



Neutral citation [2008] CAT 3

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1046/2/4/04

Victoria House  
Bloomsbury Place  
London WC1A 2EB

17 January 2008

Before:

Marion Simmons QC (Chairman)  
The Honourable Antony Lewis  
Professor John Pickering

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) ALBION WATER LIMITED**

- and -

**(2) ALBION WATER GROUP LIMITED**

Appellants

- v -

**WATER SERVICES REGULATION AUTHORITY**

Respondent

- supported by -

**(1) DŴR CYMRU CYFYNGEDIG**

- and -

**(2) UNITED UTILITIES WATER PLC**

Interveners

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**JUDGMENT (Application for disclosure)**

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## I INTRODUCTION

1. There is an appeal before the Tribunal against the Decision of the Director General of Water Services, now the Water Services Regulatory Authority (“the Authority”)<sup>1</sup> of 26 May 2004 (“the Decision”). In that Decision the Authority decided that Dŵr Cymru Cyfyngedig (“Dŵr Cymru”) did not abuse a dominant position in breach of the Chapter II Prohibition by engaging in excessive pricing (see paragraph 341).
2. In this appeal Albion Water Limited (“Albion”) has made a written application dated 23 November 2007 for the specific disclosure of the following documents, which it requested the Tribunal to consider on the papers:
  - (a) A letter from Dŵr Cymru, dated 17 March 2003, (hereinafter referred to as “the letter of 17 March 2003”);
  - (b) Copies of Dŵr Cymru document “LCE/01/001” and the email dated 30 April 2001 in unredacted form (hereinafter referred to as “the unredacted Dŵr Cymru documents”); and
  - (c) Accounting documents relating to the cost of the construction of the LG Philips main (hereinafter referred to as “the LG main costs”).
3. By letter of 27 November 2007 to the parties the Tribunal invited observations on Albion’s disclosure application. The Tribunal received written submissions from the Authority and Dŵr Cymru on 3 December 2007. Albion replied to these submissions in its letter to the Tribunal of 10 December 2007.
4. Having carefully considered the submissions of the parties, and for the reasons set out below, our conclusion is that Albion’s application for disclosure should be granted in relation to the letter of 17 March 2003 and the unredacted Dŵr Cymru documents, but refused in relation to the LG main costs.

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<sup>1</sup> Since 1 April 2006 the functions of the Director General of Water Services have been assumed by the Authority pursuant to the provisions of the Water Act 2003. Where necessary, references in this judgment to the Authority are to be taken as referring to the Director General of Water Services and vice versa.

## II BACKGROUND

5. The history of these proceedings is set out in the judgments of the Tribunal of 6 October 2006 and 18 December 2006 in *Albion Water v Water Services Regulation Authority* [2006] CAT 23 (“the main judgment”) and [2006] CAT 36 (“the further judgment”) respectively.
6. In the Decision the Authority considered the question whether the First Access Price of 23.2p/m<sup>3</sup> (“the First Access Price”) offered by Dŵr Cymru to Albion on 2 March 2001 for the “common carriage” of non-potable water via the so-called Ashgrove system could be said to bear 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 (see paragraph 339 of the Decision). The Authority was unable to answer this question in the affirmative, and accordingly concluded that Dŵr Cymru did not abuse a dominant position in breach of the Chapter II Prohibition by engaging in excessive pricing (see paragraph 341 of the Decision).
7. In the main judgment, the Tribunal found at paragraph 637 that the evidence before it, taken as a whole, “strongly suggests” that the First Access Price was excessive. At paragraph 981 of the main judgment the Tribunal concluded as follows:
  - “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/m<sup>3</sup> to 3.2p/m<sup>3</sup>.
  - (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”.

