Neutral citation [2007] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1046/2/4/04
1034/2/4/04(IR)

Victoria House
Bloomsbury Place
London WC1A 2EB

8 January 2007

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

and

WATERLEVEL LIMITED

Appellants

supported by

AQUAVITAE (UK) LIMITED

Intervener

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly the Director General of Water Services)

Respondent

supported by

(1) DŴR CYMRU CYFYNGEDIG

and

(2) UNITED UTILITIES WATER PLC

Interveners

JUDGMENT ON COSTS (SHOTTON PAPER)

APPEARANCES

Dr. Jeremy Bryan, Managing Director of Albion Water Limited, and subsequently Rhodri Thompson QC and John O'Flaherty appeared on behalf of Albion Water Limited.

Rupert Anderson QC and Valentina Sloane (instructed by the Treasury Solicitor on behalf of Director of Legal Services, OFWAT) appeared on behalf of the respondent.

Christopher Vajda QC and Meredith Pickford (instructed by Wilmer Hale) appeared on behalf of Dŵr Cymru Cyfyngedig.

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I INTRODUCTION

1. Following an interim judgment on 22 December 2005 [2005] CAT 40, the Tribunal gave judgment in Case no. 1046 on 6 October 2006 [2006] CAT 23 ("the main judgment"). In a further judgment of 18 December 2006 [2006] CAT 36, the Tribunal made a number of declarations and orders and continued an order for interim relief made on 20 November 2006. To the extent that the latter order arises in part under the parallel interim measures Case no. 1034(IR), we deal in this judgment with the costs of both cases, without drawing any distinction between them. However, the vast majority of the costs arise in the main case, which is Case no. 1046.[1]

2. In its judgment of 18 December 2006, the Tribunal: set aside numerous parts of the contested Decision; found that Dŵr Cymru had a dominant position in the relevant market; referred certain matters back to the Authority; and decided that Dŵr Cymru had abused its dominant position by imposing a margin squeeze. Albion was, therefore, to a large extent successful in this appeal.

3. This judgment deals with the issue of costs. We note, as a general observation, that the Authority and Dŵr Cymru between them appear to have incurred costs of some £2 to £3 million in unsuccessfully defending the appeal. Albion, the successful appellant, now seeks to recover costs of approximately one-tenth of that amount. Albion's application for costs is, however, strongly opposed by the Authority and Dŵr Cymru.

4. The Tribunal's jurisdiction to award costs is set out in Rule 55 of the Competition Appeal Tribunal Rules SI 2003/1372 (the "Tribunal's Rules"). Rule 55 provides as follows:

> " – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session, or the Supreme Court of Northern Ireland
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by

[1] We are not concerned here with the costs of Case no. 1031, introduced before the Tribunal on 2 April 2004, which never proceeded beyond the early stages. Case no. 1031 was effectively overtaken by Cases no 1034(IR) and 1046.

> one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President, a chairman or the Registrar or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session"

5. Rule 55 gives the Tribunal a wide discretion as to costs, as discussed in a number of the Tribunal's previous decisions, including *Hutchison 3G (UK) Limited v. Office of Communications* [2006] CAT 8, and *Racecourse Association and British Horseracing Board v. OFT* [2006] CAT 1. There is no rule that costs follow the event but, subject to other considerations, the fact that a party has won is a starting point for considering the exercise of the Tribunal's discretion: *Racecourse Association*, cited above, at paragraphs 7 to 9. Each case will depend on its particular facts and circumstances: *Hutchison 3G*, at paragraph 42. In this still developing jurisdiction, the Tribunal is proceeding on a case-by-case basis dealing with different, and not always foreseeable, circumstances as they arise. Some of the Tribunal's previous decisions on costs are referred to in *Celesio AG v. OFT* [2006] CAT 20, at paragraph 18.

6. In this case, the Tribunal sits as a tribunal in England and Wales. Under Rule 55(1), the relevant recoverable costs and expenses are, therefore, those that are recoverable before the Supreme Court of England and Wales, pursuant to the Civil Procedure Rules 1998, as amended ("the CPR").

II SUBMISSIONS OF THE PARTIES AND BACKGROUND

Albion's application for costs

- General

7. By an application dated 18 October 2006, Albion seeks an order that the Authority and/or Dŵr Cymru should pay 100 per cent of Albion's costs, to include the internal management and administrative costs incurred by Albion in pursuing the appeal, in addition to its external legal costs. Albion considers that it succeeded on all the principal issues before the Tribunal.

8. As to the exercise of the Tribunal's discretion, Albion invites the Tribunal to take account of the fact that the decision of the Authority, taken after a lengthy investigation, has been shown to be flawed in almost all its findings; based on an inadequate investigation; reliant on a number of flawed legal premises; and contrary to the policy underlying the 1998 Act. Albion submits that the Tribunal should also take into account the general importance of the issues decided in this case, both for the water industry and for competition law more widely. Albion further submits that the Tribunal should have regard to the behaviour of both the Authority and Dŵr Cymru throughout the course of this litigation. Albion refers to what it contends to be: (i) the undue delay between Albion notifying its complaint to the Authority on 8 March 2001, and the publication of the Authority's decision on 26 May 2004; (ii) the unwillingness of the Authority and Dŵr Cymru to provide evidence to the Tribunal during the proceedings; (iii) the conduct of the Authority and Dŵr Cymru in causing the proceedings before the Tribunal to be more protracted, complex and costly than necessary; (iv) the late change in position by the Authority and Dŵr Cymru in relation to avoidable retail costs and ECPR; and (v) the apparent resistance of the Authority to competition and to water efficiency. Albion also relies on damage caused to it by the Decision, and the imbalance of resources between the parties.

- Albion's internal costs

9. As regards its internal costs, Albion submits that during the course of the proceedings Dr Bryan, its Managing Director, has performed the role of litigant in person as well as

that of instructing solicitor, expert witness and witness of fact. He has been assisted in those respects by Mr Jeffery and Mr Knaggs, also directors of Albion. Whilst the legal costs of the appeal have been limited to the direct costs of instructing counsel, Albion has directly borne the total costs of administrative support and expert input. Accordingly, it should be entitled to recover its own internal costs occasioned by the appeal. Albion relies on CPR 48.6 and refers to the Litigants in Person (Costs and Expenses) Act 1975. According to Albion, that Act applies to the Tribunal by virtue of Rule 55 of the Tribunal's Rules.

10. Albion further seeks to recover the costs of Dr Bryan, Mr Jeffery and Mr Knaggs, as in-house experts. Albion refers to *Re Nossen's Patent* [1969] 1 All ER 775; *Admiral Management Services Ltd v. Para-Protect Europe Ltd* [2002] EWHC 233 (Ch), [2003] 2 All ER 1017; and *Richards & Wallington (Plant Hire) Ltd v. Monk & Co Ltd* [1984] Costs LR (Core Vol) 79. According to Albion, Dr Bryan's experience and qualifications fully justify him being characterised as an expert. As to other costs and expenses, Albion considers that the work done was equivalent to the function performed by the in-house legal teams of the Authority and United Utilities.

11. In respect of the roles of Dr Bryan, Mr Jeffery and Mr Knaggs, Dr Bryan confirms that they are all directors of Albion Water and its parent company, Waterlevel. The directors are employed by Waterlevel, and their services are charged to Albion by a monthly inter-company charge, which is varied to ensure that Albion is cash positive at all times. In order to estimate Albion's internal costs, in his witness statement dated 3 November 2006 Dr Bryan identified the time committed by its directors under seven headings: advice to counsel, information analysis, attendance on counsel, attendance on the other side, administration, witness statements, case management conferences and hearings. That time has then been used to calculate costs, on the basis of the recovery of salary, plus employer's national insurance. Using that formula, Dr Bryan states that his hourly rate amounted to £56.65 per hour, with the hourly rates of both Messrs Jeffery and Knaggs being £35.40. Dr Bryan adds that, had he calculated an hourly rate for the directors on the basis of the external supply of their services, their rates would have been £169.94 per hour for Dr Bryan, and £106.21 per hour for Mr Jeffery and Mr Knaggs. Dr Bryan submits that these rates are low by industry standards.

12. Using the rates based on the director's salaries, Dr Bryan calculates Albion's internal costs as follows: Dr Bryan £84,780 (1496 hours at £56.65 per hour), Mr Jeffery £17,240 (487 hours at £35.40 per hour) and Mr Knaggs £24,000 (680 hours at £35.40 per hour). Albion's schedule of costs filed on 23 October 2006 shows a claim for £126,020 in respect of Albion's internal costs up to that date, and £6,273 for disbursements, making some £133,000 in total. According to Dr Bryan's witness statement of 3 November 2006, the effect of excluding tasks of an administrative nature would be to reduce Albion's claim by some £10,000. In that statement, Dr Bryan claimed a further £692 for telephone costs.

13. In a later schedule dated 24 November 2006, Dr Bryan recalculated Albion's internal costs, split between the work of a solicitor, expert work and "other" (302 hours at £56.65 an hour). That schedule shows some £11,400 claimed by Dr Bryan for work as a solicitor. The cost of expert work is claimed in respect of Dr Bryan (£64,600), Mr Jeffery (£16,500) and Mr Knaggs (£23,770). Dr Bryan's further schedule of 20 December 2006 shows an increase in his internal costs claimed, to a total of £17,100 for work as a solicitor, and £66,500 as an expert.

- *Counsels' fees*

14. In its submissions of 18 October 2006, Albion informed the parties and the Tribunal for the first time that a firm of solicitors, Palmers, who are apparently Dr Bryan's family solicitors, had been formally retained in these proceedings, for the purposes of instructing counsel, but that Palmers had played an exclusively formal role and had not incurred any material costs. In that connection, Albion also submitted that, in the light of *Agassi v. Robinson (Inspector of Taxes)* [2005] EWCA Civ 1507, [2006] 1 All ER 900, technically Albion is not a litigant in person because of the role of Palmers. However, Albion indicated that it did not consider itself in an analogous position with Mr Agassi as he had instructed tax experts, not a solicitor, whereas Albion had a solicitor, but not one experienced in competition law.

15. Albion's schedule of its costs up to 23 October 2006 included the sum of £252,650.00 (excluding VAT) in respect of counsels' fees. That figure comprised £171,300 in respect of leading counsel's fees, and £81,350 in respect of junior counsel's fees. In

that schedule counsels' fees were based on 186 hours work by leading counsel at a rate of £400 per hour up to 23 January 2006, and 215 hours at £450 an hour thereafter to 23 October; as well as 163 hours work by junior counsel at a rate of £200 an hour up to 23 January 2006, and a further 195 hours of work at a rate of £250 an hour thereafter up to 23 October 2006.

16. Pursuant to the Tribunal's Order of 24 October 2006, and to requests for clarification from the Treasury Solicitor, acting for the Authority, Albion filed Dr Bryan's witness statement dated 3 November 2006.

17. At paragraph 5 of that witness statement, Dr Bryan indicates that Albion has been unable to afford the services of an instructing solicitor, or of an expert witness, and that, therefore, the directors of Albion have had to perform all such services. Dr Bryan recalls that the Tribunal granted him permission to act as an advocate for Albion, which he did until Mr Rhodri Thompson QC and Mr John O'Flaherty of counsel were instructed.

18. In respect of the involvement of counsel in the appeal, Dr Bryan's witness statement of 3 November 2006 states that Mr Thompson advised on a pro bono basis on 24 May 2004 and appeared with Mr O'Flaherty on the same basis at the case management conference on 21 September 2004, and that no costs in relation to those matters have been claimed by Albion. Since the case management conference on 21 September 2004, counsel have been instructed by Palmers, solicitors, on the basis of financial terms agreed between Albion and counsel and approved by Palmers. Dr Bryan explains that Mr Perry, a partner of Palmers, has assisted Albion by receiving invoices from counsel, and then passing them on to Albion for payment. No remuneration has been paid to Mr Perry for these activities.

19. In Dr Bryan's further letter to the Authority dated 8 November 2006, he states:

> "The current position is that we paid counsel an initial retainer of £3,000 in November 2004 and have been paying further monthly payments of £1,000, as detailed in the attached fee notes. You will see that counsel have shared these fees on an equal basis. It has been agreed that this arrangement will continue indefinitely pending full payment of counsels' fees at the agreed hourly rates.

> The monthly payments were set out at the level we could afford at that time but it is agreed that we will increase our payments as Albion's resources increase. As the Tribunal found, the pricing issues between Dŵr Cymru and ourselves are directly relevant to this issue.
>
> Counsels' fees are paid by Waterlevel, in accordance with the services agreement…between Waterlevel and Albion Water, out of the management charges made under that agreement."

20. The fee notes attached to Dr Bryan's letter of 8 November 2006 indicate that counsels' fees in the sum of £26,000 + VAT had been paid up to November 2006, apparently shared equally between Mr Thompson and Mr O'Flaherty.

21. At the hearing on 20 November 2006, Mr Thompson submitted that the arrangement in relation to counsels' fees is not a contingency fee nor a conditional arrangement, but a very straightforward one involving an agreed hourly rate. Mr Thompson submitted that it was an agreement whereby counsel "were paid a relatively modest lump sum and have been paid monthly payments thereafter. As fees have mounted up so the backlog has mounted up, but the arrangement has never been changed. Accordingly there is a small and relatively impecunious company with a relatively large outstanding debt which we would like indemnified" (transcript, p. 41).

22. Subsequent to the hearing on 20 November 2006, Albion has supplied copies of invoices from Mr Thompson. Up to 24 November 2006 those invoices totalled £204,037. Further invoices up to 19 December 2006 show that the total sum claimed for Mr Thompson's fees up to that date is £209,212. Those latter invoices comprise some 92 hours at £400 per hour, and 294.25 hours at £450 per hour.

23. As far as Mr O'Flaherty is concerned, his invoices are dated 19 December 2006 and refer to many items "previously unbilled". These invoices total £98,577, and show 54 hours at £150 per hour up to 11 February 2005, 122 hours at £200 per hour up to 23 January 2006, and 264 hours at £250 per hour since 23 January 2006.

24. The total claimed in counsels' fees is thus £307,789.

25. Albion has also supplied a letter from Mr Perry to the Practice Manager at Matrix Chambers dated 7 December 2004 confirming that he had instructed Mr Thompson and Mr O'Flaherty on terms agreed between Dr Bryan and counsel. That was in reply to the Practice Manager's letter of 30 November 2004, which itself was in response to a letter from Mr Perry dated 24 November 2004. Dr Bryan provided further information on 21 December 2006, in response to the Tribunal's letter of 20 December 2006.

