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Case No: 1603/7/7/23
1628/7/7/23-1631/7/7/23
1635/7/7/24

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 March 2025

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)
IAN FORRESTER KC
PROFESSOR ALASDAIR SMITH

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

**THE WATER SERVICES REGULATION AUTHORITY**

Intervener

Heard at Salisbury Square House on 23-25 September 2024

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**JUDGMENT**

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## APPEARANCES

Aidan Robertson KC, Benjamin Williams KC, Julian Gregory and Lucinda Cunningham (instructed by RPC) appeared on behalf of the Proposed Class Representative

Mark Hoskins KC, Anneliese Blackwood, Daisy Mackersie and Matthew Kennedy (jointly instructed by Freshfields LLP, Herbert Smith Freehills LLP, Slaughter and May, Linklaters LLP, Norton Rose Fulbright LLP and Bryan Cave Leighton Paisner LLP) appeared on behalf of Yorkshire Water, Severn Trent, United Utilities, Anglian Water, Northumbrian Water and Thames Water

Jack Williams (instructed by Norton Rose Fulbright LLP) appeared on behalf of Northumbrian Water

Jessica Boyd KC and Daniel Cashman (instructed by the Water Services Regulation Authority) appeared on behalf of the Intervener

## A. INTRODUCTION

1. This judgment determines applications for collective proceedings orders ("CPOs") on an opt-out basis brought by Professor Carolyn Roberts against six water and sewerage undertakers ("WaSUs"). Each application concerns a separate set of proceedings against a distinct WaSU, but all are brought on a similar basis and the Tribunal directed that the applications be heard together. For present purposes, there is no distinction between the different applications.

2. The privatisation of water and sewerage services and the appointment of WaSUs was originally achieved by the Water Act 1989, which was then replaced by the Water Industry Act 1991 ("WIA"). The WaSUs are private companies which operate as statutory monopolies, each responsible for the supply of water and sewerage services in distinct areas. They are subject to regulation by the Water Services Regulation Authority ("Ofwat"). It will be necessary to explain aspects of the regulatory framework in greater detail below, but it includes regulation of the prices that the WaSUs may charge to household customers. They are also subject to targets regarding pollution incorporated by Ofwat into its price review determinations. The regulatory regime includes financial penalties for not meeting these targets, and also a combination of incentives and deterrence (sometimes referred to as the 'stick and carrot') in that the WaSUs are allowed as part of the overall price control framework to recover greater revenue and therefore increase their prices, or conversely are required to recover less revenue and therefore reduce their prices, according to the number of relevant pollution incidents ("PIs") which they report.

3. In brief outline, the claims allege that the proposed defendants ("PDs") significantly under-reported the number of relevant PIs and thereby were able to charge higher prices than they would have been permitted to charge if they had made accurate reports. Prof Roberts, as the proposed class representative ("PCR"), seeks authorisation to bring these proceedings on behalf of a class comprising, in each case, all household customers of the relevant WaSU. There are accordingly several million potential class members ("PCMs") in each set of proceedings. The under-reporting of PIs, and the consequently higher prices charged to the PCMs, is alleged to constitute an abuse of a dominant position

contrary to the Chapter II prohibition under s. 18 of the Competition Act 1998 ("CA").

4. On that basis, the PCR seeks aggregate damages comprising the difference between the amounts paid and the lower amounts which the PDs would have charged if the estimated number of PIs which took place had been properly reported.

5. Ofwat was granted permission to intervene in the applications and appeared by counsel at the hearing. Ofwat provided a helpful account of the regulatory regime and made oral submissions, both by counsel and its in-house solicitor, Ms Jane Jellis, in answer to questions from the Tribunal. We are grateful to Ofwat and its legal representatives for their assistance.

## B. THE REGULATORY REGIME

6. Under Part II of the WIA, the Secretary of State, or Ofwat with the consent of the Secretary of State, may appoint a company to be the water undertaker or sewerage undertaker for a designated area in England and Wales: s. 6(1). In practice, the same company has generally been appointed for both functions; and each PD is accordingly both an appointed water undertaker and an appointed sewerage undertaker. By s. 6(2) WIA, a WaSU is under an obligation to comply with the conditions of its appointment and is further required to comply with any duty imposed on it by or under any enactment.

7. The present cases are concerned primarily with the duties imposed regarding the supply of sewerage services. The WIA provides at s. 94(1):

> "It shall be the duty of every sewerage undertaker—
>
> (a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers … as to ensure that that area is and continues to be effectually drained; and
>
> (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers."

8. That is supplemented by duties under the Urban Waste Water Treatment (England and Wales) Regulations 1994 ("UWWTR"). Reg 4(2) and Sch 2 UWWTR require that the sewerage undertakers ensure that in urban settlements of prescribed sizes and urban discharge areas, their networks (collecting systems) are designed, constructed and maintained "in accordance with the best technical knowledge not entailing excessive costs", including regarding "limitation of pollution of receiving waters due to storm water overflows". Reg 4(4) UWWTR relates to urban wastewater treatment works and requires sewerage undertakers: (i) to ensure that urban wastewater entering collecting systems is, before discharge, subject to treatment provided in accordance with Reg 5 UWWTR; and (ii) to ensure that, among other things, wastewater treatment works are designed, constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions.

9. Ofwat has the power to impose conditions in an appointment of a WaSU: s. 11 WIA. Condition B of the various licences deals with charge control.[1] Para 1.1 of Condition B provides that one of the purposes of the Condition is to give Ofwat the power "to make determinations setting controls in respect of the charges levied and/or revenue allowed"; and para 1.2 provides that another purpose of the Condition is to provide for periodic reviews of the business to be carried out by Ofwat to determine whether one or more price controls should be changed. Paras 9.1 and 9.2 of Condition B state:

> "9.1 The Appointee shall levy charges in a way best calculated to comply with the Price Control or Price Controls determined by the Water Services Regulation Authority [Ofwat] pursuant to sub-paragraph 9.3 or sub-paragraph 9.4.
>
> …
>
> 9.2 The Appointee shall furnish to [Ofwat] such Information as [Ofwat] may reasonably require to enable it to carry out a Periodic Review pursuant to sub-paragraph 9.3 or sub-paragraph 9.4."

10. Paras 9.3-9.4 of Condition B give Ofwat the power to determine the appropriate nature, form and level of price controls. Since at least 2014, Ofwat has exercised

[1] The numbering of the licence conditions varies as between companies but the substance is the same. The numbers given here relate to the licence of Severn Trent Water.

this power by adopting a revenue control approach. Ofwat has set Revenue Allowances that cap the aggregate maximum revenue that an appointed WaSU can collect for specified activities through the charges it imposes on its customers. The WaSU is free to set the prices charged to its customers within that capped Revenue Allowance.

11. Condition M concerns the provision of information more generally to Ofwat. Paras M1 and M2 state:

> "M1 The Appointee must provide [Ofwat] with any Information that [Ofwat] may reasonably require for the purpose of carrying out its functions under any enactment.
>
> M2 The Appointee must provide any Information required by [Ofwat] by such time and in such form and manner, as [Ofwat] may reasonably require."