8. The Excessive Pricing Abuse issue is considered in paragraphs 231 – 281 of the further judgment. For the reasons stated in paragraph 240 of the further judgment the Tribunal considered that the issue of abuse by reason of excessive pricing would be better reached by the Tribunal taking its own decision under paragraph 3(2)(e) of Schedule 8 to the Competition Act 1998 (“the 1998 Act”). In paragraph 241 and 279 of the further judgment the Tribunal considered that it would be preferable if certain matters were first further investigated by the Authority under rule 19(1) and 19(2)(j) of the Tribunal Rules notably to determine the extent to which the First Access Price was unrelated to costs, and to consider whether the price was unfair within the meaning of section 18(2)(a) of the 1998 Act. In paragraph 277 of the further judgment the Tribunal stated that it took the view that it was 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. The Tribunal stated in paragraph 280 that it decided to refer back to the Authority under rule 19(2)(j) of the Tribunal Rules for further investigation the matter of the calculation 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.

9. At paragraph 281 of the further judgment the Tribunal stated:

“In investigating those matters the Authority shall give Dŵr Cymru and Albion a full opportunity to comment on the Authority’s preliminary views before reaching any conclusions. There is no reason why that investigation should not proceed in parallel with the determination of the Bulk Supply Price where similar issues are likely to arise. The Authority is requested to report the results of its investigations to the Tribunal within six months of the date of this judgment [i.e. 18 June 2007], subject to any further direction of the Tribunal. The Tribunal will then determine the matter under paragraph 3(2)(e) of Schedule 8 of the 1998 Act”.

10. At paragraph 360(iii) of the further judgment, the Tribunal referred:

“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”.

11. On 18 June 2007 the Authority lodged with the Tribunal Registry its “Final Report” containing the results of its further investigation. The Final Report contains the methodology adopted by the Authority and its conclusions on the matters referred to it. In summary, the Authority reported that, whilst the First Access Price was excessive, since it exceeds the costs attributable to the relevant services by a material extent, the Authority did not consider that there was cogent evidence in the circumstances of this case that the excess is, on the balance of probabilities, unfair in itself and could not therefore be categorised as an abuse. Both Albion and Dŵr Cymru challenge the Authority’s Final Report.
12. By an Order dated 23 October 2007 (as amended on 30 October 2007), the Tribunal ordered that written submissions be filed and served in respect of the following issues which now arise in this appeal:
  - “Heading 1: The specific components of cost which should not have been included or should have been but were not included in the costs calculation in the Final Report
  - Heading 2: Arithmetical errors allegedly committed by the respondent in the Final Report
  - Heading 3: Methodological errors and errors of economic assessment allegedly committed by the respondent in the Final Report”.
13. Following receipt of the Final Report Albion in correspondence has sought voluntary disclosure of documents from the Authority and Dŵr Cymru. Although we have read this correspondence copied to the Tribunal, in deciding this application we have focused on the written submissions provided by the parties for the purposes of this disclosure application.

### **III THE DISCLOSURE APPLICATION**

14. Specific disclosure is sought of three categories of documents as described below.

#### *The Letter of 17 March 2003*

15. Daniel Mark Elliot (“Dr Elliot”), a director of Frontier Economics Limited, an economics consulting firm, made a witness statement dated 16 February 2006 as a witness for Corus UK

Limited (“Corus”) in a High Court action *Dŵr Cymru Cyfyngedig v Corus UK Limited & Another* (see [2006] EWHC 1183 (Ch), 26 May 2006) (hereafter “the Corus proceedings”)

16. Albion sought voluntary disclosure of Dr Elliot’s witness statement from the parties to the Corus proceedings. On 20 June 2007 Dŵr Cymru replied to Albion as follows:

“For the avoidance of doubt, irrespective of whether or not Corus write to us to the effect that they are content to share with you material prepared in connection with our claim against them, we do not give our consent to the disclosure of any such material”.

17. On 14 November 2007 the solicitors acting for Corus wrote to Albion, copied to the Tribunal and Dŵr Cymru, enclosing a copy of Dr Elliot’s witness statement for Albion’s information and use in the present proceedings.

