Neutral citation [2009] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1034/2/4/04 (IR)
1046/2/4/04

Victoria House
Bloomsbury Place
London WC1A 2EB

9 April 2009

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED
ALBION WATER GROUP LIMITED

Appellants

-v-

WATER SERVICES REGULATION AUTHORITY

Respondent

supported by

DŴR CYMRU CYFYNGEDIG
UNITED UTILITIES WATER PLC

Interveners

Heard at Victoria House on 13 February 2009

JUDGMENT (Remedy and costs)

APPEARANCES

Mr. Rhodri Thompson Q.C. and Mr. John O'Flaherty (instructed by Palmers Solicitors) appeared on behalf of the Appellants.

Miss Valentina Sloane (instructed by Pinsent Masons LLP) appeared on behalf of the Respondent.

Mr. Christopher Vajda Q.C. and Mr. Meredith Pickford (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of Dŵr Cymru Cyfyngedig.

Mr. Fergus Randolph (instructed by the Group Legal Manager, United Utilities) appeared on behalf of United Utilities Water plc.

I. INTRODUCTION

1. There have been three principal judgments in this litigation. Respectively, they are the judgments of 6 October 2006 [2006] CAT 23 ("the main judgment"), 18 December 2006 [2006] CAT 36 ("the further judgment"), and 7 November 2008 [2008] CAT 31 ("the unfair pricing judgment"). The Tribunal has found that Dŵr Cymru abused its dominant position by offering an access price for common carriage of non-potable water via the Ashgrove system, referred to in these proceedings as the "First Access Price", which imposed a margin squeeze and was excessive and unfair in itself. In this Judgment we use the same terms and abbreviations used in the Tribunal's earlier judgments, with which it should be read for the background and other details of Albion's appeal. Questions now arise as to the appropriate remedy and costs.

2. Following the finding of unfair pricing, the parties agreed an access price for common carriage services of 14.4p/m^3 in 2000/2001 prices (adjusted for inflation, and subject to certain conditions). We are disappointed that a completely agreed settlement of all outstanding matters was not reached. This would have been more satisfactory for the customers of the water industry. Settlement absent, on 13 February 2009 the Tribunal held an oral hearing to consider the issues raised by the applications of Albion and Dŵr Cymru, both dated 24 November 2008, for final relief.

3. The Tribunal has considered all the written material submitted by the parties, as well as the oral argument, in arriving at the conclusions set out in this judgment. We are grateful to all concerned for the assistance they have given.

4. The Tribunal has had regard to the very recent remarks of Mummery LJ in the judgment in *Office of Communications & T-Mobile (UK) Ltd v Floe Telecom Ltd* [2009] EWCA Civ 47 at paragraphs [20]-[21]:

> "… There are sound reasons why courts and tribunals at all levels generally confine themselves to deciding what is necessary for the adjudication of the actual disputes between the parties. Deciding no more than is necessary may be described as an unimaginative, unadventurous, inactive, conservative or restrictive approach to the judicial function, but the lessons of practical experience are that unnecessary opinions and findings of courts are fraught with danger.

> … The wish to be helpful to users is understandable. It may even be commendable. But bodies established to adjudicate on disputes are not in the business of giving advisory opinions to litigants or potential litigants. They should take care not to be, or to feel, pressured by the parties or by interveners or by critics to do things which they are not intended, qualified or equipped to do. In general, more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute."

II. ISSUES TO BE DECIDED

5. All parties invited the Tribunal to issue a decision on final relief. In the light of the parties' submissions, we identified the following remaining questions:

   (a) What Order should the Tribunal make to remedy the unfair pricing abuse?

   (b) What Order should the Tribunal make to remedy the margin squeeze abuse?

   (c) Given that the parties agreed that Albion should be awarded its costs, on what basis should they be assessed if not agreed? Dŵr Cymru did not object in principle to the making of an interim payment on account of costs but there was a dispute between the parties as to the appropriate amount.

6. On the questions we have identified, the submissions of the parties were as follows:

   (a) Albion asked the Tribunal to make a Declaration that Dŵr Cymru had abused its dominant position in the manner described in the Tribunal's earlier judgments. Albion also sought an order modifying the First Access Price and the Bulk Supply Price. Dŵr Cymru and the Authority agreed with Albion that it is entitled to declaratory relief (although the terms were not agreed), but argued that final Directions were (i) unnecessary in respect of the First Access Price since the parties had agreed a revised access price; and (ii) outside the Tribunal's jurisdiction in relation to the Bulk Supply Price.

   (b) To secure a minimum margin, Albion sought an order that the retail price charged by Dŵr Cymru to any industrial user should exceed the Bulk

Supply Price by a minimum of 5p/m³. Dŵr Cymru and the Authority opposed that application. They contended that the Tribunal had no jurisdiction to make a final order as regards bulk supplies; the Tribunal has not made any findings on the minimum margin in the context of common carriage; and it would not be appropriate for there to be a further investigation of this issue.