12. Ofwat has carried out a periodic price review every five years. The price reviews relevant to the claims in these proceedings are:

    (i) PR14: the determination published by Ofwat in December 2014, setting price controls for the period April 2015-March 2020; and

    (ii) PR19: the determination published by Ofwat in December 2019, setting price controls for the period April 2020-March 2025.

    The next price review period is PR24, which will cover April 2025-March 2030.

13. In its price review determinations, Ofwat set performance commitments ("PCs") for each of the WaSUs. Those allow for financial rewards or penalties if a WaSU outperforms or underperforms against specified targets. The purpose of introducing such rewards and penalties was stated to be to incentivise "companies to meet the needs and aspirations of their customers." The PCs covered a number of areas of service delivery. One area was the number of "Recognised Pollution Incidents". The way in which the PCs were set in PR19 differed from that in PR14, and the categories of PIs included were expanded. "Recognised Pollution Incidents" referred to guidance and classification produced by the Environment Agency ("EA"), according to which PIs are recorded on the National Incident Recording System with respect to England.

The Tribunal was given extensive information regarding the different forms of PIs, the classification, and the manner of reporting, but it is unnecessary to describe that for the purpose of this judgment.

14. The material point is that since PR14, as part of their price control WaSUs have had a PC relating to PIs. The price review determinations incorporate what are called Outcome Delivery Incentives ("ODIs"). Those incentives are designed to reward outperformance through higher Revenue Allowances (thereby permitting higher prices to customers), or penalise underperformance through lower Revenue Allowances (requiring lower prices to customers).

15. Although the PCs and ODIs were specific to each WaSU, they shared common features, in that each involved a performance target; a so-called "deadband zone" either side of the target as to which no rewards or penalties were applied; and an upper limit in financial terms of ODI rewards and penalties, beyond which no further reward would be granted (a "cap") or penalty incurred (a "collar").

16. It follows that if a WaSU should significantly under-report the number of relevant PIs, that could affect the determination by Ofwat of the maximum revenue allowed for the WaSU and therefore the prices which the WaSU could charge to its customers.

17. Pursuant to s. 18 WIA, if Ofwat is satisfied that a WaSU is contravening a condition of appointment, it must make a final enforcement order for the purpose of securing compliance, unless one of the exceptions in s. 19 WIA applies. Those exceptions include the case where the WaSU gives an undertaking to take the appropriate steps to secure compliance with the condition or where the contravention was of a trivial nature. Further, by s. 22A WIA, Ofwat may impose a financial penalty "of such amount as is reasonable in all the circumstances of the case" for breach of the condition. However, before making an enforcement order or imposing a penalty, Ofwat must consider whether it would be more appropriate to proceed under the CA. By s. 31 WIA, Ofwat has concurrent powers with the Competition and Markets Authority to enforce the Chapter I and Chapter II prohibitions under the CA.

18. Where an enforcement order has been made, Ofwat may enforce it by civil proceedings for an injunction or other appropriate relief: WIA s. 22(4). And s. 22(1)-(2) provide as follows:

> "(1) 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.
>
> (2) 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."

19. Ofwat stated to the Tribunal that it considers that (i) misreporting to it of data and (ii) recovering money from customers on the basis of that misreporting, contrary to the terms of its price control, would constitute breaches of one or more of the conditions of appointment, referring in particular to conditions B 9.1-9.2 (para 9 above). Further, Ofwat stated that if it found that a WaSU had misreported data, it would impose an enforcement order requiring the company to take the actions necessary to secure compliance.

20. Each WaSU owns infrastructure related to the supply of water and sewerage services in the area for which it has been appointed ("appointment area"). However, there is an important distinction under the regulatory regime between the business market and the residential/household market in England. The business market comprises all eligible non-household premises, of whatever size. The WaSUs are the direct suppliers to residential customers, and therefore each WaSU is the monopoly supplier to all residential customers in its appointment area. But in the business market, the retail provision of water and sewerage services in England was opened to competing providers in 2017.[2] The WaSU remains the sole wholesale supplier for its appointment area, but Ofwat grants retail suppliers the right to obtain a regulated contract with a WaSU for onward sale of water and/or sewerage services to business customers. Such retail suppliers buy the wholesale services (i.e. the physical supply of water and removal of sewerage) from the WaSU to whose infrastructure the business customer is connected, and offer to sell a package of services to such customers. The retailers are then responsible for reading water meters, billing, providing

[2] The Welsh Government decided not to open the business retail market, save in respect of business customers who use more than 50 mega litres of water per year.

account management and water efficiency services, and providing customer advice and support. None of the PDs have chosen to be retail suppliers in the business market.

21. As of March 2023, there were 17 retailers operating in this way in the business market in England, and they determine their own charges to customers.[3] Accordingly, business retailers compete with each other for eligible customers, based on the retail price they charge (which will normally be influenced by the efficiency with which they operate) and customer satisfaction with their services.

22. The same price control applies to WaSUs at the wholesale level, irrespective of whether the eventual supply is to residential customers or business customers. The price controls under PR14 and PR19 accordingly have included a component in respect of the wholesale-like aspect of the WaSU's services and a component in respect of the retail-like aspect. The wholesale-like component applies equally to the supply to residential customers and to the supply to retailers serving business customers. An increase or decrease in the level of revenue allowed to a WaSU will therefore affect the prices it may charge to third party retailers supplying the business market as well as the prices it may charge its own, residential customers. As stated above, there is no control on the retail price which the third-party retailers charge to business customers.

## C. COLLECTIVE PROCEEDINGS

23. Collective proceedings under s. 47B CA combine two or more claims to which s. 47A apply. Here, as explained above, the claims are for abuse of a dominant position contrary to the Chapter II prohibition under s. 18 CA.

24. However, aside from the statutory conditions set out in s. 47B CA for the making of a CPO, the PDs raised two independent grounds on which they contend that

[3] Save in respect of those business customers who were transferred automatically to a business retail supplier by way of statutory scheme and who have not agreed new terms.

the claims cannot succeed and that the applications should therefore be dismissed. They submitted that:

(1) the claims advanced are excluded under s. 18(8) WIA; and

(2) competition law, and therefore the prohibition on abuse of a dominant position, does not apply to the alleged conduct of the PDs.

We shall consider those grounds in that order.

## D. ARE THE CLAIMS EXCLUDED BY SECTION 18(8) WIA?

25. The statutory regime of enforcement orders and penalties for breach by a WaSU of its conditions of appointment is summarised at paras 17-18 above. Section 18(8) WIA provides, insofar as relevant:

> "Where any act or omission—
>
> (a) constitutes a contravention of a condition of an appointment under Chapter 1 of this Part …; or
>
> (b) causes or contributes to a contravention of any such condition or requirement,
>
> the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of this section) shall be those for which express provision is made by or under any enactment and 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*." [emphasis added].

26. As stated by Mr Hoskins KC, appearing on behalf of the PDs, this gives rise to three questions:

(1) Do the present claims concern acts or omissions which constitute a contravention of a relevant condition of appointment?

(2) Are remedies expressly provided for such a contravention under any enactment (apart from those under s. 18 WIA)?

(3) Are the remedies sought in these proceedings available in respect of those acts or omissions otherwise than by virtue of their "constituting, or causing or contributing to" that contravention?