18. In Dr Elliot’s witness statement reference is made to the letter of 17 March 2003 from Dŵr Cymru to the Authority. Albion’s application for disclosure of the letter of 17 March 2003 is founded on the information contained in paragraph 64 of Dr Elliot’s witness statement, which, in so far as material, reads:

“Finally, I note that, in the letter of 17 March 2003 it appears that, for the first time, Welsh Water attempted to calculate the cost of its distribution assets for non-potable water. This calculation produces a figure of 7.86 pence per cubic metre. In the absence of detailed workings, I cannot comment on the accuracy of this figure. However, it seems to provide a further indication that the figure of 16 pence per cubic metre, used all along as the basis for the bulk distribution costs, may be too high”.

*The unredacted Dŵr Cymru documents*

19. The Authority received the Dŵr Cymru documents from Dŵr Cymru in an unredacted form pursuant to a formal notice dated 29 June 2001 given under section 26 of the 1998 Act. The unredacted Dŵr Cymru documents are internal documents which concern the calculation and proposal of the First Access Price in January 2001. The solicitors for Dŵr Cymru in a letter to the Authority dated 21 September 2007 stated that these documents are not Board documents; that they were prepared for an internal management committee known as the “licensed company executive” (“LCE”), hence the title of the document “LCE/01/001”.

20. On 6 August 2007 Albion sought voluntary disclosure of the Board paper and minute relating to Dŵr Cymru's January 2001 Board meeting at which the First Access Price was approved. On 21 September 2007 Dŵr Cymru provided Albion with a redacted copy of the minutes of a Board meeting which took place on 15 January 2001 and a document marked "To: LCE". Albion subsequently sought voluntary disclosure of a document entitled "LCE/01/001" which was referred to in document "To: LCE".
21. On 11 October 2007 the Authority disclosed a redacted copy of document "LCE/01/001" to Albion. Document LCE/01/001 was prepared by Mr Dave Holton who was at the time a commercial manager employed by Dŵr Cymru. The title of document LCE/01/001 is "Common Carriage Application at Ashgrove, Deeside" and contains various matters relating to a proposed common carriage price to cover the partial treatment and transport of water through the Ashgrove system.
22. At the same time as disclosing document "LCE/01/001" to Albion the Authority also disclosed two other documents. These were: (a) an unredacted copy of document called "LCE/01/0XX" and (b) a redacted copy of the email dated 30 April 2001 from Mr Dave Holton. According to the Authority these documents were relevant to "the question of what was in Dŵr Cymru's mind when it approved the First Access Price". The email of 30 April 2001 records the results of a meeting held between Albion, Dŵr Cymru and United Utilities in or around April 2001. It appears that the purpose of the meeting was to discuss a proposed change in the treatment of the water supplied to, among others, Albion's non-potable customer: Shotton Paper. It appears that issues relating to the security of supply and quality of water were also discussed.

*The LG main costs*

23. The LG Philips semiconductor plant in Newport is supplied with non-potable water via a pipeline, which was constructed by Dŵr Cymru in 1997 ("the LG main"). The LG main consists of a pipeline supplying non-potable water from Dŵr Cymru's treatment works at Court Farm to the LG Philips development.
24. Dŵr Cymru first mentioned to the Authority the LG main costs in a confidential letter dated 4 April 2007.

25. The Authority did not investigate the costs of laying the LG main during its further investigation.
26. In its written submissions for the case management conference on 23 October 2007 the Authority informed the Tribunal that Albion did not make it aware that it considered that costs information regarding the LG main was relevant to the Authority's then investigation until five days prior to the deadline for submission of the Final Report to the Tribunal.
27. The letter of 4 April 2007 from Dŵr Cymru to the Authority came to the attention of Albion when it was disclosed as an annex to the Authority's Final Report.
28. Albion now applies to the Tribunal for disclosure of accounting evidence relating to the cost of laying the LG main.

