



Neutral citation [2005] CAT 23

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1042/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20th June 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)

THE HONOURABLE ANTONY LEWIS
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Appellant

And

DIRECTOR GENERAL OF WATER SERVICES

Respondent

supported by

THAMES WATER UTILITIES LIMITED

Intervener

Mr. Rhodri Thompson QC and Mr John O'Flaherty appeared on behalf of the Appellant.

Mr. Jon Turner and Miss Valentina Sloane (instructed by the Director of Legal Services, OFWAT) appeared on behalf of the Respondent.

Mr. Stephen Tupper (of Watson Farley & Williams) appeared on behalf of the Intervener.

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RULING

THE PRESIDENT:

1. At the start of the proceedings this morning we heard an application by Thames Water which was, in effect, to strike out all, or part, of Albion's appeal on the grounds that the matters put forward in the skeleton argument differed from the matters set out in the amended notice of appeal and/or made various concessions with the result that there was either nothing left to decide or that Albion was effectively abusing the process by introducing new things at this late stage of the proceedings.
2. The particular arguments put forward are that the matters raised in para. 11 of the skeleton argument are not covered by the amended notice of appeal – in particular, the summary in para. 9(1). Thames emphasises further that in the notice of appeal, particularly at para. 10 and para. 90, Albion sought only a remittal of this matter to the Director, whereas in the skeleton argument the Appellant, Albion, now invites the Tribunal to take its own decision to the effect that certain infringements of the Chapter II prohibition have indeed taken place.
3. The matters, summarising them very briefly, in issue are that in the skeleton argument the argument focuses, in particular, on the first access price offered by Thames Water before June 2002 of 27 pence per cubic metre, whereas it is said that there is very little, or no, emphasis on that price in the amended notice of appeal. It is secondly said that although there is reference in the notice of appeal to what are briefly called, in shorthand, "Overs and Unders" – that is to say, payments and credits for over- or under-supply – the Notice of Appeal now focuses very much on the issue of whether Thames should give credit for any surplus water introduced by Albion into the system over and above the requirements of Albion's particular customer, as distinct from credit for simply providing an additional supply which was the focus of the amended notice of appeal.
4. It is also objected that the skeleton argument now concentrates on the alleged delay in the giving of an access price, and also highlights various procedural issues regarding the Director's handling of the investigation, whereas delay, as a self-standing issue, is not a point that is raised in the notice of appeal and procedural issues are expressly disavowed as part of the basis for the attack on the Director's Decision.

5. The Director, who supports Thames' general approach, also says that there is a concentration in the skeleton argument on the inadequacy of the Director's reasoning that is certainly a new emphasis in this matter, and that, in general, the centre of gravity of this case has shifted substantially in the skeleton argument, as compared to the Notice of Appeal.
6. Taking those various points in turn, and dealing first with the issue of the appropriate remedy, it is true that Schedule 8, para. 3 of the Act requires the Tribunal to decide this case in accordance with the grounds set out in the notice of appeal. We would, however, provisionally agree with the Director's submission that the issue of the remedy is distinct from the issue of the grounds set out in the notice of appeal, and that the issue of the remedy is primarily a matter for the Tribunal to decide at the end of the case – or at a later stage of the case – as to what is the appropriate course to take. In this case, our present view is that we have not reached the stage at which we can say, one way or the other, what the appropriate remedy is likely to be. However, this case has hitherto proceeded on the basis that Albion has been inviting us to remit the matter to the Director.
7. We are very conscious of the fact that we would not ordinarily proceed to decide matters such as those in issue in this case unless, first, we were satisfied that we had all the material before us upon which we could take such a decision; and, secondly, that we were satisfied that the full requirements of procedural fairness have been observed – in particular vis-à-vis Thames. On that issue, our view is that the argument should proceed on the substance of the case, but we bear well in mind the points made very forcibly by Mr. Tupper that it would be quite wrong to prejudice Thames' position without giving Thames a very full opportunity to deal with all the points that were being made were the Tribunal minded to take its own decision. It does not seem to us, at the moment, that we should go any further than that on the issue of remedy.
8. As regards to the other points that are made, it appears to be common ground that delay is not pleaded, as such, as a head of abuse in the notice of appeal, and that the notice of appeal expressly disavows an attack on the alleged procedural history of this case as a ground for quashing the contested decision. Those matters seem to us to be background matters, but we accept the submissions made that they are not, as such, grounds of appeal, and we will not therefore entertain argument on those issues, apart from noting the general background.

9. As far as the question of credit for surplus water is concerned, it seems to us that the skeleton argument tends to narrow the issues as raised in the original notice of appeal, and that the issue of credit for surpluses is now the principle focus of the attack. We are not at present able to say that that is outwith the original notice of appeal.
10. As regards the question of the pre-June 2002 price, similarly, our view is that the notice of appeal – particularly paragraph 9 which refers in the plural to the various prices – does cover both the first price of 27 pence per cubic metre and the second price of 13.6 pence per cubic metre that was offered to the Appellant, Albion, in June 2002. The position of Thames is that they do not in fact object the issues relevant to both of the prices being argued before us if it is a question of the matter being remitted to the Director, but they would resist any finding by the Tribunal in relation to the first of those prices – at least without having the opportunity to put in considerably more argument and evidence than they have hitherto done.
11. The Director, similarly, takes the view that behind the question of both prices lie various issues of principle which form part of this appeal, and should be dealt with. So, our view of the pricing issues is that both prices are, strictly speaking, in the Appeal and we can address the issues of principle from that point of view with reference to both of the prices.
12. What we therefore suggest is that the situation we are in is that there are effectively two main issues in this Appeal: one is pricing and the other is giving credit in relation to water.
13. The pricing issues have two sub-issues: first of all, the 27p per cubic metre issue; and the 13.6p per cubic metre issue. The issue of giving credit for water similarly has two sub-issues: the question of giving credit for the totality of the water introduced in the system; and the issue of credit for surplus water over and above that required by Albion’s customer, that latter sub-issue now being the principal focus of the appellant’s skeleton argument.
14. We think a convenient course is to deal with all those issues at the level of principle, which is already argued in the papers, but we will not go down the road of deciding whether there has been an abuse of the Chapter II prohibition on those issues ourselves. If we ever get to the stage where it would be appropriate for us to do so, which in a case such as this may be somewhat doubtful, we will not do so without giving Thames the benefit of the fullest possible

opportunity to advance such further arguments to us as it may wish to do so. On that basis I think we can now proceed to hear the argument in this case.