27. As Mr Hoskins pointed out, the answers to the first two questions are not in dispute. It is common ground that the alleged under reporting to Ofwat by a PD, and its charging to customers on the basis of that misreporting, would (if established) contravene the conditions of its appointment, in particular condition B: see para 9 above. Secondly, there is no other express statutory provision for a remedy for such contravention.

28. Accordingly, question (3) is here the critical question. The private law remedy of damages for breach of the Chapter II prohibition under the CA is by way of a claim for breach of statutory duty. While the Tribunal is given jurisdiction to hear such claims by s. 47A CA, the claims remain claims at common law: *WH Newson Holdings Ltd v IMI PLC* [2013] EWCA Civ 1377, [2014] 1 All ER 1132. Does that common law remedy which the PCR seeks for the PCMs constitute a remedy for the acts of the PDs "otherwise than by virtue of those acts constituting, or causing or contributing to" the contravention of their conditions of appointment, within the terms of s. 18(8) WIA?

29. Section 18(8) WIA has recently received authoritative interpretation by the Supreme Court in *United Utilities Water Ltd v Manchester Ship Canal Co Ltd (No 2)* [2024] UKSC 22, [2024] 3 WLR 356. The owners of the Manchester Ship Canal were threatening to sue United Utilities, the relevant WaSU, in trespass and nuisance for damages caused by discharges of untreated effluent in contravention of the WIA. United Utilities brought proceedings for a declaration that such an action was excluded under s. 18(8) WIA, so that the only remedies were those provided under the regulatory and enforcement provisions of the statute.

30. In their judgment, Lords Reid PSC and Hodge DPSC, with whom all the other members of the Court agreed, after discussing at length the law as it was prior to privatisation and the WIA, considered the final words of s. 18(8) (similarly emphasised above) and stated at [57]:

> "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, where the contravention of the 1991 Act is not an essential ingredient of the claim. In other words, if a sewerage undertaker's act or omission gives rise to a cause of action at common law, the fact that it also contravenes or contributes to the contravention of the 1991 Act does not prevent the courts from enforcing the affected claimant's common law rights and awarding any available common law remedies."

31. United Utilities accepted that the discharges of untreated effluent into the canal were not authorised under the WIA, and indeed breached its duty under s. 94(1) WIA to provide what may be described as an effective sewerage system. The Supreme Court noted that s. 117(6) WIA expressly provided that a sewerage undertaker shall carry out its statutory functions so as not to create a nuisance. The Supreme Court based its conclusion that the claim in trespass and nuisance was not excluded on several considerations, but stated (at [123]) that the most important consideration was this:

> "… that fundamental common law rights, such as rights of action to protect private property, are not taken to be abrogated by statute in the absence of express language or necessary implication."

After considering arguments based on the practical problems which such a remedy might create for sewerage undertakers, which might militate against the grant of an injunction, the Court concluded, at [133]:

> "The only ouster, by section 18(8), is of causes of action of which a contravention of a condition of an undertaker'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."

32. The question whether the contravention of the appointment conditions under WIA is an "essential ingredient" of the claims has to be addressed by looking at the claims themselves. Like the parties in the hearing, we consider this by reference to the claim form against Severn Trent Water Ltd and Severn Trent PLC ("the Severn Trent proceedings"). The numbering differs in the claim forms against some of the other PDs, but the substance is the same.

33. In the claim form at para 120, the PCR states:

> "… the Defendant has at all 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 Reviews 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 [i.e. its conditions of appointment] 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."

34. After setting out the various conditions of appointment and consequent obligations, and how the reporting of PIs fed into the determinations under the price review, the PCR then summarises the position at para 151(2)-(3):

> "(2) … 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;
>
> (3) discharge of those obligations was in turn a fundamental element in Ofwat's price review regime; …"

35. This is further reflected, and emphasised, at para 164, where the PCR asserts that the Defendant's provision of the required information relating to the number of PIs on its network affected Ofwat's assessment of how the Defendant had performed against its PI PCs.

36. Then at para 167, the PCR alleges and asserts:

> "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."

37. The PCR's essential case on causation is set out at para 182. After repeating the allegation that the Defendant had misleadingly under-stated the number of PIs, para 182(3)-(5) is as follows:

> "(3) Absent the abusive conduct, Ofwat's assessment of the Defendant's performance against its PR14 and PR19 Performance Commitments would have been based on a higher number of Pollution Incidents, which would have led Ofwat to impose (a) ODI penalties rather than rewards and/or (b) lower ODI rewards – and thereby lower Revenue Allowances on the Defendant in respect of its charges to Household Customers across the Claim Period.
>
> (4) If Ofwat had imposed such lower Revenue Allowances, the maximum prices for Sewerage Services that the Defendant would have been permitted to charge its Household Customers would have been lower than the maximum prices that the Defendant was in fact permitted to charge.

> (5) As a result, had the Defendant not abused its dominant position by providing misleading PI Information, the prices paid by the PCMs for Sewerage Services from the Defendant across the Claim Period would have been lower than the prices that they in fact paid (and will pay)…."

38. The PDs contended that the claims were founded on the obligation to report PIs to the regulator. They submitted that if there was no condition requiring the PDs to make such reports, there could be no allegation of non-compliance. As Mr Hoskins put it, the touchstone for determining whether the regulator was misled is the appointment condition and the obligation to comply with it. If there was no breach by the PD of its reporting obligations, then the claims would fail.

39. For the PCR, Mr Robertson KC argued, in summary, that misleading the regulator was the basis for the cause of action for breach of the statutory duty imposed by the Chapter II prohibition under the CA. He submitted that this gave rise to a free-standing abuse which was independent of the WIA.

40. Although Mr Hoskins asserted that the alleged misreporting can only be understood and determined in terms of the reporting requirements set by Ofwat, and in particular condition B para 9.2 (see at para 9 above), we see some force in the PCR's response that for a dominant undertaking to mislead a public authority is in any event an abuse. It is trite to observe that the categories of abuse set out in s. 18(2) CA, following Art 102 of the Treaty on the Functioning of the European Union ("TFEU"), are not exhaustive. In that regard, the PCR drew support from Case C-457/10P *AstraZeneca v Commission*, EU:C:2012:770, [2013] 4 CMLR 7, where the Court of Justice of the European Union ("CJEU"), upholding the General Court, held that AstraZeneca ("AZ") had committed an abuse in that:

> "AZ's consistent and linear conduct, as summarised above, which was characterised by the notification to the patent offices of highly misleading representations and by a manifest lack of transparency, inter alia as regards the existence of the French technical authorisation, and by which AZ deliberately attempted to mislead the patent offices and judicial authorities in order to keep for as long as possible its monopoly on the PPI market, fell outside the scope of competition on the merits."

In that case, the consequence was that AZ maintained or obtained supplementary protection certificates for one of its main pharmaceutical products, thereby prolonging the exclusion of generic rivals from the market.

41. However, as the PCR correctly recognised, abuse is not sufficient for the cause of action being pursued. The alleged abusive conduct has to cause damage to the claimants: see the elements of the cause of action as set out in the skeleton argument for the PCR at para 93. Here, although the abuse is founded on under-reporting of PIs, the loss claimed is not the damage caused by the polluting activity, in sharp contrast to the *Manchester Ship Canal* case. The PCMs' loss arises from the fact that the PDs could charge higher prices under the price control regime set by Ofwat. Therefore, the counterfactual underlying the damages claim is not a world where the PDs caused less pollution, but one where they complied with the lower Revenue Allowances which Ofwat would have imposed had they reported their PIs accurately, and thus charged lower prices to customers.

