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IN THE COMPETITION APPEAL TRIBUNAL

Case number 1046/2/4/04
1034/2/4/04(IR)

Victoria House
Bloomsbury Place
London WC1A 2EB

2 February 2007

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

and

WATERLEVEL LIMITED

Appellants

supported by

AQUAVITAE (UK) LIMITED

Intervener

-v-

WATER SERVICES REGULATION AUTHORITY
(formerly the Director General of Water Services)

Respondent

supported by

(1) DŴR CYMRU CYFYNGEDIG

and

(2) UNITED UTILITIES WATER PLC

Interveners

REFUSAL OF PERMISSION TO APPEAL

I. BACKGROUND

1. By virtue of section 49(1)(c) of the Competition Act 1998 (the 1998 Act), an appeal from the Tribunal's judgments of 6 October and 18 December 2006 lies to the Court of Appeal on a point of law only. An appeal requires the permission of the Tribunal or the Court of Appeal: section 49(2)(b) and (3). CPR Rule 52.3(6) applies.

2. In *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2002] EWCA Civ 796 Buxton LJ said at paragraph 15:

> "[It] is important that parties seeking to appeal to this court should isolate within the criticised decision what is an issue of law, and what is merely a determination, by a specialist Tribunal, of a matter of fact or judgment. In order to clarify the question that this court has to decide, and to facilitate its task, it will be desirable in future if an applicant, in his Grounds or in Grounds supplemented by a short skeleton, sets out his case as follows:
>
> 1. Identify in precise terms the rule of law said to have been infringed;
> 2. Demonstrate where in the European jurisprudence that rule is to be found, by specific reference to the European authorities;
> 3. Demonstrate briefly from the Tribunal's judgment the nature of the error, by reference to the Tribunal's handling of the issue in question."

3. In relation to certain findings made by the Tribunal to the effect that Napp's pricing policy hindered competition and raised barriers to entry, Buxton LJ said in *Napp* at paragraph 34:

> "These findings do not and could not involve points of law, at least unless it were to be contended that the conclusions had been arrived at on the basis of no evidence at all: something that is not and could not possibly be said. They cannot therefore be reviewed in this court. But even if we did have authority to review such findings, as the conclusion of an expert and specialist tribunal, specifically constituted by Parliament to make judgments in an area in which

> judges have no expertise, they fall exactly into the category identified by Hale LJ in *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, as an area which this court would be very slow indeed to enter."
>
> (see also paragraph 43 of that judgment)

4. In its application for permission to appeal dated 26 January 2007, to which Albion responded in its submissions of 31 January 2007, Dŵr Cymru sets out five grounds of appeal, namely that the Tribunal allegedly:

   A. made various errors as regards the Tribunal's approach to the issue of excessive pricing;

   B. made various errors as regards the Tribunal's approach to the issue of margin squeeze;

   C. exceeded its jurisdiction in considering the costs underlying the Bulk Supply Price in coming to a conclusion about the First Access Price;

   D. had no jurisdiction to continue the order for interim relief first made on 2 June 2004 and continued, as varied, on 11 May 2005 and 20 November 2006; and

   E. had no jurisdiction to find that Dŵr Cymru had a dominant position within the meaning of the Chapter II prohibition set out in section 18(1) of the 1998 Act.

5. The Authority, whose Decision of 26 May 2004 is in issue, and who was the respondent to the proceedings before the Tribunal, has not sought permission to appeal. This gives rise to an anomalous situation whereby the regulator responsible for enforcing the 1998 Act in the water sector does not challenge any aspect of the Tribunal's judgments.

6. For the reasons set out below, we refuse permission on the grounds that (i) many of the points raised by Dŵr Cymru are not points of law, but points of fact; (ii) insofar as Dŵr Cymru raises points of law, those points have no real prospect of success; and (iii) the appeal is premature. We see no other compelling reason

for granting permission, bearing in mind also the long regulatory delay that has already occurred in this case, and the disparity of resources between the parties.

7. As regards the premature nature of this appeal, even if we had been satisfied that, at first sight, Dŵr Cymru had advanced a point of law having a real prospect of success, we would not have granted permission to appeal at this stage, but would have deferred our ruling. The reason is that the matters relating to the excess pricing issue – which cover 26 pages of the request for permission – have not yet been decided but have been referred back by the Tribunal to the Authority for further investigation, and the Authority has been requested to report back to the Tribunal by 18 June 2007 (judgment of 18 December 2006, paragraphs 279 to 281). Following the result of that investigation, any grounds of appeal on excessive pricing would have to be reformulated in any event. Moreover, if that further investigation and any subsequent proceedings before the Tribunal are favourable to Dŵr Cymru on the excessive pricing issue, this aspect of Dŵr Cymru's appeal would, presumably, fall away altogether. On the other hand, if a further decision by the Tribunal on the excessive pricing issue is adverse to Dŵr Cymru, it would, in our view, be more appropriate for Dŵr Cymru's appeal to proceed, if necessary, at that stage, on the basis of reformulated grounds. Contrary to Dŵr Cymru's submissions, we see no compelling reason for the Court of Appeal's intervention at this point, while the Authority is still investigating the excessive pricing issues.

8. In any event, we do not think that prejudice to Dŵr Cymru would occur if the various grounds it advances were dealt with altogether in one appeal following the completion of the Authority's further investigation and the Tribunal's ultimate decision. On the other hand, if this appeal proceeds now, there may well ultimately be two appeals instead of one (and, on Dŵr Cymru's approach, two possible references to the ECJ). That would involve very considerable extra resources, both as regards the Court of Appeal and the parties. In particular, that would impose a considerable burden on Albion. While Dŵr Cymru is a substantial and profitable company[1], Albion has few resources and has survived

[1] See paragraph 842 of the judgment of 6 October. In 2006 Dŵr Cymru rebated some £26 million to its customers, about three times its non-potable revenue, an increase from £18 million in 2005 .

to this point only by virtue of the support of its customer, Shotton Paper, and the interim relief granted by the Tribunal (judgment of 6 October 2006, paragraph 304). Bearing in mind the overriding objective in CPR Rule 1.1 (particularly putting the parties on an equal footing, saving expense, proportionality and making best use of the court's resources) we, for our part, would not wish to run the risk in this case of there being two appeals instead of one.

9. A possible exception to those considerations would arguably be ground D of the request for permission, which challenges the Tribunal's jurisdiction to continue interim relief (a reduction of the Bulk Supply Price of 3.55p/m^3). However, we consider that ground of appeal to be unarguable, as set out below.

The factual context[2]

10. Albion is the only new entrant to the water industry since privatisation in 1989. Albion holds a statutory "inset" appointment which entitles it to supply water to Shotton Paper, which operates a paper mill in North Wales. Shotton Paper uses non-potable water in its industrial process, and is one of the largest users of water in England and Wales. The Shotton Paper site is served by the Ashgrove system, which is owned by Dŵr Cymru. Dŵr Cymru is the statutory water undertaker for most of Wales and some adjacent areas of England. The Ashgrove system consists of a treatment works near Heronbridge on the River Dee, and a single 700mm pipeline through which large volumes of partially treated non-potable water descend, by gravity, for about 16 kilometres from the Ashgrove treatment works to the premises of Shotton Paper and a neighbouring site owned by Corus. Shotton Paper's consumption is equivalent in volume to the annual consumption of some 35,000 to 45,000 domestic customers.

11. Dŵr Cymru formerly supplied Shotton Paper, but the latter switched to Albion when Albion was granted its inset appointment in 1999. At present, Dŵr Cymru supplies Albion with non-potable water under a Bulk Supply Agreement (referred to in the Decision as the Second Bulk Supply Agreement) at a price of

[2] The essential facts and the Tribunal's conclusions are summarised at paragraphs 1 to 61 of the Tribunal's judgment of 6 October 2006. The factual and legal background is described in detail at paragraphs 62 to 212 of that judgment.

26p/m^3. Albion then re-supplies that water to Shotton Paper under a supply agreement between Albion and Shotton Paper, also at a price of 26p/m^3. The cost to Shotton Paper of that water at a price of 26p/m^3 is around £1.7 million per annum. Dŵr Cymru is itself supplied by United Utilities, a neighbouring undertaker, which abstracts the water in question from the River Dee. Dŵr Cymru pays United Utilities about 3p/m^3, and thus enjoys a gross margin of some 87 per cent of the Bulk Supply Price paid by Albion.

12. This case concerns Albion's request to Dŵr Cymru, first made in 2000, for the quotation of a common carriage price for the partial treatment and transportation of water through the Ashgrove system. Albion's proposal was, and as far as we know still is, that Albion itself would acquire the water direct from United Utilities and re-supply that water to Shotton Paper, paying Dŵr Cymru a reasonable charge for the use of the Ashgrove system, rather than obtaining the water from Dŵr Cymru under the Bulk Supply Agreement, as at present. According to Albion, this arrangement should enable it to pass on to Shotton Paper a substantially reduced water price[3].

13. In February 2001, Dŵr Cymru quoted Albion a common carriage price of 23.2p/m^3 (the First Access Price). In March 2001 Albion complained to the Authority's predecessor, the Director, that the First Access Price constituted an abuse of a dominant position contrary to the Chapter II prohibition in that (a) the First Access Price was excessive; and (b) the First Access Price gave rise to a "margin squeeze". The allegation of margin squeeze was based on the contention that it was economically impossible for Albion to acquire the water from United Utilities (even at the price of 3p/m^3 charged by United Utilities to Dŵr Cymru), pay a common carriage charge for the partial treatment and transportation of the water through the Ashgrove system of 23.2p/m^3, and compete effectively with Dŵr Cymru in supplying the water to Shotton Paper (Dŵr Cymru's quoted retail price to Shotton Paper then being 26p/m^3). That contention is not disputed on the facts.

[3] Each reduction of 1p/m^3 would represent about £70,000 per annum.

The Decision[4]

14. In the contested Decision, the Director dealt with the issues as follows.

(i) The Director assumed that Dŵr Cymru had a dominant position, albeit expressing doubts as to whether or not that was in fact the case (paragraphs 86 to 225 of the Decision);

(ii) The Director found that the First Access Price of 23.2p/m^3 quoted by Dŵr Cymru to Albion should have been 19.2p/m^3 on a "whole company" average accounting costs basis. The crucial element in this figure of 19.2p/m^3 was the Director's view that the "distribution"[5] costs of non-potable water on an average accounting basis were the same as those for potable water, namely 16p/m^3 (paragraphs 300 to 302 of the Decision).

(iii) The Director found that, notwithstanding the difference between the First Access Price of 23.2p/m^3 and the Director's average accounting cost calculation of 19.2p/m^3, the First Access Price was justified on the basis of an approach known as the "Efficient Component Pricing Rule" (ECPR). The essential feature of ECPR is that the incumbent supplier is entitled to charge a new entrant the retail price which the incumbent would otherwise have received from the customer, less any costs that the incumbent would avoid by not supplying the customer in question. According to the Director, the ECPR approach was also reflected in the Costs Principle referred to in section 66E of the Water Industry Act 1991 (WIA91) as amended by Water Act 2003 (WA03) (paragraphs 317 to 340 of the Decision).

(iv) Accordingly, the Director felt unable to conclude that the First Access Price bore "no reasonable relation to the economic value of the service provided, when judged by reference to the difference between the costs actually incurred by Dŵr Cymru and the price charged" within the meaning of the test set out in the *United Brands* case: see paragraphs 335 to 341 of the Decision.

[4] The Decision is described at paragraphs 213 *et seq* of the judgment of 6 October 2006.
[5] The term "distribution" costs appears to cover all costs, including retail activities, which are not specifically allocated to water resources, treatment and "local" distribution. The Authority and Dŵr Cymru never identified precisely what the components of "distribution" costs were.

(v) As to the "margin squeeze" issue, it is not disputed that, as a matter of fact, a margin squeeze exists. It appears to be common ground that, on the basis of the "upstream" First Access Price for common carriage of 23.2p/m^3, Albion could not viably compete with Dŵr Cymru in the "downstream" market for the retail supply of non-potable water. However, in the Decision, the Director found that there was no margin squeeze abuse, essentially because, by supplying Albion with common carriage through the Ashgrove system, rather than supplying Albion with non-potable water under the Bulk Supply Agreement, Dŵr Cymru would, in the Director's view, not be avoiding any costs, other than the resource cost of the water itself (around 3p/m^3) (paragraphs 345 to 352 of the Decision).

