Neutral citation [2025] CAT 29

Case Nos: 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

20 May 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

RULING (PERMISSION TO APPEAL AND COSTS)

INTRODUCTION

1. On 7 March 2025, the Tribunal issued its judgment dismissing six applications by Professor Roberts as the proposed class representative ("PCR") for collective proceedings orders ("CPOs"): [2025] CAT 17 ("the Judgment"). This Ruling will use the same abbreviations as the Judgment.

2. The CPO applications were in common form in support of proceedings seeking damages against, in each case, the WaSU holding the statutory appointment for a designated area, on behalf of a class comprising all household customers of the respondent WaSU. It was common ground that for the purpose of certification there was no distinction between the different sets of proceedings and that they stood or fell together. Save where it is necessary to distinguish between them, this Ruling, like the Judgment, refers to the respondent WaSUs together as the PDs.

3. The PCR has applied for permission to appeal against the Judgment (the "PTA Application"). The PDs oppose that application and all apply for an order of costs in their favour with a direction for payment on account. The PCR submits that all costs applications should be stayed pending the outcome of the PTA Application and any consequential appeal, and further if an appeal is unsuccessful to allow her time to seek to replead her cases. Alternatively, if no stay is granted, and although she acknowledges that she has been the unsuccessful party, she seeks orders for costs that are broadly in her favour.

4. Ofwat, with permission granted by the Tribunal, intervened in the certification stage of the proceedings. By a consent order made on 18 September 2024, it was directed that Ofwat's reasonable and proportionate costs shall be costs in the case. The PCR applies to vary that order to provide that the costs of Ofwat are paid equally by the PCR and the PDs.

5. This Ruling accordingly deals with the following questions:

   (a) Should the PCR get permission to appeal?

(b) Should all costs applications be stayed?

(c) If not, what orders should be made about the parties' costs?

(d) Should the order for Ofwat's costs be varied and, if so, to what effect?

(e) What interim payments, if any, should be made on account of costs?

6. As usual in the Tribunal, these matters have been addressed on the papers. The PTA Application and separate written submissions on costs from the PCR were answered by joint submissions by the PDs on the question of PTA and on the questions of a stay and costs. The PDs served a joint submission seeking their costs and interim payments on account, accompanied by a separate schedule of costs from each PD. The PCR served a 12 page responsive submission on the issues of a stay, costs and any payments on account. The Tribunal has accordingly received a not insubstantial volume of paper regarding these consequential matters.

(A) PERMISSION TO APPEAL

7. The PCR seeks permission to appeal on three grounds. We consider each of them in turn.

Ground 1

8. The PCR submits that the Tribunal misconstrued her case "which is based on abuse of dominance leading to unfair pricing for consumers … not on contravention of the WIA price control regime": PTA Application, para 2(1). It is asserted that the claim for damages "is based on facts and matters that are independently actionable, even though they also amount to contraventions": PTA Application, para 7.

9. The PTA Application seeks to seize on para [44] of the Judgment where we observed that the position would be different if this was a claim for unfair

pricing, under the jurisprudence following *United Brands*,[1] alleging that the prices were excessive on an objective test independent of the regulatory regime of price control by Ofwat. The PCR now seeks to argue that these are indeed claims of that character.

10. However, in the first place, the claims were not advanced on the basis of a free-standing abuse of unfair pricing but asserted that the abusive conduct was misleading the regulator. The skeleton argument for the PCR for the substantive hearing of the applications for CPOs stated clearly, at para 11:

> "… the PCR's case in summary is that each of the PDs has abused, and continues to abuse, its dominant position – contrary to the Chapter II Prohibition – by providing misleading information to the relevant regulatory bodies, i.e. the EA and Ofwat".

The case was put forward in reliance on the *AstraZeneca* judgments of the European Courts,[2] i.e., as stated in the PCR's skeleton at para 10:

> "… it is an established head of abuse for a dominant undertaking to submit misleading information to a regulatory body".