42. This is manifest from the general way the PCR puts her case, and is made clear from the pleaded summary of the way damages will be estimated. The claim form states, at para 194:

> "… the methodology contains two broad elements:
>
> (1) Identifying and/or estimating the number of relevant Pollution Incidents that Ofwat would have used in the counterfactual (absent the abuse) for the purpose of assessing the Defendant's performance against its PI Performance Commitments.
>
> (2) Identifying the Revenue Allowances relating to the provision of wastewater services to Household Customers that would have been imposed on the Defendant by Ofwat in the counterfactual based on that assessment, and calculating the difference between the maximum level of revenue which the Defendant would have been permitted to charge those customers in the counterfactual and the level of revenue that it was in fact permitted to charge (which in practice reflects the prices to Household Customers that it has charged, and continues to charge)."

43. In our view, the price control mechanism imposed by Ofwat is therefore integral to the loss allegedly suffered by the PCMs. The damage they allegedly suffered, and the remedy they seek for the alleged over-charging, arise only by virtue of the fact that the reporting of PI information fed into the determination by Ofwat of the Revenue Allowance of the PDs, and the PDs contravened the conditions

imposed on them to supply Ofwat with accurate information for that purpose. Put another way, the failure to supply accurate information for the statutory regime of price control under the WIA is an essential ingredient of the PCMs' claim for breach of statutory duty under the CA. We should add that the PCR's reference to the fact that damages can be assessed by applying a 'broad axe' does not affect this conclusion. The causation of damage, however broadly it may be estimated or quantified, remains the same.

44. The position would be different if the prices charged by the PDs were in themselves said to constitute an abuse in the form of excessive and unfair pricing, by reference to the jurisprudence on unfair pricing: see Case 27/76 *United Brands v Commission*, EU:C:19787:22, [1978] ECR 207. But that was not the case advanced here: there is no allegation that the prices charged were excessive on an objective test independent of the regulatory regime. As set out above, damages are sought only on the basis of Ofwat's price control mechanism with which the PDs were bound to comply.

45. Accordingly, we consider that the present claims fall within the scope of the statutory exclusion of other remedies in s. 18(8) WIA. Indeed, this is in our view a more straightforward application of the statutory ouster than the situation addressed by the House of Lords in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, which the Supreme Court discussed and explained in the *Manchester Ship Canal* case.

46. Mr Marcic brought a claim in private nuisance against a WaSU (Thames Water, which is a PD in one of the present proceedings) after repeated flooding of his land due to overflows from the defendant's sewers. Those sewers had become inadequate to accommodate the increased volume of sewage and surface water as additional houses were built which had the statutory right to connect to the sewers. Thames Water argued that the only remedy was enforcement by the regulator and that the claim in nuisance was excluded under s. 18(8) WIA. The House of Lords held that the claim was excluded, because the cause of action was not due to any failure to maintain the existing sewers but a failure to increase the capacity of the sewage system. An essential ingredient of the cause

of action was that Thames Water had failed to perform an obligation to construct a new sewer.

47. That conclusion, as explained by the Supreme Court in *Manchester Ship Canal*, followed a consistent line of earlier case law which had established that there was no liability in nuisance at common law for a failure to construct new facilities to curb an existing nuisance. The obligation to construct a new sewer arose only because of s. 94(1) WIA. Although the claim was in nuisance, an essential element of the claim was therefore the failure by Thames Water to comply with its obligation under the statute, and the claim was accordingly excluded by s. 18(8) WIA.

48. The distinction under the law of nuisance between a claim for pollution caused by inadequate capacity of a sewerage system (for which there is no remedy at common law) and a claim for pollution caused by defective operation of a sewerage system (for which a landowner can sue in nuisance), summarised in *Manchester Ship Canal* at [86], may not always be the easiest to apply in practice. But Mr Marcic had no independent basis of a claim in nuisance without invoking the defendant's obligation to construct a new sewer, and this failure was accordingly an "essential ingredient" of his claim: *Manchester Ship Canal* at [105]. By contrast, *Manchester Ship Canal* itself was a more straightforward case of discharge of polluting effluent from public sewers, which gave rise to an actionable nuisance at common law aside from any obligation which might be imposed on the sewerage undertaker by the statute.

49. In the present cases, each PD's charges for sewerage services must comply with its applicable Revenue Allowance as a result of the price control regime imposed through its conditions of appointment. The claims do not advance any separate allegation of unfair pricing that could be assessed on an independent basis to the price control regime (see para 44 above). The alleged failure by the PDs to provide accurate information occurred in the context of that price control regime, the operation of which determines the extent of any overcharge and therefore the damages incurred. Damages are an essential element of the cause of action. Accordingly, without contravention of the regime for determination of price control, the PCMs would have no independent basis for their claims for

damages. We therefore conclude that s. 18(8) WIA operates to exclude these claims for abuse of dominance in breach of the Chapter II prohibition.

50. It is therefore unnecessary to consider the separate argument concerning under-reporting to the EA under the system of what is described as the self-reporting of PIs. The EA used those reports in furnishing information to Ofwat, but as we understand it there was no requirement to make those reports to the EA as a condition of a WaSU's appointment. As we have explained, the contravention which we find is the essential element of the claims is the contravention of the conditions relating to pricing, namely a failure to supply accurate information for the statutory regime of price control. That results from the level of PIs reported to the EA, and from there indirectly to Ofwat, as much as from those reported directly to Ofwat.

51. We reach this conclusion on what we consider is the clear application of s. 18(8) WIA, as explained by the Supreme Court in *Manchester Ship Canal*. Nonetheless, we would feel concerned if this meant that residential customers overcharged for their water supply would be left without any prospect of compensation or reimbursement. However, Ofwat told the Tribunal in the course of the hearing that it considers that it has power through an enforcement order pursuant to s. 18(1) WIA to direct a WaSU in breach of condition to reimburse customers the amount of the overcharge.[4] In response, Mr Hoskins stated that the PDs accept that Ofwat has that power. We would add that, although not a basis for our decision, we think that the administrative process of Ofwat is much better suited to determination of the level of under-reporting of PIs and of any amount due by way of reimbursement to customers than the adversarial process of litigation before the Tribunal.

52. Moreover, this appears to us to reflect Parliament's intention in establishing the regime for privatised WaSUs. The approach of the statute is that enforcement of compliance with the appointment conditions imposed on WaSUs rests

[4] This is contrary to the position set out by Ofwat in its Statement Regarding the Regulatory Regime submitted to the Tribunal on 31 July 2024.

primarily with Ofwat; and that private parties may claim only if there is a breach of a subsequent enforcement order.

## E. IS THE ALLEGED CONDUCT OUTSIDE THE SCOPE OF COMPETITION LAW?

53. In light of our conclusion that the claims are excluded by the WIA, it is not strictly necessary to determine the second ground advanced by the PDs for rejecting the claims. However, since it was fully argued, we think we should address it.

