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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1166/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 October 2012

Before:

VIVIEN ROSE
(Chairman)
TIM COHEN
BRIAN 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 4)

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.

Thursday, 18 October 2012

(10.30 am)

DR JEREMY BRYAN (continued)

Cross-examination by MR PICKFORD (continued)

THE CHAIRMAN: Good morning, Dr Bryan.

A. Good morning, Madam Chairman.

THE CHAIRMAN: Yes, Mr Pickford.

MR PICKFORD: Madam, yesterday evening we discussed timing and subsequently Mr Beard and I have conferred and also substantially pared back our cross-examination. However, we are very likely to run into tomorrow morning, so we don't see that that should be a problem. That obviously still leaves plenty of time as long as we did do finish tomorrow morning, but I thought it would be appropriate to inform the Tribunal in advance.

THE CHAIRMAN: Does that inconvenience you, Dr Bryan, at all in terms of availability?

A. No, Madam, I have nothing else booked.

THE CHAIRMAN: You have blocked this out in your diary, I would imagine.

A. I have.

MR PICKFORD: Now, there are a couple of points that we were dealing with yesterday that we were going to pick up because we didn't have the relevant documents. One of those was whether RPI was going to be assumed against

1 Dwr Cymru by the director in its price control. You
2 recall that point?

3 A. I do.

4 Q. I asked you a question based on a document that was at,
5 just for the note, tab 52 of bundle 17. What we are
6 going to do is see what is in table E6. Do you recall
7 that?

8 A. Yes.

9 Q. The answer to all of this is E6 contains some
10 definitions, and they are then further defined in
11 another document which we found overnight, which I can
12 hand up. And they, in turn, refer to various legal
13 provisions, and so it would appear that there isn't
14 ultimately a factual question that can sensibly be put
15 to the witness on this. It's going to be a matter of
16 legal submission as to whether we were or were not in.
17 We are going to hand those documents up, but I suggest,
18 to move things along, there is no need for me to engage
19 in legal argument with Dr Bryan on that issue.

20 The other point, again, that we were going to pick
21 up from yesterday where we didn't have the relevant
22 material in the bundle was events following on from your
23 letter of 16 January, which you complained Dwr Cymru
24 never responded to; do you recall that?

25 A. I don't think I complained. I observed that I had no

- 1 record of a response and could remember none.
- 2 Q. It might be helpful, just in order to pick this trail up
3 properly, if we could go back to that letter. It's in
4 folder 8, tab 286. Do you have that, Dr Bryan?
- 5 A. Yes, I do.
- 6 Q. Just two very small points I am going to draw attention
7 to in relation to this. It's not a signed letter, is
8 it? It doesn't have your signature on it?
- 9 A. No.
- 10 Q. At the top it says "page", and then it has "page",
11 "page", "page", so the page numbers hadn't been properly
12 inserted into it.
- 13 A. Yes, I see that.
- 14 Q. To be clear, I'm not suggesting that this letter was not
15 drafted contemporaneously. It is possible, isn't it,
16 that this was something that you drafted at your end
17 and, for whatever reason, it didn't get sent?
- 18 A. I think it's unlikely. Our habit was to file documents
19 as Word files on the hard drive, and that -- they would
20 not have borne a signature. So I don't think anything
21 can be read into that. As for the error in not putting
22 the page in, I can't account for that.
- 23 Q. As far as we were aware, this is the last letter that
24 you wrote on the subject of common carriage before
25 the Tribunal hearing on 13 February, which was just

1 under four weeks later?

2 A. That accords with my recollection.

3 Q. Now, if we just have a quick look at some of the things
4 that you say in this letter, you discuss at the
5 beginning how you had previously received an offer in
6 November 2008 of 14.4p per cubic metre?

7 A. Yes.

8 Q. Do you see that?

9 A. Yes.

10 Q. You then talk about your response of 19 November. That
11 was your second response, after your initial one where
12 you turned it down. You then said you accepted it.
13 Then you go on to address WilmerHale's letter of
14 24 November, where it stated at point 4:

15 "Dwr Cymru welcomes Albion's acceptance of
16 Dwr Cymru's offer of 14.4p per cubic metre in 2000/2001
17 prices as the measure of treatment and transportation
18 costs in the context of common carriage."

19 Then you took issue with that and said you had not
20 done that and that was an improper inference. Then in
21 the next paragraph you say:

22 "Albion therefore withdraws its support for a figure
23 of 14.4p per cubic metre as a starting point in
24 negotiations, and believe that it behoves all parties to
25 more accurately reflect the findings of the Tribunal."

1 So in this letter you were going back on 14.4 again,
2 now, weren't you?

3 A. Yes.

4 Q. We see that the price that you were then suggesting is
5 on page 2566 where there is a conclusion on access price
6 for the Ashgrove System after some analysis that you
7 have carried out.

8 You, in that paragraph there, suggest that the
9 analysis gives a cost of 12.1p per cubic metre, and you
10 invite Dwr Cymru to identify the flaws in your approach?

11 A. Yes, I invite Dwr Cymru to negotiate with us, and the --
12 that is clear from the letter, that this is part of
13 a process which we hoped would lead to an agreed access
14 price that, in our view, should have been lower than the
15 simple arithmetic average of the three figures that
16 appeared in The Excessive Pricing Judgment, for the
17 reasons given.

18 Q. By the time of the hearing in February, about four weeks
19 later, you had changed your mind again, hadn't you, and
20 you had gone back to 14.4, because we saw yesterday that
21 it was recorded by the Tribunal that the parties had
22 agreed on 14.4p per cubic metre as a price going
23 forwards?

24 A. I think that certainly reflected in my November letter.
25 This was -- this letter is clearly part of a process

1 designed whereby the two parties will reach an agreement
2 on an access price going forward.

3 Q. Sorry, you say that that reflected your November letter,
4 but the sequence here is we have the November letter
5 where you'd agreed 14.4 after initially turning it down,
6 we then have this letter where you withdraw your support
7 for 14.4?

8 A. Yes.

9 Q. And then a few weeks later, by the time of the Tribunal
10 hearing, you were back supporting 14.4 again, at least
11 as a price that could be the benchmark for something
12 that was agreed going forwards?

13 A. This was in the context of The Remedies Judgment in
14 terms of what would be an abusive price.

15 Q. Yes.

16 A. I think that this is significantly different. This is
17 a part of a negotiating process which is designed in the
18 real commercial world to recognise terms, and I think,
19 I'm fairly certain, it was the only attempt by either
20 party to reflect the real findings of the Tribunal in
21 its Excessive Pricing Judgment and bring it up to date.
22 And as you see, I've done that, I have applied
23 an indexation.

24 Now, it was open to Dwr Cymru to argue about the
25 starting point and the indexation point, but at that

1 point we had not received a price that we could accept,
2 not a current price, and I may be mistaken but I don't
3 believe that we ever received a current price. And this
4 was our attempt to fill that void as part of a process
5 for negotiation. As you will see, my very last comments
6 in that letter, "agree to meet us", and there can be
7 only one inference drawn from that: to see whether we
8 can reach agreement.

9 Q. It is of course the case, you mentioned indexation, we
10 saw yesterday that Dwr Cymru had already set out what
11 their position on indexation was in their letter of
12 24 November 2008, and they had said, "We want RPI"?

13 A. Yes.

14 Q. Okay. So what then happened is we had the hearing, at
15 which point you agreed, it's there recorded, that you
16 had accepted 14.4p as the basis for what was going to be
17 recorded in that hearing?

18 A. In the context of The Remedies Judgment, yes.

19 Q. So then after that, what we then have, and we have
20 located some of the correspondence, one of the bits was
21 in the bundle, but some have now been handed in in
22 Folder 17. If you could go first, please, to move on
23 in tab 8 to 293, and then we will be moving on to
24 folder 17 after that.

25 Now, this is a letter some months after The Remedies

1 Judgment of 1 June 2009 from Dwr Cymru. Do you see
2 that? To you.

3 A. Yes.

4 Q. If we go, please, to page 2585, do you see approximately
5 halfway down a paragraph beginning "The other judgments
6 of the Tribunal"?

7 A. Yes.

8 Q. If you could please read that paragraph.

9 (Pause)

10 A. Yes.

11 Q. What Dwr Cymru are saying is that no approach has been
12 made to them in relation to a potential common carriage
13 service since their original offer, and the offer of
14 14.4p in 2001 prices has now expired. So that's their
15 view, isn't it?

16 A. Yes, it is their view.

17 Q. You would say that's incorrect in reliance upon your
18 letter of 16 January, which they say they didn't
19 receive?

20 A. Yes.

21 Q. There are no other letters that you rely upon as
22 demonstrating that that statement there is incorrect,
23 are there?

24 A. Not that I am -- not contemporaneous.

25 THE CHAIRMAN: Which statement?

1 MR PICKFORD: Sorry, the statement that no approach had been
2 made to Dwr Cymru since their offer in November.

3 A. Well, there clearly had been an approach because we had
4 responded with two letters that you don't dispute that
5 you received, both of which were within one day of each
6 other, I think, in November.

7 So from a factual basis, that statement is
8 incorrect, irrespective of the letter of -- the January
9 letter to which you took me to first of all. So
10 factually, no, it's wrong.

11 I also note with interest that the 14.4p was to
12 provide the basis for negotiations, and I think that's
13 a useful admission because that was our intent as well
14 in responding to your starting point in negotiations
15 with our response, both in November and subsequently in
16 January.

17 Q. Now, to the best of our knowledge, you didn't respond
18 directly to this letter of 1 June, did you? I can
19 possibly assist you in explaining why. There was
20 a meeting between yourselves, Ofwat and Dwr Cymru on
21 4 June at which a number of these points were canvassed;
22 do you recall that?

23 A. My memory would need to be refreshed on that,
24 Mr Pickford. So much was happening at that time that
25 it's very difficult to sort one event from the other.

- 1 But if you can help me, I am sure I can recall.
- 2 Q. Let's go, then, please, to tab 71 of bundle 17. So we
3 have now moved into bundle 17. Do you have a letter
4 there of 22 June 2009 addressed to you from, I think
5 it's Lynnette Cross, but I'll just check. Yes.
- 6 A. Yes, I do.
- 7 Q. If you look at the end of the second paragraph, you see
8 a reference there to a meeting which evidently you,
9 Dwr Cymru and Ofwat attended on 4 June. Do you see
10 that?
- 11 A. Yes, I see that point.
- 12 Q. And you are not contesting that, on the balance of
13 probabilities, there was such a meeting?
- 14 A. No, I'm not contesting that, no.
- 15 Q. No. Now, if you could go on, please, to the second page
16 of that letter, there is a paragraph beginning
17 "Second ..." Do you see that?
- 18 A. Yes.
- 19 Q. Could you please read that paragraph to yourself.
20 (Pause)
- 21 A. Yes.
- 22 Q. So that set out the position that Dwr Cymru had been
23 taking with you in relation to the 14.4p per cubic metre
24 around this time, didn't it? That was their view of
25 matters?

1 A. Yes.

2 Q. Then if you could look, please, at the final paragraph,
3 which is on the third page, what we see there in summary
4 is Dwr Cymru saying to you that they want the bulk
5 supply dispute to be resolved as soon as possible, and
6 they are obviously inferring that that's what you want,
7 to get it done, and so that's how they conclude their
8 letter; you see that?

9 A. Yes. The essence of the letter is Dwr Cymru's position
10 then, and I believe it still is, that the findings of
11 the Tribunal on excessive pricing with regard to the
12 transport and treatment components had absolutely no
13 bearing on the bulk supply price, which constituted the
14 transport and treatment components identical, plus the
15 water resource cost. And Albion's position all along
16 has been that that does not make sense economically.

17 Q. You respond on 22 June 2009, and that's at the next tab,
18 tab 72. So this is the same day. You point out in your
19 first paragraph that the letter that you have just
20 received from Lynette, you say, ignores the fundamental
21 point that Albion seeks a common carriage arrangement
22 based on the findings of the Competition Appeal
23 Tribunal. You see that?

24 A. Yes, I do see that.

25 Q. So what you do is you say, a couple of paragraphs down,

1 that you want a new common carriage price valid for the
2 current charging year, and you want full justification
3 for that price?

4 A. Yes.

5 Q. Then you get a response on 2 July from Lynnette Cross,
6 and that's at the next tab, tab 73, and what she says to
7 you is that they are keen to avoid committing
8 significant resources to pricing studies that could turn
9 out to be of academic relevance only:

10 "Accordingly, we have decided to respond to your
11 request by extending the offer we made in our letter of
12 7 November 2008, which is equivalent to 8.7p per cubic
13 metre in the current 2009/10 charging year."

14 Sorry, 18.7p per cubic metre. I must have
15 misspoken.

16 So they did, in fact, come back with an offer of
17 a common carriage price, didn't they?

18 A. Not an offer that would withstand any sort of scrutiny.
19 I take you back, Mr Pickford, to Ofwat's very clear
20 guidance on this matter. Any price has to be justified,
21 and here we have a price that has apparently leapt from
22 14.4 to 18.7. There is no justification, there is no
23 response to what I said in my previous letter, the
24 letter to which Ms Cross has responded, saying that we
25 need to understand, full justification for any price,

1 and we must not forget that Dwr Cymru had never
2 justified a price of 14.4. They had taken the figure,
3 and I fully accept that, that was the arithmetical
4 average, the three figures in The Excessive Pricing
5 Judgment, but we have never seen, and certainly the
6 2 July letter does not constitute, an offer with the
7 sort of detail that makes it capable of robust
8 challenge, to see whether indeed it accords with the
9 findings of the Tribunal.

10 Q. We can make some reasonable inferences about what was
11 being offered here, can't we, because if we look at it,
12 it says:

13 "We have decided to respond to your request by
14 extending the offer we made in our letter of
15 7 November 2008."

16 Now, I don't think we probably need to go back to
17 that. You will recall that was the letter where they
18 said: okay, let's average across the three measures that
19 have been taken by the Tribunal, that average is 14.4.

20 Okay?

21 A. Yes.

22 Q. So that's the basis we can see for the price that they
23 are suggesting. It's an extension of that offer; do you
24 see that?

25 A. I do see that, but I would --

1 Q. And --

2 A. Sorry.

3 Q. And what we know happened subsequently is there was
4 a debate between yourselves and Dwr Cymru inter alia
5 about the indexation; you agree with that?

6 A. And the starting point, yes.

7 Q. And they said RPI, and you said PPI?

8 A. Yes.

9 Q. And we can reasonably infer that, given what had passed
10 between you, their equivalent to 18.7p -- so they are
11 using the word equivalence. What they are doing is
12 they're taking their 14.4p and inflating it, and given
13 the debate between you, you can reasonably infer that
14 the inflated they were using, even though they don't say
15 so expressly, was RPI?

16 A. You could say that, yes. You could draw that conclusion
17 based on what you have said.

18 Q. And that's a reasonable inference from this letter,
19 isn't it?

20 A. It's a reasonable inference from that letter, given
21 Dwr Cymru's previous position. But I think the point
22 I have to make in response is that the November figure
23 of 14.4 was, by Dwr Cymru's own admission, a starting
24 point in negotiation. It was also a figure based on
25 work which the Tribunal criticised, and I am not going

1 to make a major point about that, but they did criticise
2 the referred work and the lack of transparency. More
3 importantly, it was a figure based on data that had been
4 dredged up in 2007 from 2000/2001.

5 Now, here we are in June 2009 saying, not
6 unreasonably, "Please go back, look at your real
7 accounts", bearing in mind what's happened in the
8 preceding -- not making assumptions about how prices
9 might have moved from the year 2000 when the work was
10 being done. "Would you please go back to your accounts,
11 as you are required to do by Ofwat's guidelines --
12 Ofwat's guidelines don't say, "Choose a year eight or
13 nine years ago and use those figures". There is
14 an expectation that you will use current figures, not
15 least to check how prices or how costs, more
16 importantly, have indeed moved or, indeed, whether they
17 have moved at all.

18 You have not done that. We have asked quite
19 specifically for a detailed price, a price that you are
20 bound to give if you are properly cognisant of Ofwat's
21 rules -- which had not changed, so we are still talking
22 about MD 163 -- how you charge yourself, and a proper
23 and robust reflection of real accounting data. We have
24 not got that. You haven't even bothered to do that.
25 The letter indicates that it's too much trouble. So you

1 are simply giving us a price, which is certainly
2 sufficient for the Tribunal to make a finding of
3 excessive pricing, of abuse, there is no question about
4 that. It certainly wasn't a robust price, given
5 the Tribunal's very trenchant criticism of numerous
6 aspects of the referred work.

7 Here was an opportunity for you to learn from that
8 and to do the job properly, with your own data, not
9 relying on Ofwat to do it for you.

10 Q. Dr Bryan, in 2009, a few months before this letter,
11 the Tribunal had made an order which ruled that 14.4p
12 per cubic metre in 2000/2001 prices was not an abusive
13 price.

14 A. A price at or below that level.

15 Q. Yes, and they said it wasn't an abusive price, and they
16 said that was the basis for the parties to move on and
17 move forwards?

18 A. Yes. And we offered to negotiate around that point.

19 What we have here is a very clear request for Dwr Cymru
20 to provide us with a current price, a price based on --

21 THE CHAIRMAN: I think we have your point.

22 A. Sorry to go on.

23 MR PICKFORD: There were no further requests from you in
24 relation to common carriage following this letter of
25 2 July, were there?

1 A. There were not. At that stage we were embroiled in the
2 next phase of the saga, which was the determination of
3 the day-to-day reality of a bulk supply price where
4 Dwr Cymru were attempting to significantly increase --
5 very significantly increase -- the price which had been
6 set by the Tribunal under the interim measures, and we
7 were resisting that. And a little while later than this
8 Ofwat agreed to investigate that as a section 40A matter
9 under the Water Industry Act, took a further two years
10 to investigate it, and as Mr Sharpe explained to you on
11 Day 1, a key aspect of that is subject to judicial
12 review.

13 THE CHAIRMAN: Yes.

14 MR PICKFORD: Now, you have given a very full answer in
15 relation to what you say was the concern here. Just so
16 that it's quite clear, the case that I put to you,
17 Dwr Cymru's case, is that the reason why you didn't
18 accept the common carriage offer in 2009 was essentially
19 two-fold: you weren't very happy with the 14.4p price
20 because you had already balked at it twice, and you
21 were not happy with the indexation they had adopted.
22 And you say your answer to that is it was because there
23 was a lack of justification?

24 A. No, the 18.7p figure has actually nothing to do with
25 indexation or the starting point. The real problem with

1 that figure is it bears absolutely no relationship to
2 your current accounting -- Dwr Cymru's current
3 accounting evidence.

4 Q. Okay.

5 A. Which it needs to do in compliance with Ofwat's very
6 clear guidelines.

7 Q. We will move on to the next topic, which is potable
8 back-up. If you could please refresh your memory first,
9 and for the benefit of the Tribunal as well, of what you
10 said in your witness statement, which you will find in
11 folder 1, tab 4, and we are going to go to
12 paragraph 301.

13 A. (Pause) Yes.

14 Q. So here you say that:

15 "If non-potable water was not available, then Albion
16 would have sought to purchase potable water from
17 Dwr Cymru pursuant to the terms of the potable bulk
18 supply agreement, and those costs would have been passed
19 on to Shotton Paper, plus a small margin if there was no
20 margin squeeze on that price. The potable back-up
21 supply arrangements are, therefore, fully covered by the
22 potable price terms and have no impact on the
23 non-potable prices."

24 Then you go on to say:

25 "In my calculation of the quantum, I have only

1 included the volumes of non-potable water purchased and
2 have not included the very small volumes of back-up
3 potable water purchased."

4 A. That's correct.

5 Q. So what you are saying here is that in relation to
6 potable back-up you could simply rely on the existing
7 terms of the bulk supply agreement, of which potable
8 back-up was part, of which supply of potable water was
9 part, and assume that the very same terms would apply to
10 a potable back-up even if you stripped out the
11 non-potable part of the agreement, because the
12 non-potable part of the agreement is what's going to go
13 and be replaced by common carriage?

14 A. Yes, our view was that the price justification for the
15 two different services was essentially separate, that
16 there was no implicit or explicit cross subsidy between
17 non-potable and potable.

18 THE CHAIRMAN: Could I just be clear, factually. Were there
19 in existence, during this period, then, two agreements
20 between Albion and Dwr Cymru: one, the bulk supply of
21 the non-potable water, and one the bulk supply or supply
22 of potable water?

23 MR PICKFORD: No, madam, there weren't. There was one
24 single agreement. It might be sensible if we go to it,
25 I think.

1 THE CHAIRMAN: Because I thought yesterday when we looked
2 through that register of special agreements, in
3 reference to a potable supply agreement ...

4 A. You are correct that the -- that Dwr Cymru reported the
5 two -- the terms of the agreement in two ways: both the
6 potable volumes supplied and the non-potable. So they
7 appear as two entries in the register. But Mr Pickford
8 is right that they are functions within a common single
9 bulk supply agreement that mirrored the earlier
10 agreement that Dwr Cymru had with Shotton Paper.

11 MR PICKFORD: Just so we are clear where we are all coming
12 from in relation to that, I think it would be helpful if
13 we did turn to folder 2, tab 19, which contains the
14 agreement. If you could turn, please, to page 360, we
15 see there in clause 1.1 that:

16 "Dwr Cymru shall supply such quantity of non-potable
17 water to AW as it may require during the term of this
18 agreement up to a maximum quantity of 18 megalitres per
19 day, which maximum quantity DCC shall reserve for such
20 supply."

21 So that's non-potable water?

22 A. Yes.

23 Q. Then it continues, in clause 1.2, to provide potentially
24 for a further 4 megalitres per day of non-potable water
25 subject to availability.

1 A. That's correct.

2 Q. Then clause 2.1 deals with the supply of potable water,
3 and that says that:

4 "Dwr Cymru shall supply such quantity of potable
5 water to Albion Water as it may require during the term
6 of this agreement up to a maximum quantity of
7 8 megalitres per day, which maximum quantity DCC shall
8 reserve for such supply."

9 You see that?

10 A. I see that.

11 Q. Then the charges for non-potable and potable water
12 respectively are set out in clause 4, and we see
13 non-potable water is 26p, potable water is 59p, and in
14 the event that Dwr Cymru can't give you your
15 18 megalitres per day of non-potable water for a period
16 exceeding 24 hours, then they are obliged to supply you
17 with potable water, but you only pay the non-potable
18 price?

19 A. Yes.

20 Q. So it's quite clear that, under the bulk supply
21 agreement, Albion had contracted for a back-up in order
22 to augment, as and when appropriate, the supply of
23 non-potable water, and there was an obligation on
24 Dwr Cymru to provide the same?