11. Of course, it can be said in colloquial terms that the consequence is that the dominant undertaking can charge prices that are "unfair", but that is very different from alleging that the abusive conduct on which the claim is based is "imposing unfair … selling prices" through the use of its dominant position, within s. 18(2)(a) CA (or the EU law equivalent, Art 102(a)). The leading cases on that head of abuse are of course *United Brands,* which set out the test for unfair pricing, and *CMA v Flynn Pharma Ltd and Pfizer Inc* [2020] EWCA Civ 339, [2020] 4 All ER 934. There was no reference to either *United Brands* or to *Flynn Pharma* in the section on abuse in the PCR's claim forms (which cited a series of cases on other aspects of abuse in the discussion of the legal principles),[3] or in the PCR's skeleton argument, or in the oral submissions of the PCR at the hearing.

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[1] Case 27/76 *United Brands v Commission* EU:C:1978:22

[2] Case T-321/05 *Astra Zeneca v Commission*, EU:T:2010:266; Case C-457/10P *AstraZeneca v Commission*, EU:C:2012:770.

[3] There are footnote references to *United Brands* in Annex 2 to the Claim Form on the distinct topic of the test for dominance.

12. Secondly, the PCR's attempt to recast her case in the context of a PTA Application is misconceived. The express wording of s. 18(8) WIA focuses on the *remedy* being sought in the claim: see Judgment at [25] for the text of the statute and at [26(3)] and [28]. In that regard, the Supreme Court held in the *Manchester Ship Canal* case that it is necessary to ask whether the contravention of the statutory requirement is an "essential ingredient" of the cause of action.[4]

13. Here, the cause of action is breach of statutory duty, and both causation and damages are essential ingredients of that cause of action. And the damages are quantified on the basis of the Revenue Allowances set by Ofwat as a result of the PI information which the PDs reported, compared to the Revenue Allowances which it is alleged that Ofwat would have set in the counterfactual, on the basis of the PI information which it is alleged that the PDs should have reported. In short, the regulatory scheme involved a system of price control. And conditions B 9.1-9.2 of the PDs' appointment, which they are alleged to have contravened, concerned this price control: i.e. the WaSUs' obligation to level charges related to the information supplied to Ofwat: see the Judgment, [9] and [19]. As the Judgment stated at [43], the price control mechanism is integral to the loss allegedly suffered.

14. The position is therefore wholly different from the situation where a dominant company misleads a patent authority and thereby secures a patent to which it otherwise would not have been entitled, which is the example given in the PTA Application, para 14. There, the patent authority would have no role whatever in setting, or capping, either the monopoly price which the company charged for its patented product or the lower price which it would have charged in a competitive market if it had not obtained the patent. By contrast, here the entire calculation of damages, which formed an important part of the PCR's expert reports, is based on the operation of Ofwat's price control regime with the PI information provided by the PDs. As the PDs observe in their Joint Observations in response to the PTA Application: "No other causative mechanism or measure of loss has been pleaded by the PCR nor has any

[4] *United Utilities Water Ltd v Manchester Ship Canal* [2024] UKSC 22, [2024] 3 W.L.R 356 at [133].

corresponding expert methodology been proposed." Re-stating the claims under the head of "unfair pricing" therefore would not change their substance.

15. The simple point made at [44] of the Judgment is that these are not cases where the PCR alleges that the prices charged to consumers were unfair and excessive on a basis independent of the price control obligations: e.g. on the basis of costs, or the return on capital employed, or the level of the PDs' profits.

Ground 2

16. This ground contends that the Tribunal misinterpreted s. 18(8) WIA. This provision has been authoritatively interpreted by the Supreme Court in the *Manchester Ship Canal* case. The PTA Application seeks to suggest that the Judgment is inconsistent with the Supreme Court judgment in three respects.

    (a) It suggests that the Judgment is inconsistent with the principle set out in *Manchester Ship Canal* at [57]: PTA Application, para 53. However, that passage is set out in full in the Judgment at [30] and is the basis for the discussion that follows.

    (b) It states that a private law claim is not precluded by s. 18(8) if the facts on which it is based can constitute a cause of action at common law as well as contravening an obligation under the WIA: PTA Application, para 27. However, that is exactly what is meant by the test of "an essential ingredient" articulated by the Supreme Court at [133], quoted in the Judgment at [31] and then applied in the following paragraphs of the Judgment. And that is why the Tribunal found that there was force in the argument of the PCR that misleading a regulator may be a free-standing abuse which was not ousted by s. 18(8): Judgment at [39]. But the *cause of action* here is breach of statutory duty, and as set out above the contravention of the obligations under the WIA is essential for the causation and computation of the damages alleged. In that regard Ground 2 overlaps with Ground 1. The distinction with a claim in nuisance is that there the damages are based on the effect of the polluting incidents on the claimant (i.e. damages independent of any regulatory

regime) whereas here the PCMs are not claiming for the effect on their property or well-being of higher discharges of pollutants by the PDs: Judgment, at [41].