54. The two competition law prohibitions under the CA are the Chapter I prohibition concerning agreements, decisions or concerted practices: s. 2 CA; and the Chapter II prohibition of the abuse of a dominant position: s. 18 CA.

55. As is well known, these mirror the provisions of EU competition law in Articles 101 and 102 TFEU, save that the EU prohibitions require an effect on trade between EU Member States whereas the CA prohibitions require an effect on trade within the UK. Furthermore, s. 60A CA provides that the domestic provisions are to be interpreted consistently with the jurisprudence of the EU Courts as it stood up to the end of the implementation period of the UK's departure from the EU ("Brexit"). Accordingly, it is common ground in the present proceedings that the pre-Brexit case law of the EU Courts applies.

56. The PDs emphasise two circumstances which are not in dispute:

    (a) each PD, like all the WaSUs, is a statutory monopoly; and

    (b) there is no possibility of rivals entering the market.

57. It is well established that the fact that a sector is subject to a specific regulatory regime does not serve to insulate it from competition law. Indeed, Ofwat, as noted above, is given concurrent powers with the CMA to enforce the Chapter I and Chapter II prohibitions in the water and sewerage industry sector: s. 31(3) WIA.

58. Schedule 3 CA, at para 4, incorporates an exclusion from the application of competition law for public service enterprises (corresponding to Art 106 TFEU):

> "Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking."

However, no reliance was placed on that provision for the purpose of the PDs' argument. That is not surprising: it cannot be suggested that under-reporting of PIs would "obstruct the performance … of the particular tasks" assigned to WaSUs.

59. The PDs contend that not only is their activity regulated by Ofwat in the public interest, but that the statutory structure leaves no scope for competition in their supply to household consumers. And if there is no scope for competition, then, they submit, competition law does not apply. For this argument, they rely on a line of jurisprudence culminating in Case C-280/08P *Deutsche Telekom v Commission*, EU:C:2010:603, [2010] 5 CMLR 27, where the CJEU stated at para 80:

> "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, to 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 (Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 33 and 34 and the case law cited)."

Mr Hoskins referred to this as the "*Deutsche Telekom* principle".

60. *Ladbroke Racing*, EU:C:1997:531, to which the CJEU there refers, contains a very similar statement at para 33:

> "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, 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 (see also Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73,111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72)."

Accordingly, *Ladbroke Racing* referred in turn to *Suiker Unie*, EU:C:1975:174, [1975] ECR 1663.

61. The PDs relied on all three of those cases, and in their skeleton argument referred also to the decision of the General Court in Cases T-191 and 212-214/98 *Atlantic Container Line v Commission*, EU:T:2003:245, [2005] 4 CMLR 20.

62. *Deutsche Telekom* concerned a margin squeeze. Deutsche Telekom ("DT") was the vertically integrated operator of a fixed telephone network in Germany. As the former incumbent monopolist, it controlled access to the local loop which provided access to the fixed public telephone network. Following liberalisation of the telecommunications market, DT was obliged by the regulatory regime in Germany to offer other operators access to the local loop so that they could compete in supplying end-users. The Commission found that the spread between the prices charged by DT to other, competing operators for such wholesale access to the local loop and the retail prices which DT charged its subscribers for end-user services left no scope for other, equally efficient operators to compete in offering retail services to end-users, and that DT had accordingly abused its dominant position. In challenging that decision, DT relied in particular on the fact that the German regulator had fixed its wholesale charges. Following the statement in para 80 of the judgment quoted above, the CJEU proceeded to dismiss DT's appeal, stating at paras 84 to 85:

> "It follows from this that the mere fact that the appellant was encouraged by the intervention of a national regulatory authority … to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article [102] …. 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."

And further, at para 92:

> "It is common ground that that regulation did not in any way deny the appellant the possibility of adjusting its retail prices for end-user access

> services or, therefore, of engaging in autonomous conduct that is subject to Article 82 EC,…"

63. Accordingly, the ratio of the *Deutsche Telekom* judgment was that although regulation may have enabled or even encouraged the pricing practice of a dominant company, since the company still had the scope to adjust its retail prices, the abuse was attributable to its autonomous conduct and came within the competition law prohibition.

64. *Ladbroke Racing* was a complicated case, which arose out of Ladbroke's complaint to the Commission about the arrangements for off-course totalisator betting in France. Pursuant to French legislation, the main French racecourses had granted to a national association which they formed ("PMU") the exclusive right to conduct totalisator betting. The complaint was brought under what are now Art 101 (regarding the agreements between the racecourses and PMU) and Art 102 (regarding the grant by all the racecourses to the PMU of the exclusive right to manage and organise off-course betting). Ladbroke also brought a complaint against France regarding the terms of the relevant French legislation, under what is now Art 106(1) TFEU. The Court of First Instance ("CFI") held that it was necessary for the Commission to complete its examination of the complaint under Art 106 before it could definitively reject the complaint under Arts 101 and 102. In addressing the appeals by both the Commission and France against that decision, the CJEU considered the inter-relationship between national legislation and the application of the competition rules.

65. In that regard, the Court stated:

> "32. Although an assessment of the conduct of the racing companies and the PMU in the light of Articles 85 and 86 of the Treaty requires a prior evaluation of the French legislation, the sole purpose of that evaluation is to determine what effect that legislation may have on such conduct.
>
> 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 national legislation or if the latter creates a legal framework which itself eliminates any possibility 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 (see also Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73,111/73, 113/73 and 114/73 *Suiker Unie and*

> *Others* v *Commission* [1975] ECR 1663, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72).
>
> 34. Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition …."

In a case where the alleged harm was the exclusion of Ladbroke from off-course betting, the Court therefore made clear that the critical question under Arts 101 and 102 was whether it was autonomous conduct of the relevant undertakings which caused the restriction of competition in question. Accordingly, the CJEU annulled the judgment of the CFI and held that there was no impediment to the Commission addressing this question under what are now Arts 101 and 102 before deciding on the application of Art 106(1).

66. *Suiker Unie* is a judgment of almost 50 years ago, where the CJEU annulled parts of a Commission decision finding that sugar producers in a number of Member States had violated competition law by protecting several national markets from sales by foreign producers. In the Italian market, the Commission held that there was a concerted practice between a group of Italian importers and organisations representing French, Belgian and German suppliers which had the object and effect of controlling supplies to the Italian market and which infringed what is now Art 101. The Court summarised the relevant argument advanced in the application to annul that decision, as follows (at para 34 of the judgment):

> "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 practices complained of were the inevitable consequence of the said measures."

67. In addressing this submission, the Court carried out a thorough examination of the domestic Italian legislation and the way it was implemented, and then concluded, at paras 71-72:

> "Although, as has been indicated earlier, the system of national quotas, by tending to partition national markets, only leaves a 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 organization 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 of the Treaty."

68. Accordingly, *Suiker Unie* in this regard concerned the application of what is now Art 101, which expressly requires "the prevention, restriction or distortion of competition." That essential requirement of Art 101 was not fulfilled.