#### **IV THE PARTIES' SUBMISSIONS**

29. It is common ground that the principles to be applied in applications for disclosure before the Tribunal are set out in the case-law of the Tribunal, in particular in *Claymore v OFT (Recovery and Inspection)* [2004] CAT 16 and *Cityhook v OFT (Disclosure)* [2006] CAT 32. The Tribunal observed in *Claymore* that an application for disclosure should only be granted if the disclosure sought is necessary, relevant and proportionate ([2006] CAT 32, at paragraph 113).
30. Albion submits that disclosure of the documents requested is both relevant and necessary to its appeal. The Authority and Dŵr Cymru oppose the application on both of these grounds. Dŵr Cymru further relies on what it submits is the highly confidential nature of the redacted parts of the unredacted Dŵr Cymru documents. The parties' submissions in respect of the individual documents which are the subject of the disclosure application are set out below.



*The Letter of 17 March 2003*

31. Albion seeks disclosure of the letter of 17 March 2003 because it appears to contain relevant costs calculations in respect of the New Tariff<sup>2</sup>. According to Albion, the costs calculations are relevant because, first, the Decision refers to the New Tariff when analysing the First Access Price (see in particular paragraph recital 248 of the Decision) and, secondly, because those calculations appear to lead to a figure (7.86 p/m<sup>3</sup>) of less than half the figure of 16p/m<sup>3</sup>, on which the Authority relied in its Decision. What is of crucial importance, says Albion, is an understanding of how this accounting costs information has been used to produce results on which Dŵr Cymru and the Authority rely, and the consistency of that approach over time. Albion submits that the letter of 17 March 2003 will shed light on this important issue. Albion adds that, in its view, the withholding of the information contained in the letter of 17 March 2003 justifies the Tribunal's comment at paragraph 254 of the further judgment, cited below.
32. The Authority submits that the letter relates to confidential discussions between the Authority and Dŵr Cymru in a regulatory context over possible revisions to its charges scheme and that, as a matter of policy, such correspondence is not disclosed to other water companies. Furthermore, in the Authority's view, the letter is of limited relevance since it is neither contemporaneous to the First Access Price negotiations in 2001 nor to the Authority's more recent calculations in the Final Report in 2007.
33. Dŵr Cymru resists the application on three grounds. First, Dŵr Cymru submits that the reference to the letter of 17 March 2003 in a witness statement served in the Corus proceedings is irrelevant to the question of disclosure before the Tribunal. Second, Dŵr Cymru submits that the question of whether it provided all the accounting information that it could during the earlier proceedings in this case, including the letter of 17 March 2003, does not fall within the scope of the issues identified by the Tribunal's Order of 23 October 2007. Third, Dŵr Cymru submits that Albion is wrong to infer that the letter of 17 March 2003 and the material underlying it amounts to additional accounting information that should have been disclosed, but was not. In that regard, Dŵr Cymru notes that the cost analyses for the New Tariff drew on the same publicly available regulatory accounting

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<sup>2</sup> Dŵr Cymru proposed a new tariff for 2003/2004 including volumetric charges for raw water and partially treated water. That tariff, as it would apply to Shotton Paper were Dŵr Cymru ever to supply Shotton directly again, is referred to as the "New Tariff" in the Decision (see paragraph 198 of the Decision).

information used for the First Access Price and that information has already been provided to the Tribunal. Dŵr Cymru also points out that the New Tariff is far from new and had the underlying basis for that tariff ever been relevant, the Tribunal or any of the parties could have sought further information at the outset of these proceedings, over three years ago.