26. By letter dated 28 December 2006 counsel for Albion responded, at the Tribunal's request, directly to the Tribunal with regard to certain comments made in a letter from the Treasury Solicitor dated 22 December 2006. Counsel have maintained firmly that the arrangements with Albion regarding their fees were not contingent arrangements.

The Authority's submissions

- *General*

27. The Authority recognises that the award of costs is within the discretion of the Tribunal and accepts, in principle, that a costs order in Albion's favour is appropriate, given the findings of the Tribunal. The Authority considers that costs should be apportioned between Dŵr Cymru and the Authority.

28. However, the Authority submits that Albion was not wholly successful in its appeal. Albion was unsuccessful on the ground of appeal relating to delay in quoting the First Access Price, and a very considerable time was spent by Albion in putting forward, and by the Authority in addressing, the various misconceived methodologies rejected by the Tribunal in both the interim judgment and the main judgment. In that regard, the Authority suggests that a percentage reduction of 15 per cent should be made to reflect the time spent on issues on which Albion was not successful.

29. The Authority further submits that there are serious doubts as to the practical commercial value of these proceedings to Albion. The issue of an access price for Albion may prove to be academic, in which case an enormous amount of time and money has been expended to no practical effect. The Authority contends that a further discount on the costs recoverable should be made to reflect that fact.

30. The Authority rejects the criticisms that Albion makes of the Authority and submits that such criticisms are irrelevant to the exercise of the Tribunal's discretion to award costs. Similarly, the Authority submits that the difficult financial position of a party to proceedings does not give rise to an entitlement to legal costs, nor does the disparity in the resources of the parties. The Authority emphasises that it is publicly accountable for the funds it expends.

31. As regards the items of cost in issue, the Authority emphasises that the recovery of costs is based on the indemnity principle: see Bramwell B in *Harold v. Smith* (1860) 5 H & N 381. The general rule is that a party is not entitled to recover more than he is liable to pay his solicitor: *Gundry v. Sainsbury* [1910] 1 KB 645. According to the Authority, the recovery of costs in this case is governed by the CPR, Parts 44 to 48. If not a special case within CPR Part 48, an award of legal costs only entitles the person in whose favour it is made to recover payments to professional legal representatives and quantifiable disbursements of, or incidental to, the proceedings, subject to being proportionately and reasonably incurred, and proportionate and reasonable in amount.

- *Albion's internal costs*

32. The Authority accepts that Dr Bryan has been permitted by the Tribunal to represent Albion under Rule 7 of the Tribunal's Rules. The Authority also accepts that, according to the *Agassi* case, cited above, where a barrister has been instructed by someone other than a solicitor, the presence of a barrister does not prevent a litigant from being a litigant in person. However, the Authority submits that Albion is not a litigant in person for the purposes of the recovery of legal costs under CPR 48.6, because the Litigants in Person (Costs and Expenses Act) 1975 does not apply to proceedings before the Tribunal: see *Nader v. Customs and Excise Commissioners* [1993] STC 806.

33. Whether or not Albion is a litigant in person, the Authority submits that internal administrative and management costs of a company (i.e. the overheads) are not recoverable in any award of legal costs against another party. The Authority accepts that there is a very limited exception, under the principle in *Re Nossen*, cited above, where a company may be permitted to recover a sum in respect of expert services

performed by its own expert staff, but restricted to a reasonable sum for the actual and direct costs of the expert work undertaken, with no overhead expenses or profit element allowed.

34. The Authority submits, however, that Re *Nossen* has no application here as Albion has no employees. More fundamentally, even if Albion had employed its directors, the costs of employees digging out basic factual material necessary to prove a claim, and for the purposes of external expert evidence, are not recoverable: see *Admiral Management Services*, cited above. Moreover, according to the Authority, Dr Bryan and Messrs Knaggs and Jeffery are not "experts" such as to enable any fees paid by Albion to Waterlevel to be recoverable. The evidence given by the Albion directors was not tendered as expert evidence, and has at no stage in the proceedings been treated as expert evidence. The Authority observes that, when giving evidence, Dr Bryan disavowed expertise in corporate finance, economics and civil engineering. In the Authority's submission, the only expert evidence in these proceedings has been provided by Dr Marshall, instructed by Aquavitae, and Professor Armstrong, instructed by the Authority. While Dr Bryan, Mr Jeffery and Mr Knaggs, may have specialist knowledge of their field of business, familiarity with a trade does not amount to expert evidence: *Re Chemists' Federation Agreement (No. 2)* (1958) LR 1 RP 75 at page 110 [1958] 3 All ER 448 at 462 C to F. Moreover, according to the Authority, a party to litigation pursuing his own case cannot ordinarily be regarded as sufficiently independent to be regarded as an expert.

35. The Authority further submits that, in any event, the salaries of Dr Bryan, and Messrs Jeffery and Knaggs are paid by Waterlevel. Even if they were recoverable as legal costs, those salaries have not been incurred by Albion, and hence are not recoverable by Albion. Albion could only recover the fees it has paid Waterlevel if these fees were for services "characterisable as those of an expert" (see *Agassi*, cited above). In any event Albion could not recover for any legal services rendered to Albion by Waterlevel. Waterlevel is not authorised to conduct litigation.

- Counsels' fees

36. As to counsels' fees, the Authority states that it is not opposed in principle to paying Albion's proportionate and reasonably incurred counsels' fees. However, the Authority does not accept that the entire amount claimed by Albion is recoverable. Moreover, the Authority is concerned as to the arrangements made in this case in respect of counsel and their fees.

37. The Authority notes that, to facilitate access to justice, some relaxation of the indemnity principle has also been permitted by Parliament through provision for funding arrangements conforming with section 58 of the Courts and Legal Services Act 1990 ("CLSA 1990"). Generally speaking, funding arrangements are made under conditional fee agreements ("CFAs"), the purpose being to facilitate access to justice where a litigant has a good case, but not the means to pursue it or to incur the legal costs involved in doing so. The Authority observes that CFAs represent an alternative to appearing as a litigant in person, and their existence was brought to Albion's attention during the hearing on 2 June 2004. CFAs are usually between solicitor and client but may also exist as between barrister and solicitor. However, a CFA which does not comply with Section 58 of the CLSA 1990 is unenforceable.

38. The Authority points out that under Rule 65 of the Tribunal's Rules, the rules governing funding arrangements under the CPR apply to proceedings before the Tribunal. The Authority notes that, in the present case, no notice has been given as to the existence of a CFA under CPR 44.3.

39. The Authority accepts that the terms for matters such as deferment of payment under a liability are a matter for the parties concerned. However, according to the Authority, the terms described in Dr Bryan's letter of 8 November 2006 cannot readily be reconciled with the representations made to the Tribunal, and to the Authority and the interveners, that Albion was unable to instruct solicitors for lack of funds. In the event it has engaged the services of specialist counsel. In the Authority's submission, the arrangements which have materialized in respect of counsel in the present case have the appearance of circumventing statutory and regulatory provisions relating to CFAs.

40. Moreover, according to the Authority, the arrangements made have permitted a company to conduct its own case without a solicitor, or an appropriately authorized professional fulfilling the statutory requirements of the CSLA 1990. The prohibition on a barrister contracting other than through a solicitor, or under the BarDirect Scheme, means that either a person represents themselves fully, or, if they wish to engage counsel, they must engage a solicitor. Counsels' fees have to be invoiced to a solicitor. They cannot be invoiced by a barrister directly to a lay client. A solicitor who engages counsel on behalf of a client is liable to pay counsel's fees.

41. According to the Authority, for counsel's fees to be recoverable, they must be included on an invoice from the solicitor to the client. Where a solicitor has invoiced his client in respect of counsel's fees, he must claim the fees on behalf of his client as a disbursement in a schedule of costs prepared in compliance with the indemnity principle, and certify that counsel's fees have been reasonably incurred, are of a reasonable amount, and proportionate to the matters in issue. That certificate enables the Court to be satisfied that the indemnity principle has not been breached. In the Authority's submission, Palmers would not be able to provide this certification.

42. The Authority further submits that a paying party will generally require to see counsel's fee notes in order to satisfy themselves that the amounts claimed are allowable, and proportionate and reasonably incurred, prior to reaching an agreement to pay legal costs. Subject to being satisfied that the fees claimed are properly recoverable, a solicitor for a paying party will generally only pay counsel's fees to the solicitor who has instructed counsel, and only pay them after receiving counsel's receipted fee notes.

43. In the Authority's submission, the suggestion that Waterlevel may have been incurring the liability for counsel's fees, and recharging them to Albion, would not satisfy the indemnity principle: the liability has to be that of the party seeking to recover (i.e. Albion). The Treasury Solicitor also points out that the potential liability for counsels' fees is not shown in Albion's statutory accounts.

44. In the Authority's submission, the Tribunal cannot proceed with a summary assessment without ruling as to the heads of legal costs which are recoverable, and being satisfied that the indemnity principle has been met. The Authority submits that the only

"internal" items claimed in Albion's schedule of costs which may be recovered as legal costs are the disbursements detailed as "Land Registry Search", "OFWAT JR CD", and "Ordnance Survey Maps", if incidental to the litigation. The recovery of counsels' fees is subject to the indemnity principle, and to the requirements of the CPR and the relevant legislative provisions. Such fees must be proportionately and reasonably incurred, proportionate or reasonable in amount, and lawful.

45. In further correspondence up to 22 December 2006, the Treasury Solicitor on behalf of the Authority continued to submit that there was evidence that counsels' fees were subject to a contingency arrangement within section 58 of the CLSA and that the rules on direct access to counsel by lay clients had been circumvented.

Dŵr Cymru's submissions

46. Dŵr Cymru submits first that it has already delivered a benefit to Albion of £338,263 between May 2004 and September 2006 in the form of interim relief. In Dŵr Cymru's submission, the sums paid by Dŵr Cymru have more than covered the legal costs paid by Albion. In those circumstances, Dŵr Cymru submits that any payment of costs to Albion should be made net of the sums that Dŵr Cymru has already paid to Albion in respect of the costs of this appeal by way of interim relief; otherwise there will be double-recovery.

47. In respect of Albion's comments as to Dŵr Cymru's conduct in the proceedings, Dŵr Cymru submits that, notwithstanding the Tribunal's concerns about the accuracy and detail of some of the information provided by Dŵr Cymru, Dŵr Cymru invested very significant resources in making an entirely genuine attempt to assist the Tribunal as best it was able in the provision of information which the Tribunal had found was lacking in the Decision.

48. Dŵr Cymru indicates that it will reflect conscientiously on the implications of the Tribunal's judgment for the organisation of its business and the feasibility of investment in modifications to its management accounting systems that would facilitate the provision of more disaggregated cost information in the future. However, Dŵr Cymru, in common with all other water undertakers in England and Wales, is unlike other

businesses in respect of the information which it is currently able, or has hitherto needed, to generate. Dŵr Cymru openly and honestly provided all the information concerning the Ashgrove system and other relevant issues arising in the case that was within its possession.

49. Dŵr Cymru rejects Albion's application for its internal costs on the same grounds as the Authority. Dŵr Cymru emphasises that, whilst Dr Bryan has had substantial involvement in the case, Albion has not been (at least for the vast majority of this case) a litigant in person as envisaged in CPR 48.6(6), because it has been represented by two counsel including specialist Queen's Counsel. In Dŵr Cymru's submission, Albion can hardly be said to be without a legal representative. Nor has Albion itself incurred any liability, since the salaries of the directors are paid by Waterlevel. According to Dŵr Cymru, it would not be a proper exercise of the Tribunal's discretion to join Waterlevel as a party for the purpose of costs.

50. As to counsels' fees, Dŵr Cymru submits that Albion has not supplied sufficient detail of its retainer with counsel, and in particular of the precise mechanism by which Albion's prospects of paying counsels' fees might increase in the future. Dŵr Cymru notes that, according to Albion's explanations of its fee arrangements, and taking account of the fees paid up to 4 October 2006, some £226,650 in counsels' fees remained outstanding in October 2006. Dŵr Cymru submits that had Albion been unsuccessful in the appeal, Albion would not have been in a position to pay the outstanding fees.

51. Dŵr Cymru submits that, in any event, even if Albion had been able to pay the outstanding fees, at an agreed rate of payment of £1,000 per month it would have taken almost 20 years to clear Albion's outstanding debt to both leading and junior counsel. This is, to say the least, a highly unusual method of remunerating counsel. The reality is that it must, therefore, have been recognised at the outset that the outstanding fees would not have been paid if Albion's appeal had failed. In those circumstances, there is a serious suggestion that Albion's arrangement is, in effect, an undeclared CFA, as defined by Section 58 of the CLSA 1990.

52. According to Dŵr Cymru, the consequences of a failure to declare a CFA are that any additional liability (e.g. an increase in fees to counsel) cannot be claimed. In these circumstances, without further explanation of the retainer between Albion and its counsel, Dŵr Cymru submits that fees beyond the £26,000 disclosed in counsels' invoices as having been paid cannot be claimed.

Attempts at settlement

53. At the hearing on 20 November 2006, the Tribunal suggested to Albion and the Authority that they attempt to settle the question of costs. Following a period of "without prejudice" correspondence and other attempts at negotiation, an exchange of open correspondence took place on 13 and 14 December 2006.

54. On 13 December 2006, the Treasury Solicitor, on behalf of the Authority, sent a letter to Albion to settle the claim for costs. That offer was as follows. The Authority would make an ex gratia payment of some £1860 in respect of work done by Dr Bryan that would have been undertaken by a solicitor, had one been instructed other than simply as a conduit for instructing counsel. That calculation was made at the statutory rate of £9.25 per hour, but "exceptionally", the Authority was prepared to go further and make an ex gratia payment of £10,000 in full and final settlement of all Albion's claims to legal costs, other than those in respect of counsels' fees. The Authority was not prepared to make any payment in respect of the "expert" costs claimed by Albion. The Authority offered £100 in settlement of Albion's claim to disbursements. As to counsels' fees, the Authority considered that a payment of £78,000 in respect of counsels' fees was appropriate. The latter figure was based, among other things, on two "discounts" of 15% each to reflect (i) that Albion had not been wholly successful in its appeal; and (ii) the "lack of commercial value in the proceedings", and was subject to receiving further information as to the number of hours of work done by junior counsel. The Authority's offer was based on the fees the Treasury Solicitor itself would pay to counsel of comparable standing, but was discounted to reflect the lengthy time for payment apparently agreed under the arrangement with counsel. However, as a compromise, the Authority was prepared to offer £150,000 in full and final settlement of Albion's claim to costs.

