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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 October 2006

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

Supported by

AQUAVITAE (UK) LIMITED

Intervener

-v-

WATER SERVICES REGULATION AUTHORITY
(Formerly Director General of Water Services)

Respondent

Supported by

DŴR CYMRU CYFYNGEDIG
and
UNITED UTILITIES WATER PLC

Interveners

Transcribed from the Shorthand notes of
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PROCEEDINGS
AFTER JUDGMENT HANDED DOWN

APPEARANCES

Mr. Rhodri Thompson QC appeared on behalf of the Appellant.

Mr. Rupert Anderson QC and Miss Valentina Sloane (instructed by the Head of Legal Services, Water Services Regulation Authority) appeared on behalf of the Respondent.

Miss Su-Yong Kim (of 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.

1 THE PRESIDENT: The Tribunal is handing down its Judgment today in case no. 1046, Albion
2 Water Limited, supported by Aquavitae (UK) Limited v Water Services Regulation Authority
3 (formerly Director General of Water Services) supported by Dŵr Cymru Cyfyngedig and
4 United Utilities Water PLC.

5 A copy of the Judgment has been handed to the parties. The parties have until 4 p.m. on
6 Tuesday, 10th October 2006 to ask whether anything should be excised from the Judgment on
7 grounds of commercial confidentiality. Subject to that, the full text of the Judgment (which
8 runs to some 300 pages) will be published on the Tribunal's website. For convenience we
9 propose also to publish an abridged version of the Judgment.

10 As far as today's proceedings are concerned, the Tribunal has also made available to the parties
11 a summary of the Judgment which is, in effect, sections I and XVI of the main Judgment; that
12 summary will also be made publicly available as soon as the Tribunal rises.

13 Paragraphs 1 and 2 and 62 to 66 of the summary are in the following terms:
14

15 "1. Albion Water Limited ("Albion") appeals to the Tribunal against the Decision
16 dated 26 May 2004 ("the Decision") of the Director General of Water Services
17 ("the Director"), now the Water Services Regulatory Authority ("the Authority")
18 adopted under the Competition Act 1998 ("The 1998 Act"). The Decision is to
19 the effect that the price of 23.2p/m³ ("the First Access Price") offered by Dŵr
20 Cymru to Albion on 2 March 2001 for the "common carriage" of non-potable
21 water across what is known as the Ashgrove system, did not constitute an abuse
22 of a dominant position contrary to the Chapter II prohibition imposed by section
23 18 of the 1998 Act.

24
25 2. This case raises some important issues regarding the application of the Chapter II
26 prohibition in the water industry in England and Wales, which is characterised by
27 vertically integrated companies with *de facto* monopolies within their designated
28 areas. A further aspect is the interaction between the 1998 Act and the regulatory
29 system established by the Water Industry Act 1991 ("the WIA91"), as notably
30 amended by the Water Act 2003 ("the WA03"). The 1998 Act applies
31 notwithstanding the provisions of the WIA91: see sections 2(6A), (6B) and (7),
32 section 31 and section 66D(9) and (10).
33

1 62. For the reasons given in the Judgment the Tribunal has reached the following
2 conclusions:

- 3
- 4 (1) There is evidence before the Tribunal that the treatment cost of non-
5 potable water on an average accounting cost basis was over-estimated in
6 the Decision. However the Tribunal is prepared to assume, without
7 deciding, that treatment costs are in the range 1.6p/m³ to 3.2p/m³.
8
- 9 (2) The matter of the “distribution” cost of non-potable water on an average
10 accounting cost basis was not sufficiently investigated. In this respect the
11 Decision is incorrect, or at least insufficient, from the point of view of the
12 reasons given, the facts and analysis relied on, and the investigation
13 undertaken, as regards in particular to the Director’s conclusion in
14 paragraph 302 of the Decision to the effect that it was not unreasonable to
15 assume that the “distribution” costs of potable and non-potable water are
16 the same.
17
- 18 (3) The evidence strongly suggests that the First Access Price was excessive
19 in relation to the economic value of the services to be supplied, by reason
20 of the absence of any convincing justification for the “distribution” costs
21 included in the average accounting cost calculation.
22
- 23 (4) The cross-check as to the validity of the First Access Price by reference
24 to ECPR in paragraphs 317 to 331 of the Decision cannot be safely relied
25 on because (i) the ‘retail’ price used in the calculation is not shown to be
26 cost-related, as regards the distribution element; (ii) the evidence strongly
27 suggests that that price was itself excessive; (iii) the particular method of
28 ECPR used in this case would eliminate existing competition and, in
29 effect, preclude virtually any competitive entry, because the margins are
30 insufficient; and (iv) the approach of the Authority in its evidence and
31 submissions was not the same as that in the Decision. None of the
32 justifications for an ECPR approach advanced by the Authority persuaded
33 us that we could safely rely on the approach set out in the Decision in the
34 circumstances of the present case.