25 A. That's correct.

1 Q. Now, I am thinking whether it's sensible to keep
2 bundle 2 open or whether we can put it away. I think we
3 can put it away. There is always a slight risk we will
4 have to go to it later.

5 If we could go now, please, to tab 21 --

6 THE CHAIRMAN: How does that actually work physically,
7 though? You have the non-potable water coming through
8 the Ashgrove System into the factory; the potable water
9 presumably comes through entirely different pipes?

10 A. Yes, it does, Madam.

11 THE CHAIRMAN: And goes into the factory, to the canteen and
12 the wash rooms and that kind of thing, or is it also
13 used in the production process?

14 A. There is a relatively small main, a potable main, that
15 comes off the local Bretton potable system, and that, as
16 you correctly say, feeds the canteen, wash rooms, and is
17 separately metered and is a separate account in
18 Dwr Cymru's accounting system.

19 Then there is the back-up system, which is
20 significantly larger than the other potable system and,
21 again, comes off, in this case, a trunk main and can
22 supply up to approximately 50 per cent of the needs of
23 the site, the production needs of the site. And it's --
24 effectively, it goes into a series of very large tanks
25 which the site uses as stores of water to cope with

- 1 variations in demand within the site.
- 2 THE CHAIRMAN: I see. So the back-up system is a separate
3 system of pipes, separate from the Ashgrove System and
4 from the ordinary little pipes that go in --
- 5 A. It's entirely separate, that's correct.
- 6 THE CHAIRMAN: What happens usually, when everything is
7 going okay with the non-potable and the potable supply,
8 are those just empty, those pipes?
- 9 A. They are not empty, but they are not used. They are
10 kept charged because otherwise there could be quality
11 problems in the pipe.
- 12 THE CHAIRMAN: Yes.
- 13 A. But the -- an average --
- 14 THE CHAIRMAN: Who owns those pipes?
- 15 A. The pipes are owned by Dwr Cymru until they reach the
16 site. There is then a meter, and beyond the meter those
17 pipes are owned by Shotton Paper.
- 18 THE CHAIRMAN: And those pipes are connected to the potable
19 trunk pipes?
- 20 A. Yes, they are, yes. This is a -- when it's running at
21 its -- at the 10 megalitres, 8 megalitres a day maximum,
22 and the maximum will vary depending on circumstances,
23 then it's a major supply. It's ten Olympic swimming
24 pools per day.
- 25 MR COWEN: Are those managed by Dwr Cymru?

1 A. The distribution system is a passive operation. It's
2 not actively managed. The control of water that's put
3 into it is actively managed, in this case from Bretton
4 Treatment Works. The system of using the back-up
5 potable requires manual intervention, and what will
6 happen in practice -- and this has been the case since
7 before Albion's appointment -- is that if there is some
8 event that requires back-up potable water, a call will
9 be put out to Dwr Cymru to open the valves. It's not
10 a supply which is available when you want. The valves
11 have to be opened and then the supply can be taken up to
12 the operational availability within the system.

13 MR COWEN: Thank you.

14 MR PICKFORD: Dr Bryan, if you could please go to --

15 THE CHAIRMAN: Just one last question. In this bulk supply
16 contract, then, there is no separate charge for having
17 available the potable supply. That's, I think, the
18 point that we are debating.

19 MR PICKFORD: That's correct.

20 THE CHAIRMAN: Yes, it's built into one or other or both of
21 the pence per metre cubed --

22 MR PICKFORD: Madam, that's a point I am going to need to
23 come on and investigate with Dr Bryan.

24 THE CHAIRMAN: Yes.

25 A. Yes, Mr Pickford.

1 MR PICKFORD: So I am not sure whether you have turned it up
2 yet. We were going to go to folder 13, tab 21. Just to
3 warn everyone, I am afraid we will have to dot around
4 between quite a few folders, but it's probably not
5 sensible to get them all out, so we will just take them
6 one by one.

7 (Pause)

8 THE CHAIRMAN: Do we have a spare copy, please?

9 MR PICKFORD: Of tab 21? Yes, I am sure we can hand one up.

10 (Handed)

11 THE CHAIRMAN: Yes.

12 MR PICKFORD: So this is The Unfair Pricing Judgment.

13 A. Yes.

14 Q. If we could go, please, to paragraph 174, this deals
15 with what Albion said about the provision of a back-up
16 supply at this time. If you could please read
17 paragraph 174 to yourself.

18 (Pause)

19 A. Yes.

20 Q. Now, in particular, it's correct, isn't it, what
21 the Tribunal records in the second sentence, that:

22 "Albion claimed that it was clear to all concerned
23 in 2001 that the back-up potable supply would have to be
24 negotiated as part of a separate revised bulk supply
25 agreement and was not, therefore, part of the proposed

1 common carriage arrangement for non-potable water"?

2 That's correct, isn't it?

3 A. That's certainly correct, yes.

4 Q. So the reality of the matter is you couldn't simply
5 stick a blue pencil through the non-potable part of the
6 bulk supply agreement and say, "Right, well, the rest of
7 the terms, the ones that happen to deal with potable,
8 still continue to apply"?

9 A. You could do, if that were the agreement of the parties,
10 yes.

11 Q. Well, that might be your position, but the reality is
12 you couldn't presume that you would get that deal, you
13 would have to negotiate new terms, and that would have
14 led to a revision of the existing bulk supply agreement?

15 A. Yes. But we were working on the basis that the prices,
16 the 59p, had been agreed with Dwr Cymru in March 1999,
17 which was only 18 months from the time that we are now
18 considering. It had been set with regard to the Ofwat
19 "minded" determination, which itself, with regard to
20 potable water, had, according to Ofwat, if my memory
21 serves me right, been a price that was in excess of long
22 run marginal cost. So I think our view was that, at the
23 very least, that was a realistic starting point for any
24 renegotiation of the potable elements of the bulk supply
25 agreement.

1 Q. Okay, if we could please put away bundle 13 and go to
2 bundle 7.

3 MR LANDERS: Are you going to bring us back to that tab or
4 can we give these documents back?

5 MR PICKFORD: I don't think I'll need to go back to that,
6 thank you very much, sir.

7 (Handed)

8 A. 7, did you say?

9 Q. Yes, we are going to folder 7, tab 273. Do you have
10 a document dated Friday, 18 May 2007, which begins:

11 "The Chairman: Well, thank you, everyone, for coming
12 along"?

13 A. Yes.

14 Q. This document is the Ofwat hearing transcript of
15 a hearing that took place between the parties during the
16 referred works stage of the Tribunal proceedings,
17 isn't it?

18 A. Yes, it is.

19 MR LANDERS: What date would that have been, roughly?

20 MR PICKFORD: That date is 18 May 2007.

21 Now, if you could go, please, to page 2202 of the
22 bundle, at the bottom of the page we see a question from
23 Mr Musco to you, and he says:

24 "Did you actually want that back-up at the time,
25 though, still?"

1 You say:

2 "I think we have explained to you that our view was
3 that, having negotiated a common carriage agreement for
4 non-potable, we would necessarily have to renegotiate
5 our existing bulk supply for the potable supply. No
6 getting away from it; Albion needed a potable supply.
7 Within that, yes, we would be looking to negotiate, as
8 indeed we are today, in the process of negotiation with
9 Dwr Cymru, what the terms for a back-up potable supply
10 would be. Those negotiations would look at reserve
11 volume, availability, conditionality, all sorts of
12 things. We would make an informed judgment on the
13 service offered at the time. That was never intended as
14 part of the quite separate non-potable supply
15 arrangements."

16 Now, everything you say there is correct, isn't it?

17 A. It is.

18 Q. If we could then, please, go to folder 16, tab 19.

19 A. Folder 16?

20 Q. Folder 16, tab 19. Do you have that?

21 A. Yes.

22 Q. This is a letter of 21 May 2007 that you are writing to
23 Guy Lougher of Pinsent Masons, who are representing
24 Ofwat during this part of the proceedings?

25 A. Yes.

1 Q. You are dealing with back-up supplies, and in
2 paragraph 2 you say as follows:

3 "There are, of course, significant uncertainties in
4 the calculation of the cost of any back-up potable
5 supply because, as we have demonstrated, that supply is
6 only available when it is surplus to Dwr Cymru's
7 prevailing operational demand. There is no sense in
8 which it has ever been treated as a dedicated
9 8 megalitres per day 24/7 resource, and a short run
10 marginal cost approach might, therefore, be more
11 appropriate if Ofwat is to attempt a valuation. That
12 complexity is, however, avoided if Ofwat accepts our
13 arguments and contemporaneous evidence", you go on.

14 So you are referring to uncertainties and complexity
15 that are avoided in the calculation of the first access
16 price if you exclude the cost of potable back-up?

17 A. The point I am making is the potable back-up is
18 a completely separate service and should be judged as
19 such and not as part of a consideration of what the
20 first access price, the access price, should be.

21 Q. That's one point you are making. The other point you
22 are making is that if you are going to cost the potable
23 back-up, that is a complex exercise and it involves
24 significant uncertainties?

25 A. I think, as we have seen, any costing exercise in the

1 water sector involves complexity and uncertainty, yes.

2 Q. So you agree?

3 A. Yes.

4 THE CHAIRMAN: But is that right, what's said there, that
5 the supply is only available when it's surplus to
6 Dwr Cymru's prevailing operational demand and it's not
7 reserved?

8 MR PICKFORD: Madam, I am just about to come on and ask some
9 questions about that. That's a pertinent anticipation,
10 but it's probably best if I ask Dr Bryan.

11 THE CHAIRMAN: Yes.

12 MR PICKFORD: Thank you.

13 So if it's complex and it has uncertainties, what
14 you could never expect is that the price is already set
15 out in the existing bulk supply agreement where it
16 addresses potable water when the relevant costs for the
17 reservation of this large potable supply were absorbed
18 in the entire agreement.

19 If I put the question perhaps a little more clearly:
20 you can't simply pick out 59p per cubic metre potable
21 price and say, "There you go, that's the only price we
22 need to pay for potable back-up"?

23 A. Well, you can pick out that price, because that was the
24 price that Ofwat made the "minded to" determination on,
25 based on Dwr Cymru's own evidence. So this was not

1 a figure in which Albion's arguments featured at all.
2 It was a figure that Ofwat decided and that Dwr Cymru
3 not only accepted but never queried up until fairly late
4 in the proceedings. And I think you will see in The
5 Excessive Pricing Judgment the Tribunal expressing
6 surprise that this seemingly significant issue had only
7 just materialised.

8 But I will take you to task on one point, which is
9 the point that Madam Chairman anticipated, which was
10 that in reality this volume was never reserved, it was
11 made available when it was surplus to operational
12 requirements. And here we are dealing with a zone, the
13 Bretton -- or sometimes called the Alwyn Bretton zone
14 because it's fed from two major sources -- which was in
15 surplus at all material times. Effectively, by asking
16 Dwr Cymru for that back-up from time to time -- and it
17 was pretty infrequently -- then what we would be saying
18 to Dwr Cymru is, "Have you got spare capacity, and if
19 you have, can we please have it?"

20 There were occasions, admittedly very rare, when
21 Dwr Cymru would say, "Well, you can have it tomorrow,
22 but you can't have it the day after because we have
23 a major break, or we have a pump replacement, or some
24 valve inspection". So it was never reserved.

25 Q. We will come on to that.

- 1 A. Good.
- 2 Q. Why don't we put away bundle 16 and go to bundle 8. If
3 you could turn, please, to tab 274. Do you have that?
- 4 A. I do.
- 5 Q. This is the final report to the Tribunal, so this is the
6 output of the referred work?
- 7 A. Yes.
- 8 Q. If you could go, please, to paragraph, or at least the
9 title above paragraph 6.83, which you will find on
10 page 2366.
- 11 A. Yes.
- 12 Q. So we see this is the section of the report dealing with
13 costing the back-up supply?
- 14 A. Yes.
- 15 Q. I might just pause just a moment to ensure that we are
16 all following. Then over the page we see there is
17 a title "The parties' comments"; you see that?
- 18 A. Yes.
- 19 Q. Then further down the page we see that the Authority
20 wrote to Dwr Cymru on 14 May asking questions about the
21 back-up supply?
- 22 A. Yes.
- 23 Q. We see that Dwr Cymru responded in a letter,
24 15 May 2007, and one of the points that Dwr Cymru made,
25 which is in the penultimate bullet on the following

1 page, is they say:

2 "Dwr Cymru noted other companies' charges for
3 back-up supplies which last year were £113.77 per cubic
4 metre per day, or 31p per cubic metre reserved for
5 Anglian, and £60.82 per cubic metre per day, or 17p per
6 cubic metre reserved for United Utilities. Dwr Cymru
7 added that those numbers would be about 20 per cent
8 lower in 2000/2001 due to inflation ..."

9 Now, you have no reason to believe that what
10 Dwr Cymru said there is incorrect, have you?

11 (Pause)

12 A. I have significant concerns about the case that
13 Dwr Cymru made for back-up potable supplies and the
14 cost.

15 Q. Well, you didn't challenge that assertion in the context
16 of the proceedings between yourselves and Ofwat and
17 Dwr Cymru that then took place after this particular
18 document was produced, because what then happened -- and
19 we will take it in stages so that you can answer the
20 question appropriately -- is that after referred work
21 there was then a further stage in the proceedings before
22 the Tribunal. You recall that?

23 A. Yes.

24 Q. What the Tribunal asked the parties to do for those
25 proceedings was provide a Scott schedule whereby they

1 commented on the referred work, and they explained what
2 their concerns were with any elements of the Authority's
3 work; you recall that?

4 A. Yes.

5 Q. A schedule was produced that then consolidated all of
6 the comments on the referred work and where it was
7 challenged by the parties, so that the Tribunal could
8 then decide what to do in relation to it; do you recall
9 that?

10 A. I do.

11 Q. We can go to it if you want to refresh your memory
12 because obviously it was some time ago, but I am
13 suggesting that you didn't challenge this assertion that
14 was set out here in your Scott schedule, did you?

15 A. The assertion that you are asking me to address is the
16 prices that other companies charge.

17 Q. Yes.

18 A. Presumably for a reserved supply.

19 THE CHAIRMAN: I don't understand what it means to say you
20 charge for back-up supplies. It can't mean that you
21 have to pay £113.77 per metre cubed per day just for the
22 possibility of having to buy a metre cubed of water. Is
23 it if you actually buy the metre cubed of water from the
24 back-up supply, it's 113 -- that seems like a lot of
25 money for a metre cubed of water.

1 MR PICKFORD: Madam, I'll answer your question and put it to
2 Dr Bryan to ensure that he agrees with it.

3 You see that there are two different prices given.
4 The first one is the £113.77 per cubic metre per day, or
5 31p per cubic metre reserved. So what that's saying is
6 that there are two ways of charging for it: either you
7 pay 31p per cubic metre for what you have actually
8 reserved, so that would be whether you take it or not;
9 or £113.77 per cubic metre per day if you are -- sorry,
10 I think there may be an error with the per day there.

11 My understanding is it was £113.77 per cubic metre
12 if you actually then took the water. (Pause)

13 Sorry, that's on the basis of a daily entitlement.
14 So there is a certain amount that you can take as
15 a back-up, and if you take it on that day you pay that
16 amount, but you wouldn't pay that amount if you weren't
17 taking it on that day.

18 THE CHAIRMAN: This is potable water?

19 MR PICKFORD: Yes.

20 THE CHAIRMAN: So people have to pay, or people charge, £113
21 for a metre cubed of potable water?

22 MR PICKFORD: On a day that they take it, if they need to
23 make -- no, sorry.

24 THE CHAIRMAN: It can't be.

25 MR PICKFORD: Sorry, Madam. I'll just take instructions, if

1 I may.

2 (Pause)

3 I beg your pardon, Madam, I had misunderstood what
4 was being said here. It's that you pay an annual charge
5 of £113, which entitles you to one single cubic metre
6 every day. So it's a much, much smaller arrangement,
7 I think we can safely say, than is being addressed in
8 these proceedings.

9 THE CHAIRMAN: But how, then, can it be some people are
10 charging 31p per metre cubed and some people are
11 charging £60.82 per metre cubed or 70 -- these are
12 vastly different amounts of money.

13 MR PICKFORD: There are two issues here: The £60 versus the
14 113, they are two different companies. The first one is
15 Anglian and the second one is United Utilities. The 31p
16 per cubic metre is what you pay for what you take.

17 MR LANDERS: Can I just see if I've understood? So people
18 who want a back-up supply have one of two options:
19 either they contract on a charge, in this example, of
20 113 which entitles them to draw down 1 metre a day and
21 that's an annual standing charge, or they charge 31p per
22 metre if they don't go for an annual charge; is that
23 right? Or do you charge both?

24 MR PICKFORD: Sorry, it's much simpler than that, and I beg
25 your pardon. Those with calculators got there more

1 quickly. Or just faster brains. 31p per cubic metre is
2 simply £113 divided by 365. I beg your pardon.

3 THE CHAIRMAN: So is this saying that if you want to have
4 a back-up supply of water from Anglian, for every metre
5 cubed that you want to be able to draw on a particular
6 day if your other supply fails, you have to pay them
7 £113.77 a year?

8 MR PICKFORD: Yes, or 31p per day, which is simply the 113
9 divided by 365.

10 THE CHAIRMAN: Do they allow you to choose whether to pay
11 it --

12 MR PICKFORD: No, my understanding is it's just a re-basing.
13 The charge is £113 per annum for the entitlement,
14 re-based on a per day charge.

15 THE CHAIRMAN: That is equivalent to -- right. But that's
16 an upfront payment that you have to make in order then
17 to be able to go to them and say, "Can you give me
18 5 cubic metres of potable water today because I have
19 been paying you this, whatever five times £113.77 is"?

20 MR PICKFORD: Yes.

21 THE CHAIRMAN: You have to pay that, presumably, whether you
22 actually take the water or not?

23 MR PICKFORD: Yes.

24 THE CHAIRMAN: But if you take the water, is the water then
25 free, or do you still have to pay for the water?

1 MR PICKFORD: You still have to pay for it. So this is the
2 charge for the reservation, this is for the service of
3 there being a back-up which will be provided to you if
4 required.

5 THE CHAIRMAN: Right.

6 Do you agree with all that, Dr Bryan?

7 A. I certainly agree that that -- it's not a very
8 competitive sector, this. That is certainly what those
9 two companies appear to do. But I stress that this is
10 for reserve supplies where, effectively, that water is
11 available immediately 365 days a year for those -- and
12 it's predominantly critical industries and others like
13 hospitals, which might require emergency supplies. That
14 is not the situation that we are dealing with at
15 Shotton.

16 MR PICKFORD: The price that we have just been discussing is
17 a price for an opportunity, isn't it? It's
18 an opportunity to be able to take something if required?

19 A. No, it is a price -- I am not aware of any legitimacy of
20 opportunity pricing in the regulated water industry.
21 This is a price which has to be justified through Ofwat
22 as the identifiable costs of effectively keeping
23 a volume free. So no-one else can have it. And there
24 are, understandably, costs of doing that, and those
25 costs need to be justified by the companies who wish to

1 impose such tariffs in price terms. I am not aware of
2 any justification for opportunity cost calculations from
3 Ofwat, or anywhere else within the sector.

4 Q. There are no 100 per cent guaranteed supplies in the
5 water industry, are there? There is always the
6 possibility of failure?

7 A. Nothing in life is guaranteed, unfortunately, except
8 taxes and death, I understand.

9 Q. Now, if we could go, please, to the next bullet point:

10 "Dwr Cymru provided the following table, table 4, on
11 the use of its potable supply for each of the last six
12 years."

13 Then you will see over the page table 4, which sets
14 out usage in megalitres per day. Do you see that table?

15 A. Yes. I am ... (Pause) Yes. I think I understand that.

16 Q. You have no reason to believe that the information in
17 that table is materially incorrect?

18 A. I don't -- I don't believe so. I clearly haven't had
19 a chance to check it. I would imagine we would have
20 checked it at the time, and mentioned if there were any
21 material errors.

22 THE CHAIRMAN: Is this use by Shotton of potable supply?

23 MR PICKFORD: Yes.

24 A. Yes. If I could perhaps explain the two columns in the
25 table which are then totalled at the right-hand side.

1 The back-up potable supply was used for two
2 purposes, fundamentally. One, where there was --
3 production was very high and there was just physically
4 not enough non-potable, and so the supply had to be
5 topped up, and that is the first column. And the second
6 column is when there were problems with the
7 Ashgrove System and the 18 megalitres a day volume could
8 not be supplied, and therefore the top -- the back-up
9 was used, in its literal sense, to back up the
10 non-potable supply.

11 MR PICKFORD: We saw that reflected in the pricing that
12 I took you to in the bulk supply agreement?

13 A. Indeed, yes. The first column would have been charged
14 at normal potable prices; the second column, which
15 implies a failure of the Ashgrove System, would be
16 charged at non-potable prices.

17 MR LANDERS: Could I just verify that I have understood
18 that, where you talk about the Ashgrove was closed for
19 planned maintenance? If Dwr Cymru is unable to supply
20 water to Shotton because of planned maintenance or
21 something, then Shotton has to pay Dwr Cymru for
22 a potable back-up at a higher price?

23 MR PICKFORD: No, not at a higher price, sir, that's the
24 second column. So where Dwr Cymru isn't able to fulfil
25 its contractual obligations, which are to provide

1 18 megalitres per day of non-potable water, it has to
2 supply potable water instead. But Albion/Shotton is
3 allowed to pay for that as if it were non-potable water
4 at the non-potable price. The first column is where
5 Dwr Cymru is fulfilling its obligations but, for
6 whatever reason, for something that's internal to
7 Shotton, they want a back-up supply.

8 That's correct, isn't it, Dr Bryan?

9 A. I am sorry, could you repeat that question? I am sorry.

10 THE CHAIRMAN: They want a top-up supply?

11 MR PICKFORD: Where Shotton want a further supply beyond
12 what's --

13 A. Available through Ashgrove under normal operating
14 conditions?

15 Q. Yes.

16 A. Yes, that's a top-up supply and that's the first column,
17 yes.

18 Q. And one of the reasons why they might need that is
19 because they have configured maintenance on their
20 systems, so perhaps although Dwr Cymru could supply them
21 the non-potable water, they can't actually make use of
22 it from the pipe that's coming in, and so they would
23 need to use a different pipe, for example?

24 A. I take your point. No, that is not a consequence of
25 maintenance and, indeed, this table tells the story.

1 If the Tribunal looks at the table, and it's helpful
2 because it shows some of the impact that Albion had with
3 Shotton Paper, in 2001/2 there was quite a -- we are
4 still talking about very small volumes -- substantial
5 amount of top-up water required because the paper-making
6 processes were inefficient in their water use. They
7 were using something like 17 tonnes of water, cubic
8 metres tonnes of water to produce a tonne of paper. By
9 2005/6 we had improved that efficiency so they were down
10 to 14 tonnes of water per tonne of paper. So the need
11 for top-up water diminished.