55. On 14 December 2006 Albion wrote to the Treasury Solicitor stating that it would be prepared to accept £350,000 in full and final settlement of its claim for costs, and confirmed later that day that that was Albion's position.

III THE TRIBUNAL'S ANALYSIS

A. GENERAL

56. Albion has been largely successful in this appeal. Our starting point is, therefore, that Albion is entitled, in principle, to its recoverable costs to the extent that such costs are reasonable and proportionate.

57. We do not think it appropriate to discount Albion's otherwise recoverable costs on the basis that Albion was unsuccessful on various points, such as certain of the methodologies for the calculation of non-potable costs which it advanced, and the issue of Dŵr Cymru's initial delay in quoting the First Access Price. As to the various methodologies, Albion had the disadvantage that, unlike Dŵr Cymru and the Authority, it had no access to information about Dŵr Cymru's costs, and had to do the best it could on the basis of what was in the public domain, and the relatively little disclosure it obtained from Dŵr Cymru. In those circumstances, we accept Albion's submission that "having been kept in the dark, we bumped into the furniture from time to time". It remains regrettable that, throughout this case, neither the Authority nor Dŵr Cymru ever gave the Tribunal a coherent breakdown of the elements of cost making up the claimed 16 p/m³ for "distribution" costs, nor of the elements, within that figure, which related to the service of the transportation of non-potable water requested by Albion. We do not regard this case as analogous on the facts with *Hutchison 3G*, cited above.

58. Furthermore, the Tribunal does not accept that there should be any discount from the costs otherwise recoverable on the basis that these proceedings were without commercial value. First, as pointed out in the Tribunal's judgment of 18 December 2006 at paragraphs 256 and 257, if the common carriage arrangement proposed originally by Albion does not, ultimately, proceed, in our view that is very largely attributable to Dŵr Cymru's own conduct in this case in imposing a margin squeeze, and the failure of the regulatory system to take any timely or effective action to prevent

that conduct. Independently of those considerations, this case has raised important issues for the water industry generally, and for the customers of that industry, as regards access pricing and related matters under the Chapter II prohibition. It is, in our view, quite wrong to describe this case as being without commercial significance.

59. As regards the conduct of the parties, there is, in our view, force in a number of the criticisms that Albion makes. The regulatory delay in this case has been regrettable. Notwithstanding Dŵr Cymru's submissions, we adhere to the view that it must have been clearly apparent that the Tribunal was attempting throughout this case to arrive at a better understanding of the component elements of the claimed 16 p/m³ for "distribution" costs, and whether those component elements differed as between potable and non-potable supplies. As the Tribunal has now observed several times, no accounting information was produced on this central issue. The extensive exercises put forward by Dŵr Cymru and the Authority, seeking to explain the cost of rebuilding the Ashgrove system from scratch, did not assist in establishing the relative difference in costs as between potable and non-potable supplies, albeit that these calculations tended to support Albion's case in other ways. However, in our view, these and similar points made by Albion do not go to increase the costs that it is otherwise entitled to recover. Such points are background points, tending to rebut the suggestions that Albion's recoverable costs might be reduced. Equally, the points made by Albion, should not, in our view, lead to any "over-recovery" of the costs to which Albion would otherwise be entitled.

60. We also reject Dŵr Cymru's submission that Albion has already been effectively "paid" its costs via the interim margin of 2.05 p/m³ which the Tribunal ordered, by consent, on 2 June 2004 by way of a reduction in the Bulk Supply Price. The Tribunal does not accept that that margin was ordered as a means of funding this litigation. The margin was ordered as a means of enabling Albion to remain in business as an inset appointee and statutory water undertaker, pending the determination of its appeal, in view of the partial reduction in the support it had previously been receiving from Shotton Paper. We also draw attention to the relief sought by Albion at page 6 of its application of 28 May 2004 in Case 1034(IR), whereby Albion sought, among other things, (a) a margin of 2.60 p/m³, by way of a reduction in the Bulk Supply Price to

enable it to meet its fixed overheads, and (b) a further reduction of 2.90 p/m³ in the Bulk Supply Price to enable Albion to have sufficient funds to instruct specialist counsel and obtain expert advice. The order sought under (b) was not an order that the Tribunal would have been prepared to make. The agreed reduction of 2.05 p/m³ in the Bulk Supply Price was, as the Tribunal understood it, a compromise reached between the parties in relation to the relief claimed under (a), which sought a reduction in the Bulk Supply Price of 2.60 p/m³.

61. We also observe more generally that, in not employing outside solicitors, Albion has kept the level of its legal expenses lower than they would otherwise have been. The costs of outside experts on technical matters relating to non-potable water have also been avoided. We further take the view that it is strongly in the public interest that Albion should have been able to obtain skilled representation in a case such as the present, given the obvious disparity of resources between the parties and the complexity of this case. It is important that such representation is available to small companies, both to ensure the proper application of the 1998 Act, and more generally to ensure fair access to justice. Had Albion not obtained proper representation, it would have been heavily disadvantaged. This case would have lasted even longer, and would have been much more difficult to manage, both from the Tribunal's point of view, and that of the other parties. In the event, Albion has been represented by its counsel honourably and fearlessly.

62. In that connection we add that, like the CPR, the Tribunal's Rules pursue the overriding objective of enabling the Tribunal to deal with cases justly, in particular by ensuring that the parties are on an equal footing, that expense is spared, and that appeals are dealt with expeditiously and fairly (The Tribunal's *Guide to Proceedings*, October 2005, paragraph 3.1). In the present case, the parties are not, and have never been, on an equal footing. Albion is a small company with minimal financial resources which has successfully prevailed against the Authority and Dŵr Cymru, both of which are well resourced, relative to Albion. This is a factor that, in our view, we ought to bear in mind when dealing with the issue of costs.

63. On the other hand, the special circumstances affecting Albion do not entitle the Tribunal to disregard the normal rules governing the recoverability of certain items of

costs, or the principles of reasonableness and proportionality which govern all assessments of recoverable costs.

B. COUNSELS' FEES

64. The various points that arise in respect of counsels' fees are: (i) whether the arrangements amount to a conditional fee agreement ("CFA") falling within section 58 of the CLSA 1990 as amended; (ii) whether there is a breach of the direct access rules, and if so what are the possible consequences; (iii) whether there is any other irregularity that might preclude recovery of counsels' fees; (iv) whether the issue is affected by the fact that counsels' fees have, in fact, been discharged via Albion's parent company Waterlevel; and (v) what quantum of counsels' fees is properly recoverable. We deal with these points in turn.

Section 58 of the Courts and Legal Services Act 1990

65. Section 58 of the CLSA 1990 as amended provides:

> "(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but any other conditional fee agreement shall be unenforceable.
>
> (2) For the purposes of this section and section 58A—
>
> (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
>
> (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.
>
> (3) The following conditions are applicable to every conditional fee agreement—
>
> (a) it must be in writing;
>
> (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor."

66. According to *Awwad v. Geraghty & Co (a firm)* [2001] QB 570 at p.576, there are three main kinds of CFAs. The first kind is where it is agreed that the lawyer will recover part of the client's earnings, normally a percentage of the damages awarded. This type of arrangement is known as a contingency fee, and is not permissible in this jurisdiction. Plainly, however, no arrangement of this sort exists here. The second kind of arrangement is where the lawyer will recover his normal fee, plus a success uplift in the event of a win – for example his normal fee plus 10 per cent. Again, no arrangement of this sort exists here. The third kind of arrangement is one where the lawyer will recover his normal fees, but only in the event of success. Under such an arrangement, no legal obligation to pay the lawyer's fee arises if the client loses the case. As we understand it, the suggestion made by the Authority and Dŵr Cymru is that in this case there is some kind of conditional arrangement of this third kind.

67. In our view this issue is to be resolved by applying the wording of section 58 of the CLSA 1990 to the facts in order to see whether the arrangement for the payment of counsels' fees is caught by section 58(1) and (2). The primary task of the Tribunal is to establish the nature of the agreement in question, and in particular whether there was no true liability on Albion to pay counsels' fees: *Burstein v. Times Newspapers Ltd* [2002] EWCA Civ 1739 at [20] and [21].

The main evidence on the CFA issue

68. It would no doubt have been better if the agreement as to counsels' fees in this case had been recorded in writing. The main evidence before the Tribunal is as follows.

69. On 24 November 2004, Mr Perry of Palmers, solicitors, wrote to Mr Thompson's clerk at Matrix Chambers:

> "We have been contacted by our client who understands that a letter of engagement is required. Do you have a standard draft? What are your requirements in this respect please?"

70. On 30 November 2004 the Practice Manager of Matrix Chambers replied to Mr Perry as follows:

> "Thank you for your letter dated 24 November 2004. I would be grateful if you could simply send a letter of instruction to me stating that you are instructing Rhodri Thompson QC and John O'Flaherty in the above matter on behalf of Albion Water Limited and Dr Jerry Bryan and that for the purposes of these instructions you are happy for us to continue invoicing Palmers solicitors on the basis that was agreed between ourselves and Dr Jerry Bryan. We appreciate that the detailed instructions are coming direct from the client but for the purposes of formality and Bar Council regulations we need to have a letter of instruction from the client's solicitor. Please do not hesitate to contact me should you wish to discuss further."

71. Mr Perry replied to the Practice Manager of Matrix Chambers on 7 December 2004:

> "Thank you for your letter of the 30th November.
>
> We are pleased to confirm that we are instructing Rhodri Thompson QC and John O'Flaherty in the above matter on behalf of Albion Water Limited and Dr Jeremy Bryan and for the purpose of these instructions we are happy for you to continue invoicing Palmers Solicitors on the basis that was agreed between yourselves and Dr Bryan.
>
> We trust that this is sufficient for your purpose".

72. Dr Bryan in his witness statement of 3 November 2006 states:

> "THE ROLE OF PALMERS, SOLICITORS
>
> 6. The Treasury Solicitor asks whether we have instructed solicitors in connection with this case. Mr John Perry, a

partner with Palmers, Solicitors of Kingston upon Thames, is my family solicitor. In September 2004 he undertook to receive invoices from counsel to Albion and to pass them on to me for payment. It was my understanding that this was a requirement for the remittance of such fees and that arrangement has continued to the present day. Mr Perry has acted for me in a number of personal matters over this period, for which he has received payment in the normal fashion. It is my understanding that he considers the forwarding of counsel's invoices to be a routine task for a valued client, for which no remuneration is necessary. Were any charges to arise from this activity, I believe they would be small and Albion would not seek to recover them. I can confirm that Mr Perry has had no further involvement in any proceedings before the Competition Appeal Tribunal.

LEADING AND JUNIOR COUNSEL

7. I have discussed the requests of both the Treasury Solicitor and Dŵr Cymru with Rhodri Thompson, John O'Flaherty and Zoe Mellor, the practice manager for Mr Thompson and Mr O'Flaherty at Matrix. I can confirm the following.

8. Mr Thompson advised on a pro bono basis on 24 May 2004, as I indicated to the Tribunal at the hearing on 2 June 2004, page 14, lines 30-33, and appeared with Mr O'Flaherty on the same basis at the CMC hearing on 21 September 2004. No costs in relation to those matters are contained in the schedule provided to the Tribunal for the hearing on 24 October.

9. Since then, Counsel have been instructed by Palmers on the basis of financial terms agreed between Albion and counsel and approved by Palmers. For the avoidance of doubt, these terms do not involve contingency fees or any waiver by counsel of their fees at the agreed rates we have indicated. We will provide updated schedules of counsels' fees before the 20 November hearing."

73. According to Dr Bryan, in his letter to Treasury Solicitor of 8 November 2006:

> "The current position is that we paid Counsel an initial retainer of £3,000 in November 2004 and have been paying further monthly payments of £1,000 as detailed in the attached fee notes. You will see that counsel have shared these fees on an equal basis. It has been agreed that this arrangement will continue indefinitely pending full payment of counsels' fees at the agreed hourly rates. The monthly payments were set at the level we could afford at the time but it is agreed that we will increase our payments as Albion's resources increase. As the Tribunal found, the pricing issues between Dŵr Cymru and ourselves are directly relevant to this issue."

74. Counsels' fee notes attached to that letter of 8 November 2006 show counsel being paid a retainer of £3,000 in November 2004, and then invoicing fees at a monthly rate of £1,000 per month up to 4 November 2006. The amounts invoiced total around £28,000.

75. During the case management conference on 20 November 2006 the following exchange took place between Mr Thompson and the President (transcript, pp. 40 to 41):

> "[Mr Thompson]…We would say in relation to counsels' fees that the arrangement in outline is a very straightforward one - an hourly rate at an agreed rate - and that we have provided sufficient information to the Treasury Solicitor to understand what the arrangement has been. But, obviously, if more specific information is required we are happy to provide it, and it may be that that will be sufficient either for some form of agreement to be forthcoming between now and the end of December. I do not know. But, I do not understand there to be a huge issue of principle, although some issues are raised about the role of our solicitors and whether either they, or possibly we, have cut corners, given the particular circumstances of this case. But, that is an issue which perhaps Mr Anderson will want to make some comments on. But, I do not understand there to be major issues of principle.
>
> THE PRESIDENT: I do not know how you would like to handle this, Mr Thompson. As far as I can see, the suggestion is that there may have been a conditional fee agreement which should have been disclosed, but was not disclosed. But, quite how the argument runs I am not completely clear at the moment. You seem to be submitting that there is an agreement for payment by instalments, and even if, on one unfolding of events, it would take rather a long time to pay off the outstanding, that was nonetheless the agreement and it is not a conditional agreement in terms of the rules.
>
> MR THOMPSON: Indeed. I think probably the Tribunal will anticipate that when we entered into this agreement, we perhaps did not anticipate that we would have been still arguing about quite so many matters over two years later. I think it has obviously been a case which has expanded beyond certainly our anticipated scope, and as it has done so there have obviously been commercial implications. But, in substance the agreement has remained as it always was. It becomes more onerous for both sides with the

passage of time, but in my submission it is not a contingency fee or a conditional arrangement. It is an unusual ----

THE PRESIDENT: Well, a contingency fee, in very crude terms, would be a sort of no win/no fee type arrangement. A conditional fee arrangement, at least in some cases, would be an agreement whereby in the event of success there would be an uplift of some kind within permitted limits on the fees ultimately chargeable. Is that right?

