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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1046/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd November, 2004

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

(1) AQUAVITAE (UK) LIMITED

Interveners

and

DIRECTOR GENERAL OF WATER SERVICES

Respondent

supported by

(2) DWR CYMRU CYFYNGEDIG

and

(3) UNITED UTILITIES WATER PLC

Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Rhodri Thompson QC and Dr. Jeremy Bryan appeared on behalf of the Appellants.

Mr. Michael O'Reilly (instructed by Messrs. McKinnells) appeared on behalf of Aquavitae.

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

Mr. Aidan Robertson (instructed by Messrs. Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of the Intervener Dŵr Cymru.

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

Mr. Stephen Tupper (of Messrs. Watson Farley & Williams) appeared for Thames Water.

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1 THE PRESIDENT: Good afternoon, ladies and gentlemen. I think we have signalled behind the
2 scenes that we have had a request to deal with the issues relating to the Bath House Appeal
3 first, and we propose to do that unless there is any objection.

4 The issue appears to be that a Notice of Appeal is still outstanding, notwithstanding
5 our previous order that there should be a revised Notice of Appeal lodged by 9th November.
6 Albion submits that it is in some difficulty in producing a Notice of Appeal because of the
7 problem of resources. We notice, however, that there is quite a detailed commentary on issues
8 in this case that was prepared by Albion and was sent to OFWAT on 15th October, so we are
9 not at the moment entirely sure what the position is in this case. We are minded to say,
10 Mr. Thompson that we think there should be a Notice of Appeal in this case, or else the Appeal
11 should be not proceeded with – one or the other. We are not at the moment clear that the
12 background case studies that are referred to in the papers really bear on the issues in that
13 Appeal.

14 Can you help us a little as to what the situation is in relation to the Bath House
15 Appeal?

16 MR. THOMPSON: Yes, I think the position has been set out in writing both in the application and
17 in brief form in the submissions we put in on Friday. Rightly or wrongly we thought we were
18 being good citizens by engaging in discussions with OFWAT and the 20th October meeting is,
19 I think, described in the papers. I was not present at that meeting but I understand from
20 Dr. Bryan (who was) that he came away with the understanding – as reflected in the
21 application and the submissions I have made, and I think in fact at the Director's insistence
22 prior to the previous Case Management Conference – that this matter should be not pursued
23 until discussions had been taken as far as they could. In that spirit we went along to the
24 discussions and understood that there was a way forward on the most live commercial issue,
25 which is whether or not excess water supplied out of the boreholes in London should be given
26 credit just as defects or deficiencies in supply are charged, I think without any disagreement
27 between the parties, by Thames to potential or actual suppliers of water. So that was the live
28 commercial issue which underlies the case. You will recall that there are somewhat historic
29 issues about delay in terms of the actual price offered, which is now some years old and not
30 a commercially live issue in that sense, whereas this other issue of giving due credit for excess
31 water is very much a live issue.

32 THE PRESIDENT: Does that arise out of the Appeal?

33 MR. THOMPSON: Yes, it does. One of the issues in the exchange of correspondence which led to
34 the Appeal and is referred to in the Press release is the issue of what is called “buffering” as

1 I understand it – the question of whether excesses and defects are given due credit in
2 a symmetrical way – and that is an issue which remains live. I think it is common ground
3 between the Director, Thames and Albion or Waterlevel that this is a live issue which will
4 remain live into the new regime and, as I understood it, had been the basis on which the parties
5 had agreed that this Appeal should not be proceeded with at the moment.

6 Therefore, given the embarrassed financial position of my client, rather than devote
7 any significant legal expense in trying to refine the case which, as the Tribunal has indicated, is
8 already reasonably well known to the Director from the background documents, we have made
9 the application for a stay although I understand that if the Tribunal takes the position that the
10 procedural position is unsatisfactory and cannot be left hanging in the air in this way no doubt
11 our position could be made clear in relatively short form, albeit that it might be a relatively
12 formal document, given that I do not think there is any intention on any side to proceed with
13 this matter until the situation of the case study has been settled more clearly.

14 The reason why we are reluctant simply to withdraw the case is that given the history
15 of the proceedings and the uncertain nature of the case study that is prepared, it seems that both
16 Thames and the Director have a somewhat different take on what is going to be involved than
17 Albion; and simply to throw our cards in at this stage would seem to us somewhat premature.
18 So we would wish to know exactly what exactly is going to happen before we accept what is,
19 in effect, a compromise of our rights.

20 THE PRESIDENT: Our initial view was, and I think probably still is, from the point of view of the
21 Tribunal's procedure it is unsatisfactory to allow a case like this not exactly to drift but to
22 continue without some proper procedural framework and structure. It had seemed to us that it
23 would not be too difficult to convert the observations that Dr. Bryan sent to OFWAT on 15th
24 October into a Notice of Appeal, so that we then had a proper Notice of Appeal. Once we then
25 had a proper Notice of Appeal it would be up to the Respondent parties either to plead to that
26 or to ask for more time, an adjournment or whatever, but we are a bit reluctant just to leave the
27 Appeal for some possibly indefinite period without making some effort to get it into better
28 procedural shape than it is in at the moment.

29 MR. THOMPSON: I hear what the Tribunal is saying. Do you want me to react any more – I will
30 probably have to speak to Dr. Bryan.

31 THE PRESIDENT: Let me see what the position of the Respondent and the Interveners is. Let me
32 make sure I have the right Respondent and the right Interveners.