*The unredacted Dŵr Cymru documents*

34. Albion submits that disclosure of the unredacted Dŵr Cymru documents is necessary, relevant and proportionate to ensure a just, expeditious and economical consideration of the matters that are before the Tribunal. In Albion's submission the documents are contemporaneous with the creation of the First Access Price and aid an understanding of the steps leading to the First Access Price and Dŵr Cymru's actions immediately thereafter. Moreover Albion submits that this is particularly relevant to whether the First Access Price was only "indicative", as Dŵr Cymru contends, or the First Access Price was a "firm" price intended to be Dŵr Cymru's standard common carriage price. Given the age of the documents in question – six years after the event – Albion submits that confidentiality cannot and should not be a bar to disclosure, at least to the Tribunal and to counsel for Albion.
35. The redacted Dŵr Cymru documents disclosed by the Authority excluded certain commercially confidential information, pursuant to section 237 of the Enterprise Act 2002. Accordingly, the Authority claims it is not in a position to release the unredacted copies of LCE/01/001 and the email dated 30 April 2001. The Authority adds that, in its view, the redacted material is not relevant to the assessment of whether the First Access Price was excessive or unfair in the sense used in the Final Report.
36. Dŵr Cymru submits that no order for disclosure should be made in respect of the unredacted Dŵr Cymru documents. Dŵr Cymru submits that the redacted sections of LCE/01/001 and of the email dated 30 April 2001 are both irrelevant to the current proceedings and, as accepted by the Authority contain commercially sensitive information whose disclosure would significantly harm Dŵr Cymru's business interests. The redactions to LCE/01/001 relate to "live" commercial arrangements between Dŵr Cymru and United Utilities and have no bearing on issues relevant to the setting of the First Access Price. The excisions to the email dated 30 April 2001 remove information which relates to the strategic thinking of Dŵr Cymru concerning current bulk supply negotiations between Albion and itself. In the event

that the Tribunal were minded to accede to Albion's request, Dŵr Cymru submits that the appropriate course would be for the President of the Tribunal or another chairman of the Tribunal to decide whether there should be limited or full disclosure of the documents in question.

*The LG main costs*

37. Albion submits that it will be of considerable value to the Tribunal to have contemporary evidence in respect of the actual cost of a closely comparable project to the Ashgrove system, namely the LG main. Albion notes the reliance by the Authority in the Final Report on several comparators to cross-check its capital cost calculations. Albion further submits that the importance of access to the underlying LG costs data is underlined by the fact that pipeline unit costs of the LG main are approximately 50% of those relied upon by the Authority in its Final Report. Essentially, Albion submits, it needs the accounting evidence so as to be able to show errors in the further investigation and that those errors had a consequence.
38. The Authority states that it possesses no information on the actual construction costs of the LG main and is therefore unable to disclose any documents relating to this issue.
39. Dŵr Cymru resists disclosure of the LG main costs. Its view is that information about the LG main arose too late for the Authority to consider it. To accede to Albion's request for disclosure of accounting information about the LG main would transform the Tribunal into a primary fact-finder in respect of the LG main which would be contrary to the purpose of the Tribunal's referral back. Dŵr Cymru also disputes Albion's claims that the LG main costs suggest a significantly lower unit cost for mains-laying than that implied by the Authority in the Final Report. In any event, Dŵr Cymru submits that Albion has the key information on the costs of the LG main so far as they are relevant to mains-laying.

**IV THE TRIBUNAL'S ANALYSIS**

40. The procedural rules governing proceedings in the Tribunal are contained in the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004).

Disclosure is governed by rule 19 of the Tribunal Rules which provides, in so far as material, that:

- “(1) The Tribunal may at any time, on the request of a party or of 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 such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
- (2) The Tribunal may give directions- ...
  - (k) for the disclosure between, or the production by, the parties of documents or classes of documents...”

- 41. The object of a disclosure application under rule 19(2)(k) is to obtain production of specified documents. Accordingly, the application must specifically identify the documents sought; it must not be of a fishing or speculative nature.
- 42. A disclosure application will be rejected if the documents are not relevant and *necessary* for the fair and just disposal of the proceedings (see, to that effect, *Claymore*, cited above, at [108] and [113]).
- 43. While the criteria of relevance and necessity are entitled to individual consideration, the Tribunal will of course also look at the matter as a whole.
- 44. In this case, we bear in mind the concerns that have already been expressed by the Tribunal about the evidence made available in the proceedings to date. In paragraph 291 of the main judgment the Tribunal stated:

“...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. 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”

In paragraph 464 of the main judgment the Tribunal stated:

*Lack of information on costs*

A striking feature of the present case has been the lack of any detailed, or verifiable, break down of the components of the cost of “distribution” here in question. The Decision arrives at a figure of 16p/m<sup>3</sup> for the “distribution” cost to non-potable users, but gives no details of what that figure comprises. Dŵr Cymru has produced no original accounting information to support the figure of 16p/m<sup>3</sup>”.