MR THOMPSON: Yes - and it is neither of those things. What it is is what has been revealed in evidence whereby we were paid a relatively modest lump sum and we have been paid monthly payments thereafter. As fees have mounted up so the backlog has mounted up, but the arrangement has never been changed. Therefore you now have a small and relatively impecunious company with a relatively large outstanding debt which we would like indemnified."

76. As already set out, Albion's further letter to the Tribunal of 24 November 2006 enclosed invoices up to that date from Mr Thompson to Palmers, detailing the work carried out since November 2004, in the total sum of £204,000 (excluding VAT), at the hourly rates agreed. Subsequently, invoices were provided showing Mr Thompson's fees up to 19 December 2006 as some £209,000. Invoices provided by Mr O'Flaherty showed fees of £98,500 as at 19 December 2006.

77. In response to the Tribunal's letter of 20 December 2006, Dr Bryan provided the following further explanation by letter of 21 December 2006:

> "The agreement entered into between Albion, Mr Thompson and Mr O'Flaherty in November 2004 was intended to provide a stream of income to counsel at a sustainable level, on the assumption that Albion's commercial position remained the same during the period of the appeal. At that time, Albion could not afford more than £1,000 per month given the limited revenues generated by the interim measures and the difficulties caused to it by the approach of the Authority and by the stubbornly abusive conduct of incumbent monopolists such as Dwr Cymru and Thames Water. The agreement was entered into on the basis that, particularly in the light of the recent Genzyme appeal in which Mr Thompson had appeared for the Office of Fair Trading, the appeal had a very good prospect of success and would be concluded relatively rapidly. In addition, there were a number of commercial opportunities and at least one substantial

> legal claim (independent of these proceedings) that appeared to offer the possibility of significantly increased revenues for Albion, so that the proposed monthly payments represented a minimum guaranteed flow of income. At the time of the interim judgment, although the case now appeared likely to last considerably longer than had been originally envisaged, the parties agreed to continue the existing arrangements notwithstanding the fact that the obligations on both sides had considerably increased beyond those originally envisaged.
>
> Reviewing the position with the benefit of hindsight, had the parties appreciated the prolonged nature of the case, it is likely that the agreement between Albion and its counsel would have been more detailed. As it is, Albion recognises that it has a liability to meet counsel's fees in full at the rates agreed for the hours worked, in recognition of the excellent service provided under difficult circumstances. Now that the main elements of the appeal have been successfully completed, Albion will recognise the full debt due to counsel in its accounts and, if it is not successful in recovering counsel's costs in full, any outstanding debt to counsel will be carried forward and discharged as soon as possible.
>
> Albion's agreement with Shotton Paper allows it to recover its costs (in this case legal costs) before any benefit can pass through in reduced charges. Thus, any benefit from reduced bulk supply or common carriage charges (or indeed any other income received) would be used to discharge our debt to counsel before benefiting the customer(s) or Albion's shareholders. I am also very conscious of the likelihood that Albion will continue to have need of counsel's services and that the current fee agreement is unsuitable for future engagements."

78. In a letter to the Tribunal of 28 December 2006, Mr Thompson wrote as follows, in response to certain suggestions made on behalf of the Treasury Solicitor, apparently without express instructions, in a letter dated 22 December 2006, to the effect that the arrangements regarding fees were a disguised contingency arrangement:

> "(i) It has been clear to the Tribunal and to the parties throughout that we have worked very closely with Albion Water in presenting this appeal and that we have not had the benefit of significant input from a solicitor. Nonetheless, Palmers have consistently paid our fees to date, in accordance with the agreement with Albion, and Albion has consistently accepted its liability to pay our fees. The fact that we have not to date sought to enforce payment of our fees beyond the agreed monthly payments

reflects the fragile financial position of Albion rather than any express or implied waiver of our entitlement to those fees.

The Treasury Solicitor, which has not apparently been involved in the case until after the judgment of 6 October 2006, now seeks to infer from the terms of the letter from Ms Nicol to Palmers [of 30 November 2004] that the arrangement between Palmers and ourselves was "no more than a sham" and that Palmers would not have any enforceable obligation to pay our fees. There is no basis for this inference, nor for any "doubt" as to the terms on which we are claiming our fees, which is at agreed hourly rates.

(ii) The Treasury Solicitor appears to have misunderstood the letter from Albion of 21 December 2006. Albion did not say that "it was entirely dependent on the revenues generated by the interim measures to pay counsel the retainer fees". On the contrary, the letter stated that the "limited revenues generated by the interim measures" and the matters complained of in this appeal meant that Albion "could not afford more than £1,000 per month" . The financial benefit derived from the interim measures has enabled Albion to carry on its business, including but not limited to its agreed monthly liabilities to ourselves.

The Treasury Solicitor also seeks to infer an unenforceable contingency arrangement from the fact that Albion states that it "recognises that it has a liability to meet counsel's fees in full at the rates agreed for the hours worked" and that this liability will "now" be recognised in its accounts. Again there is no basis for this inference. Recognition of the liability to meet counsel's fees is the basis for the claimed indemnity. The position in relation to Albion's accounts was explained by Dr Bryan in his letters of 24 November 2006 and his fax of 22 December 2006.

The Treasury Solicitor refers to the Court of Appeal case of *Awwad v. Geraghty & Co.* [2001] QB 570. The facts of that case differed from the present circumstances in that the lawyer in that case had agreed to charge her normal fee only in the event of success. In relation to the present circumstances, the points of policy identified by the Court of Appeal under numbered points (6) to (8) at 588E-H are of some relevance. In addition, as Albion has already noted in earlier correspondence, the subsequent Court of Appeal case of *Times Newspapers v. Burstein* [2002] EWCA 1739, paragraphs 21 to 29, is also relevant, in particular the Court of Appeal's approval of the statement that "it has never been suggested, so far as I am aware,

that a solicitor must cease to act as soon as it becomes apparent that his client is likely to became unable to pay his costs unless the action succeeds": paragraph 22. We also note the disapproval of satellite litigation in relation to costs at paragraph 29 of the judgment.

Finally, the Treasury Solicitor seeks to infer the existence of a contingency arrangement from the fact that Mr O'Flaherty's fee notes in Shotton were only raised on 19 December 2006. This has no significance for the liability of Albion Water to pay those fees, which are again based on hourly rates for hours worked during the period of those fee notes, Although this case is unusual in its size and complexity, the Tribunal and the Treasury Solicitor will be aware that counsel's fee notes are issued in a wide variety of circumstances and that it is not uncommon for fee notes to be raised only at the end of a piece of litigation.

In summary, the Tribunal has confirmed that this was an important and meritorious public policy case that clearly warranted an appeal to the Tribunal. The case has been conducted by the appellants in a highly focussed and efficient way that has minimised the costs incurred. We did not agree to act on the basis that we would not be paid at our agreed rates unless the appeal succeeded and we have not waived our fees in this case. The scope of the case expanded beyond anything that was originally anticipated: see, for example, the transcript of 2 June 2004, page 12, lines 26 to 35, where it was envisaged that the case would be heard in 2004 with "judgment on the principal issues in the early part of [2005]". Nonetheless, we have continued to act on the same terms apart from an alteration to the hourly rate for the purposes of the second stage of the appeal.

Finally, the fact that it might have been likely that Albion would "become unable to meet [our] fees" if the appeal had failed does not alter this analysis, as the judgment in *Burstein* makes clear. We therefore consider that this is a case where the presumption that lawyers are entitled to be paid for the work that they do remains in place and that Albion is entitled to be indemnified in full against its liability to pay our fees."

The conclusion to be drawn from the evidence

79. Mr Thompson's letter to the Tribunal of 28 December 2006 reconfirms what he told the Tribunal on 20 November 2006, namely that the fees agreed in this case were not conditional on the outcome of the case, and that Albion has at all times accepted its

liability to pay counsels' fees at the agreed rates. That was also confirmed expressly to the Tribunal by Dr Bryan in his witness statement of 3 November, and in his letters of 8 November and 21 December 2006. That evidence, which we accept, is entirely inconsistent with the existence of a CFA within the meaning of section 58 of the CLSA 1990.

80. In our view, on the evidence, the agreement as to counsels' fees in the present case seems to be, at its simplest, an agreement by Albion to pay counsels' normal fee, with an arrangement as to "time to pay" or "payment on account" at the rate of £1,000 a month. We cannot see that such an agreement falls within section 58(2)(a) of the CLSA 1990 as being an agreement which provides that the fees in question "are payable only in specified circumstances". The fees here in question remain always "payable" in the sense that there is a legal obligation on Albion to pay them. We have no reason to doubt Dr Bryan's evidence on that point in his witness statement of 3 November 2006, and in his letters of 8 November and 21 December 2006. Counsel confirmed that that was the position during the hearing on 20 November 2006, and have confirmed it again in Mr Thompson's letter of 28 December 2006. The fact that the client has been given time to pay does not, in our view, bring the agreement within section 58, nor provide a basis for inferring a CFA. If section 58 were to be construed as applying every time a solicitor or barrister extends credit to a client or allows "time to pay", that would fundamentally change the legal landscape, and introduce widespread uncertainty as to the enforceability of many such agreements.

81. Dr Bryan's letter of 8 November 2006 states:

> "It has been agreed that this arrangement [i.e. the monthly payments of £1000] will continue indefinitely pending full payment of counsels' fees at the agreed hourly rates. The monthly payments were set at the level we could afford at the time but it is agreed that we will increase our payments as Albion's resources increase".

82. As we understand it, unless otherwise agreed, as a matter of custom and practice counsels' fees normally become due and payable, at the latest, when the case is over. On the basis of the letter of 8 November 2006, it seems to us that counsels' fees are now due and payable, but that Albion is allowed time to pay at £1000 per month, with

the proviso that Albion will make accelerated payment "as Albion's resources increase".

83. On that basis, in our view section 58 still does not come into play. In particular, we are not prepared to infer, from the evidence, an agreement that "part" of counsels' fees, was "payable only in specified circumstances" within the meaning of section 58(2)(a) of the CLSA 1990. In our judgment, on the evidence, the whole of counsels' fees in this case remain "payable", even if the arrangement was that time for payment would be accelerated if Albion's circumstances changed.

84. We note that Albion's circumstances could change in various ways. A 1 p/m³ change in its margin on its supply to Shotton Paper increases Albion's revenue by £70,000 per annum, and other commercial possibilities may open up. Dr Bryan in his letter to the Tribunal of 21 December 2006, contends that, at the time, Albion had a number of other commercial opportunities and at least one other legal claim which offered the possibility of increased revenues for Albion. In our view, however, the legal analysis does not change even if it is assumed that, in practice, the likeliest circumstances in which Albion could make accelerated payment would be in the event of its winning this case and being awarded costs. The fact that this may be a realistic assumption to make is not, in our view, a sufficient basis for implying an agreement to the effect that counsels' fees are "payable only" – i.e. the legal obligation arises only - in the event of success in this case, within the meaning of section 58(2)(a).

85. We note, in particular, that there may be many circumstances in which, as a matter of practical reality, a lawyer may only be sure of being paid if the client wins the case. However, it by no means follows that the arrangement between lawyer and client thereby contravenes public policy or falls within section 58. Thus in *Burstein v. Times Newspapers Ltd*, cited above, the appellants alleged that the solicitors must have known that their client was impecunious, and that the alleged obligation on the client's part to pay the costs irrespective of the outcome was a sham. The Court of Appeal (Phillips MR, Mance and Latham LJJ) held, among other things, that:

> "Whilst the client's impecuniosity may be relevant to determining what the true nature of the agreement was, the mere fact that the solicitor may have been conducting the action on credit, or continuing an action in the

knowledge of his client's lack of means, is not objectionable or improper: [21] to [23]."

86. Similarly Zuckermann, *Civil Procedure* (Butterworths, 2003) points out (at p.203) that whenever a lawyer acts for a client in a difficult financial situation, the client's ability to pay (as distinct from his legal obligation) may well be dependent on the outcome of the litigation: see also e.g. *Factortame Ltd v. Secretary of State for the Environment, Transport and the Regions* (No. 2) [2002] EWCA Civ 932, [2002] 4 All ER 97 at [79]. But that, in our view, is not a sufficient basis for inferring the existence of a CFA within section 58 of the CLSA 1990. It is not, in our view, the law that a CFA within the meaning of section 58 of the CLSA 1990 arises every time a lawyer acts for a party whose ability to pay may be dependent on the outcome of the litigation. The key question is whether there is a formal obligation to pay. In our view, on the facts of this case, there was and is such an obligation.

87. We reject the suggestion that the arrangement in this case is some kind of sham intended to avoid the effect of section 58. That suggestion is firmly denied by Albion and counsel, and we accept that evidence. Moreover, the suggestion of a sham entirely overlooks the history of this particular case. Seen from the perspective of late 2004, when counsel accepted instructions through Palmers, this case would not have appeared to be the lengthy and complex matter that it later became.

88. As Mr Thompson points out, at the hearing on 2 June 2004 it had been envisaged that the case could come for hearing in 2004, with judgment in early 2005. In our view, even in late in 2004, counsel could reasonably have assumed that this case would be concluded by mid-2005 after a relatively short hearing. We do not think that counsel could have foreseen that, in December 2005, the Tribunal would deliver only an interim judgment, and that the case would then take a further year of intensive effort to resolve.

89. That further period included, notably, a case management conference of 23 January 2006; extensive further evidence filed, in response to the Tribunal's requests, by Dŵr Cymru in February 2006; a further case management conference on 3 March 2006; the filing of complex expert evidence by both the Authority and Aquavitae in March, and again in May, 2006; further evidence filed by Albion; a more active role played by Dŵr Cymru from April 2006 onwards, including the filing of an application in respect of the

Tribunal's powers under paragraph 3(2) and paragraph 8 of the 1998 Act, to which Albion had to respond; the filing of Albion's further skeleton argument for the second hearing beginning on 30 May 2006; further detailed skeleton arguments, often containing extensive new material, filed by the Authority, Dŵr Cymru, United Utilities and Aquavitae for that hearing, and responses to those arguments; the six day hearing in June 2006, which included cross-examination of the Authority's expert Professor Armstrong, and of Mr Jones, the Finance Director of Dŵr Cymru; dealing with procedural and substantive issues in relation to the issue of dominant position during June and July 2006; preparing for, and dealing with, the submissions at the further case management conferences of 24 October 2006 and 20 November 2006; and addressing the subsequent issues of costs and permission to appeal.