15. The Tribunal is of the view that, if the Decision is correct, Albion's common carriage proposal would not be economically viable, and Albion's position as an inset appointee is placed in jeopardy. The prospective forced exit of the only new entrant to the water industry since 1989 is a matter the Tribunal views with serious concern. More important, the approach in the Decision is, in our view, inimical to any prospect of competitive forces developing in the water industry, contrary to the policy of successive Governments and the provisions of the 1998 Act (judgment of 6 October 2006, at paragraphs 295 to 305).

The interim judgment of 22 December 2005

16. This matter first came on for hearing in mid–2005. In its interim judgment of 22 December 2005 the Tribunal came to the conclusion that it was not yet in a position to rule on the issue of distribution costs on an average accounting cost basis, nor on the ECPR and margin squeeze issues, and sought further information and evidence from the parties: see paragraph 427 of that judgment. Extensive further evidence, including expert evidence, having been provided, the matter was further heard between 30 May and 7 June 2006.

The main judgment of 6 October 2006

17. In the main judgment of 6 October 2006 the Tribunal reached these conclusions, as summarised at paragraphs 981 and 982:

> "981. For the reasons given above we have reached the following conclusions:
>
> (1) There is evidence before the Tribunal that the treatment cost of non-potable water on an average accounting cost basis was over-estimated in the Decision. However the Tribunal is prepared to assume, without deciding, that treatment costs are in the range 1.6p/m³ to 3.2p/m³.
>
> (2) The matter of the "distribution" cost of non-potable water on an average accounting cost basis was not sufficiently investigated. In this respect the Decision is incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on, and the investigation undertaken, as regards in particular to the Director's conclusion in paragraph 302 of the Decision to the effect that it was not unreasonable to assume that the "distribution" costs of potable and non-potable water are the same.
>
> (3) The evidence strongly suggests that the First Access Price was excessive in relation to the economic value of the services to be supplied, by reason of the absence of any convincing justification for the "distribution" costs included in the average accounting cost calculation.
>
> (4) The cross-check as to the validity of the First Access Price by reference to ECPR in paragraphs 317 to 331 of the Decision cannot be safely relied on because (i) the 'retail' price used in the calculation is not shown to be cost-related, as regards the distribution element; (ii) the evidence strongly suggests that that price was itself excessive; (iii) the particular method of ECPR used in this case would eliminate existing competition and, in effect, preclude virtually any competitive entry,

because the margins are insufficient; and (iv) the approach of the Authority in its evidence and submissions was not the same as that in the Decision. None of the justifications for an ECPR approach advanced by the Authority persuaded us that we could safely rely on the approach set out in the Decision in the circumstances of the present case.

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

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

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

18. As far as the Tribunal can discern, there is no application for permission to appeal in this case in respect of the Tribunal's findings in sub-paragraphs (1), (2), (4) and (6) of paragraph 981 of the judgment of 6 October 2006.

The further judgment of 18 December 2006

19. Following the judgment of 6 October 2006, the main outstanding issues were (a) what was the correct approach to adopt to the issue of dominant position, which up to that point had not yet been addressed by the Tribunal: see paragraphs 983 and 984 of that judgment; and (b) what orders and/or remedies the Tribunal should make/grant as regards the substance of the matter, in the light of the judgment. In addition, on 30 November 2006 Albion applied for a further variation of the interim relief order first made by the Tribunal on 2 June 2004.

20. Following further hearings on 24 October and 20 November 2006, the Tribunal decided the outstanding issues in its judgment of 18 December 2006. The Tribunal's conclusions are summarised at paragraph 360 of that judgment:

> "For the reasons given above the Tribunal unanimously:
>
> (i) sets aside paragraphs 93 (first sentence), 97 to 99, 131, 132, 138, 144, 150, 160 to 165, 176 to 177, 182 to 187, 189 to 191, 199 to 203, 209, 211, 213 to 215, 216 to 225, 300 to 302, 317 to 331, 338 to 341, 345 to 352, 360 to 361, 371, and Annex I of the Decision[6].
>
> (ii) confirms as correct the Director's assumption as to dominant position at paragraphs 212 and 215, last sentence, of the Decision, and finds on the facts that Dŵr Cymru had at all material times a dominant position on the relevant market within the meaning of the Chapter II prohibition.
>
> (iii) refers back to the Authority under Rule 19(2)(j) of the Tribunal's Rules for further investigation the matter of the costs reasonably attributable to the service of the transportation and partial treatment of water by Dŵr Cymru, generally and through the Ashgrove system in particular, together with the associated question of whether, in the light of those costs, the First Access Price was an unfair price within the meaning of the Chapter II prohibition.

[6] Paragraphs 93 to 225 and Annex I of the Decision relate to the issue of dominance; paragraphs 300 to 302 concern the distribution costs of potable and non-potable water respectively on an average accounting cost basis; paragraphs 317 to 331 and 338 relate to ECPR; paragraphs 340 and 341 contain the Director's conclusion on excessive pricing; paragraphs 345 to 352 and 360 to 361 deal with margin squeeze; and paragraph 371 sets out the Director's overall conclusion on the price-related aspects of Albion's complaint.

(iv) declares that by quoting the First Access Price of 23.2p/m³, at the same time as offering a retail price of some 26p/m³, Dŵr Cymru imposed on Albion a margin squeeze which constituted an abuse of a dominant position within the meaning of the Chapter II prohibition.

(v) continues until further order the Tribunal's interim order of 20 November 2006 reducing Dŵr Cymru's existing Bulk Supply Price to Albion by 3.55p/m³."

21. As far as the Tribunal can discern there is no application for permission to appeal in relation to sub-paragraph (i) of paragraph 360 of the judgment of 18 December 2006. As to sub-paragraph (iii), as we understand it Dŵr Cymru does not challenge the remittal back to the Authority as such, but rather the use of Rule 19(2)(j).

II. THE GROUNDS OF APPEAL

A. THE EXCESSIVE PRICING ISSUES

General

22. In the Decision, the Director declined to find that the First Access Price of 23.2p/m³ was an abuse. He found (i) on an average accounting cost basis that price should have been 19.2p/m³ (paragraphs 245 to 307 of the Decision); but (ii) applying an ECPR approach, the Access Price would be some 22.5p/m³, which was sufficiently close to the First Access Price of 23.2p/m³ to be immaterial (paragraphs 317 to 331).

23. At paragraphs 638 to 836 of the judgment of 6 October 2006, in a detailed analysis over 63 pages, including an analysis of the expert evidence, the Tribunal entirely rejected the Director's reliance on ECPR. The request for permission to appeal does not put in issue that extensive analysis.

24. The only mention of ECPR in the request for permission to appeal is in footnote 3 to page 11, where Dŵr Cymru asserts that it "indirectly challenges" the Tribunal's conclusions as to ECPR at paragraph 981(4) of the judgment of

6 October 2006[7]. However that "indirect" challenge is purportedly made only in relation to margin squeeze issues, not in relation to excessive pricing. Even on margin squeeze issues, the footnote to page 11 states that Dŵr Cymru does "not seek to raise any direct challenge to the Tribunal's reasoning in connection with ECPR". In the absence of any attempt to identify any error in the Tribunal's analysis of ECPR in paragraphs 638 to 836 of the judgment of 6 October, we do not accept that any valid ground of appeal is advanced in relation to the Tribunal's conclusions on ECPR, whether on margin squeeze or otherwise, and certainly not in relation to excessive pricing.

25. The consequence of this is that, even on the basis of the average accounting cost approach set out in the Decision, the First Access Price should have been 19.2p/m^3, rather than 23.2p/m^3, leading to an apparent overcharge to Albion of some 21 per cent, representing some £250,000 per annum (paragraph 236 of the judgment of 18 December 2006).

26. Furthermore, almost all Dŵr Cymru's criticisms of the Tribunal in relation to excessive pricing concern the average accounting cost of "distribution", estimated in the Decision at 16p/m^3. Dŵr Cymru's case is based essentially on the premise, set out in paragraph 302 of the Decision, that the "distribution" costs of potable and non-potable water, respectively, are the same. However, the Tribunal's detailed analysis at paragraphs 448 to 635 of the judgment of 6 October 2006, over some 57 pages, led the Tribunal to conclude that that central premise (i.e. that the distribution costs of potable and non-potable water are the same at 16p/m^3) was not established. The Tribunal held at paragraph 636 of the judgment of 6 October 2006:

> "In all those circumstances, and for the reasons given above, in our judgment the matter of the "distribution" cost of non-potable water on an average accounting cost basis was not sufficiently investigated. It follows, in our view, that on this aspect the Decision is incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on, and the

[7] There is also a passing reference to ECPR in paragraph 62, and an oblique reference in paragraph 72, of the request, dealing with margin squeeze issues.

> investigation undertaken, as regards the conclusion set out in paragraph 302."

27. Dŵr Cymru does not seek to challenge the setting aside, at paragraph 239 of the judgment of 18 December 2006, of paragraph 302 of the Decision[8]. It follows that Dŵr Cymru does not challenge the Tribunal's conclusion that the result derived from the whole company average accounting cost approach in the Decision should be set aside, as regards the "distribution" cost of 16p/m^3.

28. It appears, moreover, to be common ground that the whole issue of excessive pricing must in any event be reconsidered by the Authority. Although there is apparently a procedural issue as to the route by which the matter should have gone back (i.e. whether under Rule 19(2)(j) of the Tribunal's Rules, as the Tribunal decided, or by way of general remittal under paragraph 3(2)(a) of Schedule 8 to the 1998 Act, as Dŵr Cymru apparently suggests[9]), the issue of excessive pricing has now, in fact, gone back to the Authority, and the Authority is, we assume, re-investigating it. It is anticipated that the matter will come back to the Tribunal, the Tribunal having requested that investigation to be completed within six months, i.e. by 18 June 2007. The Authority has not appealed that approach by the Tribunal.

29. In those circumstances, as already indicated, the Tribunal takes the view that it would be premature to give permission to appeal as regards the details of the excessive pricing issues, unless satisfied that there was a substantial point of law which needed to be resolved at this stage. As set out below, in the Tribunal's view, no such point of law emerges from the request for permission to appeal, as regards the excessive pricing issues (or otherwise).

30. At this stage, the Tribunal has not found an abuse of unfair pricing by Dŵr Cymru within the meaning of section 18(2)(a) of the 1998 Act. The Tribunal considers that it is preferable for certain matters to be further investigated by the Authority, as summarised at paragraphs 279 to 281 of the judgment of 18

[8] Despite certain criticisms made of the Tribunal's reasoning in grounds A3 and A4 of the request for permission to appeal, Dŵr Cymru does not challenge the Tribunal's conclusion that paragraph 302 of the Decision cannot stand.
[9] Request, paragraph 52: see below.

December 2006. The reasons for taking that course are set out at paragraphs 240 to 278 of the judgment of 18 December 2006. In particular the Tribunal had in mind that: (i) it was desirable that the question whether the First Access Price was "unfair" should be determined on the basis of a fully informed calculation of costs (paragraphs 247 to 249 of the judgment of 18 December 2006); and (ii) the question whether the price was "unfair" was a matter that needed to be further addressed by the Authority (paragraphs 250 to 252 of that judgment).

Error A1: The Tribunal erred by wrongly reversing the burden of proof and making an unjustified presumption of guilt

31. Dŵr Cymru alleges that, on the issue of whether the "distribution" costs of non-potable water were 16p/m^3, the Tribunal effectively put the burden of proof on Dŵr Cymru and "presumed guilt" in coming to its views that:

> "The evidence taken as a whole strongly suggests to the Tribunal that the First Access Price was excessive, in relation to the economic value of the services to be supplied" (paragraph 637 of the judgment of 6 October 2006); and
>
> "It is implicit in the main judgment that the evidence at present before the Tribunal… shows, on the balance of probabilities, that the First Access Price bore no reasonable relation to the cost of the service to be provided, when judged by reference to the costs actually incurred by Dŵr Cymru and the price charged." (paragraph 245 of the judgment of 18 December 2006)

32. The suggestion is that the Tribunal relied entirely, or at least unduly, on Dŵr Cymru's failure to produce any accounting cost justification or breakdown in support of the figure of 16p/m^3 in circumstances where Dŵr Cymru simply did not have the information which would have enabled it to give any further accounting cost explanations. Dŵr Cymru considers that the Tribunal has accused Dŵr Cymru of bad faith in describing its failure to produce accounting information in support of the claimed "distribution" costs of 16p/m^3 as "a tactical approach" (paragraph 254 of the judgment of 18 December 2006).