(c) Albion claimed that it should be awarded its costs accumulated since the Tribunal's judgment on costs of 8 January 2007 ([2007] CAT 1). Dŵr Cymru and the Authority agreed that they should pay Albion's legal costs, but only if reasonably incurred and subject to detailed assessment if not agreed.

7. In section III below we set out the statutory provisions and deal with the unfair pricing abuse. We consider the margin squeeze abuse at section IV. At sections V and VI we deal respectively with costs and the final Order of the Tribunal.

III. WHAT ORDER SHOULD THE TRIBUNAL MAKE TO REMEDY THE UNFAIR PRICING ABUSE?

8. Albion invited the Tribunal to make a Declaration in the following terms:

> "1. In March 2001 and thereafter, Dŵr Cymru Cyfyngedig ("Dŵr Cymru") abused its dominant position within the meaning of section 18 of the Competition Act 1998 by quoting a First Access Price which:
>
> (1) was both excessive and unfair in itself".

9. We were asked to Order that:

> "2. … the common carriage access price offered by Dŵr Cymru to Albion Water Limited ("Albion") for the treatment and distribution of non-potable water through the Ashgrove system shall be:
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> (1) the mean figure for distribution and treatment costs found by the Tribunal, 14.4p/m^3, indexed according to the Producer Prices Index (PLLV); plus
>
> (2) the agreed costs for any other necessary services required, such costs to be referred to independent arbitration if not agreed.

> 3. … the bulk supply agreement between Dŵr Cymru and Albion shall remain in force and the price for bulk supply of non-potable water supplied by Dŵr Cymru to Albion through the Ashgrove system shall be based on:
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> (1) 14.4p/m^3 as indexed by the Producer Prices Index (PLLV); plus
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> (2) the costs of the Heronbridge bulk supply, as invoiced by United Utilities to Dŵr Cymru".

10. For reasons which will become clear from the discussion below, Dŵr Cymru and the Authority strongly contested Albion's application for final relief in relation to the Bulk Supply Price. Albion currently purchases a "bulk supply" of non-potable water from Dŵr Cymru, based on a continuation of the Second Bulk Supply Agreement dated 10 March 1999, for onward sale to Shotton Paper (see paragraphs [96]-[98] of the main judgment). The price for this bulk supply is referred to in these proceedings as the "Bulk Supply Price". Pending the determination of this appeal, there has been an interim order in this case requiring Dŵr Cymru to reduce the Bulk Supply Price to Albion by 3.55p/m³ (see paragraphs [314]-[359] of the further judgment). At the time of this Judgment, the Bulk Supply Price is 25.19p/m³.

11. Dŵr Cymru submitted that the Tribunal should simply make a final Declaration, as follows:

> "1. In March 2001 Dŵr Cymru abused its dominant position within the meaning of section 18 of the Competition Act 1998 by quoting an indicative access price for common carriage services which:
>
> (1) was both excessive and unfair in itself".

12. Before dealing with the merits of these applications, it is convenient to set out the legal framework. Following the Tribunal's findings that Dŵr Cymru abused its dominant position, the powers of the Tribunal are contained in paragraph 3 of Schedule 8 to the Competition Act 1998, the material provisions of which are:

> "3 (1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
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> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
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> (a) remit the matter to the [Authority],
>
> …

(d) give such directions, or take such other steps, as the [Authority] could itself have given or taken, or

(e) make any other decision which the [Authority] could itself have made.

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the [Authority]."

13. The parties agreed that the Tribunal has the same powers as the Authority to give such Directions as it considers appropriate to bring *the infringement* (our emphasis) to an end. In that connection section 33 of the Act provides:

> "(1) If the [Authority] has made a decision that conduct infringes the Chapter II prohibition or that it infringes the prohibition in Article 82 it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
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> …
>
> (3) A direction under this section may, in particular, include provision-
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> (a) requiring the person concerned to modify the conduct in question; or
>
> (b) requiring him to cease that conduct.
>
> (4) A direction under this section must be given in writing."

14. Such Directions may be enforced by the Authority on an application to the court: section 34.

Summary of the parties' submissions

15. Albion's position before the Tribunal essentially was that the Tribunal should (i) declare that Dŵr Cymru has abused its dominant position in the manner found in the Tribunal's judgments; (ii) set the First Access Price for the treatment and distribution of non-potable water through the Ashgrove system at no more than 14.4p/m^3 in 2000/2001 prices; and (iii) set the Bulk Supply Price.