69. However, there is no such language in Art 102, or the equivalent Chapter II prohibition. Although *Atlantic Container Line* was in part a case of abuse of collective dominance, and therefore under Art 102, the only relevant argument there by the applicants was that some of the practices of the liner conference condemned by the Commission were permitted under US law, to which the transatlantic shipping operation was subject along with EU law. The Court accordingly had little difficulty in rejecting that argument, stating at para 1131:

> "In this case, in so far as the applicants point out that certain of the practices mentioned are permitted or even made easier by US law, it is therefore to be observed that that circumstance alone has no bearing on the application of Article 86 of the Treaty to those practices, since in such a case it remains possible for the TACA parties to adapt their conduct to comply with both Community competition law and US law."

70. The judgment went on to consider whether any of the impugned conduct was *required* by US law and found that it was not. Although the Court repeated the formulation in para 33 of the judgment in *Ladbroke Racing* quoted above, it was not addressing a situation where the possibility of competitive conduct was eliminated and it therefore takes the matter no further.

71. Furthermore, it is clear that the wording in *Deutsche Telekom* on which the PDs rely (para 59 above) cannot be applied literally. It is well established that a statutory monopoly, which therefore does not face competition, can abuse its dominant position contrary to Art 102 by its conduct towards third parties. For example, in Case C-82/01P *Aéroports de Paris*, EU:C:2002:617, [2002] ECR I-9297, the operator of the two Paris airports had a statutory monopoly but was held to have infringed Art 102 by discriminating between suppliers of ground-handling services. Mr Hoskins very properly accepted that such a monopolist would also infringe competition law if it charged excessive or unfair prices for the licences to operate retail outlets at its airport terminals.

72. Accordingly, this so-called *Deutsche Telekom* principle would need to acknowledge that where the conduct of the statutory monopolist could affect competition in another market (in which it did not itself compete), the prohibition of abuse of dominance could still apply.

73. Moreover, it is generally recognised that the Chapter II prohibition, like Art 102, covers two kinds of conduct, categorised as exclusionary abuse and exploitative abuse (although some conduct may come into both categories). Hence s. 18(1)(a) CA – "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" – is regarded as an exploitative abuse. As summarised in Bellamy & Child, *European Union Law of Competition* (8th edn, 2018), at para 10.072: "An 'exploitative abuse' is conduct which is unfair or unreasonable towards those persons who depend on the dominant firm for the supply of goods or services on the relevant market."

74. That serves to highlight what we regard as the problematic and unsatisfactory consequences of the approach urged by the PDs, if it were correct, for the present cases. The WaSUs are also responsible for the supply of water and sewerage services in the business sector, but since the liberalisation of that sector in 2017 there are independent, and competing, retailers: see para 20 above. The WaSUs supply those retailers on a wholesale basis, and the retailers in turn contract for supply to business customers. As helpfully explained during the hearing by Ofwat, the WaSUs' wholesale supply in this business segment is subject to the same regime as their 'through supply' to customers in the household segment. Therefore the alleged conduct of the PDs which is said to have enabled them to charge higher prices to PCMs would have had the same effect on their prices to retailers who supplied business customers. Moreover, as we have observed above, "business customers" is a very broad category: it comprises customers at all eligible non-household premises, of whatever size. It is reasonable to assume that the wholesale price charged by WaSUs to retailers is passed through, in whole or in part, in the retailers' charges to their customers. It follows, as Mr Hoskins realistically accepted, that if analogous proceedings were brought for a class of business customers, the Chapter II prohibition could apply (subject to the discrete question of preclusion of the

claims by reason of s. 18(8) WIA), to the prices charged to those customers.[5] Mr Hoskins said that this difference in outcome was justifiable since supply to business customers was a different market.

75. It follows that the consequence of the approach urged by the PDs would be that the same conduct, by the same defendants, could give rise to a remedy under competition law for adversely affected business customers but not for adversely affected private consumers. That would contradict one of the basic purposes of competition law, which is to promote the welfare of consumers. Hence the CJEU stated in Case C-377/20 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato*, EU:C:2022:379, at para 46:

> "… the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position within the internal market or a substantial part of that market."

76. More directly, the objective of the prohibition of exploitative abuse was explained by the Court of Appeal in *London & SE Railway Ltd v Gutmann* [2022] EWCA Civ 1077, [2022] ECC 26, at [93]:

> "The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit. This is why most laws worldwide which prohibit abuse of dominance include within the prohibition the imposition of some form of "unfair" terms and prices."

77. Moreover, we would emphasise that this is not a case where the statutory monopolies are charging prices set by the regulator. Although Ofwat imposed a regime of price control, as we have explained this gave the WaSUs the liberty to set their prices so long as the aggregate maximum revenue collected for specified activities complies with their overall Revenue Allowance. If a WaSU has fewer reportable PIs compared to its PCs, then under the regime of ODIs set by Ofwat (paras 14-15 above), this will result in an upward adjustment to its Revenue Allowance. An exemption of regulated firms from competition law in respect of actions for which the legal and regulatory framework gives them no autonomy seems logical and, in our view, uncontroversial, as reflected in the

[5] The claim periods in all the proceedings except that against Severn Trent starts on 1 April 2020. The claim period in the Severn Trent proceedings starts on 1 April 2017. Supply to business customers was opened to competition in April 2017.

decisions of the EU Courts. By contrast, here, following the alleged under-reporting of PIs, it was the autonomous decision of each PD to charge its customers a higher price. Adopting the language of *Deutsche Telekom*, each PD had the scope to adjust their prices to the PCMs.

78. Mr Hoskins accepted that the PDs' legal team was aware of no case where application of the prohibition of an exploitative abuse had been held to be excluded on the basis of the principle which he advocated before the Tribunal. We recognise that there is of course always a first case, but in over half a century of jurisprudence under EU competition law that absence is striking. In our judgment, the application of the statutory prohibition to exploitative abuse is not constrained or precluded in the present cases in the manner put forward on behalf of the PDs.

## F. THE APPLICATIONS FOR CPOS

79. Given our finding that the claims are excluded by s. 18(8) WIA, assessment as to whether the applications would otherwise meet the conditions for a CPO is academic. However, out of deference to the arguments addressed to the Tribunal, we will set out our evaluation and conclusions in that regard.

80. Section 47B(5) CA states:

> "The Tribunal may make a collective proceedings order only –
>
> a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> b) in respect of claims which are eligible for inclusion in collective proceedings."

81. Accordingly, as is well recognised, there are two conditions for the making of a CPO:

    (1) the authorisation condition, regarding the proposed class representative; and

    (2) the eligibility condition, as regards the claims which are to be combined in the collective proceedings.

## (1) The authorisation condition

82. CA s. 47B(8)(b) as amplified by rule 78 of the Competition Appeal Tribunal Rules 2015,[6] provides that the Tribunal must be satisfied that it is "just and reasonable" for the PCR to be authorised to act as the class representative, having regard to the factors set out in rule 78(2). In the present cases, there is no question of Prof Roberts having a conflict of interest with the PCMs. The relevant factors are whether the PCR "would fairly and adequately act in the interests of the class members" and whether she "will be able to pay the defendant's recoverable costs if ordered to do so".

