

Neutral citation: [2003] CAT 4

IN THE COMPETITION COMMISSION

Case No. 1012/2/3/03

APPEAL TRIBUNAL

New Court,
Carey Street,
London WC2A.2JT

21st March, 2003

Before:
SIR CHRISTOPHER BELLAMY
(President)

SHEILA HEWITT
PROFESSOR GRAHAM ZELICK

BETWEEN:

AQUAVITAE (UK) LIMITED

Applicant

and

THE DIRECTOR GENERAL OF THE OFFICE OF WATER SERVICES

Respondent

supported by

NORTHUMBRIAN WATER

Intervener

Mr Michael O'Reilly appeared for applicant.

Mr Jon Turner and Miss Valentina Sloane appeared for the respondent.

Mr Robert Vidal appeared for the intervener.

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JUDGMENT

1 THE PRESIDENT: In this case the appellant, Aquavitae (UK) Limited has lodged an appeal before
2 the Tribunal in which Aquavitae contend that the respondent, the Director General of the
3 Office of Water Services, has taken a decision under the Competition Act, 1998 to the effect
4 that certain statutory water undertakings have not infringed what is known as the Chapter II
5 prohibition (abuse of dominant position) by refusing to supply water to Aquavitae on
6 reasonable wholesale terms so as to permit Aquavitae to enter the water market as a retailer of
7 water.

8 At this stage of the proceedings the issue before the Tribunal is whether or not the
9 respondent Director has, in fact, taken a decision which is capable of being appealed to the
10 Tribunal under section 46(2) of the 1998 Act, namely, a decision as to "Whether the Chapter II
11 prohibition has been infringed."

12 The Director says in effect that he has taken no decision under the 1998 Act and that
13 the whole matter of the retail supply of water in the manner suggested by Aquavitae is at the
14 moment a subject of the Water Bill pending before Parliament.

15 Aquavitae relies for the contention that there is a relevant appealable decision in this
16 case principally on two letters of the Director of 4th September, 2002 and 5th December, 2002.
17 There are several copies of the letter of 5th December, 2002 which concerned identical
18 complaints against a number of water companies.

19 In the course of the case management conference today Aquavitae has sought
20 disclosure of certain categories of documents which it says are potentially relevant to the
21 question of whether or not the Director has taken an appealable decision in this case. Those
22 documents are in effect:

- 23 (a) Correspondence between the Director and other water undertakings in relation
24 to Aquavitae's attempts to obtain wholesale supplies.
- 25 (b) The covering letter to water companies that was (or according to Aquavitae
26 could have been) sent out with the Director's letter of 4th September, 2002,
27 which was apparently given general circulation in the water industry.
- 28 (c) Documents relating to the introduction of retail competition in the water sector,
29 with particular reference to infringements of the Competition Act, passing
30 between the Director and other water undertakings.
- 31 (d) The documents relating to the Director's response to the Government
32 consultation exercise which finished in 2002 and which related to the question
33 of whether a form of retailing should be introduced in the water sector and, if
34 so, how that should be done.

35 The basis for the application for disclosure is that these documents would, or might
36 show that by 4th September, 2002 (which is the document upon which the applicant principally
37 relies) the Director had fully appraised himself of all significant issues in relation to water
38 retailing and therefore was speaking in his letter of that date with confidence and authority on

1 the matter, or at least to a degree beyond that which may appear on the face of the documents.
2 Similar arguments are advanced in relation to each category of documents.

3 It is submitted that in accordance with the developing case law of the Tribunal and the
4 principles summarised at paragraph 122 of the Tribunal's recent decision in the *Claymore* case,
5 the question of whether or not there is a decision has to be decided in accordance with the
6 particular circumstances of the case, and that these documents form part of the circumstances
7 and are likely to throw light on the issue before the Tribunal. In particular *Aquavitae*
8 emphasises that there has been a course of correspondence with the Director on the
9 Competition Act issue since the end of 2001/beginning 2002 which is material to the question
10 of what view the Director would, or might, have formed by September, 2002.

11 Mr Turner, for the Director, strongly resists this application on the basis that
12 documents of the category identified by the appellant are not relevant to the issue before the
13 Tribunal. The Tribunal should determine the matter of whether or not there is a decision
14 objectively without going behind the documents that it already has before it. The previous
15 decisions of the Tribunal, particularly in the *Freeserve* case at paragraph 91, indicate that the
16 test should be as straight forward as possible so that complainants should know what their
17 rights are. The same applies to the Director, says Mr Turner, and it would be a grave step if the
18 Tribunal were to open up issues of the kind now before it, to the potentiality of wide disclosure
19 of the kind sought by *Aquavitae*.