12 In 2006/7 we have a blip because their internal
13 non-potable main burst and it had to be repaired. As
14 there was no other way of getting non-potable water onto
15 the site, as Mr Pickford rightly says, it wasn't that
16 there wasn't availability of Ashgrove water, they
17 couldn't get it to the site, so potable back-up was used
18 under those circumstances.

19 Q. Now, if we go, please, to page 2371, we see on the
20 bottom bullet on that page that:

21 "Dwr Cymru provided the graph below of the flow
22 patterns for the relevant potable supply zone during
23 Shotton Paper's recent non-potable supply pipe outage on
24 10 to 13 May 2007."

25 It says what figure 1 shows:

1 "It shows that the demands of the other customers in
2 the area generally run at around 20 to 30 litres per
3 second. When Shotton Paper requires the back-up supply,
4 the flow increases by five or six-fold and falls back
5 when the back-up is no longer required."

6 Now, that's correct, isn't it?

7 A. Yes, I'm not disputing that graph. But it's
8 a reflection of the fact that the system that it's
9 drawing from, the Alwyn Bretton system, is -- was at
10 that time, and still is -- grossly oversized and
11 supplied. It was a very big system with very little
12 demand. So the assets were all there to provide this
13 water.

14 In effect, the cost of providing Shotton, given that
15 the assets hadn't changed and that nothing was reserved,
16 was, in the technical sense, I believe, the marginal
17 cost of -- undoubtedly the extra pumping cost, and there
18 would have been extra chemicals to treat it. But we are
19 talking about a very small figure in marginal cost
20 terms.

21 Q. Now, you would agree, then, I think, that it's not the
22 case that the back-up was only available when demand
23 from other customers dropped to some unusually low
24 level. Because of what you have just described, it was,
25 we can see, a totally different order of magnitude --

1 A. I never said that, Mr Pickford. What I said was that
2 the back-up potable was available to us when there were
3 no operational constraints on the system that would
4 prevent it, and those operational constraints were
5 unlikely to be the demand of other customers simply
6 because the zone was hugely oversupplied, but could have
7 been problems with piping or valving or some other
8 operational requirements, particularly maintenance, that
9 would have constrained the system's ability to deliver
10 that much more water.

11 Q. If you go, please, to page 2372, where it says that:

12 "According to the logs attached to Lynnette Cross'
13 witness statement, there were 60 requests by
14 Shotton Paper for potable water during the period
15 May 1999 to August 2004. Dwr Cymru provided the
16 information in the table below on those requests, and
17 concluded that it was able to meet more than 98 per cent
18 of Shotton Paper's requests for potable back-up supply."

19 Then if you look at table 5, that's the tabulation
20 referred to?

21 A. Yes. Yes. I am not denying that it was a reliable
22 supply.

23 Q. So you agree with what is said here?

24 A. Well, I think that Lynnette's table, yes, is right.
25 There were issues. I was thinking it was what I was

1 explaining to the Tribunal. There were times -- and
2 I said, I think, the transcript will show very early
3 on -- it was rare, but there were times when that
4 facility was not available. But those occasions were
5 rare. It was generally available.

6 That was never the point that we were making. The
7 point was whether there was a reservation and whether
8 there were costs associated with reserving those volumes
9 of water.

10 THE CHAIRMAN: Is that a convenient moment to take
11 a five-minute break?

12 MR PICKFORD: Yes, of course, Madam.

13 THE CHAIRMAN: We will come back, then, at five minutes
14 to 12.

15 (11.50 am)

16 (A short break)

17 (12 noon)

18 MR PICKFORD: Madam, I have been instructed, I'm not
19 proposing to do anything in relation to it now, but if
20 it would assist the Tribunal we can hand up at
21 a suitable time the Anglian and United Utilities tariffs
22 for the Tribunal's record, so you will be able to see
23 what's being referred to. That's simply for the note.

24 Now, just before we had a short break, Dr Bryan, you
25 were describing how you said this system had already

1 been engineered, overengineered, and therefore you
2 thought the costs were very low of supplying the
3 back-up.

4 Now, I would like to propose an analogy to you, and
5 you will have to forgive me, because it's one that I am
6 afraid has only developed in the last five minutes.
7 Let's suppose that we are in the countryside and we have
8 a supply of domestic water going through a village to
9 a number of houses, all been built there, they are all
10 supplied; okay? So that's the basic premise. Then
11 I come along and I purchase a new plot of land and
12 I build a new house. It's actually just a holiday
13 house, and I am rarely ever there, but I connect
14 a little bit of pipe at any own expense up to the mains
15 which passes just by me. It's already been there,
16 installed. Why shouldn't I be able to say to the person
17 providing that service, "Well, you have already
18 installed all of these pipes, the water is already
19 there, the cost of me connecting is negligible. I have
20 come along after everyone else, so I should be treated
21 as a very, very low cost, and I am not going to take it
22 very often either, everyone else can pay the higher
23 cost"?

24 A. I am not sure that the analogy is particularly helpful.
25 I am struggling. The picture you paint is one that's

1 familiar to anyone, and certainly any water company.
2 And if you build a new house you are required to
3 contribute to the general costs of the system, both the
4 water and the waste water system, that serve that
5 property.

6 Here, we are talking about supplies from one
7 incumbent to another relating to exceptionally large
8 volumes of non-potable water and the occasional use --
9 important, but occasional use, of back-up potable water,
10 and I think, again, to try and get this in our minds, if
11 we go back to the table on 2369, we see that the maximum
12 demand in any one year in that table was
13 38.6 megalitres. That's two days' non-potable demand.
14 So worst case situation, according to this table, we are
15 using two days' worth of back-up potable water.

16 Now, the importance of that, I've already stressed
17 that this is a situation where we are dealing,
18 the Tribunal is dealing with a relationship between two
19 licensed incumbents. We, from Albion's perspective, are
20 trying to look after a large customer that is in a very
21 competitive international market. In terms of the cost
22 of back-up potable water, we have the "minded to"
23 determination, which was the governing determination at
24 that time, but we also have a very clear commercial
25 issue, because if Shotton Paper realises that it needs

1 back-up potable water for two days in a production year,
2 on average -- well, at most, according to that table --
3 then anything that we try to pass on to it by way of
4 tariff will be judged in the light of how much it's
5 worth. How much is two days' production worth, and
6 could those two days' production be made up in other
7 ways if there was an interruption to the supply. In the
8 same way that paper machines -- there are two massive
9 paper machines at Shotton Paper. Occasionally one of
10 them will go down for refurbishment.

11 So those are the sort of real world judgments that
12 would have been made at the time. Now, with 59p, with
13 the Ofwat determination, that wasn't an issue. It was
14 acceptable to Shotton Paper before Albion came along,
15 and it was acceptable to Albion and Shotton Paper post
16 1999. What I think Dwr Cymru and Mr Pickford is trying
17 to do is suggest that there are some other major cost
18 factors that have to be taken into account.

19 Q. Let's look at those very briefly. It may be that we can
20 go through fairly quickly, because I think you have
21 probably given your answers to a lot of this already.

22 If you go on to the Authority's view, which is on
23 page 2374, you see at 6.95 the Authority's view is:

24 "the cost of the back-up
25 supply is significant."

1 A. Yes.

2 Q. And that's right?

3 A. No, it's not. No, it's not. I am afraid that in this
4 case the Authority has been deliberately misled. This
5 is a classic case of regulatory gaming, in my view. And
6 I don't say that lightly. I know it's an accusation
7 which needs to be supported. But fundamentally it was
8 founded on two principles. The first was that it was
9 not clear at the time, in other words in 2000/2001,
10 whether back-up potable was indeed part of the abusive
11 first access price or not.

12 Q. But we are not dealing with that issue here, are we?

13 A. We are not, because although Ofwat accepted Dwr Cymru's
14 view that it was, because they didn't know whether it
15 was or not -- they hadn't asked Mr Edwards, he was no
16 part of this work. Although he should have been,
17 I suspect. But the Tribunal saw through that and
18 dismissed it. But the more important part from that --
19 for what Mr Pickford is trying to get me to agree is
20 that the essence of Dwr Cymru's case is that this supply
21 was at all times a reserved supply, and I fully accept
22 that a properly reserved supply has cost implications,
23 and I would not seek to doubt that. But --

24 Q. I hesitate to interrupt, but if we can try to break it
25 down --

1 A. But it never was reserved.

2 Q. In the contract it says it's a reserved supply,
3 doesn't it?

4 A. That is true.

5 Q. Contractually, they are obliged --

6 A. That is true.

7 Q. It is reserved contractually?

8 A. Yes, it is. But the reality is that a reserved supply
9 that is potentially very large, 8 megalitres a day --
10 and you will see from the helpful graph that Mr Pickford
11 took us to, it is a significant demand when it's on.
12 That graph covered a two-day period. Probably --
13 I think that was probably the only demand that year, but
14 it is a significant demand. If that were genuinely
15 a reserve demand, then we would see it in Dwr Cymru's
16 water resource management plan for that zone. We would
17 be able to see it in the demand projections. It would
18 have been there, because it would have to be factored
19 in -- such a significant demand would have to be
20 factored in in terms of resource availability. It's not
21 there.

22 Q. Perhaps we could break it down. At the end of
23 paragraph 6.96 the Authority said that it:
24 "... accepts Dwr Cymru's submission that whether
25 a back-up supply is used frequently does not affect the

1 fixed costs of providing the back-up supply."

2 That's correct, isn't it?

3 A. If it's reserved. If it's not reserved there are, by
4 definition -- and I take you again back to long run
5 marginal cost arguments. There are no fixed costs
6 associated with that supply. There are only marginal
7 costs.

8 Q. If we look at paragraph 6.97, we see:

9 "Albion makes the point that the unit cost per unit of potable water
10 actually

11 uses £14 per metre cubed. The Authority is not able to
12 replicate Albion's number exactly, but the high unit
13 cost reflects the fact that the back-up supply is a form
14 of insurance which is there when it is needed most.
15 Most of the costs attributable to the back-up supply are
16 fixed costs, which still have to be paid for regardless
17 of how much water is used."

18 My submission to you is that that is right, and you
19 would say, I take it, based on what you have said, that
20 it's not?

21 A. I would say that the evidence that subsequently came to
22 light showed that Dwr Cymru were deliberately misleading
23 Ofwat with regard to that. They knew very well that
24 there was a -- we didn't know at the time, subsequently
25 we found out -- power station very close to

1 Shotton Paper, which too had a genuine, always-on,
2 back-up supply. It was a power station that was reliant
3 on using water from the Dee Estuary for cooling. And
4 there were times, tidal, other conditions, when that
5 water couldn't be used, and it had an always-on back-up
6 potable supply.

7 You can actually see it from the graph. If I could
8 possibly ask the Tribunal to turn to 2372, you will see
9 those other peaks, frequent peaks -- smaller, granted,
10 than the one for Shotton Paper itself -- but those are
11 peaks for a back-up potable supply that is used by
12 a local power station; information that was concealed by
13 Dwr Cymru at the time. And that customer pays no
14 reservation charge whatsoever, in our understanding, for
15 that back-up potable supply.

16 Q. Dr Bryan, you just said that Dwr Cymru concealed
17 information about the back-up for those -- those spikes
18 relating to five other companies at the time of this
19 referred work?

20 A. It certainly concealed the information from Ofwat, yes.
21 It concealed the information that there was another
22 customer within a couple of kilometres of Shotton Paper
23 that was receiving a genuine, no notice back-up supply,
24 no requirement to phone the Bretton control room and ask
25 for valves to be operated, and --

- 1 Q. You are quite sure?
- 2 A. -- had no -- I think we can rely on Ofwat on that,
3 because when Ofwat came to do its section 40A
4 determination, it realised that it was not a reserved
5 supply. And the terms of that determination, that we
6 don't contest, are that the cost of the back-up supply
7 should be on the basis of the normal potable charge,
8 less a certain margin for retail costs.
- 9 Q. Dr Bryan, could I turn you, please, to page 2371. Could
10 you read the final sentence there in relation to your
11 allegation of concealment:
- 12 "Dwr Cymru explained that the five smallest spikes
13 on the graph were the consequences of another
14 significant customer's use of the potable supply as a no
15 notice back-up."
- 16 A. I withdraw. I do apologise to the Tribunal. I had
17 forgotten that. I think the reality is, though, that
18 that customer was not paying a reservation charge, any
19 sort of reservation charge, and the reality as well was
20 that those volumes were not reserved. Nothing appears
21 in the water resource management plans either at the
22 time or, I believe, subsequently.
- 23 Q. If you could go, please, to paragraph 6.102, and if you
24 could just skim to yourself 6.102 through to 6.104. I'm
25 not going to ask you detailed questions about this, it's

1 simply to make the point that the Authority here is
2 explaining competing views on pricing from yourself and
3 Dwr Cymru.

4 (Pause)

5 A. Yes, I've read it.

6 Q. That's correct, isn't it?

7 A. No, I can't say it's correct. To be honest, I didn't
8 understand Ofwat's logic then and I still don't
9 understand Ofwat's logic.

10 Q. What they are doing, aside from the conclusions that
11 they draw, in these paragraphs is they are explaining
12 some of your arguments and some of Dwr Cymru's arguments
13 about how you should go about calculating this price,
14 and then they are drawing their own conclusion right at
15 the end?

16 A. Their conclusion was drawn on two fundamental assertions
17 by Dwr Cymru. First, that the back-up potable was part
18 of the first access price, and secondly, that it was
19 a reserved volume.

20 Q. You said that.

21 A. Neither point is correct.

22 Q. Now, it's the case that the Authority didn't accept
23 either Dwr Cymru's or your views? It certainly didn't
24 accept your views on the potable back-up; it didn't
25 accept Dwr Cymru's either, did it? It arrived at its

1 own conclusion, which was actually somewhere in between
2 in pricing terms; you agree with that?

3 A. Well, our pricing terms were that it was irrelevant for
4 the first access price, as the Tribunal found. To be
5 honest, I'm not sure of the disparity between Ofwat's
6 conclusion and Dwr Cymru's bid, if we can put it in
7 those terms.

8 Q. Okay, let's look at the final conclusion on page 6.105.

9 A. Yes.

10 Q. Sorry, I said "page", I meant paragraph 6.105.

11 A. Yes.

12 Q. If you could read that paragraph, please.

13 (Pause)

14 A. Yes.

15 Q. Now, you obviously don't agree with the ultimate
16 conclusion in relation to the price, but it's true,
17 isn't it, that Dwr Cymru effectively had to keep on
18 stand-by enough water to supply a small town of around
19 60,000 people?

20 A. Absolutely not. Absolutely not. There was never any
21 question of that volume being reserved, and to suggest
22 otherwise flies in the face of the facts.

23 Q. Now, when they price -- and I confess this is where
24 I came to misunderstand the previous figures that we
25 were quoting for different ways of pricing for a potable

1 back-up. Where it's said by Ofwat that the price should
2 be 10p per cubic metre for the 8 megalitre per day
3 service, it's not saying that it should be 10p per cubic
4 metre only for those units supplied, it's saying that
5 for reservation of 8 megalitres per day that reservation
6 should be charged at 10p per cubic metre? That's what
7 it's saying? I understand you disagree with it, but
8 that's what it's saying, isn't it?

9 A. That's what it's saying.

10 Q. So 8 megalitres per day is 8,000 cubic metres per day?

11 A. Yes, it is.

12 Q. So at 10p per cubic metre they are saying that it should
13 be about £800 per day for the cost of the back-up;
14 that's what the Authority is saying?

15 A. Yes.

16 Q. This is not an arithmetic test, but I have calculated
17 that that's £292,000 per year based on a 365-day year.
18 You agree that sounds about the right kind of figure for
19 what --

20 A. I think it's about the right figure, yes. It's -- yes.

21 Q. Then the Authority goes on to re-express the price in
22 different terms as 4.4p per cubic metre spread over
23 18 megalitres a day. So rather than 10p spread over 8,
24 if you change the bottom sum in the equation to 18, the
25 10 comes down to 4.4p?

1 A. Yes. This is consistent with the view that Dwr Cymru
2 propose that this price is implicitly included within
3 the abusive first access price that ...

4 THE CHAIRMAN: So let me understand, then. If it were the
5 case that Dwr Cymru had effectively to keep 8 megalitres
6 a day of potable capacity on permanent stand-by, the
7 cost of doing that would be 10p per cubic metre. So in
8 order to convert that into an annual charge payable by
9 the person who wants to have that permanent stand-by of
10 8 megalitres per day, what's the arithmetic?

11 MR PICKFORD: Essentially, you could do one of two things.
12 You could either pay 10p per cubic metre for the
13 reserved capacity, and the reserved capacity would be
14 8 megalitres per day --

15 THE CHAIRMAN: Yes. So how much money is that?

16 MR PICKFORD: That would add up to £292,000 per year.

17 THE CHAIRMAN: £292,000 per year would be 10p per cubic
18 metre for 8 megalitres a day of potable water, right.
19 And then if you want to pay that actually by adding it
20 on to the 18 megalitres of non-potable water that you
21 are actually buying, you would need to add on an extra
22 4.4p per metre cubed to the price of the non-potable
23 water.

24 MR PICKFORD: That's correct.

25 THE CHAIRMAN: You chose to pay over the year built into

1 your non-potable water supply rather than paying them
2 the £292,000 per year up front.

3 MR PICKFORD: Yes, assuming that you were taking
4 18 megalitres per day on average over the year, that's
5 what that assumption is based on.

6 THE CHAIRMAN: Yes.

7 MR PICKFORD: My answer to the Tribunal is correct, isn't
8 it, Dr Bryan?

9 A. Your mathematics is correct, as far as I can tell, yes.

10 Q. So if we could go back to table 4. Having arrived at
11 that figure, we can use table 4 to assist us. We see in
12 2005/6 that Albion barely used the potable back-up
13 at all?

14 A. That's correct.

15 Q. Sorry, that's on page 2369. So we are looking at
16 table 4. The second line down, we see 2005/2006, and
17 the supplementary supply, you only took 2.5 megalitres?

18 A. That's correct.

19 Q. In the whole year?

20 A. Yes.

21 Q. That's the same as 2,500 cubic metres?

22 A. That's correct, yes.

23 Q. Now, we saw when we were looking at the contract, and
24 you can take it from me that the figure is correct, that
25 the volumetric price in the bulk supply agreement for

1 potable water is 59p per cubic metre; do you recall
2 that?

3 A. Yes.

4 Q. So if the only charge in this year, 2005 and 2006, had
5 been on the terms that you are proposing, you would have
6 paid at 59p per cubic metre times 2,500 metres cubed,
7 a total of -- and, again, this is not an arithmetic
8 test, but in rough terms, £1,500?

9 A. Those weren't the terms that we were proposing. Those
10 were the terms that were in existence at the time that
11 reflected the Ofwat determination and that Dwr Cymru
12 agreed with, and continued to agree with until the
13 referred work exercise.

14 Q. You say that Dwr Cymru agreed with them. They agreed
15 with them in the context of a contract under which they
16 didn't -- you didn't merely pay for that potable supply,
17 you also paid large sums of money for a non-potable
18 supply. That was the context in which they agreed,
19 isn't it?

20 A. I think you will find that none of the pricing
21 justification, cost justification that we have seen from
22 Dwr Cymru that influenced that initial "minded to"
23 determination made any mention that non-potable was
24 somehow subsidising a reserved volume of potable. It
25 wasn't mentioned at the time. The first time this came

1 to light was in 2007 when the Tribunal had already made
2 it clear that it was extremely dubious about the
3 validity of the first access price and wanted more work
4 done.

5 THE CHAIRMAN: Let's just focus on the point for the moment,
6 which is that --

7 A. Apologies, Madam Chairman.

8 THE CHAIRMAN: -- you're saying, "We didn't have to pay
9 this £292,000 for the back-up supply in the bulk supply
10 agreement".

11 A. Correct.

12 THE CHAIRMAN: And you are saying that, "No, you didn't,
13 because you were also buying a great deal of non-potable
14 water from us"?

15 MR PICKFORD: No. Well, almost. My point was simply about
16 whether Dwr Cymru had agreed that the right price for
17 the potable back-up was equivalent to £1,500 in a year,
18 that's what Dr Bryan suggested. And it was being
19 suggested that that was on the basis that they had
20 signed up to this bulk supply agreement. And my point
21 was that that bulk supply agreement to which Dwr Cymru
22 and Albion were parties, had two elements to it:
23 non-potable and potable. And one can't assume that if
24 one takes out the non-potable bit, the provisions that
25 were there that dealt with potable would have been

1 sufficient to cover Dwr Cymru's costs in relation to the
2 non-potable reservation.

3 THE CHAIRMAN: So are you saying, then, that in the costs of
4 the non-potable water was built in this £292,000 for the
5 reserve potable bulk supply?

6 MR PICKFORD: I am not saying it was expressly built in, no,
7 Madam. I haven't put that point to Dr Bryan.

8 Dwr Cymru's case is that implicit in the overall
9 arrangement was that they would do three things: they
10 would supply non-potable water; they would supply
11 potable water; and they would also reserve a very large
12 quantity of potable water to be provided on certain
13 occasions, and that the pricing arrangements didn't deal
14 explicitly with that reservation. They were silent on
15 it. It's certainly not their case that they had
16 calculated that it was £292,000 at that time, because
17 this was work that was done subsequently by the
18 Authority. But our case --

19 THE CHAIRMAN: But is it their case that somewhere they were
20 keeping a big pool of 8 megalitres a day times 365 days
21 of water to meet this supply?

22 MR PICKFORD: Their case is as set out in this
23 determination, which was their submissions were in part
24 accepted by Ofwat but not entirely, which is that there
25 was a significant fixed cost in the region of £300,000

1 per annum associated with the reservation, the ability
2 to supply these types of very large amounts of water
3 equivalent to a town of 60,000 people at short notice.
4 That was their position advanced to the Authority, and
5 that was accepted by the Authority.

6 THE CHAIRMAN: You say that's binding on us?

7 MR PICKFORD: I would have to consider whether that's
8 necessarily binding. Certainly it is, if not binding,
9 very highly persuasive, we would say, in the absence of
10 compelling evidence to the contrary, because the
11 Authority is an expert body and was charged with looking
12 into specifically this matter.

13 THE CHAIRMAN: Yes, thank you.

14 MR PICKFORD: So I think we have probably got there, but
15 just to make sure that there is no ambiguity, your case
16 is that, certainly in the year that I just took you to,
17 the price that should be paid for the potable back-up
18 for that year is about £1,500?