33. To take the last point first, the Tribunal has not characterised Dŵr Cymru's approach as one of bad faith. The Tribunal, however, remains surprised that it

was not possible for either the Authority or Dŵr Cymru to arrive at any accounting breakdown of the component parts of the 16p/m^3 relied on, even on an estimated basis. Apart from operating costs of about 1p/m^3, no explanation of the make-up of the remaining 15p/m^3 of "distribution costs" (some 94 per cent of the claimed distribution costs) was ever forthcoming (see paragraphs 15, 464 to 469, 599 to 603 and 632 to 635 of the judgment of 6 October 2006).

34. We note also that the Tribunal's request in this respect was, to all intents and purposes, the same as the request made to Dŵr Cymru by the Director, on 29 June 2001 under section 26 of the 1998 Act, for details of the actual costs incurred. Dŵr Cymru answered that request, which was a statutory request involving criminal penalties for false or misleading answers[10], giving a breakdown in costs (document D21, annexed to Albion's reply). No similar information was provided to the Tribunal, and document D21 was withdrawn by Dŵr Cymru. We continue to find Dŵr Cymru's claim that it was not possible to supply any, even estimated, details of its costs lacking in credibility, as stated in paragraph 254 of the judgment of 18 December 2006.

35. However, Dŵr Cymru's principal suggestion is that the Tribunal effectively reversed the burden of proof and made "an unjustified presumption of guilt" by relying on the absence of accounting information which, according to Dŵr Cymru, it could not produce. That entirely mischaracterises the Tribunal's approach to the evidence.

36. First, the Tribunal directed itself as to the burden of proof at paragraph 291 of the judgment of October 2006:

> "At the stage of an appeal to the Tribunal we accept that Albion bears the burden of persuading the Tribunal that it is necessary to set aside the Decision, in whole or part, on one or more of the grounds set out in *Freeserve*. We note, however, that in this particular case most of the relevant information is in the hands of the Director and Dŵr Cymru, and that Albion has had access only to information which is publicly available, or has been obtained by disclosure in these proceedings.

[10] Section 44 of the 1998 Act.

> Although Dr Bryan has considerable experience of the water industry, Albion is a company with limited resources, in part as a result of the effect of the present dispute. While Dŵr Cymru has given some considerable disclosure, a troubling feature of the present case is that on a number of occasions information supplied has had to be corrected, and on other occasions assertions have been made that have proved difficult to verify. On important issues such as costs there is little by way of contemporaneous information or original documentation: see further below. We bear these points in mind when considering whether Albion has discharged the burden of proof."

Dŵr Cymru has not criticised that paragraph of the judgment.

37. Secondly, the view to which the Tribunal came at paragraph 637 of the judgment of 6 October 2006 was based on the detailed analysis of potable/non-potable distribution costs, set out over 37 pages at paragraphs 448 to 636 of the judgment of 6 October 2006. This includes analysis under the headings of potable and non-potable systems generally; lack of information on costs (including the absence of any quantification of such items as management overheads, repair and maintenance, distribution pumping, waste detection, retail customer services, scientific services, rates, infrastructure renewals charges, current cost depreciation and return on capital); use of revenue as a proxy for costs; lack of dis-aggregation of costs; difficulties with the data; costs drivers such as distance, geographic location, the complexity of potable systems versus non-potable (notably in relation to such aspects as service reservoirs and distribution pumping), renewals, maintenance and leakage; Dŵr Cymru's justification for its Large Industrial Tariff (LIT) put forward in 1999; a comparison between the costs of transporting raw water and the "distribution" costs of non-potable water; and the information produced by Dŵr Cymru and the Authority as regards the costs attributable to Ashgrove.

38. It was on the basis of all that material that the Tribunal expressed its conclusions at paragraphs 631 to 637 of the judgment of 6 October 2006 in these terms:

> "631. The Tribunal's examination has been made under four different heads namely: (1) certain costs drivers; (2) the LIT justification; (3) the raw water

comparison; and (4) the costs attributable to Ashgrove. The first three of those approaches uses "average" figures and the fourth assumes that the costs of Ashgrove are similar to the average. Each of those lines of analysis demonstrates, in our view, serious factual weaknesses in the conclusion reached at paragraph 302 of the Decision. In our judgment, the evidence we have referred to above, taken as a whole, shows on the balance of probabilities that it was not reasonable for Dŵr Cymru to assume that the costs of "distribution" of non-potable and potable water were the same at 16p/m³. The essential error, in our view, was to rely on the approach that "a pipe is a pipe" (paragraphs 299 to 301 of the Decision) without considering more widely the different characteristics and cost components attributable to non-potable as distinct from potable supply systems.

632. By various routes, Albion arrives at a figure of no more than around 2p/m³ for distribution costs. Dr Bryan was not cross-examined on the various calculations set out in Bryan 4, although he was cross-examined at length on what we would regard as the entirely subsidiary issue of how far a CCV calculation could be used as a proxy for the MEA value of the Ashgrove treatment works. The Authority did not adduce any evidence to show what the component elements of the cost structure of a typical non-potable system might be, even indicatively, on an average cost accounting basis. Apart from one document relating to the operating costs of the treatment works, no original or contemporaneous accounting material was produced by Dŵr Cymru. The only document the Tribunal has to go on, the LIT justification, was disclosed after the defence and rejoinder.

633. It must, in our view, have been obvious from the interim judgment that the Tribunal was seeking evidence in order to ascertain how, on an average accounting cost basis, the distribution cost of 16p/m³ could be justified, in its component elements, even indicatively. Instead of responding to the opportunity given to them by the Tribunal, Dŵr Cymru, and later the Authority, produced quite different "stand-alone" calculations on a "new build" basis, even though it was accepted, rightly, in evidence that those

calculations did not, and could not, form any basis for charging. Those "stand-alone" calculations are not, in our view, useable for calculating the costs of water distribution: for example, such calculations assume quite different rates of return, do not include capital charges such as infrastructure renewals, and allocate the whole, instead of a proportion, of the company's general and support overheads.

634. We find it difficult to believe that Dŵr Cymru, and the Authority, would not have considered at an early stage of this case what accounting information was available that could be used to justify the average accounting cost figure of 16p/m³, even making various assumptions and estimates, but no such information has been produced. It is in our view significant that the only cost calculation produced by the respondent Authority, namely its "stand-alone" calculation of 25p/m³, comes within the "ball park" of the First Access Price of 23.2p/m³ only by assuming a rate of return some 15 times the rate that Dŵr Cymru normally earns on its existing assets, and allocating to the Ashgrove system the entire overheads of a self-standing water company. That in itself, in our view, is strong evidence that the First Access Price was excessive. Dŵr Cymru's higher figure of 32.4p/m³ is based on assuming an even higher rate of return, and inflating the MEA value of the pipeline at a time when, in our view, it must have known, or at least ought to have known, that the cost of mains laying was declining sharply.

635. This unfortunate history thus leaves the Tribunal, on the evidence, with a large unexplained gap between Albion's figure of 2p/m³ for distribution costs, which is supported by calculations on an average accounting cost basis, and the figure used in the Decision of 16p/m³, the components of which are not supported, even indicatively, by any calculations at all, either in the Decision or otherwise. We do not think that Dr Bryan could have been expected to do more, since all the information is or should be in the hands of Dŵr Cymru and the Authority.

636. In all those circumstances, and for the reasons given above, in our judgment the matter of the "distribution" cost of non-potable water on an average accounting cost basis was not sufficiently

> investigated. It follows, in our view, that on this aspect the Decision is incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on, and the investigation undertaken, as regards the conclusion set out in paragraph 302.
>
> 637. On the basis of Albion's estimate of distribution costs of around 2p/m³ and the range of some 1.6p/m³ to 3.2p/m³ for treatment costs, on Albion's figures the First Access Price should have been in round figures no more than 4p/m³ to 5p/m³ . Even doubling Albion's figures to take account of elements possibly understated or omitted would produce a price broadly in the range of 8p/m³ to 10p/m³, less than half the First Access Price of 23p/m³. The evidence taken as a whole strongly suggests to the Tribunal that the First Access Price was excessive, in relation to the economic value of the services to be supplied, applying the *United Brands* test, by reason of the absence of any convincing justification for the "distribution" costs included in the average accounting cost calculation."

39. The Tribunal's conclusion at paragraph 637 of the judgment of 6 October was thus based on a mass of detailed evidence. The failure of Dŵr Cymru to produce any accounting information was only one aspect of the extensive evidence reviewed by the Tribunal.

40. Similarly the Tribunal's conclusion at paragraphs 245 of the judgment of 18 December 2006 stated:

> "245. It is implicit in the main judgment that the evidence at present before the Tribunal, summarised above, shows, on the balance of probabilities, that the First Access Price bore no reasonable relation to the cost of the service to be provided, when judged by reference to the difference between the costs actually incurred by Dŵr Cymru and the price charged."

41. That conclusion refers back to the passages cited above. Again, the Tribunal relied on all the evidence, as shown by the further summary contained in paragraph 237 of the judgment of 18 December 2006:

"237. Moreover, on the basis of costs, the evidence before the Tribunal does not come anywhere near sustaining a First Access charge of even 19.2p/m³, leaving aside the issue of treatment costs. The figure of 19.2p/m³ is substantially based on the figure of 16p/m³ for "distribution" costs. However, for the reasons set out in section XI of the main judgment, the figure of 16p/m³ for distribution costs also cannot be sustained. The Tribunal's principal conclusions in the main judgment were: (i) the only justification put forward for the figure of 16p/m³, namely that non-potable distribution costs were the same as potable distribution costs, could not be sustained because account had to be taken of significant cost differences between potable and non-potable distribution costs respectively (paragraph 538); (ii) consideration of Dŵr Cymru's Large Industrial Tariff (LIT) justification in December 1998 suggested significant uncertainties as to the allocation to non-potable customers of about 50 per cent of the costs apparently included in the figure of 16p/m³, with further issues arising as regards a further 36 per cent of those costs (paragraph 546); (iii) the comparison between average "raw water" transportation costs and the claimed distribution costs of non-potable water showed that the latter was some 4 to 8 times higher than the former, a differential that was not explained on cost grounds in the context of Dŵr Cymru's average accounting systems. That added weight to Albion's contention that the figure of 16p/m³ was excessive, albeit that there was not a direct "read across" from Albion's raw water comparator to non-potable distribution costs (paragraphs 561 to 563); (iv) Dŵr Cymru was unable or unwilling to provide any historical information as to distribution costs attributable to the Ashgrove system or non-potable systems generally, despite requests from the Tribunal (paragraph 578); and (v) the calculations produced by the Authority and Dŵr Cymru showed that access prices in the region of the First Access Price could be supported only by assuming rates of return around 15 times Dŵr Cymru's normal rate of return, even assuming the capital values to be correct (paragraph 584). On the latter point, the Tribunal found at paragraph 603:

> 'For the reasons given above, the evidence before the Tribunal regarding actual costs incurred or attributable, strongly supports Albion's contention that a calculation of the actual costs attributable to the Ashgrove system would show that both the distribution cost of 16p/m³, and the total cost of 19.2p/m³, found in the Decision on an average accounting basis, were not related to "the costs actually incurred" by Dŵr Cymru and accordingly were excessive.'"

42. It follows from the foregoing that the Tribunal's findings at paragraph 637 of the judgment of 6 October and paragraph 245 of the judgment of 18 December were made in the light of the extensive and detailed evidence before the Tribunal and reflected "no reversal of the burden of proof" or "unjustified presumption of guilt". In all those circumstances we consider alleged error A1 to be unfounded. This ground is, in our view, essentially an attempt to challenge the Tribunal's conclusions on the facts under the guise of a point of law.