33 MR. THOMPSON: I suspect it is the Director and Thames. I will sit down.

34 THE PRESIDENT: Yes, I think the Director is the Respondent in any event. Yes, Miss Sloane?

1 MISS SLOANE: Sir, the Tribunal has seen the Director's submissions in the letter of 15th
2 November, which was sent to the Tribunal.

3 THE PRESIDENT: Yes.

4 MISS SLOANE: In short, the Director maintains that this is not a compromise approach which is
5 agreed between the parties and if Albion Water had any misconceptions in that regard arising
6 out of the meeting then the letter of 25th October 2004, from Beryl Brown, which is attached to
7 that letter to the Tribunal stated in terms that the issue of the case studies was "wider" and in
8 the Director's view "distinct" from the issues in the appeal.

9 THE PRESIDENT: Yes.

10 MISS SLOANE: The second point the Director makes is that as of today Albion has had four
11 months since seeing the Decision in which to put in some substantive grounds of challenge. At
12 the Case Management Conference in September it was given 21 days in order to get in the
13 amended Notice of Appeal.

14 THE PRESIDENT: I am sorry, that was when?

15 MISS SLOANE: 21st September, the Case Management Conference, Albion was given 21 days to
16 amend and was given until 5 p.m. on 12th October to get in an amended Notice of Appeal.

17 I pause there to say this is really akin to a fresh Notice of Appeal because the original Notice of
18 Appeal is largely historic now.

19 THE PRESIDENT: Yes.

20 MISS SLOANE: Albion then made an application dated 8th October and asked for an extension until
21 9th November, and was granted that on the basis of looking at the disclosure which the Director
22 had voluntarily disclosed, considering it and seeking to narrow the issues. That was granted.

23 From the Director's point of view Albion Water has already had considerable
24 indulgence from the Tribunal in getting in its substantive grounds of Appeal. The Director is
25 concerned that this should be dealt with expeditiously and fairly in accordance with the
26 overriding objective, and is concerned about the prejudice that the Director and intervening
27 parties would suffer if this is left to hang over their head. The Director is also concerned about
28 it being used as essentially a bargaining counter in relation to a distinct Appeal which is the
29 case studies.

30 THE PRESIDENT: There is a distinct issue.

31 MISS SLOANE: There is a distinct issue. In that regard it is important to note that the case studies
32 involve wider parties than just Thames Water and Albion Water, that there are other people
33 who are going to have to be involved in agreeing the terms of reference of those case studies.

1 The Tribunal will have seen from the Director’s letter of 15th November that the
2 Director’s position is that the Tribunal should now dismiss this Appeal under Rule 10, because
3 the current Notice of Appeal discloses no valid substantive grounds of appeal and despite the
4 indulgence shown by the Tribunal Albion Water has not put in any substantive Appeal within
5 time.

6 THE PRESIDENT: Do we have Thames Water here?

7 MR. TUPPER: Yes, Sir.

8 THE PRESIDENT: Good afternoon.

9 MR. TUPPER: Naturally I concur with most of what my learned friend has had to say on the
10 subject. I would like to add a few extra comments and refer, if I may, to the application that
11 has actually been made. It is difficult from my own forensic analysis to determine what
12 exactly it is that the Appellant actually asks for.

13 THE PRESIDENT: This is the application of 9th November, yes.

14 MR. TUPPER: If the Tribunal could look at para.4, the Appellant has basically stated as follows:

15 “Albion Water has also been forced to recognise that it has insufficient resources to
16 effectively and simultaneously pursue two Appeals and that attempts to do so would
17 weaken both cases.”

18 One view may be that this is almost a disguised request to withdraw, but basically what I think
19 the Appellant is saying is that it is unable to pursue the Appeal as originally crafted and,
20 indeed, unable to pursue the matter in any respect whatsoever. So it is possible to interpret that
21 as a waving of the white flag with regard to this particular matter.

22 However, they go on to say in paras.6 and 7: “Albion Water and OFWAT have agreed
23 in principle” – one of the things that is characterised by this matter, if I may be so bold, is that
24 we are constantly referred to in the third person. Obviously, it is our conduct that is question
25 here but we engaged in this game of shuttlecock that exists between the Appellant and the
26 Respondent.

27 “Albion Water and OFWAT have agreed in principle that the key concern underlying
28 Albion Water’s Appeal, namely the value of the new water resources introduced should
29 be addressed by way of a tripartite case study involving Albion Water, Thames Water
30 and OFWAT.”

31 The matters that are at issue before the Tribunal at the moment involve the application
32 of the Competition Act to various matters that took place at the turn of this millennium
33 – a long time ago – involving an entirely different piece of legislation with regard to the
34 request that was made of us at that time.

1 The borehole study and everything that flows from it is a matter that has been dealt
2 with in accordance with the Water Act 2003, and the issues involved in with the Water Act are
3 different, they involve a whole new legislative regime which is very much in its infancy, it is
4 a fledgling regime. We are in a situation now where OFWAT has produced a document
5 consultation and everybody involved in the water world is now looking to see whether or not
6 this new regime can work, and how it can be made to work. It has absolutely
7 nothing – absolutely nothing – to do with the requests that were made of my client back in
8 2000, other than it is a request for the use of our infrastructure and it involves water, they are
9 wholly different, and governed by entirely different regimes, involving different calculations,
10 different notices and requirements. The two are not the same at all and should not be treated as
11 such. This is a message that we passed back through OFWAT when requested, and we had
12 hoped that that message would have got through to the Appellant.

