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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1166/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 November 2012

Before:

VIVIEN ROSE
(Chairman)
TIM COHEN
DTKCP LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Appellants

– v –

DWR CYMRU CYFYNGEDIG

Respondent

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HEARING (DAY 11)

Note: Excisions in this transcript marked “[...][C]” relate to passages excluded.

APPEARANCES

Mr Thomas Sharpe Q.C., Mr Matthew Cook and Mr Medhi Baiou (instructed by Shepherd Wedderburn LLP) appeared on behalf of the Claimant.

Mr Daniel Beard Q.C., Mr Meredith Pickford and Ms Ligia Osepciu (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

Monday, 5th November 2012

(10.30 am)

ADDRESS BY THE CHAIRMAN

THE CHAIRMAN: Good morning, ladies and gentlemen. I'm aware that there has been a lot going on since we last met. Thanks to everybody for your very helpful closing submissions which we have all read.

There are couple of issues which we would like the parties to cover which don't seem to have been covered so far in the closing submissions. The first relates to the claim in relation to the Corus contract. Having looked back at the tribunal's decision in the Enron v England and Wales and Scottish Coal, there's a passage in that judgment, from paragraphs 81 onwards, which dealt with the case of Allied Maples v Simmons & Simmons, which indicates that the way to approach this kind of loss of a chance claim is not to decide whether Albion would have got the Corus contract on the balance of probabilities, but the court has to assess, in percentage terms, the likelihood of the event occurring, and that the test is a two-stage test.

First, for the court to decide did the claimant have a substantial chance, not just a speculative chance, of getting the opportunity, whatever it is, and the question of the evaluation of the likelihood of that

1 chance is then a question of quantum.

2 Applying that to this case it looks as if what the
3 Enron judgment is telling us we need to do is first
4 decide, is there a substantial chance that Albion would
5 have won the Corus contract? If we decide that there
6 is, work out what is the total 100 per cent loss
7 occasioned by them not having got that contract, and
8 then apply some percentage reduction to that total
9 amount to reflect what we think is the likelihood of
10 them having won that, so that if, say -- and these are
11 just figures plucked from the air at the moment -- we
12 find that there was a substantial chance of Albion
13 getting the Corus contract, we would work out what is
14 the loss, we think actually there was a 50, 60,
15 whatever per cent chance, even a 40 per cent chance of
16 them getting the contract so the correct quantum is then
17 40 or 50 or 60 per cent of the total.

18 Neither of the parties, from what I've read so far,
19 seems to have approached it in that way, but that may
20 well be the way to approach it, and in any event, we'd
21 welcome submissions on that.

22 The second point relates to the exemplary damages
23 claim and that arises from a lengthy passage in the
24 2 Travel judgment dealing with who was in that case the
25 directing mind of the defendant company, discussion

1 about the two managing directors who had been in charge
2 of the company over the period of the abuse.

3 Now the Albion submissions refer to Dwr Cymru doing
4 this and knowing this, and we're not sure at the moment
5 whether we need to examine who we think was the
6 directing mind of Dwr Cymru over this period. Is
7 Dwr Cymru arguing that Mr Williams was the directing
8 mind of the company for this purpose? Is Mr Edwards the
9 directing mind for other purposes? It seems that the
10 evidence on which Albion is relying is a mixture of
11 evidence as to what the board thought or did or lack of
12 evidence about what the board thought or did, and then
13 the way in which Mr Edwards did the various computations
14 and the way in which Mr Henderson calculated various
15 things, but having looked into all that evidence, does
16 the tribunal need to be able to pool all that in
17 together within the framework that the tribunal seems to
18 have applied in 2 Travel about who was the directing
19 mind for this purpose and what did that directing mind
20 know or what can we infer that that directing mind knew
21 about the possible illegality of the conduct?

22 Given the points that Albion has made as regards
23 inferences that the tribunal should draw about the
24 failure of Dwr Cymru to call certain witnesses who might
25 have been a directing mind, where does that leave the

1 tribunal in trying to apply the test in 2 Travel, if
2 that is the test that we need to apply?

3 Those are two points that we would welcome the
4 parties addressing at some point. I realise it would
5 have been more helpful if we had been able to give you
6 those earlier but I'm afraid that pressing events hasn't
7 enabled that to be possible.

8 There are other points we want to pick up as we go
9 through, though perhaps I should say this: on the
10 question of how the negotiations would have been
11 conducted between Dwr Cymru and Albion on a number of
12 the inputs to the counter-factual, if I can put it like
13 that, not just the common carriage price but the
14 indexation, the augmentation of capacity or payment
15 likely to have been demanded by Dwr Cymru for releasing
16 its entitlement at Heronbridge, bearing in mind the
17 special responsibility that a dominant undertaking has,
18 not by its conduct to hinder existing competition in the
19 market, how that should affect the tribunal's assessment
20 of what is likely to have occurred in the
21 counter-factual world.

22 Those I think are the points which I want to make at
23 the outset.

24 Mr Sharpe, you're kicking off this morning.

25

1 Closing submissions by MR SHARPE

2 MR SHARPE: Madam Chairman, members of the tribunal. In
3 relation to those two matters, the guiding spirit or the
4 directing will of the company will very much form part
5 of my planned submissions, and it will be clear where
6 I'm going, and I will be linking it with missing
7 witnesses. In relation to the Enron case, this is
8 a very familiar case to me, but I'll have to take
9 advantage of the short adjournment or possibly even
10 reply, if that's convenient.

11 My friend and I are hoping very much that I will
12 allow him an opportunity to start today, and I will have
13 a similar opportunity tomorrow in reply. But you've had
14 our closing written submissions. It's fair to say that
15 both showed signs of very rapid drafting, which is
16 hardly surprising given two nearly 100-page documents.
17 We've burned a few tubs of midnight oil to get it in on
18 time and were pleased to be able to do so. There were
19 a few corrections which my solicitors were able to put
20 right and I understand you received an amended copy on
21 Friday and I'm very grateful to my learned friend for
22 doing the same for us this morning, the same sort of
23 exercise, and I'm very grateful to him for that as well.

24 It is fair to say that Albion's position, and the
25 pressure under which we were all working, was not

1 reduced by the fact that on Wednesday, at around about
2 noon, we received a very substantial volume of new
3 evidence, all of which, by any standard, should have
4 been disclosed months ago. The source of this
5 information appears to have been an existing employee,
6 Mr Henderson, of Welsh Water. No explanation has been
7 given, and nor do I wish to dwell on it because the
8 facts speak for themselves. My simple point is we had
9 just from Wednesday through to Thursday afternoon to
10 absorb that information and assess its importance. It
11 rapidly became clear that if we had had that
12 information, the nature of the questions put to
13 Mr Edwards would have been different, because, as is
14 clear from the disclosure, Mr Edwards was really rather
15 deeply involved in the matters prior to, during and
16 after the Hyder report which you'll recall was disclosed
17 belatedly last Thursday night.

18 I did give some considerable thought to the question
19 of bringing him back and indeed, we requested he attend,
20 and I'm most grateful to him for having done so. But
21 I also through my solicitors intimated that perhaps we
22 wouldn't be calling him but he ought to attend simply
23 because it's not impossible for the tribunal itself to
24 wish to address questions to him and that obviously is
25 a matter for you.

1 But what is clear, if he had been cross-examined, we
2 would have asked him about the nature of the work that
3 was being done to identify the local costs, so at all
4 non-potable installations, especially Ashgrove. We
5 would have asked him about the below ground asset
6 valuations which we have seen in the report and we most
7 certainly would have asked him about the information he
8 seems to have received from one of his colleagues,
9 Mr Brotherton. Mr Brotherton appears to have been
10 feeding Hyder with some raw data both from above and
11 below ground. We'll see later, and I'm going to take
12 you to it, an e-mail where Hyder have difficulty
13 understanding the above ground treatment calculations
14 but they seem to be happy with the below ground.

15 We also see requests, some of which Mr Edwards was
16 privy to, of Mr Brotherton, to provide more detail.
17 Mr Brotherton appears to be on holiday in August, it
18 must have been a very long holiday because the same
19 request is made in November to clarify, I think, some of
20 the above-ground treatment works.

21 Then it stops. Nothing in the bundle, as disclosed
22 today, tells us where the Brotherton story of valuing
23 above-ground treatment assets goes. As you've seen from
24 our skeleton and opening and closing submissions, and in
25 the course of evidence, we are extremely interested in

1 the accuracy of local treatment data, and the
2 inaccuracy, the known inaccuracy, of the 30 per cent
3 figure which was applied to it.

4 Later I shall be submitting that information was
5 known to Welsh Water at that time and it has
6 disappeared. Of course, it reemerges later in 2003 when
7 the non-potable large industrial tariff was created
8 using the figure of 15.2 per cent rather than
9 30 per cent. I'll come on to that. My learned friend's
10 skeleton is in fact in error in attributing the
11 revelation of the 15.2 to 2004, and the Ofwat hearing,
12 the Ofwat process, wasn't -- it's very black and white.
13 One can see it as forming part of the non-potable large
14 industrial tariff in 2003.

15 So as you see, the new disclosure would have been
16 very valuable but there it is. We have the evidence
17 before us, and I will be making my submissions on it at
18 the appropriate moment.

19 I'm also conscious that the exercise I'm embarking
20 on was not an easy one. It was not my intention to
21 create another speech or to create a fourth version of
22 our submissions. I think one of the most economic ways
23 -- and I'm very conscious of the time -- is for us to
24 ask you to have our written submissions close to hand.
25 What I'll be doing, in a way, is to take you through

1 that. I will be editing it quite severely, otherwise
2 one of the points is useless -- you can read it for
3 yourselves -- and secondly, I don't have the time. But
4 I hope no point about my editing and leaving various
5 matters out will not be taken against me.

6 Perhaps before I start, it's worth commenting on the
7 three witnesses that Welsh Water have put up. First of
8 all, Ms White. First of all she is United Utilities and
9 can obviously only speak for United Utilities and their
10 role in the proceedings. That goes to causation.

11 Her evidence on the internal decision-making within
12 United Utilities was bluntly of no value. She
13 acknowledged that she was there to identify and keep her
14 colleagues on the competition straight and narrow, as
15 I put it to her, and she understood that. But she
16 acknowledged she had no role at all in the commercial
17 negotiations, and appears to have been somewhat detached
18 from them.

19 Obviously the two points, the regulatory aspect and
20 the commercial aspect, do come together. And the most
21 important manner in which they come together is her
22 understanding of the law and the regulatory
23 requirements, very strongly asserted, both in the
24 correspondence between United Utilities and Welsh Water,
25 and by her in giving evidence, that it would have been

1 impossible to discriminate against Albion insofar as
2 Welsh Water refused the invitation voluntarily to
3 increase the price they were paying.

4 There had to be equality of treatment to avoid
5 non-discrimination. Non-discrimination first of all
6 under condition E, which she thought applied -- to avoid
7 discrimination under condition E which she thought
8 applied and more generally under the Competition Act,
9 non-discrimination provisions there with which you're
10 more than familiar. As she said, they would need to be
11 treated the same, and the reference to that is Day 6,
12 page 139, line 4.

13 I should add, in the normal course of my submissions
14 I'm not going to refer to documents which are pretty
15 clear in the submissions themselves, but if something is
16 especially important I will, and if it has, for whatever
17 reason, not been included in the closing submissions,
18 I will add it to them.

19 She believed as a consequence of condition E and the
20 Competition Act, the parties -- Albion had to be treated
21 squarely, fairly, in a non-discriminatory way. She was
22 also, as you saw, concerned about predation. I felt her
23 submissions in relation to predation were eccentric.

24 It is not entirely clear what she was worried about.
25 Was there going to be some other water company supplying

1 Shotton from a source as yet unnamed which would be
2 economic? The facts simply don't stand up to that.
3 I'll dwell on that later, if I may.

4 I think my point on her insistence on a conflict
5 between, if it be so, non-discrimination and the
6 Competition Act in relation to predation would not have
7 survived five minutes of internal or external legal
8 scrutiny.

9 Mr Williams. Now, on the face of it he should have
10 been in a strong position to comment upon the progress
11 of the access charge negotiations through 2000 and 2001,
12 and within Welsh Water he was a main board director, he
13 was on the LCE, he was charged with the
14 responsibility -- you'll recall he was always named the
15 sponsor for the process and we originally thought he
16 knew something about it. At its most charitable, under
17 cross-examination, it appears he has either forgotten
18 what little he knew, or never knew it. He didn't know
19 or recollect meetings he'd attended, documents he had
20 read and put forward, board meetings he appeared to have
21 attended, and where we thought he was, as the sponsor,
22 explaining to his fellow board members what on earth was
23 going on.

24 It turned out under cross-examination of Mr Edwards,
25 or Mr Williams, I think, that the LCE is actually not

1 the small specialist board we thought, it does in fact
2 consist of it seems, in answer, all the executive
3 directors. So that board, that subset of the main board
4 knew exactly what was going on. That emerged in
5 Mr Edwards' cross-examination.

6 What also emerged from Mr Williams was the very
7 important roll of Dr Brooker. Dr Brooker was managing
8 director. We had thought that the internal board
9 discussions about the importance of regional averaging
10 and analysis of how the progress of the access
11 negotiations were going was very much Mr Williams.
12 Well, on his own evidence, that was not the case. He
13 can't recall, of course, but he actually said more
14 likely than not it was Dr Brooker who understood this
15 and conveyed that realisation to the board.

16 That makes sense. You'll recall Dr Brooker's
17 response to the MD154, which I took you to earlier on,
18 about the importance of average cost pricing and how
19 efficient it might be in relation to new entries.
20 Dr Brooker knew what was going on and knew the
21 significance of efficient entry of averaging, and he
22 knew entirely what was on.

23 Also, it emerged from Mr Williams's evidence that he
24 wasn't merely managing director but he seemed also to
25 have assumed some form of regulatory function.

1 Mr Williams was a little bit vague on this, but there
2 was nobody else who could be said to have had
3 responsibility for interfacing with the regulator, and
4 perhaps to keep them on the straight and narrow. There
5 was a lacuna there which was hardly filled by having the
6 person responsible for the commercial side and
7 ultimately as managing director for the company, to have
8 that responsibility.

9 So, in the light of the evidence and what we can
10 infer about Dr Brooker's role, we're pretty sure that he
11 was very deeply involved in this process, understood it
12 completely, conveyed his understanding to the board, and
13 also we see in the interrelationship between Brooker and
14 Holton, time and time again we see DJH or DH,
15 Mr Holton's references, acknowledged by witnesses to be
16 so, on correspondence from Dr Brooker. Plainly the two
17 of them were working very closely together.

18 We also know from Mr Williams that Dr Brooker's
19 style was non-hierarchical, he walked in and out of
20 offices and discussed things, and it seems very clear
21 that he was discussing a great deal with Mr Holton and
22 sharing his thoughts, and setting out the ground rules
23 for what should happen. As I said, very likely it was
24 Dr Brooker, not Mr Williams, who briefed the board in
25 November 2000 about the importance of regional averaging

1 in order to achieve revenue neutrality:

2 "This won't cost us anything provided that we hold
3 on to regional averaging."

4 I'll come on to explain all that.

5 Of course I readily agree there came a point when it
6 was perfectly clear that diminishing returns were
7 setting in in my cross-examination of Mr Williams but he
8 did provide some interesting insights as to how they
9 organised the process, the lack of accounting skill, and
10 the absence of any need to verify data in the process.

11 Having said that, it is perhaps unfortunate that I
12 didn't have a comparable opportunity to cross-examine
13 Dr Brooker who now seems to be in charge of the process,
14 and Mr Holton who appears to be his right-hand man, as
15 their role was plainly central. I understand that both
16 are happily very much alive. Dr Brooker even served on
17 the board of Ofwat and the Scottish Water Industry
18 Commission. And Mr Holton I understand is alive and
19 well -- I understand no longer in employment with Welsh
20 Water, but that's not an issue as so demonstrated in
21 relation to Mr Williams. There's no reason to believe
22 he would not willingly have come back to assist his
23 former employer.

24 The central point of course, if he could have given
25 evidence that would have helped them, there is little

1 doubt that he would have been asked, and the inference
2 I ask you to draw is that both Dr Brooker and Mr Holton,
3 if they had given evidence, would have given evidence
4 which would have been profoundly unhelpful to Welsh
5 Water's cause.

6 Lastly, Mr Edwards. Now again, from the bundle as
7 we saw -- and I prepared my cross-examination and you
8 will have read -- we thought Mr Edwards really only came
9 on the scene in relation to non-potable charging access
10 in November/December. That's actually what he told us.
11 Well after, it seemed, any decision on the methodology
12 to have been adopted had been taken. You'll recall the
13 methodology was seen to be almost a seamless progression
14 from the network access charge, that's Mr Williams'
15 evidence, just rolled it forward.

16 We now know that that is not the case and I've
17 already described to you, in outline at least,
18 Mr Edwards' involvement letter. It is true that
19 Mr Henderson played the key role but Mr Edwards was very
20 much aware of what was going on, assisted in the process
21 and may well have been invited to attend a post-Hyder
22 meeting after it was submitted, but we know absolutely
23 nothing at all about the fate of the work that was
24 obviously in train, and according to the evidence, may
25 well have been submitted to Hyder in relation to

1 above-ground treatment assets.

2 In one e-mail, which we'll see later, they say, "We
3 can't really understand what Mr Brotherton is saying
4 here although we do understand anything in relation to
5 the below ground asset", which suggests very strongly
6 that they received something, something was given by
7 Mr Brotherton but it either doesn't exist or hasn't been
8 disclosed.

9 So once again, although Mr Edwards' evidence was
10 helpful, he after all was responsible for that final
11 twist in creating the whole company average which had
12 the profound effect of inflating the bulk distribution,
13 given the methodology they adopted, it seems very likely
14 that there was somewhere a comparable document which
15 gave a fairly accurate local cost treatment which Hyder
16 had seen, and I can't take that much further, certainly
17 at this stage in my submissions, but it is reasonably
18 clear from the evidence that such information had been
19 created or was in the process of being created, and it
20 would have been immensely helpful not only to have
21 Mr Edwards here but Mr Henderson, to add to Mr Holton.

22 Henderson was deeply involved in this process and
23 it's a mystery. A remaining employee of Welsh Water.
24 It was his evidence, it was his e-mail address, as
25 I understand it, from which the latest disclosure

1 derived. It wasn't hidden behind a filing cabinet or
2 put into a sterile box somewhere in a disused hangar
3 where people store documents occasionally. These were
4 from his own e-mails. It is a great pity I did not have
5 the opportunity to ask him, Holton and Brooker what they
6 would have had to say about this saga.

7 Perhaps the last point in that, and it's a very
8 unattractive thing for me to say but I'm going to say it
9 nevertheless and you may have seen it trailed in
10 correspondence, the Hyder report and the other evidence
11 which we've seen which goes foursquare to the local
12 costs and how to arrive at a price for access were
13 unambiguously sought by Ofwat in their section 26
14 request in 2001, and were not supplied then. Our
15 understanding is they were not supplied.

16 We roll the story forward to the referred work where
17 this tribunal asked Ofwat to produce, as you well know,
18 an accurate compilation of the costs, Pinsent Mason
19 wrote to Welsh Water requiring information on local
20 costs, MEAV values specifically requested, you've seen
21 the MEAV values in the Hyder study, they were not
22 supplied.

23 Perhaps the situation is, if anything, even worse.
24 The party who responded to Pinsent Mason for Ofwat's
25 request was Miss Lynette Cross and you'll recall the

1 name because it was in her system that the Hyder report
2 eventually emerged.

3 Of course I cannot pretend that those aren't
4 strictly relevant to our proceedings but I think it
5 indicates a cavalier attitude towards the regulator's
6 requests, which I think is a leitmotif of this case. It
7 then follows, inevitably, that when my learned friends
8 pray in aid Ofwat's support for this proposition or that
9 proposition, we have to ask precisely what it is that
10 Ofwat knew at the time. And as you'll hear later in my
11 submissions, there are times when Ofwat -- how can I put
12 it delicately -- had an incomplete understanding of what
13 was going on, and why? Well, simply Welsh Water not
14 only has a monopoly of water but a monopoly of
15 information as well.

16 So much for opening. I want to turn, topic by
17 topic, to what I'll call the foothills of the case and
18 I'm taking it up at page 2 of our written submissions.
19 I'm not suggesting you read through along with me, but
20 I just want you to know where I am. I'm going to stick
21 pretty much to the order in closings if that's fine by
22 you.

23 THE CHAIRMAN: Yes, we have read these and there may be
24 points where I can say to you you can go a little bit
25 more quickly. No one is to infer anything from any such

1 statements other than that we've read and fully
2 understood what all the points are from both parties.

3 MR SHARPE: I was very much hoping you were going to suggest
4 that because that's what I was going to suggest.

5 I actually had an analogy, you can treat us rather like
6 the European Court where you've read everything, you've
7 had the benefit of the Judge Reclateur's(?) view and I'm
8 here simply to answer your questions. So we're
9 somewhere in between Luxembourg and London.

10 I'm going to start with the proper counter-factual.
11 This is obviously fundamental. You know our case. We
12 say 14.4 pence per cubic metre. Why do we say that?
13 Well we say that was the price that Welsh Water proposed
14 as reasonable after the unfair pricing judgment, and
15 you'll recall how it was derived: it was the average of
16 three methods of calculating access charge and it was
17 also the prices you know that Welsh Water put forward as
18 "reasonable". That was the word they used. You pick
19 that up in our submissions.

20 Their case is "No, despite us thinking it was
21 reasonable, we think a higher figure would be even more
22 reasonable as being non-abusive". This is
23 a misunderstanding of what the tribunal actually did in
24 2008. It first of all didn't say that the figures in
25 the table were correct. It actually went the other way.

1 It said that the tribunal did have further concerns,
2 which was likely to result in a costs figure being
3 somewhat lower than any of these figures. And we set
4 that out at paragraph 8.1 and 2.

5 One is the disaggregated cost of capital you may be
6 interested to know that forms part of the judicial
7 review because Ofwat perpetuated the local cost of
8 capital way ahead of the actual cost of capital. That's
9 a matter still in contention between the parties,
10 I think.

11 Secondly, as you see, some of the concerns -- and
12 I'm at the bottom of page 3 -- stranded assets, water
13 storage, common service, including management, had it
14 been necessary we'd have examined in greater detail in
15 relation to the estimation of operating costs and
16 capital values. Why didn't they pursue this? They
17 didn't pursue it because of the sheer scale of the
18 over-valuation of the excess charging. Anything from
19 46.8 to 70.6 per cent. Now, faced with that margin,
20 quite reasonably, they thought: well that's enough to
21 demonstrate abuse of a dominant position. We don't need
22 to spend a few more years developing more finely what it
23 is we've been asked to do.

24 Then the question is having got this as background,
25 the parties then I think were invited, but anyway, they

1 chose from their own motion, Welsh Water offered and
2 Albion agreed, that they would take an average of the
3 three figures and that's how we arrive at 14.4. That
4 ought to have been enough for Welsh Water but for these
5 proceedings, as you know, they've taken the upper band,
6 the one that is 15.8. But not content with that either,
7 they're adding an extra bit, an extra 5 per cent or
8 whatever it is to take it up to 16.5. Nothing short of
9 ambitious.

10 Now, as I say, this fundamentally misunderstands
11 what the tribunal was trying to do. It is simply not
12 enough to look at this with perfect hindsight together
13 and look through the telescope to the other end and say
14 what was abusive and what wasn't.

15 First of all, obviously, that's not what the
16 tribunal found, and so it's an arid exercise in any
17 event. But in the task facing us is to determine what
18 the parties would have agreed to, not what an
19 undertaking of a dominant position would have insisted
20 upon. It's easy to look back and say we have perfect
21 information as to the range of abusive prices, but it's
22 another thing to say what would the parties have agreed
23 to.

24 Given the caveats that the tribunal entertained in
25 relation to even the three numbers from which the

1 average was taken, and saying the number could even be
2 lower, it is I think, in my submission, an impossible
3 submission to say that it should have been even higher
4 based upon these calculations.

