposes they object in particular to paragraphs 70 and 78 of the Amended Particulars of Claim. Paragraph 70 refers to Dŵr Cymru's conduct between 2002 and 2009 as supporting the allegation that Dŵr Cymru has acted with cynical disregard for the interests of Albion or Shotton Paper not only by engaging in the abusive conduct "but also in its entire approach to this litigation". Paragraph 78 refers to the "unremittingly aggressive and uncooperative manner" in which Dŵr Cymru conducted itself during the appeal proceedings as a reflection of the "cynical" and "outrageous" nature of Dŵr Cymru's conduct. Albion asserts that this conduct not only imposed direct personal strain on the staff and directors of Albion but also "severely impeded" Albion's ability to achieve the purposes of the Competition Act 1998 and the regime of water regulation more generally. As to the period covered by Albion's claim, this has been limited in subsequent correspondence between the parties to the period up to 7 November 2008 when the Tribunal delivered its Unfair Pricing Judgment and Dŵr Cymru revised the access price offered to Albion.

Delay in making the application

5. Albion invites the Tribunal to reject Dŵr Cymru's application first on the basis that it has been made too late. Albion's case on exemplary damages as set out in the contested paragraphs has, Albion says, been clear at least since the Amended Particulars of Claim were served in June 2011. On this point, I accept what Dŵr Cymru say, namely that they initially thought that it was sufficient simply to plead in their Defence that the allegations were contested. It was only more recently when the dispute arose over the scope of the disclosure obligations arising from these paragraphs that they decided that the matter should be resolved in advance of the main hearing.

The temporal scope of the abuse found by the Tribunal

6. Albion's main reason for opposing Dŵr Cymru's application is its submission that the Tribunal has not ruled on the temporal aspect of the abuse in the Remedies Judgment or in any of the interlocutory rulings in the current claim. The temporal scope of the abuse found in Case 1046 is, Albion asserts, a live issue in these proceedings.

7. I do not agree with that analysis. The purpose of the Remedies Judgment was to clarify the Tribunal's findings in the earlier judgments and thereby settle the appropriate wording for the final order in Case 1046. The Remedies Judgment made clear that the Tribunal in that appeal had not made any finding of abusive conduct beyond the offer of the First Access Price by Dŵr Cymru in March 2001. The Tribunal held in the Rule 40 Judgment that that does not mean that Albion's losses flowing from that abuse are limited to losses suffered in the immediate aftermath of that offer. The abuse can continue to have effects which cause loss even if the abuse itself does not continue.
8. The Tribunal has thus not ruled on the question whether there was a continuing abuse committed by Dŵr Cymru. Such an allegation could be pursued by Albion in a free-standing claim for damages in the High Court. By bringing a follow-on claim in the Tribunal, under section 47A of the Competition Act 1998, Albion has limited its claim to losses arising from the infringement found by the Tribunal in Case 1046. The temporal scope of *that* infringement has been determined by the Tribunal's judgments in Case 1046 as analysed in the Remedies Judgment. The absence of any ruling by the Tribunal as to a longer period of abuse does not, therefore, mean that the duration of the abuse is a live issue in this claim. On the contrary, it means that there is no decision of infringement for the purposes of section 47A other than the decision relating to the offer of the First Access Price in March 2001.
9. As the Tribunal said in the Rule 40 Judgment, the duration of the infringement and the duration of the period during which losses from the infringement are incurred are not necessarily the same. I have seen the disclosure statement made by Dŵr Cymru's in-house legal adviser and which was served on Albion on 28 October 2011. As regards documents which are relevant to the claim for exemplary damages and which post-date March 2001, that adviser states that Dŵr Cymru has searched for, and disclosed, documents generated between March 2001 and 27 July 2004 (when Case 1046 started) in so far as they have a direct bearing on Dŵr Cymru's state of mind as regards the formulation of the First Access Price offered to Albion. Beyond that, she asserts that she is unable to conceive of relevant material which would not be subject to legal professional privilege, save for particular documents of which she is specifically aware and has identified.

