IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1603/7/7/23
1628/7/7/23
1629/7/7/23
1630/7/7/23
1631/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 23rd – Friday 27th September 2024

Before:
The Honourable Mr Justice Roth
Professor Alasdair Smith
Ian Forrester KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:
Professor Carolyn Roberts

Proposed Class Representative

v

(1) **Severn Trent Water Limited & Severn Trent PLC**
(2) **United Utilities Water Limited & United Utilities Group PLC**
(3) **Yorkshire Water Services Limited & Kelda Holdings Limited**
(4) **Northumbrian Water Limited & Northumbrian Water Group Limited**
(5) **Anglian Water Services Limited & Anglian Water Group Limited**
(6) **Thames Water Utilities Limited & Kemble Water Holdings Limited**

Proposed Defendants

-and-

The Water Services Regulation Authority ("Ofwat")

Intervener

A P P E A R AN C E S

Aidan Robertson KC, Benjamin Williams KC, Julian Gregory & Lucinda Cunningham (On behalf of Professor Carolyn Roberts)
Mark Hoskins KC, Matthew Kennedy, Anneliese Blackwood & Daisy Mackersie (On behalf of the Proposed Defendants)
Jessica Boyd KC and Daniel Cashman (On behalf of the Intervener)

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Monday, 23rd September 2024

(10.30 am)

HOUSEKEEPING DISCUSSION WITH MR ROBERTSON

MR JUSTICE ROTH: Good morning. I start with a warning. These proceedings are being live streamed, as are all proceedings before this Tribunal. An official recording of the proceedings is being made and an official transcript will be produced, but it is strictly prohibited for anyone else to produce any recording or take any image of the proceedings and to do so is punishable as a contempt of court.

We have got, I think, an agreed timetable. We are grateful to the parties for going along with that. We are also very grateful to Ofwat for being represented before us and for the written submissions that Ofwat has put in. We are conscious of the costs of these proceedings for everyone and it may be after the first two days dealing with the issues about the scope of application of competition law that Ofwat need no longer attend the proceedings. I think that may suit you, Ms Boyd.

The other preliminary matter to mention is that, as I mentioned a moment ago, a transcript is being made. The transcriber is operating remotely, but for their benefit we will take a short break mid-morning and again mid-afternoon.

Yes, Mr Robertson.

MR ROBERTSON: Sir, I appear for Professor Carolyn Roberts, the Proposed Class Representative in six applications for a collective proceedings order. I appear at this hearing with Mr Ben Williams KC, who will be addressing you on funding issues, Mr Julian Gregory and Ms Lucinda Cunningham, and I will tell you shortly how we propose to divide up the submissions between us.

The Proposed Defendants in these six sets of parallel proceedings are represented at this hearing by Mr Mark Hoskins KC leading Ms Anneliese Blackwood, Ms Daisy Mackersie and Mr Matthew Kennedy. In addition to those counsel for the Parallel

Defendants, Mr Jack Williams is here for Northumbrian Water. He tells me he is only here to assist the Tribunal in the unlikely event that any Northumbrian specific queries or matters arise.

For Ofwat, as you have already noted, Ms Jessica Boyd KC is here leading Mr Daniel Cashman.

MR JUSTICE ROTH: Sorry to interrupt you. Just to clarify that, apart from any Northumbrian specific matter that might arise I understood that in all other respects Northumbrian Water is being represented by Mr Hoskins and the team you have mentioned. Is that correct?

MR HOSKINS: That is correct, Sir. All the submissions are on behalf of all the Proposed Defendants.

MR JUSTICE ROTH: Thank you.

MR ROBERTSON: On housekeeping matters, skeletons were exchanged last Monday. There are now bundles, as the Chair has directed. There is a hard copy bundle divided into eight volumes. Volume 5 is in two lever arch files. Volume 6, authorities, is in five lever arch files and Volume 2 is in two files.

MR JUSTICE ROTH: It is not quite what we directed, Mr Robertson, because the parties were asked to produce a bundle of the key authorities. We had, hoped, therefore, to have at most one or two bundles. I think what has been produced is not what we asked for, every single conceivable authority in hard copy. So that is unfortunate.

MR ROBERTSON: That is noted. That was actually a pretty big task in a short period of time.

MR JUSTICE ROTH: Well, it would have been a smaller task if less had been copied.

MR ROBERTSON: Hopefully we will not refer you to unnecessary authorities.

MR JUSTICE ROTH: Well, I suspect of all those six volumes of authorities no more

than about a dozen cases will be referred to in this hearing.

MR ROBERTSON: As for the timetable, so we have an hour in opening. I am going to do -- I am going to sit down in a couple of minutes after giving this short outline. I am then going to hand over to Mr Gregory, who will outline the nature of Professor Roberts' proposed claims and he should be finished by 11.30, certainly by the transcriber's break.

It will then be open to the Parallel Defendants for their submissions on what have been termed the “non-vanilla” issues. It is a term I don't like. It is just the additional issues.

MR JUSTICE ROTH: I don't think any one particularly likes it. Perhaps we can drop that expression and call them the issues of scope or the exclusion issues.

MR ROBERTSON: Yes. Call them by their real names. There are two of them anyway. So Mr Gregory is going to deal with certification issues on Wednesday. I am going to deal with the additional issues that we just discussed. Mr Gregory is going to deal with the certification issues. If there are additional matters that arise from Ofwat's skeleton or on Yorkshire Water -- we don't think there is going to be -- if there are, I am going to hand over to Ms Cunningham on those. As I have already indicated, funding issues will be addressed for us by Mr Williams, KC, and that's timetabled for Thursday.

MR JUSTICE ROTH: There is a suggestion in the skeletons that the funding issues were narrowing and that there were some further exchanges going on. So, if they have narrowed further, if at some point before Thursday it would be helpful to know.

MR ROBERTSON: Noted and we will take instructions.

MR JUSTICE ROTH: The other thing just on timetable, I think it would be helpful to us before we hear on behalf of the Proposed Defendants to hear from Ms Boyd just to clarify the point about price regulation that I think was raised by letter from the Tribunal this morning. Perhaps after at 11.30 if you could address us very briefly on that just to explain how it works for business customers.

MR ROBERTSON: Sir, I will now hand over to Mr Gregory.

MR JUSTICE ROTH: Thank you.

Submissions by MR GREGORY

MR GREGORY: Sir, members of the Tribunal, I am going to take you through some of the key elements of the claims and the proposed methodology. I will focus particularly this morning on those relevant to the exclusion issues so that you can consider those issues today and tomorrow in the light of how Professor Roberts puts her case. If there are other elements of the claims and the methodology that you would like to be addressed on, I will be very happy to do that when I address you on certification on Wednesday.

Having read the skeletons, you will be familiar with the broad outline of the Claims. The alleged breach of section 18 of the Competition Act, the Chapter II prohibition, the defendant sewerage companies are statutory monopolists in their areas of appointments, and it is common ground that they are not subject to any competitive pressure when supplying sewerage services to household customers. Sewerage companies are regulated because, from an environmental perspective, sewage spills pose a threat to wildlife, the environment and public health. And from an economic perspective, because absent regulation, the sewerage companies will be in a position to charge monopoly prices. Because of that they are subjected to a price control regime operated by Ofwat, which limits the prices they can charge.

The regime provides them with financial incentives to improve their performance against certain targets, performance commitments. If they out-perform the targets, Ofwat increases the total amount of revenue, the revenue allowance that they are allowed to charge customers for sewerage services. If they underperform, their revenue allowance is reduced. It is a stick and carrot regime.

Some of the targets concern the number of certain categories of pollution incidents, discharges of sewage on their networks. The claims allege that the defendants have misled Ofwat and the Environment Agency, the EA, by under-reporting the number of sewage discharges relevant to their pollution incident targets in two charge control periods, PR14 and PR19. If they have under-reported, they will have been permitted to charge household customers higher prices than they would have been permitted to charge if they had reported accurately.

Professor Roberts' preliminary estimates, and these are admittedly rough and ready at this stage in the absence of data disclosure, suggest that across the six areas of appointment customers may have been overcharged somewhere between around £800 million and £1.5 billion.

It has been observed that these are the first collective proceedings with a strong environmental dimension that have been brought before the Tribunal and there obviously is a broader context, which anyone watching these proceedings from the outside will have in mind. Many people care deeply about the state of our rivers and bathing waters, to which sewage spills can be incredibly damaging. As the true number of sewage spills has become apparent over the last few years, there has been a public outcry. The government has made addressing this problem a strategic priority for Ofwat, as a result of which the sewerage companies are likely to face a tougher set of pollution incidents with beefed up incentives in the next charge control period.

The claims are far from being irrelevant to these wider policy concerns. If the defendants have been under-reporting spills, they will not have been properly incentivised to reduce the number of harmful discharges. They will have circumvented the stick and carrot regime, one of the objectives of which is to ensure that we have clean rivers.

But in another sense, and more relevantly for this hearing, in substance these claims

are entirely orthodox competition claims. That the defendants are dominant is effectively common ground. The Class Representative's case on abuse, that the defendants have misled their regulators, is based on established authority, and if abuse is established, causation and loss should be relatively straightforward. It is likely to involve simply cranking the handle on Ofwat's charge control methodology.

Perhaps reflecting that, the number of issues that remain live at this hearing is limited. A deluge of points were floated at the first CMC, including up to seven what were then referred to as “non-vanilla” issues, but most are no longer advanced.

Of the two “exclusion issues” that remain, the argument that competition law does not apply to standard monopolists I think can fairly be described as ambitious. We say that the defendants' arguments on section 18(8) of the Water Industry Act is directly contrary to a recent Supreme Court judgment that considered the meaning and scope of that provision at great length.

As to the certification issues, the class definition issue is not a potential bar to certification. It only goes to the wording of the collective proceedings order, if one is issued.

As I will explain on Wednesday, the defendants' point about the Class Representative's counterfactual is in truth a dispute as to the merits of the claims, which is not for determination now, and I understand, as you have indicated, Sir, that the points taken on funding have considerably narrowed and we will try to update you about that.

Given that dominance should not be controversial, I am going to use my time now to highlight certain features of the class representative's case on abuse, which is likely to be the main issue in the claims and is relevant to the section 18(8) issue.

The claims have been brought against six defendants. The structure and substance of the claims is materially identical save in a very limited number of respects. It is not

suggested, at least now that the Yorkshire Water issue has been resolved, that any of the differences are relevant to the higher-level strike-out and certification points that are being raised.

The parties have therefore advanced their submissions by reference to materials in a single claim form, the Severn Trent claim, which was the first to be filed, that claim form is at tab 1, in bundle 1, the pleadings bundle, and I would be grateful if you could now turn that up. If you could turn to page 67 within tab 1, paragraph 154 at the bottom of the page and runs over to page 68. It summarises two ways in which the PCR puts her case on abuse.

First, the defendants unlawfully misled regulatory bodies, contrary to the principles laid down in the AstraZeneca case.

Alternatively, the defendants' conduct was abusive in all the circumstances of the case.

That second articulation simply reflects the fact that the categories of abuse are not closed and there is no need to pigeon-hole an allegation of abuse into a pre-existing category.

MR JUSTICE ROTH: It doesn't actually say what the abuse is.

MR GREGORY: Yes. I am about to -- the abuse on --

MR JUSTICE ROTH: The second way of doing it. You say it is an abuse on two bases and the second is just in the circumstances. It's not really a basis, is it?

MR GREGORY: No. Paragraph 164 of the claim form headed “Misleading abuse in this case” is where the case on abuse on the facts is set out. That's the main element that I am going to focus on. Just covering some of the legal principles first, paragraph 157 summarises some basic principles relating to the abuse of dominance, including at sub-paragraph (1), that a dominant undertaking has a special responsibility not to engage in exploitative abuses that harm customers, and at sub-paragraph (3) that

conduct can be abusive even if it was commonplace in the market.

Paragraph 158 notes various authorities confirming that the competition rules apply to activities even though they are subject to detailed regulatory rules, including the misuse of regulatory procedures.

Paragraph 159 highlights that both the Tribunal and Ofwat have stated that the Competition Act applies in the water and wastewater sector.

Those points provide the legal backdrop to the two issues that Mr Robertson and Mr Hoskins will address you on and at this stage I would be grateful if you could just quickly read those two paragraphs. That's paragraph 157 and 158. (Pause.)

Page 72 identifies the main authority on which the claims are based is the AstraZeneca case which concerned that company's misuse of the patent system. We rely on it, in particular, for the proposition that a dominant undertaking can commit an abuse by providing misleading information to public authorities. Other legal propositions from the two judgments of the General Court and the Court of Justice are set out at paragraph 162.

Whatever they may say at trial, the defendants have not challenged certification or applied to strike out the claims on the basis that those principles obviously are inapplicable to the facts here.

So, if you would like to be taken through those two judgments, I am very happy to do that, but with your permission I would do that on Wednesday. They are quite lengthy, and I will have more time then to do it.

Turning to the Class Representative's case on abuse on the facts, this is set out from paragraph 164 and following to paragraph 168 on page 73. The abuse is said to be the provision of misleading "PI Information", which is the collective definition, Ofwat's PI Information and EA's PI Information. I will take you to where those terms are defined in a moment, but broadly that is the information relating to sewage discharges

that the defendants were required to report to Ofwat and the Environment Agency under the relevant regulatory provisions.

As they set out our central case on abuse and are relevant to the section 18(8) issues, I would be grateful if you could please read to yourselves paragraphs 164 to 168. (Pause.)

Two points of emphasis. Our case is that the defendants significantly and/or systematically under-reported the number of relevant pollution incidents. We are not saying that a sewerage company would commit an abuse simply as a result of having to report a single incident, for example, as a result of an isolated, administrative error. The alleged abuse is broader than that and demands an 'in the round' assessment.

To give you some idea of the scale, we have only analysed detailed network monitoring data from Thames Water, which has been the most open in terms of publishing it, but our preliminary analysis suggests that Thames alone may have wrongly failed to report more than 6,000 discharges.

It would clearly be impractical and disproportionate for the Class Representative to try to prove her case through a bottom-up analysis based on an exhaustive consideration of the circumstances surrounding thousands of individual discharges. As you will see, her proposed methodology instead identifies a method that can be applied to large volumes of data and in certain instances, it is going to be necessary to rely on assumptions and estimates, the so-called 'broad axe' approach referred to in the case law.

The next few paragraphs here go on to say that Professor Roberts' case is consistent with the General Court's judgments in AstraZeneca, that the misleading nature of information falls to be determined objectively, but in any event that she is not in a position to set out her case on the defendants' state of mind at this stage of proceedings prior to disclosure.

I will now turn to the defendants' reporting obligations and would be grateful if you could turn back in the same document to page 46. This is part of the section outlining the factual and regulatory background. I will take you through this reasonably quickly. Paragraph 97 identifies various types of sewerage network assets: sewers, treatment works, storm tanks and so on.

Paragraph 99 explains that:

It is a criminal offence:

1. To operate a "water discharge activity" without a Permit.

2. To cause or knowingly permit the discharge of wastewater, except under and to the extent authorised by a Permit, and

3. To fail to comply with or to contravene a Permit condition.

Paragraph 101 explains that permit requirements vary by asset type, even by individual asset. The common term items include provisions saying that discharges can only take place at specified locations, requirements for sewerage companies to undertake various types of monitoring, including the installation of specific types of equipment and provisions permitting discharges only when the asset is at or above capacity in terms of the rate of flow coming into it due to rainfall or snow melt.

The terms of the defendants' permits are going to be significant for the methodology for reasons that will become apparent. As a result, in due course, we will need disclosure in some form from the defendants of the relevant permits or at least the permit conditions.

Paragraphs 102 to 105 explain that while the terms of permits vary, a common and readily understandable requirement is that the asset should not discharge untreated sewage into the environment, unless it is above capacity due to unusually heavy rainfall or snow melt.

The key terms of that particular condition are set out in paragraph 102. You can see

from the italicised text in particular. The 'flow pass forward' is the rate of flow into the asset while the ‘overflow setting’ is a rate of flow just below the asset's capacity.

Our understanding is that this particular condition is found, in particular, at treatment works and combined sewer overflows and potentially at other types of assets as well.

Paragraph 103 defines an 'Early Spill' as a discharge that is in breach of permit because it occurred when the asset was below capacity. The flow passed forward was less than the overflow setting and a 'Dry Spill' is a discharge that is in breach of permit because it was not caused by a rain or snow melt.

Permits for these types of assets, with this condition, typically require sewerage companies to have in place monitoring equipment that allows them to identify the rate of flow, as you would expect, as otherwise they would not be able to tell whether or not they were complying with their permit conditions.

Increasingly over time permits have also required them to install event duration monitors or “EDMs”, devices that can detect when an asset is discharging into the environment based on the level of wastewater, for example, in a storm tank.

In very broad terms, Professor Roberts' methodology involves analysing flow and EDM data, along with rainfall data, to identify spills in breach of permits that were not reported.

Reporting obligations to the Environment Agency are covered at paragraph 106 and following on page 50. Sewerage companies are required to report certain sewage discharges to the Environment Agency both under their permits and under the legislation. The Agency has issued guidance defined in the Claim Form as the EA guidance, referred to by the defendants as the 'Self Reporting Guidance', to help the sewerage companies comply with their obligations.

MR JUSTICE ROTH: So, these are legal obligations to report to the Environment Agency?

MR GREGORY: They are binding legal obligations in the permits and in legislation. The Environment Agency has issued guidance which is intended to help the sewerage companies understand what is required to comply with those binding requirements.

MR JUSTICE ROTH: Binding requirements, because I may have misunderstood it from what I read, include reporting to the Environment Agency.

MR GREGORY: Yes. The self-reporting guidance refers to another piece of guidance issued by the Agency. It is classification guidance that lays down a four-tier system categorising sewage discharges, Category One being those that have the most serious effects on the environment and Category Four being those with no impact on the environment. The Agency determines what category discharges should be placed into after they have been reported to it.

Turning ahead to paragraph 114, EA PI information is defined as the information relating to pollution incidents that the defendant was expected to report to the Agency under that guidance.

MR JUSTICE ROTH: When you say "expected", do you mean obliged?

MR GREGORY: Yes.

MR JUSTICE ROTH: It is not the same thing, is it?

MR GREGORY: Well, we say there are binding obligations imposed on them to report under the permits and the primary legislation.

MR JUSTICE ROTH: To the EA as well as to Ofwat?

MR GREGORY: To the EA. I am coming on to the reporting obligations to Ofwat in a moment.

MR JUSTICE ROTH: So where in 115 it says "expected", we can say that what you mean is obliged.