13 In para.7 we have:

14 “Thames Water have now signalled that they accept that proposition, subject to
15 agreement on specific terms of reference.”

16 Again, we have made absolutely clear in the correspondence with OFWAT and subsequently
17 in the correspondence that we have had with the Tribunal that that is absolutely not the case.
18 To the extent that we have created this misunderstanding obviously we apologise unreservedly,
19 but we have signalled nothing of the sort with regards to our view as regards the pilot studies,
20 and certainly nothing that could make anyone believe that the two matters are related.

21 In our view this is a matter which is now much more a question of the application of
22 Rule 8(2), because in the absence of an Appeal in essence the Appellant is now asking to file
23 one, and the Rule as set out in 8(2) requires there to be exceptional circumstances to allow that
24 to happen and, indeed, I believe the Tribunal’s guidance goes on to say that such permission
25 will be granted only in very rare circumstances.

26 The Appellant has made no effort whatsoever to try and satisfy that test of exceptional
27 circumstances and indeed we would say that those circumstances do not apply here. Therefore,
28 we would concur with the Director General and say that this is a matter that now should be
29 dealt with by way of a striking out under Rule 10.

30 THE PRESIDENT: Thank you. Do you want to come back on any of that, Mr. Thompson?

31 MR. THOMPSON: I think the general tone of the Thames’ intervention was rather over stated in my
32 submission, indeed, the same could be said of the Director. The mere fact that something is
33 wider does not mean that there is no overlap; in fact it rather implies that there is. So the mere
34 fact that there may be other issues also raised does not mean that it would not be an appropriate

1 way of compromising the procedure, and I would not accept that the issues are completely
2 different, and the Tribunal will have in mind from the Shotton Appeal that even the Director
3 himself appears to regard there being quite a considerable overlap between some of the issues
4 at least of principle and certainly of fact that arise in this case and will continue to arise under
5 the 2003 Act.

6 Also, I would not necessarily accept that the Director has been entirely consistent
7 because, as I think I said in opening, the Director initially urged a procedure of exchanges of
8 views prior to filing of a Notice of Appeal. We had a meeting on 20th October at which we
9 appeared to agree a way forward, and now the Director comes breathing fire and saying that
10 this Appeal should be struck out. We would say it is not entirely consistent and indeed, my
11 recollection – I cannot find the reference – is that either Thames or the Director were
12 suggesting that we should be asked to produce a Notice of Appeal within seven days and now
13 each of them are saying with one voice that the matter should be struck out. So to that extent
14 I would temper what is being said to you by the other side, although I fully understand what
15 the Tribunal has said.

16 (The Tribunal confer)

17 (For Ruling see separate transcript)

18
19 THE PRESIDENT: Shall we go on to the main Albion Water Appeal? I am looking at the Agenda
20 circulated by the Tribunal, the first item on which is “The arrangements for the Tribunal’s
21 visit”. We are grateful for the suggestions that have been made in this regard, and the
22 timetable that Dŵr Cymru has produced. If we may take the question of dates first, we were
23 given to understand that there is a window between 24th January and 11th February 2005. From
24 the Tribunal’s point of view, it would be convenient to travel up to North Wales on the evening
25 of 2nd February and to devote 3rd February to this particular site visit. We are anxious on two
26 heads: first, that the programme should not be too telescoped so that we do have a chance to
27 see and understand what we need to see; and secondly, that so far as possible the programme
28 should be an agreed programme so that all parties have the feeling that the Tribunal has seen
29 what it is they want to draw our attention to.

30 Those, I think, are the Tribunal’s observations on the first item on the Agenda. I do
31 not know, Mr. Thompson, how that would suit you, and then I will ask the Director and Dŵr
32 Cymru and United Utilities what they think.

33 MR. THOMPSON: I think in terms of dates that is fine, if that is the only question I have been
34 asked to ...

1 THE PRESIDENT: I think that is the only question. We gather that you have been associated with
2 the preparation of a programme for the visit. Is that right?

3 MR. THOMPSON: Yes, I have not personally.

4 THE PRESIDENT: Perhaps not you personally, but your client.

5 MR. THOMPSON: I think Dr. Bryan has been a party to it, certainly.

6 THE PRESIDENT: And if that proposed programme is acceptable to you, well good.

7 MR. THOMPSON: Yes, I think the only question might be whether the period for the potable water
8 treatment works is too short. That would seem to be the question that is being raised, whether
9 one might need slightly longer there, but I doubt whether that is a make or break issue.

10 THE PRESIDENT: Yes. Mr. Andersen.

11 MR. ANDERSON: Mr. President, we are happy with the programme and we are happy with the
12 date.

13 THE PRESIDENT: Excellent. Yes, Mr. Robertson?

14 MR. ROBERTSON: We are happy with the programme as well. As regards the possible water
15 treatment works' visit it is the actual last section of the day, so if more time needs to be spent
16 there then we can run on a bit longer. So subject to that ----

17 THE PRESIDENT: Well if we could just bear in mind that the actual times on this programme are
18 indicative times, and we can build in a certain amount of flexibility to run on if necessary, so
19 much the better.

20 MR. ROBERTSON: Yes, our clients have already had, as it were, a "dry run" to work out what time
21 we should leave.

22 THE PRESIDENT: We are very grateful indeed for the time and effort that has gone into it, and
23 thank you for taking care of matters such as transport etc., that is indeed helpful. United
24 Utilities, have you any observations on this matter, Mr. Randolph.