16. The case for Albion principally focused on the Bulk Supply Price since that is the price which it currently pays Dŵr Cymru for the supply of non-potable water. Albion accepted that the Bulk Supply Price was not part of its complaint, and was not the direct subject-matter of its appeal. However, Albion argued that the Tribunal has recognised "the validity of the First Access Price and the validity of the Bulk Supply Price have become closely intertwined" in these proceedings (see paragraph [311] of the further

judgment). The strong "read across" between the two prices should confer jurisdiction on the Tribunal to remedy the unfair pricing abuse by setting the Bulk Supply Price.

17. Mr Thompson QC, who appeared on behalf of Albion, took us to correspondence between the parties which, it was submitted, showed that all parties agreed that it would not be satisfactory to leave the Bulk Supply Agreement undetermined. Mr Thompson also drew our attention to the powers of the European Commission contained in Article 7(1) of Regulation No 1/2003 (OJ 2003 L 1, p. 1) which may impose remedies which are proportionate to the infringement and necessary to bring the infringement effectively to an end. His submission, in short, was that Albion's draft order represented the minimum needed for a proportionate and effective remedy. Should the Tribunal fail to give the Directions sought by Albion, then Albion would be denied any meaningful remedy and the Act would be ineffectual.

18. Mr Vajda QC for Dŵr Cymru and Miss Sloane for the Authority both took issue with Albion's proposed Directions. Their argument, in short, was that declaratory relief was all that was required. No final order was required to set the First Access Price since Albion and Dŵr Cymru had already agreed a revised access price. Miss Sloane submitted that the Bulk Supply Price was neither the subject of the Decision nor any of the Tribunal's judgments. Whilst the Tribunal had made certain observations about the Bulk Supply Price, the Tribunal had recognised that price was "not, as such, under challenge in the current proceedings" (paragraph [760] of the main judgment). We would be acting outside our jurisdiction if this Tribunal gave Directions in the form of paragraph 3 of Albion's draft order. Even if there were now reasonable grounds to suspect the Bulk Supply Price of being an abuse, those grounds provided no jurisdiction for the Tribunal to give final Directions (relying on section 33 and paragraph 3(2)(d) of Schedule 8 to the Act). Nor does the interim relief Order of 20 November 2006 reducing the Bulk Supply Price by 3.55p/m³ justify final relief; when this appeal ends the interim order simply falls away.

Unfair pricing abuse: The Tribunal's discussion and conclusions

19. The parties agreed that the Tribunal has jurisdiction to give Directions to bring the infringements found by the Tribunal to an end. The parties also agreed that the Tribunal had found the First Access Price was an infringement of the Chapter II

prohibition. What essentially separated them was how to bring the infringement to an end.

20. Albion and Dŵr Cymru informed the Tribunal that they had agreed a revised First Access Price of 14.4p/m^3 in 2000/2001 prices (based on the average of the three costs figures set out in paragraph [197] of the unfair pricing judgment). Given the parties' agreement, Dŵr Cymru submitted that no final order was required to bring the infringement to an end.

21. The Tribunal rejects Dŵr Cymru's submission that it should not require a reduction in the First Access Price. The Tribunal will give a Direction in respect of the access price offered by Dŵr Cymru to Albion for partial treatment and common carriage of non-potable water through the Ashgrove system. This is a Direction which the Authority could itself have given. We note that the parties have agreed that the First Access Price should now be the average figure for the maximum costs found by the Tribunal which were reasonably attributable to the service of the transportation and partial treatment of water by Dŵr Cymru, generally and through the Ashgrove system in particular, i.e. 14.4p/m^3. In our judgment, a common carriage access price offered by Dŵr Cymru to Albion, not exceeding 14.4p/m^3 (in 2000/2001 prices) would not constitute conduct having the same or equivalent effect as the infringement identified in the Tribunal's earlier judgments (see further paragraphs [37]-[39] below). Against the background of this case, and in particular the numerous obstacles raised by Dŵr Cymru to Albion's common carriage proposal, the Tribunal considers that the most effective way to prevent Dŵr Cymru charging unfair prices for common carriage now, and in the future, is to give a Direction in the form at the end of this Judgment. We note that the Authority does not object to the Tribunal giving such a Direction. Further, the Tribunal considers that its proposed Direction is appropriate because it not only brings the infringement to an end, but also has the important benefit of facilitating greater competition in the supply of non-potable water to the customers supplied through the Ashgrove system. In the absence of any Direction, as Albion pointed out in paragraph 26 of its written submissions, there is no guarantee that Dŵr Cymru will maintain its offer to provide common carriage services at no more than the average of the three maximum cost figures found by the Tribunal.