1
2 (5) As regards the allegation of margin squeeze, the existence of a margin
3 squeeze was not seriously disputed. The Director's finding at paragraph
4 352 of the Decision that nonetheless there was no breach of the Chapter II
5 prohibition was erroneous in law and incorrect, or at least insufficient,
6 from the point of view of the reasons given, the facts and analysis relied
7 on and the investigation undertaken.

8
9 (6) It is unsafe to assume, as the Director does in paragraphs 331 and 338 of
10 the Decision, that the Costs Principle set out in section 66E of the
11 WIA91 supports the conclusion which the Director reached in the
12 Decision, since (i) the retail price used in the calculation in the Decision
13 is not shown to have been reasonably cost-based, and the evidence
14 strongly suggests that that price was itself excessive; and (ii) the
15 Director's interpretation of ARROW costs under section 66E(4) is open
16 to serious question, since that interpretation would on the evidence
17 preclude virtually any effective competition or market entry, and give
18 rise to a potential conflict with the consumer objective under the WIA91
19 and with the Chapter II prohibition.

20
21 63. It is now for the Tribunal to consider what consequential action, as regards orders
22 and remedies, to take to conclude this case, having regard to the Tribunal's
23 powers under paragraph 3(2) of Schedule 8 of the 1998 Act, together with any
24 appropriate ancillary relief.

25
26 64. There is also the remaining issue of dominance and the associated question of
27 essential facilities. In the Decision the Director was prepared to assume
28 dominance, while expressing reservations as to whether Dŵr Cymru had a
29 dominant position (paragraph 215). The Director did not believe that the
30 Ashgrove system is an essential facility (paragraph 225). In recent submissions,
31 the Authority has taken the stance that it is not yet in a position to take a final
32 view on the issue of dominance which it considers to be outside the scope of the
33 appeal. Dŵr Cymru adopts a similar position, and argues that how issues of
34 dominance should be addressed, if at all, should be considered at a further case

1 management conference. Both the Authority and Dŵr Cymru submit that it is not
2 open to the Tribunal to make a finding of dominance under Schedule 8, paragraph
3 3(2)(e) of the Act. Albion submits that the issues of dominance and essential
4 facilities are before the Tribunal and raised in the notice of appeal, and that the
5 Tribunal can and should deal with them, if necessary by making the appropriate
6 findings.

7
8 65. The Tribunal's present view is that it is highly unsatisfactory for the issue of
9 dominance to be left as it is, and for the issue of dominance to have become
10 "detached" from the issues relating to abuse. A good deal of evidence bearing on
11 the issue of dominance that was not before the Director is now before the
12 Tribunal. In those circumstances the Tribunal proposes to consider with the
13 parties how the matter of dominance should now be handled. To facilitate that
14 consideration, Annex A to this judgment summarises non-exhaustively matters
15 potentially relevant to the issue of dominance and to the most appropriate course
16 to adopt in that regard.

17
18 66. Those and any other relevant applications or matters will be considered by the
19 Tribunal at a further hearing on a date to be notified."
20

21 In that latter regard, the parties have already been notified of a further directions hearing to be
22 held at 10.30 a.m. on 24th October 2006. Albion and Aquavitae should file their skeleton
23 arguments for that hearing by 4 o'clock on Wednesday, 18th October and the Authority and the
24 Interveners should do so by 4 o'clock on Friday, 20th October.

25 Unless anything else arises at this stage the Tribunal will be adjourned until 24th October.

26 MR. THOMPSON: I think the only issue is whether or not that date is writ in stone, but it sounds
27 from the tone of your announcement that it probably is?

28 THE PRESIDENT: It is fairly well chiselled, I think, Mr. Thompson. (Laughter)

29 MR. THOMPSON: I am grateful. I will make arrangements.

30 THE PRESIDENT: Very well, thank you very much.

31 (Adjourned until Tuesday, 24th October 2006 at 10.30 a.m.)