5 What would both parties have done, acting
6 reasonably? The task essentially is to determine what
7 the balance of probabilities is. What would they have
8 done, what price would they have arrived at? We were
9 fortunate enough to be able to come across the Banque
10 Bruxelles v Eagle Star case which you have seen. No
11 case is a perfect analogue, and we are, we readily
12 acknowledge, treading new ground here, but it did seem
13 to us that this House of Lords authority, considered
14 opinion, the analogy between a non-abusive price and
15 a non-negligible price is very telling. I'm sure it may
16 not have been pure coincidence but the approach endorsed
17 by Lord Hoffmann, that is to say taking a mean average,
18 was very much the process --

19 THE CHAIRMAN: Yes, he says a mean figure of that range.

20 MR SHARPE: Yes. Sorry. I'm getting my "means" and
21 "averages" mixed up.

22 Making a judgment within a range of negligent and
23 non-negligent would be the most appropriate way and was
24 indeed the way that Welsh Water themselves originally
25 put forward to Welsh Water for it to accept. They

1 themselves said it was fair and reasonable. It seems to
2 me that should be our starting position, and those are
3 my submissions in relation to 14.4.

4 If, having heard my friend, you are persuaded to the
5 contrary -- and I sincerely hope not --

6 THE CHAIRMAN: Well we'll ask you about that in reply.

7 MR SHARPE: Excellent.

8 Now, may I go on to my second topic. I'm taking up
9 page 7. This is the question of Albion and Welsh Water,
10 would they have agreed a common carriage deal at 14.4p?
11 So we've established what the base price is. Would they
12 have arrived at a deal? Against this, my friend says
13 well, Dr Bryan had this fixation about 7 pence per cubic
14 metre, and he did.

15 Faced with no information but a reasonable judgment
16 of what costs were incurred, that was certainly his
17 opening position. And that was in October 2000, a month
18 after the formal application had been put in, and
19 several months after his intention to seek common
20 carriage had been made known to Welsh Water. And during
21 cross-examination Dr Bryan was taken to a number of
22 documents which indeed showed that he was looking for a
23 price below 14.4p. But the inference is that he
24 wouldn't have settled for 14.4. Again, tribunal, it is
25 for you to make a judgment having heard Dr Bryan.

1 Dr Bryan made it very clear -- and if I may, I'll read
2 two lines:

3 "If it means acceptance, a significant incremental
4 gain in our position, the short answer is yes, as long
5 as it would not have prevented us from continuing to
6 challenge what we then felt was still too high a price."

7 I'm quoting from paragraph 25. Now, Dr Bryan, if he
8 is anything, he's a businessman and he's a pragmatist.
9 At the time he was extolling 7p as a good and fair
10 price. He was operating in almost total accounting
11 darkness. You'll recall the complete lack of
12 assessments afforded by Welsh Water not even down to the
13 methodology they were adopting. You'll recall the line
14 "We don't want to give them the methodology for various
15 reasons". Well not only didn't he know the methodology;
16 he couldn't understand how they were arriving at prices.
17 That's what it meant.

18 We also know that when it comes to the final twist
19 the use of whole company averages, you remember in
20 February 2001, he didn't know about that until after the
21 event in the papers that accompanied the first access
22 price. So not only couldn't he afford a coherent view
23 beforehand, based upon transparency and methodology as
24 they were required to do under 163, even when FOP came
25 forward he wouldn't have been able to understand it

1 until he'd actually received it so it came as rather
2 a shock.

3 So if he had received a non-abusive offer of 14.4p,
4 it is very likely he would have subjected that to
5 careful scrutiny. It is very likely that non-abusively
6 Welsh Water would have supplied him with the methodology
7 and some underpinning for it, an explanation for its
8 derivation and sufficient data for him to have been able
9 to evaluate it.

10 Now, views as to what he was arguing beforehand, the
11 7p, are, in my submission, quite irrelevant to what he
12 would have done faced with a non-abusive charge. If
13 he'd had that and it had been properly explained to him,
14 bearing in mind that, as I say, he's nothing but
15 a pragmatist, at 14.4, he would have made money. The
16 real issue is, which is the second part of the story,
17 how much would depend upon the terms of bulk supply.

18 Now even at worst case -- and I'll call worst case
19 9p rather than 12 -- there would have been a margin
20 bigger than the margin he was getting before for Welsh
21 Water which was of course, as you know, zero. It's very
22 likely indeed, faced with this non-abusive price, that
23 he would have accepted it, reserving always the right to
24 challenge it later. But we saw how he operated from
25 1996 onwards. Faced with zero margin, he persevered to

1 carry on and negotiated the bulk supply in the knowledge
2 he would get zero margin, in the hope he could better
3 that position.

4 In other words, being in the market was much better
5 than being out of the market. And having common
6 carriage was much better than not having common
7 carriage. It was a base position from which he could
8 develop.

9 In our submission, this is really the only
10 commercial and realistic approach to adopt. Had they
11 presented him with a price which offered him a margin,
12 a significant margin, a decent margin, he would have
13 rationally decided to have accepted it, and operate
14 under those terms. And he has shown a willingness to do
15 that and there's no reason at all he would have acted
16 irrationally or commercially perversely by sticking out
17 for an even lower figure bearing in mind it was always
18 open to him to challenge that figure if he wanted to.

19 He sets that out in the extract we put in at
20 paragraph 31 of the skeleton. My friend was doing his
21 best to get him to admit that he wouldn't have accepted
22 a higher price, and "If it meant [in his answer]
23 a significant incremental gain in our position, the
24 short answer is yes."

25 He goes on:

1 "It would have been a huge improvement on the status
2 quo and we would want to cement that gain; we would not
3 want to lose it. We would then use it as a ratchet, if
4 justified, to seek yet further gains."

5 That in a nutshell sums up his approach not just in
6 this but in other aspects of the case: simple,
7 pragmatic, commercial position.

8 My friend also took Dr Bryan to his November 2008
9 correspondence, you'll recall that, following the unfair
10 pricing judgment. And that led to the compromised
11 figure of 14.4 per cent being agreed. I'm taking you of
12 course to page 10 of the skeleton. The question was put
13 in essence:

14 "Why didn't you make an agreement there and then?"

15 "No, we've not contracted that price [that's what he
16 meant]. We've yet to receive from Welsh Water a current
17 price. We did respond in January 2005 with the
18 suggested index price that would have brought the price
19 up to date."

20 Then madam you intervened: "2005."

21 He got the date wrong, 2009. He refers to bundle 8,
22 tab 286.

23 "You will see that we have provided what we consider
24 to be the appropriate index price, the price that we
25 would be prepared to enter into contract on at that

1 time, invited to enter into negotiations in good faith
2 on the basis of that, and I have looked but I can find
3 no evidence of any response to that. That may be
4 because our filing is defective but I've no records of
5 any response."

6 So that explanation for the failure of the parties
7 to agree common carriage post-2000 -- it wasn't
8 challenged by my friend, they had the opportunity
9 obviously to do so. In other words, their failure, or
10 the failure of the parties --

11 THE CHAIRMAN: It is not really going to turn on whose was
12 the last letter, is it? Because as you say, Dr Bryan's
13 a pragmatist, he would have gone chasing after them as
14 he had for however many years if he thought that there
15 was a deal to be done.

16 MR SHARPE: Well they had an additional task which they
17 wouldn't have faced in 2001. We are trying to see how
18 that earlier figure should be updated and what it should
19 have done. That comes back to how we index it forward.
20 But in our submission their failure to complete that
21 task is of no assistance in determining whether Albion
22 would have accepted a non-abusive figure in 2001. We
23 set that out at some length in paragraph 36-39, and I am
24 reluctant, unless you would wish me to --

25 THE CHAIRMAN: No, I think we've read that.

1 MR SHARPE: Thank you.

2 Perhaps I should dwell on paragraph 39. This is the
3 second access price point. Shall I deal with that?
4 Here, they say that in January 2004 the defendant
5 provided the director, on request -- that's Ofwat --
6 with a lower indicative price to the claimant of 17.74.
7 Now we know this is the second access price.

8 Dr Bryan has been entirely consistent, both in his
9 statement and under cross-examination. First of all,
10 they never provided a second access price to Albion, it
11 was provided to Ofwat two months before, pursuant to an
12 information request. It was only copied to Albion by
13 Ofwat some months later as part of the decision process.

14 THE CHAIRMAN: Where does this 17th March date come from,
15 then? It may be a date of Dwr Cymru's raising, but what
16 is the significance of that?

17 MR SHARPE: From my understanding, that is the date that
18 Ofwat sent the document. Yes. Ofwat was sent the
19 document by Welsh Water. For some reason Welsh Water
20 didn't send it directly --

21 THE CHAIRMAN: I see but that is the date that Ofwat
22 forwarded it to Albion?

23 MR SHARPE: Yes. Now I don't know why they took two months
24 but we do know, and you've heard it in evidence from
25 Dr Bryan, he said they spoke to the head lawyer at

1 Ofwat, Huw Brooker, and he said, "Is this important?"
2 and Brooker said, "No." It was Ofwat's view that this
3 really was an unimportant document, and Mr Brooker isn't
4 here to give evidence and Ofwat have not been asked.
5 But the fact is that Ofwat's view of its importance is
6 perhaps reflected by the fact it has been two months --

7 THE CHAIRMAN: Can I just interrupt, for the benefit of the
8 transcript writers. There are two Brookers in this
9 case. There's Dr Brooker, who is the managing director
10 of Dwr Cymru, and there's Mr Brooker, who was at Ofwat
11 at the time. And it was Mr Brooker of Ofwat to whom
12 Dr Bryan spoke about the importance of the price.

13 MR SHARPE: They're not related, to my knowledge.

14 So first of all we have Ofwat's own valuation of the
15 importance of this letter, and we have a fairly lengthy
16 delay in passing it on and we have a Welsh Water
17 decision not to pass it directly to Albion but this is
18 really an important offer in the whole process. One
19 would have expected a more direct communication, one
20 would have expected some follow-up with Ofwat, which we
21 haven't seen, and somebody berating Ofwat "Well why
22 didn't you pass that on?" None of that is in the
23 bundle.

24 But even if that's not right, and not enough to
25 dispose of the issue, when we actually look at the

1 so-called offer we see that it is severely caveated, and
2 we set that out at subparagraph 2 of paragraph 39. It
3 is indicative, it was incomplete, it formed the basis of
4 the starting point and therefore it is not a firm offer
5 and it did not include any other administrative and
6 associated costs. We say it is highly caveated.

7 We have no knowledge incidentally, unlike the first
8 access price, whether or not it had received the
9 approval of the board. Of course we don't have a record
10 of the board approval in February 2001 but it's very
11 likely that the board did approve it, consistent with
12 the evidence, which gave it a certain formality and
13 authority.

14 There's no indication that this board have looked at
15 all of this and are proposing to offer you this.

16 Finally, when we come down to trying to draw
17 parallel between the first and second access prices
18 there are a number of very important differences which
19 perhaps explains Ofwat's attitude that this is not
20 a conclusive serious offer, and explains fully why
21 Dr Bryan did not rise to it. Therefore, in our
22 submission, this did not break the chain of causation.

23 Now, I think we've explained our position, I hope
24 clearly, in the paragraphs leading up to paragraph 40.

25 So those are my submissions in relation to what

1 Albion would have agreed with Welsh Water in relation to
2 common carriage. 14.4p.

3 The next topic is what would have been the outcome
4 of negotiations between Albion and United Utilities, the
5 other side of the stage.

6 Now, this is familiar to you, the offer of 12.1,
7 which seemed to have lasted hours, faced with
8 a rapturous onslaught from Dr Bryan, and it was
9 immediately reduced to 9p, coupled with, you'll recall,
10 a benefit sharing, a rather generous benefit sharing
11 agreement, limited in time of course for up to 18 months
12 I think you'll see, which would have significantly
13 increased the value of the contract to Albion, and we
14 also saw that it was offered indexed at RPI, and then
15 this caveat, "By the way you've got to agree these terms
16 are reasonable" and that was obviously designed to
17 forestall an accusation that it was abusing the dominant
18 position, possibly section 48, but the focus was very
19 much on the competition side.

20 THE CHAIRMAN: Do you accept as regards this that really,
21 the two counter-factual possibilities that we're
22 considering are either -- assuming that Albion had
23 accepted in principle at least, so whatever common
24 carriage price we arrive at, they would have then either
25 gone forward for the draft heads of agreement which were

1 based on the 9p and the benefit-share arrangement in the
2 £25,000 upfront, or that because the common carriage
3 price was now on either case substantially above where
4 they had thought it was going to be when they were
5 discussing the matter initially with United Utilities,
6 they would have abandoned that draft heads of agreement
7 and gone with the 3p -- I know we all called it the 3p,
8 even though it is not the 3p -- but in other words that
9 one can't combine the 3p with the benefit share and the
10 25,000. Either you would have pushed for and got an
11 agreement with United Utilities that basically you would
12 acquire the water on the same terms as Dwr Cymru were
13 buying it, or you would have decided to go ahead with
14 some kind of benefit arrangement on the basis of 9p in
15 the £25,000 but you can't get the benefit of both those
16 points.

17 MR SHARPE: With respect, I think the question is really
18 reflecting Dr Bryan's evidence that he wanted to know
19 what the common carriage -- he wanted to know what
20 margin you could negotiate with. Now, that said,
21 I don't think the evidence suggests that he saw it as
22 a sort of binary thing, 9 or 3; the evidence suggests he
23 would have negotiate the best price he could possibly
24 have got secure in the knowledge he had common carriage
25 at a non-abusive price.

1 What he would have seen, first of all, would have
2 been -- what he would have required, rather -- was some
3 verification of the basis of the numbers. I think
4 I recall that the draft memorandum of agreement did not
5 actually contain the firm price. I think it was
6 a reference to LRMC, and therefore no price at all. And
7 therefore it is very likely indeed, and consistent with
8 what he said and how he behaved, that he would have
9 asked for verification of what that LRMC was.

10 THE CHAIRMAN: I thought his evidence was that the LMRC
11 reference was I think a figleaf, was the word that he
12 used, that --

13 MR SHARPE: Yes, it might well have been. What it was
14 a figleaf for was "how much are you making out of this
15 and how much of that can we share?"

16 THE CHAIRMAN: Yes.

17 MR SHARPE: You will know, and you've seen in our
18 submissions and from the evidence, that United Utilities
19 would have potentially made a great deal of money out of
20 this arrangement. First of all, you saw the negotiating
21 stance that was put together by Miss Bolton. You recall
22 that, where she said, "We can begin these negotiations
23 with the possible benefit of a quarter of a million
24 pounds." They understood that if they sold water at
25 above marginal cost which was the electricity cost,

1 0.7p, they would make money.

2 Sooner or later I suspect that Dr Bryan would have
3 understood that perfectly well. My understanding is
4 that the terms of the Heronbridge agreement were known
5 to him -- or maybe not, but in broad terms they knew it
6 was cost-reflective but either way he knew that there
7 was a margin.

8 The question then becomes: what would have then
9 happened given the price could then potentially have
10 been profitable to United Utilities from 0.7p upwards?
11 I don't think we can readily assume that he would have
12 accepted 9 because he could have afforded 9 and still
13 made a margin. The evidence suggests that he would have
14 negotiated as hard as he possibly could seeking
15 verification as best he could of the data.

16 Now the problem lies with Ms White's evidence. She
17 says a long-running marginal cost was a legal
18 requirement, a given. I've already suggested that was
19 a somewhat eccentric interpretation and I'm being
20 polite. Now, the fact is that did not survive the 12.1
21 which was also put forward as a mature expression of
22 long-running marginal cost. The reasons given, and she
23 was very honest in her evidence of this, of the
24 reduction from 12 to 9 appeared to me to be utterly
25 contrived.

1 THE CHAIRMAN: Yes, but just to get back on to my point,
2 which was that your primary case is that Albion would
3 have ended up paying 3p for the water, but where the
4 negotiations finished before they were suspended because
5 of, you say, the first access price, was a heads of
6 agreement which was a more complicated calculation, and
7 what I am asking you for is what is your narrative for
8 what would have happened in the counter-factual world to
9 that draft heads of agreement negotiation in order to
10 arrive at a position where actually Albion was, under
11 your primary case, paying a much lower price than was
12 being envisaged in those negotiations?

13 MR SHARPE: Throughout, looking at the story through United
14 Utilities, they were convinced that they could not
15 charge different prices for the same water to two
16 different customers. And that informed Ms White's
17 judgment, she didn't resile from that. We also saw the
18 great efforts they were making to try to equalise the
19 number they wanted from Albion, from Welsh Water and it
20 was abundantly clear at the same time that they weren't
21 getting anywhere with Welsh Water.

22 So the question then becomes of United Utilities:
23 would they, despite their earlier attempts and serious
24 concerns about discrimination, would they have felt
25 themselves able to depart from a figure of 3 and create

1 discrimination in equality of treatment, running the
2 risk of a chapter 2 case, quite apart from a condition E
3 case, bearing in mind that we know that they were going
4 to make quite a lot of money even at 3.

5 So Dr Bryan's and Albion's primary case is that 3
6 would have been where they would have settled. Any
7 different figure would have rendered them vulnerable to
8 attack from him, apart from anything else, quite apart
9 from Ofwat, for breach of a licence condition, bearing
10 in mind at the time condition E was said to apply.

11 The fact that we now know that perhaps that was
12 a misreading of the law, it was a very common misreading
13 of the law at the time. So our primary case I think is
14 supported by that very firm evidence of Ms White, and
15 their resolute attempts to try to get a better deal out
16 of Welsh Water.

17 We can run the story forward, of course, because if
18 Dr Bryan had settled on a higher figure, and then it
19 turns out later on, as would have been public, that the
20 Ofwat application with Welsh Water to amend the supply
21 agreement, to bring it up to their version of
22 long-running marginal costs, and we recall the
23 section 40A application which was unsuccessful, if 3p
24 had been ratified I think it is pretty certain that
25 Dr Bryan would have renewed his attempt to renegotiate

1 and get down to 3. And it would have been extremely
2 difficult for United Utilities under those circumstances
3 to say, "Well we've heard from Ofwat and they think 3 is
4 fair and right and efficient but we're going to charge
5 9."

6 So we've got a lot of things going on here:
7 condition E, the competition non-discrimination and the
8 eventual as it were validation by Ofwat that that's the
9 price which would have afforded him an opportunity to
10 come in. So that gives us confidence that when we see
11 3, that would have been where they would have ended up.

12 MR BEARD: Just to be clear, we're not entirely clear what
13 the contention is about the eventual validation by
14 Ofwat. Just so we can --

15 MR SHARPE: I wonder if I can just get on with my
16 submissions without the intervention of my friend.
17 I promise not to interrupt him. If he has a serious
18 complaint about what I'm saying or he is not clear, no
19 doubt he can render it in his own closing submissions.
20 I hope that is not too sharp of me but I'm very
21 conscious of the time, as is he.

22 So we looked at it first from the regulatory
23 position and we think that's a very strong view, and we
24 looked at it also from the commercial position, and as
25 I said, Dr Bryan is, if anything, a very commercial man

1 and he saw what was available to both sides and the fact
2 that he may have negotiated a non-abusive price, which
3 is our counter-factual world, it's plain of course that
4 it would have given him a greater margin -- there is no
5 doubt about that -- and definition.

6 Would it have lessened his resolve to seek equality
7 of treatment which he thought was his legal right? In
8 our submission, no. Of course, it's not the whole story
9 because we now know, and we only know it from my learned
10 friend's skeleton argument at the beginning of these
11 proceedings, that Welsh Water's position would have been
12 that they were going to maintain their entitlement to
13 the right to take up to 36 megalitres a day. In other
14 words, they were prepared to pay their 22 per cent of
15 the costs whether they took the amount of water which at
16 the time was destined to Albion to go on to Shotton.
17 They're perfectly entitled to do that and it's not an
18 issue and indeed it's very sensible for them to do so.
19 It meant that they could remain in play whenever the
20 Shotton agreement had to be renegotiated and that's
21 fine, they can rebid for it, so it makes sense.

22 It also means that United Utilities was then faced
23 with an extra source of revenue stream but they were
24 effectively receiving revenue for the same water twice.
25 A very happy position for anyone to be in.

1 That being the case, there was an awful lot of money
2 on the table from United Utilities at 3p. And sooner or
3 later I suspect that the commercial people within United
4 Utilities -- with whom Ms White didn't have
5 a particularly, and she admitted, close relationship.
6 She advised them and they turned to her for advice of
7 course but the fact remains that they're commercial
8 people with a lot of money and if they could make the
9 money legally by a 3p price, there were no qualms from
10 her, except long-running marginal cost, whatever that
11 may have been, then it is very likely indeed that they
12 would have arrived at that. It's in our submission
13 overwhelming on the balance of probabilities.

14 Unless I can assist you in relation to that?

15 THE CHAIRMAN: No. I think you're now up to page 26 of your
16 submissions.

17 MR SHARPE: Yes. At 24, paragraph 79 onwards we have
18 a short discussion as to what Albion would have done.
19 But I think actually I have dealt with it, and if the
20 tribunal is comfortable in understanding my submissions,
21 I won't dwell on them.

22 There is perhaps just one point I'd like to address,
23 anticipating my friend. Just for your reference, at
24 paragraph 55 of his skeleton he makes the point, he
25 calls it a concession that Albion would never have

1 accepted the 9p price. There is no evidence to suggest
2 that at all. The points are really the same one: it was
3 in relation to common carriage. We can bank on Dr Bryan
4 arriving at a commercially sensible conclusion. That is
5 the beginning and end of it and he did not tie himself
6 to any mast of 9p or 3p, he was taken there. The
7 question is, what would he have arrived at? And you
8 have heard my submission it would have been 3.

9 There's a subsidiary point at paragraph 57 of the
10 note that he wouldn't have given up his right to
11 challenge. Well he would not have given up his right to
12 challenge. Then they infer: ah, then the offer wouldn't
13 have proceeded because it was ultimately going to be
14 contingent on that. Well, it's a matter of evidence,
15 but let me put it like this: even if that condition had
16 remained in the agreement, what does it boil down to?
17 It boils down to an undertaking in the dominant
18 position, contracting with the party dependent on it,
19 saying, "Here's the price. Now, if you sign a document
20 that says it's reasonable you can't ever complain about
21 it." A ludicrous proposition, respectfully.

22 If it were contrary, we know very well what would
23 have been the boilerplate of every agreement of an
24 undertaking of the dominant position. So even if he had
25 signed it, it wouldn't have done it. And they knew and

1 would have been advised by somebody properly advising
2 them that that's a hopeless proposition. Respectfully,
3 there is nothing in my friend's point at his
4 paragraph 57.

5 Can I now turn to timing. I'm making much better
6 progress than I thought. My friend is very likely to be
7 up earlier than we anticipated.

8 THE CHAIRMAN: It is always dangerous to say that.

9 (Laughter).

10 MR SHARPE: False hope.

11 We begin at paragraph 91 with Mr Edwards again, and
12 he says it is unrealistic to assume they would have
13 commenced immediately, and he gives four reasons for
14 this which I'm going to deal with one by one, and in our
15 submission each of them is unconvincing and doesn't
16 withstand scrutiny.

17 You'll recall as early as November it was Welsh
18 Water's view that all outstanding issues could be
19 resolved by the end of December. It was at a meeting.
20 There was an earlier board meeting in November, where
21 all the issues had been settled, but we took that to
22 mean not the issue of price, plainly, because it hadn't.
23 But the ancillary issues of contract and the machinery
24 had to be dealt with. But we're happy to rely upon
25 Mr Edwards at Day 10, page 142. Notwithstanding the

1 fact there wasn't a pricing methodology in place.

2 THE CHAIRMAN: So your case is now that the starting date,
3 if I can put it like that, for your claim is the seven
4 weeks from 10th November? You're going with that, are
5 you?

6 MR SHARPE: Sorry?

7 THE CHAIRMAN: The seven weeks from 10th November.

8 MR SHARPE: No, I think we're --

9 THE CHAIRMAN: Sorry, seven weeks from 2nd March.

10 MR SHARPE: No, where did the seven weeks come from? Our
11 pleaded case is that the time started -- they would have
12 entered the agreement if a non-abusive price had been
13 offered on or about 1st or 2nd March, or it would have
14 been backdate to that date.

15 THE CHAIRMAN: Right. That's on the basis that if the
16 access price had been given earlier, then everything
17 could have been sorted out?

18 MR SHARPE: I'm not sure I want to pursue that particular --
19 it's an attractive argument for me and I half accept the
20 point, but I think what is being said against us is that
21 there were four reasons why they would not have
22 proceeded as of that date. So if the first access price
23 is put on the table, Dr Bryan would not have accepted it
24 and then gone forward. Now, before, there were other
25 aspects of the agreement. We say no. Those other

1 aspects had all but been settled, if not settled
2 completely.