90. Against that background, we have no difficulty in accepting Mr Thompson's observation that the scale and magnitude of this case could not have been foreseen by counsel. Possibly to counsels' dismay, this case has ballooned well beyond expectation since the arrangements were first entered into in 2004. It is not, therefore, correct to draw any inference from the length of time that it would *now* take Albion to pay counsels' fees at the rate of £1000 per month. On the evidence, we take the view that Albion always had, and still has, the legal obligation to pay, but was, in effect, accorded credit. The original agreement was never changed, notwithstanding the mounting outstanding fees, but counsel have never waived their fees. On those facts, we do not consider that section 58 applies.

91. As regards the points taken by the Treasury Solicitor about Albion's statutory accounts, there is a note in the Directors' Report for the year ended 31 March 2006 which draws attention to this litigation. Dr Bryan contends that the Directors acted reasonably in assuming that legal costs would ultimately be recoverable, and that Albion's accounts represented a true and fair view. In this case we are not concerned with Albion's compliance or otherwise with the accounting provisions of the Companies Acts, except in so far as light may be thrown on the arrangements here under consideration. The alleged absence of further disclosure in Albion's statutory accounts does not, in our view, alter our conclusion, on the facts, that there is no sham to evade section 58 in this case.

92. We note finally that in *Hollins v. Russell* [2003] EWCA Civ 718, Brooke LJ held (at paragraphs 107 and 221) that section 58 must be interpreted in the light of its objectives of affording protection to the client and protecting the administration of justice. We cannot see that an arrangement of the kind here under discussion, made between an experienced businessman on the one hand, and experienced counsel on the other, to enable Albion to have the specialised assistance which would otherwise have been unavailable to it, was in any way improper, or adverse to the interests of Albion, or to the administration of justice. To hold that, in the circumstances described above, counsel were unable to recover their reasonable fees would, in our view, impede access to justice, be grossly disproportionate, and contravene the principle of equality of arms.

93. We therefore reject the suggestion that this case involves an undisclosed CFA caught by section 58 of the CLSA 1990.

Access to counsel

94. The Treasury Solicitor, on behalf of the Authority, also contends that the situation in the present case is questionable from the point of view of the rules governing access by lay clients to barristers. As we understand it, the rule that a barrister may not accept instructions from a lay client who is conducting his own litigation derives from the Code of Conduct of the Bar of England and Wales, which is approved by the Lord Chancellor under Schedule 4 of the CLSA 1990. As far as this case is concerned, the effect of that Code of Conduct (8th Edition, 2004) is that the barristers instructed by Albion were required to be instructed either through a solicitor, or via what are now the Public Access Rules at Annex F2 to the Code of Conduct.

95. It is apparent from the correspondence between Palmers and Matrix Chambers that counsel were formally instructed by Palmers, rather than under the Public Access Rules, albeit that, as far as we can see, counsel could have been instructed under the Public Access Rules, subject to compliance with Annex F2 to the Code of Conduct.

96. In our view, it is apparent on the face of the correspondence, and in particular Palmers' letter of 7 December 2004, that counsel were instructed by Palmers. It is implicit in Palmers' letter of 7 December 2004 that Palmers accepted instructing solicitors'

traditional responsibility for payment of counsels' fees. The necessary formalities were, therefore, observed.

97. In any event, we have difficulty in seeing how, in the absence of a CFA, the internal mechanism under which counsel were instructed could affect the liability of the Authority or Dŵr Cymru to pay Albion's costs. We do not think it can seriously be suggested that neither Albion nor Palmers would have had any liability for counsels' fees by reason only of the mechanism by which counsel were instructed in this case.

98. We add that, contrary to the Treasury Solicitor's suggestion, in proceedings before the Tribunal, there is no rule that, once a solicitor has been instructed, that solicitor must play a full role in the proceedings and the litigant must cease to represent himself. As elaborated in more detail below, the Tribunal has no objection in principle to a litigant before the Tribunal instructing a solicitor to act for certain purposes only, while in all other respects continuing to act in person. That, it seems to us, is what occurred in this case. In order to comply with the relevant Bar rules, Dr Bryan asked Palmers to undertake the formal role of instructing counsel, which they agreed to do. However, since Palmers have no expertise in the matter, it was neither necessary nor useful for them to play an active part in the case, or increase costs by seeking to do so. The resulting *modus operandi* was, in our view, sensible: two specialist counsel worked closely on highly technical issues with a skilled layman (Dr Bryan) who was accepted by the Tribunal as Albion's representative for the purposes of the proceedings. We find it difficult to think of a more efficient and cost-effective way of conducting the appeal in this case.

99. We do not, therefore, regard the points made by the Treasury Solicitor about the formal role of Palmers, nor the Treasury Solicitor's more general reliance on the restrictive rules still governing access to the Bar, as in any way absolving the Authority and Dŵr Cymru of their liability to indemnify Albion in respect of counsels' fees. That the Treasury Solicitor should argue before the Competition Appeal Tribunal, on behalf of a public authority responsible for enforcing the 1998 Act, in favour of restrictions on freedom of choice in the manner in which legal services are obtained by small businesses, is a rich irony which we trust will not go unnoticed by those responsible for policy in this area.

Other technical points

100. The Treasury Solicitor on behalf of the Authority objects that Palmers would not be in a position to certify that counsels' fees have been properly incurred, and observes that receipted fee notes have not been provided. However, points of this kind again overlook the fact that these proceedings are before the Tribunal. Unlike a costs judge, the Tribunal is itself in direct and frequent contact with the parties throughout the case and monitors, through its own running files, all the material submitted. The Tribunal is thus in a good position to assess for itself what work has been done. It does not seem to us that any of the supposed technical irregularities relied on by the Treasury Solicitor with regard to such matters as the signature on the bill of costs, and similar points, prevent the Tribunal from assessing the costs in this case. In so far as there are, or might be, any such irregularities, the Tribunal is prepared to waive them.

The relationship between Albion and Waterlevel

101. As regards the submission that payments to counsel have so far, in practice, been funded by Waterlevel, it is apparent from the correspondence between Palmers and the Practice Manager at Matrix Chambers that, as far as counsel were concerned, their client was Albion.[2] In any event, Waterlevel is Albion's parent company, owning 100 per cent of the shares of Albion. Waterlevel has the same directors as Albion, and has its registered office at the same address as Albion. In terms of the 1998 Act, the two companies are a "single economic entity" and would normally be treated as one undertaking. The financial arrangements between the two companies seem to us to be a purely internal matter, apparently designed to ensure that, as an inset appointee, Albion remains at all times "cash flow positive". In any event, Waterlevel itself has a substantial and direct interest in the outcome of the appeal, and we do not see that the situation is any different in principle from the common situation in litigation where the claimant is supported by insurers or a trade union. However, as explained below, we propose to join Waterlevel as an appellant in its own right, so as to put the matter beyond argument.

[2] That correspondence also refers to counsel being instructed on behalf of Dr Bryan, but it does not seem to us that anything turns on this.

102. In all the circumstances, in our view counsels' reasonably and proportionately incurred fees are properly recoverable as costs in this case.

The quantum of counsels' fees

103. As to the quantum of counsels' fees, costs are recoverable only to the extent that they are reasonably and proportionately incurred, and reasonable and proportionate in amount. As appears from the description already set out, this has been an exceptionally complex and heavy case, lasting over two years, with numerous issues and specialised argument as regards the water industry, the economic issues involved, and the issues of competition law. Nonetheless, from the point of view of the paying party, it is important that the number of hours worked and the rates charged should be scrutinised. The hourly rate system, in widespread use on both sides of the legal profession, does not always ensure that the hours worked are kept to the absolute minimum.

104. As regards the hours worked, Albion claims some 485 hours for leading counsel, and 440 hours for junior counsel making some 925 hours in total. These figures are less than the hours worked by counsel for Dŵr Cymru, and approximately half the hours worked by counsel for the Authority, broad details of which have been supplied at the Tribunal's request[3]. The Tribunal's own knowledge of the details of this case confirms that the hours claimed lie within a reasonable range. We note also that counsel for the Authority had the back up of the Authority's own in-house legal department, and latterly the Treasury Solicitor, whilst Dŵr Cymru instructed its solicitors, Wilmer Hale. We are told that, in broad terms, Dŵr Cymru's solicitors have worked in excess of 3000 hours. Albion's counsel, by contrast, have not had that support.

105. As regards the level of fees claimed, the Treasury Solicitor's letter of 13 December 2006 suggests that if the lawyer for the claimant charges his normal fee but gives his client time to pay, the unsuccessful defendant is entitled to benefit from those credit terms. We are unpersuaded by that suggestion. In particular, we do not accept that, in such circumstances, an unsuccessful defendant is entitled to discharge his liability for costs by paying only a discounted lump sum, representing the net present value to the

[3] The Treasury Solicitor claimed that the number of hours worked by counsel for the Authority in this case was commercially confidential, but under Schedule 4, paragraphs 1(2) and (3) of the Enterprise Act 2002 the Tribunal can see no basis for upholding that claim.

claimant's lawyer of receiving immediate payment of a sum that, as between the claimant's lawyer and his client, would otherwise be payable by instalments. The fact that the lawyer has allowed time to pay does not relieve the client of his primary obligation to discharge the debt. An order for costs against the losing party requires the latter to indemnify the winning party in respect of that primary obligation, namely the obligation to pay the lawyer's fees at the rate agreed. To allow the losing party, in effect, to profit from credit terms agreed between the successful party and his lawyer would, in our view, be entirely novel and wrong in principle. It would simply mean that the rich but unsuccessful defendant would profit from the impecuniosity of the successful claimant.

106. Turning to the question of assessment, we propose to proceed by way of an assessment by the Tribunal, using our own close knowledge of this case, under Rule 55(2). Despite the relatively large amounts in question, we see that as the most convenient course from the point of view of saving time and further costs.

107. Counsels' fees claimed up to 19 December 2006 amount to £209,212 for Mr Thompson and £98,577 for Mr O'Flaherty, making £307,789 in all (excluding VAT).

108. We note, first, that it appears from the invoices that, up to and including the delivery of the main judgment on 6 October 2006, including reading that judgment, leading counsel's fees were some £167,700 while junior counsel's fees were some £77,765, making £245,465 in all. It would therefore appear that some £62,324, or about 20 per cent of the total, was incurred in the final stages of this case. In general, that amount seems to us somewhat disproportionate, relative to the issues then outstanding.

109. At that stage, the outstanding issues were: dominant position final and interim relief; costs; and permission to appeal. Albion was successful on the issue of dominant position, albeit that much of the ground had been covered in previous submissions. Albion was, in effect, successful on the issue of final relief, but on interim relief did not succeed in persuading the Tribunal to do more than adjust the existing interim order to take account of the withdrawal of support by Shotton Paper. On costs, as appears from this judgment, we take the view that Albion's application for costs is successful, though only in part. Some of the issues regarding costs might not have arisen if the

arrangements had been recorded in writing at the outset. In these circumstances, we do not think that Albion should recover the whole of "the costs of the costs". Permission to appeal has not yet been resolved, so it is premature to include this relatively small element.

110. In all those circumstances, we do not think that Albion should recover more than two-thirds of the costs incurred after 6 October 2006. In round figures, that reduces the total sum claimed by way of counsels' fees to some £287,000 comprising, in round figures, some £195,500 for leading counsel and some £91,500 for junior counsel.

111. We understand the relative fees payable to be as follows. For Albion's leading counsel, the fee is £400 per hour from December 2004 rising to £450 per hour from 1 January 2006; Dŵr Cymru leading counsel's fee is £415 per hour from March 2006; and the fee paid to the Authority's leading counsel is £200 per hour. For junior counsel, Albion's fee was £150 per hour until February 2005, then £200 per hour, rising to £250 per hour from 1 January 2006. Junior counsel's fee for Dŵr Cymru is £200 per hour from March 2006. Junior counsel previously instructed by Dŵr Cymru was paid £300 per hour. Junior counsel for the Authority was paid at the rate of £60 per hour, rising to £80 per hour when she reached 5 years call. We note, by way of background, that the hourly rates paid by Dŵr Cymru to its solicitors have varied, according to seniority, in the range of between £410 an hour and £437 an hour for the partner in charge, and between £209 and £318 per hour for other solicitors.

112. Albion's counsels' fees are not dissimilar, in terms of broad range, to the fees paid by Dŵr Cymru to its counsel. On the other hand, there is still some scarcity of expertise and experience in this area of the law, and the Tribunal is not to be taken as deciding, in this case, that "the market rate" of itself is necessarily always a sound guide as to what is reasonable and proportionate from the point of view of the paying party.

113. We note that the hourly rates of Albion's leading counsel (and indeed of Dŵr Cymru's leading counsel) are at least 100 per cent above the rates paid by the Authority to its leading counsel, and about three times the rate paid by the Authority to its junior counsel. That is a situation which is familiar to the Tribunal, it being well known that the Treasury Solicitor or other public bodies such as the OFT customarily retain

counsel at rates below those available for private work. It seems to be implicit in the offer made to Albion on 13 December 2006 that the Treasury Solicitor considers that, when a respondent such as the Authority is ordered to pay costs to a private litigant, the costs should be "capped" at the rates the Authority is itself paying.

114. From the outset of this jurisdiction, the Tribunal has been concerned about the implications for the public purse if an enforcement authority such as the OFT defends a case reasonably but unsuccessfully, and then finds itself paying a very large bill for costs: see *Institute of Independent Insurance Brokers v. DGFT* [2002] CAT 2 ("*GISC (Costs)*) , at paragraphs 56 to 61. For example, in *MasterCard International v. OFT* [2006] CAT 15, the total costs claimed in that case by the numerous banks involved amounted to some £6 million. On the other hand, the rates paid by the Treasury Solicitor may also, for various good reasons, be atypical, and not necessarily a sound guide to what is reasonable and proportionate from the point of view of the successful private litigant. In the present case, for example, counsel for the Authority appear to have worked many more hours than counsel for Albion, so in global terms the total fees are not, apparently, dissimilar. The question of the liability of public authorities for costs where they have reasonably but unsuccessfully brought or defended proceedings in the Tribunal against powerful companies, may require further consideration in the future. In the Tribunal's view, however, the circumstances of this case do not lend themselves to a reconsideration of the policy issues. In our view, this is not a case where we should adopt "the public rate", as the benchmark for the reasonable and proportionate level of fees.