25 MR. RANDOLPH: No, Sir, we agree with the programme, and we agree with the date, and I am
26 instructed that at least one of your guides from United Utilities will be Mr. Andrew Mitchelson
27 - a note for diaries.

28 THE PRESIDENT: Thank you very much for your co-operation too. We will treat that then as
29 settled.

30 The next matter I have on the Agenda is outstanding issues relating to voluntary
31 disclosure. Our understanding is that there are certain submissions to the effect that further
32 voluntary disclosure might be useful, but we are not at the moment seized with a formal
33 application for additional disclosure. Perhaps you could help us with what the position is,
34 Mr. Thompson?

1 MR. THOMPSON: I think that is it exactly. It is being proceeded with in light of the discussions at
2 the previous Case Management Conference, I think there was some slippage in the timetable
3 but a substantial amount of documentation was produced, some of which is appended to the
4 reply document that we have put in which may raise certain issues, but the list that we have put
5 in and the explanations that we have given are essentially work-in-progress and whether the
6 Director is impressed by any of the points we make is probably a matter for him to explain, but
7 from our point of view we have indicated points that we think would assist in the
8 determination of this Appeal, hopefully from a reasonably objective standpoint, and we simply
9 put it forward on that basis. We are not making a formal application and we are well aware of
10 the limitations of the procedural rights of a party such as ourselves in the light of the Rules and
11 also the Tribunal's case law, which I think we refer to in a footnote.

12 THE PRESIDENT: Obviously, we are rather reluctant to go into the various whys and wherefores of
13 this further disclosure, absent a detailed argument and a formal application, so I think we just
14 leave that where it is, and if there is something that is critical, that you want to make an
15 application about then you need to make an application about it in due course.

16 MR. THOMPSON: Indeed, I think there are some relatively small points of detail, such as the
17 turbidity indicators at Ashgrove where I understand we have one half of the equation but not
18 the other. I think we have the output data, but not the input data, and whether there would be
19 any difficulty about providing us with the input data I do not know. Some of these points are
20 relatively small, and it may be they do not raise any great point of principle, but I think it is
21 partly a matter for Dŵr Cymru and partly a matter for the Director about whether the
22 information is available and, if so, whether there is any real confidentiality attached to it which
23 would make it inappropriate for it to be provided. That is where we are at the moment, so it is
24 essentially information for the Tribunal I think, rather than an application.

25 THE PRESIDENT: Yes, thank you. I do not think we need take that any further, Mr. Anderson,
26 unless you have any points you want to make, or any Intervener has any point?

27 MR. ANDERSON: No, Sir.

28 THE PRESIDENT: Pleadings and evidence. As far as we know, the Director has asked permission
29 to serve a rejoinder to, as it were, rebut the reply and I think Dŵr Cymru suggests that it may
30 want to make some written observations on the Reply, which may be another word for saying
31 it is a "rejoinder", or it may be something else, I am not sure – it may not matter very much.
32 Perhaps you would like to tell us what your position is, Mr. Anderson?

33 MR. ANDERSON: Yes, Sir. I do not know if you have had an opportunity to consider Albion's
34 Reply and in particular the annex to the Reply which is a commentary on our Defence ----

1 THE PRESIDENT: Yes.

2 MR. ANDERSON: -- arising, in many instances, out of information derived from the voluntary
3 disclosure. It is therefore raising a number of detailed points which we believe would most
4 sensibly be dealt with by way of a rejoinder rather than awaiting the skeleton argument. It is
5 principally those kinds of factual issues we do think it might be sensible to rebut by way of
6 a freestanding Reply. This is not going to be another detailed commentary and we would
7 envisage it being much shorter than the Defence. We believe that that would be the most
8 efficient way and indeed, ultimately, the most expeditious and the way that would be of most
9 assistance to the Tribunal and, indeed, to Albion, so that is why we seek permission to put in
10 a rejoinder directed principally at the new points and points arising out of the voluntary
11 disclosure. We are thinking in particular of, but not limited to, the recalculated three
12 methodologies that are advanced by Albion as part of its Appeal in this case. There are also
13 other assorted points that we would wish to deal with at some point in these proceedings and
14 we think the best way to deal with them is by way of rejoinder, which is why we seek
15 permission.

16 THE PRESIDENT: Yes, thank you. Your position is the same, I think, Mr. Robertson, is it?

17 MR. ROBERTSON: I think essentially it is. We are rather in the Tribunal's and the Director's
18 hands, whether we would wish to make an application to serve any further pleading or witness
19 statement would, I think, depend very much on the content of the rejoinder ----

20 THE PRESIDENT: They might cover everything you wanted to say.

21 MR. ROBERTSON: Yes.

22 THE PRESIDENT: Thank you. You are not pressing for any further pleading, Mr. Randolph?

23 MR. RANDOLPH: No, Sir, save for the fact that I notice the Director's counsel did say that the
24 rejoinder will be directed towards voluntary disclosure insofar as that may impinge on
25 anything relevant to United Utilities, then we wanted to reserve our rights, but I would hope
26 that that would not be the position, and I hope very much that we would not be asking you for
27 permission to lodge any supplemental pleadings.

