



1 [2004] CAT 9

2

3 IN THE COMPETITION
4 APPEAL TRIBUNAL

Case No. 1031/2/4/04

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6 Victoria House,
7 Bloomsbury Place,
8 London WC1A 2EB

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29th April 2004

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Before:

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SIR CHRISTOPHER BELLAMY
(The President)

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THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

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Sitting as a Tribunal in England and Wales

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B E T W E E N:

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ALBION WATER LIMITED

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Appellant

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- and -

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THE DIRECTOR GENERAL OF WATER SERVICES

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25

Respondent

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supported by

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DŴR CYMRU CYFYNGEDIG (1)

29

30

and

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UNITED UTILITIES WATER PLC (2)

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Interveners

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DR JEREMY BRYAN, MR MALCOLM JEFFERY and MR DAVID KNAGGS

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appeared on behalf of Albion Water Limited.

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MS VALENTINA SLOANE and MR HUW BROOKER appeared on behalf of
40 the Director General of Water Services.

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MS SUYONG KIM and MS RONA BAR-ISAAC appeared on behalf of the
43 Intervener Dŵr Cymru.

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MR FERGUS RANDOLPH and MR SIMON GARDINER appeared on behalf of
46 the Intervener United Utilities Water plc.

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Transcribed of the Shorthand notes of

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Harry Counsell & Co.

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Clifford's Inn, Fetter Lane, London EC4A 1LD

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Tel: 0207 269 0370

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RULING

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Thursday, 29th April 2004

R U L I N G

THE PRESIDENT: The Tribunal has today been considering, in a Case Management Conference, the situation that arises in an appeal lodged with the Tribunal on 2nd April 2004 by the Appellant, Albion Water Limited ("Albion"), against the Director General of Water Services ("the Director").

By way of background, Albion holds an inset appointment, granted in May 1999, under the Water Industry Act 1991, which gives Albion the status of a licensed undertaker for its specific geographical area, which is on Deeside. Albion is, we understand, the only new entrant company to have been granted an inset appointment under that Act, all the other statutory water undertakers in England and Wales being, in effect, monopolies in their local area.

As we understand it, this case arises out of the supply of water to Shotton Paper, which is a large newsprint mill on Deeside owned by UPM (UK) Limited. UPM is Albion Water's principal customer covered by the inset appointment. The water in question, as we understand it in bare outline, is extracted from the River Dee by United Utilities Limited and is supplied by United Utilities to Dŵr Cymru, in whose area Shotton Paper Mills are situated. Dŵr Cymru then supply that water to Albion for onward supply to Albion's customer, Shotton Paper.

Apparently, after its inset appointment, Albion commenced negotiations to obtain the water supply in question directly from United Utilities rather than via Dŵr Cymru. To that end, Albion Water applied to Dŵr Cymru for what is known as a common carriage access price to enable Albion to be supplied by United Utilities, but for the water in question to be piped by common carriage across a system known as the Ashgrove system operated by Dŵr Cymru. The access price quoted by Dŵr Cymru was, according to Albion, such as to give Albion no margin between its effective wholesale cost and the retail price that it was able to charge Shotton, the situation thus

1 giving rise to what is known as a margin squeeze. The
2 question of margin squeeze has recently been considered by
3 the Tribunal in Genzyme v The Office of Fair Trading
4 [2004] CAT 4.

5 Considering that there was in operation a margin
6 squeeze, on 11th December 2000, Albion made a complaint
7 about the activities of Dŵr Cymru, in respect notably of
8 the access price, to the Director, alleging an abuse of
9 dominance contrary to the Chapter II prohibition imposed
10 by the Competition Act 1998 ("the Act").

11 On 13th November 2001, the Director wrote back
12 to Albion, stating, among other things, that it was very
13 difficult to see how Dŵr Cymru's approach in this case
14 could constitute an abuse within the meaning of the Act
15 and that, "Overall, we find it difficult to see how Dŵr
16 Cymru could be said to have breached the Chapter II
17 prohibition."

18 On 4th March 2002, the Director apparently sent
19 Albion a case closure letter.

20 On 14th May 2002, Albion's then solicitors made
21 an application to the Director under section 47 of the
22 1998 Act, inviting the Director to withdraw or vary the
23 decision that they alleged he had taken on 4th March 2002
24 to the effect that no breach of the Chapter II prohibition
25 had occurred.

26 On 21st June 2002, Ofwat apparently stated that,
27 in its view, no decision had been taken, but Ofwat agreed
28 to reopen the procedure to issue a fully reasoned
29 decision.