3 They say that there would be issues surrounding the
4 United Utilities arrangements with Albion. Yes, they
5 had to be finally resolved but we say -- and you'll
6 recall Dr Bryan saying that it had been common carriage,
7 I think he had said that he would be on the plane to
8 Warrington, and he corrected himself realising there
9 wasn't a plane and that he'd be on the train. In other
10 words he wouldn't waste any time at all in finalising
11 that arrangement, bearing in mind it was in his
12 interests to get everything up and running so he could
13 make some money and it would certainly be in the
14 interests of United Utilities given the very significant
15 revenues they were likely to get.

16 Thirdly, they would have to have something about the
17 amendments to the Heronbridge agreement. That was
18 Mr Edwards. We'll deal with that in a moment. Then his
19 point about capacity augmentation. We say that has no
20 relevance at all.

21 That's the case against us. If all of these just
22 collapse, then there is no evidence in relation to our
23 assertion that the start date would be 1st or 2nd March.
24 We don't want to be over-rigid on this and my friend
25 shouldn't take this as a concession, there can be no

1 science about when this would have actually started. We
2 know that if that offer had been made, non-abusive, it
3 had the required verification that Ofwat had had, it was
4 in everybody's interests, certainly Dr Bryan's
5 interests, to get a move on and therefore there would
6 not have been any undue delay. And bearing in mind the
7 foothills of all this: the bulk supply arrangements had
8 been in place anyway, so that could have been used, it
9 had been approved by Ofwat so that could have been used
10 for United Utilities.

11 The other issues were really pedestrian by
12 comparison with the price. So there's no mandate to
13 say, as has been said against us, it would have taken
14 three or six months or a year or whatever, these are
15 just numbers, very convenient ones for my friend. We
16 say that it would move forward with all deliberate
17 speed.

18 So our case essentially is 1st and 2nd March is
19 a useful date. It might easily have been after, but not
20 so much after as to materially affect the damages claim.
21 We're in your hands on this, because it is going to be
22 a finding of fact, I suppose, as to where it should be.

23 But we do know from the evidence that when we start
24 with his checklist of other aspects of the agreement, we
25 know from the Tripartite Agreement that these issues

1 were not raised as being -- ancillary services had not
2 been considered internally or discussed in detail at the
3 time. But he wasn't involved in the negotiation and he
4 can't speak to them.

5 Sorry, he wasn't involved in the negotiation with
6 united utilities so he can't possibly speak to the
7 progress as to between Albion and United Utilities. The
8 evidence you've got then, in fact the only evidence
9 you've got is Dr Bryan in cross-examination, and you'll
10 see that's set out at paragraph 94. You'll see he had
11 draft agreements, we had a bulk supply agreement already
12 existed, no doubt there would have been variations on
13 that, an honest assessment. But he had been on the
14 first train up to Warrington negotiating. How long? I
15 don't know but I doubt whether they would have taken
16 more than a day because we had "two willing parties
17 trying to improve on the situation that both felt was
18 unsatisfactory."

19 I think respectfully you're entitled to look at this
20 as to how pragmatic business people would have looked at
21 it. They wouldn't have dilly-dallied.

22 MR COWEN: Would it be fair to say that we're entitled to
23 look at the situation not just in terms of a non-abusive
24 access price, but in terms of Dwr Cymru operating with
25 the special responsibility of the dominant operator and

1 in that regard offering a non-abusive contract in
2 a non-abusive time frame?

3 MR SHARPE: Very much so, respectfully. That obligation is
4 a high one. Everybody in a dominant position knows the
5 obligations, the special responsibilities that they owe
6 not to distort genuine competition, I think. And you
7 see time and time again, pulling down the shutters on
8 methodology and access. You'll see later a very
9 interesting internal minute, internal preparation for a
10 meeting with Albion in November 2000. Now, you've seen
11 one version of this, it's the sanitised version but we
12 now have the pleasure of seeing the earlier version
13 headed "Slippery answers to Albion".

14 Dr Bryan didn't see the joke actually in that
15 because he went to the meeting thinking that he was
16 negotiating in good faith. Respectfully, an
17 undertaking, aware of its responsibilities in the
18 dominant position, would never have written such an
19 internal memorandum. Well, let that be told it was Paul
20 being Paul. I anticipate the submission, I will save my
21 friend the trouble.

22 So yes, we have that as part of the general timing.
23 But I ought to say something about capacity
24 augmentation. I'm wondering, I'm so sorry, would it be
25 a convenient moment to give the ladies a rest?

1 THE CHAIRMAN: Yes. I think, as far as capacity
2 augmentation is concerned, you can take that reasonably
3 swiftly. What would be useful to hear about is how much
4 does the tribunal have to go into in formulating the
5 counter-factual as to what would have happened to the
6 Heronbridge agreement in the light of the agreement
7 between United Utilities and Albion, the supplier of the
8 water?

9 I think that's a good point to break. If we come
10 back at 12 we'll be making good progress?

11 MR SHARPE: Yes.

12 THE CHAIRMAN: We'll come back at 12, then.

13 (11.50 am)

14 (A short break)

15 (12.00 pm)

16 MR SHARPE: Madam before we adjourned you posed a question
17 in relation to the Heronbridge agreement. I think the
18 short answer is there was no basis on which either party
19 would have wished to -- sorry. You posed a question in
20 relation to the Heronbridge agreement, and in reply,
21 there was no basis on which either party would have
22 wished to have amended the Heronbridge agreement.

23 THE CHAIRMAN: Either party being?

24 MR SHARPE: United Utilities and -- either party to the
25 Heronbridge agreement. From Welsh Water's perspective,

1 as I submitted earlier, their intention of the right to
2 take 36 megalitres is readily understandable by their
3 continued ambitions to win back Shotton, and of course
4 they were continuing at that time to supply Corus, so
5 they were still in being, and United Utilities did
6 attempt to have a compulsory form of amendment under
7 section 48 which as we know was unsuccessful.

8 The question becomes more pointed I think
9 respectfully when one considers if Welsh Water had had
10 another customer for the capacity --

11 THE CHAIRMAN: Or if we don't accept that they would have
12 wanted to retain this entitlement to the 36 megalitres
13 so that in fact what's likely to have happened would be
14 Albion effectively replacing Welsh Water and then
15 somehow splitting the 22 per cent of the costs between
16 them. It may be that it all gets rather too speculative
17 for us to make a decision.

18 MR SHARPE: Respectfully, that was the word that was going
19 through my mind and I wouldn't have used it.

20 We know on the facts that neither party wanted to
21 re-negotiate; or rather, Welsh Water were not prepared
22 to accept any re-negotiation in relation to price, and
23 we also know, on the facts, that Welsh Water were not
24 prepared to relinquish their right to up to 36
25 megalitres. So those are the primary facts we're faced

1 with. It makes good sound sense as to the retention of
2 a low price, and an entitlement which would have enabled
3 them to have fought again for Shotton as well as
4 retaining Corus.

5 The issue becomes more moot as to whether or not
6 United could properly have supplied that capacity to
7 Welsh Water and to Albion, and if this was underlying
8 the tribunal's question, I can address that now.

9 THE CHAIRMAN: Well because this links in not only with the
10 capacity augmentation point but with the back-up supply.

11 MR SHARPE: Yes, which I'm going to deal with later of
12 course. Our case is there's not the slightest evidence
13 to suggest that Welsh Water would have rustled up
14 another customer at all for the balance of the water
15 that had formally been taken in respect to Shotton -- or
16 sold to Albion, rather -- any more than it had found
17 a customer for the growing surplus it had between what
18 it actually used and what its entitlement was, which had
19 existed for many years.

20 THE CHAIRMAN: But then we're positing a situation where the
21 counter-factual is that Dwr Cymru are prepared to pay a
22 substantial amount of money to retain this entitlement,
23 but with no prospect of using it, of wanting to use the
24 water, which seems a rather commercially unlikely
25 situation to get ourselves into.

1 MR SHARPE: First of all they had Corus, so there would be
2 some element of Corus which they retained.

3 THE CHAIRMAN: Yes.

4 MR SHARPE: Secondly the contract between Albion and Shotton
5 is not infinite.

6 THE CHAIRMAN: No, but if the Albion and Shotton contract,
7 as you say, if the Albion/United Utilities agreement is
8 on the basis of 3p, then why wouldn't that be enough to
9 indicate that if Albion dropped out of the picture at
10 some future time, and Dwr Cymru were going to revert to
11 being the supplier, they would piggyback on that price
12 rather than have to have retained the original
13 Heronbridge agreement price?

14 MR SHARPE: Respectfully, it's getting a bit speculative.
15 We know on the facts that Welsh Water was simply not
16 prepared to relinquish their entitlement. Now, what
17 they would have done, faced with the reality of it,
18 I can't tell and nor is there any evidence from Welsh
19 Water to that effect. It's not commercially rational
20 for them to cling on to the 3p. Their record says it's
21 a relatively cheap source of supply for water. They
22 were utilising some of it for Corus. I think they were
23 looking forward. If they'd taken it in good faith that
24 they were going to maintain this position -- and I've no
25 reason to doubt them on this -- they did it in order to

1 be able to be in a strong position to maintain this, to
2 be a contender for Shotton.

3 Now, if they'd won back Shotton, Albion would have
4 no customer and then if they had relinquished their
5 entitlement at the cost-reflective price they would have
6 had to re-negotiate and they would have known they would
7 have had to re-negotiate at a higher price because Welsh
8 Water were looking for a price of 12p --

9 THE CHAIRMAN: United Utilities.

10 MR SHARPE: Yes, absolutely. So if the question is posited
11 on United Utilities reverting to 3, it's not entirely
12 obvious that's what United Utilities would have done.

13 MR LANDERS: I think very early in the hearing did you not
14 say that if there was an agreement between Albion and
15 United Utilities to take the water, then Dwr Cymru would
16 have to carry on paying for the water that effectively
17 they didn't take? So United Utilities would get it
18 twice?

19 MR SHARPE: Yes.

20 MR LANDERS: So you're saying there was a rational interest
21 for Dwr Cymru to pay 2.3, the 3 less the 0.7, on water
22 that they didn't use, and positing that they couldn't
23 find another customer?

24 MR SHARPE: Well, no serious evidence that there was going
25 to be another customer, so let's put that to one side.

1 I go back. First they had Corus. They hadn't
2 disappeared. They had a contract with Corus so they
3 needed supply. So there was no question of them
4 abandoning United Utilities and supply. So the only
5 issue then is that they would have maintained that
6 proportion of the cost after Corus, and it's after Corus
7 we're only interested in, for a given period of time.
8 Why would they have done that? In order to signal that
9 they were a contender for the renewal of the Shotton
10 contract. I think that's their own surmise.

11 Respectfully, Mr Landers is absolutely right: there
12 would be a period when they were receiving twice the
13 revenue and Welsh Water would be paying for water it did
14 not need. Of course, that is their evidence, it's not
15 mine. They would not have relinquished the entitlement
16 and it does I think make commercial sense in the context
17 of not abandoning Shotton completely. This was a very
18 good deal for them. They also would have known that
19 United Utilities were actively seeking to re-negotiate
20 the price, not to treble it. It's not entirely foolish
21 to think of them doing this in the speculation of
22 winning back Shotton.

23 THE CHAIRMAN: The other point is that when you say Albion
24 would have paid the same price as Dwr Cymru were paying,
25 we know that under the Heronbridge agreement it wasn't

1 just the 3p; it was also the potential liability for the
2 capital investment in the future, and in a sense, one
3 could say it was therefore a contract covering non-run
4 marginal costs because when there was replacement
5 investment there was an obligation on the customer to
6 contribute to that. But is it your case that Albion
7 would have taken on some of that obligation as well,
8 a proportion of that obligation as well, because I don't
9 see at the moment that you can take the 3p price, which
10 is an actual costs price without any provision for
11 future investment, without also having some potential
12 liability for the future investment at whatever
13 percentage it's decided to then split that. It seems to
14 me that either you have to take the whole Heronbridge
15 structure, which may end up in fact just being 3p,
16 because we know that there was minimal capital --

17 MR SHARPE: It never happened.

18 THE CHAIRMAN: It never happened, it was never triggered.

19 But just trying to think about what the contractual
20 relationships would have been, it seems that if you're
21 saying that Albion would have got the benefit of the
22 actual cost price, that must have been on the basis that
23 they would agree to chip in to any future replacement of
24 the pumps.

25 MR SHARPE: You put your finger right on the point: this

1 never happened, it has never happened since and it is
2 entirely an academic speculation as to what the
3 liabilities would have been. If it never had arisen,
4 then that would have I think affected the mutual
5 understanding that whatever bargain would have been
6 struck in 2001, it was beyond the screens of the parties
7 involved. That's the first point.

8 The second point, respectfully I'm not entirely sure
9 with the premise. If one looks at a commercial contract
10 with price and other terms and conditions it's quite
11 realistic to see it as a totality, so you have an
12 obligation for capital injection and in return you have
13 a lower price. Let's put it like that. I think that
14 lies behind the question. But you will recall my taking
15 you to the Heronbridge agreement and how the price or
16 more accurately the contribution was built up. It was
17 built up by looking at identified costs. In other
18 words, there was no leeway in this. The costs were
19 identified, the cost stack was created. It didn't have
20 anything to do with capital and the capital provisions
21 were quite separate. There is not the slightest
22 evidence to suggest that the price which would have been
23 derived from the cost stack would have been any
24 different if that capital aspect had been present or
25 not. I think we're entitled to look at this not as a

1 unity but as a cost-reflective price established in
2 relation to one set of principles and then, in addition
3 to that, a liability which for all I know in 1996 or
4 earlier -- remember the contract reflected earlier
5 practice -- may never have been anticipated.

6 It is by I think common consent a curious agreement
7 as United Utilities were telling everybody. It was an
8 agreement thrust upon them in the days of
9 pre-privatisation. The earlier arrangement had been so.
10 And it was essentially a transfer for a very low price
11 between two water undertakings.

12 Now of course in 1996 it was a very serious
13 commercial undertaking, both parties were no doubt well
14 advised, they were privatised, they were companies and
15 there was no reason to believe that it wasn't anything
16 other than an arm's length bargain.

17 I think my primary submission is that this is
18 something that has never arisen, it may well have been
19 anticipated never to arise; secondly, that the cost
20 stack for price was determined independently of the
21 capital requirement, and in answer to your final
22 question, what would Dr Bryan agree, I think there is
23 every likelihood, in the knowledge that the reliability
24 would have been zero, it would have commercially readily
25 assented to it in the knowledge that nothing would ever

1 have happened.

2 THE CHAIRMAN: Well they would eventually have to replace
3 the pumps.

4 MR SHARPE: That's a very interesting point. My
5 instructions are --

6 THE CHAIRMAN: But maybe not.

7 MR SHARPE: -- that they were old in 2001, they are older
8 since and they have not been replaced. But happily,
9 we're not here to assess the longevity of the pumps.

10 MR LANDERS: Presumably, if the Heronbridge agreement had
11 continued, all the liability for the pumps and
12 everything would have stayed with the equipment.

13 MR SHARPE: Yes. One would have assumed that would have
14 been part of the common carriage practice.

15 MR COWEN: Forgive me, one follow-up. Where I'm puzzling is
16 I understand the argument about the optional value of
17 the 2.3p, but in the counter-factual, one thought that
18 occurred is that maybe Dwr Cymru would not have wanted
19 to lose even the 2.3p and it would have continued to be
20 the supplier to Albion at a price that they'd already
21 negotiated, so you wouldn't have ended up with a higher
22 price than that. That would have been on a pass-through
23 basis because they would have been making a reasonable
24 margin on the downstream common carriage price.

25 MR SHARPE: Well I must admit that's a possibility, but not

1 I think one that occurred to Dr Bryan at the time. But
2 yes.

3 If I now turn to the proposition that the second
4 access price didn't break the chain of causation, and
5 I'm taking you up to page 28 of our closing skeleton.
6 Now we quote the defence at paragraph 99, and they talk
7 about a cut-off date when the second access price was
8 actually communicated to Albion as 17th March.

9 Now, that's a sort of point which I'll just make
10 very quickly. To the extent that any lead time is
11 required as from, say, 1st or 2nd March in 2001, one
12 would have expected a similar sort of lead time as from
13 the date of 17th March. Insofar as "Here's the offer,
14 you need a bit of extra time." I don't want to dwell
15 over-long on that point but I nevertheless draw it to
16 your attention.

17 Now, whereas before I dealt with this in the context
18 of the argument that Albion wasn't serious in entering
19 into negotiations and arriving at a settlement, here the
20 argument is deployed not in the sense of serious but
21 somehow or another this constitutes a dramatic break in
22 the chain of causation and therefore any loss from the
23 date of the second access price cannot be recovered from
24 Welsh Water.

25 We really repeat the same sort of arguments to some

1 extent: they didn't get the offer, it wasn't a firm
2 offer, it was caveated. Actually we put it even more
3 strongly than that: they didn't have enough information
4 either to accept or reject it and for this reason it
5 cannot be accused of unreasonably having refused an
6 offer which really was not a proper offer, in the terms
7 that we understand it now.

8 But we have a further argument set out: Welsh Water
9 have to show that the price was a proper price, ie it's
10 not a non-abusive price but a price that was capable
11 rationally of being accepted, and if the price was
12 higher than what had subsequently been determined to be
13 the non-abusive price, then Albion cannot be faulted in
14 not accepting it.

15 Now, we put that forward as our secondary case.
16 First, it is not really an offer at all, but if it were,
17 it wasn't an offer that was capable of acceptance, being
18 an offer that was higher than the non-abusive price.

19 We want to make it very clear, and we do so in
20 paragraph 103, we're not saying you should make
21 a finding about whether it is abusive or not; all I'm
22 asking is you simply compare one with the other and if
23 one is non-abusive at one price, above it, significantly
24 above it, it follows that Dr Bryan was perfectly
25 reasonable in saying no, and it didn't get that far on

1 the facts.

2 We worked it out, and we established this: if any
3 form of indexation in contention had been applied to
4 this later offer and worked back it still would have
5 been higher than the non-abusive price.

6 So in our submission, Albion is entitled to
7 compensatory damages for the full period on or about 2nd
8 March until 7th November 2008, the date of the unfair
9 pricing judgment.

10 Those are my submissions on causation. I now turn
11 to benefit sharing. I'm going to treat our
12 paragraphs 106 I think onward to about 132 as read, but
13 what I'd like to do -- I found this a somewhat
14 complicated topic -- is just make my submissions and
15 then, if there are still any queries, to ask you to go
16 back to the skeleton where I deal with things in
17 slightly more detail.

18 When we talk about benefit sharing, that raises the
19 question of what account should be taken of the original
20 agreement and then what account should be taken of the
21 amended agreement. So I'm going to start with the
22 original agreement. Now, I think you're familiar with
23 clause 7(4) but just for the reference, it's at
24 bundle 2, tab 20, page 372. Clause 7(4) provides that,
25 and I'm quoting here:

1 "The savings in the cost of supply or services or
2 incremental revenue [and here it is very important] net
3 of financing and operating costs arising from such
4 initiatives as may be agreed between the parties shall
5 be shared between the customer [Shotton] and Albion
6 Water in the proportion of 70/30 respectively."

7 In my submission, the true construction of this is
8 really quite easy. To the extent that there are savings
9 in the cost of supply, or incremental revenues, they are
10 to be shared as follows: first of all, Albion recovers
11 its financing and operating costs, and then, after that,
12 any net benefits are split 70/30 in Shotton's favour.
13 Now, it is clear, in our submission, that the clause
14 would have applied to reductions in Albion's wholesale
15 costs through common carriage since those would have
16 been savings in the cost of supply.

17 What is also clear is it would have applied to
18 damages payable to Albion in relation to the supply.
19 Now, those damages can either be viewed as savings in
20 the cost of supply or as incremental revenue. In either
21 way, the clause applies to them. So that's where we
22 start.

23 Against that background, the question is how should
24 damages be calculated in the light of that agreement?
25 The starting point for the calculation of damages is of

1 course the difference between what Albion did in fact
2 pay for water on the one hand, compared to what it would
3 have paid if Welsh Water had not abused its dominant
4 position. Welsh Water now contends that the passing on
5 defence should apply, and Albion should only be able to
6 receive or recover by way of damages the amount of
7 margin that it would have maintained under the
8 benefit-sharing provisions because Albion had passed on
9 the rest of its loss to Shotton Paper.

10 By analogy, a more humdrum example, but a cartel,
11 and parties fixed the price of a cartel, and let's say
12 they're in the confectionary business, to choose an
13 example at random. They then sold the confectionary to
14 retailers who put up their prices as a result of the
15 cartel. The confectioners sue the parties to the cartel
16 for their loss, and the cartel say "Well you cannot sue
17 for that loss because you've actually passed it on to
18 the people who have bought the stuff from you.
19 Therefore you've not suffered any loss."

20 That's the sort of passing on view.

21 That's really essentially what Welsh Water are
22 saying. They should only be able to recover by way of
23 damages the amount of margin they would have made under
24 the benefit-sharing provision because they had passed on
25 the rest of the loss to Shotton. Now, we think that's

1 a very unfair approach and not justified by the
2 authorities. Welsh Water are saying that Albion should
3 only get its costs plus 30 per cent of the remaining
4 margin, because that's the amount which Albion would
5 have retained under the Shotton Paper agreement. But
6 the benefit-sharing provisions would then apply to the
7 award of damages, so Albion would recover its costs but
8 then have to pass 70 per cent of the balance on to
9 Shotton. So Albion then would only end up keeping
10 9 per cent of the benefit after recovery of its costs.

11 Now, Welsh Water say that's irrelevant. The
12 tribunal should only consider how the benefit-sharing
13 provisions would have operated in respect of the savings
14 and the cost of supply and it should ignore the fact
15 that exactly the same provision would apply to the
16 damages as well. Now, we say that's an illogical
17 position and it is noticeable that Welsh Water has
18 presented no authority for the suggestion that the
19 tribunal should only look at how the clause applied to
20 reductions in cost and ignore the fact that it would
21 equally apply to incremental revenues, including
22 damages.

23 Now, as well as being illogical, it is clearly
24 contrary to the purpose of the passing on defence. The
25 point of a passing on defence in the sort of prosaic

1 example I gave you is to ensure that a party doesn't end
2 up recovering far more than its actual loss. If you
3 passed on and garnered revenue because of the cartel you
4 get cartel damages and the extra revenue, you are being
5 twice rewarded.

6 We say this is so removed from the current
7 situation, the end result of Welsh Water's argument
8 would be that Albion would be far worse off after
9 receiving its damages than it would have been if the
10 abuse hadn't taken place at all.

11 If that's the result, then it's clear that the
12 amount awarded in damages is insufficient. But, if
13 damages are based on what Albion did in fact pay for
14 water, compared to what it would have paid under common
15 carriage, then because the same clause that would have
16 applied to savings in the cost of supply also applies to
17 the damages, Albion would, under the original agreement,
18 be put in the same position that it would have been if
19 the abuse had not taken place. On that basis as you
20 see, Albion isn't overcompensated, but equally
21 important, it's not undercompensated.

22 We therefore submit that is the correct approach for
23 the tribunal to take. It is simply to look at the
24 difference in what Albion paid for water.

25 THE CHAIRMAN: Don't you have to decide, then, how much

1 Shotton would have paid Albion for the water? Because
2 Shotton Paper were in this to reduce their own water
3 bill, and if you do as you say, which is you just assume
4 that the compensation is the difference between the
5 Albion/Dwr Cymru bulk supply price and the common
6 carriage costs, isn't that assuming that Shotton would
7 have paid the same for the water whether they were
8 supplied by Dwr Cymru or by Albion?

9 MR SHARPE: I think we would say that's precisely what the
10 benefit-sharing arrangements actually do.

11 THE CHAIRMAN: Yes, that was how I saw it, that we don't
12 have to try to guess to what extent any cost savings by
13 Albion would have been passed on, in terms of a pence
14 reduction in the water price to Shotton, because the
15 parties had themselves, Shotton and Albion, agreed to do
16 it in this other way, not by way of a reduction in pence
17 per cubic metre of water, but in this more complicated
18 benefit sharing.