83. We can address three aspects of authorisation summarily. First, as regards the PCR, we consider that Prof Roberts is well qualified to act in that role. She has extensive and impressive expertise in environmental science and water management, both as an academic and as a consultant, and therefore to understand and respond to arguments concerning the substance of the alleged abuses. She has experience of court proceedings, albeit in the rather different sphere of criminal prosecutions and the coroners' courts where she has acted as an expert witness. More relevantly, she has significant experience of managing large and complex projects, during her time as Head of the School of Environment at the University of Gloucestershire. She has in addition the assistance of a small advisory group, including a solicitor who had been the lead lawyer for policy and communications at Which?.

84. Secondly, we have seen the litigation plan developed by the PCR with her legal advisors and we consider it is an effective plan for sensible management of these proceedings.

85. Thirdly, the PCR has litigation funding up to £31 million through a litigation funding agreement ("LFA"). Although the draft litigation budget amounts to just over £36 million, we understand that the shortfall is made up by the lawyers acting under conditional fee agreements. It is not suggested by the PDs that the PCR may lack access to sufficient funds effectively to pursue these proceedings.

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[6] All references to rules in this judgment are to the Competition Appeal Tribunal Rules 2015.

86. The PDs did raise an objection to one provision of the Priorities Agreement which is linked to the LFA, but in response to that argument the PCR was able to secure an amendment to provide appropriate clarification which met the objection and we need say no more about it. Although the PDs raised an objection to the terms of cl. 1.4 of the LFA, that was not pursued following exchanges with the Tribunal.

87. However, the Tribunal expressed concerns about some terms of the LFA. Those were not matters raised by the PDs, but the Tribunal has a role, especially in opt-out proceedings, to have regard to the interests of class members. In particular, the Tribunal is alert to ensure that the funder is not able to assert inappropriate control of the conduct of the proceedings.

88. The LFA had undergone amendments, and there was before the Tribunal a draft of the latest version which, as we understood it, had been agreed as between the PCR and the funder and would be entered into if it received the approval of the Tribunal. In the hearing, the Tribunal raised several points with the PCR regarding the terms of the LFA addressing the rights of the funder to terminate the agreement. It is self-evident that a threat to terminate funding could potentially be used to exert influence over the way the class representative conducted the proceedings.

89. Cl. 11.1 of the LFA provided insofar as relevant:

> "If the Funder determines that a Material Adverse Change … has occurred in respect of the Claim or in relation to any Parallel Claim the Funder may give written notice to the Class Representative exercising the rights under this clause. When the Funder provides notice to the Class Representative, it will identify whether the Material Adverse Change is in relation to the Claim or in respect of one or more Parallel Claims. Following notice under this clause, any outstanding Payment Request, either in relation to the Claim Costs, or any specific Claim Costs in respect of the relevant Parallel Claim as appropriate, will be deemed immediately withdrawn and unless any dispute is resolved in the Class Representative's favour in accordance with the Dispute Resolution Procedure, no further Payment Requests may be delivered (in respect of the Claim, if the notice relates to a Claim; or in respect of the relevant Parallel Claim(s), if the notice relates to one or more Parallel Claims)."

90. The "Dispute Resolution Procedure" is set out in cl. 1.17 and, in summary, provides that if the funder served a notice under cl. 11.1 the Class

Representative could give notice disputing it, in which case an independent KC (who specialises in the area) would be instructed to determine "as soon as reasonably practicable" whether the Material Adverse Change had occurred. The parties are entitled to make representations to the KC. The decision on the matter by the KC would be binding.

91. However, although cl. 11 provides (at cl 11.2) for the consequences if the KC resolves the matter in favour of the funder, there was no equivalent provision for the consequences if the KC resolves the matter in favour of the Class Representative (other than the very limited wording in cl 11.1 on future Payment Requests). It seemed to us that it was important that the LFA should expressly provide that, in that event, the outstanding Payment Requests will be restored, and that funding would cover the period while the Dispute Resolution Procedure was being carried out.

92. More significantly, we were concerned about the definition of "Material Adverse Change" which would form the basis of this power in the funder. That is set out at cl. 1.23 and was expressed as follows:

> "**Material Adverse Change** means in the reasonable opinion of the Funder:
>
> a) the prospect of success or recovery in either (i) the Claim as a whole, or (ii) one or more Parallel Claims funded by the Funder as part of the Claim, are materially worse than the Funder's assessment of those prospects on or about the signing date; or
>
> b) amounts reasonably expected to be recovered in the Claim are such that even if the Claim is successful the Funder will no longer earn a commercially viable return under this Agreement."

93. As we have just explained, if the Class Representative disputed a notice given by the funder that there had been a Material Adverse Change, the matter would go to independent binding determination by an independent KC. In our view, the opening words of cl. 1.23 were unjustified and should be removed. Reasonable protection of the Class Representative, and therefore of class members, requires that the decision of the KC should not be as to whether the funder's opinion that either (a) or (b) had occurred was "reasonable", but on an objective basis as to whether (a) or (b) had occurred.

94. Secondly, the terms of alternative (b) are both vague and potentially very wide, by contrast with the terms of (a) which are to be determined by comparison with the assessment made at the time the LFA is entered into. We considered that the same criterion should be incorporated in (b) so as to provide a benchmark for the determination.

95. Mr Williams KC, who addressed funding issues on behalf of the PCR, realistically acknowledged the force of these points and did not seek to resist them. But he explained that he could not immediately offer to amend the LFA since that would of course require the agreement of the funder, by whom he was not instructed. Accordingly, the matter was left for the PCR to take these points away and seek to amend the LFA accordingly.

96. On 2 October 2024, the Tribunal was informed that the funder had agreed to the necessary amendments and the Tribunal was supplied with revised terms which satisfactorily removed these objections.

97. However, we should add that the PDs raised the question whether the provision for payment of the funder, which was not restricted to payment out of undistributed damages, was compatible with s. 47C CA. This point had been decided by the Tribunal in *Gutmann v Apple Inc* [2024] CAT 18 but an appeal against that decision is pending. In those circumstances, the PDs reserved their position on this issue pending the outcome of that appeal, and we heard no argument upon it.

98. Finally, on the authorisation condition, we note that the PDs had raised some concerns over the terms of the PCR's ATE insurance policy, but those were resolved by proposed amendments to the policy, which were then agreed by the various insurers involved.

**(2) The eligibility condition**

99. The statutory requirements in s. 47B(6) are amplified in rule 79, which provides at para (1):

> "The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
>
> (a) are brought on behalf of an identifiable class of persons;
>
> (b) raise common issues; and
>
> (c) are suitable to be brought in collective proceedings."

100. Here, it is clear that each of the proceedings is brought for an identifiable class of persons and raise common issues. Indeed, there is no real distinction between the claims of the individual PCMs within each separate set of proceedings, save for the amount they actually paid on their water bills. The PDs do not suggest otherwise.

101. However, under the "suitability" head, the PDs challenged the methodology for proving loss put forward by the PCR's expert economists. They contended that this did not satisfy the so-called "*Microsoft* test" which has been adopted for collective proceedings, drawn from the judgment of Rothstein J in the Canadian case of that name:

> "… the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (ie that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

102. The PCR's expert for five of the six proceedings is Mr Derek Holt. But because Mr Holt's firm is undertaking some separate work for Thames Water, for the proceedings against that company the PCR had to instruct a different expert, Dr Oliver Latham. However, the methodology put forward by Dr Latham follows that of Mr Holt, and for present purposes, as in the argument before the Tribunal, we will refer to Mr Holt's proposed methodology.