Error A.2: The Tribunal misapplied the test for excessive pricing in Case 27/76 United Brands v. Commission [1978] ECR 207 by advancing the proposition, without any authority in support that 'top down' averaged pricing is only legitimate where it can be cross-checked against, and comes to a similar result to, an individual 'bottom-up' assessment; in so doing it failed to have regard to the fact that a dominant undertaking can only be expected to disaggregate its prices to reflect more closely individual costs of supply where it is practicable and reasonable for it to do so.

43. First, Dŵr Cymru mischaracterises the Tribunal's approach at paragraph 470 of the judgment of 6 October 2006. The Tribunal did not find that "top down averaged pricing is only legitimate where it can be cross-checked against, and comes to a similar result to, an individual bottom-up assessment". On the contrary, the Tribunal found that a "top-down approach" is not objectionable as such, merely that such an approach needs to be subject to appropriate verification, and that a bottom-up approach is one way of providing that verification. That is apparent from the terms of paragraph 470 itself:

> "In our view, there is nothing intrinsically inappropriate in a "top-down" approach to establishing average accounting costs, assuming reliable information and proper accounting procedures. But any such "top-

> down" approach needs to be subject to appropriate verification. That, in our view, is especially so where, as here, the calculation involves a very long chain of allocations which starts with Dŵr Cymru's average revenue per customer raised from over 1.4 million almost entirely potable customers, and then seeks to derive, from that average revenue figure, the cost of serving about 10 or 12 large industrial non-potable customers, which cost is then used as a proxy for the cost of serving only one non-potable customer, here Shotton Paper. In our view, in a Chapter II context, such an approach is acceptable, if at all, only if the allocations in question can be properly verified. The obvious cross-check in such a context is a "bottom-up" calculation which starts with the activity in question and then identifies the costs properly attributable to that activity. As the Tribunal again said in the interim judgment at paragraph 311, a "top-down" and a "bottom-up" calculation properly done should meet in the middle provided that there is a sufficient link between the product or services in each calculation. However, in this case such "bottom-up" information as there is before the Tribunal, does not verify the "top-down" calculation to be found in the Decision."

44. Secondly, we do not think that this ground gives rise to an arguable point of law. It is self-evident that accounting cost information needs to be established and verifiable. *United Brands*, at paragraph 252, requires the "actual costs of supply" to be ascertained, but there is no rule of law as to how that is to be done: it is a matter of fact, appreciation, and accounting technique. As the immediately preceding paragraphs 464 to 469 of the judgment of 6 October make clear, verification of the 16p/m^3 figure was very difficult, because the Authority and Dŵr Cymru provided no breakdown of that figure, there was no historical accounting information to support it, and no attempt was made to estimate the cost of the service that Albion was requesting from Dŵr Cymru. The figure of 16p/m^3 was based on a very long chain of allocations, beginning with revenues, not costs. Indeed, that figure was essentially no more than a balancing figure, representing what was left after deducting from Dŵr Cymru's overall revenue the estimated costs of water resources, treatment and local distribution: paragraph 465 of the judgment of 6 October 2006. It was in those circumstances that the Tribunal sought to obtain a better understanding of the actual costs of the Ashgrove system, as a cross-check. We do not see that such

an approach raises any point of law. It is rather a question of ascertaining the facts. Contrary to the suggestions at paragraphs 22 to 25 of the request for permission to appeal, the Tribunal has not said that a "top-down" approach is improper, or that "bottom-up" is the required method; only that there must be some appropriate verification of the costs relied on. We do not accept Dŵr Cymru's apparent view that it is impossible to verify the costs figures on which it relies, nor that any dis-aggregation of costs (for example, retail costs) is wholly impracticable. We note again that Dŵr Cymru has not challenged the Tribunal's conclusion that, on the evidence, the Director's reasoning in support of the figure of 16p/m^3 cannot stand. In all those circumstances, in our view, no point of law arises. In any event, this whole issue is now being reinvestigated by the Authority.

Error A.3: the Tribunal erred in the principles to be applied in calculating the stand-alone cost of supply

45. This ground begins with a false premise: "Assuming (contrary to the above) that it is illegitimate to price only by reference to top-down average costs, it is necessary to examine how one is to assess cost on a bottom-up basis…" (request, paragraph 26). The false premise is that the Tribunal has not found that it is "illegitimate to price only by reference to top-down average costs": what the Tribunal has found, as paragraph 470 of the judgment of 6 October, is that if a "top-down" approach is used, the costs in question should be capable of being verified, which was not the case here. Similarly, if the approach used is such that the components of costs cannot be identified or verified, then as regards the discrete non-potable systems here in question there is a risk of price discrimination: paragraphs 624 to 625 of the judgment of 6 October. On the other hand, the Tribunal also accepted, at paragraph 605, that it would still be necessary to use company-wide average figures to a large extent.

46. However, the essential point in the context of Dŵr Cymru's request A.3 is that no issues of law arise, as alleged at paragraph 27 of the request, but issues of fact and judgment, on economic and accounting issues.

Error A.3(i): The Tribunal's approach as a matter of principle to assessing capital value was wrong in law

47. This ground of appeal is irrelevant. At paragraphs 587 to 597 of the judgment of 6 October, the Tribunal accepted, for argument's sake, the capital values calculated by Dŵr Cymru and the Authority on an MEA basis. Since, for the purposes of the judgment, the Tribunal was content to accept those capital values, no issue arises.

48. In any event, no point of law arises here. There are no rules of law governing how to assess capital values, and the work of the economics consultancy Oxera, published by the OFT in July 2003 as OFT 657, does not give rise to any point of law[11].

Error A.3(ii): The Tribunal's approach as a matter of principle to assessing rate of return was wrong in law

49. The short answer to this ground, which relates to paragraphs 580 to 598 of the judgment of 6 October 2006, is that it is a matter of fact and judgment, not a matter of law.

50. The main point addressed in those paragraphs of the judgment arises as follows. The calculations produced by Dŵr Cymru, which were not at all the approach the Tribunal had envisaged, showed that the First Access Price could be justified by assuming a rate of return on the MEA capital value in question of 17.5 per cent. The average return on MEA values for the water industry is around one per cent. That, in the Tribunal's view, supported the conclusion that the First Access Price was excessive. It was further apparent that the rate of return of 17.5 per cent was Dŵr Cymru's estimate of what would be required by a hypothetical private investor to build an entirely new Ashgrove system from scratch, with all the risks and difficulties that would involve. That did not seem to the Tribunal to be an appropriate basis for charging for the use of a 50 year-old pipeline that was already in the ground, nor was it a basis of charging used in the water industry. It was accepted, expressly, by Dŵr Cymru, that such an

[11] We deal with paragraph 581 of the judgment of 6 October under ground A.3(ii).

approach could not be a basis for charging: see generally paragraphs 580 to 585, and 590 of the judgment of 6 October. In all those circumstances the Tribunal reached the view that Dŵr Cymru's calculations in fact supported Albion's case, rather than Dŵr Cymru's case.

51. We see nothing in paragraphs 36 to 38 of the request to suggest that the Tribunal's approach was outside the bounds of reasonable judgment, or that any point of law arises.

52. Finally, it appears from paragraph 38 of the request that Dŵr Cymru has simply misunderstood the Tribunal's judgment. The Tribunal has not found that "it is unlawful to price on an averaged basis" as Dŵr Cymru there suggests, and we see nothing in paragraphs 15 to 21 of the request, to which Dŵr Cymru refers, to substantiate that suggestion. What the Tribunal has found is that, if prices are arrived at on an average accounting cost basis, it should nonetheless be possible to verify the costs in question or at least identify the components of costs, at least on an estimated basis. In this case no attempt was made to identify what elements of cost were meant to be recovered out of the revenue of over £1 million per year claimed to be attributable to "distribution costs". That was one important factor, among others, which was relevant to the Tribunal's conclusions regarding the First Access Price.

Error A.4: The Tribunal erred in its appreciation of the evidence before it

53. This ground appears to consist of a miscellaneous collection of evidentiary matters, which in our view do not amount to any point of law.

Error A.4(i): Errors in the approach to Dŵr Cymru's proposed revisions to its original pricing calculations

54. This appears to be the only point raised by Dŵr Cymru about treatment costs. However, there is no appeal against paragraph 981(1) of the judgment of 6 October 2006 where the Tribunal held treatment costs to be in the range 1.6p/m^3 to 3.2 p/m^3.

55. The Tribunal was, and remains, sceptical of the suggestion, never developed in any detail, that a calculation of treatment costs which Dŵr Cymru had itself submitted to the Director and which, as the Tribunal understood it, had formed the basis of Dŵr Cymru's New Tariff, approved by the Director, was itself erroneous. However, this is not a matter of law. Treatment costs will, in any event, be considered by the Authority in its reinvestigation: judgment of 18 December 2006, paragraph 248.

56. As to Dŵr Cymru's continued reference to the Tribunal's "unjustified presumption of guilt" (request, paragraph 40.3), the Tribunal refers to the detailed evidence, analysed over 57 pages at paragraphs 448 to 637 of the judgment of 6 October, which formed the basis of the Tribunal's conclusions.

Error A.4(ii): Errors in assessment of the evidence of Mr. Jones on rates of return

57. No point of law arises. The Tribunal was entitled to rely on Mr. Jones' evidence at paragraph 581 of the judgment of 6 October, and the figures at paragraphs 587 to 596 of the judgment speak for themselves.

58. On the question of risk, the point is that Dŵr Cymru sought to justify the First Access Price on the basis of what it would cost, hypothetically, to build an entirely new Ashgrove system duplicating the existing one, alleging that such a project would require a "risk" rate of return of 17½ per cent. The Tribunal accepted that such a project would undoubtedly be "high risk", and might well require a prospective return of that order before anyone would undertake it. What the Tribunal did not, however, accept was the proposition that any such approach could be used as a basis for calculating the common carriage charge for use of the existing pipeline. To seek to do so would be illogical, contrary to the policy of promoting common carriage, and discriminatory, as set out in paragraphs 580 to 582 of the judgment of 6 October. Dŵr Cymru accepted that its calculations could not be used for charging purposes: paragraph 585. In those circumstances the Tribunal used, for illustrative purposes, the rate of return on MEA values of one per cent (rather than 17½ per cent) that Dŵr

Cymru had itself used when calculating its Large Industrial Tariff in 1999 which, in turn, formed the underlying basis for the reasoning on distribution costs in the Decision: paragraph 588 of the judgment of 6 October. The resulting calculations, set out at paragraphs 587 to 596 of the judgment, support the view that the First Access Price was excessive. None of these matters appear to us to give rise to a point of law or fall outside the bounds of reasonable judgment.

Error A.4(iii): The Tribunal wrongly rejected Dŵr Cymru's argument that Albion's comparison between the costs of distributing non-potable water and raw water transfer failed to take account of the relative volumes concerned.

59. This is entirely a point of fact and judgment, not a point of law. The background, briefly, is that Albion submitted, among other things, that the appropriate comparator for arriving at the "distribution" costs of non-potable water was not potable water distribution costs, as the Director had contended, but the average cost of transferring raw (i.e. untreated) water from source to treatment works (about 2p/m^3). This argument is addressed by the Tribunal at paragraphs 547 to 563 of the judgment of 6 October. The central point, however, is that it emerged in the evidence that most of the "non-potable" systems here in question do no more than convey raw water from the source to the customer. There is no relevant physical difference between "raw water transport" and "non-potable distribution". The Tribunal found Dŵr Cymru's attempt to draw a distinction between a "raw water aqueduct" (which typically transfers raw water from source to treatment works) and a "non-potable main" (which typically transfers raw water from source to customer) to be artificial and confusing, since physically the pipes perform the same function[12]: paragraphs 551 to 556 of the judgment of 6 October.