19 MR SHARPE: Respectfully, that's exactly the point.

20 MR COWEN: Can I just try to make sure I've properly
21 understood this. I am not sure the analogy terribly
22 helps, I just want to clarify whether or not I've
23 understood it. The passing on defence applies in
24 a situation where you've got a cartel. Now, assuming
25 the cartel has raised the price and then impacted the

1 value chain, the participants of that value chain have
2 got a benefit which is then stripped out. So the
3 benefit is in terms of revenue and cash to the economic
4 situation positing the idea of a cartel. That's
5 a situation where prices have been raised, typically.

6 It seems that we're in the opposite situation here,
7 where we've actually had an abuse of a dominant
8 position, and the competitive structure has been
9 adversely affected, the competitor has been set back,
10 and that competitor has been set back and denied the
11 revenues that might otherwise have occurred, the cash
12 that might otherwise have benefited that business system
13 that might otherwise have grown potentially more swiftly
14 or whatever.

15 I'm just not clear why the passing on, you know,
16 benefit would be relevant in such a situation because
17 we're in a situation where the competitive structure has
18 been adversely affected, and that downstream, in the
19 benefit-sharing arrangement, that has to some extent
20 been passed on. But I don't quite follow why the two
21 are relevant or equivalent situations.

22 MR SHARPE: Respectfully, we would agree entirely with that
23 analysis and I'm responding to my friend's case that
24 this is analogous to a passing on claim, and it
25 effectively amounts on one level to us recovering

1 damages on Shotton's behalf, which we're not. What
2 we've done, we, Albion, is decided how the damages
3 should be -- in this case the incremental revenue --
4 should be apportioned after we've received it. That
5 doesn't debate the claim that we make against Welsh
6 Water; it just determines what's going to happen after
7 the event.

8 I'm talking so far at least in relation to the
9 original agreement but if we turn to the amended
10 agreement which is at bundle 5, tab 182, page 1090, this
11 really provides for the reversal of the benefit-share
12 provisions. Albion would once again recover its costs
13 but then retain 70 per cent of the net benefits rather
14 than 30 per cent.

15 Now, Albion's position -- and I think this mirrors,
16 respectfully, what Mr Cowen has just said -- is that no
17 account should be taken of that at all. It was an
18 agreement entered into to assist in the finance of this
19 litigation, and it should have no effect at all on the
20 amount of damages awarded, in the same way that Albion
21 doesn't suggest that any account should be taken in the
22 calculation of damages of its funding arrangements with
23 the litigation funders.

24 THE CHAIRMAN: That goes to the voluntary uplift as well?

25 MR SHARPE: Yes, it does. Later on. I was going to say res

1 inter alios acta, but I won't.

2 The interesting thing is at paragraph 237 of my
3 learned friend's skeleton, Welsh Water agreed that that
4 interpretation is correct. No account should be taken
5 of modifications which took place in terms of the way in
6 which Albion distributes its damages. On that basis
7 I don't really need to say any more. We seem to have
8 reached agreement. But I fear I ought to, if only to
9 get it right, because the reason Welsh Water give for
10 saying the amendment is relevant is wrong. And if
11 I may, I'll deal with this very briefly.

12 The reason why the amendment is irrelevant is
13 because Albion should not be able to alter the amount of
14 damages it's entitled to by a post-abuse agreement. It
15 is as plain as that. Otherwise Albion, or any other
16 company, could alter the level of damages after the
17 event. It's as simple as that. That's completely
18 irrelevant to the question of what account the tribunal
19 should take of the original agreement which Albion had
20 with Shotton Paper since that agreement was in place
21 before the abuse took place. As I've already explained,
22 in our submission, it applies equally to savings in the
23 cost of supply and to incremental revenue.

24 Madam, you addressed the question of the voluntary
25 uplift. Maybe I can deal with that now because I think

1 it fits in here.

2 What account should the tribunal take of the
3 voluntary uplift? You'll recall this was the increments
4 in price paid for a shortish period between October 2002
5 and -- well it's the voluntary uplift that Shotton Paper
6 paid from October 2002. Now, Welsh Water had not
7 disputed that these were not price increases, and
8 rightly so. This was finance which Shotton Paper
9 provided on a temporary basis in order to assist Albion
10 during the period. Finance which Albion remains liable
11 to repay at the conclusion of these proceedings. It is
12 foursquare with going to the banker.

13 THE CHAIRMAN: Is that a liability that arises from the
14 revised clause 7(4) or is that some different liability?

15 MR SHARPE: I think the strict answer is the issue is in
16 some doubt. No question in Albion's mind it has a legal
17 obligation to pay. It's an understanding between
18 customer and supplier which Albion must observe. And it
19 will be found in -- I think just for a reference, I'm
20 not going to take you to it, but this is Dr Bryan's
21 witness statement which is found at tab 1, bundle 4.
22 Just for your own reference, it's page 38, paragraph 21.
23 The footnote is also rather important. I'll just read
24 you the footnote if I may:

25 "I agreed the voluntary support with Martin Gale,

1 the managing director of Shotton Paper, on the basis
2 that Shotton Paper would be repaid the voluntary support
3 provided out of any benefits gained from Albion pursuing
4 the fight against Welsh Water. This was not recorded in
5 writing because both I and Mr Gale understood that
6 finance provided by Shotton Paper was repayable under
7 clause 7(4) of the supply agreement and so no amendment
8 was required."

9 I hope that clarifies ... anyway the short point is
10 there is no need to take into account the finance
11 provided by way of the voluntary uplift in calculating
12 damages.

13 THE CHAIRMAN: There is a slight conundrum here, though,
14 which may be just how things have worked out, which is
15 that you have given credit for the interim relief that
16 was granted, but the interim relief granted by the
17 tribunal appears, reading those rulings, to have been
18 triggered by first the halving of the ex gratia payments
19 and then the removal of the ex gratia payments. So is
20 there, as I say, a conundrum there if you say you're
21 required to give credit for the interim relief, but not
22 required to give the credit for the earlier ex gratia
23 payments?

24 MR SHARPE: Well there was credit given as a result of the
25 interim relief, in relation to the surcharge, if you

1 like. That was always seen, as you see from Dr Bryan's
2 evidence, to be treated as a loan as such, and to be
3 repaid. Whereas the other one was a practical response
4 to the benefit of interim relief to be shared with the
5 customer. The interim relief, as you well know, was
6 a product of the tribunal ordering the payment. And
7 that constituted a new commercial basis on which Albion
8 could proceed.

9 In a sense we see this, and we've always seen this,
10 as a separate matter from the surcharge negotiated, and
11 as a side agreement to tide them over a rather difficult
12 period and of course when that difficult period ended,
13 relatively, we say, that's the point at which the
14 payment ended.

15 May I now turn briefly to the indexation. We won't
16 finish compensatory damages until after lunch but I'll
17 finish it briefly after that. And then go on to
18 exemplary. I'm at page 37 of the skeleton.

19 The question for the tribunal is what level of
20 indexation would have been agreed by the parties, if
21 any, assuming that both acted reasonably and lawfully?
22 The requirement to act lawfully is central to this
23 element, because it would not be right, right at the
24 outset, and that's part of the counterfactual, to
25 introduce a requirement of indexations which might for

1 example on day one take a non-abusive price and then
2 translate that into an abusive price simply through the
3 addition of an indexation mechanism. That's
4 respectfully rather an obvious proposition but I have to
5 say it.

6 So we have to look and see what the parties would
7 have agreed, retaining a legal relationship, bearing in
8 mind that the indexation could create such a margin
9 between revenue, price and cost as to be abusive.

10 So the focus then becomes on cost. What would the
11 parties have agreed in 2001 at that time? What would
12 have been reasonable for them to do? Now my friend says
13 reach our price index, easy. We'll just index it there.
14 Without, incidentally, any particular analysis of the
15 impact that would have had on costs, because there had
16 been a growing divergence between the revenue garnered
17 through indexation over the years and the level of costs
18 they were incurring. They would leave themselves
19 vulnerable yet again to a charge of abuse.

20 Looking at the period that we're considering, the
21 parties would have been bargaining in the shadow, most
22 importantly, of an Ofwat determination of charges, and
23 I took you to that. And you will recall that Ofwat
24 demanded -- permitted, rather, increases in potable
25 water costs and therefore prices but also as part of the

1 determination said that there was a challenging target
2 of 25 per cent reduction for non-potable water
3 distribution treatment.

4 I think you're very much aware how this works.
5 There would have been an extensive examination of the
6 accounts and profits and comparative estimates of how
7 efficient they were relative to other water companies.

8 Anyway, that was a 25 per cent reduction.
9 Therefore, it would have made no sense at all for
10 Dr Bryan, knowing that, and indeed Welsh Water knowing
11 it even more, to put into a contract a hypothesis that
12 the costs of common carriage would go up by X per cent
13 in relation to RPI, when Ofwat had determined that the
14 non-potable side of their activities should, in
15 aggregate -- their costs should fall by 25 per cent in
16 real terms. Indeed, we see in Dr Bryan's witness
17 statement, and for your reference bundle 4, tab 1 at
18 pages 79-81, when he looks at the comparative costs
19 after the event up to 2010, he sees there, he reports
20 there, that comparable costs are those considered by
21 Ofwat in the determination to have actually fallen 46
22 per cent lower than the 2001 assessment.

23 Of course, that is with the benefit of hindsight,
24 but the first 25 per cent in real terms he knew all
25 about in 2001.

1 Now Mr Edwards knew all about this at the time, and
2 he accepted in his evidence -- and I've highlighted this
3 at paragraph 137 of the skeleton -- that it would have
4 been part of the known background to any counter-factual
5 common carriage negotiations between Albion and Welsh
6 Water. It follows that, armed with that background,
7 it's by no means obvious that there was any
8 justification for inserting any inflationary pressures
9 in a deflationary world for common carriage. Still less
10 one linked not to the costs of Welsh Water, but linked
11 to the prices that ordinary consumers make for the whole
12 range of activities, whether it's heating, lighting,
13 mortgages, electricity, and all the other components
14 that reach a price index.

15 The point is really a simple one: what would they
16 have agreed in the knowledge that costs were going to
17 fall? Answer: well, whatever they had agreed, it
18 wouldn't have been an inflationary settlement which
19 would have migrated the price way into abuse territory
20 very quickly, as the divergence between cost and price
21 increased. If it was going to be anything, it would
22 have been in relation to the costs that Welsh Water
23 would have incurred. But of course, if those costs
24 fell, the corollary would be the price would fall.

25 Our primary case is --

1 MR LANDERS: Surely, what Albion are interested in is what
2 was happening to their income. They would have matched
3 the costs against income costs. Couldn't they just
4 agree with Shotton Paper that Shotton would pay a cost
5 linked to their RPI, and if they are the costs that
6 Albion were paying, that's linked to RPI, there would be
7 no problem?

8 MR SHARPE: In other words hedge their position; is that the
9 point?

10 MR LANDERS: Yes.

11 MR SHARPE: First of all, there was an agreement with
12 Shotton, on the one hand. Secondly, why on earth should
13 Shotton have agreed to what would amount to an
14 inflationary machinery? The point that is quite often
15 forgotten about Shotton, and not forgotten on Albion,
16 Shotton could close down. The reason it didn't close
17 down was they were able to get a cheaper source of water
18 supply. We took you to some of those very early
19 discussions; you saw it in Dr Bryan's evidence as well.
20 In other words, they weren't in a strong position to
21 pass on their costs in the highly competitive world of
22 newsprint publication. Secondly, there was already an
23 arrangement in place as between Albion and Shotton for
24 pricing. I think, respectfully, on the premise of the
25 question, there wasn't that degree of market freedom on

1 the part of Albion to hedge its position. Shotton works
2 in a peculiarly competitive world, as the evidence
3 shows.

4 So our primary position is that, on the facts, and
5 what was known at the time, there was no case at all for
6 indexation. Indeed, there was a danger of a strong case
7 against it, bearing in mind if the parties are presumed
8 to be acting lawfully, having regard to their special
9 responsibilities as the dominant undertaking not to
10 inflict a contractual term which would, over time,
11 because of the divergence between cost and price, have
12 led to an extreme possibility of further abuse.

13 Now, if you're convinced of that, then there's
14 nothing more for me to say. That's our base position.
15 But on the other hand, the alternative position is it
16 would have been the same sort of deal that Albion had
17 with Welsh Water, which was indexed by reference to the
18 PPI, the producing price index.

19 What is clear is that Mr Edwards' evidence -- you
20 will recall he comes back in his second witness
21 statement and talks about the vast majority of contracts
22 being subject to RPI. Well, my learned friend Mr Cook
23 took him to that primary evidence in the special
24 register of agreements. We set them out extensively in
25 the skeleton. It really doesn't show, I'm afraid, with

1 great respect to Mr Edwards, anything of the kind. What
2 it does show is that RPI was in the minority of the 13
3 in question. Four of them I recall. And as Mr Landers
4 pointed out, when looked at the volumes of what was
5 taken, they seemed to correspond, in the main -- a very
6 small population to draw on -- really quite small
7 volumes, relative to Shotton.

8 I think we're entitled to assume from that, first of
9 all, the evidence should be disregarded. It's not
10 soundly based. Secondly, if indexation were planned at
11 all, it would have been PPI. Quite what the impact of
12 PPI would have been I don't know, but I think you do
13 because you have seen --

14 THE CHAIRMAN: Yes, someone has kindly provided us with
15 those figures.

16 MR SHARPE: Yes. PPI is obviously a very convenient index
17 when two businesses are trading with each other.
18 They're interested in maintaining margin, and if their
19 costs go up, then they can pass it on if they have the
20 good fortune to have the market power to be able to do
21 so. But our primary submission -- and we say that the
22 submission the tribunal should accept -- is that this is
23 not an agreement that should have been indexed. It
24 would have been renegotiated at some time in the future,
25 in light of the cost changes. There's no doubt about

1 that. Nobody was pretending this was going to be an
2 agreement of imperpetuity.

3 Now, if I may, I'm going to turn briefly to two or
4 three topics, beginning with Heronbridge -- well, the
5 general topic, the proposition that no additional costs
6 would have been incurred by Albion under common
7 carriage. Page 42 of the skeleton. The first topic is
8 Heronbridge capacity utilisation.

9 This is broadly familiar to you, I think, by now.

10 THE CHAIRMAN: Yes.

11 MR SHARPE: They say -- and it must be predicated on some
12 other customer coming out of thin air -- for the
13 capacity, and therefore the capacity would have to be
14 augmented to supply. My learned friend Mr Cook put all
15 this to Mr Edwards. He was saying we'd have to spend
16 £3 million in order to obtain water directly from United
17 Utilities. We say -- let me put it here -- that is
18 utterly unrealistic and inconsistent with the facts, and
19 has all the appearance of a device aimed at reducing the
20 damages to which Albion believed it is entitled.

21 You'll recall the configuration between Ashgrove --

22 THE CHAIRMAN: Yes, I think we can move on from that.

23 MR SHARPE: Well, then, I go on to back-up potable supply,
24 and I am on page 44.

25 Now, we have a hand-up. (Handed). Some things are

1 easier in this case than others, and back-up potable
2 supply is, on a scale, one of the easiest. The
3 proposition has been put by Welsh Water that because
4 supply was guaranteed or reserved, the costs associated
5 with that dedicated supply had formally been absorbed by
6 the income stream from non-potable water. Then separate
7 provision would have to be made. That's a point
8 reinforced by Mr Edwards in his second witness statement
9 at paragraph 55.

10 Now, we set out our arguments at paragraph 155, and
11 the simple point is that Albion never required or
12 demanded a reserved or guaranteed supply of back-up
13 potable water. That's the first proposition. Secondly,
14 that Welsh Water had never operated that supply on such
15 a basis. This is an argument that's emerged for the
16 purposes of this litigation.

17 Now, on this I can rely on Ofwat's own findings in
18 its determination. I don't recall your being taken to
19 it.

20 THE CHAIRMAN: That's the 2011 finding, is it?

21 MR SHARPE: That's right. Bundle 9. Mr Edwards.

22 Mr Edwards was taken to these, but the simple point
23 there was that in Ofwat's analysis of the way
24 Welsh Water conducted itself, it just simply dismissed
25 the notion that there was a reserve supply of potable

1 water in their own calculations, and as part of the bulk
2 supply price.

3 Shall I take you to it?

4 THE CHAIRMAN: No, but I think the point that Dwr Cymru make
5 is that in the referred work, they described there
6 having been a finding of fact by Ofwat that there was
7 a reservation of capacity, though I'm not entirely clear
8 as yet whether that was a finding of fact that went
9 beyond the contractual provision, and how that finding
10 of fact, as Dwr Cymru say, links with the point that
11 Dr Bryan made about the absence of any indication in the
12 accounts of Dwr Cymru as to a capital amount set aside
13 for that.

14 MR SHARPE: Well, our submission is that Ofwat's finding in
15 the determination is dispositive. We don't know
16 precisely what Ofwat were told in relation to the
17 referred work. We also know that Albion had never
18 required or demanded a reserve supply at all. So,
19 turning the proposition round, if Dr Bryan faces common
20 carriage in 2001 and says, "Well, actually we're going
21 to load another £300,000 on to you", an additional sum
22 for a service they have never supplied, Albion had never
23 needed nor wanted, that is to say reserved or guaranteed
24 supply, the odds are that Dr Bryan would not have
25 accepted that.

1 THE CHAIRMAN: When we're talking about this back-up supply,
2 that's the water. I mean, the cost of the big pipe that
3 runs from the potable mains into Shotton Paper that we
4 heard about, that must be covered by the cost of the
5 actual potable water when it's used?

6 MR SHARPE: That's my understanding, yes.

7 THE CHAIRMAN: Yes, so all we are talking about is
8 whether --

9 MR SHARPE: Reservation.

10 THE CHAIRMAN: -- there was a reservation for that volume of
11 water.

12 MR SHARPE: Yes, and there manifestly wasn't. Ofwat
13 determined that there wasn't. No internal provision had
14 been made on that basis and therefore there was no
15 justification for that charge.

16 We have provided you -- and this is at bundle 19,
17 tab 63, page 7719 -- with the volume of back-up water
18 which Albion received during 2001 to 2008 and 2009.
19 Absolutely tiny provisions. At its lowest, Albion took
20 0.01 megalitre during 2008 and 2009 -- and in 2000 and
21 2001, which would have been the date at which these
22 discussions would have taken place, so therefore the
23 information available to the parties, and the
24 information against which they would have bargained,
25 Albion had only taken 3.2 megalitres, and that is less

1 than .05 per cent of their total demand for the year.

2 Now, it beggars belief that Dr Bryan would have
3 said, "Oh, yes. Of course I understand all that. Here
4 is my cheque for 300,000 in addition", for what were
5 quite trivial quantities of water.

6 Then, if you go to paragraph 4 of our little note,
7 you'll see that the figure is £300,000. It is a simple
8 calculation. We fairly point out at paragraph 5 the
9 largest volume of back-up supply, the total volume, is
10 really about 5 per cent of total demand.

11 More importantly, Albion was willing to operate
12 without a reserve supply, and that's confirmed by Ofwat
13 in its section 40 determination of 2011. That is the
14 determination point. Ofwat expressly considered whether
15 the parties had operated with the reserve back-up
16 supply, and the paragraphs in question -- you might care
17 to go back to it, if this is still in doubt -- are
18 paragraphs 6.413 to 6.415, and they simply refer to the
19 fact that Albion didn't want the water and didn't want
20 the reservation of the capacity, that Welsh Water had
21 not treated the back-up supply as reserve capacity.
22 They hadn't done that in their water resources
23 management plan at all. You would have expected them
24 to. If it had, it would have been required to engage in
25 capital expenditure in order to meet it. So their case

1 now is totally inconsistent with what they were telling
2 Ofwat.

3 On that basis, in 2011, Ofwat approached the
4 appropriate price on the basis that there was no reserve
5 capacity. That is the situation in 2011, and actually,
6 it's the situation rolling back from 2001. In our
7 submission there's no question at all; there was no
8 reserve capacity and Dr Bryan would never have agreed to
9 it. It is one of those arguments that have emerged
10 because of its fleeting convenience, to raise the cost,
11 and in order to disadvantage Albion.

12 May I just make a correction? If you go to
13 paragraph 5 when we say "around 5 per cent of the total
14 demand", I'm told that the correct figure is
15 0.5 per cent.

16 THE CHAIRMAN: Which paragraph?

17 MR SHARPE: Paragraph 5 of the note. 0.5 per cent. So
18 those are my submissions on back-up potable reservation
19 supply.

20 I wonder, Madam, whether that would be a convenient
21 moment?

22 THE CHAIRMAN: Yes. We'll come back at 2.05 pm.

23 (1.05 pm)

24 (The Short Adjournment)

25 (2.05 pm)

1 MR SHARPE: We'll now go on to Corus. I'm picking up at
2 page 46 of the closing skeleton argument.

3 As you are aware, our claim, in addition to one I've
4 already described, is a claim for lost opportunity to
5 supply Corus Shotton, the adjoining site.

6 You'll be aware that since 1998 Albion and Corus
7 have been close and Albion was very much aware of
8 Corus's desire to have an alternative source of supply.
9 You see that set out in Dr Bryan's statement.

10 This wasn't just a casual thing. Corus have been
11 market testing and wanted to see if they could get
12 a better deal and it was very clear that Corus were
13 determined to find an alternative supplier. They were
14 unhappy with Welsh Water.

15 We see at my paragraph 167 that Corus, after
16 a meeting, invited bids for the supply of water to three
17 large plants at Llanwern, Trostre, and Shotton. And you
18 also see that Albion were unable to pursue this business
19 opportunity, and we say that was a direct result of the
20 abuse of the dominant position.

21 You've seen the way that Welsh Water have marshalled
22 their case on this. It wasn't anything to do with Corus
23 and the first access price; it was to do with the
24 transfer of ownership of Albion's ultimate parent and
25 their relationship with Pennon. You may remember how

1 Dr Bryan explained that at Day 5 page 191-192 which we
2 set out at 169. Yes, of course there were a lot of
3 promises with Pennon, but Pennon didn't want to get
4 involved in this dispute, didn't want to take on the
5 regulator, and that left Albion in between, and
6 therefore we say you cannot disassociate that
7 uncertainty in relation to Pennon from the abuse of the
8 dominant position. But for the abuse there would have
9 been no dispute, no dispute there was every chance of
10 Corus coming into the fold and signing up.

11 Of course it couldn't enter into an agreement unless
12 Albion were aware of what price would exist for common
13 carriage, and therefore you had to get common carriage
14 first and then Corus. Therefore, it's not really
15 surprising that our claim really relates only to the
16 Corus Shotton plant and the other two have simply faded
17 away. There is no suggestion in the evidence that Corus
18 said it's three or nothing; they would have been
19 prepared, we say, to accept a single contract with
20 Albion in respect of Shotton.

21 So far so good. The question, then, becomes would
22 Albion have been in a position, in the face of
23 a non-abusive common carriage price, to have engaged
24 Corus with a competitive offer such that it would have
25 secured Corus as a customer?

1 In order to assist you, can I take you back to the
2 note we handed up this morning. It dealt with two
3 things: volume of potable back-up supply, and we saved
4 paper by giving, paragraph 10, a short note on Corus.
5 Here we are making reference to the disclosure which was
6 only made on Wednesday. Sorry, the material had only
7 just come to light which formally is not part of the
8 disclosure; it came as part of your information request.
9 It matters not.

10 We see at paragraph 10, I think bundle 19 at
11 page 772, Welsh Water sets out what it describes as the
12 price paid by Corus for water. Unfortunately we say
13 this is misleading for two principle reasons. You will
14 recall in the very earliest description of the
15 configuration that from the row torque(?) valve to Corus
16 there are lagoons. You also recall the role of the
17 lagoons was to act as a sort of overflow to the extent
18 that, as in Shotton's case, demand goes up and down but
19 it is very difficult to control the valve pressure at
20 that stage. The surplus water is then decanted into the
21 lagoons. So this was the service that Corus offered to
22 Welsh Water and charged them for, in principle.

23 The prices that you've had reported to you should
24 reflect a discount equivalent to the cost of that lagoon
25 facility, which is estimated at 4p. I think it is just

1 slightly less than 4 pence per cubic metre.

2 So in a sense, the price that has been paid by Corus
3 reflects two things: one the water it is receiving, and
4 then netted in part by the service it was offering
5 Welsh Water for the use of its lagoons. The net price,
6 whatever the price was, minus nearly 4p.