22. Albion also applied for the revised First Access Price of 14.4p/m^3 to be adjusted according to the "Producer Prices Index" to protect the parties from the consequences of inflation since 2000/2001 (see paragraph 2(2) of Albion's draft order). In contrast Dŵr Cymru proposed that the revised First Access Price be indexed by reference to the Retail Prices Index. The Tribunal declines to make any findings as to the appropriate index by which a common carriage price should be adjusted. In our judgment, this is a matter which properly falls to be addressed by commercial negotiation between the parties, and is no part of these proceedings.

23. The major disagreement between Albion and Dŵr Cymru about the appropriate remedy for the unfair pricing abuse arises out of the fact that common carriage remains a live issue. Unless and until Albion and Dŵr Cymru enter into a common carriage agreement, the existing bulk supply arrangement will (presumably) continue. It was for this reason that the primary focus of the argument before us related to whether the Tribunal has jurisdiction to make a final order as regards the Bulk Supply Price.

24. After considering all the arguments, the Tribunal finds that it does not have jurisdiction to set the level of the Bulk Supply Price in the manner proposed by Albion in its draft order.

25. The Tribunal has jurisdiction under paragraph 3(2) of Schedule 8 to the Act to reach its own decision and give Directions in respect of a matter forming part of the decision under appeal. This is clear on the face of the Act, and any lingering uncertainty was dispelled by the judgment of Richards LJ in *Dŵr Cymru Cyfyngedig v Albion Water Ltd* [2008] EWCA Civ 536, at paragraph [127].

26. Pursuant to Schedule 8, paragraph 3(2)(d), this Tribunal may determine upon "directions, or … such other steps, as the [Authority] could itself have given or taken". Section 33 permits the Authority to give such Directions as it considers appropriate to bring *the infringement* to an end. The wording of section 33 does not envisage a remedy that would prevent a dominant firm behaving in a way that substantially lessens competition without a prior finding of infringement. The scheme of the Act has as its purpose that the decision-maker should require the discontinuation of the infringement.

The Order sought by Albion is quoted in paragraph [9] above and required us to consider whether *the infringement* in this case extends to the Bulk Supply Price.

27. The Tribunal has found that Dŵr Cymru infringed Chapter II by offering a First Access Price for (proposed) common carriage which (a) was excessive and unfair in itself, and (b) gave rise to an abusive margin squeeze. At no point did the Tribunal find that the Bulk Supply Price constituted an infringement of the Chapter II prohibition. Moreover, Albion rightly acknowledged in paragraph 28 of its skeleton argument that the Bulk Supply Price "was not the direct subject-matter of its complaint to the Authority or its appeal to the Tribunal". Indeed the Tribunal described the subject matter of the appeal in paragraph [89] of the main judgment:

> "It is the alleged failure of Dŵr Cymru to offer what Albion considers to be a reasonable common carriage price, and the Director's finding in the Decision that the common carriage price offered by Dŵr Cymru did not constitute an abuse of a dominant position within the meaning of the Chapter II prohibition, which form the subject matter of this appeal."

28. Albion argued, however, that while its complaint concerned the First Access Price, these proceedings clearly show that the lawfulness of the Bulk Supply Price is as questionable as the First Access Price. In those circumstances, it would have been open to the Authority (and thus the Tribunal) to make a Direction to modify not only the First Access Price, but also the Bulk Supply Price. The argument is, in essence, that the Tribunal found the Bulk Supply Price was an infringement by necessary implication.

29. The Tribunal made no such finding. The Tribunal considered the relationship between the First Access Price and Bulk Supply Price at paragraphs [329] to [335] of the further judgment. We accept that the Tribunal had regard to the costs underlying the Bulk Supply Price, since the Authority relied on the Bulk Supply Price as the basis for the ECPR calculation. In itself, however, this consideration has no bearing on the central issue as to whether the Bulk Supply Price was found to be an abuse of a dominant position.

30. The parties agreed that, in this case, only two of the four elements constituting the Bulk Supply Price have been considered by the Tribunal: first, the cost of partial treatment; and second, the transportation cost of non-potable water through the Ashgrove system.

The third and fourth elements, that is the water resources cost (i.e. the abstraction of raw water, any necessary pumping from source, and the transport of raw water to a treatment works) and certain ancillary costs (such as the costs of back-up supply), have not been considered. As the Tribunal noted in paragraphs [104] to [105] of its judgment refusing Dŵr Cymru permission to appeal against the main and further judgments ([2007] CAT 8):

> "… It was plainly necessary for the Tribunal to have regard to the costs underlying the Bulk Supply Price, since the Director relied on the Bulk Supply Price as the basis for the ECPR calculation at paragraphs 329 and 338 of the Decision (see e.g. paragraphs 747 to 760 of the judgment of 6 October, and paragraph 288 of the judgment of 18 December). As it happens, the Bulk Supply Price has remained broadly the same (around 26p/m3) up to the present day.
>
> However, *that does not imply that the Tribunal has taken any position, in its judgments or otherwise, in relation to what the level of any contemporaneous or future Bulk Supply Price should be*." (emphasis added)

31. In addition, we observe that the Bulk Supply Price did not play any material part in the reasoning that led the Tribunal to its conclusion that the First Access Price was excessive and unfair in itself.