115. We therefore have to assess whether the fees charged by counsel for Albion are reasonable and proportionate to the work involved. We first note that leading counsel's fees were subject to an increase of some 12 ½ per cent (from £400 to £450 an hour) in January 2006. Junior counsel's fees have been subject to two increases, of 33 per cent in February 2005 (from £150 per to £200 per hour) and again of a further 25 per cent on that new rate (from £200 to £250 an hour) in January 2006. In total, junior counsel's hourly rate increased by 66 per cent (from £150 to £250 per hour) in the space of two years. Although it is true that the period from January to June 2006 was a demanding period in this litigation, we are not satisfied that it would be correct to allow, on assessment, the increases in fees that took place in January 2006.

116. In addition, we note that even as at 1 January 2006 the rates paid are still, in our view, relatively high. Bearing that in mind, together with the concerns we have set out above as regards the increases in fees which arose in the course of this case, we think the right course is to reduce the figure of £287,000 by some 15 per cent overall to the round figure of £245,000 by way of a broad assessment of the reasonable and proportionate fees recoverable in this case. That equates to just under 80 per cent of the fees originally claimed in the sum of £307,789.

117. In this case, in our view, it would not be appropriate to assess counsels' fees at any lower figure. We bear in mind, in particular, the heavy responsibility assumed by counsel for Albion, the complexity and length of the proceedings, the importance of the issues involved, both for the industry and the public interest, and the overall amount of costs in question.

C. ALBION'S INTERNAL COSTS

118. The issues here are: (i) whether any of Albion's directors acted as experts; (ii) the effect of the Litigants in Person (Costs and Expenses) Act 1975 ("the 1975 Act"); (iii) whether Albion is a litigant in person within the meaning of CPR 48.6; (iv) if so, what heads of cost are recoverable by Albion; (v) whether the matter is affected by the relationship between Albion and Waterlevel; and (vi) what disbursements are recoverable.

119. As we understand it, Albion's claim to recover part of its internal costs on the basis of expert work does not depend on whether Albion is a litigant in person or not. It is convenient to deal with that issue first, before dealing with the various "litigant in person" issues.

The costs claimed on the basis that Albion's directors were experts

120. Albion's schedule of internal costs in its final version of 20 December 2006 claims a total of some £105,000 on the basis of "work of an expert nature". This sum is made up as follows: Dr Bryan claims 1173 hours work at an hourly rate of £56.65; and Mr

Jeffery and Mr Knaggs claim 1308 hours at an hourly rate of £35.40, making slightly less than 2500 hours in total.

121. This work is said to include "the preparation of witness statements and the examination and analysis of evidence", but it seems to us likely that Albion has included under this heading some work of the kind that would be undertaken by a solicitor, as set out below. A better indication of the work involved is, in our view, found under the heading "information analysis" in Albion's schedule of 3 November 2006 which states: that Dr Bryan spent some 778 hours on "information analysis" at the rate of £56.65 per hour, while Mr Jeffery and Mr Knaggs between them spent some 657 hours at the rate of £35.40 per hour. Those figures give a total of some 1435 hours at an estimated cost of around £67,000.

122. The essential nature of the "information analysis" work is described in Dr Bryan's witness statement of 3 November 2006 as "investigation and analysis of evidence disclosed by other parties and of evidence in the public domain". He also refers to providing advice to counsel of an expert nature. Under the heading "information analysis" he states:

> "The other work in this category required a very high level of skill and experience (scientific, engineering, operational, accounting and regulatory) in assessing the evidence and arguments presented by the Authority and Interveners and checking this against the mass of material that was ultimately disclosed and against information in the public domain."

123. At paragraphs 23 and 24 of that witness statement Dr Bryan states:

> "23. Throughout these proceedings the Authority and Dŵr Cymru have challenged the quality of the analysis and arguments that Albion has provided. My own evidence has been extensively criticised in written submissions ("fatally flawed" was a common observation) although it was largely unchallenged in cross examination.
>
> 24. I believe that Albion has, throughout, been able to analyse existing evidence and, to significant effect, identify errors and inconsistencies in evidence provided by Dŵr Cymru and/or published by Ofwat. These errors and inconsistencies had remained unobserved or unremarked, despite the significant resources at the disposal of the

> Authority and Dŵr Cymru, and attest to the skills within Albion."

124. An initial difficulty with this part of the claim is that, while we have no reason to doubt that extensive work of the kind identified has been done by the three individuals concerned, we have only a general description of what that work consisted of, and no precise identification of why the work is "expert" in nature, as distinct from, for example, gathering and commenting on factual data.

125. There is, however, a more fundamental difficulty with this part of Albion's claim. This stems from the reluctance of the courts to award costs for allegedly "expert" work done in-house by the employees of the successful claimant, except where that work is very clearly identified as "expert" in nature, and carried out by persons who are truly expert.

126. It appears from *Re Nossen,* cited above, that in certain circumstances the costs of expert work carried out by a company's employees may be recoverable as costs in legal proceedings. In *Nossen,* costs were recovered on the basis that certain internal work done by employees in connection with the proceedings was work of an expert nature, although any element of overheads or profit was excluded. In that case, a patent case, the claimant was the Atomic Energy Authority (AEA). The AEA had instructed an outside expert, who requested that certain experiments be carried out by AEA staff. The AEA recovered costs in respect of the time spent by its employees in conducting those experiments. Lloyd-Jacob J said [1969] ALL ER 775 at 778:

> "In the case of litigation by a corporation… it has been recognised that, if expert assistance is properly required, it may well occur that the corporation's own specialist employees may be the most suitable or convenient experts to employ. If the corporate litigant does decide to provide expert assistance from its own staff…the taxing master has to determine the appropriate charge to allow."

127. In *Admiral Management Services*, cited above, Stanley Burnton J was prepared to accept that *Nossen's* case was good law, and not confined to patent cases. In that case, the claimant provided consulting and forensic services in relation to corporate systems. It was alleged that the defendants had wrongfully procured certain staff to leave the claimants and had stolen or removed certain documents. Under a search and seizure order, the claimants' employees carried out imaging (i.e. copying) work on the

defendants' computers to establish the claim. The claimants claimed the cost of that work done by its forensic department as part of its claim for costs, on the basis that its staff were experts. Stanley Burnton J said that he saw "nothing unjust in reasonable recovery of the costs of in-house experts" (paragraph 32), and that "to permit recovery of a reasonable sum for the work of employee experts which, if done by someone who was not an employee, would be recoverable as an item of costs, is a relatively minor inroad into the general principle that payment for work done by employees of a litigant is not recoverable as costs" (paragraph 34). He emphasised, however that the work must be "truly expert" (paragraph 39) and drew attention to Bingham J's judgment in *Richards & Wallington*, cited above, which emphasised the narrowness of the principle in *Nossen*. In the *Richards & Wallington* case, two employees spent time preparing factual materials for the use of an outside expert. Bingham J said at p.83:

> "But essentially, I think, these two gentleman were engaged on a factual exercise; they were certainly not independent experts, they were not, in truth, acting as experts at all and, in my judgment, these costs fall within the ordinary costs that a litigant must bear of digging out his own factual material, through his own employees, to prove his own case. Had outside experts been introduced to carry out this work then it by no means seems to me to follow that it would in any event have been recoverable as a cost of the litigation… the principle itself is not, I think, in doubt… the facts of *Nossen's* case were very special and the work that was being done there was work which the client was himself carrying out at the behest of an independent expert, saving the independent expert the cost of doing that work, and it was, I think, essentially work of an expert character."

128. In *Admiral Management Services,* Stanley Burnton J went on to hold (at p.1029f) that, for costs to be recoverable, the employees in question have to have a sufficient level of expertise to qualify as experts, and the work must be expert in character. He added, at paragraph 43:

> "Familiarity with a party's business does not make a witness into an expert either for the purpose of testimony or for the purpose of the recovery of costs. Work in this category is indistinguishable from that considered by Bingham J in the *Richards & Wallington* case. In this connection it seems to me to be irrelevant that the work might have been done at greater expense by employees of the firm of solicitors instructed by the claimant. It is the nature of the work in question that qualifies for inclusion

> in a costs order, not the amount of cost incurred or saved".

129. In these circumstances, the Tribunal's approach is as follows. Where employees of a company which is a party to proceedings before the Tribunal devote time to the case, by assembling or presenting facts and materials, the time spent is not ordinarily recoverable in costs even if, in the course of the work, the employees bring to bear long experience of the industry in question. The same is true where the company's employees prepare or present factual evidence on technical matters that the Tribunal needs to understand in order to decide the case. An example would be the technical explanations which the Tribunal had on the function of radio base station back-haul circuits in issue in *British Telecommunications plc v. Office of Communications* [2004] CAT 8. Such evidence may well draw extensively on an employee's expertise, but the employee does not, in our view, "act as an expert" for the purposes of the rules on costs. The position may be different, however if, exceptionally, the work done goes beyond amassing data or presenting technical facts, but consists of analysing and evaluating those technical facts on the basis of expert knowledge, with a view to giving an expert opinion on the analytical conclusions to be drawn from those facts. The dividing line between, on the one hand, work carried out by a technically qualified employee in the ordinary course of his employment, in connection with legal proceedings in which his employer is engaged, and work which results in the employee giving an expert opinion, on the other hand, may be difficult to draw. There is also the issue, mentioned below, of the independence of the expert in question. In the Tribunal's view, costs would be recoverable under this head only exceptionally and in narrow circumstances.

130. Turning to the facts of the present case, Mr Jeffery is a member of the Chartered Institute of Public Finance and Accounting and has a postgraduate diploma in management studies. His career background is that of an accountant, but he has some 30 years experience in the water industry, working in financial management, regulatory affairs and special projects at a senior level, and later as an independent consultant, including overseas assignments. Mr Jeffery produced a witness statement dealing mainly with financial matters, and was briefly cross-examined on financial issues. We are sure that his long experience of the water industry and financial background has

been of great assistance to Albion. We take the view, however, that it is difficult to characterise Mr Jeffery's work as that of an "expert" for the purposes of an award of costs, any more than we would regard Mr Christopher Jones of Dŵr Cymru as an "expert" in that sense. Mr Jones, for example, is plainly an able and experienced Finance Director of Dŵr Cymru, who devoted a great deal of time to preparing and presenting his evidence, on relatively technical matters, in a manner which the Tribunal found clear and helpful. Had, however, the boot been on the other foot, and we were considering a claim for costs by Dŵr Cymru against Albion, we do not think we could have regarded Mr Jones as an "expert" for the purposes of costs, notwithstanding that the internal "cost" to Dŵr Cymru of Mr Jones' time must have been considerable. In our view, Mr Jeffery is in broadly the same position.

131. Mr Knaggs has a BSc Hons in Environmental Science from the University of Hertfordshire, and prior to joining Albion was Technical Director of Enviro-Logic. We have no reason to doubt that Mr Knaggs, as a director of Albion and Waterlevel, has put in a great deal of work on this case and has no doubt been of valuable assistance to Dr Bryan and Mr Jeffery in relation to the underlying data and materials, and technical matters. We are, however, unable to find, on the evidence, that his work can be characterised as that of an expert in accordance with the approach we have adopted.

132. Dr Bryan has a BSc Hons in Microbiology with Chemistry from Reading University (1972) and a PhD in estuarine pollution mechanisms from Southampton University (1978). He is a member of the Chartered Institute of Water and Environmental Management, and a Member of the Institute of Biology, Chartered Biologist. After completing his PhD, Dr Bryan worked for Thames Water for 13 years, particularly in such areas as water quality, technical assistant to the chairman, overseas consultancy, environmental regulation and various projects related to privatisation. After a period as a director of a waste disposal company, he was Managing Director of Enviro-Logic (owned jointly by South West Water and Dr Bryan) from 1991 to 2003. He has been a director of Albion since 1999 and of Waterlevel since 2003.

133. At paragraph 297 of the Tribunal's interim judgment, the Tribunal relied on Dr Bryan's expertise in the water industry as regards, in particular, the characteristics of the distribution systems of potable and non-potable water respectively, in reaching the view

that it required further evidence on the matters set out in paragraph 302 of that judgment. Dr Bryan's subsequent witness statement of 7 April 2006 and its extensive annexes brings to bear a great deal of knowledge and analysis as regards the cost structures and physical characteristics of potable and non-potable water distribution systems, respectively. On the basis of that analysis, Dr Bryan then expresses various opinions and puts forward a number of arguments regarding the credibility of the figure of 16 p/m³ for "distribution" costs which was the central issue in this part of the case. Dr Bryan's evidence essentially reflects the points made in the original notice of appeal, and is summarised by the Tribunal at paragraphs 325 to 363 of the Tribunal's main judgment. The Tribunal's conclusions on this aspect of the case are set out at paragraphs 477 to 603 of the main judgment and rely, in part, on Dr Bryan's evidence.

134. Although we acknowledge that, in general terms, Dr Bryan has very considerable expertise and experience in the water industry, we have some difficulty in characterising the work he did in relation to this case as truly "expert in nature", within the relatively narrow meaning to be given to that concept as set out above. The essential issues in this case, on which Dr Bryan's experience was relevant, were the "distribution" costs of non-potable, as compared to "potable", water and, to a much lesser extent, the cost of partial treatment of raw water. Dealing with these issues involved considering the factual characteristics of the distribution of non-potable, as distinct from potable, water to determine the relevant cost drivers. In our view that was essentially a matter of primary fact. In addition, it was necessary to analyse such financial information as there was, including Dŵr Cymru's LIT justification and the costs attributable to "raw water" transfer, to determine whether the figure of 16 p/m³ for the "distribution" cost of non-potable water was credible or not. Dr Bryan does not, however, have specific expertise in accounting matters. While it is true that, in addressing these issues, Dr Bryan brought to bear his considerable knowledge of the water industry, he disclaimed any specific expertise in accountancy, engineering or economics. Dr Bryan's academic qualifications appear to be more in the areas of biological and environmental matters, which did not really arise in this case.