7 Of course, since Welsh Water was the operator of the
8 Ashgrove System, it would have to pay for the Corus
9 lagoons under any circumstances, even if Albion became
10 Corus's supplier. So the effective price that Albion
11 had to beat would be the price payable by Corus plus the
12 4p that Welsh Water would have had to pay in any event.
13 Because they're going to receive that, whether or not
14 Albion was the supplier to Corus.

15 We understand that would have been indexed. So by
16 ignoring the rent payable to Corus for the lagoons,
17 which in practical terms is netted off the price, we
18 created a somewhat -- it has a sort of artificial
19 picture which has been created, and any price that
20 Albion would have to meet would have to reflect the fact
21 that no longer being the supplier of water, Welsh Water
22 would have to pay for the lagoon facilities and would
23 therefore, we say, have charged a lower price. We would
24 have paid a higher price in order to meet their target.

25 THE CHAIRMAN: Are you saying that that 4p would have to be

1 added on to the common carriage price that Albion paid
2 for use of the Ashgrove System to supply Corus?

3 MR SHARPE: No, our understanding is that -- I don't think
4 this is in contention -- is that the use of the lagoons
5 and the management of the common carriage would be part
6 and parcel of the overall price.

7 THE CHAIRMAN: What overall price, paid by whom to whom?

8 MR SHARPE: The common carriage price.

9 THE CHAIRMAN: Well if the lagoons benefit Shotton Paper ...

10 MR SHARPE: Shotton Paper then would pay for that in the
11 common carriage price.

12 THE CHAIRMAN: Is there a pipe from the lagoons into Shotton
13 Paper?

14 MR SHARPE: Well, the lagoons benefit Welsh Water as the
15 owner and manager of the system, okay? It enables the
16 efficient management of the system. They rent that
17 service from Corus. But instead of paying Corus a lump
18 sum per annum or whatever, they give them water with an
19 abated price.

20 Now, if we, Albion, are seeking to undercut
21 Welsh Water, it is illegitimate to treat Welsh Water as
22 supplying water at let us say 22p when in addition they
23 are also paying an element for the lagoons. Let's say
24 4. So the price we have to target is a price of 26p.
25 Therefore, any price offered at or below 26p would

1 rationally secure that contract for Albion.

2 THE CHAIRMAN: Because you say Dwr Cymru would have to keep
3 paying Corus Shotton the 4p for the management of the
4 lagoon.

5 MR SHARPE: Certainly. Then they would recoup that and do
6 recoup it because it is already in the common carriage
7 calculation.

8 THE CHAIRMAN: So the common carriage price -- so you're
9 saying that the 14.4p includes an element for the --
10 it's the use of the whole of the Ashgrove -- well it is
11 not the Ashgrove System, is it? It is the use of all
12 the non-potable assets including the assets which you
13 say are sort of on loan, as it were, from Corus
14 Shotton --

15 MR SHARPE: Hired.

16 THE CHAIRMAN: -- hired, yes.

17 MR SHARPE: I don't think this is in contention between the
18 parties, madam. The lagoons constitute an element of
19 the management of the water conveyance, they form part
20 of the common carriage. The point I'm merely making
21 here is you've got to compare like with like. If
22 they're charging headline 22p, that represents an abated
23 price to allow for the extra 4 they would have paid, and
24 if the contract then switches to Albion, they're still
25 going to have to pay the 4p, and therefore --

1 MR LANDERS: I follow the logic but is there any evidence
2 that that is what actually happens to the 4p, that it is
3 actually included in the cost somewhere and not just
4 treated as a discount on the price and therefore not
5 reflected the common carriage price?

6 MR SHARPE: Yes that's right. Would you like to go quickly
7 to bundle 8, page 2465. You recognise this as the
8 referred work, tab 274. Page 2465. Now, of course this
9 was the first time we were looking at the local costs of
10 Ashgrove and you see the LAC, local average costs and
11 you see various line items, water treatment, sludge, and
12 then we have water storage. So we have the item there
13 included and if you go back a couple of pages to 2458,
14 this I think is proof positive to Mr Landers' question,
15 paragraph 9.46, water storage:

16 "This item is the cost of using the Corus lagoons
17 for water storage."

18 Yes, 9.48 is also helpful. This is proof positive
19 also that Albion pays for it. All of it. Albion was
20 seeking an apportionment but in fact as I think you were
21 surmising earlier, it is for the benefit of the Albion
22 because that the one with the erratic demand --

23 THE CHAIRMAN: For the benefit of Shotton Paper.

24 MR SHARPE: It benefits Shotton and its supplier, Albion.

25 The authority considers it a benefit for which

1 "[payment] for using the lagoons accrues to Shotton Paper
2 alone and that therefore Shotton Paper's volume should
3 be used as the denominator for the calculation."

4 Just above that at 9.47, we see -- ah yes, Mr Jones:

5 "The equivalent usage cost was 86,000 [we get that
6 from Mr Jones's second witness statement and] dividing by
7 the average volume delivered to
8 Shotton that yields 1.3p."

9 THE CHAIRMAN: And that's the 1.3 at page 2465.

10 MR SHARPE: Yes, it is indeed.

11 MR BEARD: If it assists Mr Sharpe the summary is at 2464 in
12 relation to the three methodologies.

13 MR SHARPE: That's the position. These are just the ground
14 rules for comparison, and unfortunately we think that
15 Welsh Water's statement as to the price it was paying
16 was misleading in that respect. Regrettably there is
17 a further aspect which is also misleading, and you'll
18 see this at paragraph 12 of the note we handed up this
19 morning.

20 From time to time in the hearing we've heard almost
21 as an afterthought and some noises off stories in regard
22 to the relationship between Welsh Water and Corus.

23 I think the position goes like this: prior to
24 March 2004, there was a contract between Corus and
25 Welsh Water which provided for a price of roughly -- we

1 don't need to be precise -- 22p per cubic metre in 2000,
2 the time at which ... You've heard in my opening
3 submission, and I took you to the special register and
4 so forth, that until the late 1990s at least, Corus was
5 getting a very advantageous deal compared to Albion.
6 Albion complained, and the price was increased to Corus,
7 if I recall, but not as much as Albion would have liked
8 because Albion -- rather Albion wanted to have the same
9 price and were told "No, actually one of the reasons for
10 it was the ability to make use of the lagoons."

11 Right. That 22p in 2000 was escalated by the
12 potable volumetric charge. Now, why was it 22 rather
13 than 26, which was the "minded to" Albion price, because
14 of the 4p for the Corus lagoons? We say that was
15 effectively rent for the lagoons. That was money that
16 would have been payable irrespective of whether or not
17 they continued to supply Welsh Water or Shotton.

18 Now, in March 2004, as you've been taken to, Welsh
19 Water's non-potable large industrial tariff came into
20 effect. As far as Welsh Water was concerned, it
21 purported to terminate the Corus agreement, and to move
22 Corus on to this new and higher tariff. Now, that was
23 the reason. That was the thing that precipitated Corus
24 coming to Albion to get a better deal.

25 Given that the large industrial tariff for

1 non-potable water was the price that, as we've heard
2 ceaselessly, Welsh Water are going to charge large
3 non-potable customers, it is the large non-potable
4 tariff that Albion has to beat. Otherwise, if
5 Welsh Water were inclined to offer a special deal to
6 Corus, and depart from their Ofwat-approved non-potable
7 large industrial tariff, they then faced considerable
8 problems not least in relation to condition E, the
9 non-discrimination provision we've heard quite a bit
10 about, quite apart from any competition issue.

11 So that's the pure theory. Therefore it follows
12 that the price that Albion has to meet is the large
13 industrial tariff.

14 What has happened is that it seems that Corus have
15 refused to accept the significant increase in price,
16 claiming, among other things, that it was excessive.
17 Our understanding is -- I don't think this is in
18 dispute -- that it went to court. They went to court
19 I think for summary judgment. Now, it did not proceed.
20 I think summary judgment was refused. But since that
21 period, which we believed to be shortly after 2004,
22 Corus has been carrying on paying, as before, as if the
23 earlier agreement had not been terminated as Welsh Water
24 had been arguing in court and elsewhere.

25 Now, that dispute is, we understand, ongoing.

1 I don't think that's at issue. But it is the revenue
2 from the disputed contract, namely less than Welsh Water
3 are seeking, that has been given to you as indicative of
4 a lower price which Albion has to meet when in fact,
5 bluntly, if it had been done properly, it would surely
6 have been the price they were seeking and hoped to get,
7 no doubt, as a result of their prolonged legal action.
8 In other words, at the very least, we would have
9 expected to see the invoices to see what they were
10 actually seeking and secondly, they should have made it
11 very clear that the price that they're getting is lower
12 and it remains in dispute.

13 THE CHAIRMAN: Is that large industrial users non-potable
14 tariff the same figures that you say are the benchmark
15 against which the original clause point 7(4) in the
16 Albion/Shotton Paper agreement benefit share is
17 assessed?

18 MR SHARPE: Yes, not from the beginning.

19 THE CHAIRMAN: No --

20 MR SHARPE: But once it came into effect in 2000 --

21 THE CHAIRMAN: Once it came into effect. But of course it
22 was in effect the whole of the time covered by the Corus
23 claim.

24 MR SHARPE: Yes.

25 THE CHAIRMAN: So you're saying that, in working out what

1 the loss is on the Corus deal, that we should assume
2 that a similar gross benefit share would have been put
3 in place with a 70/30 or -- the original split.

4 MR SHARPE: Yes, that's right and the reason for that is
5 that we can discriminate no more than Welsh Water can
6 under condition E.

7 THE CHAIRMAN: You may want to take instructions on that,
8 Mr Sharpe. (Pause).

9 MR SHARPE: I don't think it changes the story much but it
10 makes it more accurate and that's important: the tariff
11 that would be offered to Corus would, by virtue of
12 condition E, be the same price that Albion is offering
13 to Shotton. So there would be no discrimination as
14 between the two customers.

15 THE CHAIRMAN: No, except that the Shotton benefit
16 arrangement which leads to the price reflects all sort
17 of efficiency savings and things within the Shotton
18 Paper Mill process, but wouldn't be relevant to --
19 I mean it may be that we can't chase it down quite this
20 far.

21 MR SHARPE: I think my understanding is that -- and it is
22 not in the evidence so I am very reluctant to proceed,
23 but I think my instructions would be that they would be
24 treated the same. In the same way as we know from the
25 evidence that Albion was in business not merely to

1 supply water but to supply the value added services in
2 water efficiency, it is precisely that which would be
3 offered as part of the deal. So insofar as those
4 benefits accrue to Shotton as a result of advice on
5 water efficiency and better measurement and so on, that
6 same service would be supplied and make Albion
7 attractive to Corus.

8 THE CHAIRMAN: Yes. So we can assume or we should assume,
9 say, for the sake of simplicity, if for no other reason,
10 that broadly the same level of efficiencies would be
11 available given that we have no evidence as to whether
12 Corus was already super-efficient in its use of water --

13 MR SHARPE: No, we don't. We know that we'd be offered;
14 whether they'd make any material impact is another
15 story.

16 I think respectfully, you've seen the thrust of the
17 submission, that for this to be accurate, one has to
18 account for the lagoons, self-evidently, and if it is to
19 be accurate it must also take into account what they're
20 seeking, not what they're getting, because the
21 difference is a result of a legal dispute, a dispute
22 which is taking, even by legal standards, an
23 unconscionably long time to resolve. But it does mean
24 of course that Corus are continuing to get the benefit,
25 albeit it may be temporarily, perhaps with

1 a retrospective adjustment -- who knows, I'm not going
2 to give evidence -- but either way an accurate
3 reflection of what is going on must reflect the price
4 they're seeking, not the disputed price they're getting.

5 We've done our own calculations which I think are
6 drawn from the data at paragraph 13. It then follows
7 you see this is the price that Albion has to beat in
8 order to secure the Corus contract.

9 One final point. The tribunal brought to our
10 attention the Maples case this morning. Happily the
11 case is broadly familiar to me so I haven't had to rush
12 off and defer my submissions on it. It's a variation of
13 the bathing beauty cases, sort of beauty contest cases.
14 Now we can, for the purposes of our argument to date,
15 readily accept that you begin with an analysis, did
16 Albion have a significant chance, a substantial chance,
17 of this opportunity? In our submission the facts really
18 point overwhelmingly in favour of that. They were
19 invited to tender, they entered into negotiations and
20 but for the abusive price, there is not the slightest
21 reason to believe that Corus would not be pressing as
22 hard as Albion to reach some sort of deal.

23 So we say the first limb on the evidence is
24 satisfied. When it comes to the second element, the
25 tribunal's evaluation of the probability, the way I put

1 our case is like this: there isn't here a spectrum of
2 probabilities. I'm going to submit to you that if
3 Albion could undercut Welsh Water and beat the prices
4 you see in paragraph 13 -- and the evidence is that it
5 would -- then rationally, in the absence of any other
6 evidence to the contrary, Corus would have moved to
7 Albion.

8 On the other hand, if the evidence suggests -- which
9 in our submission it doesn't -- that Albion could not
10 undercut Welsh Water for Corus's business, it must
11 follow that they would not have been able to exploit the
12 opportunity available to them. So rather than
13 a spectrum it becomes binary, but one has a 100 per cent
14 probability of success or a zero probability.

15 I don't think I'm doing any violence to the Maples
16 case; it is just a subset of the probability -- and of
17 these particular facts, one can't think in terms of
18 a 40 per cent probability of winning. Either there was
19 a substantial chance of winning the contract, which we
20 say there was, and then one looks to see the secondary
21 issue of probability, frankly it was all or nothing.

22 Now of course, it is very much my submission, given
23 the magnitude of the difference between the price Albion
24 was in a position to offer, the non-abusive price, and
25 even taking the higher of the two ranges, up to 9p for

1 the water resources, it would most certainly have been
2 capable of undercutting a lawfully offered Welsh Water
3 price to Corus. If that's right, in the absence of any
4 other information, Corus will have gone to Albion and
5 Albion would have been able to exploit the opportunity
6 available to it.

7 Now, those are --

8 MR LANDERS: When you say lawfully offered, you are implying
9 that it would not have been open to Dwr Cymru to come to
10 a special agreement in competition with whatever Albion
11 was doing?

12 MR SHARPE: Well, they have a tariff, a large industrial
13 tariff for non-potable water that was approved by Ofwat.
14 You heard the evidence of Mr Williams, they really felt
15 obliged to price water up on that basis. They would
16 have been in an extremely difficult position under
17 condition E to offer terms which were significantly
18 favourable to Corus and not offer the same terms to
19 anyone else. So --

20 THE CHAIRMAN: And assuming you say the fact that they are
21 litigating over many years with Corus Shotton indicates
22 that they want to stick to the tariff?

23 MR SHARPE: Yes.

24 MR LANDERS: Yes but you have been saying all along they
25 haven't been sticking to tariffs. That's what your

1 argument is.

2 MR SHARPE: Very much so, but the earlier position -- and
3 I'll take you back to this -- when Dr Brooker and others
4 were telling Ofwat "We have a consistent approach" --
5 this is before the non-potable large industrial
6 tariff -- "We have a consistent approach", then I took
7 you to the special register in opening and you've seen
8 it once or twice since then, and you've heard
9 Mr Williams. Now they introduced the non-potable tariff
10 and they're trying to enforce it through the courts,
11 I have every reason to believe that's precisely what
12 they want to do.

13 So far they've had the field to themselves because
14 Albion has not been in a position to engage Corus, given
15 the abuse of the dominant position. It is now in that
16 position and once this is resolved, one looks forward to
17 Albion trying to undercut Welsh Water and Corus.

18 You see, undertakings in a dominant position here do
19 have special responsibilities. A very important phrase,
20 and we use it all the time, and one of them is you can't
21 discriminate between customers because you are the
22 monopoly supplier of water.

23 If that is the case, they could not lawfully depart.
24 And that seems to me their own view. That's why they've
25 gone to court. Why it's taken so long, it's not for me

1 to decide, but no doubt they can continue to tell Ofwat
2 that we are carrying on taking money from Corus, it's
3 lower than we want, we're not really discriminating in
4 their favour, the matter is being litigated and no doubt
5 will be resolved in their favour. That's presumably
6 what they're saying.

7 MR COWEN: To what extent can we built into the percentage
8 loss of chance the chance that Corus would be able to --
9 I think what we're getting into is speculating on the
10 outcome of litigation that Corus would lose the existing
11 contract, or the benefit of the existing contract.

12 MR SHARPE: Well, it's respectfully a fine point. We don't
13 know. I think it would be extraordinarily rash of us to
14 dive into what the position is. We've heard very little
15 evidence on it. We do know it's gone on for a very long
16 time, and in relation to the position from 2004 at
17 least, all we know and can infer is that Welsh Water
18 desperately want the high price otherwise they wouldn't
19 have proceeded with what I can only guess has been
20 extremely expensive and protracted litigation. They
21 think they can win, otherwise they would have settled,
22 presumably.

23 From Corus's position, looking at it from their
24 standpoint, what Albion is offering is a certain low
25 price instead of one they may have to fight very hard

1 for. All Corus would be fighting over is any
2 retrospective payment. I think that is quite a telling
3 point, in a way.

4 THE CHAIRMAN: Yes. Thank you.

5 MR SHARPE: If we pursue the point, we're starting the
6 counter-factual clock here in about 2004. So any
7 element of retrospection would actually be nullified
8 because we'd be dealing at that time moving forward,
9 then gone for a certainty lower price instead of
10 a higher price for the possibility of being able to
11 knock them out in court.

12 I'm conscious of the time, and my promise to my
13 friend. I have no further submissions on the
14 compensatory element. You've seen what I've had to say
15 about interest, and --

16 THE CHAIRMAN: There was just one point on the Corus thing.
17 This maybe needs a little explanatory note about this
18 exemption from section 66I and 66J of the Water Industry
19 Act which is a point that --

20 MR SHARPE: Is this about exemption?

21 THE CHAIRMAN: -- Dwr Cymru raise in their submissions.

22 I don't necessarily want to take up time with it now but
23 at some point, maybe in reply, you might want to deal
24 with it.

25 MR SHARPE: Is this what I call the exemption point?

1 THE CHAIRMAN: Yes.

2 MR SHARPE: Yes. With the limited time available I wasn't
3 going to dignify that with too much. What I'd prefer to
4 do is if my friend is still relying on it, and I think
5 the point is having got exemption for Shotton we
6 wouldn't get it for Corus, which I think is almost an
7 unarguable proposition, but it has never stopped my
8 friend -- if he raises this, may I come back to it in
9 reply?

10 I now turn to exemplary damages. We've stated our
11 understanding of the law in our closing skeleton
12 arguments. I don't propose to dwell on that. It's not
13 in contention for the purposes of these proceedings.
14 that exemplary damages lie. And we fully intend to
15 proceed with our claim for exemplary damages.

16 We're also very much aware that Welsh Water has
17 profited mightily from the abuse of the dominant
18 position. We put forward numbers based on the original
19 Corus price being a profitable price, you'll recall, of
20 annual profits of £7,000 or £8,000 a year. That's not
21 been contested by the parties. We don't need to be
22 precise. These are very, very significant numbers. And
23 you'll recall also that the purchase price for Ashgrove
24 was £165,000, I showed you that in the original --
25 a trivial sum compared with the annual profits

1 subsequently garnered.

2 The question then becomes this: we seek our
3 compensation. If we get compensation, it'll be very
4 welcome. If we get compensation at the higher straits
5 that we're claiming, very agreeable. It would probably
6 not equal the benefits that Welsh Water had garnered as
7 a result of their abuse, at one level. And given their
8 massive size in relation to Albion, the fact that they
9 are a huge corporation with I think £1 billion worth of
10 reserves which no doubt serve a useful purpose, this is
11 nothing, absolutely nothing, compared with their assets,
12 and therefore the compensation element does really no
13 more than compensate Albion, which it is designed to do,
14 but it means they're walking away, on top of the
15 compensation, effectively, with very significant profits
16 from their abuse. And the sum of money involved is
17 trivial compared to their overall assets. So neither
18 acts as a deterrent to them or anybody else, nor does it
19 punish them in any material way, because the sums of
20 money are so small in relation to their total assets.

21 So if ever there was a situation that is tailor-made
22 for exemplary damages, it is this, provided that we can
23 make good our claim that they went into this cynically,
24 intentionally or reckless as to the abuse of the
25 dominant position. We understand.

1 Now we acknowledge, and we don't need our friend to
2 tell us, this is an exceptional jurisdiction and in this
3 tribunal a novel one, a new one. It does not mean to
4 say it is not a good one, and it is.

5 Let me start with a short narrative, much of which
6 is familiar to you. Some time in probably late 2000,
7 the penny dropped within Welsh Water. Faced with
8 Ofwat's guidance, repeated guidance, Welsh Water could
9 have met Albion's request for access by examining the
10 local costs of the Ashgrove system and the facilities
11 required from a bottom-up perspective. Or they could
12 have done it by engaging in a top-down perspective,
13 using regionally average costs for the relevant
14 activities. What are the relevant activities? Well, at
15 the very least, non-potable water, or possibly even
16 partially treated non-potable water.

17 And from an accounting perspective, if either had
18 been done properly, deploying the accounting expertise
19 and data readily available, with appropriate allocations
20 and verified data, probably doing both, bottom up, top
21 down, possibly as a sanity check, cross-check, it is
22 undeniable that Welsh Water would have arrived at a much
23 lower figure for access and probably would not have
24 infringed the chapter two prohibition.

25 Welsh Water decided to do neither. Instead, as

1 we've seen, it embarked upon a complicated piece of
2 trickery, and especially at that last-minute decision
3 making use of whole company averages which had the clear
4 and obvious effect of reducing the aggregate figure for
5 treatment, therefore enhancing increasing cost of bulk
6 distribution by 50 per cent, which served to tip the
7 access charge from an already high 19.4 to 23.2p, as
8 you've seen, rendering access a totally uncommercial
9 option.

10 Now, Welsh Water's defence to this, in part, is that
11 well, it managed to convince Ofwat, and therefore it was
12 all right. It did convince Ofwat, but as you've heard
13 more than once today from me, in addition to having
14 a monopoly of water, Welsh Water had a monopoly of
15 information. And the recording shows that when specific
16 requests were made in 2001 and afterwards for
17 information, Welsh Water bluntly refused to comply or
18 furnished evidence which it knew to be, charitably, not
19 robust, and in some cases downright misleading.
20 Therefore the record that went not only to Ofwat but to
21 this tribunal in earlier proceedings was incomplete and
22 misleading.

23 Now it is not challenged, as I said, that various
24 significant revenues were at stake, and if Albion
25 secured access to common carriage, those revenues would

1 be directly at stake, the possibilities we've just been
2 discussing, Corus might have gone over to Albion, but in
3 addition, that list which was given to the board of
4 23.8 million or so which would have been potentially
5 vulnerable to challenge would have been vulnerable to
6 challenge not only from Albion, though Albion was the
7 primary challenger, but generally.

8 This was the revenue if you like which was
9 contestable for Welsh Water. The rest it had its local
10 monopoly and was unlikely to be challenged, residential
11 delivery and so on.

12 To make matters worse the person responsible
13 ultimately for this was Dr Brooker. He was the person
14 at the top. We've seen his name a lot, and we've seen
15 his colleague, Mr Holton, and underneath him
16 Messrs Henderson and Edwards. As far as Ofwat is
17 concerned, certainly in relation to all events up to the
18 referred work, one has got to measure not what they put
19 out but assess that in relation to what was put into
20 them from the monopoly supplier.

21 THE CHAIRMAN: Well that's the jump that you make, but are
22 you saying that there's something in the decision in
23 2004 that indicates that the reason why they agreed the
24 Dwr Cymru approach of regional average pricing based on
25 either whole company or potable assets was because they

1 thought that it was impossible to do anything else,
2 rather than as a matter of principle, they agreed that
3 the whole approach was the correct approach?

4 MR SHARPE: I'm going to come on to that. I think the short
5 point is that at that time they were told they did not
6 have information in relation to the local costs. You'll
7 recall that only emerged in I think it was Mr Jones's
8 witness statement in 2006. So they had no benchmark
9 against which to measure the legality and accuracy of
10 the numbers that had been provided to them.