28 THE PRESIDENT: Any objection, Mr. Thompson?

29 MR. THOMPSON: I think there is only a formal question about whether there is a law of
30 diminishing returns about schedules on schedules ----

31 THE PRESIDENT: There always is.

32 MR. THOMPSON: But in terms of getting information earlier rather than later, as long as it does not
33 lead to a delay in the procedure I do not think we have any objection.

1 THE PRESIDENT: At this stage of the pleadings we often do leave things over to skeleton
2 arguments, but I have a feeling that in this particular case it is probably better to have it all
3 properly pleaded in advance now, rather than later. So unless you have detailed objections it is
4 probably right to give the Director permission to serve the rejoinder that he wants to.

5 MR. THOMPSON: I think given that there is now a timetable involving 2nd February it seems
6 hopeful that we could get the pleadings at least well finished before that.

7 THE PRESIDENT: Yes, get that out of the way.

8 MR. ANDERSON: What we were asking for, Mr. President, was four weeks from today.

9 THE PRESIDENT: Yes, that seems fine, that is almost Christmas Eve.

10 MR. ANDERSON: Yes, I know – we would not ask for more! [Laughter]

11 THE PRESIDENT: Very well, we will say four weeks from today for a rejoinder. Now,
12 Mr. Robertson, what shall we do about your document?

13 MR. ROBERTSON: I think we leave it for us to make an application to the Tribunal if we want to
14 serve some further document. Obviously, no doubt we will discuss the rejoinder with the
15 Director, and hopefully it can cover the things we will be covering.

16 THE PRESIDENT: Let us hope from all points of view that the Interveners do not need to serve any
17 further documents, we will see how we get on. But if you do, what I would suggest is that you
18 make a written application and we will deal with it in writing as appropriate.

19 MR. ROBERTSON: There is one small point on the pleadings. It is to do with the reply that has
20 been served by Albion. That has been served on United Utilities and ourselves, but not on
21 Aquavita. There is some confidential information attached to that reply that should not go to
22 Aquavita, and what we propose doing is preparing a non-confidential version of the reply that
23 can be served on Aquavita.

24 THE PRESIDENT: Yes, because it is information that is confidential to you

25 MR. ROBERTSON: It is information that essentially has come out on voluntary disclosure.

26 THE PRESIDENT: Yes.

27 MR. ROBERTSON: And strictly speaking some of it should not have gone to United Utilities, but
28 we have already gone past that point.

29 THE PRESIDENT: Yes, well that had better be done, and the same point applies to the rejoinder,
30 does it not?

31 MR. ROBERTSON: Yes, it does.

32 THE PRESIDENT: Mr. Randolph, I see you rising to your feet?

33 MR. RANDOLPH: Yes, Sir. I am instructed that the same applies apparently insofar as United
34 Utilities is concerned, in that apparently there is information annexed to the Reply which may

1 well be confidential, and which would require redaction insofar as Aquavitae were able to look
2 at the document in question, so effectively it is the same point as Mr. Robertson has just made.

3 THE PRESIDENT: Yes.

4 MR. RANDOLPH: We again would like to examine it before it is passed to Aquavitae and make
5 any sensible suggestion.

6 THE PRESIDENT: I do not know how long that process would take, whether we need to make an
7 order as to timing? 14 days?

8 MR. RANDOLPH: I would not imagine it would take long at all?

9 MR. ROBERTSON: We would say we could do it certainly by the 30th?

10 THE PRESIDENT: By the 30th – seven days?

11 MR. ROBERTSON: Yes, very well.

12 MR. RANDOLPH: The same with us, Sir.

13 THE PRESIDENT: Let us say that a non-confidential version of the reply will be served on
14 Aquavitae within seven days.

15 MR. THOMPSON: Sir, I am aware that the Tribunal made an order on 16th November in relation to
16 the Aquavitae intervention and there was an order to the effect that we would serve non-
17 confidential versions of the pleadings by the 30th. So unless that is going to be waived.

18 THE PRESIDENT: So that is all covered?

19 MR. THOMPSON: Well I do not know whether it needs to be waived to give a bit more time.

20 I should say there have been some hiccups which I think partly reflect the circumstances on
21 our side, and Dŵr Cymru has pointed out I think in relation to the Reply and some of the
22 documents appended to it that there was a procedure, which I did not know anything about,
23 whereby although there was some vetting of the confidentiality, as I understand it was only
24 a rather limited basis, and that there are some confidentiality concerns about some of the
25 documents that were eventually give to my client, and some of the documents appended to the
26 reply raise confidentiality concerns. I should also say ----

27 THE PRESIDENT: You mean some of the documents were given to Albion by the Director in
28 relation to which Dŵr Cymru felt a bit uncomfortable.

29 MR. THOMPSON: They had expressed reservations about confidentiality. I understand it is
30 essentially in relation to Aquavitae but I am not entirely clear whether it is also in relation to
31 United, or vice versa, United in relation to Dŵr Cymru, but that has not been entirely ironed
32 out. I should also say, as I understand it, the reply has been sent to the Aquavitae lawyers,
33 again not something I was aware of and again a misunderstanding. It has not been given to the
34 Aquavitae client at all, as I understand it, and this may be something which just needs to be

1 sorted out between the lawyers in the light of this discussion, and I can only apologise, this is
2 something inadvertent on the part of Dr. Bryan, but I doubt if any great harm has been done,
3 but clearly I want to respect the confidentiality concerns of the Interveners in particular.