MR GREGORY: Yes. We have not seen at this stage any evidence casting light on how the Environment Agency applied their guidance. We are assuming that it applied

it properly and consistently with its terms and the underlying legislation and permit requirements.

Let me briefly show you a few passages from the self-reporting guidance. It is at bundle 5, volume 2, tab 15. The first page of the guidance is at page 543.

MR JUSTICE ROTH: This is the EA self-reporting guidance or --

MR GREGORY: Yes. It is the Self-Reporting guidance.

MR JUSTICE ROTH: It says that it's – 'Operational Instruction' is what it's called, but it's -- this is what --

MR GREGORY: Yes, there are two sets of guidance in that. Self-reporting guidance starts on page 543. The operational instruction is 16 02, issued on 1st November 2012.

MR JUSTICE ROTH: Yes.

MR GREGORY: I am grateful. If you could turn forward to page 550, the guiding principle for self-reporting is that:

"the water companies should self-report as an incident, any event which may have an environmental and/or operational impact on the Environment Agency" -- I think that should say the “environment” -- "as defined in our CICS guidance."

That was the Classification Scheme guidance.

In addition, however, halfway down that page next to the heading "Water company asset types".

"Water companies operate a wide range of assets. The guidance sets out the principles for incident reporting and categorisation for each asset type."

You can understand why different reporting obligations may apply to different types of asset. Sewers, for example, are often underground. Treatment works, in contrast, are above ground, are often manned and are generally required to have various types of monitoring equipment installed.

If you look at the top of page 551 -- this is the guidance for sewers:

"Sewers do not have permits to discharge from any point other than from a permitted discharge point such as a CSO ("Combined Sewer Overflow"). If the operator observes or becomes aware of a discharge from a sewer… the water company should report the event to the Environment Agency."

So, for sewers they are only required to report discharges that they know about. Lower down the page you see the guidance for Combined Sewer Overflows, ("CSOs").

"CSOs and other intermittent discharges usually have permits, and are designed to operate within the conditions of the permits. Water companies should report to the Environment Agency a discharge from a CSO if it is not compliant with its permit… Some CSO permits require the water company to notify the Environment Agency of all operations of the CSO or spills. CSO spill notifications must be made in order to comply with the permit."

So, there is no knowledge requirement there.

Then if you turn over to page 553, this page concerns treatment works, including their storm tanks. Halfway down the page under the subheading "Storm tank discharges".

"The water company should report to the Environment Agency a discharge from a storm tank if it is not compliant with its permit."

Again, there is no knowledge requirement. Whether the reporting obligation has a mens rea element, varies by asset type. With several types of assets, sewerage companies are required to report all discharges in breach of permit. To the extent there is a mens rea requirement for some assets, evidence may be required in respect of the arrangements that each defendant had in place to monitor discharges, such as logs of alarms signalling discharges and so on.

Relatedly, I would be grateful if you could now turn back to the claim form in bundle 1. Page 54, paragraph 119. I think that's the last paragraph that I am going to ask you

just to read to yourselves, please. (Pause.)

This is just one area -- permit conditions are another -- where there is a significant information asymmetry between the claimants and the defendants and that is not uncommon in competition claims, and in particular, in collective proceedings claims brought on behalf of a class of consumers. And it will likely be necessary in due course for the class representative to plead out her case further and develop her methodology in the light of what she learns through disclosure.

Turning to the company's reporting obligations to Ofwat, this is addressed in paragraph 120 on page 54. This section provides quite a lot of detail about Ofwat's Charge Control regime. For present purposes it is sufficient to note that Ofwat's Performance Commitment pollution incident targets are based on the Environment Agency's four-tier system for categorising discharges.

If you turn ahead a few pages to page 61, paragraph 136 sets out the Performance Commitment targets of Severn Trent. Sub-paragraph (2) sets out the PR19 target which was common across the sector – based on the number of incidents in categories 1 to 3. In PR14, the earlier period, different companies had different targets. The sub-paragraph (1) sets out Severn Trent's targets in PR14. The first, S-C2, was based on the total number of Category 3 pollution incidents. The second, S-C7, was partially based on the number of Category 1 to 3 incidents, but also on targets in other areas unrelated to pollution incidents, so-called composite targets.

Performance against all of these targets fed through into the defendants' Revenue Allowance, the total amount it was allowed to charge customers for supplying sewerage services. The company's reporting obligations to Ofwat arise under their Conditions of Appointment, sometimes referred to as their Licence Conditions.

Those obligations are summarised at paragraph 140 on page 64. "Under its Licence conditions, and related provisions made under them, the Defendant has at all material

times been under a duty to provide Ofwat with information relevant to the PI Performance Commitments and related ODIs." ODIs are outcome delivery incentives. They are a financial number which you multiply the amount that the company has over-performed or under-performed the target to identify the revenue adjustment to the revenue allowance -- including, in particular, details of a number of relevant pollution incidents on its network during the infringement period.

The following few paragraphs summarise the relevant Licence Conditions. You can see from paragraphs 147 and 148 that, in each Claim Form, the information relevant to that defendant's pollution incident performance commitment is defined as Ofwat PI Information.

I now come to methodology. I do not have time now to go through the PCR's preliminary methodology in detail. Instead, and with an eye on the section 18(8) issue, I will simply cover a few points that highlight how, one, the findings that the Tribunal will be asked to make in these proceedings and, two, the basis on which it will be asked to make them, will be different from those in proceedings concerned directly with breaches of the relevant regulatory provisions.

The starting point, of course, is the legal test that the Tribunal will be applying. The ultimate legal issue that the Tribunal will need to determine is whether Professor Roberts has established that the defendants have abused a dominant position contrary to section 18 of the Competition Act, for example, contrary to the principles laid down in the AstraZeneca case. That is obviously not a legal issue that would fall for determination by Ofwat or the Environment Agency proceedings which are concerned with breaches of the relevant regulatory obligations. On the facts, the alleged competition law abuse as pleaded is that each of the defendants significantly and/or systematically understated the number of pollution incidents relevant to their PR14 and PR19 performance commitments.

If the PCR makes good that allegation, it is possible that you may be able to infer, depending on precisely what the Tribunal finds in its judgment, that some regulatory infringements are likely to have taken place, but that is as far as it goes, and it does not mean that the Class Representative will have proved regulatory breaches on the same basis, and to the same standard, that would apply in proceedings that were specifically concerned with breaches of those regulatory obligations.

MR JUSTICE ROTH: When you say under-reporting, that means not reporting as required?

MR GREGORY: Broadly, yes, but the methodology -- the principles of evidence the Tribunal will need to apply in these proceedings and which it is permitted to apply under the case law, Merricks, the broad axe approach and so on, will be different from the principles which those bodies, the regulatory bodies themselves, have to apply in regulatory proceedings specifically concerned with the breaches.

MR JUSTICE ROTH: In that there would be a different standard or method of proof?

MR GREGORY: Yes. I think the standard of proof will differ and the method of proof and principles of evidence will differ.

To take an obvious example, whether a discharge that had been reported will often turn on whether it was in breach of the permit conditions. Mr Holt, Professor Roberts' expert, has proposed a method of establishing unlawful dry spills and early spills based on a quantitative analysis of network monitoring data. The defendants have not challenged certification on the basis that that quantitative methodology is not appropriate or is obviously flawed. However, methodological disputes will no doubt --

MR HOSKINS: We do not accept that it is appropriate that we haven't used it, as I say, just that we are saving the objection but not using it to object to certification. Sorry to interrupt.

MR JUSTICE ROTH: You are not objecting to it at certification?

MR HOSKINS: Exactly.

MR JUSTICE ROTH: Leaving it until it is certified. Yes.

MR GREGORY: Methodological disputes will no doubt arise as we look into the merits. Just to give an illustrative example, the defendants may claim that the equipment produces false positives. EDM monitors, for example, getting clogged up with leaves. We might identify false negatives, in periods when the equipment is broken, it may be missing spills. As it will be considering thousands of discharges, the Tribunal plainly cannot conduct mini-trials into each individual incident. Issues of this sort will need to be resolved at a higher level, potentially in quite a rough and ready way.

Take the example I have just given. The Tribunal may need to form a view about the balance between false negatives and false positives and make an appropriate percentage adjustment to the number of spills initially identified as having been in breach of permits. That is a necessary and appropriate course in proceedings of this type and in damages claims for competition law infringements, and it is entirely consistent with the approach of the Supreme Courts in Merricks and the subsequent judgments of the Court of Appeal, including their endorsement of the use of the 'broad axe'.

But a discharge in breach of permit is a criminal offence. Criminal offences have to be proved to a higher standard of proof, beyond reasonable doubt, and while I am not a criminal lawyer, it seems to me unlikely that a criminal court would regard it as acceptable for the Environment Agency to seek to prove criminal offences using the same, potentially quite rough and ready, evidential approaches that are permissible in competition damages claims.

Similarly, I am not aware of any authority saying that it would be open to Ofwat to rely on the broad axe principles for the purpose of proving breaches of the defendants'

Conditions of Appointment.

There is one final point I can make by reference to paragraph 17 of our skeleton, internal page 9. As you have seen, the defendants' Performance Commitment targets are based on the number of discharges falling within specified categories in the Environment Agency's four-tier categorisation structure. As we note in paragraph 17, if a discharge was not reported to the Environment Agency in circumstances where it should have been, for example, because it was in breach of permit, we will never know what category the Environment Agency would have placed it in. Professor Roberts' expert will therefore have to develop a method of estimating which category those unreported discharges would have been placed, in if they had been reported.

At paragraph 18, we set out Mr Holt's summary of his proposed approach. Essentially, he is proposing to look at discharges which were reported to the Agency and identify the characteristics associated with discharges placed in different categories, for example, discharges of longer duration may tend to be placed in higher categories. Based on those insights, he will develop a set of criteria that he would use to estimate which category the Agency would have placed discharges, which were not reported but most likely should have been, for example, because they were likely in breach of permit condition.

Sir, that was all I was proposing to say at this stage in terms of an outline of the claims and the methodology. You are now due to be addressed on the exclusion issues, following which I am due to address you on certification issues, I think that is currently listed for Wednesday morning. As things stand, at that stage I was proposing to focus primarily on the certification issues which have been raised by the defendants. However, of course, the Tribunal itself must be satisfied that the certification criteria are met. So, if there are any additional points the Tribunal would like me to address you on, please say so and I will prepare submissions to address you on, on Thursday.

MR JUSTICE ROTH: Yes.

MR GREGORY: Thank you.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Morning.

MR JUSTICE ROTH: I thought I said that….

MR HOSKINS: I am so sorry. I am just so keen. Sorry.

MR JUSTICE ROTH: I thought I said I would hear from Ofwat, so if you restrain your enthusiasm.

MR HOSKINS: I will curb my enthusiasm.

MR JUSTICE ROTH: Yes, Ms Boyd.

Submissions by MS BOYD

MS BOYD: Sir, the Tribunal wanted to know, I believe, about the application of the price control as regards businesses.

MR JUSTICE ROTH: Yes.

MS BOYD: Perhaps I can give the short answer now and if there are further questions the Tribunal has then we can take those away and see if we can supply something fuller.

The short answer is there is no price control in respect of retail supply to businesses in England where there is no competition. There is a remaining price control in respect of retail supply to businesses in Wales. If it assists, there is a concise explanation of the approach taken in PR19 to business and household retail provision. I will just give you the bundle reference. It is bundle 5, tab 5, pages 140 to 143, which explains the history.

MR JUSTICE ROTH: Yes.

MS BOYD: There is price control in respect of upstream wholesale provision to

businesses, because that provision is still pursuant to statutory licence and is monopolistic. That price control is imposed pursuant to the same price review regime and was the subject of the same determinations in PR19 and is associated with the same performance commitments.

MR JUSTICE ROTH: And PR14.

MS BOYD: In PR14 as well.

MR JUSTICE ROTH: Yes.

MS BOYD: Yes. So, in other words, the same wholesale price controls apply regardless of whether the ultimate downstream customer is a business or a household.

MR JUSTICE ROTH: And the wholesalers who are subject to that price control will be -- is that right -- the water and sewerage undertakings who are the defendants.

MS BOYD: Indeed.

MR JUSTICE ROTH: So, these defendants – the Proposed Defendants in their capacity as wholesalers were subject to price controls as regards the price they could charge to retailers. Is that right?

MS BOYD: Yes.

MR JUSTICE ROTH: And that price control was subject to -- it is the same price control, so, the same as the ODIs and Reporting Incentives. So, if there was under-reporting as alleged of water pollution incidents, that would affect the level of price they could charge to retailers?

MS BOYD: Yes.

MR JUSTICE ROTH: Can you just then explain how does the competition between the retailers work? You said the retailers, that is competitive business.

MS BOYD: The market has been opened. It was opened in 2017. Now this is explained in brief in the reference that I have given the Tribunal.

MR JUSTICE ROTH: Yes.

MS BOYD: But in short, the vertically integrated companies were at that stage given the option of exiting the market as retailers, separating out their business, or being subject to structural controls, and most -- in fact, all of them I believe, exited and they are, therefore, no longer vertically integrated and they compete with each other in the retail provision to businesses.

MR JUSTICE ROTH: So, there are separate retailers, therefore, presumably who deal with businesses?

MS BOYD: Yes.

MR JUSTICE ROTH: If I am a business -- suppose I am a farmer in Lincolnshire and have to take a lot of water to irrigate my crops, I can choose between different retailers -- is that right -- and the retailer can choose between different water undertakings, or it will be confined to the one in that area?

MS BOYD: No. That will be -- the wholesale provision will be subject to a licence and will be monopolistic.

MR JUSTICE ROTH: To the retailer?

MS BOYD: Yes, which is why I say there is a price control at the wholesale level.

PROFESSOR SMITH: Can you help me to understand? I think I can form a picture of what the supply chain looks like from the supply of water. I am less clear how this wholesaler/retailer distinction works in respect of sewerage services.

MS BOYD: Well, the wholesaler would own assets and provide the services that require the use of those assets. The retailer can -- I am speaking, I am afraid slightly off the cuff given this was a question that arose at 9.30 this morning, and we can certainly take these questions away and provide some form of detailed note if there are specific things that the Tribunal would like to understand, but the wholesaler owns the assets and provides the service of supply through those assets, and the retailer

supplies the ultimate downstream customer in the same way as in a telecoms market, the retailer may supply the business or the householder, but using the wholesaler assets for which they will pay wholesale prices.

PROFESSOR SMITH: I look forward to seeing the note.

MS BOYD: Just to assist you could I ask what it is that the Tribunal would really like assistance with? Is it understanding structurally --

PROFESSOR SMITH: It is just to understand the structure. I do understand what it means to have a wholesale/retail distinction in the supply of water.

MS BOYD: Yes.

PROFESSOR SMITH: Because the wholesaler who has -- the wholesaler takes water from whoever -- the wholesaler has a monopoly, but the competing retailers can get their fresh water supplies, supply of fresh water to -- different people can supply fresh water. I am just less clear how that works in the case of sewerage services what the supply chain is.

MS BOYD: We can definitely provide that clarification.

MR JUSTICE ROTH: Would the business take water and sewage from the same retailer, are they supplied together or ...

MS BOYD: Indeed, it may be that Mr Hoskins is able to throw further light on things.

MR HOSKINS: (Inaudible).

MR JUSTICE ROTH: Presumably the wholesale price of the defendants for the business market, it won't be the same as the retail price. They are regulated, that they can charge customers. Is it a different price?

MS BOYD: It is the same regulated wholesale price. Sir, I wonder if it would help to have a look at a table that appears in the final determination-- sorry -- bundle 5, tab 5, page 32.

MR JUSTICE ROTH: Yes. Just one moment.

MS BOYD: Not to look at the detail of this table, but --

MR JUSTICE ROTH: Just a moment. 32. You mean the red number?

MS BOYD: Bundle page 32.

MR JUSTICE ROTH: Page 18 within the document.

MS BOYD: Page 18 of the document.

MR JUSTICE ROTH: Yes.

MS BOYD: At the top you see the two headings "Wholesale Controls" and "Retail Controls".

MR JUSTICE ROTH: Yes.

MS BOYD: On the retail side you can see there is a control as regards to residential and there is a control as regards businesses in Wales.

MR JUSTICE ROTH: Yes.

MS BOYD: On the wholesale side you can see it is not differentiated as between business customers and households. It is the same wholesale control, whoever the downstream customer is.

MR JUSTICE ROTH: It says "Wholesale form of control. Retail form of control".

MR FORRESTER: I am somewhat confused about market reality. In the case of telecoms, the distinction between the wholesale market and the retail market is easy to understand. There is a very big company and then there is a retailer who makes promotions to a local area or a large area saying all the wonderful thing the subscriber will get if he or she goes to that retailer.

In the case of water and sewage, what is it that the retailer contributes in the chain of delivery of services?

MS BOYD: Sir, I am not sure I am in a position to answer that without going away. I mean, this claim is brought obviously on behalf of consumers where there is no competition in the retail provision. We can certainly try and assist by providing more

clarity on the relationship between wholesale and retail supply to businesses and we can also seek to clarify the relationship between the sort of notional wholesale and retail aspects of supply to households, but I think that may -- those may be questions for us to take away unless there are of sort of urgent importance now.

MR FORRESTER: One of the questions we will likely be considering is this issue of monopoly. Does competition happen or doesn't competition happen? Is the role of the state regulation so comprehensive that there are certain consequences and the thought that there's retailers who are competitive animals is an interesting one.

MS BOYD: Yes. Well, as I say, that question doesn't arise in relation to consumers.

MR JUSTICE ROTH: We understand that. We understand it arises potentially regarding the effect of price controls.

MS BOYD: Yes.

MR JUSTICE ROTH: But I think you have probably told us enough for present purposes.

MS BOYD: Yes.

MR JUSTICE ROTH: I think it would be helpful to have a note setting out -- because speaking for myself -- my colleagues may be ahead of me -- I don't find the table terribly instructive -- just explaining how this retail competition works, including the question Mr Forrester asked about how does it actually operate in practice, what retailers do, and if you are able to do that later on -- to have that with us later in the week, that would be helpful.

MS BOYD: We will do our very best, Sir.

PROFESSOR SMITH: If I can have a go at answering my own question and perhaps you or someone can confirm I have got it right: A retailer operating, say, in the area where Southern Water has the monopoly will be supplied with water through Southern Water's pipes.

MS BOYD: Yes.

PROFESSOR SMITH: And will discharge sewage through Southern Water's sewers but has its commercial retail relationship with its clients for passing on Southern Water to its clients and then in return passing on its sewage to Southern Water sewerage. That's the way the supply chain works.