11 Now, there are other examples as well, I'm sorry to
12 say.

13 There is also some evidence they didn't quite
14 appreciate the distinction between potable and
15 non-potable in this context, and it took quite a while
16 for that to be resolved. One can blame Ofwat, and it is
17 very easy to, but they can only be judged by what they
18 knew at the time. And if they didn't have the
19 information on local costs, if, having asked for
20 information about MEAV for non-potable access and told
21 it didn't exist, and they didn't have it, if asked about
22 other things and told it wasn't there, they had to make
23 the best of a bad job. I think they can legitimately be
24 criticised for their lack of enthusiasm to chase up and
25 verify the data, and that indeed, if you'll recall, was

1 the findings of this tribunal.

2 One can take that so far, but in my submission in
3 relation to exemplary damages there's nothing accidental
4 about this. This was a reaction to a company looking at
5 the mere certainty of very significant revenue and
6 profit losses as a result of an energetic new entrant,
7 and finding different ways of keeping them out of the
8 market, soft ways, delaying access to information, not
9 telling them the methodology, being a bit slow here and
10 there, which formed the subject of complaints to Ofwat
11 and we know they weren't pursued because they were by
12 any standard infinitely less serious and secondary to
13 the fundamental issue of the access charge, and then of
14 course the access charge itself.

15 Now just by way of introduction -- I'm conscious of
16 the time -- we've seen this crab-like progression
17 through the end of November, December 2000 through to
18 February 2001. Now, we don't quite know where
19 Mr Edwards fits into the earlier part. His role was
20 much more important than he let on. But then we have
21 a succession of attempts to try to bridge the gap
22 between resource cost and access charge. And anything
23 that got the figure up to 26 with the resource cost
24 included would effectively exclude Albion.

25 We've seen the ways they attempted to do that. Now,

1 the most important way and the fundamental way to cut
2 into it, Welsh Water went forward using the whole
3 company average approach specifically for treatment
4 costs, and we saw that. We now know, through the glare
5 of intensity of this case, that that was a bizarre and
6 perverse thing to do. Why? Because, when one looks at
7 the whole company average cost of treatment, you're
8 inevitably looking -- as they did -- at resources which
9 had no treatment at all -- they're all water -- or only
10 partial treatment as well of course as the potable
11 treatment. And of course taking it that way served,
12 because of the weightings attached to each of these, to
13 reduce the average cost after treatment.

14 The manner in which they attempted to do this, what
15 that meant was they then deducted that ultimately to
16 produce a figure of bulk distribution of potable water.
17 Now, that final step, taken as we said by Mr Edwards on
18 his own, had the effect of tipping something which was
19 bad to something which was impossible.

20 Our submission is that that was not a mistake; that
21 was open to anyone acting in good faith and with due
22 regard to their legal obligations. Why? Because it's
23 obvious to everybody and it should have been obvious to
24 Mr Edwards that if you were to employ whole company
25 averages with a zero and very low numbers, you're going

1 to decrease the treatment costs.

2 When he was under cross-examination by my learned
3 friend Mr Cook, he professed ignorance that this might
4 be the -- he acknowledged that it would be the effect
5 but I think he said something along the lines of it
6 didn't occur to him. He didn't strike me as a fool,
7 Mr Edwards; he struck me as someone who was very much at
8 home in numbers, particularly numbers in the water
9 industry. And he knew very, very well indeed that if
10 this artificial change at the end of a fairly long chain
11 of very obvious intention would serve to increase bulk
12 distribution from the figure equivalent to 11p per cubic
13 metre up to 16, he should have realised -- in fact he
14 did realise -- that that would render the access charge
15 hopelessly uneconomic to Albion.

16 Now, I've drawn your attention to that as being an
17 important element. It's the last element of this, but
18 it's not alone, and I'm going to have to deal with some
19 of the other ingredients. By itself, in my submission,
20 it damns Welsh Water. They're not incompetent. They
21 would have us believe they didn't understand what they
22 were doing and Mr Edwards didn't see the significance of
23 what he did. He saw the significance all too well
24 because this was part of a progression leading to an
25 inevitable outcome: give me a price that effectively

1 excludes Albion.

2 THE CHAIRMAN: Well, that's the question, isn't it, that we
3 don't have any evidence about, although we did ask
4 Mr Edwards a number of times, first of all -- well there
5 are three points: did somebody tell him to do that, did
6 he discuss it with anyone before he did it, and did
7 anyone afterwards ask him why he had done that? Now,
8 the fact is that we don't know the answers leading to
9 any of those questions, or we have Mr Edwards' evidence
10 which, from what I recollect, was that he didn't really
11 discuss it or get any instructions or have to explain to
12 anybody. It may be that Dr Brooker understood what was
13 going on.

14 I think we've read all your submissions about the
15 30 per cent leading to the 15.2 per cent, and I think we
16 understand those points and the movements of the
17 calculations. I think what would be more helpful to us
18 is to understand, in the context of the test for
19 exemplary damages as it was discussed in the 2 Travel
20 case, how you would say we should go about working out
21 if that test is satisfied, given the evidence that we
22 have before us, and given the inferences that you ask us
23 to draw from the absence of evidence.

24 I think the numbers, we'll have to go away and look
25 at the documents and for my part I don't see there's

1 much benefit in crunching through that now, and your
2 submissions were pretty clear on that. It's the drawing
3 of it all together which I think we need some help with,
4 if that gives you any assistance.

5 MR SHARPE: I think it is the nature of this type of action
6 that it will only be in the rarest and most dramatic of
7 cases that somebody is going to admit they were told to
8 act illegally. So we're always going to be considering
9 circumstantial evidence. Always. And the
10 circumstantial evidence surrounding this is first of all
11 Mr Edwards didn't work alone; he was part of a team. He
12 was part of a team, he worked very closely with
13 Mr Holton, who worked very closely with Dr Brooker.

14 So what we have here is not just a lone wolf,
15 a young chap working a frolic of his own, I think we say
16 elsewhere, nothing like that at all. He was charged
17 with finding an access price.

18 We're also very much aware, by his own admission,
19 that the access price that he eventually determined was
20 a price that rendered entry uneconomic. He said so in
21 terms. An interesting thing for them to have said,
22 because it should have been formally irrelevant, but it
23 plainly was highly relevant to their decision-making.
24 They wanted to know whether they were going to be faced
25 with entry or not.

1 So we build up a jigsaw. He was part of a team,
2 there was an objective we say and that was to make sure
3 they retained -- they hit upon a solution which was
4 revenue neutral, ie it wouldn't cost them anything, ie
5 Albion wouldn't enter the market.

6 We say that was a target, that was their objective
7 from the very beginning.

8 Arguments about average and de-average are
9 actually -- I think you've probably gathered by now --
10 fairly secondary in this, because if you had the right
11 average of the relevant asset it doesn't matter. I mean
12 if you've taken an average cost of non-potable treatment
13 and non-potable supply, that would have been perfectly
14 legitimate. That was the appropriate class, as the
15 tribunal ultimately -- that's one way of looking at it.

16 If you looked at it bottom up, you would get the
17 same sort of approach, providing you did the accounting
18 allocations properly.

19 Now, there is some evidence in the bundle that has
20 been released recently, and I think it is sensible to
21 take you to some of that because that in my submission
22 indicates a fairly remorseless attempt first of all to
23 avoid local treatment because they were beginning to see
24 what solution that would have achieved, by inference
25 a very low figure as had proved to be the case, and then

1 they moved to a figure based upon averages but based
2 upon averages which were quite inappropriate, ie not
3 ones that dealt with the assets in question.

4 All that is bad enough, but as I think you've
5 surmised, 30 per cent treatment charge was artificial,
6 and known to be flaky, as just one example. So it is of
7 necessity always going to be a circumstantial inquiry
8 and at the end of day you have the task of assessing
9 whether or not the facts stack up.

10 Our case is that there was some intelligence behind
11 this. There was an objective to exclude Albion and that
12 was achieved by the imposition of an abusively high
13 price. Mr Edwards was part of that team and was well
14 aware of its objectives, and commented in his own
15 documentation that it would exclude Albion. And we
16 infer from that that was at least a matter of interest
17 to his superiors as it was.

18 Of course, by the time he took over, the approach of
19 using global averages, averages as such, had been
20 established. Now, in the justification to Ofwat, and
21 ultimately to Albion, this was put in terms -- you heard
22 it from Mr Williams -- this was put in terms of doing no
23 more than they'd done conventionally for several years.
24 There was a letter from Dr Brooker to Ofwat at bundle 4,
25 tab 160 -- I'm not going to take you to it but it's

1 worth re-reading -- where he attempts to justify the use
2 of average prices to Ofwat.

3 There is nothing wrong with average prices, but the
4 context in which he was making that statement is the
5 traditional context of residential potable water, where
6 you do your best to avoid significant differences
7 between different classes of customer based upon
8 location and whatever. All that is utterly
9 unacceptable. But here, we were dealing with ultimately
10 one customer in a class of maybe overall ten customers,
11 and probably one of the largest, the second-largest
12 customer.

13 That type of approach was in many ways misconceived
14 from the beginning as being inapt for this type of
15 exercise. Furthermore, it is even more eccentric when
16 you recall the configuration of Ashgrove as being
17 connected with the River Dee, to customers and nothing
18 else. In other words, it wasn't part of the network.
19 So arguments based upon cross-subsidy and unbundling,
20 which were the traditional arguments in favour of
21 averaging, simply had no application at all.

22 So they must have realised that the arguments based
23 upon averaging which are perfectly acceptable in
24 a potable water situation, might conceivably be
25 acceptable in the non-potable situation where it is part

1 of a network where its costs and charges would have some
2 knock-on effect somewhere else, which was the
3 justification used with Ofwat, simply have no
4 application to this particular instance.

5 I'm building up, I hope, a picture that an inapt
6 methodology was chosen from the beginning for the
7 express purpose of arriving at numbers which ultimately
8 would prove to be so unattractive that Albion would not
9 enter the market.

10 In addition to that, we have a number of very
11 specific problems surrounding this. One of them with
12 which you're familiar: the late disclosure of documents.
13 All along the line. Late disclosure to Ofwat, to the
14 tribunal, late disclosure to this tribunal. Not
15 least --

16 THE CHAIRMAN: Do you say, then, that the fact that somebody
17 put in train that study of the values of the assets for
18 the non-potable supply shows that somebody in the
19 company must at some point have addressed their minds to
20 the question of whether it was appropriate to apply that
21 whole company averaging approach that you agree would
22 have been acceptable for potable water distribution,
23 which I think Mr Edwards' evidence was, that was what
24 was in everyone's mind at the time, that the fact that
25 all that work was commissioned and done indicates that

1 somebody had addressed their mind as to whether that
2 approach was apt for this, because as I understood
3 Mr Edwards' evidence, it was more that nobody ever
4 thought that, because it was, you know, average pricings
5 in their DNA, I think he said, that they just went along
6 and nobody told him to do anything different?

7 MR SHARPE: I don't believe it, but it doesn't matter what
8 I believe. Let me take you to some of the documents.
9 What we've seen in the last few days simply does not
10 bear that out.

11 We know first of all that they were very sensitive
12 to the introduction of competition and I'm going to give
13 you a reference. That's bundle 18, tab 44. This
14 is a board meeting, a board paper prepared by Holton and
15 Boarer in December 99. These are new -- paragraph 188
16 of the skeleton.

17 THE CHAIRMAN: Yes.

18 MR SHARPE: At this stage, we're not talking about averages
19 as such, they were talking about a challenge, how do you
20 meet a challenge? They've identified the challenge.
21 And they were prepared to take steps to protect their
22 market and they were prepared to develop tariffs which
23 reflected costs demonstrating their awareness that their
24 existing tariff did not reflect cost. We also see from
25 this documentation that Brooker and Holton were

1 responsible for the competition strategy at Welsh Water.

2 Now, we don't have any further documents in response
3 to this paper. We then know -- we're not talking about
4 the averages still, we're talking about studies of
5 non-potable assets -- and we know, from paragraph 191,
6 we see a document, a series of e-mails in fact, copied
7 to Mr Edwards, seeking information and relating to asset
8 information for non-potable tariffs. So here they were
9 plainly thinking of a bottom-up approach looking to
10 reflect MD163, remember the first paragraph, and looking
11 at the assets to which access is sought.

12 We see references to non-potable costing work
13 started, the timetable for it, they needed it to
14 re-negotiate their expiring special agreements, and then
15 we see -- and I put this in at paragraph 191(4):

16 "This work was being carried out for ELL [ie Albion]
17 defence".

18 They were going to defend themselves against Albion,
19 and his understanding is that "There is a lot of money
20 riding on this ..."

21 Then we see what they were doing about it. Again,
22 we're not talking averages here; we're talking about
23 non-potable assets at bundle 18, tab 47. They were
24 doing this with the express purpose of looking at
25 non-potable assets being identified so that de-averaged

1 prices could be introduced to meet competition. And for
2 bespoke distribution networks.

3 They're identifying precisely the situation that
4 existed at Ashgrove, detached from other networks. Here
5 I can help you produce a de-averaged price. Now, that's
6 in stark contrast to what they eventually chose to do.
7 The reason for that, and I'll come on to, is they
8 realised, as we now know, that if you priced on the
9 basis of bottom-up local charges the price would be very
10 low.

11 You'll see also paragraph 192, our reference to the
12 average prices could be calculated for bespoke
13 distribution networks or, correctly, the average for
14 non-potable prices.

15 So they were very much aware, where I started these
16 submissions, there are two ways of looking at it: you
17 look at the average of non-potable, the right average,
18 or you look at bottom up prices. I don't think it makes
19 any difference providing the accounting is done
20 properly, and they did neither.

21 Then we go on in the next paragraph and this is
22 again Mr Edwards through July, August and September.
23 All of this is in relation to the non-potable asset
24 study. The e-mail, bundle 19, tab 57, states very
25 clearly Mr Edwards' involvement in the study. He was

1 closely involved, was aware of the study and knew all
2 about it, and I would have to say at the most charitable
3 it reflects very curiously on his lack of memory of what
4 he was doing because he was actually engaged -- I don't
5 know how fully, but he was certainly engaged in this
6 study and his comments were being asked for it.

7 But so far we haven't moved to averages at all.
8 We're only concerned with non-potable assets.

9 Then over the page, my paragraph 194, these e-mails
10 refer to a Mr Brotherton. Now we had to press for
11 Mr Brotherton's papers. We got them for -- it was he
12 apparently who was supplying Hyder Consulting with the
13 raw data, the primary data. It was clear that he
14 provided them with below-ground data which they
15 understood, and above-ground data which they didn't
16 understand. Nevertheless, this came from within
17 Welsh Water. From that, he was going to calculate the
18 value of the non-potable assets above and below ground.

19 So here we are, mid-2000, still looking at employing
20 consultants to look at non-potable assets. And so the
21 story progresses.

22 At bundle 19, tab 58, we see here referenced
23 Henderson to Holton, briefing notes for a meeting at
24 Albion. I referred to it this morning. Instead of
25 going into that meeting in good faith, they were

1 preparing slippery answers.

2 THE CHAIRMAN: But it was always the intention, was it --
3 I don't suppose this is objectionable -- none of this is
4 talking about a common carriage price per se; it's all
5 talking about a tariff for the supply of water to large
6 industrial non-potable users, but it was always the
7 assumption that you would arrive at that tariff then
8 just deduct the water resources cost and come up with
9 the common carriage amount. That seems to be the --

10 MR SHARPE: Well, the position frankly is unclear. We do
11 know, and I take you back to paragraph 191(4) and the
12 reference there, page 54 of the skeleton, they were very
13 much aware of Albion's role as an intruder into this
14 market. So it's not clear whether they were looking at
15 it globally, in which case it took them another couple
16 of years to sort it out, as we know, and then it only
17 came into force in 2004, but equally, at the same time
18 they were very much aware of Albion demanding access
19 price within -- well, formally from September 28th 2000.
20 So whatever they may say, the evidence suggests they
21 were looking at two things. One, it was an immediate
22 thing, the other one was more longer term, if that.

23 Also these documents at bundle 19, 58, we see some
24 extraordinary admissions about how the tariff had been
25 employed. Mr Henderson analyses the existing tariffs

1 for non-potable water and he is stating -- this is an
2 internal document obviously -- there is no evidence that
3 the charge is cost reflective in any way. That's at
4 7465.

5 He goes on to say that there's a nominal tariff, but
6 that it has been set on the Albion price. That of
7 itself is remarkable because they're going back and
8 instead of divining a price and then seeing what it
9 should be, they started off with the Albion price of 26p
10 in the "minded to" decision and then worked back. That
11 itself was based on assumptions of cost allocation for
12 which there is no supporting evidence. You're probably
13 thinking: well wait a minute, that's an Ofwat-minded
14 price. Here we have him saying, "Yes, it's the same
15 price but it's based upon no supporting evidence."

16 That's the sort of thing you can say to your
17 colleagues but you couldn't say to Ofwat. I mean you're
18 telling Ofwat there's plenty of evidence. And so it
19 goes on.

20 We haven't quite reached the end of the story.
21 Having established internally that the existing prices
22 were not based upon any accounting data, for which there
23 is no supporting evidence, he then states, Henderson,
24 that:

25 "The capital values for non-potable ... have now

1 been produced for the first time [this is the Hyder
2 study]. [And in order] to fully calculate the tariff
3 accounting information on opex for the non-potable
4 service."

5 That's what's required.

6 So what he's saying here is that non-potable prices
7 have not previously been based on cost, they can now be
8 calculated on cost and we can then go forward.

9 Unfortunately, we've had no disclosure of what
10 emerged from that. We have no information on Opex
11 operating costs for non-potable services and we know
12 very well -- and I think you've been shown this -- that
13 Mr Henderson was trawling around the company, bundle 3,
14 tab 86. You remember the meetings, X is going to do
15 this, Y is going to do that. We haven't seen anything
16 emerging from that. We do know, from the local
17 operating costs which were disclosed in 2006, that the
18 operating information was actually held on a local basis
19 and was readily available from their own internal
20 accounting systems and there is no reason to believe
21 that Mr Henderson did not see these data, probably begun
22 at that time. He may have seen it. Ofwat didn't see
23 it, this tribunal didn't see it, until much later.

24 What we also see is attempts from Mr Brotherton,
25 requests to him to make good the above-ground treatment

1 costs. It's not clear whether he had supplied
2 information which couldn't be understood or he hadn't
3 supplied the information because he was too busy or
4 something. Whatever.

5 THE CHAIRMAN: What is this distinction between above ground
6 and below ground?

7 MR SHARPE: Pipes, treatment. Simple. Crude but simple.

8 THE CHAIRMAN: But the pipes, are they always below ground?

9 MR SHARPE: No.

10 THE CHAIRMAN: But they're called below ground even if in
11 fact they're above ground?

12 MR SHARPE: I think the pipes we're worried about were above
13 ground but they don't have to be, but they were in this
14 case.

15 What we've got here is no response from
16 Mr Brotherton to this, or if he gave a response, we
17 haven't seen it. What he would have given in response
18 would have completed the picture about treatment, Opex
19 treatment. So we'd have had the capital values of below
20 ground and the capital values of the treatment from
21 which tariffing could be garnered.

22 I have no way of knowing whether the information was
23 in fact collected, whether it was assessed internally by
24 Welsh Water. I mean the odds are that it was. There's
25 no information that says, "I can't do this, I haven't

1 done it, haven't got the information". What we do know
2 from the bundle that has been disclosed, albeit, to put
3 it mildly, at the very last minute, is that it stops.

4 The request of Mr Brotherton is the last thing in
5 the story, round about the November. That's why
6 I started by saying this is where the penny drops
7 because I think, surmising -- and I can only surmise --
8 at that time they began to understand that if they based
9 their access charge upon local costing, drawing upon the
10 non-potable study that they had derived --

11 THE CHAIRMAN: When you say local costing, you still mean
12 not just the Ashgrove System, but the non-potable assets
13 as a whole?

14 MR SHARPE: No I mean the non-potable assets at Ashgrove but
15 also the non-potable assets as a whole because the study
16 embraced both on a site-by-site basis.

17 THE CHAIRMAN: So the study, in order to get hold of all the
18 non-potable costs, looked at the Ashgrove System as one
19 of those.

20 MR SHARPE: It did.

21 THE CHAIRMAN: We've seen those. So it would have thrown up
22 both the truly local Ashgrove-specific costs and putting
23 Ashgrove together with all the others, the non-potable
24 assets?

25 MR SHARPE: That's right. So it would have been possible

1 for them to do an Ashgrove-specific tariff or
2 a non-potable tariff. It did neither.

3 I don't know what happened to that information.
4 We've no evidence at all, and there's an extraordinary
5 gap in the disclosure. I cannot, bluntly, believe it
6 ended there.

7 Now the second point which I won't dwell on is the
8 choice of witnesses, which I think we've established.
9 Quite eccentric. We should have had Dr Brooker here; we
10 should have had Holton here, okay. And Henderson
11 perhaps as well, and we could have dispensed with
12 Mr Williams, but we're leaving that to one side. Now,
13 it's for you to decide how significant those omissions
14 are. They're all available, they are all alive, they
15 are all willing, for all I know, to come.

16 You are entitled -- and we give you authority for
17 this proposition -- to draw inferences that these
18 people, if they had come here, would not have assisted
19 Welsh Water's and I can guess why. Dr Brooker: very
20 clear understanding of the situation, right on top of
21 his brief, managing director. He understood the
22 importance of average prices. Holton: understood his
23 brief. He is not a techie. He could give all the
24 technical work to Mr Edwards and Mr Henderson, but he
25 knew, he did as he was told. It is a great pity that

1 they weren't here and I can only guess why they weren't.

2 We've got to go back to your question of what
3 evidence is there? We're not going to get clear
4 admissions but I can ask you to draw quite legitimate
5 reasonable inferences. Something happened on or about
6 November 2000 which resulted in a fairly big significant
7 change from the bulk of the work that they'd been
8 undertaking internally, for which consultants had been
9 retained, for which the e-mail trail indicates they were
10 preparing for tariffing, based upon non-potable assets.
11 Then they move away from that. They move away from that
12 and it's just coincidental that the board is told
13 regional averaging will achieve revenue neutrality.

14 So they move to a situation where they are
15 requiring -- their targets and all their energies were
16 now devoting to justifying the application of
17 extraordinarily large numbers. Think of it. You move
18 from a situation with 1.4 million or so customers and
19 the average costs of supplying them down through various
20 very arbitrary allocations ultimately to one customer.
21 Now the scope for error in that is obvious, but it
22 wasn't error if you get the right answer.

23 Now of course, as we know, they had several attempts
24 at the right answer. I'm not going to dwell on, in the
25 time available to me -- and I sense that Mr Beard is

1 anxious.

2 MR BEARD: I was actually indicating it might be a moment
3 for the shorthand writers.

4 MR SHARPE: Well I will leave that to you, madam.

5 THE CHAIRMAN: Yes, we'll take a short break now and come
6 back at 3.35.

7 (3.27 pm)

8 (A short break)

9 (3.35 pm)

10 MR SHARPE: Let me resume and I want to take this reasonably
11 briskly, if you go to bundle 3, tab 75. You've seen
12 this before, I make no apologies for showing it to you
13 again.

14 This is the board meeting, the minute of the board
15 meeting of Monday 6th November. Over the page at 686,
16 we see at paragraph 4.42 application has been made.
17 We've seen that:

18 "This will have a relatively neutral cost effect for
19 Welsh Water for so long as average cost of distribution
20 can be applied to such arrangements."

21 You may recall my cross-examining Mr Williams.
22 I thought he might have been responsible for introducing
23 that thought into the board meeting, and you'll recall
24 he said oh no, he didn't think so. It didn't seem very
25 credible. He said almost certainly Dr Brooker.

1 So Dr Brooker was advising the board. Now --

2 THE CHAIRMAN: And we don't have any of the papers that were
3 before the board about this discussion?

4 MR SHARPE: No.

5 Then we can cut to a document you have seen again at
6 bundle 3, tab 90. In this e-mail, as you've seen,
7 Mr Henderson sets out their first thinking in terms of
8 the methodology that we use to determine access price:

9 "Where this leads me to think is that we will
10 probably have to look at the overall reduction of the
11 49p tariff [and that's the standard non-potable tariff]
12 to around 26p. The argument will have to come from the
13 fact that non-potable appears to hardly use local
14 distribution, so we would construct ..."