(c) It states that the Tribunal erred in its analysis of *Manchester Ship Canal* at [30]-[31] and [43] of the Judgment: PTA Application, para 34. The reference to [30]-[31] is bizarre: those paragraphs merely quote from and describe the Supreme Court's reasoning and the PTA Application does not explain why the description is inaccurate. As for [43], the PTA Application focuses on one sentence taken out of context. The previous two sentences make clear that the remedy sought by the PCR is entirely dependent on Ofwat's system of price control and would not exist independent of that price control.

17. The PTA Application is misconceived insofar as it seeks to make a separate argument about the underreporting to the EA. The reports to the EA formed part of the information provide to Ofwat on the level of PIs and which the PCR accepts affected Ofwat's determination of the Revenue Allowances for the PDs under its system of price control. The points made about the supply of inaccurate information and the dependence of the claims and the remedy on that system of price control apply as much to information supplied through the EA as to information supplied directly to Ofwat.

Ground 3

18. This ground is without foundation. It is based entirely on the observation in the Judgment at [51]. However, as is clear from the final sentence of [49] and the opening sentence of [51] itself, that observation forms no part of the Tribunal's reasoning. The conclusion on the application of s. 18(8) WIA rests on the reasoning leading up to the end of [49]. The additional observation is simply to the effect that we would have felt some concern at the consequences of what we held to be the legal position if it were to mean that there was no prospect of customers receiving compensation, and we wished to record Ofwat's statement that it saw its enforcement power as enabling it to direct reimbursement to customers.

19. The PTA Application nonetheless develops this ground at some length, on the basis of investigations conducted by Ofwat and, in particular, Ofwat's decision published subsequent to the Judgment to accept undertakings from Yorkshire Water. We should state that in response, the PDs contend that the PTA Application contains various inaccuracies regarding the Ofwat investigations. Those are disputes of fact which it is unnecessary to resolve and Ofwat has made clear by letter of 4 April 2025 that restitution to customers of an overcharge would not be by way of an order of compensation but by an enforcement order requiring a WaSU to secure compliance with its price control obligation.

20. Accordingly, we find that none of the three grounds in the PTA Application has any real prospect of success. The PCR additionally submits that there is "some other compelling reason" for an appeal: PTA Application, para 53. We disagree. As regards the interaction of the competition rules and sectoral regulation, that arises here only in the specific context of the terms of s. 18(8) WIA: no wider policy issues arise. As regards the correct application of s. 18(8) WIA, that has been very recently and authoritatively considered and determined by the Supreme Court. Therefore, if the specific grounds of appeal have no real prospect of success, we do not consider that there is some other compelling reason for an appeal to be heard.

21. We accordingly refuse permission to appeal.

(B) STAY

22. As noted above, the PCR applies for a stay of all costs applications to await the outcome of any appeal; and, if an appeal is unsuccessful, for a further 8 weeks to allow her to decide whether to apply for a longer period to allow her to file amended draft pleadings and seek permission to amend.

23. However, a potential appeal does not of itself afford grounds to stay questions of costs. There is no suggestion that if an appeal were to be successful, the PDs would be unable to repay any costs which they recover. As for repleading, as explained above these are not cases where this is a simple matter of repleading the same case under the head of an unfair pricing abuse. If there were to be a

free-standing unfair pricing abuse allegation, independent of the regulatory price control regime, that would be a substantially new case, and it is wholly unclear how such a case could be framed.

24. Whether the PCR would be granted "permission to amend" is not a question presently before the Tribunal, and of course that could not be determined without a fully pleaded draft amendment. The applications for CPOs on the present basis have failed, and the result in substance would be no different if the PDs had applied to strike out the claims as impermissible since they were excluded by the WIA. If a case is struck out, it is no answer to an application by the defendant for its costs for the claimant to say that it might wish to come back to the court seeking to advance its case pleaded on a different basis. We see no reason, in all the circumstances, why the Tribunal should delay the determination of applications for costs.