30 A year later, on 6th June 2003, Ofwat apparently
31 issued a draft decision to Albion upon which Albion
32 commented in letters of 9th July 2003 and 13th August
33 2003. It had apparently, at or about that time, been
34 intimated to Albion that a final decision could be
35 expected by November 2003.

36 On 22nd October 2003, Ofwat indicated that the
37 deadline of November 2003 was not going to be met and that
38 the final decision would be issued in February 2004.
39 There was then an indication that a further draft decision
40 would be issued in mid-December 2003 and Albion was asked

1 to ensure that its staff would be available over Christmas
2 in order to be able to comment on that draft decision.

3 No decision or draft was in fact issued at that
4 time and, on 29th December 2003, there was a revised
5 indication from the Director that a draft decision would
6 be issued by mid-January 2004.

7 On 20th January 2004, the Director wrote to
8 Albion apologising for the delay and indicating that a
9 revised draft decision would be sent to Albion in March
10 2004.

11 On 27th January 2004, in a letter, it was stated
12 by the Director that Ofwat was in the final stages of its
13 investigation, and in further letters of 13th January and
14 4th February 2004 from the Director to Albion it was
15 indicated that Ofwat would shortly produce a revised draft
16 decision.

17 No decision or draft in fact emerged prior to
18 the introduction of this appeal on 2nd April 2004.

19 Albion contends in its appeal that the Director,
20 following the events that have happened has, in fact,
21 taken a decision against which the Applicant, Albion, is
22 entitled to appeal. The Director however contends that no
23 appealable decision has been taken and contests the
24 jurisdiction of the Tribunal. The Director suggests that
25 the issue of jurisdiction should be tried as a preliminary
26 issue. We will revert to that suggestion in a moment.

27 What then happened was that, on 7th April 2004,
28 the Director apparently sent Albion a substantial draft
29 decision, now apparently expanded, inviting comments
30 within four weeks. Albion has told us today that it does
31 not in fact wish to make any comments on the draft, which
32 it considers to be flawed to an extent that no further
33 comment on Albion's part would be useful.

34 The Director has apparently also sent the draft
35 for comment to Dŵr Cymru. That was apparently done on
36 20th April and Dŵr Cymru has indicated to the Tribunal
37 that they would be in a position to make any further
38 comments on the draft by 13th May, that is effectively two
39 weeks from today. (We observe that the draft is
40 apparently one that rejects Albion's complaint and clears

1 Dŵr Cymru of any abuse of a dominant position.) We have
2 had an assurance from Dŵr Cymru that they would wish this
3 matter to proceed expeditiously and that they do not
4 foresee substantial problems in meeting the deadline that
5 they have indicated.

6 It is also apparently anticipated that the
7 draft, or parts of the draft, will be sent to United
8 Utilities, which has apparently already received some
9 extracts, but there are apparently further parts of this
10 draft which have not yet been sent to United Utilities
11 while certain issues of confidentiality have been sorted
12 out with Dŵr Cymru. United Utilities has also told us
13 that it wishes this matter to proceed as rapidly as
14 possible. We are not clear that in fact any allegation of
15 abuse was ever made against United Utilities and we are
16 told on behalf of the Director that the matters that
17 United Utilities has not yet seen should not, as we
18 understand it, contain any particular surprises or raise
19 any particular difficulties. To the extent that the
20 United Utilities aspect of the matter has not yet
21 progressed further, it seems to us that that is a part of
22 the procedure that could be dealt with expeditiously.

23 The Director was pressed in the course of
24 today's hearing by the Tribunal as to when he might be
25 able to issue the final draft decision. The Director
26 replied, without being precise and giving no guarantee,
27 that, if all went according to plan, he might be in a
28 position to issue his draft decision, assuming he got the
29 comments back by mid-May, in a further eight weeks, that
30 is to say in July.

31 In the light of the information before the
32 Tribunal and on the basis of our present understanding of
33 the case, it does seem to us that that estimate is overly
34 pessimistic and errs far on the side of caution. The
35 Tribunal's experience is that other regulators, certainly
36 at this stage of the proceedings, are capable, in
37 appropriate cases, of dealing with matters expeditiously.

38 In view of the very long delay that has so far taken
39 place, it seems to us that, whatever the reason for that
40 delay is, matters have now reached such an advanced stage

1 that it would be reasonable to suppose that a final
2 decision should now be issued on Albion Water's complaint
3 in the earliest possible time scale so that a proper
4 appellate process can proceed. It seems to us that, at
5 the outside, a date of 1st June 2004 would be a reasonable
6 date for a final decision to be issued in this case,
7 assuming that all goes according to plan and that no
8 unforeseen complications or other circumstances of which
9 the Tribunal is presently unaware should arise.