60. Dŵr Cymru's argument underlying alleged error A.4(iii) depends on drawing a distinction between "raw water transfer" and "non-potable distribution", but the Tribunal was not prepared to accept that there is a significant difference between the two: paragraphs 551 to 556 of the judgment of 6 October, including the

[12] In the two cases (one of which is Ashgrove) where some treatment is applied, this makes no difference to costs of distribution: paragraph 554 of the judgment of 6 October.

cross-examination of Mr. Jones at paragraph 552. The specific point about volume, as made in paragraph 17 of Dŵr Cymru's skeleton argument of 19 May 2006, was answered by the Tribunal at paragraph 559. A further and increasingly detailed exchange of correspondence and argumentation then took place between Albion and Dŵr Cymru (Annex 2 to the request for permission), all of which involved the purported distinction (which the Tribunal does not accept) between the function of raw water transfer and that of non-potable distribution, as well as an examination of various sub-sets of "non-potable mains" and "raw water aqueducts" of different lengths and sizes, often on the basis of changing information (see e.g. paragraphs 476 and 549 of the judgment of 6 October) or confusion about nomenclature (paragraph 555). For the reasons given in paragraph 560 of the judgment of 6 October, the Tribunal was not prepared to go down that road, but decided to stick to the basic point that, on a regional average basis, "non-potable distribution costs" were estimated at 16p/m^3 in the Decision, whereas "raw water transfer costs", estimated on the same basis, were accepted by the Authority and Dŵr Cymru to be in the range 2p/m^3 to 4p/m^3. Subject to the important qualification at paragraph 562 of the judgment, the Tribunal considered that, overall, the raw water comparison supported Albion's case. However, all this, is, in our view, a matter of fact and appreciation, not law.

Error A.4(iv): The Tribunal erred in concluding that Dŵr Cymru made a "tactical" decision to decline to supply accounting information in support of the claimed "distribution" costs of 16p/m^3.

61. This has already been dealt with under A.1 above.

Error A.5: The Tribunal missappreciated its role as an appellate body and went beyond the scope of its proper jurisdiction and/or wrongly exercised its discretion in reserving to itself the final decision on the issue of excessive pricing.

62. Dŵr Cymru's first argument is that, if the Tribunal was dissatisfied with the Decision after the hearing in 2005, the Tribunal should simply have quashed the Decision at that point, rather than seeking further evidence (request, paragraphs 47 to 51). However, the Tribunal's jurisdiction under the 1998 Act is not

judicial review but on the merits under paragraph 3 of Schedule 8 of that Act. The Tribunal's reasons for seeking further evidence are spelled out in detail in the Tribunal's interim judgment of 22 December 2005 [2005] CAT 40 at paragraphs 291 to 303 (distribution costs), 336 (costs attributable to Ashgrove), 384 (ECPR), and 395 to 419 (margin squeeze). As appears from those passages, the Tribunal did not feel it had yet heard sufficient evidence or argument to be in a position to decide the merits of the case in a manner that was fair to all parties. There was no appeal from the judgment of 22 December 2005, and Dŵr Cymru did not object to the course that the Tribunal proposed to follow. It is too late now to put in issue the decision the Tribunal took in that, interim, judgment.

63. At paragraph 52 of the request, Dŵr Cymru criticises the Tribunal's decision to refer the matter of excessive pricing back to the Authority under Rule 19(2)(j) of the Tribunal's Rules, with a view to deciding the issue itself. As set out in paragraph 241 of the judgment of 18 December, Rules 19(1) and 19(2)(j) of the Tribunal's Rules provide:

> "(1) The Tribunal may at any time, on the request of any party or its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The Tribunal may give directions –
>
> …
>
> (j) to enable a disputed decision to be referred back in whole or part to the person by whom it was taken;…"

64. Rule 19(2)(j) derives from paragraph 17(4) of Schedule 4 of the Enterprise Act 2002, which provides:

> "(4) Tribunal rules may make provision enabling the Tribunal to refer any matter arising in any proceedings (other than proceedings under section 47A or 47B of the 1998 Act) back to the authority that made the decision to which the proceedings relate, if it appears that the matter has not been adequately investigated."

65. Dŵr Cymru does not contest the Tribunal's reasons for using its powers under Rule 19(2(j) set out at paragraphs 243 to 274 of the judgment of 18 December. Nor does Dŵr Cymru draw attention to paragraphs 275 to 278 of the judgment of 18 December, where the Tribunal spelled out why the use of Rule 19(2)(j) was appropriate.

66. Under paragraph 3(1) of Schedule 8 to the 1998 Act, the Tribunal has a merits jurisdiction. Under paragraph 3(2) of that Schedule the Tribunal has power not only to remit, in an appropriate case, but to "make any other decision which [the Authority] could itself have made" (sub-paragraph (e)). The options available to the Tribunal were considered by the Court of Appeal in *OFCOM and OFT v. Floe Telecom Limited* [2006] EWCA Civ 768 ("*Floe*"). Lloyd LJ said:

> "If the appellant challenges a decision by a regulator, and establishes, on grounds taken in the notice of appeal, that the decision was wrong, whether as a matter of procedure or because of some misdirection of law or because the CAT takes a different view of the facts on the evidence before it, the Tribunal has a choice of a number of courses open to it. It may set aside the decision and remit the case to the regulator. It may feel able to decide itself what the correct result should have been, so that no remission or reference back is necessary. It may wish to retain for itself the task of deciding the eventual outcome but require further findings from the regulator, in which case it will not remit but may refer all or part of the decision back under rule 19(2)(j), with a view to deciding the appeal with the benefit of the result of that referral."

67. Citing *Floe*, the Tribunal said at paragraphs 276 to 278 of the judgment of 18 December:

> "276. It appears from that judgment that, if the Tribunal sets aside the decision under appeal and remits the whole matter to the regulator under paragraph 3(2), first sentence, of Schedule 8, the appeal may no longer be subsisting, and the Tribunal may have no power to give consequential directions: see paragraph 28 of *Floe*. It is true that Lloyd LJ said at paragraph 28 that there may be cases, on unusual facts, where the setting aside of the decision and remittal of the matter to the regulator would not dispose of the appeal entirely.

> Similarly Sedley LJ accepted at paragraph 55 that the Tribunal could attach appropriate conditions to an order for remission requiring the OFT to act in a particular way, which order could, if necessary, be enforced through the High Court. However, the extent of these possibilities remains to be explored in future cases.
>
> 277. In the present case, the Tribunal takes the view that it is very close to being in a position to decide the issue of excessive price abuse, and that it would be appropriate for the Tribunal to do so. This case, in our view, falls squarely within the situation envisaged by Lloyd LJ in the last sentence of paragraph 25 of *Floe*:
>
> "It may wish to retain for itself the task of deciding the eventual outcome but require further findings from the regulator, in which case it will not remit but may refer all or part of the decision back under rule 19(2)(j), with a view to deciding the appeal with the benefit of the result of that referral."
>
> 278. We note again that *Floe* itself was a case in which the regulator had reached a non-infringement decision. Paragraph 29 of *Floe* also confirms that in such a context the Tribunal may set a time within which the matter is to be dealt with. In those circumstances we consider that Rule 19(2)(j) is the most appropriate mechanism to adopt."

68. Dŵr Cymru's suggestion, at paragraph 52 of the request, is that such an approach deprives Dŵr Cymru of a statement of objections under the OFT Rules and a subsequent appeal on fact to the Tribunal. That suggestion is elaborated under Ground E, and we deal with it further there. In the present context, it suffices to point out, as the Tribunal did at paragraph 281 of the judgment of 18 December, that, in investigating the matters in question, the Authority is to give Dŵr Cymru and Albion a full opportunity to comment on the Authority's preliminary views before reaching any conclusions. Dŵr Cymru's "right to be heard" is thus fully protected at the administrative stage of this further investigation. Assuming the matter is not resolved, Dŵr Cymru (and Albion) will have a full opportunity thereafter to place all the facts they wish before the

Tribunal. We see that procedure as being entirely fair, and no point arises as to jurisdiction.

Error A.6: The Tribunal illegitimately found in the Further Judgment that the First Access Price bore no reasonable relation to the cost of the service to be provided

69. Dŵr Cymru complains of what it says is a difference of nuance between paragraph 637 of the judgment of 6 October, which stated:

> "On the basis of Albion's estimate of distribution costs of around 2p/m³ and the range of some 1.6p/m³ to 3.2p/m³ for treatment costs, on Albion's figures the First Access Price should have been in round figures no more than 4p/m³ to 5p/m³ . Even doubling Albion's figures to take account of elements possibly understated or omitted would produce a price broadly in the range of 8p/m³ to 10p/m³, less than half the First Access Price of 23p/m³. The evidence taken as a whole strongly suggests to the Tribunal that the First Access Price was excessive, in relation to the economic value of the services to be supplied, applying the *United Brands* test, by reason of the absence of any convincing justification for the "distribution" costs included in the average accounting cost calculation"

and paragraphs 244 and 245 of the judgment of 18 December 2006, which stated:

> "244. In the main judgment, the Tribunal found at paragraph 637 and elsewhere that the evidence taken as a whole "strongly suggests" that the First Access Price was excessive. That finding was deliberately expressed in cautious terms, to give the parties every opportunity to make submissions on what findings and orders the Tribunal should proceed to make, if any, on the issue of abuse, in the light of the main judgment, as well as on the Tribunal's jurisdiction in that regard. The parties have now had that opportunity. Albion and Dŵr Cymru have also been offered the possibility of mediation to resolve their differences.
>
> 245. It is implicit in the main judgment that the evidence at present before the Tribunal, summarised above, shows, on the balance of

> probabilities, that the First Access Price bore no reasonable relation to the cost of the service to be provided, when judged by reference to the difference between the costs actually incurred by Dŵr Cymru and the price charged."

70. At paragraph 982 of the judgment of 6 October, the Tribunal invited submissions as to what consequential action, regarding orders and remedies, it should then take, in the light of the Tribunal's powers under paragraph 3(2) of Schedule 8 of the 1998 Act. Albion submitted that the Tribunal should declare that Dŵr Cymru had infringed the Chapter II prohibition. On the excessive pricing issue, both the Authority and Dŵr Cymru submitted that further matters needed to be investigated before there could be any finding of abuse. Dŵr Cymru submitted, in particular, that the question whether the First Access Price was "unfair" had not yet been considered by the Authority.

71. In its judgment of 18 December 2006, the Tribunal effectively accepted Dŵr Cymru's procedural submissions and referred the issue of excessive pricing back to the Authority under Rule 19(2)(j) of the Tribunal's Rules, for the reasons given at paragraphs 240 to 252 of that judgment.

72. Paragraph 245 of that judgment, to which Dŵr Cymru takes objection, merely states what is, in our view, implicit in the Tribunal's judgment of 6 October 2006, read as a whole, namely that the evidence presently before the Tribunal shows, on the balance of probabilities, that the First Access Price bore no reasonable relation to the cost of the service to be provided, when judged by reference to the difference between the costs actually incurred by Dŵr Cymru and the price charged. Similarly paragraph 246 states our view that there would be strong grounds for the Tribunal to make a finding of abuse in this respect as regards the First Access Price.

73. However, the Tribunal has made no finding of abuse on this aspect of the case, as expressly accepted by Dŵr Cymru at 66.2 of the request. Paragraphs 247 to 252 of the judgment of 18 December indicate various matters which require to be further investigated. That investigation is now in progress and Dŵr Cymru (and Albion) are to have a full opportunity to comment on the Authority's

preliminary views before the Authority reaches any conclusions: paragraph 281. There is no reason why Dŵr Cymru should not put to the Authority or, in due course, the Tribunal, such further evidence or submissions that it wishes.

74. In those circumstances we do not accept that, in the judgment of 18 December, the Tribunal "altered its conclusion", or "altered the substantive findings", that it had already made in the judgment of 6 October, nor has Dŵr Cymru suffered any prejudice.

B. MARGIN SQUEEZE ISSUES

Error B.1: The Tribunal misapplied and misunderstood the Community case law on margin squeeze

Error B.1(i): The relationship between excessive pricing and margin squeeze

Error B.1(ii): The correct test for margin squeeze

Error B.1(iii): The Tribunal's further errors in the Main Judgment in justifying its approach

Error B.1(iv) The Tribunal's further errors in the Further Judgment

75. It seems to us that, at pages 38 to 51 of its request, Dŵr Cymru advances five main arguments in relation to the Tribunal's findings on margin squeeze at paragraphs 871 to 919 of the judgement of 6 October 2006 and paragraphs 282 to 313 of the judgment of 18 December 2006. Those arguments are, apparently:

(1) That in order to establish a margin squeeze, Community law requires it to be shown that the dominant supplier in the upstream market no longer incurs the cost of the downstream activity when supplying third parties with the upstream inputs – i.e. it must be shown that the supplier has failed to reflect his "avoided costs" in the price he charges for the upstream inputs needed by his competitors on the downstream market (request, paragraphs 68.1, 70.1, 72.1, 72.2, 73.2).