4 THE PRESIDENT: As far as the immediate situation is concerned, it would seem at first sight if
5 non-confidential versions of the pleadings are served on Aquavitae by the end of the month
6 that is enough to carry that aspect of the matter forward. If, by mischance, something
7 confidential has been served on Aquavitae's legal representatives which should not have been
8 served on those representatives, they will no doubt deal with it appropriately and send it back
9 when you get the other copies, Mr. O'Reilly?

10 MR. O'REILLY: Indeed, Sir. As I understand it I am the only person who has had a quick skim
11 through – and it was certainly a very quick skim through – and I will destroy all those
12 documents and no one will see them.

13 THE PRESIDENT: Yes, thank you very much, that is entirely appropriate. In relation to the
14 Director's rejoinder when it appears, just before Christmas Eve, similarly a non-confidential
15 needs to be served on Aquavitae making allowance for the Christmas period within 21 days of
16 that service. But if a non-confidential version could be prepared in parallel, that obviously
17 helps administratively speaking, Mr. Anderson?

18 MR. ANDERSON: I can see it would help in terms of the timing. It makes the task of drafting it all
19 that much more difficult in terms of meeting the four week deadline, because obviously it
20 involves consultation with United Utilities and Welsh, but we will do our best to produce
21 them ----

22 THE PRESIDENT: Let us just say at the moment we will not say that a confidential version has to
23 be prepared at the same time. At the moment I am envisaging that a non-confidential version
24 should be available for service on Aquavitae, say, three weeks after the ----

25 MR. ANDERSON: We will certainly keep an eye on the confidential issue as we go along.

26 THE PRESIDENT: Try and keep an eye on it, that is all we can say, I think. Very well, does that
27 deal with that at the moment?

28 The next item that we are aware of is that there appears to be an application by United
29 Utilities to strike out a certain part of the Appeal and I am not entirely clear, Mr. Randolph,
30 where we are on this now?

31 MR. RANDOLPH: Well, where we were before we received Albion's skeleton, or observations,
32 was that we set down, as we had before, our intention to make an application to strike out those
33 parts of the Notice and, in particular, the relief sought which we said went outside of the scope

1 of the Appeal process, because it went outside of the Director's Decision. Usefully, and I am
2 most grateful to my learned friends and Dr. Bryan, in their observations dated 19th, at para.
3 19 ----

4 THE PRESIDENT: This is Albion's observations?

5 MR. RANDOLPH: Albion's. --Albion Water accepts that the Decision does not address this aspect
6 of the case (that which we said we were going to strike out) and that the relief claimed against
7 United in paras. 217D to E "... is therefore formally inappropriate and will not be pursued in
8 this appeal." That is what we were concerned about.

9 THE PRESIDENT: That is what you wanted.

10 MR. RANDOLPH: Exactly, so we are delighted. So on the undertaking from Albion that they will
11 amend their Notice of Appeal to make good the point that they set out at para.19 we will
12 undertake not to pursue any application for a strike out. I think that really takes that as far as it
13 does. As I say, we are most grateful that we did not have to fight this out and I think sense has
14 prevailed.

15 THE PRESIDENT: I would not have thought a formal amendment to the Notice of Appeal is really
16 necessary. It would simply be appropriate for the Tribunal to record in its order drawn that on
17 Albion Water undertaking not to proceed with paras.D and E of para.217 no order is made on
18 your proposed strike out application.

19 MR. RANDOLPH: I would be satisfied with that, Sir.

20 THE PRESIDENT: Does that sound a way of dealing with it, Mr. Thompson?

21 MR. THOMPSON: I do not think that paras.217 D and E play a leading part in the case, and I would
22 not have any strong objection to them being simply struck out.

23 THE PRESIDENT: Well I think it is sufficient just to make it clear that relief is not proceeded with,
24 because once we start striking things out you never quite know where, in a long document like
25 this, there are repercussions.

26 MR. THOMPSON: I am grateful.

27 THE PRESIDENT: Thank you very much for that, and thank you for dealing with that in a sensible
28 way.

29 MR. RANDOLPH: Indeed, and obviously in the light of my learned friend's sensible approach we
30 will not be pursuing any application for costs or anything else that might have arisen.

31 THE PRESIDENT: Thank you very much, we take note of that.

32 MR. THOMPSON: I do not want to spoil the spirit of goodwill ---- [Laughter]

33 THE PRESIDENT: It has to happen sooner or later, Mr. Thompson!

1 MR. THOMPSON: I am sure the Tribunal will be aware that in a further attempt to further the
2 goodwill between myself and Mr. Randolph we had invited them to give some indication of
3 what the price might be. We still think that would be quite a helpful indication and so that part
4 of the case has not gone away, but we would see it as an opportunity for further good natured
5 relations between ourselves and United, but whether they see it in the same spirit we leave that
6 to Mr. Randolph.

7 THE PRESIDENT: We too, I think, must leave it to the parties to see how they get on in that kind of
8 matter. Does that then take us on to the question of the later timetable for this case and dates
9 for the hearing and matters of that kind?

10 Are there any other matters the parties wish to raise before we actually tackle dates
11 for the hearing?

12 MR. O'REILLY: Yes, Sir.

13 THE PRESIDENT: Mr. O'Reilly, I am sorry, I have not said "good afternoon" to you yet.

14 MR. O'REILLY: Good afternoon to the Tribunal as well, Sir. Can I just raise the question of when it
15 is that we have to serve our Statement of Intervention, because you have given us 21 days from
16 the date that the last pleading gets to us. In the light of what have just been dealing with it
17 seems that there is now going to be a rejoinder and a possible further pleading from Dŵr
18 Cymru and there may be some further time required for confidential material. So I am just
19 seeking clarification of when we have to do what we have to do?