MS BOYD: That is my understanding, Sir.

PROFESSOR SMITH: Thanks. Then I am happy.

MR JUSTICE ROTH: I think what Mr Forrester is raising is what is the -- how do they compete, what are the alternative benefits, the added value that different retailers can offer to attract the customer saying "come to me instead of going to my competitor"?

MS BOYD: What are the dimensions of the retail competition?

MR JUSTICE ROTH: Exactly, because it is easier to visualise in terms of telecoms than it is with water and sewerage.

MS BOYD: We will try to help.

MR JUSTICE ROTH: I think that's the right moment at which to --

MR HOSKINS: Obviously Ofwat are going to provide a note. Would you like us to look at the note in advance of you getting it or do you want us to wait, get it from Ofwat and then if we have anything to add, we can do it? Obviously, we may have something to say. We may not.

MR JUSTICE ROTH: Well, if Ofwat wants to pass it to you for any comment in advance, they can. It is a matter for Ofwat. We are not going to require that. If they don't, clearly you can make any comment on it that you would like.

We will come back in about ten minutes.

(Short break)

MR JUSTICE ROTH: Sorry. Ms Boyd, we have one other question for you, a very basic question. These defendants have all been appointed under the statute as water

and sewerage undertakers. Technically I think you can have separate appointments, but they have all been appointed as both in this case. Is that appointment indefinite or is it for a fixed term?

MS BOYD: Indefinite I am told.

MR JUSTICE ROTH: If a company is regarded by Ofwat as performing very badly as the water or sewerage undertaking, we know it can be subject to fines, but it keeps its appointment indefinitely however badly it conducts itself or ...

MS BOYD: It can be taken into special administration in the right circumstances.

MR JUSTICE ROTH: Then is the operation passed to someone else in due course? Yes. To be that someone else, then rival companies can seek that appointment, can they?

MS BOYD: Sir, can I suggest it might assist if my very helpful instructing solicitor were to answer these questions rather than me.

MR JUSTICE ROTH: I am very happy to hear from her.

Could you stand up, please, and you will need a microphone.

MR HOSKINS: You need a microphone. Do you want to come and use mine?

MS JELLIS: Right. Thank you.

MR JUSTICE ROTH: Could you also for the transcript tell us your name?

MS JELLIS: Jane Jellis.

MR JUSTICE ROTH: Spelt?

MS JELLIS: J-E-L-L-I-S.

MR JUSTICE ROTH: Miss Jellis, are you Ofwat or are you independent of Ofwat?

MS JELLIS: I am a solicitor employed by Ofwat.

MR JUSTICE ROTH: Yes. Thank you.

MS JELLIS: So, a particularly unusual feature of the water industry is that you can have special administration for performance failure, so for breach of one or other of

the principal duties of a water undertaker, one of which is effectually dealing with the contents of sewers. That breach has to be sufficiently severe for it to be appropriate for the licence to be removed from the company.

MR JUSTICE ROTH: Yes.

MS JELLIS: Until that situation the company is then put into administration and that administration regime operates in exactly the same way as any normal administration regime would do under insolvencies. So there are various different forms of exit from that administration. It could either be the dissolution of the company and the transfer of the business of the company to a new owner or alternatively -- and this is a new feature of the regime -- there's also a rescue purpose whereby the company can be essentially financially reorganised and continue in a new and more solvent form. The rescue purpose doesn't apply to a special administration for breach of a principal duty. The purpose of a special administration is to ensure that the company continues to provide the relevant services until either the business is transferred either into a share sale or a business sale.

MR JUSTICE ROTH: Yes. Thank you. That's very helpful.

MR FORRESTER: Is there any experience of that?

MS JELLIS: (Shakes head).

MR FORRESTER: So far it is merely hypothetical?

MS JELLIS: (Nods head).

MR FORRESTER: Thank you.

MR JUSTICE ROTH: Yes, Mr Hoskins.

Submissions by MR HOSKINS

MR HOSKINS: Can I just begin with the task of telling you what our division of labour is? You will hear from me on the two exclusion issues and on the methodology issues.

Mr Kennedy is going to deal with class definition and Ms Blackwood is going to deal with funding.

If I could begin with section 18(8) of the Water Industry Act 1991, so the first exclusion issue. You know what the position of the parties is. We say that the claims that have been pleaded are excluded by section 18(8) of the 1991 Act.

Just to very briefly look at the scheme of the Act, if you could go to authorities bundle 6, volume 4, tab 67 and that should be the Water Industry Act 1991. It is bundle 6, volume 4 on the spine.

PROFESSOR SMITH: Can you say that again?

MR HOSKINS: It says bundle 6 and then volume 4 below that, and it is tab 67.

MR JUSTICE ROTH: I think some have been updated and some haven't is what we are -- can you give us just a moment?

MR HOSKINS: Of course. Do you not have any hard copy bundles?

MR FORRESTER: We do. Apparently some have been updated this morning.

PROFESSOR SMITH: I think the Water Industry Act is the only one that was not in the bundle. This is not going to happen all the time.

MR HOSKINS: If we could begin with section 6(1), please, which is on page 3833, you will see the heading "Appointment of relevant undertakers". I am so sorry.

MR FORRESTER: No, no.

MR HOSKINS: It is just printed out and they are in blocks. In section 6. I am sorry you are having problems. Would it assist if we handed up a hard copy? Good old-fashioned paper. Section 6(1):

"Subject to the following provisions of this Chapter a company may be appointed… to be the water undertaker or sewerage undertaker for any area of England and Wales."

Then at 6(3) over the page:

"The appointment of a company to be a relevant undertaker shall be by service on the

company of an instrument in writing containing the appointment and describing the area for which it is made."

The Proposed Defendants in this case have each been appointed as sewerage undertakers or indeed as water and sewerage undertakers pursuant to such instruments of appointment, and those appointments as we will see contain conditions. There is a slight glitch in the terminology. Sometimes people refer to licence conditions to mean appointments, but you will see or may have seen in the Water Industry Act there is a separate notion of licences, but we are concerned with appointment and conditions in the appointments.

MR JUSTICE ROTH: Yes.

MR HOSKINS: And you are aware that Ofwat applies a very detailed price control regime to appointed sewerage undertakers and as part of that regime each sewerage undertaker's instruments of appointment include conditions, which impose legally binding obligations on that undertaker to provide information to Ofwat to assist or in respect of its price control role.

If you go to our pleaded consolidated response, which is bundle 1, tab 6, page 329, this was an annex to our pleading in which we sought to set out summary of the regulatory regime insofar as it is relevant for these claims, you will be aware that Ofwat has said -- I can't remember the language -- broadly content and has added some detail.

MR JUSTICE ROTH: (Inaudible).

MR HOSKINS: Exactly, but there are more points of detail --

MR JUSTICE ROTH: Yes.

MR HOSKINS: -- and in relation to the CPR they have not made any substantive comment. I think we are pretty safe to work on the basis of this as an agreed statement. People may have things to add at later stages but for the moment this is

pretty much agreed.

You will see at page 328 the heading at the bottom of the page "Reporting requirements in the Conditions of Appointment".

Then at paragraphs 317 to 320 there are three reporting conditions which are relevant to price control. So, you have Condition M and you will see that set out at paragraph 317, Condition B, and that's set out at 319 and that's specific to the price review process, and then Condition F, which requires the provision of regulatory accounting statements in compliance with requirements in the RAGs.

So, these are different conditions, all of which may be relevant to the price control process.

You have been told already this morning and you will have read that the relevant price controls for these claims, i.e. PR14 and PR19, contained what were called performance conditions in respect of recognised pollution incidents and you have been told that the sewerage undertakers' performance in relation to those performance conditions then had an impact on the revenue levels that they were permitted to attain by their dealings with their household customers.

The Water Industry Act establishes --

MR JUSTICE ROTH: On those performance conditions or Performance Commitments that were set for pollution incidents, if we go back to page 325 in this document, the table that begins at the bottom of that page and goes on to the next page, that's, of course, for PR14, because it's different for each company.

MR HOSKINS: That's right.

MR JUSTICE ROTH: And it is said to be, looking at the top, a metric based on number of incidents per 10,000 kilometres of sewer upper quartile performance. Then in paragraph 309 you have the table. One can see that there is the sort of sliding scale that they've got to improve performance over the year starting from what it was in

2014/15 before PR14 comes in. I couldn't quite follow on the next page for United Utilities and Yorkshire Water, what is the 4/2007, what does that mean?

MR HOSKINS: I must confess I don't know the detail.

MR JUSTICE ROTH: It is said to be the number of incidents per 10,000 kilometres. One can understand Thames Water, 340. I just couldn't understand United Utilities.

MR HOSKINS: I think it is when you use the metric based on the number of incidents per 10,000 kilometres of sewer and then I think further work is done to produce these performance commitments.

MR JUSTICE ROTH: I just didn't understand for United Utilities what is the 4/?

MR HOSKINS: We can certainly find out, Sir.

MR JUSTICE ROTH: Ditto can you explain under PR19 you have the table at 327. These are also supposed to be -- it says in paragraph 311(a) incidents per 10,000 kilometres of sewer. They are done for everyone, but I didn't follow 24.51 as opposed to what it had been, several hundred.

MR HOSKINS: Sir, I think the difficulty is, and I think probably the all the counsel will be labouring under this, is beneath these apparently sort of simple tables there is a whole world of complexity which leads to these things. Now certainly we can answer your questions, but I can only apologise for the fact that we can't immediately give you the answers.

MR JUSTICE ROTH: I just want to know how it was arrived at and just want to understand what it is saying.

MR HOSKINS: Sir, I understand.

MR JUSTICE ROTH: I think one can understand on page 325 Anglian Water, 2015/16 is allowed 371 pollution incidents, and by 2017/18 it is allowed no more than 298. How they get to the 298 doesn't matter. I just don't understand how -- it obviously seems to be a different -- although it says it is also the number of recognised pollution

incidents, we suddenly go to 24.51. It seems a completely different measure. That's all.

MR HOSKINS: We will get someone to explain that.

MR JUSTICE ROTH: Thank you.

MR HOSKINS: I was going back to the Water Industry Act. So, we are back in bundle 6, volume 4. I wanted to show you there are a variety of remedies for dealing with contravention of conditions by sewerage undertakers. So, we are at bundle 6, volume 4, tab 67. Sorry. Tab 47 this time. They are split up for some reason. So, volume 4, tab 47 and it is page 3158. So, you will see, first of all, section 18 and this deals with enforcement orders:

"where in the case of any company holding an appointment under Chapter I of this Part… the Authority is satisfied (a) that that company is contravening (i) any condition of the company's appointment…."

Then over the page, "he", that's the Authority, here Ofwat, "shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement."

In relation to contravention, there is a power, indeed an obligation, subject to exceptions to adopt an enforcement order.

Another aspect of the remedies are the acceptance of undertakings. If you go to page 3162, section 19, which is headed "Exceptions to duty to enforce" and subsection (1) says:

"neither the Secretary of State nor the Authority shall be required to make an enforcement order… if he is satisfied."

Then at (b):

"that the person has given, and is complying with, an undertaking to take all such steps as it appears to him for the time being to be appropriate for the person to take for the

purpose of securing or facilitating compliance with the condition or requirements in question."

So that's the power to accept undertakings. As you will have seen from the materials, including materials from Ofwat, undertakings have in the past included compensation packages for customers.

Then page 3167, section 22. I would like to focus on section 22(1) and (2). The heading is Effect of enforcement order:

"The obligation to comply with an enforcement order shall be a duty owed to any person who may be affected by a contravention of the order" and "Where a duty is owed by virtue of subsection (1) above to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit of that person."

So, there is provision for the bringing of a claim, but it is only in respect of a breach of an enforcement order, not a breach of a condition in the first instance.

Finally, to identify the main categories --

MR JUSTICE ROTH: Does that mean, under the statutory scheme, if you breach a Condition of Appointment and that leads to a different level of price because of the effect on price control, the effect of that, until Ofwat makes an enforcement order, is that there's no right to compensation? Once it makes an enforcement order, if then again the company breaches the enforcement order, at that point, but only then, can it get compensation?

MR HOSKINS: Correct.

MR JUSTICE ROTH: So, on the first look, it's uncompensated.

MR HOSKINS: Under the legislative scheme there is no provision for bringing a claim in compensation for a breach of a condition. You will see the submission is by implication given that there is a cause of action created for breach of an enforcement

order, that leads one to assume that Parliament did not intend it to be possible to bring a damages action for breach of a condition.

MR JUSTICE ROTH: Well, not under the statute.

MR HOSKINS: That's right.

MR JUSTICE ROTH: Yes.

MR HOSKINS: So, the final part of the remedies, page 3175. It is a power to impose financial penalties. Section 22A, the heading is “Penalties”.

"(1) Where the Authority is satisfied… (a) in the case of any company holding an appointment under Chapter I of this Part, that the company has contravened or is contravening any condition of the appointment."

Then skipping over to the next page below (b):

"The Authority may, subject to Section 22C below, impose on that company… a penalty of such amount as is reasonable in all the circumstances of the case."

So, there is a suite of remedies for breach of condition provided for under the Act.

Now, of course, the crucial provision for this particular issue is section 18(8). If we go back to page 3160. So, it is the bottom of page 3160, (8):

"Where any act or omission– (a) constitutes a contravention of a condition of an appointment under Chapter I of this Part."

Then, skipping to below sub (b):

"the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of this section) shall be [(i)] those for which express provision is made by or under any enactment and

[(ii)] those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention."

It is not the easiest drafting to follow, so let's break it down into its constituent parts. For the purposes --

MR JUSTICE ROTH: (i) and (ii), that's --

MR HOSKINS: I have added (i) and (ii) for simplicity hopefully. There are basically three questions, therefore, that the Tribunal will have to determine in order to answer whether section 18(8) applies in this case or not.

The first question that arises is in sub (a) and it is whether the present claims fall within the scope of those words, i.e., whether the present claims constitute a contravention of a Condition of Appointment under Chapter 1 of this part. You will anticipate I am going to say there is three parts. There is those opening words. Then there is what I call 1, which is whether the express provision is made by or under any enactment, and then there is the final words. The remedy available in respect of that act or omission otherwise than by virtue of its constituting and contravention. Those are the three parts I am splitting it up into.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Focusing on the first part, is a remedy sought in this case for any act or omission which "constitutes a contravention of a condition of an appointment under Chapter I of this Part".

Happily, there is actually common ground on that. It is common ground, as I will show you, that the alleged acts or omissions in respect of the Proposed Defendants' reporting obligations would constitute contraventions of their Conditions of Appointment.

You see that in the claim form at paragraph 105(3). That's in bundle 1. You might want to keep section 18(8) out, because we are going to look at constituent parts. The claim form is bundle 1, tab 1, page 50. You will see the heading above 105, the defendants' reporting obligations an overview. Then you will see at (3):

"the Defendant was and is under legally binding obligations to report equivalent information to Ofwat."

Then (b):

"under its Licence Conditions, the Defendant was under a legally binding obligation to report accurate and complete information to Ofwat relating to the number of Pollution Incidents on its network relevant to those targets."

The crucial subsection here is (c):

"As a result, failure accurately and completely to report such Pollution Incidents to Ofwat (in line with the approach set out in the EA guidance) constituted a breach of the Defendant's Licence Conditions."

So, in relation to the first part of section 18(8) there is actually common ground between us. That's confirmed by Ofwat as well.

If we look at Ofwat's skeleton argument for the CMC that we had in March, which is bundle 8, tab 7, page 107, and it is paragraph 19. Tab 7, page 107 and it is paragraph 19. Ofwat explains:

"Misreporting pollution incidents in order to obtain a better ODI outcome and hence higher revenues is a breach of the revenue cap in Condition B. Where Ofwat is satisfied that such a breach has occurred, and unless any of the exceptions in section 19 WIA apply, it has a duty to issue an enforcement order..."

So, we are on common ground between the parties that Ofwat agrees. That's the first part of section 18(8).

If we go back to section 18(8), let's look at the second aspect. I call it a (i). I should probably just call it the second aspect. So it says:

"Where any act or omission constitutes a contravention of a condition" -- we know that's satisfied, and then it says "the only remedies for… that contravention… shall be those for which express provision is made by or under any enactment."

So that's the second part. Again, it is common ground that in respect of the proposed claims in this case express provision is not made by or under any enactment for the

remedies sought.

That's because the Competition Act 1998 does not contain any express provisions providing for a remedy in damages. This is so well-known, but I will show you it. It is bundle 6, volume 4.

MR JUSTICE ROTH: It is the same.

MR HOSKINS: It is the same one, yes. Sorry. Tab 48. Page 3196, section 47A sub (1) and (2):

"A person may make a claim to which this section applies in proceedings before the Tribunal, subject to provisions of this Act and Tribunal rules."

So that's a jurisdictional power that has been given to the Tribunal. Then (2):

"This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom."

Sub (3) includes claims for damages.

So, what section 47A does is it gives the Tribunal jurisdiction to hear such claims but it doesn't itself create an express cause of action in damages. As we all know, claims for damages under the Competition Act must be brought by the common law remedy of breach of statutory duty.

So that's the second part of section 18(8) which is fulfilled in our particular case. So we come now to the final one. Given everything else is common ground, this is really the issue which -- it narrows down to this for the Tribunal on this issue.

MR JUSTICE ROTH: This is the difficult provision.

MR HOSKINS: This is it. So, the question is, the final words of section 18(8), are the remedies sought in the proposed claims available in respect of the relevant acts or omissions "Otherwise than by virtue of its constituting, or causing or contributing to, such a contravention".

Now the meaning and effect of those words has been determined very recently by the Supreme Court in the Manchester Ship Canal (No. II) case. We have that in bundle 6, volume 1 at tab 5. This is United Utilities v Manchester Ship Canal and you will see it is a judgment from July this year.

MR JUSTICE ROTH: Yes.

MR HOSKINS: We could begin at paragraph 56 on page 382, you will see between the letters B and D on that page the Supreme Court set out section 18(8) and italicised at the end of the quote the words we are concerned with.

MR JUSTICE ROTH: The bundle reference again.

MR HOSKINS: So, I am in bundle 6, volume 1.

MR JUSTICE ROTH: Authorities bundle 1.

MR HOSKINS: Tab 5. We are at tab 5 in that bundle, page 382. I have just drawn the Tribunal's attention to between the lettering B and D the Supreme Court cites section 18(8) and you will see that it italicises at the end of the quote the words that we are focusing on.