135. While it seems to us that the remarks of Devlin J, in *Re Chemists Federation (No. 2)*, cited above, relied on by the Authority, were dealing with a different point,[4] we have some hesitation in holding that a trade witness who gives factual evidence, based on his expertise, on the physical characteristics of a particular industry and the likely costs of particular activities, is to be characterised as an expert in the present context. Many other employees in the water industry or other industries, who have long experience, would be in a position not dissimilar to that of Dr Bryan.

136. We also have difficulty in this case in determining or identifying the points on which Dr Bryan gave truly 'expert' evidence, as distinct from supplying the Tribunal with, and commenting on, factual material. Some of the financial workings in the annexes to Dr Bryan's witness statement of 7 April 2006, for example, reflect his knowledge of the industry as a businessman, but do not in our view constitute 'expert' evidence by an expert in accountancy. On an issue such as 'stand alone' costs, for example, Dr Bryan seems to us to be in a similar position to Mr Jones, who we would not regard as an 'expert' for these purposes, for the reasons already given. As with Mr Jeffery, we have not succeeded in identifying a clear distinction between the nature of the evidence given by Dr Bryan and the nature of the evidence given by Mr Jones.

137. We add that Dr Bryan was not identified as, or held out, in advance as an expert witness, as was the case for example with Professor Armstrong and Dr Marshall. We have difficulty in distinguishing, retrospectively, elements in the extensive material put before the Tribunal by Albion that could be said to be 'expert' as distinct from 'factual'.

138. There is another element which, in our view, is relevant. The judgments in *Nossen,* and in particular in *Admiral Management Services* at p.1027 E to J, seem to show that costs may be recovered in respect of expert work by employees even if such employees could not fulfil the requirement of independence. The view is taken that the position of the employees in question goes to the weight to be given to their evidence, and not to whether costs are recoverable in relation to the work done. It is not entirely clear

[4] In that case, one of the early cases heard by the Restrictive Practices Court (before a bench of seven) Devlin J considered, and rejected, the utility of expressions of opinion by trade witnesses on questions of public interest within the meaning of section 21 of the Restrictive Trade Practices Act 1956. That point does not arise here: see [1958] 3 All ER 448 at 462 D to E.

whether that view is consistent with CPR Part 35, which now governs expert evidence in civil proceedings. In this case, however, the evidence of Dr Bryan is given in his capacity as the Managing Director of Albion and the directing mind in this litigation. Dr Bryan is the principal shareholder in Waterlevel, which owns Albion, and obviously has a direct interest in these proceedings, which distinguishes his position from that of the employees in *Nossen* and *Admiral Management Services.* We accept that, as a matter of fact, Dr Bryan fully understood and fulfilled his duty to the Tribunal in this case, but his position in the litigation disqualifies him automatically from fulfilling the requirements of an expert as set out in the Tribunal's *Guide to Proceedings*, October 2005, at page 46, which are in turn based on Part 35 of the CPR. To hold that a litigant who is, in effect, the principal shareholder of the appellant, and thus, in effect, pursuing his own case, can recover the costs of his time as "an expert", where the expertise in question is essentially based on his business experience in the industry in question, would, in our view, be to extend the existing case law. The Tribunal is not persuaded that it should take that step.

139. That is not in any way to detract from the quality of the work that Dr Bryan and his colleagues presented to the Tribunal. It is simply that, as a matter of law, the Tribunal does not consider that such work is to be regarded as falling within *Re Nossen*, or otherwise recoverable as the costs of 'expert' evidence.

The "litigant in person" issues

140. Albion also seeks to recover its internal costs on the basis that it is a litigant in person. A number of issues arise in that regard.

The Litigants in Person (Costs and Expenses) Act 1975

141. Prior to the 1975 Act, a litigant in person was unable to recover costs in respect of the time and trouble he expended on the preparation of his case. The 1975 Act reformed that position. Section 1 of the 1975 Act provides:

> "**Costs or expenses recoverable**
>
> (1) Where, in any proceedings to which this subsection applies, any costs of a litigant in person are ordered to be

> paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs sums in respect of any work done, and any expenses and losses incurred, by the litigant in or in connection with the proceedings to which the order relates. This subsection applies to civil proceedings—
>
> (a) in a county court, in the Supreme Court or in the House of Lords on appeal from the High Court or the Court of Appeal,
>
> (b) before the Lands Tribunal or the Lands Tribunal for Northern Ireland, or
>
> (c) in or before any other court or tribunal specified in an order made under this subsection by the Lord Chancellor."

142. The Authority and Dŵr Cymru contend that Albion's internal costs are not recoverable since the Tribunal is not designated under section 1(1)(c) of the 1975 Act.

143. The Tribunal's power to award costs is found in Rule 55 of the Tribunal's Rules, set out at paragraph 4 above. The Tribunal's Rules are made by statutory instrument (SI 2003/1372), subject to a negative resolution by either House of Parliament under section 15 (1) and (4) of the Enterprise Act 2002. (An order made under the 1975 Act would also be made subject to the negative resolution procedure under section 1(3) of that Act.)

144. Rule 55(2) of the Tribunal's Rules gives the Tribunal jurisdiction to award costs. Rule 55(1) provides:

> "For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session, or the Supreme Court of Northern Ireland."

145. Rule 55(1), in our view, identifies the heads or kinds of costs (or in Scotland, expenses) which are recoverable before the Tribunal – i.e. the same costs which would be recoverable in the Supreme Court of England and Wales, the Court of Session, or the Supreme Court of Northern Ireland as the case may be. As far as England and Wales is concerned, the relevant rules are those of the CPR. According to Rule 55(1), all heads of costs recoverable in accordance with the CPR are similarly recoverable before the Tribunal. Since the CPR includes Rule 48.6, the costs identified in Rule 48.6 as

recoverable in proceedings in the High Court are, in our view, equally recoverable before the Tribunal.

146. In our view, it is unnecessary to have a second statutory instrument under section 1(1)(c) and (3) of the 1975 Act, when there already is a statutory instrument (i.e. the Tribunal's Rules) evincing the clear intention of Parliament made under section 15(1) and (4) of the Enterprise Act 2002. The submissions of the Authority and Dŵr Cymru would involve implying into Rule 55(1), after the words "Supreme Court of England and Wales", a bracket reading "(except that Rule 48.6 of the Civil Procedure Rules shall not apply as long as the Lord Chancellor has not made an order under section 1(1)(c) of the Litigants in Person (Costs and Expenses) Act 1975)." We see no basis for reading these extraneous words into Rule 55(1).

147. The case of *Nader v. Customs and Excise Commissioners*, cited above, lends support to the Authority's contrary contention. However, what was in issue in that case was Rule 29 of the then Value Added Tax Tribunals Rule 1986 SI 1986/590, which provided:

> "(1) A tribunal may direct that a party or applicant shall pay to the other party to the appeal or application –
>
> (a) within such a period as it may specify such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application; or
>
> (b) the costs of such other party of and incidental to and consequent upon the appeal or application to be taxed by a Taxing Master or District Registrar of the Supreme Court of Judicature in England … on such a basis as it shall specify.
>
> (2) Where a tribunal gives a direction under paragraph 1*(b)* of this rule in proceedings in England and Wales the provisions of Order 62 of the Rules of the Supreme Court 1965 shall apply, with necessary modifications, to the taxation of costs as if the proceedings in the tribunal were a cause or matter in the Supreme Court of Judicature in England …"

148. The Court of Appeal, following the earlier decision by Simon Brown J in *Customs and Excise Commissioners v. Ross* [1990] STC 353, [1990] 2 All ER 65, held that the above Rule 29 was not a sufficient basis upon which to import into proceedings before VAT tribunals the provisions of the then RSC Order 62, r.18 allowing litigants in person to

recover costs beyond those that would otherwise be recoverable at common law. While we accept that the matter is not entirely free from doubt, in our view the provisions of Rule 55 of the Tribunal's Rules are considerably clearer than the provisions in issue in the cases of *Nader* and *Ross*. Rule 55(1) directly defines costs and expenses recoverable before the Tribunal as being those recoverable in the High Court, whereas under Rule 29 of the then rules of the VAT tribunals that was, at best, only an indirect inference, which the courts were not prepared to draw. No order under the 1975 Act is necessary here, since the kinds of costs recoverable are already defined by Rule 55(1).

149. It follows, in our view, that Albion's recovery of costs before the Tribunal should be dealt with in accordance with CPR 48.6.

Can Albion recover costs as a litigant in person?

150. CPR 48.6 provides:

> "**Litigants in person**
>
> (1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.
>
> (2) The costs allowed under this rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.
>
> (3) The litigant in person shall be allowed –
>
> (a) costs for the same categories of –
>
> (i) work; and
>
> (ii) disbursements,
>
> which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;
>
> (b) the payments reasonably made by him for legal services relating to the conduct of proceedings; and
>
> (c) the costs of obtaining expert assistance in assessing the costs claim.
>
> (4) The amount of costs to be allowed to the litigant in person for any item of work claimed shall be –

(a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work; or

(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the practice direction.

(5) A litigant who is allowed costs for attending at court to conduct his case is not entitled to a witness allowance in respect of such attendance in addition to those costs.

(6) For the purposes of this rule, a litigant in person includes-

(a) a company or other corporation which is acting without a legal representative; and

(b) a barrister, solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990 who is acting for himself."

151. The first issue is whether Albion is properly to be regarded as a litigant in person. Nothing prevents a corporate body from being a litigant in person, as Rule 48.6(6)(a) expressly indicates. Even in the High Court, a company may appear, with the Court's permission, by an authorised representative who is neither a solicitor nor a barrister (see Part 39 CPR at 39.6.1). However, Rule 48.6(6)(a) further states that a litigant in person includes a company or other corporation "which is acting without a legal representative". What constitutes a "legal representative" for these purposes is defined by CPR 2.3(1), which states that "legal representative" means a barrister or a solicitor, solicitor's employee or other authorised litigator (as defined by the Courts and Legal Services Act 1990) who has been instructed to act for a party in relation to a claim". Does the fact that Albion was represented by counsel, formally instructed through Palmers, mean that Albion was nevertheless "acting without a legal representative" for the purposes of Rule 48.6(6)(a)?

152. Rule 7 of the Tribunal's Rules provides:

"In proceedings before the Tribunal, a party may be represented by –

(a) a qualified lawyer having a right of audience before a court in the United Kingdom; or

(b) by any other person allowed by the Tribunal to appear on his behalf."

153. Pursuant to Rule 7(b), Dr Bryan, with the Tribunal's authorisation, represented Albion personally at the outset of the proceedings in May 2004. There is no doubt that Albion was a litigant in person from then until November 2004 when counsel and Palmers were instructed.

154. After counsel were instructed in late 2004, as far as the Tribunal was concerned, Dr Bryan continued to represent Albion before the Tribunal. Although, unlike the High Court, the Tribunal does not formally have a representative that is "on the record", each party's address for service and the names of its representatives are established by the notice of appeal: see Rule 8(3). Any change in legal representation should be notified to the Tribunal: *Guide to Proceedings*, October 2005, paragraph 5.8. In this case Dr Bryan signed the notice of appeal, and has been the sender or recipient of all the numerous communications passing between the Tribunal, Albion, and the four other parties. Albion's address for service has been its registered office, which is also Dr Bryan's home. The Tribunal has accepted Dr Bryan as Albion's authorised representative in exactly the same way as the Tribunal has accepted the in-house legal advisers of the Authority and United Utilities, and the solicitors instructed by Dŵr Cymru and Aquavitae respectively, as the representatives of those parties. On behalf of Albion, Dr Bryan has performed, *de facto*, the role that a solicitor would normally undertake.

155. The Tribunal was unaware, prior to Albion's submissions of 18 October 2006, of the arrangements under which counsel had been instructed, or of the existence of Palmers. As far as the Tribunal is concerned, the Tribunal has looked to Dr Bryan as Albion's representative before the Tribunal. The Tribunal has never had any communication with Palmers.

156. In the Tribunal's view, the existence of Palmers as the formal mechanism for the invoicing and payment of counsel's fees, does not preclude Albion from being treated as a "litigant in person" in these proceedings. The substance of the matter is that Albion, through Dr Bryan, has conducted these proceedings. Moreover, we do not accept the submission made on behalf of the Authority that a litigant must *either* act entirely in person, doing everything himself, *or* instruct a solicitor, in which case *everything* must be done through the solicitor (our emphasis). In proceedings before

the Tribunal, the Tribunal's Rules are sufficiently flexible to permit, where appropriate, the "unbundling" of legal services as urged by Lord Woolf of Barnes CJ, in *Access to Justice*, Interim Report, paragraphs 39 to 40, whereby some legal work is carried out by the lay client and other work by legally qualified representatives[5]. In this case, it is plain that Albion *could,* formally speaking, have used Palmers as a "post-box", and Palmers *could,* formally speaking, have been notified as authorised to receive and send communications from/to the Tribunal and the other parties. However, in proceedings of the present kind, that would seem to us to be unnecessarily cumbersome and expensive, especially given that Palmers have, we understand, no expertise in the subject matter.

157. It may, at first sight, be thought to be stretching a point to hold that Albion is "acting without a legal representative" within the meaning of CPR 48.6(6)(a) even when it has been represented by leading and junior counsel, who are formally instructed through Palmers. In our view, however, Albion does not fall outside CPR 48.6(6)(a).

158. As already stated, in our view the position is perfectly clear as regards the period of some six months from May to November 2004, prior to counsel (and Palmers) being involved. No other legal representative was instructed during this period.

159. We do not think the position is altered as from November 2004 because counsel were instructed. After counsel were retained, Dr Bryan continued to perform the role that a solicitor would otherwise perform, including corresponding with the Tribunal and the parties, giving information and advice to counsel, preparing witness statements, assembling documents and bundles, attending hearings in support of counsel and so on. That is not work that would ordinarily be done by counsel, who in this case have performed the traditional role of advocates, namely drafting the reply, and preparing and presenting written and oral submissions. The position in *Agassi's* case, cited above, was that Mr Agassi was treated as a litigant in person, notwithstanding that counsel were instructed: see [63] of that judgment. Counsels' fees were treated as disbursements: [68] to [69]. In our view, Albion does not cease to be "acting without a

[5] This approach seems to be supported by CPR Rule 48.6(3)(b) whereby a litigant in person may recover for sums expended by him for legal services relating to the conduct of proceedings.

legal representative" for the purposes of CPR 48.6(6)(a) solely on the basis that counsel were instructed.