(C) COSTS OF THE PARTIES

25. Rule 104 gives the Tribunal a broad discretion on questions of costs. However, that discretion must of course be exercised on a consistent and principled basis. The principles to be applied were recently set out in *Merricks v Mastercard (Costs)* [2024] CAT 57, [2024] Bus LR 1830 at [17]-[22]. The statement in that Ruling that an otherwise unsuccessful party may be awarded its costs of a discrete issue on which the other party has failed, without any requirement of unreasonable conduct or exceptional circumstances, is fortified by the judgment of Davies LJ (with whom Arden and Tomlinson LJJ agreed) in *F&C Alternative Investments Ltd v Barthelemy (No 3)* [2012] EWCA Civ 843, [2013] 1 WLR 548, at [45]-[49]. This was not cited to the Tribunal in *Merricks* or in *Pigot v The Environment Agency* [2020] EWHC 1444 (Ch), [2020] Costs LR 825 to which the Tribunal in *Merricks* referred.[5]

[5] The ruling in *CICC v Mastercard (Costs)* [2023] CAT 61, to which the PDs refer, is not inconsistent with this principle: there, the Tribunal recognised that an issues-based order might be appropriate, so that the unsuccessful PCR would not have to pay all the respondents' costs, but held, at [10(e)], that the PCR should not be entitled to its own costs of the issues on which it succeeded because of its conduct in the proceedings.

26. It is common ground that the PDs were the successful parties. But applying the principles referred to above, since on these applications there were a number of discrete issues, it is appropriate to adopt an issues-based approach to costs. We reject the primary contention for the PDs that since they succeeded on their contention that the claims were precluded by s. 18(8) WIA, they should recover all their costs on the basis that the CPO applications should never have been made. If the PDs had confined their opposition to the applications to their arguments under s. 18(8) WIA, they would not have incurred any of their costs of advancing all their other, unsuccessful, arguments and the costs of the PCR would also have been substantially lower. Hence in the *Merricks* case, where the Tribunal originally dismissed the application for a CPO, the defendants were then awarded only a proportion of their costs: the discount reflected both their own costs of a discrete issue on which they had failed and a contribution to the PCR's costs: *Merricks v Mastercard : Ruling (Costs)* [2017] CAT 27.

27. It is clear that the PCR should bear her own costs of the claim forms and applications, including the two expert reports on which she relied. Those costs were all incurred to support her applications irrespective of the stance that might be adopted by the PDs.

28. Thereafter, as stated above, we adopt an issues-based approach. But that does not lead to an award derived from a simple counting of the number of issues. Justice requires that we look at the substance of what the issues involved and, where opposition on a particular point was abandoned or resolved before the hearing, what that had involved.

29. The major issues on which the PCR faced sustained challenge from the PDs which she successfully resisted were (a) the alleged legal exclusion of the claims as outside the scope of competition law (referred to in the hearing as "the *Deutsche Telekom* principle"), and (b) a challenge to the methodology of her experts. The major issue on which the PDs succeeded was the exclusion of the claims by reason of s. 18(8) WIA. We do not accept the PCR's submission that this can be characterised as "the narrowest possible legal point". It was as much a major point as (a), since the WIA regime was at the heart of the PCR's claims, and indeed this point took up significant time in argument during the hearing.

30. The PDs filed a joint experts report from Mr Sam Williams of Economic Insight challenging the PCR's experts' methodology. On that basis they mounted a sustained challenge to the approach of the PCR's experts. Moreover, three of the PDs, Thames Water, Northumbrian Water and Yorkshire Water, additionally, and separately, instructed economic experts[6] to advise them (but did not file separate reports). The total costs incurred by the PDs on expert evidence was in excess of £1.2 million. The Tribunal comprehensively rejected the PDs' challenge to the PCR's methodology: Judgment at [101]-[112]. We therefore consider that the PDs should not recover most of the costs of their economic experts. We can accept that they would reasonably incur some expert cost for evaluation of the PCR's expert reports, but no more, and on that basis we think it is appropriate to allow them 20% of the reasonably incurred expert costs. We express it that way since, on the papers before us, we cannot ascertain at what stage and for what reason three of the six PDs sought separate expert advice, and whether and to what extent it was reasonable for them to do so. Those are matters which can more appropriately be considered on detailed assessment.