45. In paragraph 254 of the further judgment the Tribunal also noted that:

“... Albion is a small company which has been trying for some six years to have its complaint determined, and has so far succeeded on the substance. In our view, it would not be in accordance with justice if that result, achieved by tenacity and force of argument against the combined forces of the Authority and an incumbent monopolist, should become an empty victory because some cost information is still not available and a few points remain to be decided. To conclude otherwise would simply mean that Dŵr Cymru’s tactical approach in declining to supply accounting information in support of the claimed “distribution” costs of 16p/m<sup>3</sup> would have paid off, leaving Albion with a Pyrrhic victory. Dŵr Cymru’s claim that it is not possible to provide even estimated accounting information to support the figure of 16p/m<sup>3</sup> for “distribution” costs is not, in our view, credible”.

46. We have borne the foregoing comments in mind when considering Albion’s application for disclosure. We shall now consider whether disclosure of the individual documents the subject of the application, set out in paragraph 2 above, would be relevant, necessary and proportionate in the particular circumstances of this appeal.

47. In this judgment it is important to note that the Tribunal is not making any findings of fact.

*Letter of 17 March 2003*

48. The Tribunal understands that Albion’s sole source of knowledge of the existence of the letter of 17 March 2003 and of the information contained in it is from Dr Elliot’s witness statement. That witness statement was disclosed in the Corus proceedings and the general rule is that it may only be used for the purpose of those proceedings: see *Civil Procedure Volume 1 (The White Book Service 2007)*, Part 31, rule 31.22(1). One of the exceptions to the general rule is where the party who disclosed the document and the person to whom the document belongs agree: rule 31.22(1)(c). That exception applies in this case since Corus

disclosed the document to Albion and is the person<sup>3</sup> to whom the document belongs. The fact that the other party to the Corus proceedings (Dŵr Cymru) did not agree to the witness statement being disclosed is irrelevant for these purposes. It follows that Albion is entitled to use information contained in Dr Elliot's witness statement in the appeal before the Tribunal and particularly in its application for specific disclosure of the letter of 17 March 2003 referred to in that document.

49. The letter of 17 March 2003 is requested because, in Albion's submission, it bears on the correct measure of the distribution costs of non-potable water.
50. Albion says that it needs access to this letter because it concerns the calculation of the cost of distribution for non-potable water. Albion refers to the apparent discrepancy between the figures of 7.86 p/m<sup>3</sup> (in the letter of 17 March 2003) and 16p/m<sup>3</sup> (in the Decision). We accept Albion's submission that the calculations are relevant to the question whether the First Access Price bears a reasonable relation to the economic value of the service provided by Dŵr Cymru. In that regard it is relevant that the Authority itself referred to the New Tariff in the Decision and specifically noted that "Dŵr Cymru's approach to the First Access Price and its approach to the New Tariff are similar" (see paragraph 248 of the Decision). This document appears to us to be relevant to a consideration of the similarity of its approaches, which was a factor relied upon by the Authority in its Decision.
51. As to the submissions put to us for resisting the application, the fact that the letter of 17 March 2003 relates to confidential discussions between the Authority and Dŵr Cymru in a regulatory context and that, as a matter of policy, such correspondence is not disclosed to other water companies, is not relevant to the Tribunal's consideration of whether it ought to order disclosure of a document in an appeal before it.
52. The fact that the accounting costs information, on which the New Tariff calculations are based, is already publicly available is also irrelevant to the question whether the letter of 17 March 2003 should be disclosed. That information does not explain the discrepancy between the two figures referred to above.

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<sup>3</sup> See Civil Procedure Volume 1 (The White Book Service 2007), p 57 and Schedule 1 to the Interpretation Act 1978: "Person" includes a body of persons corporate or unincorporated.