32. Thus we have concluded that the Tribunal's power to give final Directions in accordance with paragraph 3(2)(d) of Schedule 8 is limited to Directions which the Authority could have made. The Tribunal cannot give a Direction in respect of the Bulk Supply Price because it has made no finding (expressly or by necessary implication) as to whether that price was an abuse of a dominant position.

33. There was some debate in the course of argument as to the relevance of the Tribunal's interim Order of 20 November 2006. That Order required Dŵr Cymru to reduce the Bulk Supply Price that would otherwise be payable by Albion by 3.55p/m³. The several different routes by which the Tribunal had jurisdiction to continue the interim relief in place since June 2004 were set out at paragraphs [345] to [354] of the further judgment. None of these routes mean that the Tribunal has jurisdiction to make any final order as regards the Bulk Supply Price. At one point the Authority suggested that the interim Order could remain in place until a common carriage price had either been agreed or set by the Tribunal. We are unable to accept that suggestion. Albion and Dŵr Cymru agreed that the interim relief should now cease to have effect. In our

judgment, the interim order was necessary to protect Albion's position pending the conclusion of this appeal (see paragraphs [318], [336], [338], and [345] of the further judgment). Interim relief cannot outlive the appeal to which it relates; and interim relief in relation to the Bulk Supply Price was just that – an interim measure necessary to preserve the position of Albion pending the final outcome of the litigation.

34. Despite Mr Thompson's persuasiveness, we do not consider that final relief can be dealt with on the sweeping basis that, because the Bulk Supply Price is related to these proceedings, in the sense of being relevant to interim relief and the ECPR calculation, it is necessarily included within the Tribunal's powers. Our conclusion can only relate to the infringements found by the Tribunal, and the statutory limits on the Tribunal's jurisdiction to give Directions. If the Bulk Supply Price cannot be agreed, it will have to be referred to the Authority.

35. The Tribunal recognises that this conclusion is unsatisfactory from Albion's viewpoint. However, at the hearing Mr Vajda indicated Dŵr Cymru was prepared to enter into an agreement with Albion whereby both parties refer the determination of the Bulk Supply Price to the Authority under section 40 of the Water Industry Act 1991 (without prejudice to Albion's rights under the 1998 Act). Pending that determination (with any decrease being backdated to the date of the agreement), Dŵr Cymru was prepared to continue to accept a reduction of the Bulk Supply Price by 3.55p/m³, which is the amount ordered by the Tribunal in its interim order. Whilst this sector-specific regulation cannot preclude the application of the Act, it may be that outstanding matters can now most conveniently be dealt with by the Authority making a determination of the potable and non-potable bulk supply prices. Miss Sloane indicated that the Authority would have proper regard to the Tribunal's judgments as part of any future re-determination of the Bulk Supply Price.

36. There are two further issues which bear on the unfair pricing abuse and call for our consideration. First, should the Tribunal make a Direction with a view to preventing Dŵr Cymru's infringement of the Chapter II prohibition, or any similar infringement, arising in the future? Second, what is the correct form of the declaratory relief?

37. On the first of those issues, we were referred to Article 3 of the decision in *Eurofix-Bauco v Hilti* (OJ 1988 L 65, p. 19) in which the European Commission ordered Hilti AG to refrain from measures "having an equivalent effect" to those found to have been abusive. Likewise, in *Genzyme v OFT (remedy)* [2005] CAT 32, a case concerning the sale of a drug at a price that did not allow an independent competitor to recover a proper margin on the downstream activity, the Tribunal expressed the view:

> "In our judgment, the power to make a direction under section 33 of the Act includes the power to ensure that an infringement is not repeated, if the OFT in its discretion considers that such a direction is necessary. Moreover, in our view, the power "to bring the infringement to an end" covers conduct closely linked to, or to the like effect as, the infringement found, otherwise section 33 would be ineffective. Similarly, the Tribunal's powers to give such directions or make any decision the OFT could have given or made must, it seems to us, be construed as a power to give a direction that is adapted to the developments that have taken place in the course of the proceedings, provided that the underlying problem to be addressed remains the same or similar. Otherwise, a kind of "catch as catch can" situation could arise in which a dominant undertaking could, by constantly changing its arrangements, keep the competition authorities at bay indefinitely." (paragraph [233]).

38. At the hearing Mr Thompson confirmed that (as a minimum) Albion sought an order in terms similar to *Genzyme*, and Miss Sloane indicated that the Authority would not oppose the Tribunal making such an order.