31. As regards the PCR's expert costs, up to the time of the applications for CPOs (and therefore including Mr Holt's and Dr Latham's first reports), those would have been incurred in any event and are therefore not recoverable. However, as regards the PCR's expert costs incurred after service of Mr Williams' report on 14 June 2024, the position is rather different. We think that she should recover 90% of Mr Holt's costs, the small discount reflecting the fact that Mr Holt produced a revision to his method to apply to Yorkshire Water. Those costs should be paid as to 18% each by Northumbrian Water, Anglian, Severn Trent and United Utilities, 10% by Yorkshire Water, and 8% by Thames Water. Further, she should recover all of the costs of Dr Latham as against Thames Water. In each case, those costs are to be subject to assessment on the standard basis.

[6] Northumbrian Water instructed Mr Williams/Economic Insight jointly with the other PDs (the shared cost of Economic Insight for joint work was £47,750 for each PD), and separately to carry out work for Northumbrian Water only. Northumbrian Water's total fees payable to Economic Insight were £684,050.

32. On all the legal costs, we have regard to the fact that the PDs succeeded on the WIA exclusion but failed on the competition law exclusion and on methodology, while securing some changes to the LFA and ATE arrangements. We also take account of the fact that some issues were raised by the PDs but abandoned well before the hearing, and therefore some, but limited, costs were incurred on those issues.

33. Rather than making cross-orders for costs, we regard it as preferable to make one-way orders, taking into account the fact that a part of the PCR's costs should be at the expense of the PDs. In our view, taking a broad brush approach, the overall justice of the case is that, after excluding their experts' costs, the PDs should recover one third of their legal costs, subject to detailed assessment on the standard basis, if not agreed.

34. We should add that although our reasoning on the application of s. 18(8) WIA is not the same as the submission made for the PDs, it was the PDs who took this point, which depended on the relevant working of the statutory regime. An issues-based approach to costs is not the same as an argument-based approach. It is often the case that the reasoning in a judgment is not the same as the argument of the successful party, and we do not regard that in itself as a basis to reduce the PDs' recovery of costs related to an issue which they raised and which was decided in their favour.

(D) OFWAT'S COSTS

35. On 18 September 2024, the Tribunal ordered that Ofwat's reasonable and proportionate costs of participation in and up to the certification proceedings should be costs in the case. The order was made by consent.

36. Although the order contains liberty to apply, it is only exceptionally that a consent order will be varied. Here, there is no suggestion that there have been any new, unforeseeable developments since the making of the order. The order was made a week before the substantive hearing, when the issues arising on certification were clear and it would have been obvious that one side or the other would not necessarily succeed on all the issues, and that the PDs had raised

several independent grounds of opposition, any of which might lead to the applications being refused.

37. Accordingly, we see no reason here to vary the order to which the PCR agreed. The PCR will therefore pay Ofwat's costs, assessed on the standard basis if not agreed.

(E) INTERIM PAYMENT ON ACCOUNT OF COSTS

38. It is the usual practice for the Tribunal to order an interim payment on account of costs, following the approach of CPR r. 44.2(8).

39. The solicitors for each of the six PDs have filed a schedule of costs in support of the applications for interim payment. The costs of solicitors and counsel shown for each of the PDs is as follows:

	Solicitors	**Counsel**	**Total**
Thames Water	£ 566,381.00	£ 102,178.00	£ 668,559.00
United Utilities	£ 2,204,450.50	£ 422,491.08	£ 2,626,941.58
Severn Trent	£ 1,246,045	£ 291,071.62	£ 1,537,116.62
Anglian	£ 2,126,972.11	£ 259,771.08	£ 2,386,743.19
Northumbrian Water	£ 1,901,929	£ 387,911	£ 2,289,840.00
Yorkshire Water	£ 2,266,786.62	£ 286,684.77	£ 2,553,471.39
Total	**£10,312,364.23**	**£1,750,107.55**	**£12,062,671.78**

40. Even after excluding the costs of their expert, the total costs incurred by the six PDs are over £12 million That is a staggering amount for cases where the PDs, as directed by the Tribunal, served a single consolidated response to the CPO applications (apart from a supplementary annex for Yorkshire Water), a single skeleton argument for the hearing, and where they were jointly represented at the hearing, which lasted three days, by a single counsel team (save for additional junior counsel instructed to represent a potentially distinct issue concerning Northumbrian Water). The total is particularly striking when the PDs state in their submissions that they have collaborated effectively to avoid duplication.