(2) Any other approach would mean that the dominant undertaking would be required to subsidise new entry (request, paragraph 68.2, 72.3, 72.4).

(3) On the facts of this case, Dŵr Cymru avoids no costs in supplying Albion with common carriage rather than a bulk supply of water, other than the water resource cost (request, 70.1, 72.6 (b)) and has no meaningful separate "downstream" activity (request, 73.1).

(4) None of the countervailing considerations put forward by the Tribunal, in particular Albion's activities as a statutory inset appointee, supplier of water efficiency services or broker, alters the analysis (request, 70.1, 72.2, 72.6). Nor is the matter affected by any possible difficulty in identifying avoided (or avoidable) costs (request, 72.2, 73.3).

(5) The Tribunal has misapplied the decision of the Court of First Instance in Case T-5/97 *Industries des poudres sphériques* [2000] ECR-II 3755.

76. We accept that some of the above points could be characterised as points of law, but we do not accept that any of those points have a real prospect of success.

77. A margin squeeze (also referred to as a price squeeze) occurs, notably, when a dominant undertaking supplies an upstream input to its competitors on a downstream market at a price which does not enable those competitors to compete against the dominant undertaking on the downstream market. In this case the "upstream input" which Dŵr Cymru offered to supply to Albion at the First Access Price of 23.2p/m^3 was common carriage through the Ashgrove system. The "downstream market" is the retail supply of non-potable water, in this case to Shotton Paper. At the time Dŵr Cymru's offered retail price was some 26p/m^3.

78. There is no doubt that, as a matter of fact, the difference between the input price offered by Dŵr Cymru (i.e. the First Access Price of 23.2p/m^3) and Dŵr Cymru's offered retail price of some 26p/m^3 was too small to enable Albion to compete effectively against Dŵr Cymru in the downstream retail market, bearing in mind that Albion also has to acquire the water from United Utilities at a price of at least 3 p/m^3, and probably more. Dŵr Cymru has not challenged the Tribunal's finding, at paragraphs 772 to 774 and 871 of the judgment of 6 October, and paragraphs 285 to 289 of the judgment of 18 December 2006, that

Albion was left with a zero margin and thus unable to compete unless Shotton Paper was prepared to pay Albion more than Dŵr Cymru's retail price.

79. The First Access Price would thus have the clear anti-competitive effect of protecting Dŵr Cymru from competition, through common carriage, in the downstream retail market and depriving Shotton Paper of the choice of a possible alternative supplier. As the Tribunal stated at paragraph 772 of the judgment of 6 October:

> "However, it has not been seriously disputed by the Authority and Dŵr Cymru that, if the Decision is correct, Albion's common carriage proposal is dead. Albion is expected under the Director's ECPR calculation to supply Shotton at a margin of 0 per cent. Whatever the debate about the size of the margin needed by Albion, it is not seriously suggested that it could survive on a zero margin, and it has only done so, so far, because of the support of Shotton Paper and the interim relief ordered by the Tribunal."

80. The Tribunal found, at paragraph 919 of the judgment of 6 October, that the Director's conclusion that Dŵr Cymru had not infringed the Chapter II prohibition by engaging in a margin squeeze was erroneous in law and incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on, and the investigation undertaken. At paragraphs 312 and 313 of the judgment of 18 December 2006, the Tribunal formally held that Dŵr Cymru had abused a dominant position by imposing the margin squeeze in question.

81. In reaching those conclusions the Tribunal applied an entirely orthodox approach to margin squeeze, following the guidance of both the OFT and the European Commission. Thus OFT 414a, cited in the judgment of 6 October at paragraph 864, states:

> "6.1 A margin squeeze may occur in an industry where a vertically integrated undertaking is dominant in the supply of an important input for a downstream market in which it also operates. The vertically integrated undertaking could then harm competition by setting such a low margin between its input price (e.g. wholesale price) and the price

it sets in the downstream market (e.g. retail price) that an efficient downstream competitor is forced to exit the market or is unable to compete effectively.

6.2 To test for margin squeeze, it is usual to determine whether an efficient downstream competitor would earn (at least) a normal profit when paying input prices set by the vertically integrated undertaking.

6.3 In practice, in order to determine whether an efficient downstream competitor would make a normal profit, the test is typically applied to the downstream arm of the vertically integrated undertaking. Therefore, the test asks whether, given its revenues at the time of the alleged margin squeeze, the integrated undertaking's downstream business would make (at least) a normal profit if it paid the same input price that it charged its competitors.

6.4 A test for margin squeeze might require assessing the accounts of a 'notional business' as in practice the integrated undertaking's downstream business may not have separate accounts from its upstream business and would not usually treat its input prices as a cost in the same way that an independent downstream competitor would. Therefore, the details of how costs and revenues are allocated and/or calculated will depend on the circumstances of each case. For example, a margin squeeze investigation may raise issues such as the measurement and allocation of costs and revenues (both between products and between upstream and downstream operations), the appropriate rate of return, and the appropriate time period over which to measure profitability.

6.5 If there is evidence that a vertically integrated dominant undertaking has applied a margin squeeze and that it harmed (or was likely to harm) competition, this is likely to constitute an abuse of that dominant position."

82. Similarly the European Commission in its *Telecommunications Notice*, cited in the judgment of 6 October at paragraph 845 states:

"117. Where the operator is dominant in the product or services market, a price squeeze could constitute an abuse. A price squeeze could be demonstrated by showing that the dominant company's own

> downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company. A loss making downstream arm could be hidden if the dominant operator has allocated costs to its access operations which should properly be allocated to the downstream operations, or has otherwise improperly determined the transfer prices within the organisation…
>
> 118. In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)."

83. The request for permission to appeal does not set out either OFT 414a, or the *Telecommunications Notice*, or make any attempt to distinguish that Guidance, which was followed by the Tribunal.

84. Dŵr Cymru's central suggestion is that in the Commission's decision in *Deutsche Telekom* OJ 2003 L263/0, cited in the judgment of 6 October at paragraphs 866 to 869, Deutsche Telekom ceased to incur certain costs in the downstream market, but had not made allowance for that fact when setting its upstream prices. That, it is apparently suggested is, at least implicitly, the underlying basis or rationale for the Commission's decision on margin squeeze in *Deutsche Telekom*, as well as its decision in the case of *Napier Brown/British Sugar* OJ 1988 L284/41 and the Tribunal's decision in *Genzyme v. OFT* [2004] CAT 4.

85. Dŵr Cymru does not cite any passage in *Deutsche Telekom* in support of its argument, and in particular no passage to support its proposition that the reasoning in that case is essentially based explicitly or implicitly on the concept of "avoided costs," contrary to the guidance given by Buxton LJ in *Napp*, cited

above. The Tribunal can detect no such passage. Nor does Dŵr Cymru cite the text of *Deutsche Telekom*, referred to by the Tribunal at paragraphs 866 to 869 of the judgment of 6 October, which is entirely in line with OFT 414a and the *Telecommunications Notice*:

> "106. The Commission's practice in previous decisions has been to hold that there is an abuse of a dominant position where the wholesale prices that an integrated dominant undertaking charges for services provided to its competitors on an upstream market and the prices it itself charges end-users on a downstream market are in a proportion such that competition on the wholesale or retail market is restricted.
>
> 107. In the case of the local network access at issue here, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.
>
> 108. In such a situation, anticompetitive pressure is exerted on competitors' trading margins, which are non-existent or too narrow to enable them to compete with the established operator on retail access markets. An insufficient spread between a vertically integrated dominant operator's wholesale and retail charges constitutes anticompetitive conduct especially where other providers are excluded from competition on the downstream market even if they are at least as efficient as the established operator."

86. Nor can the Tribunal detect any trace of an "avoided costs" principle in the reasoning in either *Napier Brown/British Sugar*, or in the Tribunal's own decision in *Genzyme*. Dŵr Cymru cites no passages from those, or any other European or domestic decision, to support the point it makes. The Tribunal thus entirely rejects Dŵr Cymru's suggestion, at paragraph 72.1 of the request, that "Community law and practice" proceeds on the basis of "avoided costs". The Tribunal has already rejected Dŵr Cymru's argument on this point at paragraph

910 of the judgment of 6 October, and paragraph 305 of the judgment of 18 December 2006.

87. Dŵr Cymru does not contest the Tribunal's findings, at paragraphs 898 to 901 of the judgment of 6 October, and paragraphs 292 to 293 of the judgment of 18 December, that the accepted tests for a margin squeeze are either (a) that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company; or (b) that the margin between the price charged to competitors in the downstream market for the input product and the price which the dominant firm charges in the downstream market is insufficient to allow a reasonably efficient downstream operation to earn a normal profit. Nor does Dŵr Cymru contest that both those tests are met in this case.

88. We add, for completeness, that Dŵr Cymru's "avoided costs" approach to margin squeeze is, to all intents and purposes, the same as the ECPR approach followed in the Decision: see paragraphs 287 to 289, and 305 of the judgment of 18 December. Dŵr Cymru's argument is that it is entitled to set the First Access Price at 23.2p/m^3, even if that creates a margin squeeze, on the basis that its Bulk Supply Price is 26.2p/m^3. The only cost Dŵr Cymru claims to avoid in providing common carriage rather than bulk supply is the water resource cost of approximately 3p/m^3: paragraph 288 of the judgment of 18 December.

89. That, however, is precisely the ECPR-type approach which the Tribunal rejected in detail at paragraphs 638 to 842 of the judgment of 6 October, which Dŵr Cymru does not challenge. In our view, it is not legitimate for Dŵr Cymru to advance an argument to the effect that competition law either does, or should, incorporate an "avoided costs" approach in the test for margin squeeze without facing up to, and challenging, the formidable objections to any such ECPR-type approach set out by the Tribunal in its analysis of ECPR in the judgment of 6 October.

90. In that analysis the Tribunal held, notably, that an ECPR or "avoided costs" approach tends to preserve monopoly profits, inefficiencies and/or cost misallocations; tends to eliminate competition and prevent entry; requires the new entrant to support the incumbent's overheads as well as his own; gives rise to difficulties in calculating what costs should be treated as "avoidable", and over what time scale; insulates the incumbent's profits from competition; renders the incumbent indifferent as to who wins the customer's business; and fails to create a level playing field between the incumbent and the new entrant (paragraphs 740 to 803 of the judgment of 6 October).

91. To give only one example (there are many others): on the basis of the Decision, the common carriage price should be 19.2p/m^3 on an average accounting cost basis, whereas Dŵr Cymru's "avoided costs" approach would entitle it to maintain a margin squeeze at around 23p/m^3, some 4p/m^3 above what would be justified on the basis of costs. That would give Dŵr Cymru an extra revenue of about £250,000 a year. This one simple example shows that the "avoided costs" approach advanced by Dŵr Cymru tends, among other things, to maintain prices above costs, perpetuate cost misallocations, and insulate an incumbent's profits from competition.

92. We would therefore refuse permission to appeal on this part of the case on the further ground that Dŵr Cymru's "avoided costs" approach would have the detrimental effect on competition set out in paragraphs 740 to 803 of the judgment of 6 October (and referred to in the Tribunal's margin squeeze analysis, notably at paragraphs 875 and 907 to 910), which neither the Authority nor Dŵr Cymru has challenged. Furthermore, to advance an "avoided costs" approach on the margin squeeze issue without properly challenging the Tribunal's conclusions as to the consequences of an avoided costs approach in its analysis of ECPR would, in our view, give the Court of Appeal less than half the picture.