20 THE PRESIDENT: Yes. At the time that order was made it was envisaged that you would get
21 everything by the end of this month, and that you would therefore be in a position to serve your
22 Statement of Intervention by 21st December, or thereabouts. We now have a situation where
23 there is a rejoinder, and the question is whether or not your Statement of Intervention awaits
24 that document, or whether something comes in before then. Your Appeal is on a fairly narrow
25 basis, if I remember rightly.

26 MR. O'REILLY: I hesitate to interrupt, but we are quite happy to go 21 days after the receipt of the
27 documents this month, as it were, and then if there is anything to add, and indeed anything that
28 we are entitled or allowed to see then we could make a further supplement, but we do not want
29 to hold anything up on our account.

30 THE PRESIDENT: My initial impression is that it would be better to stick to the existing timetable
31 as far as you are concerned, and invite you to put in your Statement of Intervention within 21
32 days of 30th, i.e. by 21st, and then if you want to make further observations then we will cross
33 that bridge when we get to it.

1 MR. O'REILLY: Thank you, Sir. Just one point on the site visit. We do not propose to attend
2 unless the Tribunal thinks there is any point in us being there. We do not wish to be
3 disrespectful and just not turn up.

4 THE PRESIDENT: No, that is fine, thank you very much. Has anybody got as far – perhaps you,
5 Mr. Thompson and Mr. Anderson in particular – as thinking of a possible time estimate for the
6 main hearing in this case? The answer may be “no”.

7 MR. THOMPSON: I have not given the matter much thought. When I think about it I would think it
8 would be possibly two days – I do not know whether or not Mr. Anderson thinks that is
9 realistic – that would be straight off the top of my head. I suppose the fact that there are now
10 a number of different parties might lengthen things slightly.

11 THE PRESIDENT: We have five parties altogether.

12 MR. THOMPSON: I would imagine that it would be very much a matter of argument, and I would
13 think that a lot of it is on paper and so it may not actually take all that long.

14 THE PRESIDENT: We do not have witnesses and so forth.

15 MR. THOMPSON: Certainly on our reply there are two points of principle and law, and there is also
16 a number of quite knotty points of fact, some of which are concealed in the annex, and
17 obviously the Defence is a complex document, and so if we are going to get into all of the
18 detail that could take a little time. I would be surprised if it went into a fourth day certainly, but
19 I suppose two to three days might be a reasonable estimate.

20 THE PRESIDENT: It sounds like a two to three day case to me, but I may be quite wrong. Let us
21 see what Mr. Anderson says.

22 MR. ANDERSON: I have to say, Mr. President, we think that is a bit optimistic. There is indeed, if
23 one gets into the pleadings, really quite a lot of ground to cover. To some extent it will depend
24 on the Tribunal how far we go into those in terms of detail, but we would think that, given the
25 amount of ground there is to cover, that this may well take a week.

26 THE PRESIDENT: Yes, thank you. I do not know, you may not have formed any view,
27 Mr. Robertson or Mr. Randolph?

28 MR. ROBERTSON: I do not think we have any view that really advances matters.

29 THE PRESIDENT: In the light of that brief discussion I think the Tribunal would like to rise for
30 a few minutes so we can consult our diaries and consider the position and we will come back
31 with some suggestions in a moment.

32 (The hearing adjourned at 3.30 p.m. and resumed at 3.45 p.m.)

33 THE PRESIDENT: Working back from a possible hearing date and taking into account the
34 Tribunal's now rather crowded calendar, we doubt whether effectively we are able to start the

1 substantive hearing much before 9th May. Of course, if there are particular urgent
2 considerations we have overlooked we will hear the parties in a moment, but we were thinking
3 of 9th May as a provisional date for the hearing, and we have certainly set aside three days for
4 the hearing at present.

5 However, what we would also envisage is a further CMC in this case which would
6 make some effort to try to identify the main issues in the case and deal with any outstanding
7 procedural issues that still remain, and we had provisionally identified 11th April for that CMC,
8 on the hypothesis that before that meeting the Tribunal would attempt to communicate to the
9 parties at least in outline what it (the Tribunal) sees as the main issues in the case, with a view
10 to which the Tribunal itself proposes to meet internally in the second part of March, with
11 a view to trying to formulate the issues so that we can have a useful discussion at the Case
12 Management Conference which may in turn may help to shape the arguments that we hear at
13 the main hearing.

14 With the visit on the 3rd February and the pleadings being completed effectively early
15 in the New Year, and having regard to other cases in the Tribunal's calendar that looks at the
16 moment the best we can probably do. I do not know whether there are any initial reactions to
17 that suggestion, or whether the parties would prefer to raise any detailed timing matters behind
18 the scenes?

19 MR. THOMPSON: My only immediate reaction was whether or not the proposed CMC was a little
20 bit too late in the procedure, particularly if the sort of timetable that the Director is
21 suggesting ----

22 THE PRESIDENT: From the point of view of skeletons?

23 MR. THOMPSON: Yes, because I think it would be difficult for my clients to be putting in
24 a skeleton within a matter of only a few days of a CMC of this general character.