39. In our judgment, such an order reflects Dŵr Cymru's ongoing special responsibility not to allow its conduct to impair genuine undistorted competition (see paragraph [290] of the further judgment). Further, we are keen to prevent any similar infringement to those identified by the Tribunal from arising in the future. It is plain that it would be in the interests of Albion and its customers if Dŵr Cymru were ordered to refrain from measures "having an equivalent effect" to those found to have been abusive. Additionally, it follows from our earlier conclusion that since the Bulk Supply Price is outside the Tribunal's jurisdiction the concerns expressed by Mr Vajda about the legal certainty of an "equivalent effect" order do not arise (cf. *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130, at 145H-146D). Accordingly, we will make an order to prevent Dŵr Cymru's infringement of the Chapter II prohibition, or any similar infringement, from arising in the future.

40. The second issue is the wording of the declaratory relief. Albion originally sought an order declaring that: "In March 2001 *and thereafter*, Dŵr Cymru Cyfyngedig abused its dominant position within the meaning of section 18 of the Competition Act 1998 by quoting a First Access Price". We have italicised the contentious words.

41. Albion submitted that the commercial situation that has prevailed since March 2001 is the direct result of the abusive conduct, namely the First Access Price forestalling the proposed common carriage agreement and requiring the continuation of the Second Bulk Supply Agreement. Albion's draft order invited the Tribunal to find that the conduct of Dŵr Cymru constituted an ongoing abuse that could have (but has not) been terminated at any time since March 2001.

42. Mr Vajda submitted it is plain from the unfair pricing judgment that the First Access Price of 23.2p/m³, which Dwr Cymru was minded to charge Albion for the common carriage services, related to the year 2000/2001. (See e.g. paragraphs [8], [40], [46], [50] and [275] of the judgment on unfair pricing.)

43. Following the oral hearing, in an attempt to agree the form of the final order, Albion removed the reference to "and thereafter". We have decided that our Declaration will omit any temporal aspect.

IV. WHAT ORDER SHOULD THE TRIBUNAL MAKE TO REMEDY THE MARGIN SQUEEZE ABUSE?

44. The Tribunal's finding of abusive margin squeeze was based essentially on the fact that the First Access Price payable to Dŵr Cymru for the (upstream) transportation and partial treatment of water left Albion with no profit margin with which to compete in the (downstream) retail market for the supply of non-potable water to Shotton Paper.

45. Albion invited the Tribunal to make a Declaration in the following terms:

> "1. In March 2001 and thereafter, Dŵr Cymru Cyfyngedig ("Dŵr Cymru") abused its dominant position within the meaning of section 18 of the Competition Act 1998 by quoting a First Access Price which:
>
> …
>
> (2) imposed a margin squeeze".

46. Albion also sought an Order that:

> "Dŵr Cymru's tariff offered to retail customers for the bulk supply of non-potable water shall exceed the wholesale price for such supply offered to Albion by a minimum of 5p/m^3".

Summary of parties' submissions

47. Albion submitted that the appropriate remedy for the margin squeeze abuse is an Order that Dŵr Cymru's retail price for the bulk supply of non-potable water should exceed the wholesale price for such supply offered to Albion by a minimum of 5p/m^3. But for the interim relief, Albion would have no margin with which to compete in the retail market. At the hearing Mr Thompson submitted that the purpose of paragraph 5 of Albion's draft order was to establish a margin in order to create a competitive retail market. There is no doubt that the customer in question, Shotton Paper, wished to see a choice of water suppliers, and the survival of Albion. Albion was very concerned that Dŵr Cymru's approach to date had been to make it as difficult as possible for Albion to remain in the retail market. Albion noted that a similar remedy was imposed in *Genzyme*, and relied on the Tribunal's reasoning in *Genzyme* in support of making a similar Direction in the present case.

48. The Authority submitted that the setting of a common carriage price would in practice address any issues of margin squeeze. Stipulating a minimum margin, they argued, is undesirable for two reasons: first, it is not necessary in the light of the Authority's powers under the Act and sector-specific legislation; and secondly, it would be necessary to make further findings of fact in order to determine the appropriate level of the margin. In these circumstances the Authority submitted that the Tribunal's approach in *Genzyme* does not advance Albion's case.

49. For Dŵr Cymru Mr Vajda made five submissions. First, he reiterated the jurisdictional problem with the remedies sought by Albion in relation to the price for the bulk supply of non-potable water. Second, the upward trajectory of Dŵr Cymru's retail prices to industrial users had eliminated any risk of a margin squeeze. Third, he submitted that the Tribunal had made no finding as to the level of margin to which Albion may be entitled. Fourth, and in any event, if the Tribunal or Authority were to determine the margin to be accorded to Albion, it would have to be based on the retail costs of Dŵr

Cymru, not the retail costs claimed by Albion. In that connection, Dŵr Cymru relied on the judgment of the CFI in Case T-271/03 *Deutsche Telekom AG v Commission* [2008] 5 C.M.L.R. 631 ("*Deutsche Telekom*")[1], paragraphs [188]-[193]. Fifth, Mr Vajda emphasised that ordering Dŵr Cymru to charge a price to retail customers that is a minimum of 5p/m^3 above the upstream price could itself be anti-competitive.