19 A. It's the price that is to be paid should reflect the
20 real costs to Dwr Cymru, which in situations -- the
21 situation that we have discussed is no different from
22 the price that was determined by Ofwat.

23 Q. So your answer is "yes" to my question?

24 A. The price that we paid for that volume was the price
25 invoiced to us by Dwr Cymru at the agreed price, and was

1 satisfactory. And in 2005/6 there was no indication
2 from Dwr Cymru that the price that we had paid for that
3 service, minimal as it was, was in any way
4 unsatisfactory or failed to meet costs that you had yet
5 to identify.

6 Q. Okay, let's move on, please, just a few more questions
7 on this issue, but to a different document, which is
8 back in tab 15 of bundle 2, so I knew we would get back
9 to bundle 2 eventually, but it was some time later.

10 (Pause)

11 You have got there?

12 A. This is the large industrial tariff justification, yes.

13 Q. That's right. So this is a letter from Dwr Cymru to
14 Ofwat explaining its justification for its then new
15 large industrial tariff that's also been referred to
16 often as the LIT. Do you see that?

17 A. I do. I do.

18 Q. Now, strictly speaking, the supply that's being
19 contemplated between Albion and Dwr Cymru in relation to
20 provision of potable back-up is effectively a bulk
21 supply, because you are both --

22 A. Yes, it's a supply arrangement between incumbents.

23 Q. But the physical characteristics of the supply, had it
24 been made directly to Shotton, would have been
25 identical? It's simply that the --

1 A. The physical characteristics were indeed identical, yes.
2 Well, there is a slight caveat on that, because when
3 Albion became involved, when Albion's inset appointment
4 started, Dwr Cymru decided that there was insufficient
5 boundary protection on the potable mains that were going
6 into the site.

7 Their concern was that somehow the potable water
8 would be contaminated and would find its way back up the
9 pipes that supplied it and, therefore, pose
10 a contamination risk to the generality of consumers. So
11 they required Shotton Paper, they required us and
12 Shotton Paper, to put in some very significant and
13 complex valves that would prevent any risk of that
14 happening. It was not only a significant cost
15 associated with that, but the valves have to be tested
16 each year, which means running water through them. So
17 there was an implicit requirement to use potable water
18 to test the valves that Dwr Cymru insisted that we put
19 in place. So in that technical sense, the supplies were
20 not entirely comparable, but in all other regards, yes,
21 they were.

22 Q. Subject to the proviso, I'm correct?

23 A. Yes.

24 Q. Right. So had the supply been made directly, there
25 would have been the possibility for the large industrial

- 1 tariff, user tariff, to apply?
- 2 A. Indeed, yes, I suspect.
- 3 Q. If we could go, please, to page 283 and look at table 1,
4 so this is the tariff. We see above at 2.5 the tariff
5 that's going to apply to potable water users?
- 6 A. Yes.
- 7 Q. It was going to be in place at the time of the bulk
8 supply agreement on 10 March 1999?
- 9 A. I think technically it came into effect on 1 April 1999,
10 but I stand to be corrected on that. This proposal is
11 dated the end of 1998, so it wouldn't have taken effect
12 until 1 April 1999 at the earliest.
- 13 Q. I understand that. If we could go to the final band.
14 There are consumption bands, you see, across the top?
- 15 A. Yes.
- 16 Q. Megalitres per annum?
- 17 A. Yes.
- 18 Q. And the biggest band here is 1,000 to 5,000 megalitres
19 per annum. We are talking about potable water here?
- 20 A. We are. A million to 5 million cubic metres of water
21 a year.
- 22 Q. Yes, and if we divide by 365 to get a feel for per
23 day -- I'll give you the figures and we can see whether
24 you agree if they sound roughly right --
- 25 A. Yes.

1 Q. -- 1,000 comes down to about 2.7 megalitres per day,
2 5,000 comes down to about 13.7 megalitres per day.
3 Again, it's not an arithmetic test, but if we can go
4 with those numbers as roughly correct.

5 Now, the bulk supply agreement places an obligation
6 on Dwr Cymru, as we saw, to provide up to 8 megalitres
7 per day?

8 A. Yes.

9 Q. So that would fall within this range in this top band
10 here?

11 A. No, that's not at all how the large industrial tariff
12 works.

13 Q. Well, let's take it in stages. Let's assume that,
14 rather than it being reserved, this was water that was
15 actually taken?

16 A. Yes.

17 Q. If it was water that was actually taken every day, we
18 would be in this top band?

19 A. Top being 1,500?

20 Q. Yes.

21 A. No, we would be in the bottom band, because never has
22 consumption exceeded 49 megalitres a year on your
23 evidence.

24 Q. What I'm doing is I am assuming -- and I understand this
25 is not what actually happened in relation to the supply,

1 but so we can take this calculation in stages, let's
2 assume that actually this was a supply that was made
3 every day of 8,000 megalitres per day?

4 A. Yes.

5 Q. So that's not the reservation. We are actually assuming
6 that there was such a supply made.

7 A. 8 megalitres a day, yes.

8 Q. I beg your pardon, I am confusing my units. If that
9 were the case, then we would find ourselves in this
10 final column on the right-hand side?

11 A. If that were the case, yes.

12 Q. Now, in that instance, the unit price, the volumetric
13 price would have been 57.65p per cubic metre; you see
14 that in the bottom right-hand corner?

15 A. I do.

16 Q. That's actually, whether coincidentally or otherwise,
17 very close to the 58p per cubic metre in the bulk supply
18 agreement?

19 A. 59 in the bulk supply agreement. This has a fairly
20 sizeable standing charge, so to get a more accurate unit
21 charge you really need to divide out the standing charge
22 element as well.

23 Q. So that's quite right. You have pointed to the standing
24 charge, and that reflects the fact that even if
25 a company took no water in that year, they would in

1 fact -- Sorry, I'll put it this way. They always have
2 to pay on top of their unit charge £62,790, irrespective
3 of the amount of water they actually take?

4 A. I think, Mr Pickford, that you or those behind you
5 misunderstand how this tariff works. This is
6 an elective tariff that large customers can choose to go
7 on, and if they choose to pay the standing charge, then
8 they get the benefit of a lower unit cost of water. And
9 they will do the sums and they will decide, and those
10 standing charges have escalated quite a bit since these
11 days.

12 For a company like Shotton Paper that anticipated
13 using, as we have seen, less than 50 megalitres a year
14 of back-up potable, it would not elect to pay a large
15 sum of money to access slightly cheaper rates for the
16 vanishingly small quantity it was going to use, it would
17 stay on the first band of 0 to 49 and pay, in this case,
18 the full volumetric price of 82.35 as and when it needed
19 the water. And in the case of Albion that equivalent
20 price was 59p as set by Ofwat.

21 Q. That wouldn't be an appropriate band to be on if in fact
22 you were taking vastly larger sums when you actually did
23 take the water in a day, would it?

24 A. No, this tariff is not about reservation. This is
25 a tariff that's responded to the sort of competitive

1 threat that Albion was presenting at that time, and
2 Mr Sharpe took you to the table of inset appointments.
3 Water companies had hitherto got away with one tariff,
4 no matter how big you were, or small, or that's it, take
5 it or leave it. As the threat of competition started to
6 emerge, so we see the evolution of these tariffs.

7 THE CHAIRMAN: Dr Bryan, if you decided, if, say, you were
8 a large user, you were very unsure about how much water
9 you wanted to have over the year, could you elect to be
10 on the left-hand column, the 0 to 49, but then in fact
11 use a lot more water than that, then you would be stung
12 by having to pay 82.35 per cubic metre for it; or were
13 you limited to only being able to have 49 megalitres
14 a year?

15 A. No, the way that that -- I have to be careful, because
16 this table confuses the new LIT with the current LIT, so
17 let me make sure I am looking at the top part of that
18 table.

19 If, in the example you have given me, you were
20 uncertain how much water you were using, then you are
21 taking a risk if you go for the 0 to 49p band that you
22 will be paying 84.08 virtually come what may. But it's
23 very rare, in my experience, for any company that is
24 water intensive not to have a pretty good idea of how
25 much water it's going to need. And if it's a new

1 company with new processes, then the process engineers
2 and designers will have given certain warranties about
3 water consumption, so there, again, there is really no
4 excuse for companies not to have pretty good
5 appreciation of whereabouts they stand and what would be
6 the best tariff.

7 They may get it wrong and may need to refine it the
8 following year, and we do find companies that have opted
9 for a high tariff, a high volume tariff because they
10 were using a lot of water. Their efficiencies improved,
11 or their production has gone down, or they have changed
12 production methods, and they find they are using a lot
13 less water, but they are still on the old band because
14 they have not changed it. And by and large they are not
15 prompted to, they are not reminded to change for a more
16 beneficial tariff.

17 MR PICKFORD: We saw in the table that I took you to in the
18 referred work that the annual usage of the back-up in
19 Shotton's case actually varied quite a lot from year to
20 year?

21 A. It did, but within very small bands, and at no time did
22 it exceed the 49 megalitres a year, which is the top end
23 of the lowest band for the LIT.

24 Q. Okay. Let's move on to a new topic: capacity
25 augmentation.

1 A. Ah, yes.

2 Q. Your evidence on this issue is set out in your witness
3 statement at paragraph 305, and that's at bundle 1,
4 tab 4, page 82A.

5 A. Yes.

6 Q. You say:

7 "No new connection was put in place in the period
8 March 2001 to November 2008, and I have seen no evidence
9 to suggest that a new connection would have been
10 necessary merely because the contractual arrangements
11 have changed. Albion anticipated the physical
12 configuration of the system would remain unchanged, and
13 Dwr Cymru do not suggest that any change would be
14 required."

15 Now, your counsel showed us on the first day of the
16 trial that Dwr Cymru have a right to 36 megalitres per
17 day at Heronbridge and that they pay a fixed percentage
18 of costs in respect of that 36 megalitres per day; do
19 you recall that?

20 A. Yes, I believe Mr Sharpe referred to it as
21 an entitlement, but I am not sure much hangs on that
22 distinction.

23 Q. I don't think we need quibble between the word "right"
24 or "entitlement".

25 If we could then, please, pick up bundle 4. We are

1 going to go to a few documents in here, and we start
2 with tab 116. So this is a meeting note prepared by
3 Dwr Cymru of the tripartite meeting between Albion,
4 Dwr Cymru and, as it then was, North West Water.

5 A. Yes.

6 Q. That's correct?

7 A. It is.

8 Q. If we look, please, at page 826 --

9 A. Yes.

10 Q. -- we see JL, who is John Lees, and the second thing
11 he's recorded as saying is:

12 "NWW has an aggregated abstraction licence for the
13 Dee so abstraction is not an issue. However, there may
14 be a problem with the capacity of their pipe."

15 That's JL. Then after that, there is issue 1:

16 "Ability to deliver: NWW currently has an obligation
17 to deliver up to 36 mld to DCC, is the BS to ELL
18 independent of this agreement? NWW to investigate
19 ability to deliver to bulk supply point."

20 Do you see that?

21 A. Yes, I do.

22 Q. So that appears to be a separate issue from the first
23 point being made there by JL?

24 A. It does, yes. I'm not entirely sure, but yes, I think
25 you are right.

1 Q. Now, I am going to take you to a couple of letters that
2 were passing between Dwr Cymru and North West Water
3 because they are part of the story and they are relevant
4 to a later question, so we have to see them in sequence,
5 but there is only a couple of them.

6 The next is tab 126. This is a letter from
7 North West Water, and we see on page 1 -- this is
8 a comment that you made, you addressed this point
9 yesterday, that at the bottom of the first substantive
10 paragraph -- sorry, Dr Bryan, are you getting to 126?

11 A. Sorry, I was wrong tabbed, but you are right. Yes.

12 Q. First, this is a letter from John Lees, so he is writing
13 to Paul Edwards, and he is writing about the note?

14 A. Yes.

15 Q. He says:

16 "The comments about pipe capacity were actually
17 regarding downstream of the delivery point, which is not NWW's
18 concern."

19 So that was the first point we saw, the JL one?

20 A. Yes.

21 Q. And he is saying: that is nothing to do with us,
22 North West Water, no issue.

23 A. Yes.

24 Q. Then he goes on on the next page to discuss a separate
25 issue, which is about North West Water's ability to

1 provide the volumes in question. You see that on the
2 following page?

3 A. Yes, I do, yes.

4 Q. That was a separate issue and that was issue 1 that was
5 being considered previously?

6 A. Yes.

7 Q. If you would just like to briefly read the first two
8 paragraphs on that page, so that we can make sense --

9 A. On 868?

10 Q. -- yes, 868 -- of the letter that then follows.

11 (Pause)

12 The question is simply that we see that he is
13 setting out North West Water's position on this issue 1
14 about their ability to provide the relevant water?

15 A. Yes.

16 Q. So then we go on to tab 133, please, and this is the
17 response to that letter from Mr Edwards. Do you see?

18 A. Yes.

19 Q. He is seeking clarification on the issue 1 point,
20 because he says:

21 "Your response to issue 1 is a little confusing, are
22 you saying you cannot deliver more than 36 Ml/d without
23 investing capital?"

24 Then he goes on to set out what Dwr Cymru's position
25 is on who should pay in the event that some investment

1 is required, and he explains Dwr Cymru's position, which
2 is that it should be Albion paying if investment is
3 required rather than Dwr Cymru?

4 A. I see that.

5 Q. Do you see that?

6 A. Yes, I do.

7 Q. So we then finally come to the end of this sequence,
8 tab 143, and we see the response back to Paul Edwards
9 from Mr Lees. In the second paragraph, he says:

10 "You are correct that the current agreement is for
11 NWW to supply up to 36 megalitres per day to yourselves.
12 This is the maximum that can be supplied from the
13 existing pumps that provide the water to the supply
14 point. Any increase in this volume will require capital
15 to be invested.

16 "As I stated in my letter of 8 February, I am
17 confident we can accommodate a maximum supply of up to
18 50 megalitres per day at the supply point, with the
19 capital investment described. To confirm that the
20 additional 8 megalitres per day could also be provided,
21 bringing the total to 58 megalitres per day, we would
22 have to carry out a feasibility study. I am happy to
23 arrange this. However, the party that requires the
24 information would have to underwrite the costs of
25 doing so."

1 Now, what he says there about North West's ability
2 or otherwise to supply, you have no basis to say he is
3 wrong, do you?

4 A. No.

5 Q. So it is the case that if Dwr Cymru insisted on keeping
6 their entitlement to 36 megalitres and you were going to
7 need 22 megalitres to supply Shotton, giving a total
8 of 58, which is the sum that's being discussed here,
9 there would need to be capacity augmentation?

10 A. No, because you are confusing entitlement with demand.
11 Entitlement is clear, that if Dwr Cymru have a need for
12 the water and they have retained that entitlement, then
13 they have a contractual entitlement to take it,
14 presumably. But their demand is very low indeed,
15 because by definition they will have lost by far the
16 larger of the two consumers on that pipeline,
17 Shotton Paper. So their demand will be limited to
18 6 megalitres a day, thereabouts, which I believe is what
19 Corus were taking at that time, plus any volumes that
20 they needed to make up for leakage.

21 So there is a very clear distinction between the
22 theoretical entitlement and the practical reality of
23 what would need to be put through the pipes and pumps
24 and the rest of the Ashgrove System under what you are
25 now saying is Dwr Cymru's position.

1 Q. Let's suppose that Dwr Cymru said, "We are entitled
2 to 36 and we are going to take it, we are going to find
3 something else to do with it". Now, there is a factual
4 dispute between us about whether there was anything else
5 they could do with it. Let's suppose that --

6 A. No, there is no factual dispute, Mr Pickford, if I am
7 permitted to say so. I understand Dwr Cymru's position,
8 but the facts point very clearly to the fact that there
9 was no such demand then, and there is no such demand
10 now. And no such demand -- and we are talking about
11 a huge demand, we are talking about a demand in effect
12 for not the 22, because you have already got headroom in
13 the system -- the system as we have previously heard was
14 only running at that time at about 26 megalitres a day,
15 so there is already 10 megalitres spare without any
16 conflict in terms of assets. And there has never been
17 any evidence whatsoever that there is a conceivable
18 demand for the 10 megalitres a day, let alone the
19 theoretical extra, the theoretical extra 22, or whatever
20 it is that Dwr Cymru correctly sees as its entitlement.

21 Q. I understand that answer, and I understand your factual
22 assertion about what you say is the demand position.
23 Just so we are very clear about each of the steps in the
24 argument: if, and -- I take it it's an "if" with which
25 you disagree, but if Dwr Cymru had an alternative use

1 for that water that they didn't merely assert their
2 right, but they took it away and they did something with
3 it --

4 A. Yes.

5 Q. -- you disagreed with that. But then, there would need
6 to be capacity augmentation, if?

7 A. No, I suspect not, because if we look at the reality of
8 such a situation, what's the most likely cause for
9 Dwr Cymru to need that water? The most likely cause is
10 that they win back Shotton Paper as a customer. We,
11 therefore, have no demand, hence no need for capacity
12 augmentation.

13 Q. Let's assume it's not Shotton. So this is in a world
14 where you're supplying Shotton --

15 A. If Welsh Water were to come to us in a negotiating
16 position and say, "We reserve our capacity, our
17 entitlement, for which we have to pay United Utilities",
18 I think the most likely view we would have taken at the
19 time -- and the situation didn't arise because it was so
20 unrealistic then, as it is now. The situation that we
21 would most likely have taken is the commercial one,
22 which says, "Okay, we will take an interruptible supply.
23 We will have a supply, we will take it--

24 THE CHAIRMAN: Call their bluff, in other words?

25 A. -- we will call their bluff -- we will take it while

1 it's there. If you suddenly find another big customer,
2 well, the chances are that we will outcompete you for
3 that customer anyway, but if you do find additional
4 demand in zones which already have surplus capacity, as
5 we have seen from the back-up potable argument, then
6 effectively we will take our chances."

7 Because there is no other resolution to hypothetical
8 situations like this.

9 MR PICKFORD: Did you ever ask Shotton Paper whether they
10 would be happy with an interruptible supply?

11 A. No.

12 Q. If we could go, please, to bundle --

13 A. Can I qualify that? I am sorry. I don't want to
14 mislead the Tribunal.

15 We did ask them whether they would be happy with
16 an interruptible reply on back-up potable, because
17 subsequent to the period of time that Mr Pickford took
18 me to with the referred work, the following year
19 Dwr Cymru attempted to impose a £1 million a year,
20 slightly less than that, reservation charge on us for
21 back-up potable, which we didn't pay. We resisted it.
22 It's still on the invoices, interestingly enough, for
23 payment, but we have never paid it, and we did at that
24 time say to Shotton Paper, "If necessary, would you be
25 prepared to forego the back-up potable, ie to have what

1 was in effect an interruptible supply situation?" And
2 they said, "Yes, because it makes more sense to lose
3 a small amount of production than it does to impose huge
4 additional fixed costs on the business".

5 Q. Now, during the Tribunal proceedings leading to the
6 finding of infringement, both you and Mr Jeffery gave
7 evidence on behalf of Albion, didn't you?

8 A. We did.

9 Q. You would have seen Mr Jeffery's witness statements
10 before they were submitted?

11 A. I did.

12 Q. And you wouldn't have permitted a witness statement to
13 be put in on behalf of Albion that you considered to be
14 materially wrong or misleading, would you?

15 A. There was never any question of that. There was never
16 any question of me permitting anything. Those are
17 Malcolm Jeffery's own words. He was and is a trusted
18 colleague, and --

19 THE CHAIRMAN: This is just a preliminary question before
20 you're taking to Mr Jeffery's witness statement.

21 A. I do apologise. Anyone who impugns Malcolm's
22 integrity --

23 MR PICKFORD: No, I'm not --

24 A. I am sorry, I withdraw those comments then.

25 MR PICKFORD: I am not impugning him at all.

1 A. To your point, Mr Pickford.

2 Q. You would have agreed with the views that Mr Jeffery
3 expressed in his written evidence?

4 THE CHAIRMAN: Why don't you just put to him the point that
5 you're --

6 A. Could you take me to it, or put it --

7 MR PICKFORD: It's folder 6, tab 244. This is the second
8 witness statement of Malcolm Jeffery in those
9 proceedings; you see that?

10 A. Yes, I do.

11 Q. If you could go, please, to paragraphs 23 and 24, and
12 here he is dealing with an issue that we have just been
13 canvassing, and he says:

14 "It should be noted that in the event of a new bulk
15 supply from Heronbridge direct to Albion, Dwr Cymru has
16 told United Utilities that it would not agree to any
17 variation of the existing bulk supply agreement between
18 Dwr Cymru and United. This clearly demonstrates
19 Dwr Cymru's intention to [and then he emphasises]
20 continue taking the same volume through that bulk supply
21 agreement as previously obtained."

22 He refers to a letter.

23 "The costs of the Heronbridge supply were therefore
24 not the costs that would have been avoided as a result
25 of the common carriage arrangements with Albion."

1 He goes on to say:

2 "This shows that it was not the local, low cost
3 supply that would have been discontinued, but some
4 other, presumably more expensive, supply ..."

5 Then he goes on to describe at the end how:

6 "... given the large volumes involved, the costs of
7 acquiring a completely new source are likely to be at
8 least 6.3p per metres cubed and could be considerably
9 higher."

10 Now, there are two points being made here. The
11 first is that Mr Jeffery understood that the evidence
12 clearly demonstrated Dwr Cymru's intention to continue
13 taking the same volumes through the Heronbridge bulk
14 supply agreement.

15 A. No, I'm not sure that you can read that into it,
16 Mr Pickford.

17 This witness statement, as far as -- I need time to
18 read it and understand the context in which it was
19 provided to the Tribunal --

20 Q. I can help a little bit there. The context in relation
21 to --

22 THE CHAIRMAN: Let him finish the point.

23 MR PICKFORD: I beg your pardon.

24 A. -- is discussing ECPR -- efficient component pricing
25 rule, if I remember right --

1 Q. That's correct.

2 A. -- and long run marginal cost. I think it's a fairly
3 arcane point that we are trying to -- that Malcolm is --
4 Mr Jeffery is trying to make, but I'll help you all
5 I can on it.

6 If you put to me a question, I'll see how well I can
7 answer it.

8 Q. I will put the same question as I put previously, which
9 is that Mr Jeffery understood that the evidence clearly
10 demonstrated Dwr Cymru's intention to continue taking
11 the same volume through the Heronbridge bulk supply
12 agreement?

13 A. Well, I think the intention is clearly there, the stated
14 intent. But the reality, as we have seen -- this was
15 a statement of April 2006 -- the reality both before
16 then and after is that even though Dwr Cymru seeks to
17 retain its entitlement, there is no evidence that there
18 is any real prospect of an extra cubic metre of water
19 going through that pipeline any time in the foreseeable
20 future.