53. For the reasons set out above, we order disclosure of the letter of 17 March 2003 since in our judgment it is necessary, relevant and proportionate to the fair and just disposal of this appeal.
54. We referred above to the previously expressed concerns of the Tribunal as to the approach which Dŵr Cymru has taken in this appeal to disclosure of documents relating to the “cost” of distribution of non potable water (see in particular paragraph 464 of the main judgment and paragraph 254 of the further judgment cited above). The position which Dŵr Cymru has taken in this application for specific disclosure in relation to Dr Elliot’s witness statement and the letter of 17 March 2003 is but a further example of this concern. This is particularly so in relation to the present application because the Authority admits that the letter is of relevance albeit of limited relevance.

*The unredacted Dŵr Cymru documents*

55. We note that Albion has been seeking disclosure of these documents since as long ago as 13 May 2004. Albion renewed its request for voluntary disclosure of these documents in 2007 and, quite properly on 11 October 2007, the Authority finally disclosed a redacted copy of document LCE/01/001 and a redacted copy of the email dated 30 April 2001.
56. Albion submits that the Authority and Dŵr Cymru, in producing redacted versions of the unredacted Dŵr Cymru documents, have consistently failed to provide material that is central to the calculation and determination of the First Access Price.
57. Albion submits that the redacted passages of the unredacted Dŵr Cymru documents are relevant and necessary since they bear on the steps leading to the First Access Price and Dŵr Cymru’s actions immediately thereafter. The Authority and Dŵr Cymru resist disclosure of the unredacted versions on the basis that the information is irrelevant to these proceedings. United Utilities who is an intervener in these proceedings has not made any submissions on this disclosure application.
58. The title of the document “LCE/01/001” is “Common Carriage Application at Ashgrove, Deeside”. The document in its redacted form discusses various matters which are (directly or indirectly) relevant to the access price to cover the partial treatment and transport of water

through the Ashgrove system. These matters are plainly relevant to our decision. We are told that the redacted passages of document LCE/01/001 relate to commercial arrangements between Dŵr Cymru and United Utilities. However, we note that paragraphs 5.73-5.79 of the Final Report specifically refer to these arrangements. Unlike the LG main costs, discussed below, these were matters before the Authority during its further investigation. For example, paragraphs 5.78-5.79 of the Final Report refer to the bulk supply arrangements between Dŵr Cymru and United Utilities when the Authority determines whether “connection charges” should be included as a cost underlying the First Access Price. In our judgment, the redacted information in LCE/01/001 appears on the information presently available to us to be relevant and necessary to the issues to be determined. Accordingly, we reject the submissions of the Authority and Dŵr Cymru in that regard.

59. The other Dŵr Cymru document – the email dated 30 April 2001 – relates to the water undertaker’s strategic thinking in relation to ongoing bulk supply negotiations with Albion. At present, Albion purchases the water in question under a bulk supply agreement from Dŵr Cymru at the boundary of Albion’s inset appointment area at the premises of Shotton Paper. Dŵr Cymru submits, however, that the redacted material is irrelevant to Albion’s common carriage proposal in general and to the calculation of the First Access Price in particular. The email specifically refers to Albion’s complaint under the 1998 Act dated 10 December 2000. It also sets out Dŵr Cymru’s reactions to correspondence with Albion, following notification of the First Access Price. We note that the email touches on other material issues such as security of supply which have been raised in paragraphs 5.37-5.72 of the Final Report.
60. We consider that disclosure of the unredacted Dŵr Cymru documents is both relevant and necessary. On the information before us the redacted parts of these documents appear to us to be relevant and necessary to a matter presently before the Tribunal which is whether Dŵr Cymru “has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition”, so as to satisfy the test of abuse as laid down by the European Court of Justice in *Case 27/76 United Brands v Commission* [1978] ECR 207 at paragraph 249.