10 However, that raises the question of what the
11 Tribunal should do with the present appeal in which the
12 Tribunal's jurisdiction is contested. The following
13 options have been explored by the Tribunal with the
14 parties.

15 The first option was that the Tribunal should
16 decide in the present appeal whether in fact it has
17 jurisdiction to hear the case. That would involve
18 addressing the question as to whether there had in fact
19 been an appealable decision. One issue that may well
20 arise, as the Tribunal has already indicated in
21 discussion, is whether in circumstances such as those that
22 I have outlined, there has been an implied decision by the
23 Director in this case to the effect that no infringement
24 of the Chapter II prohibition is shown. That would be an
25 important issue from the point of view of the structure of
26 the Act and would affect other regulators. It is also
27 important in view of the situation that arises under the
28 jurisprudence of the European Community, in which the
29 concept of an implied decision is fairly well established.

30 We bear in mind in that context that, as from 1st May
31 2004, under Regulation 1 of 2003, the United Kingdom
32 authorities have jurisdiction to apply the competition
33 rules of the Treaty. In general terms, the United Kingdom
34 domestic system is required to operate, at least arguably,
35 in a way that is as coherent as possible with the EC
36 system. Section 60 of the Act may also be relevant here.

37 However, be that as it may, it does not
38 necessarily help Albion or the Interveners, Dŵr Cymru and
39 United Utilities, if their resources and the Tribunal's
40 resources, and indeed, the Director's resources, are

1 devoted in this case to deciding the issue of jurisdiction
2 in the present appeal if in fact the present appeal is
3 likely to become moot in the near future by reason of the
4 fact that the Director has in fact taken a new decision.

5 The second option I think was that the Tribunal
6 should not take any action in the present appeal but
7 should simply await events and see whether any further
8 decision is in fact taken.

9 The third option effectively was that we should
10 adjourn this Case Management Conference today to see what
11 happens, but give such directions as to ensure that the
12 matter would be restored for further hearing in the light
13 of developments, so that, in particular, it could be
14 reviewed in case of undue slippage. It was, in
15 particular, pointed out in argument that if in fact we get
16 to the end of July before there is a decision, the summer
17 holidays then intervene and before, as it were, one knows
18 where one is, one is very considerably later in the year
19 before any effective appellate process can start.

20 In reviewing all those options there is,
21 however, a further important matter, which is the question
22 of Albion's present financial situation and the issue of
23 interim relief. Albion tells us that, in view of the
24 margin squeeze that it has allegedly been suffering, it
25 has effectively remained in business as a result of a
26 voluntary support mechanism from its customer, Shotton
27 Paper, whereby Shotton pays a small extra sum to Albion in
28 order for Albion to continue to trade. Shotton, so far as
29 we can tell, seem to be anxious that Albion does remain in
30 business, and there are some indications in our papers
31 that there are other customers within the area covered by
32 Albion's inset appointment that would similarly be
33 interested in obtaining water supplies from Albion.

34 The difficulty is that we are told that the
35 support arrangement from Shotton Paper is substantially
36 modified as from the end of June 2004 in a way in which we
37 are told may very well place a question mark over Albion's
38 ability to continue to trade much beyond that date.
39 Albion has, therefore, among its applications to the
40 Tribunal, applied for interim relief under Rule 61 of the

1 Tribunal's Rules, which gives the Tribunal power to make
2 an interim order and to take interim measures. The
3 Tribunal's jurisdiction to do that is contested by the
4 Director and by Dŵr Cymru, in particular on the basis
5 that, among other things, the Tribunal is not seized of
6 any appealable decision, which, of course, takes one back
7 to the issue of jurisdiction that we were discussing a
8 moment ago.

9 There has apparently been some form of
10 negotiation between Albion and Dŵr Cymru about the bulk
11 supply price which Albion is paying or has been paying Dŵr
12 Cymru, which is in some respects apparently a different
13 concept from the access price that was the subject of
14 Albion's original complaint. It has been said on behalf of
15 the Director and Dŵr Cymru that there has never been any
16 decision on the effect of the Chapter II prohibition on
17 the bulk supply price and, therefore, even if there has
18 been a decision by the Director of some kind, that does
19 not touch on the issue of the bulk supply price. Albion
20 Water, on the other hand, who has been represented today
21 by Dr Bryan, points to links between the access price and
22 the bulk supply price, which it is not necessary for
23 present purposes to elaborate on.