Then at paragraph 57 the Supreme Court said this:

"The words which we have emphasised… expressly preserve any common law remedies that are available in respect of acts or omissions which contravene a statutory requirement enforceable under that section, or cause or contribute to that contravention" – and here is the legal test -- "where the contravention of the 1991 Act is not an essential ingredient of the claim."

MR JUSTICE ROTH: Though that's clearly correct just because the Supreme Court says it, it is not an exhaustive exposition of the emphasised words, because there is nothing there that in the section 18(8) that restricts it to a common law remedy. It can be a statutory remedy. Those that are available in respect -- it could be available at common law or under statute.

MR HOSKINS: I am only hesitating because the Supreme Court looked at it in terms of --

MR JUSTICE ROTH: They were only concerned with the common law.

MR HOSKINS: Exactly.

MR JUSTICE ROTH: They didn't need to go further. So, they were looking at a common law remedy. As I say, that's clearly right, but it is not confined to a common law remedy. It is those that are available, however available.

MR HOSKINS: I am hesitating for two reasons. One, because I don't think it matters for this case, and, two, given the degree of the complexity that went into the analysis of Manchester Ship Canal, I don't want to speak out of turn and say that must be right.

MR JUSTICE ROTH: It might matter, because the remedy is a remedy for -- you may say it is a common law remedy, breach of statutory duty. I am not sure if one has that common law remedy or statutory remedy. It is related to a statute, unlike nuisance, there is no statute of nuisance. That is the only point I am making.

MR HOSKINS: I understand. I absolutely accept the point you are making, Sir. It might be something I need to come back to, but hand on heart, it is not something I had thought of. I don't think it comes up in the Manchester Ship Canal case in that way, but I absolutely see the point.

That crucial test of whether the contravention of the 1991 Act is an essential ingredient of the claim or not, you will see that comes up again. For example, page 400, paragraph 124, and you may just want to read that to yourselves. The crucial sentence is the final one.

MR JUSTICE ROTH: I would accept, looking at the last sentence, one could say the remedy of a claim for damages for -- under section 47A of the Competition Act remains available where, and then reading on the judgment states, it is not an essential ingredient.

MR HOSKINS: Well, the distinction I make is a finer one. In my submission it must follow from the final sentence of paragraph 124 that a common law remedy, i.e. breach of statutory duty…

MR JUSTICE ROTH: Yes.

MR HOSKINS: **…**Is not available where a contravention of a Condition of Appointment is an essential ingredient of the cause of action.

MR JUSTICE ROTH: Yes. That must be right, I think.

MR HOSKINS: And that's our submission. That's our premise.

MR JUSTICE ROTH: The question is, is contravention an essential ingredient?

MR HOSKINS: That's right.

MR JUSTICE ROTH: That it is a contravention of Condition of Appointment or is it more generically making misleading statements to a regulator or an official authority to secure a financial advantage?

MR HOSKINS: I am going to --

MR JUSTICE ROTH: That seems to me the crux of it really.

MR HOSKINS: We are in the same place. I am just going to get there a bit more slowly to give you all the bit and pieces.

MR JUSTICE ROTH: Take your time.

MR HOSKINS: Just finally to complete Manchester Ship Canal, paragraph 133 on page 403, and it is just below (d):

"The only ouster, by section 18(8), is of causes of action of which a contravention of a condition of an undertaking's appointment or licence, or of a statutory or other requirement enforceable under that section, forms an essential ingredient."

Then in the context of that case:

"A cause of action in trespass or nuisance brought against a sewerage undertaker on the basis of the discharge of polluting effluent from its sewers, sewage treatment works

or associated works into a watercourse does not normally include, as an essential ingredient, the contravention of a statutory requirement, and in those circumstances is therefore not excluded."

So, you have to look at the particular cause of action and the way it has been pleaded in order to determine what is or is not an essential ingredient.

If one takes Manchester Ship Canal, it's -- I mean, the reasoning is incredibly dense, but you can, and it is necessary to distinguish between two situations which the Supreme Court refers to. Obviously, a claim in which breach of a relevant obligation is not an essential ingredient of the cause of action is not precluded by section 18(8) and that was the result in Manchester Ship Canal.

Just to show you how that worked, if you go to page 394, paragraph 102:

"As we have explained, the present case concerns the discharge of foul water from United Utilities' outfalls into the canal. As the decision in Manchester Ship Canal (No I)… made clear, such discharges are not authorised by the 1991 Act…. In response to the threat by the Canal Company of a common law action in trespass and nuisance, United Utilities sought a declaration that the Canal Company had no right of action."

Then at page 363, paragraph 6:

"In general terms, the tort of private nuisance is committed where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with the use and enjoyment of the claimant's land."

Then page 403. We are back to paragraph 133, and I will read you out the sentence opposite E:

"A cause of action in trespass or nuisance brought against a sewerage undertaker on the basis of the discharge of polluting effluent from its sewers… into a watercourse does not normally include, as an essential ingredient, the contravention of a statutory requirement, and in those circumstances is therefore not excluded."

So, the essential ingredient in the Manchester Ship Canal was 'Sewage has been discharged into my canal'. It didn't matter whether that discharge was the result of a breach of a condition or not, because the cause of action in nuisance is simply 'You have allowed sewage to come into my canal'. It doesn't matter how that arose.

That's put very simply, but that's why Manchester Ship Canal section 18(8) did not apply to exclude the claim.

But in contra-distinction is the Supreme Court's explanation of the Marcic case. Marcic is odd, because what you have is a House of Lords' judgment in Marcic which is adopted on a particular basis, and then you have the Supreme Court fifteen years later saying "Actually what the House of Lords meant to say was this". I hope I am not doing a disservice to any of the very distinguished judges, but it is clear when you read them there is a disjunct between the reasonings.

But what we have now is the Supreme Court saying "This is what was happening in Marcic. It is just how it should be understood". That's why I am going to show you what the Supreme Court said in Manchester Ship Canal about Marcic.

If we can go to page 386 and if I could ask you to read, please, paragraph 75 down to the first sentence of paragraph 77. (Pause.)

MR JUSTICE ROTH: Yes.

MR HOSKINS: Marcic is again a nuisance case in the sense that the sewage just spilled on to Mr Marcic's land, but the Supreme Court, analysing the cause of action, says what the essence, what the essential ingredient of that cause of action was, was that the sewerage undertaker should have built more sewers to prevent the spillage. That was an essential aspect of the claim in nuisance that was brought.

You see that coming out at paragraph 82, so page 388. If you could read paragraph 82, please. (Pause.)

Then the Supreme Court brings together --

MR JUSTICE ROTH: Going back to what you said about the Manchester Ship Canal, you said the essential ingredient was sewage discharge into my canal. It didn't matter how that arose, but I think it does matter how it arose, because the essential ingredient in Mr Marcic's claim was, "You have a discharge of sewage on to my property", but it is because of how that arose, as I understand it, that they say you have to drill down to see how it arose and say, "Well, what is the explanation?" to see what is the essential ingredient. Is that not what they are saying?

MR HOSKINS: It is loose language on my part in the sense that you see from early on in Manchester Ship Canal they go through old case law and they distinguish between a continuing nuisance, etc, and they go into the details of the case law about when a claim for damages will arise, and the point is that there was a common law claim available on the facts of Manchester Ship Canal, but not on Marcic, because the Supreme Court tells us the essential ingredient of the Marcic claim was because of the nature of the particular claim in nuisance, you would have had to build more sewers.

You see that -- this makes it clear -- at paragraph 105 on page 395. I draw particular attention to the sentence opposite E. (Pause.)

Opposite letter E the Supreme Court said:

"Unlike an ordinary case in nuisance, the cause of action therefore included, as an essential ingredient of the claim, the defendant's breach of its obligation to construct a new sewer."

So, what that tells us is it is not enough to simply look at the nature of the cause of action. Is it a cause of action in nuisance? Is it a cause of action based on breach of statutory duty? You have to analyse the particular claim being brought to see whether the essential ingredient condition is met or not. You have to go beyond the label.

MR FORRESTER: Will you be addressing the question, skipping on to 106,

where -- at the top of the page:

"... denies that any action can be maintained by the person affected, except in cases involving negligence or deliberate wrongdoing."

Does that -- would we be talking about failure to report as being -- whether that shades into negligence or deliberate wrongdoing?

MR HOSKINS: No, because that was the argument of United Utilities in 106 and it wasn't accepted by the Supreme Court. So that question of "Is it negligent and deliberate?" did not apply for Manchester Ship Canal and does not apply for our case, for this purpose anyway at least.

MR FORRESTER: Thank you.

MR HOSKINS: I appreciate there is a whole wealth of difficulty in those two authorities, but hopefully that has got to the essence of them. What's the test? The essential ingredient, and you don't just look at 'is it nuisance?' 'Is it statutory duty?'. You have to look at the particular claim being brought to see if the essential ingredient condition is met or not.

Now before we go to this particular claim I would like to look --

PROFESSOR SMITH: Sorry, Mr Hoskins. Can I just be clear? In the Manchester Ship Canal case the action of United Utilities was a breach of their licence conditions, or was it not, or you are saying it doesn't matter -- it might have been, but that wasn't what the action was about?

MR HOSKINS: In this case -- I am trying to remember. I am not sure is the answer again. The reason why I am focusing on it is even if it had been a breach of condition, section 18(8) didn't apply in that case, so the claim could be brought.

MR JUSTICE ROTH: I think it was a breach and that is why it depended upon that --

MR HOSKINS: That's why I was hesitating, but I can't put my finger on the paragraph.

MR JUSTICE ROTH: That's why the italicised words were the crucial basis.

PROFESSOR SMITH: I am trying to understand why if it was a breach of their licence conditions, what is the reasoning that led the Supreme Court to say that it's not -- it wasn't essential to the cause of action whereas I think you're saying in this case we are looking at a breach of the licence conditions, and because it is a breach of the licence conditions, it is essential to the action in this case.

MR HOSKINS: I go further than that in the submission I am going to make, because the first part of section 18(8) was 'would the conduct complained of be a breach of the licence condition?' I have shown you the answer is "yes". Then I am going to look at -- there is an extra part of the test, which is the essential ingredient part. So, they are not the same thing. They are separate. You have to identify what the essential ingredient is of the cause of action. Then you have to ask yourself whether that essential ingredient would be a contravention of the condition, but they are separate questions.

PROFESSOR SMITH: I am afraid that's what I have not quite understood. What's the difference in the essential ingredient test in Manchester Ship Canal and in this case here?

MR HOSKINS: Manchester Ship Canal is a nuisance case. So, you will see from -- I showed you paragraph 6, what the essence of a nuisance claim is:

"A tort of private nuisance is committed where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with the use and enjoyment of the claimant's land."

So, in order to make good that sort of claim you don't have to say, "There has been spillage on to my land and it happened in this particular way and that is a contravention of a condition". You don't have to do that in order to make good the cause of action, whereas what I will show you in our case is we have a claim of certain conduct, and that conduct, the way it is pleaded, it is an essential ingredient that that conduct, that

regulatory obligation was not complied with, and the regulatory obligation that wasn't complied with constitutes a contravention of a condition.

So, the reason I can't just give you -- it is apples and pears, because one is a nuisance claim and one is a Competition Act claim, but what you are looking at is in order to succeed in a claim for damages, what do you have to prove? That's the high-level question.

PROFESSOR SMITH: We have a nuisance claim based on actions that were a breach of licence conditions, but this is not an essential ingredient of the cause of action.

MR HOSKINS: It wasn't required -- you didn't have to rely on any licence condition in order to make good the nuisance claim.

PROFESSOR SMITH: Here we have a competition claim about acts which were a breach of licence condition.

MR HOSKINS: That's the bit I am coming to.

PROFESSOR SMITH: Does the claimant have to rely on the fact that it is a breach of licence condition or is it just happenstance that it happens to be a case that the action was a breach of licence conditions?

MR HOSKINS: That's what I am going to turn to now, because I am going to look at, first of all, what are the pleading requirements for an abuse case, and then I am going to look at what the claim is, but you are absolutely right. Again, we are getting to the nub of it.

MR JUSTICE ROTH: That is the critical question.

MR HOSKINS: It is absolutely, and it is one I am going to attempt to deal with.

MR JUSTICE ROTH: Absolutely. (Inaudible) the question you have just been posed. So, would that be a sensible moment and then we will return at 2 o'clock?

(1.01 pm)

(Lunch break)

(2.00 pm)

MR JUSTICE ROTH: Yes, Mr Hoskins.

MR HOSKINS: I was going to move on to pleading requirements, and in particular, the pleading requirements for an abuse of dominance allegation. It won't surprise you to hear me say that it is not enough merely to plead there has been "an abuse". Sufficient particulars must be given of the abuse alleged.

If we can start with the case of DSG Retail v Mastercard, which you will find in bundle 6, volume 1, tab 6. I am going to begin on the first page just to show you what the judgment is. It is page 405. I am sorry. You are in the electronic bundle. I will make sure I give the page numbers. Sorry. So, this is a judgment of the Court of Appeal, DSG Retail Limited v Mastercard.

On page 433, paragraph 88, this is in the judgment of the Chancellor, Sir Geoffrey Vos. This is a useful summary of the basic principles for a pleading. That's paragraph 88, which is a citation from Lord Justice Millett in Paragon Finance. If I could ask you to read paragraph 88, please. (Pause.) You will see opposite C there is the basic test:

"'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse."

Then just above E:

"However it is formulated, only those facts which are material to be proved are to be taken into account."

Then the very final sentence:

"The selection of the material facts that define the cause of action must be made at the highest level of abstraction."

So that is the basic requirements for pleading a cause of action.

The next case I would like to go to is BHB Enterprises v Victor Chandler. That is in bundle 6, volume 4 at tab 65. It is page 3777 that it begins on. This is the case of BHB Enterprises PLC v Victor Chandler, from the Chancery Division, Mr Justice Laddie from 2005.

If I can ask you to turn to page 3793, paragraph 43.

MR JUSTICE ROTH: 3793?

MR HOSKINS: That's it. Paragraph 43 Mr Justice Laddie held:

"it seems to me that particular care is to be expected of a party ..."

MR JUSTICE ROTH: Just a minute.

MR HOSKINS: I am so sorry. It is paragraph 43.

MR JUSTICE ROTH: Yes.

MR HOSKINS: "It seems to me that particular care is to be expected of a party who pleads breach of s.18 of the Act or an Art.82 offence. These are notoriously burdensome allegations frequently leading to extensive evidence, including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrate they can lead to lengthy and expensive trials. Mere assertion in a pleading will not do. Before a party has to respond to an allegation like this, it is incumbent on the party making the allegation to set out clearly and succinctly the major facts upon which it will rely."

Then the final authority I wish to take you to on this subject is the next tab, tab 66, page 3799, and it is the judgment of the Chairman sitting as a judge in the Chancery Division in the case of Sell Imperial and the British Standards Institution. If you turn to page 3804, paragraph 17:

"Moreover, it is important that competition claims are pleaded properly. To contend that a party has infringed competition law involves a serious allegation of breach of a

quasi-public law, which can indeed lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct [and I underline specific]conduct or agreement is complained of and how that is alleged to violate the law."

Then the quote we have seen from Mr Justice Laddie in BHB Enterprises. So those are -- or that is the law in relation to what is required in relation to a competition law pleading.

We need to turn now to applying those principles and the essential ingredient question of Manchester Ship Canal to the claims in this case.

In our submission, it follows from the submissions I have made so far that if it is an essential ingredient of the PCR's proposed claims, that the Proposed Defendants contravened the Conditions of their Appointment, then those claims will be precluded by section 18(8). The first two parts of section 18(8) I have shown you is common ground. This is the only one that is contentious.

We need to go to the claim form. That is the exercise that the Tribunal is required to do. The Severn Trent claim form is in bundle 1, tab 1.

MR JUSTICE ROTH: So, we can put away volume 4 now, can we?

MR HOSKINS: You can put away those authorities, yes. It is page 3 it begins. You see that's the Severn Trent claim form. I want to pick it up, please, at page 54.

MR JUSTICE ROTH: Bundle 1, page 54.

MR HOSKINS: Page 54, yes. It is paragraph 120. You see the heading "The Defendant's reporting obligations to Ofwat":

"As stated above, the Defendant has at all relevant times been under (and continues to be under) a legally binding obligation to report certain information relating to Pollution Incidents accurately and completely to Ofwat because, as detailed in the following paragraphs: (a) in its price review Ofwat imposed on the Defendant certain

Pollution Incident targets based on the approach to the self-reporting of such incidents set out in the EA Guidance; and (b) under its Licence Conditions the Defendant was under a legally binding obligation to report accurate and complete information relating to the number of Pollution Incidents on its network relevant to those targets."

Then if you could read paragraphs 121 to 122 to yourself, please. (Pause.)

Then please turn to page 64. If you could read paragraphs 140 to 148. (Pause.)

If I could stress the following passages from the pleading. Paragraph 140:

"Under its Licence Conditions, and related provisions made under them, the Defendant has at all material times been under a duty to provide Ofwat with information relevant to the PI Performance Commitments and related ODIs."

Similarly in 141, the second sentence that begins just above sub (1):

"At all material times the Defendant has been under (among others) the following duties pursuant to its Licence Conditions."

You have seen those conditions. I have shown them to you.

MR JUSTICE ROTH: Those Licence Conditions, and the point was made earlier, there is a slight confusion in the term "licence", are these conditions of the appointment?

MR HOSKINS: They are absolutely. Yes. There is no dispute between us on that. It is just the language is sometimes used. It is not usually important but it is for this case, because we are under appointments.

Then paragraph 148 -- we were shown this by Mr Gregory this morning -- this information, i.e. the information that was required to be provided pursuant to the conditions, is referred to as the Ofwat PI Information for the purposes of this claim.

Then if we go to page 66, paragraph 150:

"In summary, at all relevant times the Defendant was under an obligation pursuant to its Licence Conditions to provide to Ofwat (in particular in its APRs) the Ofwat PI

Information, namely information of the number of Pollution Incidents on its sewerage network… relevant to its PI Performance Commitments, and to report such information accurately and completely."

Then 151:

"…the PCR contends that the position can be summarised as follows, namely that at all relevant times: (1) the PI Performance Commitment targets were based on the definitions, method of categorising and approach to reporting Pollution Incidents set out in the EA Guidance."

Sub (2) is the important one:

"it was an integral part of the Defendant's obligations under its Licence and the RAGs, that it was required accurately to report the number of its Pollution Incidents to Ofwat on the basis of that approach."

Then (3):

"discharge of those obligations was in turn a fundamental element in Ofwat's price review regime."