103. In summary, Mr Holt proposes to estimate the loss caused by the alleged abuses by four steps, applied to each PD:

(a) identify the number of PIs, relevant to the PCs set under PR14 and PR19, which in fact took place during the claim period and should have been reported;

(b) compare those PIs with the levels set in the PCs under, respectively, PR14 and PR19, and thereby calculate the financial penalties / reduction in rewards which would have applied if the PD had reported those higher numbers;

(c) calculate the maximum aggregate charges which the PD would have been able to charge to comply with those penalties / reduction in rewards; and

(d) calculate the degree to which those charges are below the charges which the PD in fact imposed.

104. As the PDs observed, the only fact which is altered in the counterfactual is the number of relevant PIs which would have been reported by the PDs (as compared to those which actually were reported): i.e. step (a). Indeed, although a fundamental element of the counterfactual, that is not a hypothetical figure but an attempt to estimate what actually occurred. The PDs do not criticise that aspect of the approach.

105. The challenge by the PDs is directed at the approach in step (b). Mr Holt there applies the level of PCs which were set for the PDs in PR14 and then PR19. However, the PDs contend that if the information available to Ofwat had shown an appreciably higher level of PIs, then it cannot be assumed that Ofwat would have set PCs at the same level. In that regard, the PDs rely on the explanatory statement regarding the regulatory regime provided by Ofwat to the Tribunal, which states, at para 10:

> "Ofwat makes price control decisions on the basis of the evidence available to it at the time. If the information available to it had been different at the time of a price control decision, it may have reached different decisions, both in terms of methodology and determinations."

106. On that basis, the PDs assert:

> "The question of what price control decisions Ofwat would have taken in a counterfactual in which higher numbers of relevant Pollution Incidents were reported by the PDs would be one of the central issues in the trial."

They submit that there is a lacuna in Mr Holt's approach, in that he fails to put forward a credible method by which this could be determined. For this purpose, they also rely on an expert's report from Mr Sam Williams.

107. However, in the first place it is necessary to distinguish between two periods of price regulation covered by the claims: PR14 and PR19. The claim periods start in April 2017. PR14 covered the period 2014-2019. Therefore for 2017-2019, Mr Holt would apply the price regime set out in PR14 to the higher PIs which he estimated occurred. That price regime was determined and issued by way of Ofwat's Final Determination prior to the start of the claim period. Unless the PDs seek to put forward a case that they had been seriously under-reporting PIs already prior to 2014, and therefore in a period in respect of which allegations are not made in these proceedings (and that the counterfactual should assume that this had been discovered), the PCs and the target/collar of PR14 in the counterfactual would have been the same. As Mr Williams says in his report (at para 3.33):

> "There is a direct and mechanistic link between the number of pollution incidents reported by WaSCs and the targets … Ofwat set WaSCs at its PR14 and PR19 Final Determinations."

108. We were not surprised when in the course of the hearing, confronted with this objection, Mr Hoskins abandoned reliance on this point in relation to the PR14 period, although he stated that this was only in respect of the certification of the proceedings so that the point might be revived if CPOs were granted and the proceedings continued to trial.

109. However, Mr Hoskins submitted that the point applied with full force to the period from 2020 onwards. He said that the PCs and the target/collar might have been very different from what they were in PR19 if much higher levels of PIs had been reported in the prior period, before the Final Determination of PR19 was made. He stressed that Mr Holt was unable to put forward any method by which the Tribunal could approach a finding of what they would have been.

110. In addressing this argument, we think it is necessary to step back and consider what is required to develop a counterfactual under the *Microsoft* test. In endorsing this test in *Merricks v Mastercard Inc* [2020] UKSC 51, [2021] Bus LR 25, the Supreme Court noted that the test involves a "low threshold" and that it is not intended to be onerous: see the judgment of Lord Briggs at [41]. Further valuable observations on the test were given by the Court of Appeal in *Gutmann* at [60]:

> "*The test is about practical justiciability:* …the CAT is seeking, in broad terms, to determine whether [the] methodology will "advance the resolution" of the issues at trial and enable the court to determine the issue… a central consideration for the CAT when scrutinising a methodology under the *Microsoft* test is to decide whether it is workable at trial, but always bearing in mind that the CAT has the power to wield its broad axe and work, in a relatively rough and ready way, with the assumptions and common sense intuitions, and that it can permit or even require adjustments to the methodology prior to and at trial."

111. Here, what Ofwat would have determined for PR19 in the counterfactual is unknown and unknowable since, by definition, it concerns a world which did not exist. This is not a case where one is considering how a market would have behaved, for which various econometric techniques may be used. What is required is for the Tribunal to have a plausible and reasonable method for estimation of the likely position. One way is to apply PR19 as it was, which is what Mr Holt currently proposes, and that is manifestly a workable methodology. Since PR19 incorporated a reduction in the PC (compared to PR14) to reflect the number of PIs reported in the prior period, the PDs may be able to show that it is more likely that the PC in the counterfactual would have incorporated the same percentage reduction, applied to the higher number of PIs which would have been reported. Mr Williams notes that Ofwat considered that a 30% reduction in PIs should be required for PR19 as compared to PR14, so that reduction could readily be applied to the higher number of PIs which are estimated to have occurred. But that is a matter for argument at trial and, as Mr Holt points out in his supplementary report, his method can readily be adjusted to reflect such a change.

112. Of course, we cannot rule out the possibility that Ofwat would have been so appalled by the higher number of PIs that it would have resorted to a wholly different method for regulating charges. But that seems hardly likely given what

was being proposed for the next price regime period, PR24. The PCs and the regime are becoming much stricter for the WaSUs, not more generous. In that respect, Mr Holt's methodology takes a cautious approach which favours the interests of the PDs. We see no reason to reject that as unacceptable for the purpose of finding these proceedings suitable for CPOs, because theoretically another form of regime, potentially leading to still further reductions in permissible charges, might have been introduced in the counterfactual world.

113. This was the only ground of the PDs' objection on the suitability of the proceedings for certification, and we reject it. Further, we think that the claims are clearly suitable for an aggregate award of damages and that they potentially bring significant benefits to class members. The estimated individual recovery varies as between the different sets of proceedings, but it is about £40 in relation to the Severn Trent proceedings and there is no realistic prospect of PCMs bringing individual proceedings. Accordingly, we find that the eligibility condition is satisfied.

114. Finally, on rule 79(3), given the large size of the class for each set of proceedings[7], it is not practicable for them to be brought on an opt-in basis. The PDs have sensibly not sought to suggest otherwise. If the proceedings go ahead, that should clearly be on an opt-out basis.

## G. CONCLUSION

115. For the reasons set out above:

(a) we find that these claims for abuse of dominance in breach of the Chapter II prohibition are excluded by s. 18(8) WIA; but

(b) if not so excluded, we would have granted a CPO in each set of proceedings.

116. This judgment is unanimous.

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[7] In the Severn Trent proceedings, the PCR estimates that there are about 8.1 million PCMs.

| The Hon Mr Justice Roth<br>Acting President | Ian Forrester KC | Professor Alasdair Smith |
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Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 6 March 2025