20 Taking the various documents to which we have been referred, we note first ,that the
21 Tribunal does have jurisdiction to order disclosure of documents in an appropriate case under
22 Rule 17(2)(k) of the Tribunal Rules. That disclosure is not, however, automatic and should, in
23 the view of the Tribunal, be done only if it is necessary for a fair and just disposal of the case
24 before it.

25 Looking at the various categories of the documents referred to, and taking them first of
26 all in reverse order, as we understand it the Director's response to the Government consultation
27 in the course of 2002, in its final form, is a public document that is freely available, so no issue
28 as to disclosure arises in relation to that.

29 In relation to the Director's internal documents that were part of the preparation of his
30 consultation response, it seems to us that that is, as a category of documents, in principle too far
31 distant from the issues in the present case to be likely to be relevant to the matters that we have
32 to decide. We are not, therefore, persuaded that documents of that character should be subject
33 of an order of disclosure.

34 On the submissions we have received so far we are of a similar view in relation to
35 another, rather general, category of documents sought by the applicant, that is to say the
36 documents relating to the introduction of retail competition passing between the Director and
37 other water undertakings with particular reference to the Competition Act. Documents of a
38 general nature concerning retail competition seem to us to fall into a rather wide category, and

1 that is not a category of documents that we are persuaded should be the subject of a disclosure
2 order at this stage of the proceedings.

3 Those first observations are, however, subject to the following caveat, which also
4 relates to the two other categories of documents which Aquavitae seeks, namely documents
5 passing between the Director and other water companies in relation to Aquavitae's attempts to
6 obtain wholesale supplies, and any covering letter there may have been to the letter sent to the
7 water companies on 4th September.

8 The caveat we would make is as follows - and this is in essence our approach to the
9 application that we have heard this afternoon. In general, as I have already said, the Tribunal is
10 slow to order discovery on the issues that I have mentioned without good reason. However, it is
11 true that it is sometimes difficult for a complainant who has only limited access to the
12 Director's documents to feel confident that everything that could bear on the issue that the
13 complainant raises is, in fact, before the Tribunal.

14 We have noted that in the *Freeserve* case, very properly and without any prompting
15 from the Tribunal, the procedure followed by the Director in that case was that the Director
16 gave voluntary disclosure of all documents passing between him and the company complained
17 against in that case, British Telecom, at a stage when the question of whether there was an
18 appealable decision in relation to certain activities of British Telecom, was the issue before the
19 Tribunal.

20 In our view it is a general principle of proceedings before the Tribunal, as indeed
21 before any Court in this country, that a party to the case should not withhold documents that
22 might adversely affect his case or might support the case of his opponent. That is essentially the
23 underlying principle of disclosure of documents as now set out in Part 31 of the CPR. We are
24 quite sure in this case that the Director would not wish to seek to withhold any documents
25 which, on a fair reading, might support the case that is now made by Aquavitae on the question
26 of whether or not there is a decision.

27 It seems to us in those circumstances that the first step in dealing with this matter is to
28 invite the Director to consider whether he has in his possession any documents which might
29 adversely affect his own case or support the case made by Aquavitae on the issue now before
30 the Tribunal, namely, whether or not the Director has taken an appealable decision. We are
31 quite sure that the Director would not wish to make submissions to the Tribunal that he had not
32 taken such a decision, knowing that there was in his possession a document (or documents) that
33 suggested the contrary. At this stage, of course, as I have said, we invite the Director simply to
34 make a voluntary examination of what documents there are in his possession, and notably
35 documents relating to Aquavitae by name, and to give disclosure in the way that I have just
36 indicated.

37 In other words, what we propose to do at this stage is to invite the Director to consider
38 and, if so advised, give voluntary disclosure of documents of that kind.

1 We can if necessary consider any further steps when we see how that first exercise has
2 gone. Given the timetable that we have, we would suggest, subject to argument, a period of 14
3 days should be sufficient for that exercise to be undertaken.

4 We wish to say that that is an indication that we have given on this matter in the
5 circumstances of this particular case. We take the view that it is no more than an indication of
6 what we would conceive to be the general duty of a public authority anyway, that is to say not
7 to conduct litigation knowing that it had documents which supported the case being made
8 against it by the citizen.