21 Q. The other point that he addresses here in paragraph 24
22 is that the implications of his analysis are that the
23 value of this water, because of its ability to displace
24 an alternative cost supply, is at least 6.3p per cubic
25 metre, and it could be considerably higher, going back

1 to a point that we discussed yesterday?

2 A. No, what he says was that the large volumes, given the
3 large volumes involved -- and I am reading from the last
4 sentence of paragraph 24 -- the costs of acquiring
5 a completely new source are likely to be at least 6.3p.

6 Q. But of course the ability to use this source displaces
7 the need for the new source. So the value of this
8 supply is the cost of what you otherwise would have to
9 pay?

10 A. Well, then you must take issue with United Utilities
11 because they, as we have seen, put no value on this
12 water at all.

13 MR PICKFORD: We discussed that yesterday, so we don't need
14 to revisit those questions.

15 Now, we are at just gone 1 o'clock. I probably have
16 another couple of questions on this issue. I am very
17 happy to pause there and we can deal with them after
18 lunch.

19 THE CHAIRMAN: Yes. We will come back at five past 2.

20 (1.05 pm)

21 (The short adjournment)

22 (2.05 pm)

23 MR PICKFORD: Dr Bryan, before lunch we were dealing with
24 the capacity augmentation issue.

25 Now, it's the case, isn't it, that you don't know

1 the comparative cost to Dwr Cymru of, on the one hand,
2 using the cheap Heronbridge supply and building a pipe
3 to take water to either a treatment works or another
4 customer for non-potable water, as against, on the other
5 hand, Dwr Cymru's highest cost alternative means of
6 making the same supply?

7 A. Yes, I think we do, largely speaking. We have some
8 information on Dwr Cymru's own estimates of long run
9 marginal costs, which were published by Ofwat for
10 a period of time for all the water companies.

11 Now, whether those were the very highest costs
12 I don't know, but it's clear that, as one would expect,
13 to develop a new resource will tend to be more expensive
14 than utilising an existing resource.

15 Q. We know that the Heronbridge supply is very cheap water
16 from Dwr Cymru's point of view?

17 A. We know that the cost is very low.

18 Q. Yes, and we don't know how much it would cost Dwr Cymru
19 to build a pipe and take that water to somewhere where
20 it could use it?

21 A. I think we can form an educated guess, if that's
22 permissible, in that one has to look at where that water
23 is likely to be needed. And the water resource
24 management plan that we were taken to beforehand does
25 identify that there may have been shortages in two zones

1 in North Wales: Clwyd Coastal and Ynys Mon, or at least
2 the landward side of that supply zone.

3 These are geographically the closest to the Ashgrove
4 supply, so they would be -- that would be the logical
5 source to look at.

6 My first comment in response to your question,
7 Mr Pickford, is because there is already surplus
8 capacity in the potable system within the Bretton supply
9 zone, and because that potable system reaches further
10 towards where there are potential areas of weakness,
11 then that is -- that would be the preferable source
12 rather than Ashgrove. The cost of laying a pipeline is
13 likely to be prohibitive, particularly given the very
14 small volumes of water that were needed, and I think
15 Mr Pickford took me to part of that water resource
16 management plan which suggested that the sort of
17 shortfall we are looking at is 1 to 5 megalitres a day.

18 Q. I took you to United Utilities' resource plan,
19 North West Water's.

20 A. Forgive me.

21 Q. There is no evidence before the Tribunal, is there, on
22 Dwr Cymru's water resource management plans?

23 A. I think there is evidence in the bundle, and maybe
24 that's what I was confusing.

25 Q. It isn't the case that Dwr Cymru has said that it has

1 excess capacity?

2 A. It certainly is the situation that it has excess
3 capacity in the Alwyn Bretton supply zone, where it
4 identifies possible future deficits are the two zones
5 that I referred the Tribunal to in North Wales. And
6 there is potentially a much larger deficit in
7 South Wales, in what is called the SEWCUS, the South
8 East Wales Conjunctive Use System, and it's not sensibly
9 being suggested by anyone, I think, that you could pipe
10 water from North Wales to South Wales economically.

11 Q. I would put it to you that it is wrong that there is
12 excess capacity in the long run in the region with which
13 we are directly concerned around the Ashgrove System,
14 and your point is, you say that it is --

15 A. Please take me to the evidence, then.

16 Q. We don't have that evidence.

17 THE CHAIRMAN: Is the Bretton and Alwyn supply, that's
18 Dwr Cymru's pipe system?

19 A. That's their potable distribution zone, supply zone.

20 MR PICKFORD: And the Bretton Treatment Works are only about
21 four miles away from Heronbridge, aren't they?

22 A. They are close, I'm not sure of the precise distance.
23 I know that the Tribunal visited both in the spring of
24 2005.

25 Q. So one thing that Dwr Cymru might want to do is take the

1 cheap supply of water from Heronbridge, build a pipe,
2 and send it to the Bretton Treatment Works, and that
3 would be a further supply of water it could then use and
4 treat at Bretton?

5 A. There is one major flaw in that argument, which is that
6 the Bretton Treatment Works has its own direct access to
7 the River Dee, its own direct abstraction, so why pay UU
8 even threepence when you can get it direct from the
9 river yourselves, where the marginal cost is actually
10 the cost of paying the Environment Agency's abstraction
11 charge, which is something less than a penny? And there
12 is also a capacity problem, of course, with Bretton.
13 It's, from memory, rated at something like 40 megalitres
14 a day. It already has more than enough resource
15 capacity from its existing sources to meet that, so if
16 you were going to try and put more water through it, you
17 would have to enlarge the treatment plant, which would
18 cost money, and there is no demand for that extra water.

19 Q. You knew that these matters were in issue between
20 yourself and Dwr Cymru about the ability to use water
21 elsewhere when coming into these proceedings?

22 A. Yes.

23 Q. But there is nothing in your witness statement about any
24 of this, is there? The first time we are hearing about
25 it is now in your live evidence?

1 A. Then if I have failed in my evidence, I apologise to
2 the Tribunal.

3 Q. Now, just to conclude this particular issue -- and this
4 links back into something we were discussing yesterday
5 about hypothetical offers that might have been made --
6 Mr Edwards says that Dwr Cymru wouldn't have given up
7 its capacity and we are going to assume that he is right
8 about that. Okay? We have obviously debated that --

9 A. The entitlement. Yes, I am more than happy to accept
10 that's Dwr Cymru's position.

11 Q. We are going to assume more than just entitlement. We
12 are going to assume that Dwr Cymru said, "We are keeping
13 our entitlement and we are going to use that water",
14 that's the assumption we are making.

15 A. Okay.

16 Q. We could debate it, but that's the assumption for these
17 questions.

18 A. Right, right.

19 Q. If Dwr Cymru had offered you in 2001, 2 January, a 14.4p
20 per cubic metre price --

21 A. Yes.

22 Q. -- but they had also said, "If you want us to forego
23 our rights to 36 megalitres of water at Heronbridge to
24 enable you to come in without any capacity augmentation,
25 we are going to want -- pick a figure -- £3 million for

1 that", you would have rejected that offer, wouldn't you?

2 A. I am sorry, Mr Pickford, I'm not being deliberately
3 dense, but just -- there is a fundamental flaw in your
4 logic.

5 Q. I understand that you disagree with the premise, you
6 disagree with the --

7 A. No, no, I am happy with the premise. Your premise is
8 that Dwr Cymru want to keep all the water and want to
9 use the water.

10 Q. Yes.

11 A. And your point, I think, is that to do that there would
12 need to be augmentation of the pumps at Heronbridge to
13 pump more water into the system.

14 Q. No, my point is that Dwr Cymru doesn't have to do
15 anything because Dwr Cymru already has the right to the
16 water.

17 A. Ignoring for the moment who pays, what you are saying is
18 that if you were using 36 and we wanted 22, then there
19 would need to be additional investment at Heronbridge to
20 pump more water.

21 Q. Yes.

22 A. That point is valid. But what you are -- the
23 illogicality of that position is that that is not really
24 the critical issue. The critical issue is that the
25 Heronbridge -- the Ashgrove System itself is incapable

1 of taking that extra water, so it wouldn't be sufficient
2 to add another pump at Heronbridge. You would actually
3 have to replace, duplicate the whole of the
4 Ashgrove System.

5 Q. Let's assume that the water doesn't go down the
6 Ashgrove System. You take your 22 megalitres down the
7 Ashgrove System to Shotton; yes? Let's assume that.

8 A. All right.

9 Q. The 36 megalitres, Dwr Cymru, for example, takes
10 directly from Heronbridge, builds a pipe, four miles to
11 Bretton.

12 A. Where it doesn't need the water.

13 Q. Well, that's the assumption. We've discussed that. We
14 don't need to debate, that's the assumption.

15 A. Yes.

16 Q. So I understand you disagree with those factors. Let's
17 assume that's what Dwr Cymru say.

18 A. That's the position you give us with your non-abusive
19 access price of 14.4p.

20 Q. Yes, so let's assume that was true and they say, "We'll
21 give you 14.4p", which is your number, obviously.
22 That's without prejudice to what they say is the right
23 number. We will use that for the sake of argument. But
24 they also say, "If, however, you want us not to use this
25 water in the way that we are planning to use, we will

1 let you buy us out of our rights, our 36-megalitre
2 rights, but it's going to cost you".

3 A. Yes.

4 Q. If they said to you, "It's going to cost you
5 £3 million", I am putting to you you would have told
6 them to go away?

7 A. We would have made a Competition Act complaint to Ofwat
8 immediately that this was a further barrier to entry,
9 and one without any substance whatsoever, that it was
10 abusive conduct of the clearest kind.

11 Q. If that sum had been a much lower sum of, say, £300,000,
12 you would have done the same thing?

13 A. The principle is the same: you have surplus capacity in
14 that system today, and at that time in 2000, that you
15 haven't used, you haven't come close to using. And so
16 any suggestion that there was going to be an additional
17 explicit barrier to entry that presupposed some sort of
18 fictional supply arrangement, of course we would have
19 made a complaint under the Competition Act. That's what
20 the Act is there to prohibit.

21 Q. I think we can leave that there, thank you.

22 A. Thank you.

23 Q. If we could just go back to a point that you made about
24 interruptible supply. If you could go, please, to
25 folder 8 tab 280 and turn to page 2553A. What we have on

1 that page at the bottom, the second half, is an email
2 where it says:

3 "On 16 May 2008, Andrew Bronnert at UPM-Kymmene.com
4 wrote 'Dear Mr Annett' ..."

5 Do you see that?

6 A. Yes, I do. I do. Mr Annett being the managing director
7 of Dwr Cymru.

8 Q. That's right.

9 He says:

10 "I received a fax this afternoon from your
11 Lynnette Cross, Agreements Manager, that with immediate
12 effect you will not supply back-up potable water to our
13 North Wales paper mill, UPM Shotton. Of course there is
14 much detail regarding ongoing disputes with our direct
15 supplier, Albion Water, but the effect is the same. 400
16 jobs will be placed at direct risk by the actions of
17 Dwr Cymru. Our customers, the national British media
18 may not receive paper this weekend on which to print
19 their newspapers."

20 Now, here he is dealing with the back-up supply, the
21 potable back-up supply?

22 A. Yes.

23 Q. And this emphasises, even in relation to the back-up
24 supply, how important it is to Shotton Paper,
25 doesn't it?

1 A. I don't think I've ever disputed its importance when it
2 was needed. What I do and continue to dispute is the
3 appropriate costs.

4 Q. Yes, okay, we don't need to revisit that. The next
5 point is that when he is talking about back-up here, in
6 relation to his main supply of water, it's going to be
7 at least as important, even more important, that he
8 continues to receive regular water, isn't it? He is not
9 going to be prepared, given the nature of his business
10 and supplying newsprint to the British media, to
11 contemplate suddenly discovering that he doesn't have
12 a supply of water any more?

13 A. Yes, I can see where you are taking me on this.

14 THE CHAIRMAN: I can't. What's the distinction --

15 A. I think we are coming to interruptibility,
16 Madam Chairman.

17 This incident arose because we are required by the
18 appropriate statutory instrument to test the boundary
19 protection devices, the valves of which I spoke a little
20 earlier this morning. We are required to test those on
21 an annual basis to certify that they work. And for that
22 to happen we need a supply of potable water to put
23 through the valves to check that they are doing what
24 they should be doing. And in this particular situation,
25 if I remember correctly, Dwr Cymru had insisted on

1 a reservation fee, not of £300,000 but of £950,000,
2 which we had rejected, and they unilaterally cut off
3 that supply at a time when we had a statutory duty to
4 test those boundary protection devices.

5 Now, I of course shared this information with
6 Shotton Paper, who were still feeling understandably
7 rather hard done by that after, at this stage, four
8 years of proceedings before the Tribunal, with a number
9 of decisions, all of which were in our favour, they were
10 still seeing no benefit; indeed, the situation appeared
11 to be deteriorating, as far as the security of supply
12 was concerned.

13 The importance of that is not whether they would be
14 able to make paper tomorrow, although that was
15 a consideration. The importance -- and particularly so
16 in 2008 and subsequently -- was that the newsprint, the
17 international newsprint market was grossly oversupplied,
18 and UPM-Kymmene, the parent company of Shotton Paper,
19 which had interests throughout the world, was closing
20 mills, and it was closing mills on a number of factors,
21 partly cost, partly security.

22 MR PICKFORD: Dr Bryan, I hesitate to interrupt, but my
23 question was a very simple one. If you answer my
24 questions in this way, unfortunately you are going to be
25 in the witness box for longer than we had, I think, all

1 hoped.

2 My question was quite simple, which is that: you
3 agreed with me in relation to the potable back-up that
4 this email from Andrew Bronnert, who is the head of
5 Energy and Utilities at UPM --

6 A. Yes, he is.

7 Q. -- was making it very clear how serious he thought it
8 would be to be potentially without water?

9 A. Yes.

10 Q. So what I am saying to you is: you suggested to me
11 previously that one thing that you might have done if
12 Dwr Cymru had insisted on its rights, retaining its
13 rights, is that you say, to use Madam Chairman's words,
14 you would have called their bluff and said, "Okay, fine,
15 we will take it, and if it happens that you can't supply
16 and, Dwr Cymru, you find another customer, we will just
17 deal with that in due course". What I am saying is that
18 is not a commercial risk that UPM were ever likely to be
19 willing to undertake.

20 A. I think you have put words into my mouth in
21 characterising that risk. The risk of an interruptible
22 supply in the context of Dwr Cymru wanting to maintain
23 its rights, its entitlement, but having no demand, is,
24 in our view, vanishingly small, and were such a demand
25 to materialise, as I said before lunch, we would have

1 been able to manage that risk to a considerable extent.
2 We would have had some forewarning. You can't easily
3 walk away from a bulk supply agreement, there would have
4 been some time, and we would have had that conversation
5 with Shotton Paper.

6 Now, we haven't had that conversation, that specific
7 conversation, with Shotton Paper, because there has
8 never been any realistic prospect of surplus demand on
9 the system.

10 Q. Because these arrangements have never been put in place,
11 because you've been supplied under bulk supply?

12 A. But the point here, the point why Mr Bronnert responds
13 the way he does to Dwr Cymru's managing director, is
14 that the actions of Dwr Cymru raised the perception that
15 the supplies of water to the mill and to Helsinki, where
16 their head office is -- they are not going to worry
17 about the difference between potable and non-potable or
18 back-up or top-up, the perception is that the supplies
19 to that mill are in some way imperilled. And his view,
20 because we have had many an hour discussing this, is
21 that if that signal got to Helsinki, then the risks on
22 the continuation of Shotton Paper, as one of the major
23 employers in Wales, would be at risk.

24 Q. I've asked my question. I think we will move on to the
25 next point. I will try and shortcut on this one, and if

1 that doesn't work we will have to go the slightly longer
2 way around.

3 Turning to the subject of interim relief. I would
4 like to put aside -- this is a careful part of the
5 question -- the legal question of whether you were right
6 or wrong to do so and simply ask you about the factual
7 matter, which is that it's correct that you have not
8 given credit in your quantum calculations for the
9 interim relief that you received between 7 November 2008
10 and 9 April 2009; as a purely factual matter you have
11 not taken account of that?

12 A. No, I have not.

13 Q. Next question, or the next set of questions concerns the
14 period of loss. I would like to deal firstly with the
15 start date of the arrangements.

16 The case advanced in your skeleton argument is that
17 had you been offered a lawful common carriage price on
18 2 March, you would have pounced on it so fast that
19 common carriage arrangements would have started from
20 1 March?

21 A. No. No, the case we make is that it's entirely
22 reasonable to assume that common carriage -- in the
23 counterfactual where not only was Dwr Cymru prepared to
24 offer a non-abusive price, but was also prepared to act,
25 as I believe, Madam Chairman, you described not at the

1 limits of legality but in a reasonable way, that under
2 those circumstances, given that we were -- that
3 Dwr Cymru were well aware of our presence, that we had
4 warned them that we were going for common carriage in,
5 I believe, February or March of 2000, it was a logical
6 deduction that that common carriage would affect Shotton
7 because (a) we were there, and (b) it was one where
8 there was ample opportunity to do a direct deal with
9 United Utilities for the supply; that under those
10 circumstances, particularly given Ofwat's very clear
11 rules as to when companies had to be ready --
12 1 March 2000, to make substantive replies to
13 applications -- it's entirely reasonable for us to
14 assume that following our detailed application on
15 28 September, was it? You will correct me if I am
16 wrong -- that Dwr Cymru would have been able to respond
17 in the manner that Madam Chairman suggested with
18 a non-abusive price well before the end of November.

19 Q. You complained about Dwr Cymru's delay to Ofwat?

20 A. Yes.

21 Q. Ofwat rejected that complaint and --

22 A. No, no, no.

23 Q. -- so did the Tribunal. It was found not to be
24 an abuse; we can agree on that?

25 A. We can agree it was not -- what is clear from the record

1 is that Ofwat took it very seriously at the time, and
2 complained long and hard to Dwr Cymru about its delays
3 back in early December.

4 Q. Okay. Let's just go through step-by-step some of the
5 elements you would have needed to have in place in order
6 to be able supply by common carriage.

7 A. Yes.

8 Q. You would have needed an agreement with Dwr Cymru, and
9 you would have obviously needed to agree price. We are
10 assuming for the sake of argument that you would have
11 agreed price, obviously, because that's --

12 A. Yes.

13 Q. -- the scenario that we are now in. You would have
14 also needed to agree the indexation measures,
15 wouldn't you?

16 A. Which would have been part and parcel of the price
17 discussions, I assume, yes.

18 Q. You hadn't agreed indexation measures by 2 March 2001,
19 had you?

20 A. No, it was a secondary issue that was well behind the
21 key one.

22 Q. And you would have needed to agree all the other
23 elements of the relationship, including issues such as
24 potable back-up?

25 A. No. I don't believe we would. We had an existing bulk

1 supply agreement which ran until 2003. Now, it would
2 have been very easy to negotiate a variation to that
3 agreement that removed non-potable and had no effect on
4 the rest of it, but I don't see that as insuperable.
5 And certainly at that time there was no question of some
6 large, or, indeed, any charge for a putative
7 reservation --

8 Q. It wouldn't have been very easy if, as has transpired in
9 these proceedings, there was a gulf between Dwr Cymru's
10 view and your view on the appropriate charge for that
11 back-up?

12 A. That gulf was not apparent, and there is no evidence to
13 suggest that it existed at the relevant time.

14 Q. You would have also needed an agreement with United
15 Utilities --

16 A. Yes.

17 Q. -- to get the water, wouldn't you?

18 A. Yes, we would.

19 Q. And you didn't have that at that time, did you?

20 A. No, and that, as I explained yesterday, would have been
21 driven by a fair access price where I could actually sit
22 down with the deputy managing director of United
23 Utilities and say, "Look, here it is, open book, here is
24 the potential benefit. How can we split it?"

25 Now, in view of your counterfactual -- in view of

1 your decision to -- Dwr Cymru's decision to retain the
2 entitlement, then we would have had to factor into those
3 calculations with UU the fact that they would continue
4 to receive effectively the reservation fee, the price
5 that they were paying less the pumping costs, throughout
6 the piece, which neither party, neither Albion nor UU,
7 consider was at all likely at the time.

8 Q. On that issue there are two alternatives, aren't there?
9 We debated it previously. Our case is that if Dwr Cymru
10 had insisted on keeping its capacity, there would have
11 needed to be some building of new capacity, and we have
12 debated that and you have given me your evidence on it.

13 Alternatively, there would have needed to be some
14 amendment of the agreement between United Utilities and
15 Dwr Cymru so that they didn't continue to have the same
16 rights and obligations under the Heronbridge Agreement?

17 A. I think United Utilities, from a purely pragmatic and
18 water engineering point of view, would have been quite
19 happy to have two contracts: one to supply 36 megalitres
20 a day, which was unlikely ever to exceed 6, but for
21 which they were going to be paid as if they were
22 delivering the full 36; and another contract for 22 or
23 for up to 22 from Albion.

24 I don't see that there is an obstacle to that,
25 because it was extremely unlikely that UU were ever

1 going to be in a position where they could satisfy both
2 parties.

3 Q. Now, you began the journey of moving from being
4 a supplier under bulk supply to being -- you were
5 attempting to be a supplier under common carriage, by
6 contacting North West Water, as they then were, back in
7 May 1999?

8 A. That's correct.

9 Q. Now, 22 months later, by March 2001, you still hadn't
10 managed to settle on a price with United Utilities?

11 A. That's correct.

12 Q. You re-engaged with United Utilities in October 2006.
13 We can go to the letters, but the key point for my
14 purposes is simply roughly when you re-engaged with
15 them.

16 A. 2004.

17 Q. Okay, 2004. Still, as of today, you haven't reached any
18 agreement with United Utilities over what the
19 appropriate price should be for water?

20 A. No. We did get tantalisingly close, but I am afraid
21 those negotiations are still subject to confidentiality
22 agreements, and although they have been stalled by the
23 judicial review, I would hope that we can complete them
24 as soon as the position is clear following that review.