93. As to Dŵr Cymru's allegation that it is "being required to subsidise its competitors", this does not arise on the facts of this case for the detailed reasons set out at paragraphs 307 to 309 of the judgment of 18 December 2006, which are not challenged in the request for permission. In particular the Tribunal stated at paragraph 309:

> "In the present case, Albion does not, in our view, seek a subsidy, but a proper opportunity to compete on an equal footing with Dŵr Cymru's own "retail" activities. Self-evidently, a zero or negative margin prevents that competition. Dŵr Cymru has not shown any objective justification for that margin. It has not shown that its own retail activities could make a normal profit in the downstream market at the margin in question; nor that any other competitor could do so, nor that Albion is inefficient. Dŵr Cymru has made no attempt to identify the costs properly to be allocated to the service of transportation, as distinct from the "distribution" function as a whole, which we understand to include, besides transportation, a range of other costs including notably retail costs, as well as other heads of costs discussed at paragraphs 503 to 546 of the main judgment. Moreover, Dŵr Cymru submitted inconsistent arguments on the issue of avoided costs. In its calculations Dŵr Cymru did not deduct the costs which it said towards the close of the hearing were also to be treated as avoidable, namely the costs of its retail function as a whole (e.g. paragraph 785 of the main judgment). It provided no information capable of substantiating the figure of 16p/m³ for "distribution" costs. The Director found in the Decision that 4p/m³ had been wrongly allocated to treatment costs. In all those circumstances, it is not a question of Dŵr Cymru being called upon to "subsidize" Albion. It is simply that the zero or negative margin which Dŵr Cymru imposed on Albion called for an objective justification, and Dŵr Cymru has failed to provide any such justification."

94. In particular, as already pointed out, the evidence is that the First Access Price of 23.2p/m^3 is 4p/m^3 above Dŵr Cymru's average accounting costs as found in the Decision which, we are told, include a profit element. Thus no "cross-

subsidy" arises, on the facts. On the contrary, the evidence shows, on the facts, a margin squeeze of at least 4p/m^3 [13].

95. A further related aspect is that Dŵr Cymru failed to follow the requirement of the *Telecommunications Notice* at paragraph 117, and of OFT 414a at paragraph 6.4, to consider the costs attributable to a notional retail arm of Dŵr Cymru, notably so as to "charge entrants as it would charge itself" (see MD 163), or to identify the costs attributable to the service which Albion asked Dŵr Cymru to provide. These omissions mean that the parties have never been placed on an equal footing: see paragraphs 900 to 907 of the judgment of 6 October, and paragraphs 294 and 295 of the judgment of 18 December.

96. On this aspect, Dŵr Cymru's contention is that these tests "are meaningless and impossible to perform" because there is "no identifiable and separate downstream activity" (request at 73.1). That, in our view, is not a point of law, but of fact and judgment. The Tribunal is entirely unpersuaded that it is impossible for Dŵr Cymru to get a better idea of its costs, so as to exclude from the common carriage price all costs that are not specifically referable to that activity; nor are we persuaded that it is impossible for Dŵr Cymru to identify the costs of its retail activities, particularly so as to enable third parties to compete with Dŵr Cymru at the retail level on an equal footing. This aspect is, however, a matter of fact and judgment, not law.

97. The remaining points on margin squeeze raised by Dŵr Cymru in relation to the judgment of 6 October are, in our view, equally points of fact and judgment and/or economic appreciation rather than law, for example those relating to the problem of calculating avoidable costs (paragraph 908 and 910), consumer choice and reinforcement of local monopolies (paragraph 911), future efficiency gains (paragraph 913), Albion's position as a statutory undertaker (paragraph 914), the relevance of the Milwr Tunnel supply (paragraph 915), water

[13] The retail margin sought by Albion is 5p/m^3 (judgment of 18 December, at paragraph 209). Thus the fact that Dŵr Cymru's First Access Price was 4p/m^3 above its average accounting costs as found in the Decision is highly material.

efficiency services (paragraphs 876 to 895) and Albion's brokerage role (paragraph 917). The same applies to the additional points made by Dŵr Cymru regarding the Tribunal's findings on "avoided costs" in paragraphs 305 and 306 of the judgment of 18 December[14].

98. Finally, in relation to the *Industries des poudres sphériques (IPS)* case (request, paragraphs 65 to 68), Dŵr Cymru does not address the Tribunal's analysis of this case at paragraphs 297 to 303 of the judgment of 18 December, which shows that the facts of that case are quite different and not transposable to the present case.

99. In a nutshell, the essential point about the *IPS* case is that the complainant IPS was the author of its own misfortune. The reason that IPS had difficulties competing against Pechiney in the downstream market was that its costs of processing the raw material were higher than those of Pechiney. At the same time the price at which Pechiney supplied the raw material to IPS was fully justified because IPS had particular quality requirements. It was in those circumstances that the Court of First Instance rightly stated, at paragraph 179, that even a dominant producer "is not obliged to sell its products below its manufacturing costs".

100. As pointed out at paragraphs 302 and 303 of the judgment of 18 December, the position in this case is quite different. It is not suggested that Albion is inefficient or has higher costs than Dŵr Cymru. Far from Dŵr Cymru being required to supply Albion at below cost, the evidence is that the First Access

[14] The points made at 73.3 of the request appear to be inconsistent with Dŵr Cymru's ultimate stance before the Tribunal, which was to the effect that all its retail costs should be treated as avoidable: paragraph 306 of the judgment of 18 December. We note also that Dŵr Cymru's argument, at paragraph 73.3 of the request, presupposes that Albion should bear all the costs, including Dŵr Cymru's profit, which are lumped into the figure of 23.2p/m^3 without any attempt to identify the cost of the service requested (paragraph 294 of the judgment of 18 December). Dŵr Cymru's approach also presupposes that "avoided" costs are calculated on the basis of the short-run saving made by serving one less customer. Such avoided costs are likely to be very small (paragraph 788 of the judgment of 6 October). This is what Professor Armstrong described as "a horrible practical aspect" and advocated the use of average incremental retail costs, with a forecast of likely entry (paragraphs 787 to 789). Similarly, Dr. Marshall pointed out that the correct approach is not "avoided" costs but "avoidable" costs (i.e. costs avoidable in the future). We accepted Dr. Marshall's evidence that the calculation of such avoidable costs depends on establishing total retail costs, and then identifying costs that are fixed and those that are avoidable. That will in turn vary according to the time period and unit of output (paragraph 791). Dŵr Cymru does not address any of these points.

Price was 4p/m^3 *above* Dŵr Cymru's average accounting costs, so no question arises of Dŵr Cymru being required to supply common carriage to Albion at below cost. The attempt to extract any general principles from *IPS* which could be transposable, on the facts, to the present case is, in our view, quite unfounded.

Error B.2: Error in assessment of evidence

101. This minor point about the water efficiency aspects of the case arising from paragraphs 891 to 892 of the judgment of 6 October relates to the Tribunal's view, expressed as a matter of common sense, that the saving of water by a customer such as Shotton Paper, whose annual consumption of water is equivalent to that of a medium sized town, redounds to the benefit of the community generally, as does the improved competitiveness of Shotton Paper. No point of law is involved.

Error B.3: The Tribunal illegitimately found a margin squeeze in the Further Judgment in contrast to the position in the Main Judgment

102. Dŵr Cymru does not appear to challenge here the Tribunal's jurisdiction to make a finding of infringement on margin squeeze under paragraph 3(2)(e) of Schedule 8 of the 1998 Act, nor the Tribunal's basis for doing so set out at paragraph 284 of the judgment of 18 December. The test set out in *Burgess v. OFT* [2005] CAT 25, at paragraph 132, discussed under ground E below, was satisfied.

103. In so far as there is some kind of allegation of unfairness (see request, paragraph 76, which refers back to request, paragraph 58), the main facts were not in dispute. Dŵr Cymru was extensively heard over several days and had the opportunity to cross-examine. After the judgment of 6 October it was perfectly plain to Dŵr Cymru that the Tribunal was being invited by Albion to make a finding of infringement on the margin squeeze issue and Dŵr Cymru had the opportunity to be heard in that regard. No point of law arises.

C. THE TRIBUNAL EXCEEDED ITS JURISDICTION IN HOLDING THAT IT IS NECESSARY TO CONSIDER THE COSTS UNDERLYING THE BULK SUPPLY PRICE IN ORDER TO COME TO A CONCLUSION ABOUT THE FIRST ACCESS PRICE

104. This point appears to be entirely misconceived. 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/m^3) up to the present day.

105. 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, or how that price should be determined under section 40 of the Act. We reject the suggestion that the Tribunal has exceeded its jurisdiction.

D. ERRORS RELATING TO THE TRIBUNAL'S EXTENSION OF INTERIM RELIEF

106. Dŵr Cymru does not challenge the Tribunal's analysis, at paragraphs 336 to 343, of the need for interim relief. That need is, in our view, plain. The Tribunal said at paragraph 338:

> "In those circumstances, if Albion were now to cease trading for lack of an interim solution, that, in our view, would send an appalling signal to customers, potential entrants and incumbents alike, to the effect that the 1998 Act and the Authority as a regulator were entirely ineffective. We express our regret that the Authority has seen fit to raise technical objections to the Tribunal's efforts to maintain the status quo. We make it clear that, for its part, the Tribunal is not prepared to run the risk that Albion might not survive pending the final determination of these proceedings and/or the proposed re-determination of the Bulk Supply Price."

107. As to jurisdiction, the Tribunal's powers are widely expressed, as set out in paragraphs 321 to 325 of the judgment of 18 December:

> "321. Paragraph 22 of Schedule 4 to the Enterprise Act 2002 provides:
>
> '(1) Tribunal rules may provide for the Tribunal to make an order, on an interim basis –
>
> …
>
> (c) granting any remedy which the Tribunal would have had power to grant in its final decision.
>
> (2) Tribunal rules may also make provision giving the Tribunal powers similar to those given to the OFT by section 35 of the 1998 Act.'
>
> 322. The Tribunal's power to make interim orders is found in Rule 61 of the Tribunal's Rules which provides:
>
> '(1) The Tribunal may make an order on an interim basis –
>
> …
>
> (c) granting any remedy which the Tribunal would have the power to grant in its final decision.
>
> (2) Without prejudice to the generality of the foregoing, if the Tribunal considers that it is necessary as a matter of urgency for the purpose of –
>
> (a) preventing serious, irreparable damage to a particular person or category of person, or
>
> (b) protecting the public interest,
>
> the Tribunal may give such directions as it considers appropriate for that purpose
>
> (3) The Tribunal shall exercise its power under this rule taking into account all the relevant circumstances, including –
>
> (a) the urgency of the matter;
>
> (b) the effect on the party making the request if the relief sought is not granted; and
>
> (c) the effect on competition if the relief is granted.

(4) Any order or direction under this rule is subject to the Tribunal's further order, direction or final decision…'

323. The powers of the OFT (here, the Authority) to make interim orders are set out in section 35 of the 1998 Act which provides:

'(1) This section applies if the OFT has begun an investigation under section 25 and not completed it (but only applies so long as the OFT has power under section 25 to conduct that investigation).

(2) If the OFT considers that it is necessary for it to act under this section as a matter of urgency for the purpose –

(a) of preventing serious, irreparable damage to a particular person or category of person, or

(b) of protecting the public interest,

it may give such directions as it considers appropriate for that purpose.'

324. As regards the OFT's power to make a final direction, section 33(1) of the 1998 Act provides:

'(1) If the OFT 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.'

325. As regards appeals to the Tribunal, section 47(1) of the 1998 Act provides that a third party may appeal to the Tribunal with respect to:

'(a) a decision falling within paragraphs (a) to (f) of section 46(3)

…

(e) a decision of the OFT not to make directions under section 35.'"

108. The several different routes by which the Tribunal had jurisdiction to continue the existing interim measures order which has been in place in one form or another, since June 2004, are fully set out at paragraphs 345 to 354 of the judgment of 18 December, cited at paragraph 80 of the request.

109. The only point made by Dŵr Cymru is that the Tribunal had no power to make a reference back under Rule 19(2)(j). We have already dealt with that point at ground A5 above.

110. Quite independently of that point, the effect of the quashing of the Decision is that the Authority's investigation remains open. In that respect, it is quite immaterial, as regards the Tribunal's jurisdiction to grant interim measures, whether the matter has been remitted under Rule 19(2)(j) or, as Dŵr Cymru seems to suggest it should have been, under paragraph 3(2)(a) of Schedule 8. Interim measures remain necessary to protect Albion's position pending the outcome of the Authority's further investigation, and the ultimate determination of this appeal. The Tribunal's powers are, in our view, quite wide enough to achieve that.