41. We of course appreciate that these were heavy applications in terms of the technical detail and the complexity of the regulatory scheme which had to be explored and addressed. We recognise that it was reasonable for the individual PDs to instruct separate counsel at an early stage to advise them on their position, and to have separate solicitors, especially where some PDs were subject to ongoing investigations by Ofwat or the EA. However, we emphasise the indication given by the then President, Marcus Smith J, at the joint CMC on 19 March 2024:

> "We are not going to lay down a directive, but I think our provisional thinking should be clear that were one at the end of a certification process to be contemplating a costs order against the class representative, our present thinking is that there would be only one set of costs recoverable, albeit that those would be assessed on a generous basis. If and to the extent that separate submissions or evidence would be required for certification, then we would suggest that be raised in advance of the certification hearing with the Tribunal so that the need for that can be discussed in advance rather than in arrears. That again is a provisional indication but we would invite careful thought to be given to that."

42. As noted above, the parties did not seek to make separate submissions or representation for the certification hearing (save to a very limited extent in the case of Yorkshire Water and Northumbrian Water); and only limited separate evidence was filed on behalf of United Utilities in the form of two witness statements from employees (which were relied on as illustrative of the position of all PDs in their original consolidated response, and then no longer relied on in the amended consolidated response). We do not suggest that each PD was not reasonably entitled to instruct separate solicitors, but the costs incurred by most of the individual PDs for solicitors and, in some cases counsel, remain vast.

43. We do not think that there is a direct read across from the approach to costs of the courts when dealing with group litigation, as set out in *Lungowe v Vedanata Resources* [2020] EWHC 749 (TCC), to which the PCR refers in her responsive written submissions on costs. But we consider that either more effective or more efficient pooling of resources was possible in these cases, where the PDs are not competitors and have no (or very limited) conflict of interest: cp *R (Rawlinson and Hunter Trustees SA) v Central Criminal Court* [2012] EWHC 3218 (Admin), [2013] 1 Cost LR 122, at [18]-[21], where the Divisional Court

(Thomas P and Silber J) accepted that parties were justified in having separate representation but restricted the number of solicitors and counsel for whom they could recover because the "close identity of interests" between them meant that pooling of resources was appropriate whereas there had been duplication of preparatory work. Here, the lack of efficiency is demonstrated by the fact that in the period of just under four weeks, 2-25 September 2024, under the head of "preparation and review of skeleton arguments and preparation for and attendance at the certification hearing", and notwithstanding that the PDs had a large, joint counsel team and filed a single skeleton argument, as did the PCR (and Ofwat), the PDs' six firms of solicitors billed for a total of over 1,880 hours. That includes a remarkable figure of over 400 hours spent by the solicitors for Yorkshire Water.

44. As Leggatt J (as he then was) said in *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), when determining an application for payment on account in 'hard fought' litigation:

> "13. In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."

45. All the PDs instructed large City of London solicitors' firms. The case against each PD was effectively the same and, indeed, no distinction was drawn between them in the argument (save for a limited point advanced on behalf of Yorkshire Water in an Annex to the PDs' Joint Response) or the Judgment. While we appreciate that various tasks were shared out between the PDs, such

that some solicitors would have done more work than others, the discrepancy in the costs incurred is striking. One manifest explanation is the wide divergence in hourly charging rates. Moreover, save in the case of Thames Water, those rates are in excess, and for some of the PDs, very substantially in excess of the Guideline Rates. The Guideline Rates were updated with effect from 1 January 2024, and provide, for "very heavy commercial and corporate work by centrally based London firms", hourly rates for Grade A and Grade B solicitors of, respectively, £566 and £385. The rates actually charged by the solicitors for each of the six PDs were as follows:

Solicitors for:	**Grade A**	**Grade B**
Thames Water	£ 435	£ 325
United Utilities	£1065	£895-985
Severn Trent	£ 595-650	£450-550
Anglian	£1062-1477	£777-982
Northumbrian Water	£ 895	£710-744
Yorkshire Water	£1075-1241	£655-743

46. In *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, [2022] Costs LR 627, a competition case between major international companies, Males LJ, with the concurrence of Lewison and Snowden LJJ, said at [6]:

> "If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate."