10. If there were documents post-dating March 2001 in which it appeared, for example, that Dŵr Cymru were balancing the disadvantages of offering a lower access price to Albion against the actual or predicted costs of defending its position before the regulator or the Tribunal, such documents might be relevant to the award of exemplary damages. I do not see why July 2004 is or should be a logical cut-off date for any such documents. Dŵr Cymru clearly decided on 7 November 2008 to revise the price offered to Albion for access to the Ashgrove System. There may be internal documents concerning that decision which are not legally privileged. It would also be surprising if the company had not reviewed internally from time to time, between July 2004 and November 2008, whether it should revise the offer made to Albion in March 2001, given that the parties were in an on-going commercial relationship for the supply of bulk water. Such documents might be separate from any discussion of the tactics involved in defending the allegations of abuse of a dominant position and may not be covered by privilege. It would not be unduly onerous for Dŵr Cymru to consider who within the company is likely to have been involved in any such consideration over the period to November 2008 and to search for any documents shedding light on that topic. That may reveal evidence as to whether Dŵr Cymru did, at any stage, balance the advantages and disadvantages of the arrangements which remained in place in a way which might be relevant to an award of exemplary damages. The relevance of such documents does not, in my judgment, depend on any finding of infringement beyond that made in the Case 1046 Judgments. Any such documents should therefore be disclosed by Dŵr Cymru. Documents covered by legal professional privilege do not need to be listed individually.

The possible relevance of Dŵr Cymru's behaviour in the earlier administrative and judicial proceedings

11. On 22 June 2011 Dŵr Cymru asked Albion for further particulars of, amongst others, paragraphs 70 and 78 of the Amended Particulars of Claim. They asked Albion to identify "each and every act giving rise to the alleged "stalling tactics" giving full particulars thereof". Albion's response, by letter dated 8 July 2011, stated that the principal points relied on included: the substantial costs incurred by Dŵr Cymru, said to be "out of all proportion to the issues in the case"; Dŵr Cymru's persistent denial that they held a dominant position, including its decision to appeal the Tribunal's finding on this to the Court of Appeal; allegedly

- inadequate disclosure and frequent changes of and corrections to data provided by Dŵr Cymru to the Tribunal; a refusal to seek a mediated resolution of the claim or to negotiate a settlement; and the repeated introduction of new issues in an apparent attempt to delay a final determination.
12. These matters are, at best, of limited relevance to the real issue in this case which is what losses did Albion suffer as a result of the Dŵr Cymru’s abusive conduct. It would be entirely impractical for the Tribunal to investigate whether Dŵr Cymru acted as promptly or responded as fully as it could have done at each step of the complex proceedings in the original investigation and during the course of Case 1046 and, if not, what explanation or motivation there might have been for any shortcomings. Albion’s Amended Particulars of Claim include various quotations from the Tribunal’s earlier judgments concerning Dŵr Cymru’s conduct. The Tribunal hearing the damages claim may need to have regard to those comments and to any other comments to which Dŵr Cymru chooses to direct our attention. But to embark on the exercise that Albion seems to envisage in the 8 July letter would be disproportionate and would greatly extend the scope and cost of these proceedings.
13. In its request of 22 June 2011 Dŵr Cymru also ask for particulars relating to the various allegations made in paragraph 78 of the Amended Particulars of Claim. The allegations detailed in Albion’s reply on 8 July include complaints about an interruption of supply of potable water to Shotton Paper in May 2008 and an attempt to increase the bulk supply price on the day of the Remedies Judgment. The letter also refers to Dŵr Cymru’s alleged “failure to respond to direct questions from the Tribunal” and the decision to challenge the Tribunal’s jurisdiction to make a finding of dominance before the Court of Appeal. Again, for the Tribunal to have to examine what happened during these contentious incidents and determine whether they show that Dŵr Cymru was unduly “aggressive”, “threatening” or “denigratory” would generate satellite issues far removed from what should be the primary issues in the case.
14. I therefore conclude that the just and expeditious conduct of these proceedings would best be achieved if:

- (a) Dŵr Cymru discloses any documents created before 7 November 2008 in which there was discussion about the formulation of the First Access Price or as to the possible revision of the access price to be offered to Albion;
- (b) Disclosure is not required (other than of documents already disclosed in the Defendant's disclosure statement served on 28 October 2011) in relation to:
- i. The "stalling tactics" engaged in by Dŵr Cymru during the investigation by the Water Services Regulation Authority or during the proceedings before the Tribunal in Case 1046, as alleged in paragraph 70 of the Amended Particulars of Claim (as particularised in paragraphs 1(a) to (k) of the letter from Shepherd and Wedderburn LLP to Hogan Lovells International LLP dated 8 July 2011);
 - ii. The matters alleged in paragraph 78 of the Amended Particulars of Claim and particularised in paragraphs 7 to 10 of the 8 July letter.
15. The parties agreed to suspend the timetable that had been established by the order of 29 June 2011, pending the resolution of Dŵr Cymru's application. In addition to making directions to give effect to the conclusions set out above, I will reset the timetable for the steps in paragraph 2(d), (e) and (f) of that Order to ensure that this case is not delayed any further.
16. Further, Dŵr Cymru has applied to amend its Defence in the terms of the draft that was attached to a letter from their solicitors dated 28 November 2011. Albion has agreed to those amendments and the parties have also agreed that Albion should have two weeks from the date of the Tribunal's decision to file an amended Reply. The Order to be drawn up should cover those matters as well.

Vivien Rose

Charles Dhanowa
Registrar

16 December 2011

ALBION WATER LIMITEDClaimant

- v -

DŴR CYMRU CYFYNGEDIGDefendant**GLOSSARY OF TERMS****The Tribunal judgments in the current proceedings: Case 1166/5/7/10**

| | |
|----------------------------------|---|
| The Rule 40 Judgment | <i>Albion Water Ltd v Dŵr Cymru Cyfyngedig</i> [2010] CAT 30 (8 December 2010) |
| The Strike Out Ruling | <i>Albion Water Ltd v Dŵr Cymru Cyfyngedig</i> [2011] CAT 1 (21 February 2011) |
| The Particulars Amendment Ruling | <i>Albion Water Ltd v Dŵr Cymru Cyfyngedig</i> [2011] CAT 18 (9 June 2011) |

The Tribunal judgments in the infringement proceedings: Case 1046/2/4/04

| | |
|-----------------------------|--|
| Case 1046 | The appeal brought in the Tribunal by Albion Water Ltd in Case 1046/2/4/04 |
| The Interim Judgment | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2005] CAT 40 (22 December 2005) |
| The 1046 Main Judgment | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2006] CAT 23 (6 October 2006) |
| The Margin Squeeze Judgment | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2006] CAT 36 (18 December 2006) |
| The 1046 Costs Judgment | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2007] CAT 1 (8 January 2007) |

| | |
|---|---|
| The 1046 Permission to Appeal Judgement | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2007] CAT 8 (2 February 2007) |
| The 1046 Court of Appeal Judgment | <i>Dŵr Cymru Cyfyngedig v Albion Water Ltd</i> [2008] EWCA Civ 536 (22 May 2008) |
| The Unfair Pricing Judgment | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2008] CAT 31 (7 November 2008) |
| The Remedies Judgment | <i>Albion Water Ltd v Water Services Regulation Authority</i> [2009] CAT 12 (9 April 2009) |

Other Terms

| | |
|------------------------------|---|
| The Tribunal's Rules | The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) |
| The Chapter II prohibition | The prohibition of the abuse of a dominant position contained in section 18(1) of the Competition Act 1998 |
| First Access Price | The price offered by Dŵr Cymru for common carriage in March 2001, namely 23.2p/m ³ |
| Second Bulk Supply Agreement | The agreement entered into between Albion and Dŵr Cymru on 10 March 1999 for the supply of non-potable water via the Ashgrove System. |
| Second Bulk Supply Price | The price payable by Albion under the Second Bulk Supply Agreement, namely 26p/m ³ |
| Ashgrove System | The system of pipes owned and operated by Dŵr Cymru through which water is supplied to Shotton Paper and Corus Shotton |
| Shotton Paper | A paper-making plant situated on Deeside supplied with non-potable water via the |

| | |
|------------------------------|--|
| | Ashgrove System |
| Corus Shotton | A steel producer supplied with non-potable water via the Ashgrove System |
| United Utilities | A water undertaker and supplier of non-potable water from the River Dee at Heronbridge to Dŵr Cymru |
| p/m ³ | Pence per cubic metre |
| Amended Particulars of Claim | The Particulars of Claim amended in accordance with the Rule 40 Judgment and served by Albion on 9 June 2011 |