15 And then he goes on.

16 Now, you'll remember Mr Edwards telling you "average
17 pricing was in our DNA". Well, average prices for
18 potable residential use, sure. Maybe. Not an issue in
19 this case. But here we have Mr Henderson beginning the
20 construction applying a totally new methodology. He is
21 not suggesting that he should be following an existing
22 methodology; he's coming up with a new methodology which
23 hadn't been considered before.

24 We know that by something you may not have had the
25 opportunity of seeing which is in bundle 19, tab 58.

1 I referred to it earlier. It is his report to the board
2 of 7th November. Perhaps we can go to it quickly. It
3 is a report to Mr Holton. 19/58. Do you have it?

4 THE CHAIRMAN: Yes.

5 MR SHARPE: The top bit you can ignore. That says where it
6 has come from. That's Mr Henderson. It has come from,
7 as you see, Monday 29th October of this year. That's
8 irrelevant. You can ignore that. Underneath that,
9 first of all you see what he has to say. This is the
10 preparation for the meeting with Albion, which I've
11 described. I can, if I may, take you to 7465. You see
12 how he deploys the argument: "Move forward ... necessary
13 to allocate the general Opex costs to various categories
14 required."

15 And he takes that down. The important point for our
16 purposes is under the heading "Non-potable water":

17 "The price of non-potable water standard rate is set
18 within the statement of charges as a percentage of the
19 standard volumetric rate. There is no evidence that
20 this charge is cost-reflective in any way. There's a
21 nominal large user tariff for non-potable water in the
22 range of 26 to 30. This has been set based on the
23 Albion price derived, and uses assumptions of Denis
24 Taylor [DT, remember?] -- "and uses assumptions of cost
25 allocation for which there is no supporting evidence."

1 Over the page:

2 "Capital values for non-potable water have now been
3 produced for the first time to fully calculate the
4 tariff accounting information on opex for the non-potable service is
5 required."

6 Then he goes on:

7 "A large user tariff for non-potable can be
8 calculated on the same basis of pipe size that has been
9 used for potable LIT and the information ... is available
10 now."

11 I think that's all we need. That gives you the
12 state of play.

13 THE CHAIRMAN: What does it mean, that "information required
14 to break down the non-potable service into the common
15 carriage categories is not available"?

16 MR SHARPE: I think we don't have a breakdown aligning
17 non-potable services with the line items that go into
18 common carriage. That's my understanding of that at
19 that point in time.

20 The simple point I wanted to convey is this:
21 throughout 2000 we are seeing a lot of work being done
22 in relation to local assets, non-potable costs. The
23 penny drops, as I put it earlier, colloquially, on or
24 before 6th November when Dr Brooker appeared to have
25 addressed the board about the concerns that must have
26 been in their minds and certainly was in relation to the

1 board in passport meetings that they faced serious
2 competition from Albion, and Albion was running the risk
3 of inroads into what would be very serious sums of
4 money, and saying to them, "If we get by with averaging
5 our numbers, the outcome will be revenue neutral. We
6 won't lose any money on it."

7 So far from being in the DNA, whatever that may
8 mean, of Welsh Water, they had gone quite a significant
9 way to assess non-potable costs even at a local basis,
10 Ashgrove, where they had the data, and they could have
11 proceeded with that, but on or about November, I think
12 probably because they understood what the implications
13 were going to be and we know what those implications are
14 because that's one of the tests, one of the calculations
15 that subsequently went forward in the referred work,
16 they were looking at local costs.

17 They probably had -- non-potable averaging. They
18 looked and foresaw what the number was going to be,
19 really a rather small number so there was no point in
20 proceeding down that road. We've got to have a plan B,
21 and the plan B was averaging. Now, of itself, that
22 wouldn't have been a disaster if they'd done it properly
23 but wilfully they chose not to by looking at averages of
24 things which were wholly inappropriate.

25 So Henderson in his e-mail here which I've drawn to

1 your attention, he's trying to divine a new methodology,
2 and I'm back at paragraph 240 of our skeleton, just for
3 a point of reference. One, there was a new methodology.
4 And secondly, they weren't doing it with any attempt to
5 try to find an objective price; they were aiming for the
6 26p on which their other charges seemed to have been
7 based. And they were not as you saw, cost-reflective.

8 This is a game of inference, if it's a game at all.
9 We're pointing inevitably to what they were seeking to
10 achieve: namely a revenue neutral solution. And the
11 rest you know, you've indicated. We know how the first
12 indicative charge was created, and we know that was
13 insufficient for their purpose. It was minor loss, it
14 was under 20, so therefore something had to be done.

15 We also know what Mr Edwards did. He applied the
16 most extraordinary sleight of hand by seeking to reduce
17 the treatment cost by the application of things which
18 were, by any standard, wholly irrelevant.

19 Now you can say that he is a fool, that he shouldn't
20 be in the job he's in or was at that time, but I don't
21 think that's fair. I think this is a highly intelligent
22 man who understood water industry numbers, who knew what
23 the implications were of choosing a figure for all
24 company average treatment, and he knew very well that
25 would serve, by the method they had divined at that

1 time, to bulk up, to increase the price of bulk
2 distribution, albeit potable water.

3 If he didn't, I can't believe he didn't understand,
4 but if you move the figure from 11 to 16 in this
5 calculation, 50 per cent increase -- for distribution,
6 it is a major increment, and was responsible, virtually
7 exclusively, for tipping the balance. Obviously we know
8 and he admitted there was going to be some change to the
9 treatment cost that you saw, but that treatment cost was
10 trivial because only 30 per cent of it is included. But
11 100 per cent of the bulk distribution cost is included.
12 He must have seen that. This is a man with several
13 degrees, and he was doing essentially what he was
14 bluntly, in my submission, told to do: arrive at
15 a figure that satisfactorily excludes Albion from the
16 market.

17 Of course, as you know, and I'm not going to dwell
18 over-long on it, there were four aspects to the
19 background to this which add weight to my submissions.
20 One of course is the 30 per cent, we've dealt with that.
21 There should be no argument that that was a wilfully
22 misleading number. They knew it was inaccurate, the
23 documentary records says internally they didn't think it
24 was robust but it didn't stop them applying it to
25 Albion. And when it did come for scrutiny it was

1 halved. A major, major change.

2 Then the whole company average approach in general.
3 A change from their earlier position, which can be
4 justified if it is done properly, but it was manifestly
5 done very badly.

6 We saw repeatedly with Mr Williams, he is not an
7 accountant, in fact I don't think there is any reference
8 to any accountant at all in this exercise. You would
9 have expected an accountant to have looked at this to
10 see whether or not it reconciled with the data they had,
11 whether the allocations they were employing made sense.
12 But they didn't. I hesitate to say it, but I think
13 Welsh Water had got quite a lot of accountants on the
14 strength, and if they hadn't, they could certainly pay
15 for them externally. So they adopted an approach and
16 executed it in a manner which was wilfully defective.

17 Of course, another very obvious point: we now know
18 there are significant differences between the cost of
19 potable distribution and non-potable distribution. It
20 took the referred work for Ofwat to understand what had
21 happened here, and you'll appreciate that the
22 non-potable distribution, the cost of that was
23 essentially halved in relation to bulk distribution.
24 They must have understood, even the meanest of laymen in
25 the water industry, in which I include myself, knows

1 that potable water has to be done with care, to avoid
2 contamination, self-evident, and to avoid expensive
3 leakage. It's very expensive. And you have
4 reputational damage. It is self-evident.

5 Bulk non-potable is water that's either not been
6 treated or partially treated and it has much, much less
7 value and a calculation has to be made whether it is
8 worth spending a fortune and avoiding leaks when you
9 don't have a contamination issue. Plainly there are
10 major differences in cost. Did nobody, Mr Edwards,
11 Mr Henderson, Mr Holton, Mr Brooker, people who had
12 spent their careers, as far as we know, in the water
13 industry, not twig this? Of course they did. It was
14 just a very inconvenient fact in the calculation they
15 were doing.

16 Of course, any serious accountant and anybody with
17 an interest in the truth would have looked at their
18 calculation, thought to verify it. One of the ways of
19 doing that would be to say: let's look at it bottom up
20 instead of top down and see if there's a difference.
21 There's not the faintest hint that they did that
22 exercise after the event. There's quite a lot of
23 circumstantial evidence, they ascertained what the local
24 costs were likely to be and then we see a disclosure
25 block with nothing else being disclosed. I can't

1 believe nothing else happened after that but I'm beyond
2 comment on Welsh Water's disclosure. It is not
3 a subject that I want to dwell on at the moment.

4 So what we have here is a complete willingness to
5 avoid looking the facts in the face, but a sensible
6 company wanting to avoid, conscious of its dominant
7 position, wanting to avoid a charge of illegality,
8 conscious properly of its responsibilities to its
9 customers and people it dealt with, would not have put
10 out this access charge on the basis of the work, lack of
11 verification, knowledge of the flakiness of the numbers,
12 but they did.

13 Now, in my respectful submission, that then moves us
14 immediately to a conclusion that this number was put
15 together with one purpose: it was a target. It wasn't
16 the result of a calculation; it was a target to get rid
17 of Albion, and the instruction may easily have been:
18 "Can we think of a way of dressing this up so that it
19 will survive scrutiny by Ofwat? We know more about our
20 industry than Ofwat ever will, and Ofwat will probably
21 admit that, and we know more about our data. This seems
22 a reasonable view. We can translate the residential
23 potable learning on averaging to this in an acceptably
24 plausible way, and we can go forward with that, and with
25 luck, we'll get away with it. By the way, if we don't

1 get away with it, what's likely to happen?"

2 Remember where we are, 2001, one year into the
3 Competition Act. Hardly any enforcement activity by the
4 Office of Fair Trading and a judgment may easily have
5 been made that Ofwat would not be particularly
6 aggressive in the exercise of its concurrent powers. It
7 may surprise you to know that to my knowledge, Ofwat has
8 not yet exercised its concurrent powers in 2012. And
9 certainly, as you well know, chose not to -- well, this
10 would be the only example, and there the results are,
11 shall we say, lacklustre.

12 So putting myself as an advisor to Welsh Water in
13 2001, the calculation could easily be: you aren't going
14 to face very much, we don't know much about the Ofwat or
15 OFT fining policy if there's going to be a fine, there's
16 quite a heavy hurdle for fining, the issues are complex,
17 we might get away with it. And as for damages,
18 theoretical possibility but we know even today damages
19 are hardly everyday fare in competition actions.
20 Latterly yes but in 2000 and 2001 they were purely a
21 theoretical outcome. So the calculation could readily
22 and easily have been made that this was a risk worth
23 running bearing in mind the huge revenues which were at
24 stake.

25 If may just have a moment, the story is

1 a complicated one. We've done our best in the closing
2 submissions to take you through as easily as we can. My
3 describing is no substitute for a quick run through
4 bundle 18 and 19. There is no good reason Welsh Water
5 should take the benefit of unreasonably late disclosure
6 in the hope that nobody is going to read it. We did our
7 best in the 24 hours that were available to us and
8 I hope it will --

9 THE CHAIRMAN: We will certainly read it Mr Sharpe. Have no
10 fear about that.

11 MR SHARPE: It repays reading.

12 I've already averted to the relationship with Ofwat
13 and the information that had been supplied to Ofwat. We
14 will see that, I opened with saying it and we'll see it
15 in the most recent correspondence between the parties.
16 It's clearest, we put it to them that maybe the potable
17 study and so on ought to have been disclosed in answer
18 to questions 1 and 14 of the section 26 application. We
19 put it to them, perhaps it ought to have been disclosed
20 in relation to the Pinsent Mason letter. The reply is
21 they didn't think it was relevant or appropriate. There
22 are errors. I find it utterly unconvincing and I hope
23 very much you will as well.

24 Formally, it is not relevant to our case, save
25 insofar as it sheds light upon the knowledge that Ofwat

1 possessed at the time and makes sense of what Ofwat were
2 doing but it does indicate in my submission that in the
3 course of dealing in latitude towards the regulators and
4 their legal obligations, this should not be rewarded by
5 the mere payment of fairly modest compensatory damages
6 by any standards and should be rewarded by a very
7 substantial award of exemplary damages. The precise
8 level of that award, in my submission, is at large. The
9 figures we quoted in the pleadings I think are
10 illustrative. It need bear no necessary relationship to
11 any fine that may have been in contemplation. It
12 certainly should not bear any direct relationship to the
13 level of compensation.

14 The point about exemplary damages is it is detached
15 from compensation. And plainly, if compensatory damages
16 are very low, either at all or in relation to the assets
17 of the abuser, I think the case for exemplary damages is
18 correspondingly greater. That is true both in terms of
19 punishment, one function of exemplary damages, and it is
20 also true of deterrent, another function although in my
21 submission a subsidiary function. And therefore
22 uncomfortable as it may be, the precise level of any
23 exemplary damages is a matter for you and you should not
24 feel constraint by the level of compensation or what OFT
25 might conceivably have awarded in damages.

1 Now, on that note, unless I can assist you further,
2 those are my closing submissions on behalf of Albion
3 water.

4 THE CHAIRMAN: Thank you very much, Mr Sharpe.

5 Closing submissions by MR BEARD

6 MR BEARD: Members of the tribunal, I am conscious of the
7 time but what I will do is go back to the beginning, as
8 it were, and start again with compensatories rather than
9 engaging with exemplary damages, albeit I note in
10 passing exemplary damages are not supposed to be
11 a reward for anyone --

12 THE CHAIRMAN: Put your microphone on.

13 MR BEARD: I'm sorry I'll put them both on.

14 If I may, I'll go right back to issues to do with
15 common carriage price if I may. I'll take it in three
16 stages. I'll deal with the first question, which is the
17 legal test in relation to the counter-factual, and then
18 I'll deal with the linked question of the relevant level
19 of pricing under the common carriage arrangements, and
20 then move on to the question of whether Albion would
21 have accepted any of this at the time, and also try to
22 deal with indexation in relation to common carriage.
23 I think that will take me to about 4.30.

24 The first question in relation to the
25 counter-factual, it is important, it is a question that

1 was raised by you, Madam Chairman, earlier on in
2 proceedings: how do you deal with a counter-factual test
3 in relation to this sort of situation?

4 Now, clearly, the key question that you raised,
5 madam, was to do with how you deal with the unlawfulness
6 of the particular price, because what we're dealing with
7 here is a situation where you've got an unlawful price
8 that's been deemed by the tribunal and you're looking at
9 the consequences of it. Now, in relation to what
10 happened beyond unlawful price, we know that the proper
11 test is what would have happened not what should have
12 happened. But in relation to the unlawfulness itself,
13 what we've got to do is assess damages on the basis that
14 the wrong is removed. That is all that is supposed to
15 happen, because that is what the essence of tortious
16 compensatory damages assessment is. The wrong is
17 removed, you then assess what the damages would be.

18 That may seem banal, but it is important here. It's
19 a proposition that we've cited in our closing, drawing
20 on an old case, Livingstone v Rawyards, which is cited
21 with approval in Devenish which just for your notes is
22 bundle 13, tab 20 at paragraph 43, "In the
23 counter-factual you remove the wrong ..."

24 Now here, the wrong that is relied upon is excessive
25 pricing. So what has to be removed is the excess.

1 THE CHAIRMAN: Well isn't it also the margin squeeze?

2 MR BEARD: If the margin squeezed out something more to the
3 excess, there might be an issue in relation to that, but
4 there has been no suggestion at all that so long as you
5 got rid of the excessive pricing, you do anything in
6 addition in relation to the margin squeeze at all. So
7 I'm not going to focus on that, I think that's washed
8 out.

9 So the question is: what do you do here? You have
10 to remove the excess. This is saliently different from
11 the situation that arose in relation to what my learned
12 friend called Banque Bruxelles Lambert but is normally
13 referred to as the SAAMCO case in the House of Lords.
14 Now that's not an easy case to interpret and Lord
15 Hoffmann's judgment there is itself not that
16 straightforward to deal with generally, but it is worth
17 just looking at the passage that is cited in support of
18 the approach that is adopted by Albion here. It is at
19 paragraph 17 of their closing, page 5.

20 Now the important thing to bear in mind here in the
21 SAAMCO case is it was to do with negligent valuations
22 and then the consequential assessment of damages and
23 whether or not you took into account the impact of
24 markets falling and so on, about which there had been
25 much learned debate thereafter.

1 But Lord Hoffmann at page 221 is quoted here:

2 "I must notice an argument advanced by the defendants
3 concerning the (...reading to the words...) most likely
4 to fetch if sold upon the open market."

5 So you're removing the negligence there. When you
6 remove the negligence which is the unlawfulness, what
7 are you left with as the relevant price? And the court
8 is there saying it's not that there is some residual
9 price that you can properly identify once the negligence
10 has gone, what you have to do is then carry out an
11 assessment of what a reasonable valuer would have done.
12 No problem.

13 A similar sort of arrangement arises in relation to
14 cartel cases, for example. So there you have an
15 infringement whereby all sorts of parties agree to, say,
16 engage in an overcharge. If you strip out the
17 unlawfulness, in other words the contact, the
18 consultation, the agreement between the competing
19 entities, you don't automatically have what is
20 a competitive price. At that point you have to call on
21 the economists and accountants and so on to provide
22 evidence as to what the competitive price would be. But
23 this is different because here the abuse is an excessive
24 price. You remove the unlawfulness which is the excess
25 and then you are left with a price.

1 Now, there maybe an argument about precisely what
2 that price is, but it is not at large, because that is
3 not --

4 THE CHAIRMAN: Nobody is saying the price is at large.

5 MR BEARD: No, but it's not a matter of assessing what
6 a reasonable person might have done in these
7 circumstances. What you are doing is identifying as
8 best you can, as the tribunal, what the non-excessive
9 price is.

10 THE CHAIRMAN: Which you say is the maximum price that you
11 could charge without it being unlawfully abusive?

12 MR BEARD: Yes, because --

13 THE CHAIRMAN: Well then how can you ever get damages in
14 a cartel case? Because if you strip away the agreement,
15 why can't the defendant cartel participant say, "There
16 would have been nothing unlawful about my charging the
17 same price as I charged as a result of the cartel; if
18 all you strip away is the illegality of the agreement,
19 I could still have charged that price and it would have
20 been perfectly lawful"?

21 MR BEARD: No because you then have to assess how the market
22 dynamics would have worked in those circumstances once
23 you've removed the gravamen of the tort, which was the
24 unlawful contact.

25 THE CHAIRMAN: Yes, but the cartel very rarely operates in

1 a perfectly competitive market; it operates in a --
2 I say it operates in an oligopolistic market.

3 MR BEARD: Of course that may be possible. It is possible
4 that the non-cartelised price is close to the cartelised
5 price, in other words the cartel doesn't work very well
6 in those circumstances, and it may well be that there
7 are no damages available on a compensatory basis there.
8 That's not impossible; it's just unlikely, because
9 normally you would expect a cartel is going to have some
10 sort of impact. But the exercise you're doing is
11 different, because you're taking away the connection
12 between the infringing parties and saying: what would
13 happen in a world without that unlawful connection? And
14 that does involve an assessment of how they interact in
15 the market structure and so on and so forth.

16 Here, because the infringement, the gravamen the
17 tort is the excess price, all that you are required to
18 do and all that you should do, as a matter of law, is
19 remove that excess.

20 Now it may be that there's an argument at the
21 margins about what the non-excessive price is, but the
22 point is that here it is clear that the non-excessive
23 price is above 14.4p and we know that in particular,
24 because the methodologies used by the tribunal included
25 the AAC plus methodology which it in fact says is the

1 key methodology which it uses, and there is no possible
2 way that the tribunal could lawfully reach a conclusion
3 that it was appropriate to use an abusive methodology in
4 order to reach a relevant price point in its overall
5 assessment.

6 So we know that 15.8 is a lawful non-abusive price.

7 In those circumstances --

8 THE CHAIRMAN: But it's not the highest, you say --

9 MR BEARD: No it could be higher.

10 THE CHAIRMAN: How high could it be, then?

11 MR BEARD: Well we have pleaded saying it's at least

12 5 per cent above that.

13 THE CHAIRMAN: Why not 6 per cent or 7?

14 MR BEARD: It may well be but the fact that we've been into

15 Zeno's paradox of a heap doesn't mean there isn't

16 a relevant question here.

17 THE CHAIRMAN: Yes it does because you're saying to us that

18 that is the test we have to apply. In these sorts of

19 cases we have to find the maximum price. Now, as you

20 know, there are two steps to finding an excessive price.

21 It's not only that it is high above cost but it also has

22 to be in excess of -- unfair in terms of the value to

23 Albion.

24 MR BEARD: Yes.

25 THE CHAIRMAN: You have said, or Mr Pickford said in your

1 absence, that you're not going down that second route,
2 you don't want us to compute that and you also say "Well
3 we're only going for 16.5", but the fact that you make
4 those concessions to make our task possible in this case
5 wouldn't, I would say shouldn't mask the fact that in
6 the absence of those concessions which you're not
7 obliged to make, the task that would be facing us would
8 be very difficult, if not impossible.

9 MR BEARD: Well it is certainly not impossible. It may be
10 difficult. We have made life easier in that regard.
11 That doesn't change the basis of the legal approach. It
12 may be hard. Some of these questions just are hard.

13 THE CHAIRMAN: Whose job is it, then, to establish what the
14 maximum possible price is?

15 MR BEARD: I'm sorry, do you mean --

16 THE CHAIRMAN: Who?

17 MR BEARD: Well in proceedings before you it will in the end
18 be you. Do you mean how does the burden work?

19 THE CHAIRMAN: No I mean on whom does the burden lie of
20 establishing that price, or a difference between that
21 price and the actual price?

22 MR BEARD: Well, as is often the case in proceedings of this
23 sort, if a prima facie case is put forward as to what
24 a non-abusive price would be, in those circumstances, it
25 may be that the relevant burden shifts. We have put

1 forward a plain case, so no issue on burden arises here.
2 We've said 15.8, plainly not abusive. 16.5, which is
3 a small increment on the 15.8, we also see no reason why
4 that is abusive. In those circumstances, we have put
5 forward a case. So we are willing to take on that
6 burden whether or not it formally falls upon us. So in
7 this case we're not taking a point that actually it fell
8 to the other side. It might have been open to us to do
9 so but that's not the way we've proceeded. So we say
10 you just can't do it another way. That is the legal
11 approach you have to look at because that is the
12 unlawfulness you're dealing with.

13 You don't then go into how would people act in
14 relation to these situations because the question you
15 are asking yourself, as a matter of law, is how to get
16 rid of the unlawfulness here. And here, because of the
17 nature of the infringement, it is getting rid of the
18 excess.

19 If you don't approach it in this way, you can end up
20 with a situation which would be horribly contrary to
21 public policy, in the sense that you could end up with
22 a situation that the more gentle a participant in the
23 market, to put it in euphemistic terms, the greater
24 damages exposure they face in relation to any abuse
25 case. Of course, you also would be operating contrary

1 to public policy, in particular in this case, because
2 here you have a situation where a compromise was reached
3 about what would be given as a price at 14.4p, after
4 extensive and lengthy and painful proceedings.

5 Now, that compromise is set. It is now being held
6 against Dwr Cymru as being the only price that it can
7 deal with in this context, because that is what it has
8 compromised on. Now, there is no good basis for that.
9 The irony would be if this tribunal were to say, "Oh
10 well, look, that was how it panned out in the compromise
11 at the end of the process, we'll treat that as the
12 maximum price that could have been charged, that is the
13 non-abusive price and anything else we'll treat as
14 abusive". Or "We'll go down a different legal route and
15 try to unpick what it was that would have happened in
16 relation to dealings between the parties and we'll
17 choose 14.4p".

18 What you end up there with is a real problem that
19 you will massively disincentive anyone ever settling in
20 relation to any of these details, and Madam Chairman, as
21 you said, there may be complexities in relation to these
22 issues, and effectively the CAT will end up having to
23 deal with them, and regulators having to deal with these
24 issues, because parties are not going to be inclined to
25 compromise if, having compromised, that is then held

1 against them as the way in which they would deal with
2 them in a market.

3 So that reinforces why it is that diverging from the
4 proper legal course in relation to the analysis here
5 wouldn't be appropriate.

6 We think it is important to bear in mind what was
7 actually said in judgment, and I just refer you to the
8 remedies judgment. For your notes, volume 13, tab 22,
9 paragraph 21:

10 "We note that the parties have agreed that the FAP
11 should now be the average figure for the maximum costs
12 found by the tribunal which were reasonably attributable
13 to the service of the transportation and partial
14 treatment of water by Dwr Cymru generally and through the
15 Ashgrove System in particular, ie 14.4p."