111. In our view, Dŵr Cymru's submissions overlook the wide terms of Rule 61(2); overlook the fact that Albion's appeal against the Director's original refusal to grant interim measures is still before the Tribunal in Case 1034(IR), giving rise to jurisdiction under both Rule 61(2) and Rule 61(1)(c); and overlook the fact that under Rule 61(2) the Tribunal has powers equivalent to those of the OFT (or the Authority).

112. We regard Dŵr Cymru's contrary submission as unarguable, and refer to the detailed analysis at paragraphs 345 to 354 of the judgment of 18 December.

E. THE TRIBUNAL EXCEEDED ITS JURISDICTION IN DECIDING THE ISSUE OF DOMINANCE

113. These proceedings have now been pending before the Tribunal for over 2½ years on the basis of an assumption of dominance which, in our view, was plainly and obviously correct: see paragraphs 90 to 185 of the judgment of 18 December. The Tribunal's factual findings in that regard are virtually unchallenged by Dŵr Cymru, save in minor and peripheral respects. Dŵr Cymru's suggestion is that, after what is now over six years of investigations and proceedings, this specialist Tribunal lacks jurisdiction to move from "an assumption" to "a finding" on a plain and obvious point of dominance; that that matter must instead go back to the Authority for a statement of objections to be

prepared and issued; and, presumably, that the matter must then come back to the Tribunal on a further appeal. Such an approach, laborious, costly, and time consuming, would obviously well serve the interests of dominant companies wishing to delay matters as long as possible, but it would gravely weaken the effectiveness of the 1998 Act. That, in our view, is not what Parliament intended.

114. Dŵr Cymru does not challenge the Tribunal's analysis, at paragraphs 70 to 76 of the judgment of 18 December, as to why it was appropriate for the Tribunal to consider the issue of dominance. The challenge is solely to the Tribunal's jurisdiction to do so, particularly under paragraph 3(2)(e) of Schedule 8 to the 1998 Act.

115. We take the view, first, that the Tribunal was fully entitled to confirm, under paragraph 3(2) of Schedule 8, the correctness of the Director's assumption as to dominance (request, paragraphs 86 to 87). However, the main point, in our view, is the exercise by the Tribunal of its jurisdiction under paragraph 3(2)(e) of Schedule 8 to take "any decision which the Authority could itself have made". Dŵr Cymru's argument is

    (i) the Authority could not have made any such decision without undertaking a further investigation and serving a statement of objections pursuant to the OFT Rules; and

    (ii) were it otherwise, the Tribunal would transform itself into a primary decision-maker, and so deprive the undertaking in question of the appeal on the facts to the Tribunal which it would otherwise have had from a decision of the administrative authority (request, paragraphs 88 to 91)

116. These arguments are similar to those advanced to the Tribunal by T-mobile (represented by the same junior counsel) in *VIP Communications Ltd v. Office of Communications* [2007] CAT 3, judgment of 22 January 2007. In the *VIP* case the Tribunal comprehensively rejected those submissions at paragraphs 43 to 54 of that judgment. We are surprised that this judgment is not mentioned in the request for permission to appeal, albeit that it was only recently delivered.

117. The Tribunal's analysis of the jurisdiction point is at paragraphs 188 to 197 of the judgment of 18 December, and the points made by Dŵr Cymru are addressed at paragraphs 192 to 196.

118. Paragraph 3(1) of Schedule 8 provides that the Tribunal has a jurisdiction on the merits. Paragraph 3(2) of Schedule 8 gives the Tribunal wide powers. As pointed out at paragraph 188 of the judgment of 18 December, in *Burgess v. OFT* [2005] CAT 25, the Tribunal considered the circumstances in which the Tribunal might exercise its power to "make any other decision that the [Authority] could itself have made", under paragraph 3(2)(e) of Schedule 8. The Tribunal said in *Burgess* at paragraph 132:

> "In our judgment, on the above basis the Tribunal should, if necessary, take its own decision rather than remit if (i) it has or can obtain all the necessary material (ii) the requirements of procedural fairness are respected and (iii) the course the Tribunal proposes to take is desirable from the point of view of the need for expedition and saving costs. Such an approach in our view is compatible with the overriding objective of deciding cases justly".

119. As to point (i), Dŵr Cymru has questioned whether the Tribunal had all the necessary material, but only in the minor and peripheral respects mentioned at paragraphs 92 to 95 of the request. Most of the Tribunal's 30-page analysis of dominance is entirely unchallenged. In any event, whether the Tribunal has all the necessary material is a matter of reasonable judgment, not law.

120. As to point (iii), with regard to the need for expedition and saving costs Dŵr Cymru has not challenged paragraph 197 of the judgment of 18 December:

> "…To remit that issue [of dominance] to be decided by the Authority would serve no useful purpose, merely adding to the delay and cost of these proceedings. We bear in mind that Albion is a small company which has already suffered very serious delays in this case. Dŵr Cymru, which is very well resourced and ably advised, has drawn no point to our attention which could, even arguably, merit further scrutiny on the issue of dominance. We do not think that Dŵr Cymru can have it both ways: having argued extensively before the Tribunal that the construction of an alternative pipeline

> in 2001 would have been high risk and that the cost of doing so would have been well above Dŵr Cymru's existing retail tariff, Dŵr Cymru cannot at the same time credibly argue that the construction of such a pipeline was a realistic commercial proposition."

121. As to point (ii), procedural fairness, Dŵr Cymru has not challenged paragraph 191 of the judgment of 18 December:

> "As to procedural fairness, at the hearing in June 2006 the Tribunal made it clear to Dŵr Cymru that the Tribunal considered that it was in a position to decide the issue of dominance (Day 6, pp. 94 to 97), and by letter of 20 June 2006 invited submissions on that issue. The response of Dŵr Cymru (and the Authority) was to raise procedural objections. The Tribunal again indicated in its judgment of 6 October 2006 that it wished to consider how the issue of dominance should be handled (paragraph 984) setting out in Annex A certain matters particularly relevant to that issue. Having heard further argument, the Tribunal gave a ruling on 24 October 2006 [2006] CAT 25 to the effect that it proposed to consider the issue of dominance, and offered a hearing. At Dŵr Cymru's suggestion, the matter was dealt with in writing, by consent. Dŵr Cymru has principally argued that the issue of dominance would require further investigation, a submission which we have already rejected. Dŵr Cymru did not answer, on the substance, the submissions made by Albion."

122. Dŵr Cymru has had every opportunity to be heard on the issue of dominance. The main point taken by Dŵr Cymru is the purely formal one that the Authority itself could not have decided dominance without issuing a statement of objections.

123. The answer to this point is set out in paragraph 192 of the judgment of 18 December, in these terms:

> "The words 'any decision the OFT could itself have made' in paragraph 3(2)(e) of Schedule 8 seem to us to refer to the kinds of decisions the OFT can make (i.e. infringement/non infringement etc.) rather than to the procedure by which it makes them. The OFT could not, for example, apply section 66E of the WA03 because that is outside the OFT's jurisdiction, and the Tribunal

> is in the same position. Procedural fairness, which is what a statement of objections is intended to safeguard at the administrative stage, is achieved by different means at the level of the Tribunal. Indeed, the procedural means open to the Tribunal to secure fairness, in terms of the judicial nature of the proceedings, *inter partes* submissions, hearings in open court and so on, present in many ways wider opportunities for ensuring fairness than those that arise under the administrative procedure."

124. That approach to the Tribunal's jurisdiction under the 1998 Act is further supported by the observations of the Tribunal in *Napp v. Director General of Fair Trading* [2002] CAT 1, admittedly in a different context, but with the same underlying rationale, at paragraphs 117, 118 and 134:

> "117. If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the rôles of 'prosecutor' and 'decision maker', becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional role of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case 'on the merits' and may, if necessary and appropriate, 'make any other decision which the Director could have made': paragraph 3(2)(e). If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director: paragraph 3(4) of Schedule 8. Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts (see Schedule 8, paragraph 9 of the Act, and Rule 17 of the Tribunal's Rules) and may do so even if the evidence was not available to the Director when he took the decision: see Rule 20(2) of the Tribunal's Rules.
>
> 118. In elucidation of these provisions, we refer to the statement made in the House of Commons by the then Minister for Competition and Consumer Affairs (Mr Griffiths) during the passage of the

Competition Bill on 18 June 1998 (Hansard Col 496):

> 'It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules. This is an important aspect of our policy, and I shall explain the rationale behind our approach. The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures.'

> 134. … As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director."

125. As to Dŵr Cymru's "two-tier" point about an appeal on fact to the Tribunal from the decision of the administrative authority, the above passage from *Napp* shows that the system under the 1998 Act is intended to operate flexibly. There are, moreover, two specific answers to Dŵr Cymru's submission.

126. First, as pointed out at paragraphs 194 and 195 of the judgment of 18 December, citing *Burgess* at paragraph 130, the Tribunal frequently acts as the primary decision-maker on matters of fact. The classic example is *JJB and Allsports v. OFT* [2004] CAT 17, where the Tribunal made extensive new findings of fact, and the matter was later appealed (unsuccessfully) to the Court of Appeal: [2006] EWCA Civ 1318. The effectiveness of the Tribunal's jurisdiction would be seriously inhibited if matters had to go back to the OFT every time a further issue of fact had to be decided.

127. Further, where (as here) it is a case of the Tribunal taking an infringement decision, the test applied by the Tribunal, set out in paragraph 196 of the judgment of 18 December, is that:

> "the Tribunal should take a decision of infringement, after hearing the parties, only if the facts are agreed, uncontested, or plain and obvious. That was the case in *Burgess* and in the Tribunal's earlier decision in *IIB and ABTA v. Director General of Fair Trading* [2001] CAT 3. In such cases, the Tribunal's task is to apply the law to the facts and there is an appeal on a point of law to the Court of Appeal. In *Office of Communications v. Floe Telecom Limited* [2006] EWCA Civ. 768 ("*Floe*") the Court of Appeal was considering a case where the regulator had reached a non-infringement decision. We see nothing in the judgment of the Court of Appeal in that case – considered further below – to preclude the course we propose in circumstances where the Tribunal feels able to decide for itself what the correct result should have been (*Floe*, at paragraph 25)."

128. If the facts are "agreed, uncontested or plain and obvious," and the parties are heard, in our view no procedural prejudice arises to the dominant undertaking if the Tribunal proceeds to take an infringement decision on the basis of those facts.

129. As to the point made in the request at paragraph 88.2 about the "parallel structure" at Community level, the Tribunal in *VIP*, cited above, at paragraphs 50 and 51, rejected the same submission, drawing attention to the differences between the jurisdiction of the Tribunal under the 1998 Act, and that of the

Court of First Instance under paragraph 230 of the EC Treaty. We adopt that reasoning, and indeed the reasoning of the Tribunal in *VIP* at paragraphs 43 to 54.

130. As to the alleged need for further administrative investigation before any decision could be taken in this case, the Tribunal has already rejected the submissions of Dŵr Cymru and the Authority to that effect as regards product market (paragraphs 96 to 107), geographic market (paragraphs 108 to 115), and dominance (paragraphs 118 to 182). Those conclusions are put in issue by Dŵr Cymru only to a minor extent. No issue of law is involved.

131. The few points made at paragraphs 92 to 97 of the request are merely unsupported assertions about the facts. Indeed, we are surprised that these points should be made at all. Dŵr Cymru knows very well that at all material times no one else was supplying Shotton Paper and Corus with water (request, 93.2). To suggest, at this stage, to the Court of Appeal that there could be some doubt on that point, requiring further investigation, is, in our view, wholly inappropriate. The points made at paragraph 94 of the request about the fact that Shotton Paper and Corus are supplied with the services of both partial treatment and transportation of water, discussed at paragraphs 105 and 106 of the judgment, are entirely academic and peripheral. Dŵr Cymru's supporting examples regarding computer and in-car entertainment systems have nothing to do with this case.

132. The fact that those are the only points which Dŵr Cymru makes about the Tribunal's analysis of relevant market and dominance over 32 pages of the judgment of 18 December (paragraphs 90 to 185) amply confirms, in our view, that the evidence that Dŵr Cymru held a dominant position was overwhelming.

III. CONCLUSION

133. For all those reasons we unanimously refuse permission to appeal.

Christopher Bellamy Antony Lewis John Pickering

Charles Dhanowa 2 February 2007

Registrar