9 We go no further than that, and we are certainly not suggesting that it is appropriate,
10 where the issue is whether the Director has taken the decision under the 1998 Act, to conduct
11 any roving or far reaching exercise of disclosure in order to throw light on what the Director
12 did or did not do. In the normal course of events it will be sufficient to rely on the documents
13 before the Tribunal, but as a precautionary measure we think, as a matter of practice, that it is
14 an appropriate check if a search is made so that the Tribunal can be satisfied that nothing has
15 been inadvertently overlooked in the material placed before it.

16 So that is how we propose to deal with this application, namely, to invite the Director
17 to make any voluntary disclosure that he feels appropriate within 14 days of today. We will
18 give liberty to restore this application thereafter depending on how matters turn out.

19 MR TURNER: Sir, may I just take instructions?

20 THE PRESIDENT: Yes, of course.

21 MR TURNER: (Pause) Sir, on the principle, we entirely accept that. We do endorse that and,
22 indeed, it was recently emphasised by the Court of Appeal I believe in a case, the name of
23 which eludes me, by Laws LJ.

24 THE PRESIDENT: Yes, I am reassured that there is Court of Appeal authority on the matter.

25 MR TURNER: It may be *Quark Fishing* but I can check. In any event, we are very sensitive to that
26 duty.

27 So far as the obligation is concerned, we shall comply with that and, indeed, if we can
28 find documents sooner than 14 days, given the timetable, we should and will do that.

29 An important concern that had been voiced to me while the Tribunal were conferring
30 was the difficulty, in particular with something as big as the consultation on the Bill, of
31 searching. But certainly, if one proceeds on the basis that we know what the issue in the case is
32 and that we are looking primarily, to start with at any rate, the documents of the two categories
33 that the Tribunal has mentioned, then we shall comply.

34 THE PRESIDENT: I am very grateful, Mr Turner - I did not expect any other response, of course.
35 Yes, Mr O'Reilly?

36 MR O'REILLY: Thank you, Sir.

37 THE PRESIDENT: We will not make any order for the costs of today, the costs of today are
38 reserved, and matters will now proceed according to plan, I hope, and there is liberty to apply

1 generally on anything that arises.

2 MR O'REILLY: I am most grateful, Sir.

3 MR TURNER: Sir, I am very conscious of the hour but there are two small matters I ought to
4 mention.

5 THE PRESIDENT: Yes, Mr Turner.

6 MR TURNER: The first is a matter that was flagged in paragraph 5 of the skeleton, and it has
7 become clarified that the case relates to all of the water companies - that is made absolutely
8 plain in the clarification.

9 THE PRESIDENT: Yes.

10 MR TURNER: The point that has been made to me is that the water companies reading the
11 Tribunal's notice and seeing the website may not appreciate that it directly concerns them and
12 therefore there may be an interest in amending that to make that clear.

13 THE PRESIDENT: I was wondering quite how to deal with that, because that means another notice
14 in the Gazette, and it means another time period starts running. We do not know, the Tribunal,
15 who all the water companies are, but presumably the Director does. I wonder whether the
16 respondent would be kind enough to write to all the water companies and point out that there is
17 a possibility to intervene in the case, if they so wish.

18 MR TURNER: Yes. That is a sensible suggestion.

19 THE PRESIDENT: Thank you very much - I see nodding behind you. I do not know that we
20 necessarily want to encourage an avalanche of intervention, and there may be some way in
21 which the industry view could be adequately represented by someone representing all of them
22 or some of them, or something, I do not know, but they should at least be given the opportunity
23 of knowing what is going on and be alerted to the fact that it could potentially affect them, or
24 they might have an interest in it.

25 MR TURNER: Yes.

26 THE PRESIDENT: So could we just ask the Director whether perhaps in seven days he could write
27 to the statutory water undertakings---

28 MR TURNER: We shall do that.

29 THE PRESIDENT: ---telling them of the existence of the proceedings and drawing the possibility of
30 intervention to their attention.

31 MR TURNER: I am obliged, Sir. The second point relates to the time for filing the defence,
32 because it was not specifically addressed. As the Tribunal is aware, as matters stand, under the
33 Rules it remains 4th April until an order is made. The suggestion had been, as the Tribunal will
34 have seen, that the time should be extended, with liberty to apply, until two weeks after the
35 delivery of Judgment on the preliminary issue.

36 THE PRESIDENT: Yes, that is reasonable, unless Mr O'Reilly has any point?

37 MR O'REILLY: No, Sir.

38 THE PRESIDENT: Very well. It has gone on a bit longer than anticipated, but I think we are better

1 informed all round. Thank you all very much indeed.
2 MR O'REILLY: Thank you, Sir.
3 THE PRESIDENT: We look forward to seeing you in due course.
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