61. The disclosure application is resisted by the Authority and Dŵr Cymru on the basis that the redacted passages in the unredacted Dŵr Cymru documents are confidential. In our judgment, when documents are confidential, the claim that their disclosure is necessary for the fair resolution of proceedings may well be subjected to careful scrutiny. However, the fact that the documents of which disclosure is sought are confidential or contain confidential information is not a bar to an order for their disclosure.
62. The unredacted Dŵr Cymru documents as disclosed by the Authority excluded certain commercially confidential information under Part 9 of the Enterprise Act 2002. By virtue of section 237(5) of that Act, the restrictions on disclosure of confidential information which apply to the Authority do not apply to the Tribunal.
63. The Tribunal's duty to have regard to the need to exclude certain confidential matters from its decisions is set out in Schedule 4, paragraph 1(2) and (3) of the Enterprise Act 2002, as follows:
- “Decisions of the Tribunal*
- ...
- (2) In preparing that document the Tribunal shall have regard to the need for excluding, so far as practicable—
- (a) information the disclosure of which would in its opinion be contrary to the public interest;
- (b) commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;
- (c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests.
- (3) But the Tribunal shall also have regard to the extent to which any disclosure mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons for the decision”.
64. This provision anticipates that disclosure of confidential material may be made in the course of proceedings before the Tribunal.
65. For the reasons set out above we consider that it is relevant, necessary and proportionate for the fair and just disposal of this appeal that the unredacted Dŵr Cymru documents should be disclosed.

66. Dŵr Cymru has a legitimate interest in protecting its business confidentiality. Having regard to the submissions that have been made, and in particular the fact that no party objects to the principle of a confidentiality ring, we consider it appropriate in the first instance to order disclosure within a confidentiality ring (consisting of certain named external advisers of Albion, and Dŵr Cymru) of unredacted copies of document LCE/01/001 and of the email dated 30 April 2001.

*The LG main costs*

67. Albion's case, in essence, is that the Authority did not look at a potentially important comparator – the costs of laying the LG main – when assessing the costs reasonably attributable to the Ashgrove system. In order to develop this criticism of the Authority's Final Report Albion seeks access to the accounting evidence relating to the actual construction costs of the LG main.
68. Albion is anticipating that disclosure of this evidence may highlight deficiencies in the evidence and documentation before the Authority and may also be used by it to explore more generally the underlying issues in the case.
69. Although in its letter of 4 April 2007 Dŵr Cymru mentioned the LG main to the Authority, the Authority did not pursue this as an avenue of enquiry for the purposes of its Final Report. It was only five days before the date for submission of the Final Report to the Tribunal that Albion first raised with the Authority the LG main as a possible cost comparator. As a matter of administrative procedure, we consider that the course taken by the Authority in these circumstances to have been reasonable.
70. There are undoubtedly areas of factual conflict in this case but their resolution by way of comparative evidence relating to the LG main, which is in an area of different topography and has different pipeline dimensions and lengths, would be very time-consuming, would not be a proportionate exercise and is not in our judgment necessary for the Tribunal's determination of this appeal, having regard in particular to the other comparative evidence already available.

71. In the further judgment the Tribunal decided that it would be better if there were to be a short further investigation “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”, before a final conclusion was reached on the issue of abuse (see paragraph 247 of the further judgment). The referral back did not anticipate detailed investigation of the costs of laying other non-potable water pipelines. How the Authority went about its further investigation was, in the first instance, a matter for it. We do not consider that it would be appropriate or proportionate for the Tribunal to order disclosure of this accounting evidence which the Authority did not consider.
72. In our judgment, therefore, Albion has failed to satisfy us that documents concerned with the LG main costs are relevant or necessary or proportionate for the fair and just disposal of the appeal.

## **V CONCLUSION**

73. For the above reasons we unanimously grant Albion’s application for disclosure in respect of the letter of 17 March 2003 and the unredacted Dŵr Cymru documents, but, as regards the LG main costs, the application for disclosure is refused.

Marion Simmons

Antony Lewis

John Pickering

Charles Dhanowa  
Registrar

Date: 17 January 2008