25 THE PRESIDENT: I can see that.

26 MR. THOMPSON: We would be content to put in our skeleton, say, two weeks before the hearing
27 date but I think the Director might say that that was too little time for him to deal with it,
28 although I am not sure quite why, it would be a normal sort of timetable for us to put in our
29 skeleton 14 days in advance and the Director and Interveners seven days in advance. But if he
30 thinks that that is too long then I think perhaps the CMC is a little too close to the hearing date.

31 THE PRESIDENT: That would mean probably having the CMC before rather than after Easter.
32 Sunday 27th March is Easter Sunday, so Good Friday is 25th. That would probably indicate
33 a CMC in the week before Easter, then there would be Easter, and then the exchange of
34 skeletons would follow in the last weeks of April.

1 MR. THOMPSON: I think I would respectfully support something along those lines if that fits in
2 with the Tribunal's timetable for discussions, but that was my immediate reaction.

3 (The Tribunal confer)

4 THE PRESIDENT: We could do a CMC on 21st March, which is the Monday before Easter, which
5 should leave ample time for exchange of skeletons and so forth, before the hearing date.

6 MR. THOMPSON: Insofar as we are in the firing line for the first skeleton, that would be helpful to
7 my clients, if it fits in with everybody else.

8 THE PRESIDENT: Let us see what everybody else says?

9 MR. ANDERSON: Mr. President, I think the point Mr. Thompson makes is perfectly valid. A CMC
10 as late as 11th April would not leave much time for skeleton arguments given the timetable we
11 are suggesting, which we think is a realistic timetable given the complexity of the case, and the
12 importance of avoiding repetition and therefore having them sequential in that way. As far as
13 we are concerned, 21st March would be an ideal date.

14 THE PRESIDENT: Well unless there are strong objections, let us say 21st March for a CMC and 9th
15 May provisionally for the hearing, which would leave us only with the timetable for the
16 exchange of skeletons, and I think the Director has made a suggestion. I am not sure whether
17 you agree with the Director's suggestion, Mr. Thompson. It is basically that you should go
18 first, followed by Aquavitae, followed by the Director, and followed finally by the other
19 Interveners. If, just for argument's sake, we followed the Director's suggestion your skeleton
20 would be due on 11th April, I think; Aquavitae's would be due on 18th, Director's on 25th and
21 the Interveners' on the 2nd. That is his suggestion.

22 MR. THOMPSON: I am bound to say it seems a very leisurely pace compared to what one is used
23 to in litigation, even though this is relatively complex and it also, I am bound to say, places the
24 heaviest burden on probably the Body least able to bear it and also the one with perhaps the
25 most to do.

26 THE PRESIDENT: So what are you suggesting?

27 MR. THOMPSON: Well I wonder if it is really necessary for Aquavitae to have a separate slot in
28 the timetable? Whether it would be sensible for Aquavitae to go last along with the other
29 Interveners, in which case we would then shift to 18th as I think the Tribunal originally
30 thought, with the Director on 25th and the Interveners generally weighing in on 2nd May,
31 because I suspect that Aquavitae's position will be relatively well known by the time it has put
32 in its written pleading and given the limited scope of its intervention in any event. I do not
33 know whether that would be a reasonable compromise?

34 THE PRESIDENT: Yes, what do you think, Mr. Anderson?

1 MR. ANDERSON: I have to say we do not agree with that. Aquavitae is intervening in support of
2 Albion and it seems only right that what Aquavitae wishes to add to anything Albion says is
3 something that the Director would wish to deal with in his skeleton. So the order that we have
4 suggested there is the order of who the Interveners are supporting. The idea of having a gap
5 between Albion and Aquavitae is so that Aquavitae can see what Albion has said and avoid
6 repetition. That is the same reason for having the other Interveners after the Director. So it is
7 really those advancing the Appeal first, and those responding to it second. We do not believe
8 that that is too leisurely a pace, given the overall timetable between now and May.

9 THE PRESIDENT: Could you put your skeleton in at the same time as Albion, do you think,
10 Mr. O'Reilly?

11 MR. O'REILLY: Indeed, we have just discussed that and agreed that that would be a sensible way
12 forward.

13 THE PRESIDENT: One possibility would be to say 18th for Albion and Aquavitae, 25th for the
14 Director and 2nd for the other Interveners. Shall we go with that?

15 MR. ANDERSON: We would ask for a little more time than seven days, Mr. President. There is no
16 need for them all to be equally spaced. If Aquavitae and Albion go together on 18th, we would
17 like a little later in the following week to submit our skeleton.

18 THE PRESIDENT: Well if we say 18th for Aquavitae and Albion and said, say, 27th for you, which
19 would give you the first three days ----

20 MR. ANDERSON: 27th, yes, that would be helpful.

21 THE PRESIDENT: Yes, 18th for them, 27th for you and then 2nd for the Interveners.

22 MR. ROBERTSON: Sir, there is a practical problem, 2nd is a Bank Holiday.

23 THE PRESIDENT: Yes, a Bank Holiday – indeed a practical problem.

24 MR. ROBERTSON: If we could have a week then that would be the 4th.

25 THE PRESIDENT: Yes, Wednesday 4th. Very well, let us treat that as a provisional timetable for
26 the time being, and we will endeavour to communicate with the parties before 21st as to
27 matters that can usefully be discussed on that day. Apart from that I think we will see you next
28 on 3rd February up on Deeside. Any other applications or comments?

29 Thank you all very much.

30 (The hearing concluded at 4 p.m.)