The particulars of the alleged abuse are then set out in the claim form at paragraphs 164 to 177, which begins on page 73. You see the heading "Misleading abuse in this case". If I can ask you to look at paragraph 164(1):

"The Defendant's provision of the Ofwat PI Information, in particular in its APRs, directly affected the assessment, as Ofwat's assessment was based on the Ofwat PI Information, along with information on the number of the Defendants' Pollution Incidents provided to Ofwat by the EA."

Then paragraph 167 on page 74:

"The PI Information" -- now remember that's the Ofwat PI Information, i.e. information that the Potential Defendants were under an obligation to report; it also includes the EA, which I will come to and deal with separately, but PI Information is defined as

information that there was an obligation to report -- "The PI Information provided by the Defendant was misleading, in particular, as it significantly and/or systematically understated the number of Pollution Incidents on its network relevant to the PI Performance Commitments, which led Ofwat into error and to set the Revenue Allowances at a higher level than they would have been set at had accurate PI Information been provided."

Then you have heard there is two ways the abuse is put. The second one has the catch all heading 'abuse in all the circumstances of the case'. You will see that allegation is at page 79. If you go to paragraph 177(6) what's pleaded is this:

"At all relevant times, the Defendant was (and remains) under extensive and detailed regulatory obligations to ensure that the PI Information that it provided to Ofwat was complete and accurate. The Defendant provided signed statements warranting that that was the case… and Ofwat determined its Revenue Allowances on the assumption that the Defendant had complied with those obligations."

Then over the page, paragraph 177(7):

"The provision of misleading PI Information to the EA and Ofwat," and again PI Information is as defined in the claim, "has allowed the Defendant to charge customers higher prices than the maximum that would have been permitted by Ofwat under its Revenue Allowances had accurate information been provided."

It is, therefore, clear from the face of the claim form that it is an essential ingredient of the proposed claims, that the Proposed Defendants were under relevant Conditions of their Appointments and failed to comply with those Conditions of their Appointments. To make out an allegation of abuse, you have to give sufficient details of why the conduct is said to be an abuse. It is absolutely clear from the face of the pleading that the existence of the conditions and the failure to comply with them is an essential ingredient in the particular allegation in this case.

Ask yourself this question. If there were not in the pleading any reference to the conditions, if there were not a suggestion it hadn't been complied with, would there still be a claim? The answer is clearly not, because the whole concept of 'misleading' has to be judged by reference to a touchstone. Misleading by reference to what? The pleaded case here is misleading by reference to the obligations under the conditions.

So where does that leave us with section 18(8)? Well, let's go back, because the language is not very easy to retain, section 18(8). That's bundle 6, volume 4, tab 47, page 3160. I have shown you there is three parts to it. The only one that is in dispute was the final building block, which was remedies that are available in respect of that act or omission otherwise than by virtue of it constituting or causing or contributing to such a contravention.

We know from Manchester Ship Canal that the relevant question to determine whether those words are satisfied is what is the essential ingredient of the pleading? I have shown you that the allegation that the Potential Defendants failed to comply with the reporting conditions imposed on them by their Conditions of Appointment is an essential ingredient of the proposed claim.

I have shown you, and I am working up section 18(8), that there are no remedies -- the remedies claimed here, there is no express provision by or under any enactment. So, we fall within that part. I have shown you that in relation to the first part, failing accurately and completely to report recognised pollution incidents pursuant to the Conditions of Appointment constitutes a breach of those conditions, and I showed you this morning that's common ground.

MR JUSTICE ROTH: Can I just interrupt you? We are not concerned with the condition of a licence under Chapter 1A, are we.

MR HOSKINS: We are not. It is a different framework.

MR JUSTICE ROTH: It is a different part of the regime.

MR HOSKINS: I fell into that trap when I started looking at it.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Those are the three parts, two of them are common ground. In relation to the essential ingredient part, it couldn't be clearer on the face of the pleading that it is an essential ingredient that conditions existed and they were not complied with. Absent that allegation, there would be no meaningful claim of misleading or indeed of abuse.

MR JUSTICE ROTH: Well, you were going to come on to the EA.

MR HOSKINS: I am going to deal with the EA separately. I thought it was easier to take the obligations and section 18(8) and get to the end of that and then we will look at the EA, because otherwise it is going to get too complicated. The EA is coming.

PROFESSOR SMITH: Can I just press you on what you just said? It is at the centre of the case that has been made that the companies -- at least it is alleged that they breached their licence conditions. They didn't report the correct information.

MR HOSKINS: Yes.

PROFESSOR SMITH: And because they didn't report the correct information, Ofwat set the wrong prices.

MR HOSKINS: Yes.

PROFESSOR SMITH: I am still struggling a bit with the word "essential" because these reporting requirements were required by the law, and then also by misleading Ofwat price setting to be incorrect, but the fact that there were breaches of the Licence Conditions doesn't seem to be necessary to the fact that Ofwat set the wrong prices. It is the necessary connection between the breach -- the fact of what they did was in breach of their Licence Conditions and that it led to Ofwat's price setting being misleading, it is that necessary connection I am still struggling with I am afraid.

MR HOSKINS: It comes in two of the three parts of section 18(8). If I take the final

part, so the wording is:

"... remedies that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing, to such a contravention."

That's where you are looking for whether there is a free-standing common law cause of action that doesn't depend upon relying on the particular act or omission that we are focusing on. The Supreme Court in Manchester Ship Canal tells us how those words are to be applied. You have to look and see, are they acts or omissions which we are concerned with which are an essential ingredient of the cause action? And in my submission, is that the conditions, the existence of them are an essential ingredient of the cause of action and the fact that the Proposed Defendants are alleged not to have complied with those conditions is also an essential ingredient of the cause of action. That's the third part of section 18(8).

Then you get the first part, which is:

"Where any act or omission", i.e. that is the failure to comply with the reporting conditions, "constitutes a contravention of a condition of an appointment under chapter 1 of this part ..."

So that's a separate but related question, but that's a separate question, and I have shown you both in the claim form that the PCR accepts that failure to comply with the conditions is a contravention of a Condition of Appointment and I have shown you that Ofwat confirms that that indeed is the position. So that's the chain and that's how you get the two.

The first question is simply what is the act or omission that is essential to the claim? It is the existence of the condition. It is the failure to comply with them. Then you ask the separate question: is that act or omission a contravention of a Condition of Appointment? The answer is yes. You are right. They are two different but related questions and they both have to be satisfied.

MR FORRESTER: Yes. Can you please address the question of whether the limitations expressed in that quite contorted sub-paragraph might be addressed to Ofwat? In other words, to an undertaker that is contemplating on embarking on provision of water treatment and sewerage services, "as a guide, here are the things you must do. Here are the bad things that may happen to you if you don't do them". Could we look at 18(8) -- sorry. Yes. Could we look at that and say this is reassurance to the undertaking that nothing worse will befall it? There is no extra competence that the regulator has in the event that the sewerage company does something bad. There is no extra remedy that is available to it, no seizure of the property or whatever. Does that also exclude -- does it address the question of whether an entity like this one, our one today --

MR HOSKINS: It absolutely does, because that's what Manchester Ship Canal is about. The whole issue in Manchester Ship Canal is whether section 18(8) can apply so as to prevent a claim in nuisance being brought. So, it wasn't a sort of forward-looking provision directed to Ofwat, nor was it a provision directed solely at the remedies that Ofwat has under the act. The Supreme Court in Manchester Ship Canal expressly said that section 18(8) is a reflection of the pre-existing common law and deals with, for example, ability to bring nuisance claims and it must be the case breaches of statutory duty claims, which are also common law claims. So, we know from Manchester Ship Canal it is not limited in the way you have asked the question, sir.

MR JUSTICE ROTH: Marcic as well.

MR HOSKINS: From Marcic as well.

MR JUSTICE ROTH: How far does it go? I imagine on the statute, given they are appointed monopolies, they are under a duty to supply water and sewerage services to all householders in the area, provided they pay the requisite charges. I assume that

they are under a duty somewhere in the statute that they have to provide the water services and the sewerage services.

Suppose one of the water undertakings says to the householders "Well, we will only supply you if you enter a contract for plumbing and maintenance contract. We offer you this maintenance contract. It costs £15 a month. If you sign up for that, fine if you don't. We are not going to continue to supply you with water sewage". They bring a claim saying "You are dominant, this is an abuse because of your refusal to supply" relying on the established abuse jurisdiction and the duty to supply a longstanding customer and refusal to supply.

Now there are also obligations to supply under the statute, but they say "We are not replying on the statutory obligation to supply. We are relying on competition law, the law of abuse of dominance. Would you say section 18(8) precludes the claim because they are also contravening the obligation to supply under the Water Industry Act?

MR HOSKINS: That doesn't necessarily follow. It will depend upon analysis of the particular competition claim that is put and whether it is an essential ingredient of that claim that it relies on a particular act or omission, and if that act or omission is an essential ingredient, and if that act or omission constitutes a contravention of a condition of an appointment.

So, to answer the question, it is possible that there could be competition cases that are not excluded by section 18(8). The submission is not all competition cases must fall. The submission is you have to look at the particular competition claim and see whether the three conditions are satisfied or not.

MR JUSTICE ROTH: Well, that act would be a contravention of the Condition of Appointment. The act would be refusing to supply unless you enter into a supplementary contract and --

MR HOSKINS: If you want, we can assume that for the purposes of argument, but

you have seen how detailed the legislation and case law is. So, I am assuming for the purposes of argument --

MR JUSTICE ROTH: I would be pretty astonished and indeed I see the solicitor from Ofwat is helpfully nodding her head.

MR HOSKINS: There we go. She is behind me, so what do I know.

MR JUSTICE ROTH: These monopoly undertakers can't decline to supply customers provided they pay the reasonable fee. "They say, so this act we are relying on, it is a contravention, but I am not relying on that contravention for my cause of action. I am relying on obligations on dominant companies imposed by competition law."

MR HOSKINS: Really the analysis would be 'what is the act complained of?' Refusal to supply without tying to a contract. Is that act an essential ingredient of the claim, based on Manchester Ship Canal? If the answer to that is yes, one then asks is that act a contravention of a Condition of Appointment? If the answer to that is also yes, then section 18(8) would preclude a common law claim and the matter would then be dealt with by Ofwat under its powers, which you have seen enforcement undertaking penalties, etc.

MR JUSTICE ROTH: So, it is quite a broad exclusion.

MR HOSKINS: It is what it is on its own terms. I simply say you have to take each case, and each competition case, on its own terms. Once you take the -- what Manchester Ship Canal tells us is how the third part is to be understood, what is an essential ingredient or is the relevant act or omission an essential ingredient of the claim, it doesn't become particularly difficult then to apply the other two parts. It is the essential ingredient bit that means that one competition case may be fine, and one may not be. It is actually quite easy to apply in terms once you plug in the essential ingredient part.

MR FORRESTER: May I just push a wee bit there? The consumer who says Ofwat

has been far too generous and the price we are paying is too high. Maybe it is easier for you to argue that section 18(8) is, as we might say exclusionary, but isn't section 18(8) also possibly to be read as assuming the regulations are respected, something of that kind, so there is no further claim that can be made, no further demand, no further punishment that can be inflicted upon the water companies, but supposing it said, as here, that the reporting obligation on the companies has not been complied with and that on so many hundred or thousand occasions they have not said anything, and as a consequence of that failure the price has gone up or the price has not gone down as it should have done. Isn't it implicit in section 18(8) perhaps the assumption that people will obey the regulations, or putting it differently, assuming the regulations apply, then there is a no room for additional penalties or burdens that can be placed upon the water companies?

MR HOSKINS: I think it is almost the opposite of that because of section 18(8)(a), because for the first part of 18(8) is that the act or omission has to constitute a contravention of a Condition of an Appointment for section 18(8) to apply, i.e. to exclude the common law claim. The reason in my submission -- what is happening here is Parliament is saying where there is a contravention of a Condition of a Appointment, there is a statutory scheme for dealing with that contravention. So, where the cause of the conditions of section 18(8) are satisfied you are in the statutory regime. We don't want common law being overlaid on that, because there is a complete regime Parliament has decided upon. So, it is almost, if I may say, the opposite of the point you put to me, which is if it's not a contravention you don't satisfy section 18(8) and you can bring the common law claim, but if it is a contravention, you are in the statutory scheme.

MR JUSTICE ROTH: The essential ingredient notion is not in section 18(8). It has come from the Supreme Court. If one looks at, say, paragraph 133 of Manchester

Ship Canal.

MR HOSKINS: Can I just get that.

MR JUSTICE ROTH: Sure. Page 403.

MR HOSKINS: Can you remind me of the reference?

MR JUSTICE ROTH: Page 403, paragraph 133 which is the summary that Lord Reed gives at the end of the summary of his long judgment, and you helpfully took us to that paragraph. This is in authorities bundle 1 I think, but ...

MR HOSKINS: 403 did you say?

MR JUSTICE ROTH: 403.

MR HOSKINS: Yes.

MR JUSTICE ROTH: The last few sentences of that paragraph:

"The only ouster, by section 18(8), is of causes of action which are contravention of a condition of an undertaking's appointment or licence, or of a statutory or other requirement enforceable under that section, forms an essential ingredient.

A cause of action in trespass or nuisance brought against a sewerage undertaker on the basis of the discharge of polluting effluent from its sewers, sewage treatment works or associated works into a watercourse does not normally include, as an essential ingredient, the contravention of a statutory requirement, and in those circumstances is therefore not excluded."

If you go back to my hypothetical example of the tying contract, the cause of action, abuse of dominance does not normally include the contravention of a statutory requirement as an essential ingredient, it might here be a contravention I suppose, and not an essential ingredient and therefore, it is not excluded.

MR HOSKINS: I understand. That's why I said some competition cases might be caught by section 18(8) and some won't be. I am very happy -- it is a good way to test to discuss hypotheticals and I understand the point you are making to me about the

tying example, but you understand why I come back to this case and this case is inevitably based on the existence of the conditions and the failure to comply with them.

MR JUSTICE ROTH: But if this case is seen as abuse of dominance by giving misleading information to a public authority, such a case doesn't require as an essential ingredient the contravention of a statutory requirement. It is just a case of the dominant company misleading a public authority for financial advantage. Just as in AstraZeneca there was no statutory requirement. So, it is not an essential ingredient, is it, of that cause of action. Here it does contravene, but it is not an essential ingredient of the cause of action.

MR HOSKINS: That comes down to, it is not enough -- if there was just a pleading that said "The defendants have misled the regulator", you would say to them you have to give particulars. How were they misled? In what way have they been misled? You have to have a touchstone. What's the touchstone here? It is the existence of licence conditions which contain specific reporting obligations. Without that, without the explanation, without the particulars, to use the jargon, without the particulars of misleading, there would be no claim. It is not enough just to say misleading without explaining why is it misleading?

PROFESSOR SMITH: This subsection (8) applies if there is a contravention of a licence condition.

MR HOSKINS: That's the first part, yes.

PROFESSOR SMITH: Now you seem to be saying when we get to the end of subsection or clause (2) or whatever you call it, it is by virtue of its causing, contributing or causing such a such a contravention, then it's ruled out. So, it has to be a contravention to be ruled in and then because it is a contravention it is ruled out at the end. What kind of case would be admitted by this last phase, that it is a contravention of a Condition of Appointment, but the remedies available in respect

of that act other than by virtue of it being a contravention of the Licence Conditions?

MR HOSKINS: I am in danger of repeating myself and I do apologise. I don't want to test your patience.

PROFESSOR SMITH: It is probably helpful to me to repeat it.

MR HOSKINS: If I am becoming repetitive, you will tell me. There are two distinct elements in section 18(8). There are three elements, but we are concerned with two of them. The first one is whether it is -- you start by looking at a relevant act or omission. So here the relevant act or omission is misleading reporting. You ask yourself the question would remedies be available in respect of that misleading reporting, otherwise than by virtue of its constituting such a contravention, i.e. a contravention of the conditions?

In this particular case the misleading reporting, you have to ask yourself, because Manchester Ship Canal tells us, you have to say "What is the essential ingredient of the misleading reporting?" The authorities I showed you a short while ago about what has to go into a cause of action, you have to plead the material facts, no more, but you have to plead the material facts to know what the nature of the abuse is.

So. in this case what are the material facts of the misleading reporting? It is the existence of the conditions. and it is the failure to comply with them. Then you ask yourself the separate question, which is "Is that a contravention of a Condition of Appointment?"

Now those are separate legal requirements under the Act, but in this case you are absolutely right in the sense that they fuse together, because the particular case is "You have failed to comply with a Condition of Appointment", but they are logically separate questions and they are separate questions, but once you ask yourself what is the essential ingredient of misleading? It is the existence of the conditions. It is failure to comply with them. It is a contravention. I accept that, but they are logically

distinct questions.

MR JUSTICE ROTH: Suppose not a contravention of the Condition of Appointment. Suppose Ofwat is given a statutory power to set the price control of the water and sewerage undertakings, taking into account such information as it thinks fit. So, it's given a broad discretion and it decides in its best judgment "We want to look at the pollution record". So, it asks all the undertakings to supply them with information about the degree to which there have been pollution incidents and there's under-reporting or misleading information and that leads Ofwat to set a higher price than otherwise.

MR HOSKINS: We are assuming it is not a contravention --

MR JUSTICE ROTH: It is not a contravention. Then one would have a potential claim for abuse of dominance, misleading information supplied to the regulator, and you could bring that claim.

MR HOSKINS: That's right, and the reason why you can bring that claim is because it is not a contravention of a Licence Condition which would mean that the statutory remedies were not available. So what Parliament is doing is it's plugging the gap, if you see what I mean, but it has two regimes. One is statutory. One is common law.

MR JUSTICE ROTH: But it means that you can bring that claim on those facts, misleading information about Pollution Incidents, without having as a necessary element to say it's a contravention of a Licence Condition, because in those circumstances it isn't, and you can still bring the case. Just let me finish.

MR HOSKINS: Absolutely. (Inaudible).

MR JUSTICE ROTH: : You can bring your cause of action. Why then, because it is also a contravention of the Conditions of Appointment does that make it then an essential ingredient of the cause of action, when you could bring the same cause of action on the same underlying facts, namely misleading reporting or under-reporting if it were not a contravention. That is what I am struggling with.

MR HOSKINS: Because of the touchstone. In your example, the touchstone is something different. It is a request from Ofwat. It is not a licence condition. It is a request from Ofwat to provide information and that is not a contravention, and in our case, the essential touchstone for misleading is the existence of the licence condition and the failure to comply with it.

MR JUSTICE ROTH: Isn't the touchstone for misleading just whether it -- what is the truth and what is the information supplied? That's what it makes it misleading.