24 The Tribunal's powers to give interim relief
25 under Rule 61 are under two headings. There is a power
26 under Rule 61(1)(a) to suspend in whole or in part the
27 effect of any decision which is the subject of proceedings
28 before the Tribunal, and, under 61(1)(c), to give any
29 remedy which the Tribunal would have power to grant in its
30 final decision. However, under Rule 61(2), the Tribunal
31 has a power, without prejudice to the generality of Rule
32 61(1), to give such directions as it considers
33 appropriate, if it is necessary, as a matter of urgency
34 for the purposes of preventing serious, irreparable damage
35 to a person or category of person, or protecting the
36 public interest.

37 We are not, at present, persuaded that we would
38 have no jurisdiction to give interim relief either under
39 Rule 61(1) or under Rule 61(2) if the relevant threshold
40 was met. For reasons that I will come to, however, that

1 is not a matter upon which we need to take a final view
2 today.

3 It is also relevant to mention that, as part of
4 the changes necessary to bring into force the provisions
5 of Regulation 1 of 2003 of the European Community, there
6 is due to come into force, as far as we know, on 1st May
7 2004, a Statutory Instrument entitled "The Competition Act
8 1998 and Other Enactments (Amendment) Regulations 2004".
9 One of the effects of those regulations, which is to be
10 found in paragraph 20 of the Regulations, is to amend
11 section 47 of the 1998 Act which provides for third party
12 appeals to the Tribunal. One of the matters that can now
13 be appealed to the Tribunal after 1st May 2004 is: "A
14 decision of the OFT not to make a direction under section
15 35." The effect of that is that if a third party applies
16 to the OFT, or in this case to the Director, who is the
17 OFT for the purposes of the provision I have just read,
18 for interim relief and the Director expressly or impliedly
19 declines to grant such interim relief, there is a power,
20 at first sight, of appeal to the Tribunal against that
21 decision. That is the broad statutory framework.

22 We, as a Tribunal, obviously have a concern if
23 it is the case that the survival of what is apparently the
24 only new entrant to hold an inset appointment under the
25 1991 Act is threatened, and we also have a concern about
26 the apparently lengthy period this case has taken to reach
27 the stage it has.

28 What then should the Tribunal do? In our view,
29 the right course at this stage for the Tribunal is to
30 adjourn this Case Management Conference to the first open
31 date in June, which on the Tribunal's calendar happens to
32 be Wednesday, 2nd June, in order to review the situation
33 as of that date and decide what to do in the light of the
34 situation prevailing on that date, and in particular in
35 the light of whether or not by that date a final decision
36 has been taken. The Tribunal will then be able to decide
37 whether it is appropriate to deal with the question of
38 admissibility of the present appeal in relation to the
39 matters that I have indicated, or whether the present
40 appeal should stand adjourned or be withdrawn or otherwise

1 disposed of, and that resources should be directed to the
2 new decision that will apparently have been, or so we hope
3 at least, taken by that date. So that is how we propose
4 to deal with the matter so far as the future of this
5 particular case is concerned.

6 As far as the issue of interim relief is
7 concerned, that is not resolved. If it continues to be a
8 serious issue, it appears to us that there are two
9 possible procedural routes available. One is that we
10 should simply, if it became necessary, determine the
11 application for interim relief in the context of the
12 present appeal, under Rule 61. The second alternative is
13 that the Appellant, Albion, should ask the Director to
14 make directions under section 35 of the Act, which is the
15 section that deals with interim relief from the Director's
16 point of view; and, if the Director declines or fails to
17 do so, to seek to appeal to the Tribunal under the
18 provision of the amended section that I have just
19 indicated. It would, however, of course, be much more
20 preferable from the point of view of all parties if some
21 sensible arrangement could be arrived at by those
22 concerned to ensure the survival of Albion pending the
23 determination of these proceedings, and, in particular, to
24 ensure that the rights to appeal which are granted by
25 Parliament are effective and not rendered nugatory by the
26 inability of the complaining party to obtain any effective
27 relief under the system. So we propose to leave the
28 question of interim relief on one side so far as today is
29 concerned, but the Tribunal is available, if necessary at
30 short notice, to revisit that matter, if it becomes
31 necessary, which we hope it will not.

32 So that, I think, deals essentially with the
33 position so far as today is concerned unless my colleagues
34 have anything further comment to make. **(No reply)**

35 _____
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