Margin squeeze abuse: The Tribunal's discussion and conclusions

50. Albion invited the Tribunal to specify a minimum retail margin. The relief sought by Albion's draft order was set out in paragraph [46] above. For the reasons already given, in our judgment relief of that kind is outside the jurisdiction of the Tribunal under paragraph 3 of Schedule 8 to the Act.

51. It is clear that the Tribunal would have jurisdiction to make an Order that Dŵr Cymru bring the margin squeeze abuse to an end by allowing Albion a minimum retail margin. However, for the reasons given below the Tribunal is not satisfied that it would be appropriate to make such an Order.

52. It is common ground that the Tribunal has not made any findings on the margin to be accorded to Albion (or an equally efficient operator as Dŵr Cymru) in order to provide retail services in competition with Dŵr Cymru. What was said by Albion was that the witness statement of Mr Jeffery of 9 November 2004 provided the (only) evidence before the Tribunal on the necessary margin. In response, the Authority and Dŵr Cymru emphasised at the hearing that they did not accept Mr Jeffery's evidence. Mr Jeffery was not cross examined on this issue.

53. Whether or not Mr Jeffery's evidence was unchallenged, we have considered the effect of the CFI's judgment in *Deutsche Telekom*. We accept that it is clear from that judgment that the Tribunal would need to consider whether the retail price is sufficient to cover the costs to Dŵr Cymru of providing its own retail services on the downstream market for the supply of non-potable water to industrial customers in the area served by the Ashgrove system. At no point did the Tribunal decide what that margin should be.

[1] On appeal to the European Court of Justice in Case C-280/08 P (pending).

54. Setting a minimum retail margin would therefore require a yet further fact-finding investigation. In our judgment it is now important to achieve finality in these proceedings on the basis of the findings contained in the Tribunal's judgments to date. The facts of this case (and the costs information available) are different from those in *Genzyme*, on which Albion relied heavily. In *Genzyme* the parties embarked on lengthy negotiations; there was considerable historic information concerning the margins typically observed in homecare services (the downstream activity); information was submitted by two independent competitors in relation to hypothetical tenders for homecare services; detailed costs reports were prepared by the OFT; and the Tribunal held a full remedies hearing. Having carefully considered the situation in *Genzyme*, we have found nothing to convince us that it would be appropriate to initiate a similar exercise in this case at this late stage.

55. Further, there are considerable practical difficulties for courts (or indeed competition authorities) in crafting a remedy in the form suggested by Albion. How can the Tribunal determine this margin without examining costs and demands, indeed without acting as a price-setting regulator, the determinations of which often last for several years (and are themselves subject to appeals)? Must the margin be large enough for all independent competing firms to make a "reasonable profit," no matter how inefficient they may be? If not, and the judgment of the CFI in *Deutsche Telekom* suggests it should not, how would we identify the "equally efficient competitor" in the present case? As already stated in earlier judgments, a troubling feature of this case has been the lack of detail on how costs and revenues are allocated and/or calculated by Dŵr Cymru. (See e.g. paragraphs [291] and [464] of the main judgment and paragraph [254] of the further judgment.) A further point of some importance is how the Tribunal, or the Authority, should respond when costs or demands change over time, as inevitably they will. The efficient margin fixed today may, through economic and business changes, become the inefficient margin of tomorrow. We do *not* say that these questions are unanswerable, but we have said enough to show why courts normally avoid direct price administration, relying on more appropriate methods (see, to that effect, the judgment of Mummery LJ in *Attheraces Ltd v The British Horseracing Board Ltd* [2007] EWCA Civ 38, paragraph [119].) This was not an appropriate role for this Tribunal in the present case.

56. We conclude, therefore, that setting a minimum retail margin is not an appropriate Direction to bring to an end the infringement found by the Tribunal. We add that our conclusion is based on the specific circumstances of this case.

57. As to the question of declaratory relief, Albion sought a Declaration in respect of the margin squeeze abuse in the form quoted at paragraph [45] above. Mr Vajda for Dŵr Cymru drew the Tribunal's attention to the upward trajectory of retail prices for the supply of non-potable water to large industrial users from June 2004 (when an interim order was first made) to December 2008. It was suggested that the increased retail prices have effectively eliminated any margin squeeze. However the Tribunal notes that a margin is the difference between two prices – in this case the common carriage price and the retail price. An abusive margin squeeze occurs where the difference between the two prices set by a dominant undertaking (active at both the upstream and downstream level) is insufficient to enable an equally efficient competitor to compete in the downstream market. A further argument advanced by Mr Vajda was that the margin squeeze in March 2001 did not continue because Albion promptly complained to the Authority, then appealed to the Tribunal and eventually obtained interim relief from the Tribunal. In the event, the Tribunal's Declaration in relation to the margin squeeze abuse omits any temporal aspect for the same reason as for the unfair pricing abuse (paragraph [43] above).