160. In our view, the position does not change by virtue of the involvement of Palmers. Palmers were apparently involved so as to secure formal compliance with the Code of Conduct of the Bar of England and Wales regarding direct access to barristers and billing arrangements. Palmers has played no part in this litigation, and has never, as far as the Tribunal is concerned, been identified as Albion's representative before the Tribunal, for example for the purposes of Rule 7, Rule 8(3), or the service of documents under Rule 63. In those circumstances, in our view, Albion continued throughout to be "acting without a legal representative" before the Tribunal in respect of work that would ordinarily have been done by a solicitor but in this case was undertaken by Albion itself. Although Albion seemed to argue at one point that it was not a litigant in person, we do not think that argument is correct, for the reasons given above.

161. We reiterate again, that in proceedings before the Tribunal, we see no objection in principle, and many advantages in practice, in the various tasks of legal representation being undertaken in the most cost-effective way. In this case, the work that would otherwise have been done by a solicitor has been performed by the litigant itself, through Dr Bryan, while counsel have performed their traditional role. Palmers has performed the formal role, required by the Code of Conduct of the Bar of England and Wales, of being the conduit through which counsel were instructed. In our view, the formal arrangement by which counsel were instructed does not alter the fact that Albion has itself done all the work that would ordinarily be done by a solicitor, and has, in substance, been throughout "acting without a legal representative" in respect of that work.

The work done in respect of which Albion is entitled to recover costs

162. CPR 48.6(3) provides in effect that the litigant in person shall be allowed:

> "(a) costs in the same categories of (i) work… which would have been allowed if the work had been done… by a legal representative on the litigant in person's behalf."

163. Where a corporate body is a litigant in person, it seems to us that the right approach is to focus on the additional work undertaken as a result of the fact that the company has been doing the work that a legal representative would have done. In other words, the company is not entitled to recover costs in respect of the work its employees would have had to do anyway, such as assembling facts and documents, whether or not a legal representative had been instructed. For the purposes of Rule 48.6(3)(a)(i), our approach is to identify the work carried out by Albion which it would not otherwise have done, or would have done to a lesser extent, if a legal representative had been carrying out that work on Albion's behalf.

164. It does not seem to us that any hours are recoverable in this context in respect of Mr Jeffery and Mr Knaggs. Mr Jeffery and Mr Knaggs have not been authorised by the Tribunal to act as Albion's legal representatives, and it is not suggested that they have performed that role.

165. As regards Dr Bryan's hours, in the various schedules submitted Dr Bryan claims in round figures a total of some 1500 hours up to 23 October 2006 and 1630 hours up to 20 December 2006. In his schedule of 24 November 2006 Dr Bryan identified 200 hours as work equivalent to that of a solicitor. Dr Bryan claims 300 hours under that heading in his further schedule of 20 December 2006. As regards the latter claim, it seems to us that most of the additional hours claimed are likely to relate to the issue of costs. For the reasons already given in relation to counsels' fees, we regard only a proportion of these hours as being allowable, in any event.

166. However, we are not satisfied that, in the schedules of 24 November and 20 December 2006 referred to above, Albion has done itself justice in dividing the hours worked between "acting as a solicitor" and "expert". The earlier schedule of 3 November 2006, which used seven headings, is more informative. According to that schedule, Dr Bryan's hours divide into: (a) advice to counsel (188 hours); (b) information analysis (778 hours); (c) attendance on counsel (205 hours); (d) attendance on the other side (27 hours); (e) administration (155 hours); (f) witness statements (203 hours); and (g) case management conferences/hearings (124 hours). In our view, a number of these headings (notably (a), (c), (d), (f) and (g)) include work that a legal representative would ordinarily do. It is also our view that some part of (b) "information analysis"

would have been carried out by a legal representative, had Albion instructed one. In his witness statement of 3 November 2006 Dr Bryan identifies "advocacy related work" prior to September 2004 as falling under this heading. The substantial work of the preparation of the notice of appeal also appears to be included under this heading.

167. We bear in mind that for the first six months of this case in 2004, when the essential groundwork was laid in the notice of appeal and its annexes, and the question of interim relief was dealt with, Albion was without any legal assistance at all. The notice of appeal required legal research, a coherent presentation of the grounds of appeal, the selection and assembly of relevant documents, and a detailed commentary on the paragraphs of the Decision. The notice of appeal is a complex 32 page document with 12 substantial annexes, which served as a sound basis for the proceedings. All that was done by Albion without legal assistance. Similarly, the interim measures application, the subsequent case management conferences, and the appearance on the scene of the Director, Dŵr Cymru, United Utilities and Aquavitae – all of whom filed pleadings before counsel for Albion were involved - would have required, in our judgment, considerable work of a legal nature by Dr Bryan, over and above what would have been necessary had Albion had legal support. In addition, during this period, Albion was engaging in correspondence with the Tribunal and other parties, and had to consider the Director's request for an extension of time for serving the defence, the requests for intervention from Dŵr Cymru, United Utilities and Aquavitae, various requests for disclosure, the contents of the substantial defence served on 15 September 2004, the procedure for dealing with Aquavitae's appeal in Case no. 1045, and the various statements of intervention served by Dŵr Cymru, United Utilities and Aquavitae in October 2004.

168. We estimate in broad terms that Dr Bryan would have needed to devote at least some 200 hours (equivalent to 5 working weeks of 40 hours a week) in the period May to November 2004 on work that would otherwise have been done by a legal representative, had Albion had such a representative during this period.

169. It is true that in relation to the period after November 2004, Dr Bryan's two roles of instructing solicitor and lay client intermingle (for example, even with an instructing solicitor, the lay client still has to read pleadings, attend hearings and assist counsel).

However, there is, in our view, no doubt that a significant extra dimension is involved if the lay client is also doing the work of the legal representative. Obvious examples include liaising and corresponding with the Tribunal, and the four other parties as to the conduct of the appeal; pursuing applications for disclosure; drafting witness statements; dealing with submissions made by other parties not dealt with by counsel; and generally providing back-up and support to counsel of the kind provided, in this case, to counsel to the Authority by Mr Brooker and his team, and to Dŵr Cymru by Wilmer Hale.

170. In his dual role of lay client and Albion's representative before the Tribunal, it would also, in our view, have still been appropriate for Dr Bryan to peruse and comment on the various pleadings and submissions, as an instructing solicitor would have done; to attend all the case management conferences and hearings; to be in attendance at the site visit in February 2005; to deal with a number of issues regarding the interim measures order; to consider the witness statements of Mr Jones served in February 2006; and the preparation of his own statement of 7 April 2006; to consider the expert evidence of Dr Marshall and Professor Armstrong, as well as the further evidence of Mr Jones in May 2006; to deal with a number of procedural and other issues arising out of the second hearing in May/June 2006; to consider the Tribunal's judgment of 6 October 2006, and prepare for the subsequent case management conferences on 28 October and 20 November 2006; and to consider consequential matters arising out of those hearings, including costs.

171. At the same time, throughout that period, Albion (through Dr Bryan on its behalf) had to conduct correspondence with the Tribunal and the other parties, and deal with numerous points of procedure and other matters relating to the progress of the appeal. In other circumstances, solicitors would have done that work on Albion's behalf.

172. Taking a broad brush approach, we consider that 300 hours of Dr Bryan's time is reasonably allowable to reflect the fact that, after November 2004, Dr Bryan was still de facto carrying out the work of a legal representative, notwithstanding that, by then, he had the assistance of counsel formally instructed through Palmers.

173. We therefore allow in total some 500 hours in respect of the categories of work that would have been done on Albion's behalf by a legal representative had Albion had such

a representative, within the meaning of Rule 48.6(3)(a)(i), but which was in fact done by Dr Bryan.

Has Albion established financial loss?

174. The next question is whether Albion can establish financial loss, in terms of Rule 48.6(4)(a), in which case the amount recoverable by Albion is the amount Albion can prove it has lost for time reasonably spent on doing the work; or whether, by contrast, Albion cannot establish financial loss, in which case the amount recoverable is £9.25 per hour, in accordance with Rule 48.6(4)(b) and the accompanying practice direction 48PD.3.

175. Dr Bryan's evidence in his letter to the Tribunal of 21 December 2006 is that, prior to this litigation, Albion's previous parent company, Enviro-Logic, had been able to earn some £100,000 per annum in consultancy fees. The then Enviro-Logic team included Dr Bryan, Mr Jeffery and Mr Knaggs who are all experienced executives in the water industry. Dr Bryan tells us that, had Albion not been engaged in this litigation, he and his colleagues could have spent their time engaged in various consultancy projects, notably in developing inset appointments for greenfield sites.

176. In our view, the correct approach is to consider the position that Albion would have been in had it not brought this appeal. In our judgment, in that event Dr Bryan (with the other Albion directors) would have been able to devote himself to seeking consultancy work within the water industry during the two and a half years in which this appeal has been proceeding. We have no reason to doubt Dr Bryan's evidence that "commercial" charge-out rates would have been considerably higher than the internal rate at which Dr Bryan has "costed" his time, on the basis of his salary, namely the rate of some £56.50 per hour. We are further satisfied that that rate is well below two thirds of the amount a legal representative would have charged: see Rule 48.6(2).

177. In all the circumstances, it seems to us on the balance of probabilities that, as a result of the time spent on this appeal, Albion has foregone alternative consultancy income that is at least equivalent to, and in all probability would have greatly exceeded, the product of the total of some 500 hours of Dr Bryan's time at the rate of around £56 per hour

which we are minded to consider recoverable on Albion's part as a litigant in person. That amounts to the sum of some £28,000 in round figures which we are prepared to treat as recoverable costs.

The relationship between Albion and Waterlevel

178. The Authority and Dŵr Cymru submit, however, that Albion itself has suffered no loss in respect of the costs attributable to the work done by Dr Bryan, since Dr Bryan's salary is in fact paid by Waterlevel by means of the management fees that Albion pays Waterlevel. Although Rule 48.6(3)(b) would permit Albion to recover payments reasonably made by Albion "for legal services relating to the conduct of the proceedings", the point is taken that any such payments to Waterlevel cannot be recovered because Waterlevel is not authorised to conduct litigation under section 27 of the CLSA 1990.

179. It seems to us that the short answer to this point of extreme technicality is that had this litigation not occurred, Dr Bryan (supported by his team) would have been in a position to earn consultancy fees on behalf of Albion, so the financial loss in question is properly to be attributed to Albion, not Waterlevel.

180. However, in our view, to put the matter beyond doubt, the way to deal with this technical point, if it needs to be dealt with at all, is for Waterlevel to be joined as an appellant. In that capacity, Waterlevel would have both the right to conduct litigation and a right of audience, both at common law, and under section 27(2)(d) and section 28(2)(d), respectively, of the CLSA 1990.

181. Under section 47(2) of the 1998 Act, a third party may appeal to the Tribunal "only if the Tribunal considers that he has sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest".

182. It is, in our view, manifest that Waterlevel has, and always has had, a sufficient interest in the contested Decision under section 47(2) of the 1998 Act to be an appellant in its own right. No doubt an application to join Waterlevel as an appellant would have been made at an earlier stage had it been appreciated that technical points of the present kind

were going to be taken. In our view, and contrary to Dŵr Cymru's submission, this situation is not directly analogous to the situation envisaged under CPR 48.2 where the court may join a "non-party" for the purpose of an order of costs for or against that party. In this case, Waterlevel has at all material times had a sufficient interest in the substantive outcome of the appeal. The appeal was always likely to be determinative of the future of Waterlevel's wholly owned subsidiary, Albion.

183. In these exceptional circumstances, it is appropriate, out of an abundance of caution, to order that the notice of appeal be amended under Rule 11(1) to add Waterlevel as an appellant in these proceedings. We make that order to secure that any legitimate claim to recover costs in this case should not be defeated on the technical ground that Waterlevel is not a party to the appeal. The Tribunal took a not dissimilar course as regards Sportsworld International in *JJB and Allsports v. OFT (Costs of the Intervener)* [2005] CAT 34.

Disbursements

184. In its schedule of 23 October 2006 Albion claims disbursements of £6,274, of which the principal elements are travel and subsistence £4,386, photocopying and stationery £1,177, postage £278 and fax £291, plus various other items coming to around £140. In the schedule attached to his witness statement of 3 November 2006, Dr Bryan claims a further £692 for telephone costs, on an apportioned basis.

185. Under Rule 48.6(3)(a)(ii) a litigant is entitled to claim for disbursements "if the disbursements had been made by a legal representative on the litigant in person's behalf".

186. In our view a proportion of the claimed disbursements are recoverable. For example, Dr Bryan as Albion's representative before the Tribunal was in our view obliged to attend the various case management conferences (7 in all) and hearings (9 days), as well as the site visit in North Wales in February 2005. Mr Jeffery filed a witness statement, and in that capacity needed to be present at the main hearings of the Tribunal and at least certain case management conferences. On that basis, some allowance for travel and subsistence is in our view recoverable as regards Dr Bryan and Mr Jeffery.

187. In addition it seems to us that an allowance should be made in respect of photocopying, postage, fax and telephone. We note that in *Agassi*, cited above, Dyson LJ appeared to regard costs such as couriers, telephone and fax to be recoverable: see [65]. Although such items, in a solicitors' firm, may normally be treated as part of general overheads, in our view the position here is that a company which was *de facto* acting without a legal representative, has incurred extra expenses as a result of doing so. We therefore make an allowance under this heading.

188. On the other hand, in our view the Tribunal should be cautious in the matter of disbursements. On a summary basis, we are prepared to allow the overall sum of some 30 per cent of the sum claimed for disbursements, namely £2,000.

Apportionment

189. In our view the costs awarded to Albion in this case should be apportioned between the Authority and Dŵr Cymru. We understand that is agreed. These parties are requested to inform the Tribunal, within 7 days, the basis of the agreed apportionment for the Tribunal to give its consent.

IV CONCLUSIONS

190. For the foregoing reasons the Tribunal unanimously decides to assess the costs payable to Albion in the sum of £275,000 (plus VAT where applicable), to be paid within 28 days, such costs to be apportioned as between the Authority and Dŵr Cymru as agreed between them or on such other basis as decided by the Tribunal.

Christopher Bellamy Antony Lewis John Pickering

Charles Dhanowa 8 January 2007
Registrar