25 Q. Well, we've seen no evidence about that --

- 1 A. No.
- 2 Q. -- so I don't think we can take that any further in
3 these proceedings.
- 4 A. That's fine. I am simply informing you.
- 5 Q. It's just not realistic, is it, that if you had been
6 offered a lawful price on 1 March, arranged all of those
7 things that I have been discussing would have fallen
8 into place immediately, you would have required at least
9 six months and more likely a good year to bring them all
10 into place?
- 11 A. No, I don't recognise those timings at all. My working
12 assumption is that if Dwr Cymru had behaved as it was
13 intended that they should behave in Ofwat guidance, and
14 as we reasonably expected them to behave, we would have
15 had a price before the end of November, that they would
16 have been --
- 17 Q. November which year, sorry?
- 18 A. 2000. In other words, the Act and Ofwat's clear
19 guidance required Dwr Cymru to be able to respond
20 substantially by 1 March 2000. They knew before that
21 date that we were interested in common carriage, and yet
22 even if we move ahead and take our formal application
23 letter of 28, I think, September 2000 as the starting
24 point, it ought to have been possible for them to have
25 provided us with a substantive response very quickly.

1 Now, whether you say very quickly is within a week,
2 two weeks or six weeks, that still only takes us to the
3 end of November.

4 Q. I think what we are going into here is an area where
5 there is potentially a legal dispute about the correct
6 approach to how one defines the counterfactual.

7 What I would just like to home in on, so we are
8 clear about the facts, because obviously that's what you
9 can speak to -- and the legal dispute is one that we
10 will have to have between counsel -- is this: let's
11 assume -- and, again, I understand that this is contrary
12 to the basis on which you say it should be judged.
13 Let's assume we got to the position in March 2001 that
14 we were actually in in reality. So everything else is
15 the same in terms of how far you have got with the
16 negotiations with UU, how far you have got with
17 negotiations with Dwr Cymru on other aspects of the
18 deal, including indexation, and let's just assume that
19 the one difference, okay, is the price, and this time
20 they have offered you a lawful price? That's the basis
21 for the assumption.

22 If that was the situation we were in, it would have
23 taken at least a further six months and most likely
24 probably until about April 2002 to put in place the
25 arrangements, if that was the starting position?

1 A. I disagree entirely. We had draft agreements, we
2 already had the basis of a -- we had a bulk supply
3 agreement in place which contained a lot of the
4 boilerplate that would be needed for any such
5 arrangements. So the bulk supply agreement already
6 existed, which Ofwat had approved and would be a model
7 for United Utilities' agreement. There is no doubt that
8 there would have been variations on that. I don't -- if
9 I had a lawful price from Welsh, I would have been on
10 the plane -- train up to Warrington and would have been
11 negotiating with United Utilities within 24 hours.

12 Now, how long those negotiations would have taken
13 I do not know, but I doubt whether they would have taken
14 more than a day because we had two willing parties who
15 were trying to improve on a situation that both felt was
16 unsatisfactory.

17 Q. Okay, I would like to look, please, at your evidence on
18 this in a letter that you wrote on 19 November 2008. If
19 you could please go to folder 8, tab 284. Just to put
20 it in context, let's briefly look at 282, which is the
21 letter you are responding to. 282 is the letter we have
22 talked about a number of times, the 7 November 2008
23 letter.

24 A. Yes.

25 Q. You see on 2556 that that offer was said to remain in

1 place for a period of six months from today's date?

2 A. Yes.

3 Q. You see that?

4 A. Yes.

5 Q. On 19 November, your second reply, that's at 284, bottom
6 of paragraph 3 -- do you have that?

7 A. I do.

8 Q. You say this:

9 "Given the history of this matter and also taking
10 account of United Utilities' historical position on the
11 price at which it is prepared to offer a bulk supply of
12 water to Albion at Heronbridge, we do not think that it
13 would be sensible to set a time limit of six months to
14 your offer in respect of common carriage."

15 A. Yes.

16 Q. So what you are saying there, quite clearly, is you
17 don't think that the whole thing can be tied up in six
18 months, you think it's going to take longer than six
19 months, and therefore you need a longer time limit?

20 A. Mr Pickford, that letter was written in 2008, almost
21 eight years after the events that we are talking about.
22 During those eight years, UU had entrenched its position
23 for 12p or 9p, or whatever figure it felt the long run
24 marginal cost was, had gone through two section 40A
25 applications to Ofwat, both of which were rejected.

1 That was a direct consequence of our inability to engage
2 with them commercially at the relevant time, the
3 relevant time being a short period after we had
4 presented you with a common carriage application, and
5 expected a substantive and non-abusive response.

6 Had there been such a substantive and non-abusive
7 response, we would have been directly back to United
8 Utilities, and I think it's reasonable to assume that
9 they would not have entrenched themselves in the
10 position that they did.

11 That entrenchment is a direct consequence of the
12 actions that Dwr Cymru took.

13 Q. That's your opinion. I think it's probably not sensible
14 for us to debate the inferences that one draws from
15 those other facts. But obviously we have gone through
16 the facts.

17 If we could go, please, to the next part of this
18 issue about the length of the period over which you
19 claim damages, and that's the end point.

20 You were forwarded a second access price on
21 17 March 2004 from Ofwat?

22 A. No, we were not forwarded a second access price. It's
23 unfortunate that it came to be called that during the
24 proceedings. It was never a price, it was never offered
25 to us, but it certainly was a communication with Ofwat,

1 and I think we went over that territory yesterday.

2 Q. It's been suggested by both yourself and your counsel,
3 you say it wasn't a price because it was too uncertain?

4 A. It was never offered to us, and it was uncertain.

5 Q. The fact that it wasn't offered to you, you knew what it
6 was and you knew that Dwr Cymru was prepared to provide
7 it to you. So had you actually liked it -- let's
8 suppose it had been 10p, the fact that it hadn't been
9 offered directly to you but had simply come via the
10 postman of Ofwat, it doesn't make any difference, does
11 it? You would have been on the phone -- actually, let's
12 call it 7p. You would have said, "Okay, we will have
13 that, thank you"?

14 A. Let me be quite clear about this. We had realised that
15 Dwr Cymru had changed its tariff stance in April of the
16 previous year, April 2003, when the tariff that gives
17 rise to those two figures that make up the 17-point
18 whatever pence was published as part of Dwr Cymru's new
19 non-potable tariff.

20 Those individual figures weren't apparent from that
21 new tariff, at least the distribution part wasn't, but
22 the treatment part was, because, as I think I said
23 yesterday, the new tariff that was published showed
24 a tariff for untreated and for partially-treated water,
25 and the difference between the two appeared to us to be

1 a reasonable measure of treatment, and it was less than
2 half the price that had been quoted to us as
3 justification for the abusive first access price in
4 March 2001.

5 We had challenged it at that time. As soon as we
6 found out about that tariff, we challenged it, and we
7 challenged Dwr Cymru --

8 Q. In the context of bulk supply.

9 A. Well, in the context of bulk supply because that was the
10 direct comparison.

11 Q. And you --

12 A. It would have been entirely open to Dwr Cymru at that
13 time to say -- to revise its common carriage price that
14 it offered us and, indeed, to revise its bulk supply
15 price to be consistent with this new tariff. It did
16 neither.

17 Q. It didn't revise its bulk supply price, but what it did
18 do is ultimately revise its common carriage price,
19 didn't it? And that was what is called --
20 notwithstanding that you don't like the tag -- the
21 second access price? That was the revision to the
22 common carriage price?

23 A. No, it revised two components: treatment and
24 distribution --

25 Q. That's what you say is all that should be in it,

1 isn't it?

2 A. That was how the first access price was presented. But
3 it then -- that letter contained numerous caveats.
4 There was no bulk supply price. There was an indication
5 to Ofwat that those figures would form the basis for
6 such a price if Albion took the initiative and went back
7 to Dwr Cymru.

8 Q. We have gone over the construction --

9 THE CHAIRMAN: There was still the issue, was there, about
10 the -- had the issue about whether back-up supply should
11 be included in common carriage been resolved by that
12 point?

13 MR PICKFORD: No, it had not, Madam. The position of
14 Dwr Cymru is that it was never said explicitly one way
15 or the other whether the FAP included back-up or didn't
16 include back-up, and what the Authority then had to
17 investigate as part of its referred work is: was it in
18 or was it out? And it looked at the evidence and said,
19 "It's not very clear, but we think it was needed and we
20 think it's part of the service, so we are going to
21 include it".

22 Then the Tribunal said, "Well, whether it's needed
23 or not, we don't actually think it was part of the FAP,
24 and therefore we are going to exclude it". So this
25 matter was never addressed.

1 A. If I might, Madam Chairman, I think your question was,
2 the figure that emerged at the start of 2004 in response
3 to the Ofwat question, the 17p figure, there was no
4 indication that that formulation included a back-up
5 supply price, a back-up reservation charge. Indeed, it
6 couldn't do so because this was a tariff available to
7 all non-potable customers, most of whom I assume do not
8 have back-up, potable back-up facilities.

9 So it rather works against Dwr Cymru's position.
10 If, indeed, those figures were purported to be a second
11 access price, then one of the various factors that,
12 according to Mr Pickford's arguments, we would need to
13 factor in is an additional price for the reservation
14 charge for back-up potable.

15 THE CHAIRMAN: Perhaps we should go to that letter, because
16 I am not clear in my mind whether what was being offered
17 or what was being communicated to Ofwat was that that
18 was the price for common carriage, or that would be the
19 price of distribution and partial treatment, leaving it
20 open whether, if this was pursued so as to come up with
21 a common carriage price, Dwr Cymru was still saying that
22 additional things would need to be added in.

23 MR PICKFORD: We looked at this letter yesterday, and I made
24 some submissions on it. I am very happy to take
25 the Tribunal again to the SAP. I just have to get the

1 reference for it.

2 A. Folder 5 tab 217, I think.

3 Q. Thank you. Dr Bryan is ahead of me. It might be
4 helpful to understand the context for tab 217. Perhaps we
5 can go to tab 216 first, because it's a response to Ofwat.
6 So Ofwat says to Dwr Cymru on 7 January 2004:

7 "Access price for non-potable water. You are aware
8 of the complaint ... Dwr Cymru's published access prices
9 ... for potable water only."

10 Since then it's introduced a standard partially
11 treated and raw water tariffs. He is saying he can't
12 find any records of the similar access prices.

13 "Could you please provide us with the current, for
14 2003/4 charging year, access price for the treatment and
15 transportation of non-potable water to Albion Water
16 Limited for onward supply to Shotton."

17 That's what is being asked for: the treatment and
18 transportation of non-potable water to Albion Water
19 Limited for onward supply.

20 Then the price that's then provided in the following
21 letter:

22 "Using the derived information from the new large
23 user tariffs and indicative 2003/4 access price for the
24 treatment and transport of non-potable water to Albion Water Limited
25 could be non-potable treatment costs - 3.31 per metre cubed

1 and non-potable transport costs - 14.43 per metre cubed."

2 It said it wouldn't include any other administrative
3 and associated costs. Neither in the Ofwat letter nor
4 in the response is the potable back-up being discussed.

5 (Pause)

6 THE CHAIRMAN: Yes.

7 MR PICKFORD: Now, Madam, I made submissions to you
8 yesterday comparing and contrasting the language of this
9 letter versus the FAP.

10 THE CHAIRMAN: Yes.

11 MR PICKFORD: It doesn't seem to me that that particular
12 issue is one that can sensibly be canvassed with
13 Dr Bryan. It's a matter on which we can make
14 submissions about what the words mean. So I'm not
15 proposing to go through that comparison exercise unless
16 you want me to, but there are some other questions in
17 relation to this that I think it would be helpful to
18 hear his evidence on.

19 If we could go, please, to two tabs earlier in this
20 bundle, which is your diary entry, it's for around this
21 time, and in particular if you could go to page 1350.
22 This is your diary entry for March 2004, the 18th. Do
23 you see that?

24 A. Yes.

25 Q. The very first thing you say -- so this is the day after

1 having received the SAP:

2 "Confirmation of DC's reduced access charge."

3 A. Yes.

4 Q. There is nothing in your note here that complains about
5 it being far too uncertain to be able to make head or
6 tail of or that you just didn't really know what they
7 were up to?

8 A. No, I took the letter at face value.

9 Q. Yeah, and if you will go, please, to 24 April 2004 --

10 A. Could I, if you don't mind, go to the following day,
11 because the action I took following receipt of that
12 letter was to phone Huw Brooker, you will see on
13 19 March, Huw Brooker being the senior lawyer at Ofwat
14 and the officer who had forwarded that correspondence to
15 us on the 18th.

16 So Mr Pickford is right, we had received it on
17 18 March, some two months after Ofwat had got it, and
18 I spoke to Mr Brooker the following day and asked him
19 what the significance of these new figures was. And you
20 will see -- I apologise for my writing:

21 "New tariffs, wrote to DC asking for revised actions
22 price."

23 Q. Pausing there so the Tribunal and I am clear, that is
24 him saying that Ofwat wrote to DC asking for revised
25 access price?

1 A. Ofwat wrote to DC.

2 Q. Yes. Please carry on.

3 A. And that there was no more to it than that. There was
4 no significance in Ofwat's mind, and this is Ofwat that
5 is at that time finalising its determination of the
6 complaint under chapter 2 of the Competition Act, the
7 complaint that would ultimately be overturned by -- the
8 determination of the decision that would ultimately be
9 overturned by the Tribunal.

10 So we had a very clear indication from Ofwat that
11 they did not consider that response to be at all
12 material in the context of what was occupying our mind,
13 namely the legality of the 2001 price.

14 Q. Now, if you had been interested in that price, if it was
15 an attractive level from your point of view, there was
16 nothing stopping you from getting in touch with
17 Dwr Cymru and taking forward negotiations and sorting
18 out a contract?

19 A. I did get in touch with Dwr Cymru following that. I got
20 in touch with the managing director, Dr Brooker, and
21 again, I think asked him -- and I am -- I haven't got
22 the papers in front of me, but from memory I again asked
23 him to resolve what was clearly an anomalous position
24 where the reality of our daily payments to DC did not
25 reflect what was now the new reality that was apparent

1 from that letter.

2 That was the driving force for us, because that was
3 immediate, that was affecting our cashflow -- I won't
4 say profitability because we had none -- our cashflow on
5 a day-to-day basis, and that was what was important. We
6 were a company on the brink and we needed to take action
7 to restore a reasonable margin. Remember at that time
8 the margin was zero.

9 Q. If you could answer my question, and it's quite a simple
10 one: if you had been interested in that price, the
11 17.74p price, for common carriage purposes, there is
12 nothing to stop you from getting in touch and seeking to
13 take forward a negotiation in relation to common
14 carriage, was there?

15 A. That it was a lower priority than bulk supply was what
16 stopped us. Limited resources, we were getting ready
17 for an appeal to the CAT, we just didn't have time at
18 that time to pursue yet other avenues which would, in
19 our mind, inevitably lead to the same problems,
20 obstacles, that we had met all the way along.

21 To say we were jaundiced would probably be
22 a reasonable description.

23 Q. You yourself continued to refer to that price, although
24 you took issue with me when I called it the second
25 access price and you said, "That's wrong", in your

1 notice of appeal when you appealed to the Tribunal,
2 which is at tab 222, a few documents further along in
3 the bundle.

4 If you go to page 1424, paragraph 238, you talk about
5 your methodologies for calculating price, which there
6 give you 2.22p per metre cubed. And you say that they
7 are both significantly lower than the 23.2p per metre
8 cubed offered by Dwr Cymru in 2001, and the revised
9 price of 17.74p per metre cubed received in March 2004?

10 A. Yes.

11 Q. So you seem to be satisfied that it's sufficiently
12 certain that you can talk about it in those terms as the
13 revised price?

14 A. Those are the figures. There are no figures within that
15 letter on the other costs that aren't specified. But
16 the comparison is a fair one, and looking at those local
17 costs I think that estimate was pretty accurate.

18 Q. The true reason why then and subsequently you didn't go
19 back to Dwr Cymru and pick up on that price is because
20 you didn't think that 17.74p was good enough?

21 A. No, we didn't -- we never saw 17.74 as other than
22 a piece of paper with figures on. It was not conveyed
23 to us as a price, let alone a firm price. But it
24 clearly was important evidence on how Dwr Cymru's
25 position had shifted with regard to cost justification

1 between 2000 and 2004. So it was a valuable piece of
2 evidence, but we never saw it at the time as a serious
3 attempt by Dwr Cymru to engage with Albion in the form
4 of a firm and lower access price, and certainly
5 Dwr Cymru never approached Albion in that spirit.

6 Indeed, never approached Albion at all with that figure.

7 Q. I think we discussed -- and probably it can be the last
8 question because I think we have probably got there on
9 this one. But had you thought that the price being
10 offered was one that was more profitable to you than
11 bulk supply, and was going to be a good price for you,
12 there was nothing to prevent you from taking forward
13 things at that point, was there? Nothing?

14 A. I think the key part of your question, Mr Pickford, is
15 had we thought it was more profitable than bulk supply.

16 Here, we had the first firm evidence that the
17 figures underpinning our bulk supply were wrong, and
18 therefore it's entirely natural and, in my view, good
19 business practice that you challenge the price that you
20 are paying today rather than divert energy into
21 a putative price that you might be paying once that
22 price is (a) settled, and (b) you have put the other
23 part of the equation in place, namely the UU bulk supply
24 price.

25 So there is no question, our priority was to address

1 the immediate issue which these figures raised, which
2 was that that we were being clearly significantly
3 overcharged for the bulk supply price, namely with
4 regard to the treatment component.

5 Q. Dwr Cymru didn't budge on the bulk supply price, did
6 they?

7 A. No, they didn't.

8 Q. No, so you had open to you at that point Dwr Cymru
9 saying, "No, bulk supply price is calculated". The
10 reason why they didn't budge is because they said there
11 were different considerations that applied to the
12 calculation of bulk supply price from the access price?

13 A. Did they? Because their managing director, Mr Brooker,
14 said that the basis was exactly the same in his response
15 to the Ofwat section 26 notice in 2001. That was
16 absolutely clear on its face in his covering letter, and
17 I am not aware that that rationale had changed. I don't
18 think I've seen any evidence to suggest it had.

19 MR LANDERS: Is that letter in the bundle?

20 A. It is in the bundle, yes.

21 MR PICKFORD: The point I am making, Dr Bryan, is having,
22 for whatever reason, been told that you weren't going to
23 get a better bulk supply price, if the common carriage
24 access price looked like it was a better price from your
25 point of view, than what de facto you had on the

1 opposite side of the table, which was bulk supply at
2 whatever level, there was nothing stopping you from then
3 saying, "Okay, let's take forward common carriage"?

4 A. Well, you are suggesting to me that we should give up on
5 the bulk supply price point immediately, or at least
6 immediately that Welsh said "No, we are not interested
7 in that". Of course we are not going to give up on that
8 point, we are going to progress it.

9 But what I have to say to you is that that first
10 application that we put into the CAT for permission to
11 appeal, at that time Ofwat's refusal to hand down
12 a decision, was dated 2 April, if I remember rightly,
13 2004. So we were pretty tied up. It's a mammoth
14 undertaking for a small firm to launch an appeal before
15 the CAT, and it's a testament to the CAT that it is
16 possible for an SME to do so, particularly when I was
17 acting as litigant in person.

18 So one, I think, has to look at this evidence in the
19 very real context in which it's set, and not draw too
20 many assumptions from it.

21 Q. Obviously the inferences to draw are something for
22 a later date. I think we have done as much as we can
23 with that.

24 Next topic is the calculations that you have carried
25 out in your particulars of claim, your annexes.

- 1 A. Right, yes.
- 2 Q. The first thing is the benefit share point, and when
3 I say "the benefit share" here, I am talking about the
4 benefit share between yourselves and Shotton Paper.
- 5 A. Are you going to take me to those?
- 6 Q. I will, we will be going to those tables. So 10 we will
7 go to shortly. Before we do, so we take it in proper
8 sequence, we can see what you say about this in your
9 evidence first. So we will start off in bundle 1.
- 10 A. Yes.
- 11 Q. Tab 4, page 84.
- 12 A. I don't appear to have an 84 in mine. This is my
13 witness statement?
- 14 Q. Your witness statement.
- 15 A. What paragraph are you referring to?
- 16 Q. I am referring to the paragraph above 319.
- 17 A. Yes, I am afraid my copy finishes at 82A.
- 18 Q. It might be behind it. One has been provided to you.
19 (Handed)
- 20 A. No, there appears to have been some papers interposed.
21 That's not my fault. Right, I am with you.
- 22 Q. So paragraph 319.
- 23 A. Yes.
- 24 Q. You say:
25 "Albion's original supply agreement with

1 Shotton Paper (clause 7.4 ...) provided: 'the savings in
2 the cost of supply or services or incremental revenues,
3 net of financing and operating costs, arising from such
4 initiatives as may be agreed between the parties, shall
5 be shared between the customer and Albion Water in the
6 proportion 70/30 respectively'."

7 A. Yes.

8 Q. Then you go on to explain what you understand by the
9 term "savings in the cost of supply" at paragraph 322,
10 and you say:

11 "The term 'savings in the cost of supply' is
12 straightforward and represents the difference between
13 Albion's wholesale price, ie the water resource cost
14 plus the common carriage charge, and Dwr Cymru's
15 published retail price were it to supply Shotton Paper.
16 The next step is therefore to identify what Dwr Cymru's
17 retail prices would have been."

18 A. Yes.

19 Q. You say you have taken account of this benefit sharing
20 arrangement in your calculations 1(a), 2(a), 3(a) and
21 4(a)?

22 A. I believe I have, but I would want to double check. But
23 yes, you can take me there in a minute. But yes.

24 Q. We don't have a lot of explanation of the annexes in
25 your particulars of claim or, indeed, your witness

1 evidence. There is a little bit in your skeleton
2 argument. So before moving on, I would just like to
3 briefly look at that, which is in folder 11 tab 1, paragraph 53.
4 Do you have that?

5 A. Yes.

6 Q. If one turns over the page to subparagraphs 7 and 8,
7 that explains options 4 and 4(a), it explains what
8 assumptions are being made in 4, and then the variant
9 in 4(a). If you could just read, and if the Tribunal
10 could read, please, 7 and 8.

11 (Pause)

12 A. Yes.

13 Q. So that's the description of 4 and how it relates
14 to 4(a).

15 A. Yes.

16 Q. If we go finally -- and we will keep out bundle 10 for
17 some time even though we need to go to some other
18 bundles. So if you could please now take up bundle 10,
19 and I would like to go, please -- when you have it.