V. COSTS

58. Rule 55 of the Tribunal Rules gives the Tribunal a wide discretion as to costs, as discussed in a number of the Tribunal's previous decisions. An example is *Albion Water Ltd v Water Services Regulation Authority* [2007] CAT 1.

59. The parties are largely in agreement as regards the terms of the Order to be made by the Tribunal on the issue of costs.

60. There are two issues for our determination – whether a costs order in Albion's favour should be limited to reasonably incurred legal costs, and whether Albion should receive an interim payment on account of costs.

61. As to the first issue, the Tribunal agrees with the Authority and Dŵr Cymru that a costs order in Albion's favour is appropriate, but only in relation to reasonably incurred legal costs. In our judgment, sums of costs of the kind in issue here should be agreed wherever possible, both in the interests of time and in avoiding further costs being incurred in detailed assessment. Apart from the question of remedy, to which we return below, Albion has succeeded on the remaining issues before the Tribunal. Albion is therefore entitled to recover its reasonable costs from 8 January 2007 (the date of the Tribunal's earlier judgment on costs) to 30 January 2009 (the date on which the parties exchanged skeleton arguments on the question of remedy). We consider that standard basis assessment is the appropriate measure of recoverable costs, such costs to be subject to detailed assessment if not agreed.

62. As to the second issue, a generally accepted starting point for the calculation of an interim payment is 50% of the costs figure. The parties referred to the interim payment of 30% of the costs claimed by the Consumers' Association in *The Consumers' Association v JJB Sports plc* [2009] CAT 3, but that was a very different situation to the present case. Albion has largely been successful in its appeal. We bear in mind the continuing imbalance of resources between the parties, and the general importance of the issues raised by this case. Making a necessarily broad assessment, we propose to order two-thirds as an interim payment on account of costs. We have not heard submissions on the time for payment but, subject to any further submissions when we hand down this judgment, we propose to order payment within 28 days from such handing down.

63. That leaves the question of costs of the present applications. Although the issue of remedy arose as a result of Albion's success in its appeal, the Tribunal has substantially accepted the Authority's and Dŵr Cymru's submissions on remedy as against Albion's. In these circumstances we consider costs should lie where they fall after 30 January 2009, i.e. the date on which the parties exchanged skeleton arguments and when the force of the arguments in response to Albion's application should have been apparent.

VI. CONCLUSION

64. For the foregoing reasons, the Tribunal:

DECLARES THAT:

1. Dŵr Cymru Cyfyngedig ("Dŵr Cymru") abused its dominant position in the market for the partial treatment and transportation, via the Ashgrove system, of non-potable water abstracted from the Heronbridge abstraction point for supply to Shotton Paper within the meaning of section 18 of the Competition Act 1998, by proposing (in March 2001) to charge a price for the provision of such partial treatment and transportation which:

   (1) was both excessive and unfair in itself; and

   (2) imposed a margin squeeze.

ORDERS THAT:

2. Dŵr Cymru shall bring the infringement identified at paragraph 1 of this Order to an end and shall refrain from any conduct having the same or equivalent effect.

3. Any common carriage access price offered by Dŵr Cymru to Albion, as described in paragraph [2] of the Tribunal's unfair pricing judgment ([2008] CAT 31), not exceeding 14.4p/m^3 in 2000/2001 prices shall not be conduct having the same or equivalent effect as the infringement identified in paragraph 1 of this Order.

4. The Tribunal's interim Order of 20 November 2006 (as continued by the Order of 18 December 2006) ceases to have effect as of the date of this Order.

5. Subject to paragraph 6 below, Albion's reasonably incurred legal costs from 8 January 2007 to 30 January 2009 shall be paid by the Authority and Dŵr Cymru, such costs to be assessed if not agreed by those three parties and to be apportioned between the latter two parties as agreed between them or, in default of agreement, on such other basis as decided by the Tribunal.

6. As an interim payment in respect of their liability in costs, the Authority and Dŵr Cymru shall pay two-thirds of the sum claimed by Albion within 28 days of the date of this Order in such proportions as shall be agreed between them or, in default of agreement, on such other basis as decided by the Tribunal.

Lord Carlile of Berriew Q.C. Antony Lewis John Pickering

Charles Dhanowa
Registrar

Date: 9 April 2009