



COMPETITION APPEAL TRIBUNAL

**NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998**

**CASE NO 1045/2/4/04**

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (the “Rules”), the Registrar of the Competition Appeal Tribunal (the “Tribunal”) gives notice of the receipt of a notice of appeal, on 21 July 2004, under section 47 of the Competition Act 1998 (the “Act”) by Aquavitae (UK) Limited (the “appellant”) of 33 St James’s Square, London, SW1Y 4JS in respect of a decision (CA98/01/2004) taken by the Director General of Water Services (the “Director”) and published on the websites of Ofwat and the OFT on 27 May 2004 (the “Decision”)<sup>1</sup>.

The Decision concerned a complaint made by Albion Water Limited against Dŵr Cymru Cyfyngedig (“Dŵr Cymru”) relating to common carriage for the supply of water to Shotton paper mill. According to the notice of appeal the Decision found that:

1. Dŵr Cymru did not infringe section 18 of the Act (“the chapter II prohibition”) by offering an access price computed by and/or justified using a version of a “retail minus” calculation;
2. in order to find that Dŵr Cymru had infringed the chapter II prohibition the Director would have had to satisfy himself to a high standard so that any doubts as to the economic value of a service and/or in relation to a retail minus calculation would be resolved in Dŵr Cymru’s favour; and
3. that Dŵr Cymru’s approach is also permitted in accordance with the Costs Principle in section 66E of the Water Industry Act 1991 and by implication represents a sound working example of the true legal effect of the Costs Principle; and that furthermore the Act will have no relevance to price determination under the Costs Principle.

According to the notice of appeal although the Decision appears on the face of it to relate specifically to the behaviour of a single undertaking in a single location it represents the Director’s view in relation to competition in the water sector in England and Wales generally and effectively sets a general precedent for the future. The appellant states that it trades as a water retailer and that its bargaining position in negotiations has been undermined by the actions of the Director. In particular, according to the notice of appeal, the Decision deals a body blow to the appellant’s hopes of obtaining a fair price as it finds that Dŵr Cymru’s behaviour, which, it is alleged, is indistinguishable from that of other water companies, in refusing to allow any margin is not an abuse of a dominant position. The appellant therefore states that it has a direct and sufficient interest in the Decision.

The appellant seeks the following relief:

1. a determination that the approach of, and price offered by, Dŵr Cymru to Albion (and which the Director found to be non-abusive using a calculation based on the Costs Principle) is inconsistent with the Costs Principle of the Water Act 2003 and/or the Water Industry Act 1991; and

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<sup>1</sup> The text of the decision can be found at: <http://www.ofwat.gov.uk/NR/rdonlyres/1F266351-D26B-429A-A2C7-ADBDF2B92694/0/shotton.pdf> and at [http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/shotton\\_decision260504.pdf/\\$FILE/shotton\\_decision260504.pdf](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/shotton_decision260504.pdf/$FILE/shotton_decision260504.pdf)

2. a determination and/or declaration that the prohibitions in the Act will apply to water competition even after the Water Act 2003 comes into force and that the burden rests with the incumbent to demonstrate that the price it offers is reasonable within the parameters of the Costs Principle.

The principal grounds on which the appellant relies are that:

1. Dŵr Cymru's approach and access price did infringe the Chapter II prohibition. Insofar as a "retail minus" approach is applicable (which is not admitted by the appellant), the version of "retail minus" adopted – namely that the appropriate retail price was the one unilaterally determined by the alleged abusive undertaker was incorrect and represented an error of law. The correct retail price is the objectively justifiable retail price, based on a hypothetical competitive market and related to the true market value of what is to be provided. The Director misdirected himself in law and was mistaken as to the facts in deciding otherwise.
2. the Director misdirected himself in law by deciding that the standard of proof applicable was higher than the ordinary civil standard of proof; indeed the Director misdirected himself in law by failing to take account of the principle that a dominant undertaker has a special responsibility in the market and it is the incumbent's responsibility to show that it has acted in a non-abusive manner.
3. contrary to the Director's view – which amounts to an error of law:
  - (a) the Act will continue to contribute to the interpretation and delivery of water competition after the regime provided for in the Water Act 2003 comes into force; and
  - (b) the provision of an access price based on the principles adopted by Dŵr Cymru and endorsed by the Director lie outwith the permissible parameters of the costs principle in section 66E of the Water Industry Act 1991, as amended.

Any person who considers that he has a sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

*Charles Dhanowa*  
Registrar

30 July 2004