20 A. Sorry, I was confused by the existence of 9A then.
21 Right.

22 Q. When you have it, if we could go, please, to page 3344.
23 As I say, what I suggest is that although we are going
24 to go to some other documents during this, if we can
25 keep folder 10 out, otherwise we will be constantly

- 1 having to take it out again.
- 2 A. Yes.
- 3 Q. Now, this page deals with your scenario 4(a),
- 4 doesn't it?
- 5 A. It does, yes.
- 6 Q. I am going to put it to you -- and we will go through
- 7 the details of it -- that there are a number of problems
- 8 with this spreadsheet. Some of the issues involve
- 9 questions of law, and so obviously I am not going to
- 10 debate questions of law with you, notwithstanding
- 11 that --
- 12 A. Thank you.
- 13 Q. -- they are wrapped up to some extent with the numbers
- 14 in here. What I am going to do is take you through what
- 15 I say are four particular problems with the way that we
- 16 have done the calculations.
- 17 A. Yes.
- 18 Q. Okay?
- 19 A. Understood.
- 20 Q. So the first problem is this: what you are purporting to
- 21 do here in 4(a) and, indeed, what it says in the title
- 22 is it's an analysis of Albion's financial position if
- 23 the abuse had not taken place.
- 24 A. Yes.
- 25 Q. In order to work out the effect of the abuse, you also

1 need an analysis of Albion's financial position in the
2 real world on the basis of appropriate counterfactual
3 assumptions so that you can compare the two to work out
4 how you have lost out. You understand that?

5 A. Yes, I have attempted that in column 5, "What margin did
6 Albion make".

7 Q. Yes, that's what you have purported to do in column L.

8 A. Yes.

9 Q. I am going to come on to that in a moment. So everyone
10 is clear, I will go through the spreadsheet from left to
11 right and we will come back to that.

12 A. That's fine.

13 Q. Not all of it, but some of the key bits. What you are
14 doing essentially in this analysis is you look at the
15 price to beat, that's your box 1, and the price to beat
16 is what you calculated to be the equivalent volumetric
17 charge for Dwr Cymru based on its published non-potable
18 tariff?

19 A. Yes. If it helps the Tribunal, and spreadsheets can be
20 notoriously difficult to describe, but the first column
21 is the start date for a particular period. I have
22 chosen periods during which the price is the same, so by
23 implication every subsequent time period is when the
24 price has changed somewhat. So that we have the first
25 two columns are the start and end dates of a particular

1 time period; the interval speaks for itself, it's in
2 years; and the volume, again, I hope is
3 self-explanatory. It's the volume of non-potable water
4 actually bought during that period, which I believe
5 Dwr Cymru is now content with.

6 What I have then done is calculated what the
7 prevailing published Dwr Cymru tariff would have been
8 for Shotton Paper absent Albion, and those tariffs, as
9 we heard earlier, were published from 2003/4. So for
10 periods of time prior to 2003/4, the figure I've used
11 there is the prevailing bulk supply price because that
12 was the de facto tariff, and it was the same as the
13 retail price that Shotton Paper would have received with
14 Albion not being there.

15 That's as far as you got, I think, Mr Pickford.

16 Q. Thank you, Dr Bryan.

17 So what that takes us to is what you called the
18 price to beat, which is what we see in column C. So
19 that's the comparator, which is: had Shotton been on the
20 retail tariff, what it would have been paying?

21 A. Yes, and I don't think Dwr Cymru has questioned that
22 calculation.

23 Q. They have not questioned the veracity of that, no.

24 A. Good.

25 Q. Then what you do is you calculate in the next box the

1 cost to you under the assumptions in this counterfactual
2 scenario --

3 A. Yes.

4 Q. -- of the water, and there is the common carriage
5 price, there is the bulk supply price, that's D and E?

6 A. Yes.

7 Q. Then you add it up, fairly enough, to get F?

8 A. Yes.

9 Q. Then what you say in the next box is you then calculate
10 the gross margin available, and you say: let's look at
11 the difference between what Shotton would have been
12 paying if it had been on the retail tariff?

13 A. Yes.

14 Q. And what it costs me -- Albion -- to supply this water,
15 taking those two elements of common carriage and bulk
16 supply?

17 A. Yes, effectively our inputs or wholesale costs, yes.

18 Q. Yes, and you derive a margin, which is in column G?

19 A. Yes.

20 Q. That becomes a sum of money, because it's then
21 multiplied by the volumes in column H?

22 A. That's correct.

23 Q. And that's the gross benefit?

24 A. Yes.

25 Q. What you then have in column L is a title which says

- 1 "What margin did Albion make?"
- 2 A. Yes.
- 3 Q. What it doesn't do in column L is assume that there
4 would have been any benefit share in the real world.
5 There is no inclusion of any figures in your column L
6 that are derived on the same basis as comparing the
7 retail price from Dwr Cymru to the bulk supply price
8 that you were actually getting in the real world, is
9 there?
- 10 A. What column L does is it takes the price that we were
11 selling the water for and subtracts the price that we
12 were buying the water for. That was the actual margin
13 we made. And the Tribunal will see that the first
14 figure is zero for that month in March 2001, the
15 following three periods are negative, and then we return
16 to zero. And then we turn positive and that is when the
17 interim measures awarded by the Tribunal in July 2004
18 kick in.
- 19 THE CHAIRMAN: So how is L compiled, then?
- 20 A. It's essentially the difference between our buying
21 price, which from July 2004 was determined by the CAT
22 itself, and our selling price to Shotton Paper.
- 23 THE CHAIRMAN: So L, those figures are pounds?
- 24 A. Those figures are pounds, and that represents the --
- 25 THE CHAIRMAN: Just tell me --

1 A. Sorry.

2 THE CHAIRMAN: Apologies if you were going to it, but just
3 so I -- in the tops of the other columns you have
4 helpfully said: G equals C minus F, and K equals I plus
5 U plus 0.3, something or other. But with L you haven't
6 really described how it's compiled from these figures.

7 A. No. I apologise for that, Madam Chairman, that is
8 an oversight. It is -- I am trying to ... no. It is
9 an oversight.

10 THE CHAIRMAN: Do you know what it is?

11 MR PICKFORD: I do, Madam, yes.

12 THE CHAIRMAN: Oh. Well, I won't interrupt any more, then.
13 Go on.

14 MR PICKFORD: Perhaps I can assist you, Dr Bryan. I am
15 sorry, I was overconfident. I was looking at -- I knew
16 what column K was.

17 THE CHAIRMAN: We can all see what column K is.

18 MR PICKFORD: No, from somewhere else. You have pulled it
19 out of another part of the spreadsheet. But L I had not
20 done.

21 In any event, what I would like to ask you,
22 Dr Bryan, so that we can be clear about the facts that
23 we then need to make the legal arguments --

24 A. Yes.

25 Q. -- is that what you have not done in L is assumed that

1 you were getting any of this benefit share from
2 Shotton Paper that you have taken into account in the
3 first part of your calculation in the real world; that's
4 correct as a factual matter, isn't it?

5 A. You use "assumed" and "real world". What L was doing
6 was looking at the real world in the sense of what were
7 the real prices we were paying to Dwr Cymru during that
8 period, which from July 2004 were effectively controlled
9 by the CAT by a series of orders on interim measures.
10 And those were effectively, they represented a discount
11 to the bulk supply price that would otherwise have been
12 prevailing, and that discount was set initially at 2.05p
13 per cubic metre and then subsequently at, I believe,
14 3.55p per cubic metre. It is that benefit, the benefit
15 that we received as a result of those interim measures,
16 that is reflected in those figures.

17 MR LANDERS: If I might assist, in 3341 it actually explains
18 what L is, which is merely the margin between the buying
19 and selling price multiplied by the volume.

20 A. Thank you. I thought I had put it in somewhere.

21 MR PICKFORD: Thank you, Mr Landers.

22 MR COWEN: Just by way of clarification, you emphasised the
23 importance of cash earlier on and the fact that you were
24 on the brink.

25 A. Yes.

1 MR COWEN: Is there any place in these calculations where
2 you have taken that and looked at the value of cash?

3 A. No.

4 MR COWEN: Is that because of the interim relief you
5 effectively were in a position --

6 A. I think it was because of the additional complexity that
7 that would have introduced into the calculation
8 primarily, and I am all too well aware of my limits in
9 that regard.

10 MR COWEN: Thank you.

11 MR PICKFORD: Madam, we are kind of halfway through a point,
12 but on the other hand, I think there is some way to go
13 with this and I am obviously conscious that there may
14 need to be a short break for the transcript writer. So
15 I am in your hands as to whether you would like me to
16 continue.

17 THE CHAIRMAN: I would just like to work out how L is
18 derived from the other columns, if it is derived from
19 the other columns.

20 A. If I might assist, Madam Chairman, it's there because
21 what I am trying to do in the counterfactual is work out
22 the difference between the margin, the gross margin that
23 we would have made between the prevailing Dwr Cymru
24 tariffs and our input costs under a variety of
25 circumstances of which this represents one.

1 Now, what I then go on to recognise is that it is
2 not sufficient to look at that gross figure, we need
3 also to reflect the fact that we have received some
4 benefit during that period as a result of those interim
5 measures. So what I'm doing is calculating the figure
6 for gross benefit, and then making sure that I deduct
7 the benefit, the margin that we have already received.
8 So I am not --

9 THE CHAIRMAN: Is L, then, the monetary value of those
10 interim relief --

11 A. Precisely.

12 THE CHAIRMAN: Ah, okay.

13 A. I am sorry, I should have described it thus before.

14 THE CHAIRMAN: The monetary value, taking into account the
15 volumes in fact supplied of the interim relief orders,
16 the interim relief deductions.

17 A. Exactly.

18 THE CHAIRMAN: Right.

19 A. And prior to interim relief, the actual difference
20 between our selling price and our buying price. Yes.

21 THE CHAIRMAN: So it's a stand-alone column, it's not
22 actually a composite of the other --

23 A. No, it's not.

24 THE CHAIRMAN: I think that is a point to break. We had
25 better just have a short break, I think, so if we come

1 back at 3.30.

2 (3.25 pm)

3 (A short break)

4 (3.30 pm)

5 MR PICKFORD: So, Dr Bryan, where you get to with H is what
6 you describe as the "great benefit". And essentially
7 that is the pot that you then apply to the benefit share
8 in clause 7.4, where you say we get out our costs and
9 then after our costs the rest gets divvied up 30/70.

10 A. Yes, the financing and operating costs fall to be
11 deducted first from the gross benefit to produce the net
12 benefit, and it's the net benefit that is then split
13 between the parties, 70 per cent to Shotton Paper,
14 30 per cent to Albion, in the counterfactual where there
15 was a non-abusive access price.

16 Q. We are going to get on to some of those calculations in
17 a bit more detail in a moment, but just to be clear
18 about the pot, you described in your witness statement
19 that the savings in the cost of supply you said is
20 straightforward. So this is the pot, isn't it, the
21 savings in the cost of supply?

22 A. Yes, the difference between the prevailing price and
23 the --

24 Q. Yes. And you say it represents the difference between
25 Albion's wholesale price, and then you put in

1 parentheses "ie the water resource costs plus the common
2 carriage"?

3 A. Yes.

4 Q. And Dwr Cymru's published retail price were it to supply
5 Shotton Paper?

6 A. Yes.

7 Q. If that's the right definition of the savings in the
8 cost of supply, it would also apply to the difference
9 between Albion's wholesale price and Dwr Cymru's
10 published retail price where Albion's wholesale price is
11 under bulk supply, because there is nothing in
12 clause 7.4 which says it only operates under common
13 carriage?

14 A. That's correct.

15 Q. It would also operate under bulk supply?

16 A. Indeed it would, all things -- all other things being
17 equal.

18 Q. So if we were taking an all other things being equal
19 analysis, if we could go, please -- keeping tab 10 -- to
20 also open up bundle 17, tab 74.

21 A. If I had last night's copy it would have been a little
22 easier to find.

23 Q. This is the table I handed up yesterday --

24 A. I recognise it.

25 Q. -- and have you had a chance to look at it overnight?

- 1 A. Yes, I did.
- 2 Q. I'll take you through what I have done. I've taken your
3 scenario 4(a), at least the beginning parts of it, so we
4 have the same dates, the same intervals, the same
5 volumes and the same price to beat. So everything
6 that's not in red, that's in black, is the same as it
7 was --
- 8 A. Yes, I agree.
- 9 Q. -- in your table?
- 10 A. That's right.
- 11 Q. Then what I have done is to pursue the line that we were
12 just discussing, how the benefit share, on your
13 analysis, all things being equal, would also apply under
14 bulk supply?
- 15 A. Yes.
- 16 Q. I have input into column F, rather than being the sum of
17 the common carriage price and a bulk supply price from
18 UU, I have simply input the bulk supply price that you
19 were in fact paying from your scenario 4; you see what
20 I have done there?
- 21 A. The bulk supply price that was set by the Tribunal, in
22 effect, through the interim measures orders.
- 23 Q. It was a combination of two things, wasn't it? It was
24 Dwr Cymru's bulk supply price to you taking account of
25 the interim measures?

- 1 A. Yes, correct.
- 2 Q. You would agree. And we can go back and look at this,
3 but hopefully you have had a chance to look at this
4 overnight, what I have done there is correctly taken the
5 numbers for the bulk supply there and put them into
6 column F?
- 7 A. You have.
- 8 Q. Then the next step, step 3, which is, again, calculating
9 the pot, the pot that's available for sharing once you
10 have deducted your costs, I've left the calculations
11 unchanged, but what does change is obviously the
12 numbers. I have put some new numbers in column F.
- 13 A. Yes.
- 14 Q. So although the calculations stay exactly the same, I
15 didn't change anything in your spreadsheet, new numbers
16 drop out of those calculations, and you understand that?
- 17 A. I do. I haven't gone through each and every column, but
18 yes, it looks as though you have done exactly that.
- 19 Q. What that gives at the bottom for the pot is a figure of
20 1,776,490?
- 21 A. Yes.
- 22 THE CHAIRMAN: That's compared with what?
- 23 MR PICKFORD: That's the sum that's directly underneath. So
24 the gross benefit as per the original counterfactual,
25 you will see, is 1,800,839, and that is the figure that

1 we see in tab 10, the scenario 4(a) that we have been
2 looking at.

3 You see that, Dr Bryan?

4 A. I do.

5 Q. So I have then calculated the difference between the
6 counterfactual and the real world, and I have showed
7 that under your assumptions, if you are applying the
8 benefit share in both, in terms of the pot to share, you
9 would be £24,000 better off in your counterfactual than
10 you would have done in the real world. You see that?

11 A. No, I don't, no. I see the calculations that you are --
12 one of the boffins, I believe, Lady Chairman referred
13 to, has calculated, but it bears no relationship to the
14 real world.

15 In essence what Mr Pickford is putting to me is that
16 in 2004, when in the real world we were going to
17 the Tribunal and saying: we think we are being grossly
18 overcharged, and in particular we have an issue with the
19 first access price. We are also, as it happens, very
20 short of money, not least because the amount of
21 voluntary uplift, the financing that Shotton Paper were
22 providing for us, was, by agreement, due to halve in
23 July 2004. As we know, subsequent -- consequent to that
24 the Tribunal issued a number of orders and that pegged
25 effectively the, our buying price in the way that

1 Mr Pickford describes.

2 What Mr Pickford is saying is, notwithstanding that,
3 we have come to the Tribunal saying we are trying to
4 protect our customer and obviously self-interest as
5 well, we think we are being charged too much.

6 Mr Pickford is now advancing the argument that we should
7 have tracked Welsh Water's ever escalating published
8 non-potable tariff and thereby created a huge extra
9 margin for ourselves which we could have shared with --

10 THE CHAIRMAN: Isn't the scenario that you are positing that
11 you have to apply the Shotton Paper benefit share, both
12 to what would have happened if they had been under
13 a common carriage position, common carriage
14 arrangement --

15 MR PICKFORD: Yes.

16 THE CHAIRMAN: -- and on the basis of what actually
17 happened, which is that they continued with the bulk
18 supply price?

19 MR PICKFORD: If it's going to be relied upon at all, I say,
20 yes, as a matter of law it should apply to both. There
21 are mixed issues here. There's a question of law there.
22 There is also a question of just deconstructing these
23 tables so that the Tribunal can understand precisely
24 what Dr Bryan has done and hasn't done, so that you are
25 able, if you agree with me, for example, on the question

1 of law about whether you should take account of that
2 benefit share or not, you can see that he has not done
3 that in these numbers. If you are with Albion on the
4 question of law, then obviously different consequences
5 follow.

6 A. Might I be permitted to point out one of the non
7 sequiturs in this argument? If we follow the point
8 that's been put to me, let us assume that Albion had no
9 interest in protecting Shotton Paper from unnecessary
10 price rises, let us say that the price had gone up, as
11 indeed it did, from 26p to 36p, to try and make the
12 maths a little easier. So that is, in that sense,
13 a gross benefit of 10p. And so if we forget about any
14 costs, there would in effect be a 3p margin to Albion
15 and a 7p margin to Shotton Paper. That's the point,
16 I think, that you are trying to make.

17 Q. I'm not making any point about you putting up your
18 retail prices, Dr Bryan. So we can try and work through
19 this and work through it at a reasonable pace, it's
20 correct, isn't it, you would agree with me, that taking
21 a strictly contractual analysis, so putting aside what
22 you say is what you felt you could do in the real world,
23 the entitlement to the 30 per cent benefit share that
24 you are asserting and relying upon as operating in the
25 counterfactual world --

1 A. Yes.

2 Q. -- that contractual entitlement was an entitlement that
3 you had, if you had it at all, in the real world too?

4 A. Yes.

5 Q. Yes, and what you are saying to me is, notwithstanding
6 that entitlement, you are saying: well, in the real
7 world we didn't feel that we could enforce that
8 entitlement?

9 A. No, I didn't say that.

10 Q. Okay, so what are you saying?

11 A. I am saying that we were constrained, we were
12 constrained by the fact that the Tribunal obviously
13 thought our arguments were sound and took action in the
14 form of various orders that enabled us to have a margin.

15 Now, in the alternative view that you propose, there
16 wouldn't have been a basis for us to go to the Tribunal
17 and plead poverty if we simplify our case, because our
18 price is going up and our margin is there, when it
19 clearly wasn't when we made the application to
20 the Tribunal. Not only that, but our bulk supply
21 contract with Dwr Cymru had finished in 2003 and we were
22 working on a month by month basis. So if our price --
23 if we tried to create a margin and put our price up, it
24 is common sense that Dwr Cymru would try and impose
25 their proposed bulk supply price to us, which was

1 effectively shadowing their tariff.

2 So in the counterfactual that -- the alternative
3 view of the real world that you are trying to paint,
4 I don't see how, given the constraints imposed on all
5 the parties by the process that we were going through,
6 that these margins, these benefits, could have possibly
7 been material -- could have possibly materialised.

8 Q. In the real world you didn't seek to rely upon this
9 clause, did you, to extract benefits from Shotton Paper?

10 A. During the period of the proceedings, no, we did not.
11 They were in abeyance, in effect, because we were
12 engaged in -- and it's not too fanciful -- a fight for
13 our survival.

14 Q. You said "during the period of proceedings"; during the
15 whole of the period over which you claim damages?

16 A. No, I am talking about the period of the proceedings.

17 Q. Right. So --

18 A. During which -- which is effectively the period from
19 2004 to 2008.

20 Q. During the period over which you claim damages --

21 A. Yes. The earlier period as well.

22 Q. -- which is from 2 March 2001 to 7 November 2008?

23 A. Yes, but for the earlier period, the period prior to the
24 interim measures, there was no margin, there was no
25 possible way that the 70/30 split could operate, because

1 our buying price was actually higher than our selling
2 price, as your table helpfully illustrates.

3 Q. So for the second period you are saying that you did not
4 enforce that contractual right?

5 A. No.

6 Q. No, you agree with me?

7 A. The position --

8 THE CHAIRMAN: What are you talking about a contractual
9 right? It's a right of Shotton Paper, isn't it, to get
10 70 per cent of the --

11 MR PICKFORD: No, Madam, the way in which Albion constructs
12 its scenario here in 4(a) is it says: look at what
13 Shotton would have been paying had it remained on the
14 Dwr Cymru retail price. So it's effectively saying:
15 look, Shotton is much better off with us, got a lower
16 price than that Dwr Cymru retail price, and therefore we
17 want our share of that. And you, Shotton, get to keep
18 70 per cent of that benefit all to yourself, but what
19 you have to do is you have to give us 30 per cent of
20 that benefit relative to a price that no-one is paying.
21 It's a hypothetical nominal price that Shotton would
22 otherwise be paying. So the pot of money to be shared,
23 as it were, sits in Shotton's hands.

24 That's correct, isn't it?

25 A. No, it's not a hypothetical price, it's a published

1 market tariff that is the --

2 THE CHAIRMAN: But it's hypothetical so far as

3 Shotton Paper's payment of it is concerned.

4 A. Yes. It's the alternative.

5 MR PICKFORD: So the pot of money, as it were, is

6 a hypothecated pot of money that Shotton has; that's

7 correct, isn't it?

8 A. I am sorry, which pot of money are we talking about?

9 Q. Yes, the money from which the benefit share comes.

10 A. The gross benefit, yes.

11 Q. The gross benefit.

12 A. Yes.

13 Q. You don't have that cash, do you, under these scenarios?

14 It's a benefit that Shotton has achieved, and you are

15 saying, "We want 30 per cent of that benefit"?

16 A. No, no, no. No, I am sorry, Mr Pickford, it doesn't

17 work like that at all. We are a licensed undertaker

18 which is required by Ofwat to publish a tariff at the

19 beginning of each year. The way that this mechanism

20 would work is that at the beginning of each year we

21 would sit down with Shotton Paper and we would look at

22 the difference between what we knew would be our buying

23 price under whichever counterfactual scenario,

24 indexation, you care to mention, and what we know would

25 be the competing price from Dwr Cymru's published

1 tariffs. We would then sit down with them on an open
2 book basis and say, "There is the gross margin, these
3 are the costs that have to be taken out of that gross
4 margin initially, and here is the balance, the balance
5 will be split 70/30", and we would then construct
6 a tariff on that basis, and Shotton Paper would pay that
7 tariff, and that tariff would reflect our best estimates
8 of that benefit sharing arrangement. And if our best
9 estimates proved to be somewhat out at the end of the
10 year, then we could make certain adjustments.

11 But we are required by law, and certainly by the
12 Regulator, to produce tariffs at the beginning of each
13 year and have them agreed by Ofwat, and so that is the
14 process that we would undertake.

15 Q. I'm not suggesting that the money actually comes to you
16 from Shotton, I am suggesting that in calculating your
17 tariff you are taking account of the fact that there is
18 a benefit to Shotton in not paying Dwr Cymru's retail
19 tariff, and that feeds through into the benefit share
20 which feeds through into the calculation of the tariff.