16 I'm sure that's familiar, but it is important. That
17 was a compromise price. It doesn't dictate how either
18 the legal approach to this should work or indeed the
19 practical approach. I'll come on to that. Indeed,
20 there is an irony, if one looks at paragraph 2 in that
21 judgment, there's a sort of growl from the CAT that it
22 was disappointed that it's actually got to engage with
23 any of the issues and it was rather hoping everyone
24 would go away and agree everything in relation to the
25 various issues that then had to be dealt with in the

1 remedies judgment.

2 You can understand the CAT's concern in those
3 circumstances. The tribunal obviously would rather that
4 in relation to these matters remedial arrangements were
5 agreed. But diverging from the proper legal course will
6 actually damage that sort of approach in future. But
7 I emphasise, that is an additional factor in addition to
8 the issues concerning the proper legal approach that's
9 to be adopted.

10 Just picking up another issue --

11 THE CHAIRMAN: Isn't there also another public policy point
12 pointing the other way, which is if, as you say, damages
13 can only ever be the difference between the excessive
14 price and the maximum possible price, then there's no
15 disincentive for the dominant company from charging an
16 abusive price? It's only ever going to be held to pay
17 back the difference between the maximum price that the
18 court then has to construct for its benefit.

19 MR BEARD: Let's just take this in stages for a moment.
20 There is no reason why competition law should deter
21 dominant undertakings from pricing at maximum lawful
22 levels. That is no part of competition law. Now,
23 reference has been made this morning and during the
24 afternoon to the special responsibility of a dominant
25 undertaking. The special responsibility of the dominant

1 undertaking, it was neatly captured by Mr Cowen:
2 non-abusive prices. Non-abusive terms of dealing.
3 Those are the special responsibilities of a dominant
4 undertaking, amongst others. The others are not to
5 abuse in any way. The special responsibility of
6 a dominant undertaking is not to abuse. That is what
7 competition law requires of it. That's what the case
8 law, talking about special responsibility, is talking
9 about. It's that a dominant undertaking can't operate
10 in the same way as a non-dominant undertaking because it
11 has special responsibilities.

12 What can't it do? It cannot abuse that dominant
13 position. There may be various ways in which it can
14 abuse a dominant position but that doesn't mean that
15 there's some sort of penumbra of activity it can't
16 engage in which is not abusive but somehow feels a bit
17 strong in the market. There's nothing in competition
18 law that says, in relation to dominant undertakings,
19 that they should sort of sit back and be soft. That's
20 not part of competition law. It is not part of the
21 regulatory purpose of competition law. And you ask
22 about deterrent, and that is plain and obvious. The
23 statutory scheme says not only can you face damages if,
24 by for instance over-charging somebody, you are imposing
25 a dominant price on them and that can be stripped

1 away -- there are fines that can be imposed.

2 That is the statutory scheme that Parliament has
3 adopted, that is the one that must be applied here. If
4 we start creating these fuzzy edges to the notion of
5 dominance, to the notion of abuse and special
6 responsibility, there's a real problem. Sorry Mr Cowen.

7 MR COWEN: I would just like you to help me a little bit.

8 I don't want to get off on completely the wrong foot.
9 Your thesis is that what we're dealing with here is an
10 excessive price and that the wrong that needs to be
11 taken out of the equation, as it were, is that. I'm
12 just wondering where that leaves us in relation to the
13 judgments which clearly referred to both margin squeeze
14 and excessive and unfair pricing. It's in paragraph 1
15 of the part that you referred to.

16 MR BEARD: I'm sorry I'm not getting away from the --

17 MR COWEN: I'm not quite with you on why that's not
18 relevant.

19 MR BEARD: No, I think the answer -- I wasn't clear. The
20 allegations in relation to compensatory damages proceed
21 today and have proceeded over the past few weeks on the
22 basis that the compensatory damage is caused by the
23 excessive price, not the margin squeeze.

24 Now, in those circumstances, when we're focused on
25 how do you assess what the relevant comparator is, what

1 would have happened absent the unlawfulness, strip out
2 the unlawfulness, if you're focusing on a margin squeeze
3 analysis, you'd have to talk about what was the
4 reasonable margin and put it on top. But again, that
5 would be a matter for assessment, because you would be
6 stripping out that unlawfulness. The only point I was
7 making to the Chairman was simply that because of the
8 level claimed in relation to the excessive pricing,
9 there's nothing to add in relation to the margin squeeze
10 analysis here.

11 So once you have decided what the excessive price
12 analysis is, you've dealt with anything else in any
13 event, but that's not the basis on which this claim is
14 brought. It is very clearly brought on the basis of the
15 excessive pricing abuse. So I'm not trying to resile or
16 qualify anything to do with the judgments.

17 So as I say, that means that there is a real legal
18 basis on which 15.8 should be adopted, and we say 16.5.
19 And the fact that there may be a blurred area above that
20 doesn't somehow render that legal approach wrong.

21 So, as I say, I'm trespassing into the second topic,
22 which is level of pricing. It is obviously interlinked.
23 Mr Cowen has already referred to the unfair prices
24 judgment. It is at folder 13, tab 21. Just a couple of
25 paragraphs I was going to go to. Turn on to 4667 and

1 paragraph 88. This is the start of the tribunal's
2 analysis and it's saying in applying the excessive
3 pricing tests, it's not straightforward, there is no
4 consensus on how you do it, what the most appropriate
5 method of measuring cost and excessive prices is.

6 Then we get the tribunal working its way through the
7 various methodologies. At the top of 95 the AAC plus
8 methodology, just above paragraph 100 the LAC
9 methodology, 102 the long-running incremental cost
10 methodology. And then 107 the tribunal's conclusion:

11 "We think it's valuable that in the circumstances of
12 this case the authority provided more than one
13 methodology to assist the tribunal in assessing whether
14 or not the access price was excessive... It is reasonable
15 in the circumstances to use AAC plus as the main
16 methodology to estimate the costs reasonably
17 attributable to the service of transportation and
18 partial treatment of water by Dwr Cymru in relation to
19 non-potable users or potable users generally. We also
20 recognise the role of the LAC methodology as a means of
21 verifying the AAC plus results and ascertaining the
22 estimated costs of the Ashgrove System."

23 I refer the tribunal to that merely to emphasise
24 that there is no way you can read this judgment as
25 suggesting that the outturn price from the AAC plus

1 methodology is somehow abusive. It is not.

2 Then if we go on to paragraph 195, here we just get
3 the conclusions in relation to these matters, just for
4 your reference.

5 It is just interesting in considering this issue,
6 because it is striking that implicitly at paragraph 23
7 of the closing, Albion say:

8 "There is therefore every reason to believe that the
9 maximum lawful price is substantially lower than 15.8p
10 per metre cubed."

11 So the basis on which Albion is proceeding is
12 a basis that is not in line with the way that the
13 tribunal has dealt with this.

14 Now, Albion said, quite rightly, well the tribunal
15 has some residual concerns about various aspects of
16 calculating cost methodology. No doubt about that. It
17 kept doing that and it was content to proceed on the
18 basis that there was a sufficient gap between the FAP
19 and any of the measures, including notably the 15.8
20 measure alone, and that that was sufficient to give rise
21 to the finding of abuse, in the circumstances.

22 But there wasn't any conclusion that somehow you
23 could divine from this reasoning the idea that the 15.8p
24 was an abusive price or tending towards an abusive
25 price, or in some way a price that could not be accepted

1 and a non-abusive price would be somewhere lower. You
2 can't divine that at all. And this case proceeds
3 following on from that unfair pricing judgment, and that
4 dictates the way in which we look at what the relevant
5 level of pricing would have been.

6 So, as a matter of law, we say the relevant approach
7 is to look at 15.8 or indeed 16.5 as the relevant level
8 of pricing. But we also do bear in mind how it would
9 work on Albion's alternative approach, that you somehow
10 go around and try to work out what would have been dealt
11 with at the time. Here, we've just got no good reason
12 to believe that Dwr Cymru would have offered 14.4p at
13 the start of the process.

14 In closing, Albion are saying, well, they would have
15 done, because that would have been conservative. But
16 the conservatism of Dwr Cymru at the time wasn't somehow
17 in relation to knowledge that only arose many years
18 later after the tribunal decision; at the time,
19 Dwr Cymru's approach was focused on regional average
20 cost pricing.

21 Now, therefore, if you're looking at the matter at
22 the time, there's no reason to be thinking that
23 actually, Dwr Cymru would have been approaching this,
24 that somehow 14.4 was the relevant price it should have
25 offered. We know, because of what's happened with the

1 tribunal, that offering the price that it did was wrong.
2 But you can't presume, even if you're going to go back
3 in time and say what would have happened at the time,
4 taking the wrong legal approach, you can't assume that
5 14.4 would have been the outturn offer at the time,
6 because that presumes that you knew what had happened
7 subsequently.

8 We don't have any good reason to think that that's
9 the right way to approach the counter-factual, even on
10 the wrong legal basis.

11 So even if Albion were right that Dwr Cymru would
12 have taken a conservative approach, you don't take
13 a conservative approach on the basis of knowledge you
14 didn't have. You take a conservative approach on the
15 basis of what they were doing at the time. Again,
16 there's no reason to say it would have been 14.4p. So
17 even if you go down the wrong legal route you end up in
18 a situation where you can't say Dwr Cymru would, on the
19 balance of probabilities, have offered 14.4. That can't
20 be right. Actually, Dwr Cymru, on the basis of what it
21 knew and thought it understood at the time, and what it
22 thought and understood having been in close contact with
23 Ofwat, and actually understanding what Ofwat said about
24 it, they would have gone higher. In those
25 circumstances, you end up --

1 THE CHAIRMAN: You say it's a subjective test rather than
2 objective test. It's looking at Dwr Cymru's state of
3 knowledge at the time, rather than looking at what
4 a reasonable water company would have charged?

5 MR BEARD: Well let's take it in stages.

6 THE CHAIRMAN: How subjective does it have --

7 MR BEARD: If we're taking it as a subjective test, which is
8 the "would" test which is what the tribunal has rightly
9 articulated previously, what would people have done,
10 then I think I've already answered the question. But
11 even if you move to an objective basis, you couldn't
12 credit the objective water industry observer, whoever he
13 or she might be, with knowledge of an outturn process
14 many years later when assessing how they would approach
15 something back in 2000 and 2001.

16 We say subjective because it's a "would" test, but
17 even if you were to move across to some sort of
18 objective test, I'm not sure that necessarily assists or
19 changes anything here.

20 MR COWEN: I just wonder whether subjectively or objectively
21 it would have been reasonable for Dwr Cymru to take into
22 account all of the information which was disclosed and
23 we saw over the weekend. A sort of local average cost
24 type analysis.

25 MR BEARD: I'll come through to that, but I think the key

1 question is when it was calculating the FAP, which is
2 obviously the basis of it, that was being done by
3 Mr Edwards on the basis of the information that he had.
4 He gave evidence in relation to the fact that he didn't
5 take into account any Hyder material when he was doing
6 it.

7 Now when you're asking what would Dwr Cymru have
8 done, the answer is plainly on the basis of that
9 evidence, no, they weren't taking that into account. So
10 on a simple evidential basis the answer is no, but when
11 you get to a point where you start saying well there was
12 some other information floating around, you then have to
13 ask yourself, assuming that it was somehow
14 hypothetically fed in, what did it actually tell you?
15 Did it tell you enough to actually inform the way that
16 you carried out this analysis?

17 Now Mr Sharpe has of course proceeded on a predicate
18 that, well, it was obvious from this material that the
19 costs were much, much lower and you come up with much
20 lower cost through this process, but that isn't what we
21 have any evidence at all about.

22 Now Mr Sharpe says: ah well we're missing all sorts
23 of documents, we're missing this and that. The
24 disclosure exercise has been carried out properly.
25 There have been some mistakes. Those have been picked

1 up not just in the course of this hearing but prior to
2 that, and there have been mistakes on both sides.
3 Furthermore, we don't have complete documentary records
4 on either side in relation to these matters, but what we
5 are confident about is the evidence of Mr Edwards when
6 he said that Hyder material, if I had it, it wouldn't
7 have given me enough to calculate local costs in any
8 event.

9 THE CHAIRMAN: Well we do tend to, as Mr Cowen's question
10 suggests, if we have to go down this subjective route,
11 doesn't it then risk having completely to redo the
12 exercise that was done in the infringement decision of
13 not working out what the price was, not working out what
14 a reasonable price would have been, but working out,
15 given who was involved, given the state of their
16 knowledge, given the time they had to devote to the
17 exercise, given what we know or think they knew at the
18 time, given that they would have tried to go for as high
19 a price as they possibly could with whatever advice they
20 had about what was abusive and what wasn't, this then is
21 the price, 16.5, that they would have come up with? Why
22 do you rely on the findings of the tribunal?

23 MR BEARD: Hang on, let's take it in stages.

24 THE CHAIRMAN: Because the findings of the tribunal, that
25 15.8 figure, is that a figure that was -- I haven't seen

1 that figure in the Dwr Cymru disclosure.

2 MR BEARD: No, we're not suggesting there was a figure of
3 that sort in the Dwr Cymru disclosure. We're not
4 suggesting that 15.8 or indeed 16.5 was a figure
5 actively considered by Dwr Cymru.

6 THE CHAIRMAN: So why is that the figure that they would
7 have --

8 MR BEARD: What we are saying is that --

9 THE CHAIRMAN: -- charged?

10 MR BEARD: -- given the knowledge at the time that the
11 persons involved in Dwr Cymru would have had in carrying
12 out this sort of analysis, they wouldn't have ended up
13 at 14.4p. There is no reason to conclude that would
14 have been the price they would have offered. They would
15 have offered a higher price. We know that 15.8 is
16 a non-abusive price. Therefore, the damages that are
17 being claimed can't be claimed in relation to any lower
18 price than 15.8.

19 Yes, it does mean that you might have to go through
20 this exercise, but that would be true both subjectively
21 and objectively in relation to these matters.

22 THE CHAIRMAN: Well you're mixing, then, two tests. You're
23 mixing the tests of what would Dwr Cymru have offered at
24 the time if they had known that 23.2 was an abusive
25 price, and then you're combining that with a statement

1 of the tribunal which you say said that 15.8 is not an
2 abusive price -- or that's what you infer -- and say
3 well then they would have offered 15.8. Either it's
4 a price that derives from the tribunal's work in some
5 way or it's a price that derives from applying a test
6 what would Dwr Cymru have offered had it known that 23.2
7 was unlawful?

8 MR BEARD: Let's take it in stages. First of all we say
9 this is the wrong legal approach. I've set out what the
10 right legal approach of stripping out the excess is.

11 THE CHAIRMAN: Let me just stop you there. That, then, is
12 nothing to do with what Dwr Cymru would have done or
13 what they knew.

14 MR BEARD: No.

15 THE CHAIRMAN: Simply the tribunal has to try and work out
16 what is the maximum price that Dwr Cymru could have
17 charged without breaking the law.

18 MR BEARD: Yes, and there may be obviously a grey area in
19 relation to what the tribunal assesses would be the
20 maximum price, and instead of trying to press into
21 precisely what that would be, we have used what is in
22 the tribunal decision and a small increment above it,
23 because we say that on no basis can that be considered
24 an abusive price. Therefore, we move round the
25 difficulty of the tribunal having to get into precisely

1 what the maximum price would be. We say that's the
2 right test because that strips out the tortious activity
3 in relation to this.

4 If you're not going down that line --

5 MR LANDERS: So what you're saying is that the maximum
6 price, because you're in a monopoly position, you can
7 then impose that price, essentially you're saying "That
8 is the price we would have said to Albion, take it or
9 leave it, that is the price"?

10 MR BEARD: No, I'm saying that when you carry out the
11 exercise, here you're asking yourself what is the
12 relevant level of compensation by reason of a tort. If
13 you're doing that, what you have to do is take out the
14 unlawfulness. In relation to the price which was found
15 to be excessive, you take out the excessiveness. That
16 then puts you in a position where you then do have to
17 look at a bunch of other things to do with, for
18 instance, the United Utilities price, to do with potable
19 back-up supply. You've got to factor in your analysis
20 of all of those issues, but the analysis you carry out
21 there is different from the legal analysis where you are
22 actually focused on the illegality and that's what we
23 say is the lawful approach and the correct legal
24 approach here.

25 THE CHAIRMAN: So in 2 Travel, then, you would say that the

1 defendant was wrong to make the concession that the
2 counter-factual was the non-launch of the white bus
3 service at all; what they should have required the
4 tribunal to do was to work out what frequency of buses
5 and what fares Cardiff Bus could have operated which
6 were something short of being predatory, and then worked
7 out whether that would have had any effect on 2 Travel's
8 business?

9 MR BEARD: Again, one needs to be careful. You need to
10 identify what the abuse was. The abuse there was the
11 launch of the bus service.

12 THE CHAIRMAN: No it wasn't; it was the launch of a bus
13 service at particular frequencies and at particular
14 prices.

15 MR BEARD: Well then it may well be that it wasn't necessary
16 for them to have made that concession. Equally it may
17 not be necessary for us to say 15.8, 16.5 is the
18 appropriate benchmark, but by doing so, we avoid getting
19 into the miasma of arguing about what the maximum price
20 would be.

21 THE CHAIRMAN: Yes, but there are effectiveness issues in
22 our deciding that the test that is to be applied in this
23 case only works if the defendant is prepared to make
24 concessions which keep the tribunal's task within some
25 kind of doable bounds.

1 MR BEARD: No, let's take it in three stages. First of all,
2 you're dealing with a follow-on case. If the tribunal
3 had said there's an excess price and rather than there
4 being a compromise, had decided what the excess was,
5 then actually you'd have that information. Now the pain
6 and suffering might have been felt by the tribunal in
7 the previous hearing, but that would have been entirely
8 proper.

9 In relation to the situation here, you talk about
10 effectiveness, the tribunal is still perfectly able to
11 carry out this sort of exercise because in the end it is
12 a matter of the tribunal's judgment as to what the
13 maximum price would be, and it may have to use certain
14 sorts of assumptions there. That we accept. Those
15 sorts of mechanisms, in deciding these difficult
16 questions, may well be appropriate. That doesn't render
17 it ineffective, the tribunal, in dealing with this, any
18 more than it gets rendered ineffective by having to deal
19 with extensive factual and economic submissions in
20 relation to a range of other matters.

21 And just the third point, that if the tribunal were
22 to say, "Well actually, if this is the right approach,
23 then at least the legal burden will start off upon the
24 defendant in relation to these matters" then of course
25 in those circumstances you have to be able to put

1 forward some sort of case as to what a lawful
2 non-abusive price is. And we've done that here.

3 So I don't think principles of effectiveness apply.
4 Indeed there is a good question which I'm not going to
5 divert into as to whether or not principles of
6 effectiveness apply at all in relation to these sorts of
7 matters. I recognise that you could have a European
8 parallel infringement in relation to article 102, but
9 I don't think that it's necessary to move into whether
10 or not, as a matter of common law, there is a principle
11 of effectiveness in relation to the way in which an
12 adjudicative test has to operate. But that is not
13 necessary here.

14 That's the first approach, we say it's the right
15 one. It's only if we start diverging into "what would
16 have been done" world that we then start saying what
17 would have been done, you can't just assume that the
18 outturn compromise, some six or seven years later, is
19 what would have been done at the time when the
20 subjective parties didn't know that, the parties
21 subjectively didn't know that, and legitimately,
22 understandably, approach matters on a different basis.

23 Of course you can't reach a conclusion that they
24 would only have entered into an abusive price, but if
25 they're acting conservatively, what I'm saying is you

1 equally cannot reach a conclusion that on the balance of
2 probabilities they would have reached the outturn end
3 compromise price. And then we look for what figures we
4 are using and we are content to use 15.8 and 16.5 in
5 particular as non-abusive prices that a conservative
6 Dwr Cymru, dealing with these matters at the time, would
7 have offered, saying, "We think these are non-abusive
8 prices."

9 But there is an artificiality in this because we are
10 importing the fact that Dwr Cymru has to know that the
11 FAP was abusive, but equally -- and this is important to
12 stress -- any notional objective observer has to have
13 the relevant knowledge at the relevant time and have
14 that fact imported into their analysis. So even if you
15 move towards an objective test, you're not circumventing
16 the sort of practical difficulties of grappling with
17 this.

18 MR COWEN: Can I just ask, in your sort of "but for" world,
19 if we're stripping out the abuse, are you saying we
20 should only strip out the excessive pricing abuse but we
21 shouldn't also strip out the margin squeeze abuse?

22 MR BEARD: Well, you could, but that's not the test that's
23 being put here.

24 MR COWEN: I'm just asking, imagine that we're back in 2000
25 and we are going to follow your thought, so take your

1 argument and I'm just trying to examine where it leads
2 us.

3 MR BEARD: It must be stripped out. I don't think we resile
4 from that. You have to strip out --

5 MR COWEN: I think you've been very helpful in suggesting
6 that you might be quite happy in accepting what
7 subsequently came out as a consequence of the case, but
8 that's not going to apply in many cases. So looking at
9 the principle, what you're suggesting, I think for the
10 future, is that the CAT should put itself in the
11 position of the "but for" world, stripping out the
12 abuse.

13 MR BEARD: Yes, in relation to the essential components of
14 the abuse.

15 MR COWEN: So it is open to us to do that now?

16 MR BEARD: I don't see how else this could properly be dealt
17 with. You've got to strip out the elements of the
18 abuse, but what we are saying is, stripping out the
19 elements of the abuse, excessive pricing and margin
20 squeeze don't get you down to 14.4p. That's the point
21 we're making here.

22 THE CHAIRMAN: Because you don't accept that the test we
23 have to apply is what would a reasonable company have
24 put forward, but what would a dominant company, acting
25 to the maximum of its lawful abilities --

1 MR BEARD: Well I'm saying in relation to the principal
2 submission, the legal submission, is you're not looking
3 at what a company would have done, you're looking at
4 what a company was permitted lawfully to do.

5 THE CHAIRMAN: I see.

6 MR BEARD: It's only in the alternative that you go into
7 what the company would have done. You have two species
8 of that. One is the subjective focus species, which is
9 you look at the evidence as to what it would actually
10 have done and here we say if you follow the subjective
11 line, it's not going to be 14.4p.

12 MR COWEN: Why do you say that?

13 MR BEARD: Why do we say that?

14 MR COWEN: Yes.

15 MR BEARD: Because in the circumstances of the present case,
16 we've got a situation where, at the time, Dwr Cymru
17 didn't know what the relevant cost measures were that
18 were ascertained by the tribunal. It was focused on an
19 approach that looked at regional average cost pricing as
20 being legitimate on the basis of what Ofwat did, and
21 permitted it to do, and in those circumstances, to
22 presume that it would have gone down to 14.4p, which was
23 the outturn compromise price at the end of the process,
24 is to presume against Dwr Cymru that actually they would
25 have tried to achieve a higher price than 14.4p and we

1 say you can take that as being 16.5p or indeed 15.8,
2 because they would have tried to have a higher price and
3 we know now that those were non-abusive higher prices
4 and that's what it would have done. Actually, we say
5 that's what an objective entity with that knowledge
6 would have done as well.

7 So subjective, objective, we say this is not the
8 right way to do it, but if that's the way you're going,
9 you're still at prices above 14.4p.

10 I'm rather conscious of the time. It took me
11 a little longer than anticipated to deal with that.

12 I've got to deal with what would Albion have
13 accepted and then move on to RPI, but perhaps now is
14 a moment to pause.

15 THE CHAIRMAN: Yes. We'll come back at 10.30 tomorrow
16 morning.

17 MR BEARD: I don't know if it would be feasible for the
18 tribunal to sit slightly earlier just to make sure that
19 there is proper and sufficient time tomorrow?

20 THE CHAIRMAN: Yes, all right, well we'll sit at 10.00 then.

21 MR BEARD: It will ensure that Mr Sharpe has proper time to
22 reply.

23 THE CHAIRMAN: Thank you. We'll reconvene at 10.00
24 tomorrow.

25 (4.46 pm)

1 (The hearing adjourned until 10.00 am the following day)

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3 Address by the CHAIRMAN1

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5 Closing submissions by MR SHARPE5

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7 Closing submissions by MR BEARD142

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