MR HOSKINS: It would be at large. If you just pleaded misleading information --

MR JUSTICE ROTH: You would have to say what it would be -- you stated that the number of pollution incidents in this period was X whereas in reality, it was Y and Ofcom (sic) took into account the information you gave them in setting the price control.

MR HOSKINS: Sir, you will have seen that you don't just say Pollution Incidents. You have to say what Pollution Incidents have to be complied with. So, there are necessarily definitions of what has to be reported. So, the touchstone has to be by reference to the particular requirements of what has to be reported otherwise it would be meaningless and in neither of our examples is it the case that simply said "Just report. Just tell us about Pollution Incidents", because you have to be aware of what has to be reported and what does not.

MR JUSTICE ROTH: Ofwat in my example for its price control would specify in detail how you must report, and what information they want.

MR HOSKINS: Uh-huh.

MR JUSTICE ROTH: It just wouldn't be a Condition of the Appointment. It would set out the information they need, and they would rely on that in determining the price control.

MR HOSKINS: In that example what we are discussing there is requirements of

section 18(8) that would not be complied with. I say that because I say the essential ingredient is still why we are reporting and why we are not reporting accurately to tie it through example. So, it would still be an essential ingredient of that claim that Ofwat had asked for certain information, and it had not been provided accurately.

The reason why section 18(8) would not apply in that case is because it is not a breach of Condition of Appointment, and therefore no statutory regime and therefore only remedy is common law.

MR JUSTICE ROTH: Clearly that's not right. It clearly wouldn't apply. What I am saying is why doesn't it apply? Of course, the opening words are engaged. The first part is engaged, but why is it then an essential element of the cause of action just because it's a contravention of the Condition of Appointment?

MR HOSKINS: Again, I do apologise If I am testing your patience. Misleading by reference to what? If you get a bare plea of misleading, that will not suffice. That would be strikable. Misleading by reference to what? Misleading by reference to the existence of particular conditions. Misleading by reference to a failure to comply with those conditions.

MR FORRESTER: Surely the pleadings that we have in this case with the expert testimony and so on are exceptionally precise? It is not a vague "There's been abuse of a dominant position. Therefore, I win". It's very, very specific, so many hundred occasions, so many million litres and such. So aren't you pushing it a bit too --

MR HOSKINS: I am not relying on -- it is not that there's so many hundreds of litres or so many occasions. The essential ingredient is the existence of the conditions and the failure to comply with those conditions. When you get into the detail, we are moving into quantum, etc. We will come to that argument. I am not saying you have to plead that there are X thousand spills. I am saying you have to plead the existence of the conditions and the failure to comply with them.

MR FORRESTER: There is a regulatory regime. We all agree about that, and it is very detailed. Your adversaries are saying there were violations of that regulatory regime and they give a description of how bad those were and so on. Are the words "The only ouster" in the Manchester Ship Canal case sufficient to get you out of trouble, as it were, given that that case concerned someone who was the victim of sewage being dumped, Mr Marcic, and the Ship Canal? Now here we are in a different situation. There are so many householders who it is said were overcharged.

I go along with you that a big element is obviously the pricing regime, a pricing regime which has carrots and has sticks, and where the carrots and sticks are not achieving the adequate result, isn't that a situation where competition law might intervene to assist the victims of the regulatory failure?

MR HOSKINS: If there is a regulatory regime, it covers the substantive issue and that regime is failing, is failing as you described it, then the appropriate remedy is, for example, JR of Ofwat or to get Parliament to change the law. It is not to introduce competition law, because section 18(8) has already -- Parliament has drawn that line and said where there is a statutory regime that will apply and nothing else will apply. So, in my submission what one can't do in section 18(8) is take a holistic approach and say "Okay. Even if there is a complete regime, we are not satisfied it is working very well and therefore we will allow competition law in", because Parliament has drawn that line already in section 18(8) it has made that decision.

MR FORRESTER: And in my earlier observation that perhaps section 18(8) has in mind two persons, the water companies and the public authority, it doesn't in terms exclude competition law.

MR HOSKINS: No, it doesn't, but it excludes common law remedies, because Manchester Ship Canal tells us that's the purpose of section 18(8). Where the conditions are satisfied, the common law remedies are excluded and common law

remedies include breach of statutory duty which is what we have here. So, in terms of competition law, but that is because it excludes the common law.

MR FORRESTER: Thank you.

PROFESSOR SMITH: But if section 18(8) is Parliament drawing a line and it says, "if there are statutory remedies available, that's what you have to go for", why in Manchester Ship Canal where there was a breach of Licence Conditions and therefore a statutory remedy, the Supreme Court said common law remedies are still available to Manchester Ship Canal? I am struggling to understand why you can describe that as drawing a line with statutory remedies on one side and --

MR HOSKINS: Actually, Manchester Ship Canal, because that question was asked this morning, there's no express finding in Manchester Ship Canal of breach of a condition or indeed a statutory obligation. It is difficult to unpick, but what looks like has happened is the Supreme Court has focused on one of the conditions that has to be satisfied for section 18(8), which is the essential ingredient test and it --

MR JUSTICE ROTH: Sorry to interrupt you, but there must have been, because both at first instance and the Court of Appeal it said the claim was excluded by section 18(8).

MR HOSKINS: Exactly, because the essential ingredient part of the test was not met. So, the court didn't have to deal with was there a contravention of a licence condition, because the section 18(8) failed for one of the three. You don't have to show all three of the limbs don't apply.

MR JUSTICE ROTH: But they said it was excluded.

MR HOSKINS: That's right because the essential ingredient didn't apply.

MR JUSTICE ROTH: Doesn't the --

MR HOSKINS: Sorry. I am getting myself confused. You have Marcic where section 18(8) doesn't apply -- no, it does apply, and you have Manchester Ship Canal

where section 18(8) doesn't apply. And the reason for the difference in the decisions is the essential ingredient part of the test.

MR JUSTICE ROTH: Sorry, in Manchester Ship Canal both in the High Court and in the Court of Appeal they said it does apply. The Supreme Court overruled them. So it could only apply because the Act constitutes a contravention of the condition of the appointment, otherwise you wouldn't get into that territory at all. They said in the Court of Appeal:

"The ouster is not available."

The saving provision in the final paragraph is not applicable because it is an essential ingredient and the Supreme Court said "No, it is not an essential ingredient" but you wouldn't have had the result in the Court of Appeal and the High Court you would have had if it wasn't a contravention. So, they must have been satisfied. We can look back.

MR HOSKINS: United Utilities were one of the parties in Manchester Ship Canal. I have spoken to United Utilities. I had better be careful I am not giving evidence here. It is a very odd case because the way it came up is there was a nuisance claim brought. It was an action for a declaration that a nuisance claim couldn't be brought.

MR JUSTICE ROTH: That's right.

MR HOSKINS: What you don't find in Manchester Ship Canal is a limb-by-limb assessment of the application of section 18(8). You find a conclusion on essential ingredient. You find Marcic being re-read on the basis of that essential ingredient composition, but what you don't find is an express finding in Manchester Ship Canal in relation to each of the three limbs of section 18(8).

MR JUSTICE ROTH: Let's have a look at the Court of Appeal.

MR HOSKINS: I am talking about the Supreme Court judgment when I make that submission.

MR JUSTICE ROTH: Yes. When you said misleading by reference to what, it is not

misleading by reference to the Conditions of Appointment. It is misleading by reference to the requirements that Ofwat then sent to the undertakings for reporting, because the Condition of Appointment is that they must provide Ofwat with any information that Ofwat may reasonably require. That's the condition, isn't it? It is not that -- there is no Condition of Appointment saying "You must report your pollution incidents by reference to pollution commitments", is there? It is Condition M. I am looking at your very helpful summary of the regulatory regime, which is annexed to your response.

MR HOSKINS: Uh-huh.

MR JUSTICE ROTH: Which we have in bundle 1 at tab 6 starting at page 300.

MR HOSKINS: Sorry, sir.

MR JUSTICE ROTH: It starts at page 300 in bundle 1.

MR HOSKINS: I think 329 is maybe what you are thinking of.

MR JUSTICE ROTH: Exactly. 329. Condition M. You set out Conditions M1 and M2.

MR HOSKINS: If we look at Condition B.

MR JUSTICE ROTH: Yes.

MR HOSKINS: **“**Part IV of Condition B is entitled "Provision of information to [Ofwat]". It requires that:

"the WaSC shall furnish to Ofwat “such information as [Ofwat] may reasonably require to enable it to carry out a Periodic Review."

So that's Condition B. Then if we turn to bundle 8, tab 7, page 107 -- sorry. Let's start at 92. You can see what this document is. This is Ofwat's skeleton argument for the CMC.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Then go to page 107, paragraph 19:

"Misreporting Pollution Incidents in order to obtain a better ODI outcome and hence higher revenues is a breach of the revenue cap in Condition B."

So misreporting pollution incidents leads to a breach of Condition B.

MR JUSTICE ROTH: Oh, yes, it is a breach. There is no question it is a breach. What I am saying is when you say misleading by reference to what, Condition B doesn't tell you what is the information you have to report. Hence the request from Ofcom (sic) that is made pursuant to Condition B it is given statutory force by reason of Condition B.

MR HOSKINS: What paragraph 19 tells you is, if you misreport to Ofwat, that will be a breach of Condition B.

MR JUSTICE ROTH: It will be.

MR HOSKINS: Therefore, the act you have to plead is you have to refer to Condition B and you have to refer to the fact it's not being complied it, and it's a contravention.

MR JUSTICE ROTH: That's the question. Do you have to refer to Condition B or can you say "There is misleading information given to Ofwat which also is a breach of Condition B" but it is the misleading information pursuant to Ofwat's request that is what we are complaining about, not the fact that this is a breach of Condition B.

MR HOSKINS: Well --

MR JUSTICE ROTH: And, therefore, the fact that this is also a breach of Condition B is not an essential part of the claim that is being made.

MR HOSKINS: Well, the proof in a sense is in the pudding, because I showed you the way the claim is put, and it is put very firmly on the basis that obligations existed and they were breached.

MR JUSTICE ROTH: Yes.

MR HOSKINS: So, in my submission if the claim had been pleaded the way you had put it, Sir, I would be saying that would be a triumph of form over substance to allow

that to escape the bounds of section 18(8). This is what happened in a sense in Marcic when the Supreme Court revisited it. What you are looking at is what is the true nature of the claim and the material facts that it has to be based on. What you can't do is escape section 18(8) just by a slight of hand in the pleading.

MR JUSTICE ROTH: We have probably dealt with that as much as we can. It is quite a conceptual point, isn't it? You were going to come on to the EA reporting.

MR HOSKINS: I was.

MR JUSTICE ROTH: Which is -- at the moment I don't quite see how that fits in.

MR HOSKINS: Can I deal with one point before I get there just to tie up the Ofwat submission, because Mr Gregory foreshadowed or made a submission this morning about how the broad axe might help them here on this particular point? If I could just clear that up.

Can we go to the PCR's reply, bundle 1, tab 7 at page 339? If I could ask you to read paragraphs 13 and 14. (Pause.)

Now even assuming that the approach which is suggested there is correct for present purposes -- I am not conceding that down the line, but let's assume that's correct -- it is clear that in order to succeed in the claims as pleaded, the PCR would have to prove to the Tribunal, would have to satisfy the Tribunal that the PDs, the Proposed Defendants, had committed at least some contraventions of their reporting obligations and then they would go on to ask the Tribunal to assess the loss caused by those breaches on a broad brush or broad axe approach, but the crucial point is the claims would necessarily fail if the PCR failed to establish that no such contraventions had occurred.

Again, it is a slight of hand to say we can escape the essential ingredient aspect by relying on the broad axe or broad brush approach. It is inherent in the claims that they will have to satisfy you that those conditions apply and that they weren't met.

MR FORRESTER: Assuming you are right, where does that take you?

MR HOSKINS: I am meeting an argument that is put by the PCR which is that because they can rely on the broad axe and broad approach, so the Tribunal won't have to go through every allegation of misreporting and reach a conclusion on it, they say it is not an essential ingredient. My point is you can't escape the essential ingredient point in that way because they will have to satisfy you that there has been contravention and not just a single contravention, but, as they put it, systemic and significant contraventions.

MR FORRESTER: I see.

MR HOSKINS: So, the Environment Agency point. The Environment Agency framework for reporting pollution incidents we have summarised in our annex. So, let's start there. Bundle 1, tab 6 and it is at page 311. We should pick it up at page 309. Sorry. You will see there the heading "EA framework for reporting Pollution Incidents". Let's go back one page even further before we get there. 308. I am so sorry. This is the permits. Paragraph 241:

"Under EPR16", the Environment Protection Regulations2016, “regulation 12: (1) A person must not, except under and to the extent authorised by an environmental permit– (a) operate a regulated activity, or (b) cause or knowingly permit a water discharge activity or groundwater activity."

So, you need a permit. Then paragraph 245. Not all permits are in the same form, but this is put as a template for a permit. You will see that one of the notification requirements is:

"The EA shall be notified “as soon as reasonably practicable following detection within the site of the regulated facility” of ..."

Then there is a definition of the spills that have to be notified.

Then 246. "The template permit also includes the requirement to…"submit reports of

the monitoring and assessment carried out in accordance with the conditions of this permit."

So, it is the sense we have for Ofwat, which is economic conditions -- the instrument of appointment and conditions and for the Environment Agency, which is dealing with environmental matters, you have permits and reporting requirements, but you see the similarity in the schemes.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Now it is right that there is no equivalent to section 18(8) in the legislation relating to the Environment Agency. So, it is not a section 18(8) point, but there is, as I will show you, a principle of statutory construction which is similar in nature and relevant. As a matter of pleading in the way the claim is being pursued, the PCR has not sought to run a separate argument in relation to the Environment Agency for the purpose of today.

Let me show you what I mean by that. If we go to our Consolidated Response, so that's bundle 1, tab 6, page 233, paragraph 29, this is our document, so this is where we are setting out our case on this.

MR FORRESTER: Sorry. What is ...?

MR HOSKINS: Page 233. So we said:

"Those allegations also amount to an allegation of a breach of the permits issued by the EA. As set out below, EPR16 establishes a statutory remedial regime, including criminal sanctions, for non-compliance with the terms of a permit held by a WaSC. That regime contains no equivalent to section 18(8) of the WIA91. Where a statute provides for a method of enforcing a statutory duty, that will normally indicate that the duty was intended to be enforceable by that method alone (and not by a private right of action)."

You will see the footnote is a reference to Bennion on Statutory Interpretation. Then

we said:

"The statutory remedial regime is therefore the exclusive method for enforcing the terms of the relevant permits."

So, we made that point in our consolidated response and the PCR has not challenged that submission in either her reply or her skeleton argument for today.

MR JUSTICE ROTH: This is not a claim to enforce a statutory duty in terms of the EPR16 regime at all.

MR HOSKINS: The EPRs impose the requirement to have a permit. The permit contains reporting conditions.

MR JUSTICE ROTH: But they are not seeking to enforce the reporting conditions under the permit at all. That's not what this claim is about.

MR HOSKINS: Well, they have pleaded again that there are obligations to report to the Environment Agency and they have reported that we have failed to comply with those requirements.

MR JUSTICE ROTH: Yes, but there is no -- if we go back to the claim in the same bundle, page 73, misleading abuse in paragraph 164, they have pleaded two separate forms or aspects, if you like, independent aspects of the abuse. One is sub-paragraph (1) which you read to us before.

MR HOSKINS: Uh-huh.

MR JUSTICE ROTH: Which is Ofwat and-- I see the breaches of the Conditions of Appointment, but then there is quite separately 164, sub-paragraph (2) and that's also independently relied on and that is not subject to the section 18(8) exclusion, because that's not a breach of the Condition of Appointment. It is a breach of the permit.

MR HOSKINS: That's the point I am addressing. I have explained that there is not a section 18(8) equivalent, but I am going to show you there is a principle of statutory interpretation that we rely on. You have seen the reference to Bennion and I am going

to take to you that.

MR JUSTICE ROTH: Yes.

MR HOSKINS: So, I am not relying on section 18(8).

MR JUSTICE ROTH: No, I appreciate that, but I thought you said that the Class Representative is not making an independent point of the EA.

MR HOSKINS: I don't want to give it too much weight. This is a pleading point. So, we plead in relation to the EA that you can't bring this claim because of the principle of statutory interpretation that is referred to in Bennion. My point is the PCR has not contradicted that submission in any of the submissions which are before this Tribunal. So, they haven't adopted that position.

Now it may well be the case that the PCR takes the view if they can't bring their claim against Ofwat, they accept that they can't bring the claim at all, and that would be credible, because as you pointed out to me, sir, if you look at page 73, paragraph 164 (2) -- (1) and (2), one is directly affected Ofwat and (2) indirectly affected EA, indirectly affected the price review.

MR JUSTICE ROTH: Let's just stop there and clarify that. Mr Robertson, is that accepted that if you can't bring it against Ofwat because of section 18(8) as regards the Ofwat PI Information, that you then cannot bring a claim in respect of the EA PI Information?

MR ROBERTSON: We don't accept that. We are bringing a claim against his clients, not against Ofwat or the Environment Agency.

MR JUSTICE ROTH: No, but they are saying if you can't -- do you accept if you can't bring the claim against the defendants based on the Ofwat PI Information, then you also cannot bring one against the defendants, obviously based on the EA PI Information?

MR ROBERTSON: No.

MR JUSTICE ROTH: It is not accepted. I didn't think it was.

MR HOSKINS: What we have then is the position as Mr Robertson has just described it but no skeleton argument or reply that actually engages with that point.

MR JUSTICE ROTH: Well, show us the Bennion bit that you want to rely on.

MR HOSKINS: Absolutely and I will take you through the point, but I am tilting at a windmill here because we have not heard what the case against us is.

So, there are two reasons why the claims which rely on the Environment Agency information should not be allowed. The first is the longstanding principle of statutory construction that where an act creates an obligation and enforces the performance in a specified manner, there is a general rule that performance cannot be enforced in any other manner. In so far as that provision applies as a principle of statutory construction to an act, it must equally apply to a regulation.

Can we go, first of all, to bundle 6, volume 4, tab 63? It is page 3758.

MR JUSTICE ROTH: Bishop of Rochester v Bridges.

MR HOSKINS: It is. Bishop of Rochester v Bridges. When I said this was a longstanding principle, this case was decided in 1831. Don't worry. I will show you some more recent authorities as well, but ...

I would like to look at the judgment of the Chief Justice, Lord Tenterden at 3763. It is four lines down towards the end of the fourth line. The Chief Justice held:

"And where an act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

So, I am on page 3763 and I am four lines down from the top of the page. At the end of that fourth line it begins with the words:

"And where an act creates an obligation ..."