21 Now, if we could look, please, at the hand-up, do
22 you agree with the point that I just put to you?

23 A. No.

24 Q. Okay.

25 A. Well, could we be quite clear what "the point" is that

- 1 you want me to agree to?
- 2 Q. Maybe it's best done by reference to the diagram that
3 was attached to the skeleton argument, which is in
4 bundle 11, tab 2, and it's below paragraph 122, from my
5 recollection. Above paragraph 122.
- 6 THE CHAIRMAN: What page is that?
- 7 MR PICKFORD: That's on page 3488II.
- 8 A. I am sorry, I am in the wrong bundle. (Pause) Yes.
- 9 Q. What this diagram shows -- and it's obviously not real
10 numbers, it's just illustrative -- is that what the
11 share, the pot that becomes available to you under your
12 calculations is the area under the graph below the "DC
13 retail tariff" and above the "Albion's costs under
14 common carriage", and that's the pot that you have
15 calculated?
- 16 A. If you mean that is the gross margin between buying and
17 selling, yes, you are correct.
- 18 Q. Similarly there would also be a pot under bulk supply,
19 which is the triangle, the green triangle in mine. It
20 should be in yours.
- 21 A. Not, I would argue, in the factual situation where we
22 were engaged in proceedings before the Tribunal, which
23 heavily -- which made it impractical and, from our point
24 of view, unethical to abuse our position by trying to
25 extract more money from Shotton Paper. I would still --

1 I don't understand the points of law, I know you don't
2 expect me to, but I still cannot understand the scenario
3 where that benefit share could be operated in situations
4 where any benefit was merely the margin that
5 the Tribunal had awarded to Albion to allow it to fight
6 the case, plus the residual --

7 THE CHAIRMAN: No, the benefit to Shotton, which Mr Pickford
8 said arose even in the real world, was the difference
9 between what they were paying you for water --

10 A. And what they would have been paying.

11 THE CHAIRMAN: -- and what they would have been paying you
12 under the Dwr Cymru retail tariff.

13 A. That is arguable, yes, yes, but the only mechanism that
14 we have for recovering that benefit as a licensed
15 undertaker is through our tariff, and our tariff was in
16 effect set by the Tribunal. Had we tried to vary it,
17 well, the thought never crossed our mind because it
18 would have -- (a) we could never have stood up in front
19 of the Tribunal and made a case for interim measures,
20 and we would have ended up having to charge our customer
21 a much higher price than the high price which we already
22 thought was excessive. I don't think that we could ever
23 have contemplated such a move.

24 THE CHAIRMAN: But am I right in thinking that that's the
25 point that you are making: that, in theory, on the basis

1 of the arrangements that occurred in the real world,
2 Shotton was still paying less for their water buying it
3 from Albion, than they would have paid if they had been
4 stuck with the Dwr Cymru tariff.

5 MR PICKFORD: Yes.

6 THE CHAIRMAN: And under the contract, there was supposed to
7 be a split of that benefit 30/70, and you are saying
8 that if you are really going to compare the difference
9 between the real world and the counterfactual world, you
10 have to take into account that in the real world they
11 were entitled to that chunk of that saving that Shotton
12 were in fact making?

13 MR PICKFORD: Yes, because it's not attributable to the
14 infringement by us that they lost out on it, if they
15 were entitled to it in any event. That's part A of this
16 bit. There is a part B to it as well, and we saw the
17 difference in numbers on page 6941, which I took
18 Dr Bryan to.

19 Now, Dr Bryan has given evidence that he was
20 required by law to produce an annual tariff for his
21 special agreement with Shotton, that was the only way he
22 says that he could have dealt with this matter of the
23 price, and therefore, because he was in --

24 THE CHAIRMAN: He could have collected the 30 per cent.

25 MR PICKFORD: Yes, and therefore, because he was in Tribunal

1 proceedings, effectively by law he seems to be
2 suggesting he was prevented from being able to collect
3 the monies that would have been due.

4 We would ask Albion if they could please produce the
5 law that they are relying upon tomorrow because we don't
6 accept that position in law.

7 A. I don't think the transcript shows that I said "in law".
8 If I did, I may have erred, but -- certainly our
9 strongly held view that we couldn't do that, and it was
10 never suggested that we could or should.

11 Q. If Dr Bryan or Albion could please produce whatever it
12 is that they rely upon as preventing them from being
13 able to charge in the way that they say they couldn't
14 charge.

15 Now, coming back to the numbers.

16 THE CHAIRMAN: Well, how was the price that Shotton paid you
17 for the water calculated?

18 A. It was calculated effectively by virtue of the bulk
19 supply price set by the Tribunal. There was a de facto
20 bulk supply price, which is what was charged to
21 Shotton Paper. We got the benefit of the reduction in
22 that bulk supply price awarded by the Tribunal, and then
23 for the first period of time Shotton Paper was also
24 making additional voluntary payments to us to assist our
25 financing of the proceedings.

1 THE CHAIRMAN: So the interim relief was expressed as pence
2 off the --

3 A. Bulk supply price.

4 THE CHAIRMAN: Yes, but the bulk supply price between whom?

5 A. Between Dwr Cymru and Albion.

6 MR PICKFORD: We don't demur from that, Madam.

7 THE CHAIRMAN: Yes, but what was Shotton's price, then?

8 What price was Shotton paying you for the water?

9 A. Shotton was paying us the undiscounted bulk supply
10 price; in other words, the price less -- without the
11 deduction ordered by the Tribunal, and they were over
12 and above that making a voluntary contribution,
13 a financing contribution to us of 1.5p.

14 MR PICKFORD: Right. I would like to look, please, at the
15 table that I handed up, and the line that's
16 1 August 2006 to 9 November 2006. Do you see that line?

17 A. Yes.

18 Q. On the basis of Dwr Cymru's retail tariff at the time,
19 which you have calculated then as being 30.57p?

20 A. Yes.

21 Q. And the cost of the water purchase, which was the bulk
22 supply price, taken from column B of your scenario 4,
23 that yielded a margin of 0.0499, so pretty well 5p per
24 cubic metre?

25 A. Yes.

1 Q. We know that 2.05p of that was as a result of the
2 interim relief being provided by Dwr Cymru?

3 A. Yes. I think that was just before the interim relief
4 was increased.

5 Q. And that leaves a further 2.94p per cubic metre, so
6 almost 3p, which arises because the Dwr Cymru tariff has
7 now gone up and exceeded 30p, so there is a gap that's
8 opened up?

9 A. Yes.

10 Q. So on the basis of our agreement between us about how in
11 law you say the benefit share would have worked, there
12 was a 3p margin to then be shared out according to the
13 terms of clause 7.4?

14 THE CHAIRMAN: Just tell me again what you are comparing?

15 MR PICKFORD: So this is my line -- I have taken the line
16 1 August 2006 and I have compared 30.57 with 25.58, and
17 that gives us 4.99p, and then there are some
18 calculations which aren't on this sheet, so the further
19 set of calculations I have just gone through with
20 Dr Bryan, I have recognised that that 5p of margin
21 contains about 2p of interim relief from Dwr Cymru. So
22 that is -- and then there is 3p, which arises as
23 a result of the fact that the retail price that
24 Dwr Cymru charges has now gone to above 30p, whereas the
25 bulk supply price would be at about 27p. And it's

1 written down here as 25p because of the interim relief.

2 What I have just explained to the Tribunal, so
3 far --

4 THE CHAIRMAN: You are taking the interim relief out there
5 because you are dealing with that in another column?

6 MR PICKFORD: Yes, and I am being fair to Dr Bryan, I'm not
7 suggesting that the interim relief aspect would have
8 fallen to be shared.

9 THE CHAIRMAN: So 1 August 2006 to November 2006, during
10 that period, the tariff, Dwr Cymru tariff which Shotton
11 would otherwise be paying but for the inset of Albion,
12 is 30.57. In fact, the costs that Albion is incurring
13 in providing that water, ignoring the interim relief, is
14 about 27.5. So they are getting the kind of benefit,
15 with which clause 7.3 in the agreement is concerned, of
16 about 3p?

17 MR PICKFORD: Yes.

18 So far you are with me, Dr Bryan, aren't you?

19 A. I think I am following you, yes.

20 Q. When you say you're following me, you agree with the --

21 A. Yes, yes, I can see the --

22 Q. Calculations that we've got to so far and how it all
23 works?

24 A. -- analysis you are undertaking, yes.

25 Q. We can certainly put folder 11 away, and it's probably

1 best to keep those charts fairly close at hand.

2 Then we go to folder 7. When I say charts, I mean
3 tables. So the tables in 17 and 10 we will keep.

4 If you could please go to tab 255, page 2071I. Do
5 you have that?

6 A. Yes, I do.

7 Q. This is your witness statement in response to
8 the Tribunal's request of 1 November 2006, and this
9 concerned your follow-up application for variation of
10 the interim relief.

11 A. Yes.

12 Q. Do you recall that?

13 A. I do.

14 Q. It's by you, and you explain in paragraph 1 -- is
15 the Tribunal missing some papers?

16 THE CHAIRMAN: I don't seem to have that.

17 MR PICKFORD: 2071I. Hopefully we can have some further
18 ones handed up. (Handed)

19 (Pause)

20 THE CHAIRMAN: Yes.

21 MR PICKFORD: Does everyone have that document now? I am
22 grateful.

23 So you are setting out, you see at paragraph 1,
24 sub 1, an update on inter alia the financial position of
25 Albion Water?

1 A. Yes.

2 Q. And in paragraph 6, if you could please turn to that,
3 you set out all of the key current circumstances that
4 relate to your financial position. If you could please
5 read paragraph 6.

6 (Pause)

7 A. Yes.

8 Q. Now, you do not there make any mention of having
9 an entitlement to a benefit share but one that you are
10 not claiming, do you?

11 A. No.

12 Q. I would suggest the reason is because in fact you didn't
13 believe that you had an entitlement to a benefit share?

14 A. Under those circumstances, no, or we would have -- we
15 would never have made an application to the Tribunal for
16 interim relief if we felt that there was a legitimate
17 way of creating a margin.

18 Q. You told --

19 A. But by abusing our position with our customer by forcing
20 prices up to beyond a price which we already thought to
21 be abusive, that would never have occurred to us.

22 Q. You told me before that you believed you had
23 a contractual entitlement, we were just going through,
24 to a share of 3p, of 30 per cent of the 3p margin, and
25 you were with me at that point?

1 A. I was with you on the calculation, not on the
2 contractual entitlement.

3 Q. You also agreed with me earlier that you had
4 a contractual entitlement, but you said that you didn't
5 feel that you were in a position to be able to pursue
6 that because of all the circumstances?

7 A. The only way that that contractual entitlement could
8 have been manifested in that situation would have been
9 if we had put up our price to Shotton Paper, and we
10 could not do that, morally we could not do that, because
11 it wasn't justified. And we certainly couldn't do it in
12 the circumstances where we had made a case to
13 the Tribunal that effectively Shotton Paper's prices
14 should be protected as a result of the interim measures
15 that gave us a working margin.

16 Q. Okay. Could you go, please, to tab 265 of the same
17 bundle, 7. Do you have that?

18 A. Yes.

19 Q. This is an email from you to Andrew Bronnert, and you
20 are describing, about 15 lines down or so, you say:

21 "As soon as we get a new definitive and fair price
22 for the water ..."

23 And note "for the water". So here, just pausing
24 there, you are talking about a bulk supply, aren't you?

25 A. (Pause) I don't know whether I was restricting that

1 term to the outcome. I think I was -- I think the sense
2 in which you should read that is a fair price for the
3 water that we supply to Shotton Paper, however it's
4 delivered, be it bulk supply or common carriage. And
5 clearly the proceedings that I am describing above and
6 the judgments of the Tribunal were all related to common
7 carriage. So I don't think you can read into that that
8 I am referring to bulk supply, but --

9 Q. You go on to say:

10 "This will be reflected in a reduction in your
11 tariff."

12 A. Yes.

13 Q. You are not suggesting anywhere there that the reference
14 point is the tariff that Shotton would otherwise be
15 paying. What you are saying here to Mr Bronnert is: you
16 are currently paying whatever -- let's, for the sake of
17 argument, say it's 26p. It had obviously been inflated
18 a certain amount by then, but it's 26p, if. We manage
19 to get a better price through our efforts, whatever they
20 may be, common carriage, bulk supply, and we bring the
21 price down below that, let's say to 20p, then there will
22 be a reduction in your tariff to reflect the benefit
23 sharing between us 70/30 in your favour. So what that
24 means is that the tariff is going to go down, to make
25 the sums easy, let's say that the benefit is 10p from

1 26. And what you are describing to Mr Bronnert here is
2 that they get 7p of that benefit and you get 3p of that
3 benefit.

4 A. I am not saying anything of the sort.

5 Q. So their tariff goes down to 19?

6 A. No, I'm not saying anything of the sort. (a) that's not
7 the way that the benefit share works --

8 Q. Subject to the cost points, I should have said.

9 A. Well, the cost point is a pretty significant point,
10 given the amount of costs that both --

11 THE CHAIRMAN: We are looking at the -- oh, no, no, this is
12 still the original one.

13 A. What this does do, Mr Pickford, is confirm what I told
14 you a little earlier: namely, that the benefit would be
15 expressed as a revised tariff, and I honestly believe
16 that's all you can read into that.

17 MR PICKFORD: Now, if we could go to tab 164 of bundle 4,
18 please. We are back at the workshop document that we
19 considered yesterday in a different context and we
20 looked at a different bit of it.

21 A. Right. Yes.

22 Q. We went yesterday to section 3.1 on page 1025, and we
23 looked at the bottom of that page. Do you recall that?

24 A. Yes.

25 Q. Then over the page, same section, we see you discussing

1 the benefit share, and you say:

2 "Albion Water's contract allows for the recovery of
3 all costs accrued to date plus 30 per cent of any net
4 benefit from improvements in supply costs. These
5 benefits will only be triggered by improvements in the
6 cost of supply."

7 A. Can you just point whereabouts in the document it is?

8 Q. The top of page 1026.

9 A. Sorry, yes. Yes, I apologise. Yes.

10 Q. It doesn't say anything about the net benefits being
11 triggered by increases in Dwr Cymru's retail tariff,
12 does it?

13 A. No.

14 Q. Under your calculations, the vast majority of the
15 benefit that you have ascribed to the pot that you then
16 share, as we saw from the calculations that I carried
17 out, comes from an increase in Dwr Cymru's retail price,
18 not from a decrease in your buying price, and therefore
19 the price that you could sell on to Shotton?

20 A. The two factors work together. What we are talking
21 about is: how do we achieve a net gain in the current
22 position? My understanding of competitive markets is
23 that, you know, there are price makers, there are price
24 takers, and there is no question that Dwr Cymru was at
25 all times the price maker.

1 It is by no means unusual to see a calculation of
2 benefit that reflects what the customer would otherwise
3 be paying absent the entrant, and I don't see anything
4 contradictory in this.

5 Q. This is the final question on the benefit share, and
6 then we will move on to another topic and we are nearly
7 there. If I could please hand up a transcript from the
8 main hearing, and this is the evidence that you gave
9 when being cross-examined by Mr Vajda, Queen's Counsel,
10 on the topic of the benefit share. (Handed)

11 We will need to put that into tab 17, and obviously
12 I will ensure my solicitors have found a place for it
13 and an index number tomorrow.

14 We have here an extract from the transcript of
15 a hearing in May 2006. If you could please turn to
16 page 29 of that transcript, you should see third line
17 down Professor Pickering and a question from him. Do
18 you see that?

19 A. Is this my cross-examination?

20 Q. This is your cross-examination. I am afraid, having
21 just looked at this, that we can't immediately, I think,
22 pick that out from the paper. I we can tell from the
23 re-examination, actually. If you go to that on the next
24 page, "Re-examined by Mr Thompson":

25 "Just a very few questions, Dr Bryan."

1 We see that on the following page, page 30, that
2 it's you.

3 A. Yes.

4 Q. Let's go back to page 29. If you could please read from
5 line 3 to line 18, so this is a question from
6 Professor Pickering initially about the 70/30 formula,
7 and your answer down to the end of line 18.

8 (Pause)

9 A. Yes.

10 Q. You say:

11 "... applies when you can ascribe the benefit to
12 your activities"?

13 A. Yes.

14 Q. And Dwr Cymru putting up its retail tariff, you can't
15 ascribe benefit to your activities, can you?

16 A. What I was describing to Professor Pickering was the
17 situation, and I have referred to it, I think, in
18 managing directors' reports, that when we started at
19 Shotton Paper and this sharing agreement was there right
20 from the start, it was also anticipated that we would
21 work with them to create internal improvements in
22 efficiency, and the sharing of benefits there would also
23 apply.

24 What I am describing to Professor Pickering here is
25 the real life problems we found when we are working in

1 partnership in a complex industrial process, and you
2 then at the end of the day, as we tried to, say, "Well,
3 we have saved you that much water", the response
4 invariably was, "Well, no, you didn't, we were the ones
5 who turned off the hoses that were running" or "We were
6 the ones that mended the leak that you pointed out".

7 So as a practical measure, it was perhaps
8 a reflection of our initial naivety, but it was also
9 a reflection of the fact that we were working
10 exceptionally closely with the team at the paper mill.
11 And it's very difficult in reality to ascribe particular
12 benefits simply according to that sort of formula. So
13 we have a situation where, in reality, the principal
14 benefit that is indisputable is the benefit that
15 Shotton Paper achieves by virtue of us being in the
16 market and fighting for their interests over
17 a considerable period of time.

18 Q. Thank you.

19 A. I don't think that's -- that contradicts what I said to
20 Professor Pickering, I certainly hope not.

21 Q. If we could go back, please, to folder 10, which I said
22 we would need to keep out, and back initially to
23 page 3344, which was the scenario 4(a) that we were
24 looking at when we started out.

25 A. Yes.

1 Q. You have said that the benefit share works out in terms
2 of a revised price to Shotton Paper?

3 A. Correct.

4 Q. Can you show me where on that table you have calculated
5 what the price is to Shotton Paper that takes account of
6 the benefit share?

7 A. I don't need to in this formulation because it actually
8 falls out of this calculation -- I don't need to
9 calculate the tariff. I have done so, and the tariff
10 that's implicit in this appears in the Corus sheets
11 derived from this very data, because we are bound by
12 licence condition E of our instrument of appointment not
13 to discriminate between customers. And clearly in
14 seeking to supply Corus, there was no basis for not
15 charging them the same price as Shotton Paper.

16 But for this calculation, what was important was not
17 what we were charging Shotton Paper, but what benefit we
18 actually accrued. And so, therefore, this calculation
19 expresses the costs that we recover, the UU benefit
20 share to the extent that it existed, 30 per cent of the
21 net benefit, the remainder in the counterfactual passing
22 to Shotton Paper, minus the benefit received in column L
23 that we have already been to.

24 Q. You said you calculated, you have shown it in the Corus
25 quantum?

- 1 A. Yes.
- 2 Q. I would suggest that the numbers that appear in the
3 Corus quantum, AW tariff, do not include any calculation
4 of benefit share?
- 5 A. Well, I will certainly check those calculations. If
6 they are wrong, I will certainly apologise and correct
7 them. But I have to say that Dwr Cymru were very
8 proficient at crawling over my spreadsheets and
9 certainly identified some really quite tiny points,
10 which shows the diligence to which they addressed the
11 task. And they didn't point to an error in the tariff
12 calculation. But I will certainly look at it.
- 13 THE CHAIRMAN: Over that period, was there in fact a tariff
14 of what Shotton paid you for the water?
- 15 A. No, it was essentially the unreduced bulk supply price
16 that was being paid --
- 17 THE CHAIRMAN: Between Albion and Dwr Cymru?
- 18 A. Between Albion and Dwr Cymru, effectively discounting
19 the effect of the interim measures.
- 20 MR PICKFORD: If your analysis is correct, and the benefit
21 share feeds through into reduced price, that reduced
22 price obviously determines what margin you get,
23 doesn't it? Lower price for Shotton means less margin
24 for you?
- 25 A. Yes, the tariff that we calculate through this method,

1 which is the tariff that encapsulates the 70 per cent of
2 net savings to Shotton Paper, that tariff is designed to
3 give Shotton Paper those net benefits and to retain for
4 Albion the 30 per cent according to the agreement.

5 Q. So we would need to be able to see what the tariff is
6 that you say you are getting from Shotton to be able to
7 work out what your margin is, and it's not here?

8 A. No, we don't need to see that. And I do apologise if
9 it's not clear, but my understanding of the feedback I'm
10 getting from Welsh is that it was actually clear.

11 Essentially what I have done is quite openly -- and
12 I have set it out as clearly as I could -- calculated
13 the process that we would go through looking at the
14 difference between our target price and our buying
15 price, namely the gross margin, and subtracting from
16 that a number of legitimate --

17 THE CHAIRMAN: When you say "target price", you mean the DC
18 tariff price?

19 A. The DC tariff price, the prevailing --

20 THE CHAIRMAN: Let's keep calling things by the same names,
21 otherwise we will get in a big muddle.

22 A. The prevailing DC tariff. And I have built up what we
23 would have effectively kept of that gross benefit. The
24 remainder, the 70 per cent of the net benefit, would
25 have been passed on to Shotton Paper as a discount to

1 the Dwr Cymru published tariff. That is how it would
2 have appeared to Shotton Paper. They would see their
3 tariff from Albion and they would be able to compare it
4 to the Shotton Paper tariff -- sorry, to the Dwr Cymru
5 tariff and would see very graphically the benefit of
6 staying with Albion. And similarly, because our tariffs
7 are required to be published, Corus could equally see
8 what the prevailing tariff was from Albion and compare
9 it to the tariff that they were being exposed to from
10 Dwr Cymru.

11 MR PICKFORD: Madam, that was the most difficult of the
12 points on the spreadsheet, but there are three hopefully
13 considerably shorter ones left.

14 I realise it's now 4.30. It's very difficult to say
15 exactly how long they will take, given that sometimes --

16 THE CHAIRMAN: I think they might be quicker if we are
17 a little fresher tomorrow morning.

18 MR PICKFORD: I should be able to wrap them up quickly
19 tomorrow morning.

20 MR BEARD: I am conscious of timing overall. As indicated
21 previously, I have some cross-examination that I need to
22 take up with Dr Bryan. I hope to be very, very much
23 briefer, but I think it is likely now that a lot of
24 tomorrow morning will be taken up with continued
25 cross-examination of Dr Bryan.

1 Nonetheless, I do wonder whether, if it weren't of
2 great inconvenience to the shorthand writers,
3 the Tribunal or anyone else, we might sit slightly early
4 tomorrow, conscious that Dr Bryan will be finished by
5 lunchtime and, therefore, it won't be a single witness
6 all day.

7 THE CHAIRMAN: Yes, we will sit at 10 tomorrow, then.

8 MR BEARD: I am most grateful.

9 THE CHAIRMAN: So until 10 tomorrow morning. Thanks very
10 much.

11 MR BEARD: Thank you very much.

12 (4.35 pm)

13 (The court adjourned until 10.00 am
14 on Friday, 19 October 2012)

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