It is just a single sentence. I am listening while I am drinking. Don't worry.

MR FORRESTER: They are talking about performance. Your adversary is talking about remedies in competition law for failure of performance.

MR HOSKINS: I don't think the principle is limited or is divided between acts and omissions. Here we are dealing with an obligation to report, and the performance of that obligation alleged against us is you failed to report completely and accurately. I don't think anything turns on the statutory interpretation principle whether it is an act or omission. The point is where you have a statutory scheme which creates an obligation and has a system of remedies within the statutory scheme or scheme of regulation, the common law is excluded. It's a similar principle to section 18(8) but here through a principle of statutory interpretation.

MR JUSTICE ROTH: But we don't need section 18(8).

MR HOSKINS: I think that's arguable, yes. Indeed, section 18(8) was said by Manchester Ship Canal to reflect the existing common law. There is a statement to that effect in Manchester Ship Canal.

MR FORRESTER: But the PCR is not seeking to enforce the accurate reporting of information to the Environment Agency any more than to Ofwat. It is seeking remedies for past misreporting. It is not -- it is a different kind of action, isn't it?

MR HOSKINS: Where you have a piece of legislation that creates an obligation and where the legislation provides a suite of remedies to deal with breach of that obligation, then the common law is excluded as a matter of statutory interpretation, and that is what is happening here because the PCR has pleaded the case which says there are certain reporting obligations to the EA which arise from the regulations and from the conditions imposed thereunder and we want to bring a common law claim in damages in that respect.

However, under the environmental regulations there is a suite of remedies already provided. So, it is a very similar point I made to you in relation to section 18(8). Where

Parliament or where the relevant legislator has decided to set up a scheme and to impose remedies, then the common law is excluded.

PROFESSOR SMITH: Sorry to test your patience.

MR HOSKINS: Please do. That's what I am here for.

PROFESSOR SMITH: The PCR is not seeking to enforce the correct reporting from 2010 to 2020. It is seeking remedies for incorrect reporting that has taken place. One could envisage an action to enforce correct reporting from this point on, but it's hard -- I understand that the action is not seeking past enforcement if such a thing were even conceivable, the kind of action.

MR HOSKINS: With respect, sir, one cannot construe a principle established by case law as if it were a statute. One is talking about performance, but we have already been through, you have already heard my submissions on the essential ingredient nature of the claim, and it is an essential ingredient of the claim that reporting obligations existed to the EA and that we failed to comply with them. So in that regard there is as essential ingredient of the claim an allegation that we failed to perform our obligations. It has to be substance over form. You cannot exclude section 18(8). You cannot exclude statutory construction just by words glossing over what the relation is.

PROFESSOR SMITH: I didn't think we were talking about section 18(8) here.

MR HOSKINS: I am just making the point it is a similar argument.

MR FORRESTER: But I am still troubled by the suggestion that the PCR should be, as it were, limited, that she is asking for performance in a statutory scheme and because that statutory scheme has been defined in a limited way in terms of the remedies that may be applied, she's disentitled to come here on a different theory and is saying, and I think some of us heard the BBC this morning where these ideas were being espoused, the argument is not demanding that the water companies perform better. That may be the consequence of what she's arguing, but rather than extending

that failure in the past she is not disentitled to come here and ask for damages on behalf of those who received inadequate service.

MR HOSKINS: Can I show you the next authority and it might take us out of the language of 18(8)?

MR JUSTICE ROTH: We will let you develop this, because I am not sure the wording of Lord Tenterden in itself is enough.

MR HOSKINS: Indeed.

MR JUSTICE ROTH: Because reporting performance is not necessarily the same as a remedy for non-performance it seems to me.

MR HOSKINS: Tab 64. I am obliged, sir. It is the next one I think.

MR JUSTICE ROTH: These are decidedly antique.

MR HOSKINS: Indeed. I am going to show you it is still up-to-date. Don't worry. This was a decision of the House of Lords 1898, Passmore v the splendidly named Oswaldtwistle Urban District Council. It is the speech of the Lord Chancellor Halsbury I would like to draw to your attention. It is page 3771. I have not forgotten the page reference.

MR FORRESTER: In the days when judgments were only three pages long.

MR HOSKINS: Exactly. You will see at the top of the page there is the judgment of Halsbury. If you see where the hole punch is and go about five lines above, you will see:

"The principle where a specific remedy is given by a statute ..."

It is about five lines above the second hole punch:

"The principle where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

I think Lord Tenterden accurately states that principle in the case of Doe v. Bridges

which we have just seen... The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone."

Then over the page "There is a specified remedy contained in it, which is an application to the proper Government department."

MR JUSTICE ROTH: This was a claim for mandamus demanding what was then the Water Authority to build such sewers as were necessary.

MR HOSKINS: It was. I am not relying on the result of this particular case. I am relying on the statement of principle.

MR JUSTICE ROTH: Yes. The only way of enforcing the obligation to create sewers, as I say -- well, we see what it says. Right.

MR HOSKINS: I am going to come back to why these principles apply in our case. I am showing you the principles first.

MR JUSTICE ROTH: Right.

MR HOSKINS: I would like next to go to the Bennion quote. It is bundle 6, volume 4. So, we're still here. It is tab 68. It is at page 3838. This is I hasten to add the most recent edition of Bennion, not the 19th century one. At the bottom of the page, “Other method of enforcing the duty”:

"First, where the statute provides some other method of enforcing the duty that will normally indicate that the duty was intended to be enforceable by that method alone (and not by a private right of action)."

So, we are not simply in the world of public law. This is about the relationship between statutory regimes and private law rights of action:

"This may be regarded as an application of the expressio unius principle… In Doe d Bishop of Rochester v Bridges, it was put as follows ..."

You see the quote. So, this is squarely a principle which is about, where the statute

creates particular obligations and provides remedies for failure to comply with those obligations, then private law rights of action are excluded.

MR JUSTICE ROTH: We are in the second point, aren't we, not the first point? "Second, the likelihood that the legislature intended breach of the statute to amount to the tort of breach of statutory duty is lessened."

MR HOSKINS: That's another principle --

MR JUSTICE ROTH: They are not seeking to enforce the duty. They are seeking damages for breach of duty, arguably. We will come back to that, but it is the second point, not the first point that is the relevant one for us, isn't it?

MR HOSKINS: Well, we rely on the first point, and I do submit --

MR JUSTICE ROTH: The first point is not this case. Ms Roberts is not seeking an order that the defendants make accurate reports to Ofwat.

MR HOSKINS: No, I accept that.

MR JUSTICE ROTH: That is the duty, and she is seeking damages for breach of the duty.

MR HOSKINS: It is an essential ingredient of the cause of action that an obligation existed and that it was breached.

MR JUSTICE ROTH: Yes.

MR HOSKINS: There is a common law principle, as expressed here, as you indeed said is encapsulated in section 18(8) where Parliament creates an obligation and provides remedies for breach of that obligation and private law remedies are excluded.

MR JUSTICE ROTH: What Bennion says is that the likelihood of it is lessened. That's how Bennion puts it. The likelihood that you can then have a breach of statutory is lessened.

MR HOSKINS: Sir, the principle I rely on is one of general application. It is not restricted to breach of statutory duty.

The second point then is one which is specific to breach of statutory duty and the question there is a different one of construction, which is where you have a statute and where it is breached, did the legislature intend to allow a civil claim to be brought, it is a different but related principle. We are relying on the first one in this case. You may agree with us, you may not, but that is the principle we are relying on.

MR JUSTICE ROTH: Yes.

MR HOSKINS: In Bennion you will see after the citation of Bridges a reference to footnote 21. Footnote 21 is produced on page 3840. You have a slew of cases. They are not even exhaustive, that run up, you will be glad to see, towards the end or the beginning of this century. So, this is a principle which is very much live.

MR JUSTICE ROTH: Yes.

MR HOSKINS: If we can go, please, to our annex 2, which sets out the regime, so bundle 1, tab 6, page 311.

MR JUSTICE ROTH: Just a moment. Say that again, please.

MR HOSKINS: I began at page 308, so let's pick it up there.

MR JUSTICE ROTH: Yes. I think before we go back, we have not taken our break yet and I think that's an understandable request. So, we'll take ten minutes.

(Short break)

MR JUSTICE ROTH: Yes, Mr Hoskins.

MR HOSKINS: We are in our annex 2, which is bundle 1, tab 6 at page 310. I keep doing this, at page 308. I have shown you that the regulations impose a requirement to have a permit. Then I showed you paragraph 245, the reporting obligations that are imposed through the permits. Then the last bit I wanted to show you was at page 311, which is that statute provides remedies for failure to comply with permit obligations. Paragraph 251:

"Where a WaSC breaches their permit conditions, the EA may:

(a) serve an enforcement notice…;

(b) suspend the environmental permit…;

(c) …accept an enforcement undertaking...."

So you see a similarity to the Ofwat regime. Over the page:

"(d) for certain offences…, including breach of permit conditions from sites that discharge into rivers, [etc]…, impose an unlimited financial penalty."

So actually, the suite of remedies are very similar to the ones that exist for Ofwat.

"The EA can also prosecute breaches of permits which constitute an offence under regulation 38 EPR16."

The Environment Agency can and does investigate misreporting and you will have seen reference to South West Water decision in the pleadings. So, this regime certainly covers the sort of misreporting which the claim is based upon.

So, you will have my submission, which is legislation creates obligations. Legislation creates remedies for those obligations and as a principle of statutory construction private law actions are therefore excluded.

The second argument in relation to the Environment Agency is that the position, the legal position in relation to the Environment Agency should be interpreted so as to be consistent with section 18(8) of the Water Industry Act. The provision of information to the Environment Agency in terms of the price control regime was of secondary importance for the application of Ofwat's price control regime. Sir, you pointed out that paragraph before the short break, it is claim form paragraph 164, bundle 1, tab 1, page 73. 164(1):

"The Defendant's provision of the Ofwat PI Information, in particular in its APRs, directly affected the assessment", i.e. Ofwat's assessment.

"(2) The Defendant's provision of the EA PI Information… indirectly affected Ofwat's assessment."

So, there is a correct recognition of the fact that the -- in the context of this case or Ofwat's price control regime, the EA PI Information was of secondary importance.

The submission is this, that as a matter of statutory construction in circumstances where, if you are with us on section 18(8) of the Water Industry Act, so in circumstances where section 18(8) precludes damages claims for failure to provide complete and accurate information to Ofwat for use in its price control reviews, it would be inconsistent with and undermine that legislative provision, i.e. section 18(8) to allow damages claims for breach of statutory duty to be brought in reliance on alleged failures to provide information to the Environment Agency.

Parliament's legislation, Parliament's decisions as to where private law remedies should and should not lie should be consistent in relation to these claims and in relation these fields. So, if you are with us in relation to our submission on section 18(8) in our submission you should be with us in relation to the Environment Agency.

Unless there are any further questions, I was going to move on to the second issue, but I do genuinely mean if there is anything else to ask then obviously, I am happy to deal with it.

So we are moving on to the second exclusion issue, which is whether the application of competition law is excluded because there is no competition or indeed any scope for competition. That's in relation to the activities which are the subject of the claim and that is the supply of sewerage services to household customers by the Parallel Defendants.

Now it is common ground, as you have seen, between the parties that, first of all at all relevant times each of the Proposed Defendants have supplied sewerage services under their respective appointments and each Proposed Defendant is the only company with an appointment to provide such services within its own area of appointment.

It is also common ground that each Proposed Defendant has a statutory monopoly over its relevant market and it is also common ground that there is no possibility of rivals entering the market.

We can see that if you go to the claim form, bundle 1, tab 1, page 7.

MR JUSTICE ROTH: It may be enough if you give us the reference.

MR HOSKINS: Fine. You have this already.

MR JUSTICE ROTH: If it is common ground.

MR HOSKINS: Yes. Claim Form, paragraphs 5, 152 and 173(5). The absence of competition in the market has been confirmed by Ofwat. That's bundle 8, tab 7. I am going to pick it up at page 103, but if you look first at page 92. So, this is bundle 8, tab 7, this is again the skeleton argument that Ofwat submitted for the CMC in March.

MR JUSTICE ROTH: Yes.

MR HOSKINS: I would like to look at page 103, paragraph 3 and you will see what Ofcom (sic) says about the competition position there. If you could read that, please.

MR JUSTICE ROTH: Yes.

MR HOSKINS: They confirm there is no competition in the industry apart from the business retail services market in England.

If I can turn to the relevant legal principles. I won't do it chronologically. I will start with Deutsche Telekom because that's the Court of Justice case and it encapsulates the relevant principles very crisply. It is bundle 6, volume 3, tab 41. Page 2759. You will see it is a decision of the Court of Justice of October 2010. I would like to take you to paragraph 80, which is on page 2812. There the Court of Justice held the following:

"According to the ..."

I am sorry. I will wait. I am sorry. So that's tab 41 at page 2812. There the court held:

"According to the case law of the Court of Justice, it is only if anti-competitive conduct

is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, the autonomous conduct of the undertakings. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition, which may be prevented, restricted or distorted by the autonomous conduct of undertakings", and the reference is to the Ladbroke Racing case in the mid' 90s.

Then paragraphs 84 and 85. In Deutsche Telekom itself, the principle couldn't be relied upon. That's because there was an effect on competition. You will see that in 84:

"It follows from this that the mere fact that the appellant was encouraged by the intervention of a national regulatory authority such as RegTP, to retain the pricing principles which led to the margin squeeze of competitors, who are at least as efficient as the applicant, cannot, as such, in any way absolve the applicant from responsibility under art.82 EC… Since, notwithstanding such interventions, the appellant had scope to adjust its retail prices for end-user access services, the General Court was entitled to find, on that ground alone, that the margin squeeze at issue was attributable to the appellant."

So, you have in paragraph 80 a recognition of the principles but in Deutsche Telekom itself the companies could not rely on the principles because there was competition.

MR JUSTICE ROTH: Because there was autonomous conduct, that it had the ability to adjust its retail prices. It wasn't compelled.

MR HOSKINS: In that case the companies were relying on the first part of the first sentence of paragraph 80. I know there is a dispute on this, and we will come to it. So, there are two ways in which competition law might not apply. The first one -- I am

looking at paragraph 80 -- is if anti-competitive conduct is required of undertakings by national legislation, and in this case, it was not required by national legislation. It was merely encouraged by the intervention of a national regulatory authority, but there is also a second limb of the principle -- I will show you it is free standing -- which is if national legislation creates a legal framework which itself eliminates any possibility of competitive activity, then the competition rules do not apply.

MR JUSTICE ROTH: Then it goes on to say:

"In such a situation."

That's a reference to both, isn't it:

"The restriction is not attributable to the autonomous conduct."

MR HOSKINS: That's right. That's a description of why the court is saying that those two things apply.

MR JUSTICE ROTH: Yes.

MR HOSKINS: I will show you in the EDP case that it applied to the second limb, and I will show you the context, but the principle, the core principle which we rely on is if national legislation creates a legal framework which itself limits any possibility of competitive activity.

Now --

MR JUSTICE ROTH: "In such a situation, the restriction of competition is not attributable to the autonomous conduct of the ..."

MR HOSKINS: Sir, if you have a monopoly, a complete monopoly created by legislation, it still operates on a daily basis with a degree of autonomous conduct. The way in which the company operates on a day-to-day basis is not established by legislation. The legislation --

MR JUSTICE ROTH: But the restriction of competition is not attributable to its autonomous conduct. That's what they are saying. The restriction of competition is

not attributable to the autonomous conduct. It is the restriction of competition which the impugned conduct Articles 81 and 82 are directed at.

MR HOSKINS: But there must be a possibility for competition, because it doesn't make any sense to say the restriction of competition is attributable to an undertaking in circumstances where there is no competition, and the Court of Justice is holding that in the absence of any competition, then the competition rules don't apply. I understand why you are drawing my attention to that provision but that can't be the tail that wags the dog, with respect.

MR JUSTICE ROTH: Perhaps not.

MR HOSKINS: Exactly. I understand the reason for that, but the rule is in the first sentence.

That principle has been consistently recognised and applied by the EU courts. I do want to take you through some quite quickly, but the point, you know, is generally the same, but I will deal with certain particular aspects of the arguments as we go through them.

The principle, as far as we can see, was first recognised in the Suiker Unie cases. They were decided in 1975 and we have those in bundle 6, volume 2.2, tab 29. Page 1469 is the title page. See Court of Justice judgment December 1975. I would like to pick it up at page 1579.

Now, first of all, at paragraph 29 you can see the Commission had found that several undertakings had infringed Article 85(1) by engaging in certain practices having as its object and effect the control of deliveries of sugar on the Italian market.

MR JUSTICE ROTH: Can I ask was this only an 85 case? Was it also an 86 case? I think it was also 86, was it?

MR HOSKINS: I can't remember off the top of my head, sir.

Then if you go to page 1580, paragraph 34, you will see what the undertakings were

submitting:

"To the extent to which the applicants do not dispute the conduct for which they are blamed by the decision they submit that it does not fall within the prohibition laid down in Article 85 of the Treaty, because, on the one hand, Community rules together with the measures taken by national authorities left no opportunity for any competition on the Italian sugar market which was capable of being prevented, restricted or distorted and because, on the other hand, the practice complained of were the inevitable consequence of the said measures."

So the undertakings were relying on the market, no competition in the Italian sugar market.

The undertakings' arguments on this point was upheld by the Court of Justice. If you go to page 1585, paragraph 71:

"Although, as had been indicated earlier, the system of national quotas put in to partition national markets, only leaves the residual field for the operation of the rules of competition, that field is in turn to a great extent fundamentally restricted in its scope by the special organisation of the Italian market. These considerations show that the conduct complained of could not appreciably impede competition and does not therefore come within the prohibition of Article 85."

So there was autonomous conduct on the part of the undertakings, because it was admitted, but there was not an infringement because there was no competition in the Italian market. Now this was a 1975 judgment.

MR JUSTICE ROTH: Under Article 85 restriction of competition is something specifically you have to show.

MR HOSKINS: Well, I will show you that there are --

MR JUSTICE ROTH: You can't show a restriction potential or actual restriction of competition if the Article 85 case fails.

MR HOSKINS: I am going to show you authorities which show in terms that this principle applies both to Articles 85 and 86 as they were. It is not limited to Article 85.

MR FORRESTER: I think this is beyond antique.

MR HOSKINS: I am going to show you --

MR FORRESTER: It is pre-medieval in terms of relevance for us today. It can be seen as a political initiative by the European Commission to open up the Italian and other sugar markets and to make the market maybe a bit less incestuous, but I would -- I think we have to be very cautious in drawing much by way of conclusion from something that happened more than 50 years ago.

MR HOSKINS: Sir, I wouldn't disagree with you if that was the only case I was presenting to you. I don't think I would be here if that was the only case I had. I am going to show you -- I am showing it to you because that appears to us to be the genesis of the principle, but I am going to show you the most recent Advocate General's opinion from September 2022 that shows the principle is alive and well.

If I can go then to the Ladbroke case which was cited in Deutsche Telekom. That's in this bundle at tab 33. The title page is at 1735. It is again a judgment of the Court of Justice in November 1997 and the principle is stated at page 1779, paragraph 33.

"Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative... If anti-competitive conduct is required of undertakings by a national legislation ..."

Sorry, sir.

MR JUSTICE ROTH: What page?

MR HOSKINS: Page 1779 and it is paragraph 33.

MR JUSTICE ROTH: Yes. Thank you.

MR HOSKINS: "Articles 85 and 86 apply only to anti-competitive conduct engaged in by undertakings on their own initiative... If anti-competitive conduct is required of

undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity", not just activity, "of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings."

You will see the reference to Suiker Unie.

The next case I would like to show you is --

MR JUSTICE ROTH: Can I ask did that apply, the second limb as you would put it, of that statement to exclude --

MR HOSKINS: Sir, most of these cases the principle is recognised and then fails. I am sure you understand why.

MR JUSTICE ROTH: Has it been applied?

MR HOSKINS: Yes. I am going to show you where it's applied.

Atlantic Container. That's in tab 37. So, we need to go to bundle 6, volume 3, tab 37. It begins at page 1975. This is a judgment of the Court of First Instance from September 2003. If we go to page 2225, paragraph 1130, you will begin to see a formulation emerging. If I ask you to read that to yourself, please. (Pause.)

You will note that the footnote recites authorities replied upon and includes, first of all, Ladbroke Racing, which I have shown you.

Now pausing there on our journey through the case law -- obviously I am not showing you every case that mentions this principle -- pausing there, the PCR argues that these judgments were limited to addressing what they call the so-called 'state compulsion principle' whereby conduct which is required of an undertaking by national legislation will not amount to a breach of EU competition rules. That's the PCR's argument, but in our view that's flatly contradicted by the express language of the judgments I have shown you, because the way the principle is stated, it is consistently said that, first of

all, if anti-competitive conduct is required of undertakings by national law, which is the state compulsion principle, or if national legislation creates a legal framework eliminating any possibility of competitive conduct on their part, then the EU competition rules do not apply. So, it is quite clear that the principle being referred to in these cases is not limited to the first part. It has two parts, and it is not limited to state compulsion.

Now a case in which it was applied, and I accept it is applied in a merger case rather than an Article 86 case, but I will show you how they rely on the general principle, is this bundle 6, tab 38, so the next bundle (sic). So this is a judgment of the Court of First Instance, EDP, Energias de Portugal, v The Commission. It is a judgment of September 2005. It was a case under the merger regulation.

Portugal had established a national gas industry operating as a monopoly in all sectors of the gas industry: transmission, storage, distribution and supply levels. It followed that the gas markets in Portugal were not open to competition at the time of the contested decision.

If you can go to page 2357, I think it will probably save time if I ask you to read paragraphs 114 to 119, please. I am particularly relying on paragraphs 118 and 119.

(Pause.)

MR JUSTICE ROTH: This is not the application of the principle in the context of Article 102 at all, is it?

MR HOSKINS: Sorry. I didn't mean to mislead earlier.

MR JUSTICE ROTH: You are not misleading. I am just commenting. I mean, they say in paragraph 119, and I am just repeating what you have shown us, but the reason it won't apply -- the merger regulation didn't apply is that you can't say something is a specific requirement in Article 2, and neither of those criteria are satisfied. Paragraph 119 is just a comment on the general law that you have shown us. Isn't

that right?

MR HOSKINS: Absolutely.

MR JUSTICE ROTH: So, it is not applying it.

MR HOSKINS: Well, Sir, there is absolutely no doubt from the authorities I have shown you that the principle applies to abuse cases.

MR JUSTICE ROTH: Is there any instance where it has been applied?

MR HOSKINS: Not that we are aware of, no.

MR JUSTICE ROTH: In all these years, decades of competition law?

MR HOSKINS: Well, it would be an unusual situation to have an activity, and it is becoming even harder to find examples in the modern economy, of situations in which you have an activity in relation to which there is no competitive activity or the possibility of competitive activity.

MR JUSTICE ROTH: Well, there were lots of statutory monopolies until recently.

MR HOSKINS: They don't all -- they're not all --

MR JUSTICE ROTH: Of all the countries in Europe, we were one of the first to liberalise.

MR HOSKINS: I understand. The principle I have shown you, and you understand why I have shown you it in a number of cases, clearly applies to abuse cases, but you asked me have we found an example where it's been applied in one or two of a Chapter II case and no, we are not aware of it. It doesn't mean the principle isn't a legal principle.

MR JUSTICE ROTH: There's always a first case.

MR HOSKINS: Indeed. There's always a first.

MR JUSTICE ROTH: But if conduct is autonomous conduct, namely supplying information, that's clearly autonomous conduct by the water company, your client, deciding what information to supply and whether to be accurate or be misleading.

That's the autonomous conduct of the defendant. If that conduct has an effect on competition, if you are dominant, it would be very odd to say then it can't be an abuse just because you are a monopoly.

MR HOSKINS: I absolutely agree, but the way you phrased it, Sir, was 'if it has an effect on competition'.

MR JUSTICE ROTH: Surely it does here because --

MR HOSKINS: Well -- I will let you finish.

MR JUSTICE ROTH: -- this price control applies to wholesale prices to the retailers supplying the business market. This was explained by Ofwat. Presumably the wholesale price has an effect on the retail price and, therefore, the very same conduct that's being complained about here is going to affect competition between businesses and the price businesses pay. So, the conduct has an effect, albeit there the competition that's affected is not competition between consumers, who generally don't compete anyway.

MR HOSKINS: Sir, I hope you will allow me this indulgence. We are waiting for the note from Ofwat about how the markets work. We will see the detail of that. I understand absolutely the point you are making to me. You won't be surprised to hear that we thought that might be what would be said, but I don't want to tilt at windmills, because I would like to see what Ofwat says the position is in relation to competition.

I accept the premise that if a statutory monopoly conducts itself in such a way which affects competition, there might be arguments about in what way, etc, but I will come to that. I don't want to tilt at windmills. You may well be right, and this point might go away, but I would rather hold fire until we actually see what the position is. I am approaching --

MR JUSTICE ROTH: Yes. That does slightly put the burden on Ofwat to produce the

note quickly, if that is possible.

MS BOYD: Sir, we are trying to produce it today and circulate it.

MR JUSTICE ROTH: That would be very helpful. Yes. Then if Mr Hoskins can address in the morning. I don't think it is a very sophisticated point that we are making. Quite aside -- I mean, that's this case. Quite aside from this question of whether there is this separate limb, as you have said, and you point to the language, which is repeated and repeated and repeated. It's pretty much the same formulation in each case, and whether it has that broad effect where we are dealing with an exploitative abuse allegedly rather than an exclusionary abuse.

MR HOSKINS: I mean, I have come today -- I hope this doesn't come across as defensive -- on the basis there was common ground there was no relevant competition. The Tribunal has made an enquiry and that position may alter.

MR JUSTICE ROTH: Yes.

MR HOSKINS: It's up to you whether you want me to carry on, because there are further submissions on the law, etc, but it may well be you say, "You might be wasting our time", because this note might come in and everyone might say, "Okay. There is relevant competition".

PROFESSOR SMITH: Can I ask you to elaborate a little on the no possibility of competition because in the Ladbroke and Atlantic Container lines cases you quoted the phrase the framework or the set-up "eliminates anti-competitive conduct".

So I think the question in my mind that's raised by that is if you have a monopoly, a statutory monopoly, which, however, has actions open to it that lead to its prices rising, is that anti-competitive conduct? There is no competition, so there is no anti-competitive conduct in the sense of excluding competition or making it harder for competitors or anything like that. There are no competitors, but a monopoly raising its prices, is that a -- a monopoly contriving for its prices to be raised, because it doesn't

set the price itself, is that -- does that fall under anti-competitive conduct, which is not -- we have been told is not eliminated in this market or is it something different?

MR HOSKINS: At the moment we have been told there is no competition in this market. We are waiting to see if there is competition.

PROFESSOR SMITH: What I am asking you is --

MR HOSKINS: I understand.

PROFESSOR SMITH: -- I am suggesting "eliminates anti-competitive conduct" is a different use of the word "competition" from "there is no competition in this market". "There is no competition in this market" to me means there are no competitors in the market, but anti-competitive conduct could be a 100% monopoly, no competition, no threat of competition, but finding a way of raising its prices. That's my query: is that anti-competitive conduct, even though there is no competition in the market?

MR HOSKINS: Our submission is that would not be anti-competitive activity, because you can't be anti-competitive in a market in which there is no competition and that's what this principle says.

PROFESSOR SMITH: So would your position be that if you had a non-statutory market -- we are just looking at a fortunate company that found itself in a situation where it had 100% of the market. It wasn't a statutory set-up. It just was such that it was very hard for competitors to enter into the market. Then such a company raising its prices is not anti-competitive conduct.

MR HOSKINS: If there wasn't a 100% market created by legislation, then it wouldn't fall within this principle, because on its terms this only applies. In relation to a company with 100% -- I will start again. One possibility would be there's the possibility of competition, because nobody sits with 100% forever without a statutory position, but our submission is not that just because you are 100% dominant you escape from competition law. It's in terms of this. It is because national legislation creates it.

Again there is a logic to this, which is, similar to submissions I was making to you on the earlier point, which is where a legislature has decided to create a statutory monopoly and to regulate that monopoly in a particular way, then it is not necessarily helpful to have someone come in and say, "Well, we see this detailed regulation, but actually you should be doing it this way because of competition law".

So, it is a shade of the argument I was making to you earlier on section 18(8), but to answer your specific question, absolutely not. The principle on its own terms only applies where it is a result of national legislation.

MR JUSTICE ROTH: But pursuing that, I mean, national legislation creating 100% monopoly, that doesn't immunise the monopolist from competition law, does it?

MR HOSKINS: No. If the monopolist has an effect on competition -- for example, and we will come to it later, but there are examples of monopolies that leverage their statutory monopoly into other markets in which there is competition. They don't benefit from this exception. There has to be an effect on competition somewhere.

MR JUSTICE ROTH: It need not be their competition. They don't have to be the competitor. It can be competition by others.

MR HOSKINS: That's a point I may have to make submissions to you on. The cases --

MR JUSTICE ROTH: That's clear, isn't it? I mean, Aéroports de Paris involved a statutory monopoly.

MR HOSKINS: There is another strand to this, which is -- sorry.

MR JUSTICE ROTH: Just pursuing that for a moment, I mean, there was an abuse. They have a -- it may be a natural monopoly, but it's a legislative monopoly that they operate at Paris airports, and if they discriminate between suppliers of, I think it was catering or grounds handling services, that was an abuse, although they did not -- they had a complete monopoly by reason of French legislation. There was no question that

they were shielded. On a literal reading of that statement, of course, competition law wouldn't apply to them, so it can't be applied literally.

MR HOSKINS: You will have to pick me up on this. I don't know this off the top of my head, but one has to distinguish between the application of the competition rules to the undertakings themselves and to the Member States. I can't remember if the Paris Airports case, which side it fell on, but there are also --

MR JUSTICE ROTH: It was the Airport Authority.

MR HOSKINS: Yes, but there is a lot of authorities -- we can obviously check this -- where what you are looking at is what is in Article 106, which is the application of the competition rules to the Member States. That's a different issue.

MR JUSTICE ROTH: That's a different issue.

MR HOSKINS: So, you have the analysis of is the state in breach of Article 106 and as part of that analysis you are looking at whether there's a breach of Article 102, but just because you conclude that the Member State has infringed 106 doesn't mean that the undertaking itself has infringed Article 102.

MR JUSTICE ROTH: I think that was a 102 case.

MR HOSKINS: That's what I can't remember.

MR JUSTICE ROTH: Similarly -- I mean, suppose Heathrow Airport -- if Heathrow Airport is a monopolist -- you could say it is not, because of Gatwick and so on, but just assume that it is, or we can take the Paris Airport, which is a monopolist, and it says, "We are going to raise the rent to all the outlets in our terminals by 500%", and all the operators of the outlets bring a case saying, "This is an excessive price. You are abusing your position".

You wouldn't say competition law can't apply because Heathrow Airport or the Paris Airports don't face competition. They are -- by reason of national legislation there is no possibility of competitive conduct on their part. That can't be right.

MR HOSKINS: There is an egregious -- it is extreme, so it is an extreme example. An extreme example, the regulator would be down on it like a ton of bricks. If there were a more nuanced case of an allegation of excessive pricing against Heathrow and assuming it is dominant in the relevant market, then there is a mechanism, which is to go to the regulator and then the regulator decides.

MR JUSTICE ROTH: Even if the remedial system hasn't provided for damages?

MR HOSKINS: Well, it depends what the particular remedial system is, but if the remedial system doesn't provide for damages directly, then that's what Parliament has decided.

MR JUSTICE ROTH: You say then the retailers -- some regulators are more astute than others, quicker than others or have priorities that may preclude them from taking action. You say that the victims of that conduct could not invoke abuse of dominance?

MR HOSKINS: If it is excluded by this particular principle and if the particular legislative system doesn't provide for damages, then yes, that is the logic of what I am saying.

Sorry. Can I finish this point, Sir? I know I am not supposed to. If I can finish this point.

If there is an experienced regulator, if there is a detailed system for price control and/or for assessing the level of prices, then the idea that competition law comes in with abuse of pricing principles to be applied by the courts is not necessarily a very attractive one. Everyone in this room thinks competition law is a good idea, and I am not going to try to dissuade anyone otherwise, but it is not always a good idea, because if you have a specialist regulator, a specialist system, the idea that you will have a general system of law, competition law, coming in and having a general Tribunal, for example, trying to come up with "Is this excessive and, if not, what is the competitive price?", and we all know the difficulties that are tied up in that, you can

well see why as a legal policy issue in this case law or as a matter of legislation the decision may be taken, "We don't want competition law in this realm. Competition law isn't the answer to everything and sometimes it can actually be unhelpful for competition law to be applied". I know that's anathema in this court, but there's the point.

MR FORRESTER: I think what you are saying suggests that those who are blessed by a statement of the Court of Justice saying "There is no room for competition law here" have a sort of get out of jail free card.

MR HOSKINS: No, because the regulator regulates them. It is not that they are not subject to any restraints. It is just that the proper restraints are those of the regulator.

MR FORRESTER: Yes, they may be regulated. So, in the case of Portuguese Gas there were indeed -- or Ladbrokes for that matter -- there was a lot of state intervention. In Ladbrokes there was the Pari Mutuel, which was competing with Ladbroke, and the background was free market betting and state-owned betting at racecourses, and there was no doubt there was a lot of state regulation and there was a favoured state participant. Would that be challenged by the European Commission or not? Likewise in the case of Portuguese Gas. There was a lot of state regulation. It was on the way to de-regulation but it hadn't quite got there yet.

So, the challenge was made and the institutions you might say went too far. They were too ambitious, but never I think was it said that if the conduct in question had been the practice in the case of Pari Mutuel of cheating betters -- "cheating" is a too strong word -- imposing a levy on betters which was not transparent and which was too much, which was excessive, I would not at all exclude the possibility that the Pari Mutuel would be subject to a challenge under competition law, because what it was doing was an abuse vis-a-vis its customers, the people who came to bet.

So, I would gently suggest that when the court said "There's no room for a competition

in this matter", it wasn't saying as a universally valid proposition that competition law can't apply in any circumstances.

MR HOSKINS: So, the principle has been stated and re-stated on a number of occasions.

MR FORRESTER: In particular cases where there was a lot of state intervention, which was extensive and probably challenged as being too extensive, but I don't think we've yet heard a case where victims came and said, "Independently of what you are doing with respect to Deutsche Telekom or Ladbrokes or the Pari Mutuel or Portugese Gas, independently of that, we have been injured by this conduct and that conduct".

MR HOSKINS: I think another way of putting the point -- you will correct me if I am wrong, because this is intended to be helpful -- is given the language in which the principle is stated and restated, does it apply to exploitative abuses or just to exclusionary abuses?

MR FORRESTER: Uh-huh.

MR HOSKINS: That's a facet of what you are putting to me. My submission in relation to that is the case law is couched in general terms in the sense that it says where national legislation creates a legal framework which eliminates any possibility of competitive activity, then the competition rules do not apply to that activity. The case law does not make any distinction between exclusionary and exploitative abuses and I accept I can't think of an example -- I have not found an example where the application of that principle has been tested against an exploitative case in a case in which there is otherwise no competition.

So, my submission is, take the principle as frequently restated as it is stated, and it makes no distinction between exclusionary and exploitative abuses. There are no exceptions to the principle. It is if no competition -- if no possibility of competitive activity, then the rules don't apply.

You already have my submission in a sense of there is no lacuna there, because in relation to, for example, complaints of excessive pricing by statutory monopolies, the regulator has been set up to deal with it and the regulator is better placed to deal with it.

MR FORRESTER: Yes. That's what you say.

MR HOSKINS: That's my submission. Absolutely. That's my submission.

MR JUSTICE ROTH: Very well. We probably should stop there. You may have a little more to say based on the Ofwat --

MR HOSKINS: Depends what I get overnight, sir. I should say I stood up half an hour later than scheduled.

MR JUSTICE ROTH: Yes. You can have half an hour tomorrow.

MR HOSKINS: That's very kind. Thank you.

MR JUSTICE ROTH: Although, Mr Robertson, that cuts into your time inevitably, because Mr Hoskins had to open Manchester Ship Canal and details of the regulatory framework. I think perhaps we shouldn't have a problem.

MR ROBERTSON: Sir, I intend to be a lot shorter than is set out in the timetable that the Tribunal communicated last week. It may well be the case that Mr Gregory finds himself on his feet tomorrow afternoon, depending how we get on tomorrow morning.

MR JUSTICE ROTH: Yes. I would not be surprised if that were to happen. Very well. 10.30 tomorrow.

Can I just say if Ofwat does produce its note, if we could also please be sent a copy as well as the parties.

MS BOYD: Of course.

(4.34 pm)

(Court adjourned until 10.30 am

on Tuesday, 24th September 2024)