The Tribunal has held that no different approach applies to collective proceedings: *Merricks v Mastercard Inc (Costs)* [2024] CAT 57 at [43].

47. There may be particular reasons why Thames Water was able to secure a favourable rate. But no particular factors have been put forward to justify rates for the solicitors for the other PDs which are above, and in some cases far above, the relevant Guideline rates. In the *Kazakhstan Kagazy* case, Leggatt J proceeded to state, at [14]:

> "Where, as here, the court is not actually assessing the amount of costs to be recovered and has nothing like the level of information that could be required on a detailed assessment, there is additional reason to be conservative. The fact that the total costs claimed are very high cannot by itself be allowed to increase the sum awarded as an interim payment. I am sure that the costs claimed by the main group of defendants are neither reasonable nor

> proportionate. By what factor they should be discounted, however, to arrive at a reasonable and proportionate amount can only properly be determined by a detailed assessment."

48. For the purpose of calculation of interim payment, we consider that the most practicable course is to take as a basis an equal amount for each of the PDs, except for Thames Water, which was not involved in the CMC.[7] In our view, on a rough and ready approach, we regard £700,000 to be a fair and conservative amount for those five PDs, and £400,000 for Thames Water. That amounts to £3.9 million in total for solicitors' costs.

49. As regards counsel, as we understand the position from the costs schedules, the cost apportionment for the joint counsel team, comprising the silk and three juniors who appeared at the hearing and in addition Mr Jamie Carpenter KC who assisted on questions of costs, was about £75,000 for each PD: i.e. in round terms about £450,000. That seems to us reasonable and proportionate given the scale and complexity of the claims. In addition, Northumbrian Water as noted above, instructed separate junior counsel to attend the hearing to address potentially discrete matters concerning its position, at a cost of £24,575, which we regard as reasonable and proportionate.

50. At the early stages, including the CMC involving five of the six PDs on 19 March 2024, each PD was separately represented. That was the situation which gave rise to the observations of the Tribunal at the CMC quoted above. On that basis, additional costs of counsel were reasonably incurred by each PD, and we accept that Thames Water, which did not take part in that CMC, does not provide a benchmark for such additional costs. The supplementary annex to the PDs' consolidated response submitted on behalf of Yorkshire Water was drafted by separate senior and junior counsel and would clearly have involved some additional cost on its behalf. However, we do not see how these factors can support as reasonable and proportionate the very substantial level of additional costs incurred on counsel by all the PDs except Thames Water. Taking a broad brush approach for the purpose interim payment, we consider that £175,000 is

[7] The claim against Thames Water was issued later and, by consent, on 3 May 2024 that case was ordered to be managed and heard with the other claims and to be subject to the directions made following the CMC in those claims.

a generous, and certainly reasonable and proportionate, cost for counsel for each of United Utilities, Severn Trent and Anglian, and £200,000 for each of Northumbrian Water and Yorkshire Water. We accept, again for the purpose of considering interim payment and without prejudice to what might be held on detailed assessment, that the counsel's fees of a little over £102,000 incurred by Thames Water appear reasonable and proportionate, having regard to the fact that it did not take part in the CMC.

51. As regards the experts, from the schedules of costs it appears that the jointly shared cost of Mr Williams/Economic Insight were £47,750 each, i.e. £286,500 in total. *In addition*, Thames Water engaged Compass Lexecon at a cost of £59,616; Yorkshire Water engaged Frontier Economics at a cost of £247,768.96; and Northumbrian Water paid a further amount of £636,300 to Economic Insight. As we have observed above, since the experts' costs will be subject to detailed assessment, this is not the occasion on which to examine and determine whether such additional (and in the case of Yorkshire Water and Northumbrian Water, remarkably high) costs were necessary or reasonable. We will accordingly determine the interim payment on the basis only of the shared costs of Mr Williams/Economic Insight: i.e. £47,750 for each PD.

52. The approach set out above means that the basis for calculation of the interim payment for each PD is as follows:

	Solicitors	**Counsel**	**Expert**
Thames Water	£400,000	£102,000	£47,750
United Utilities	£700,000	£175,000	£47,750
Severn Trent	£700,000	£175,000	£47,750
Anglian	£700,000	£175,000	£47,750
Northumbrian Water	£700,000	£200,000	£47,750
Yorkshire Water	£700,000	£200,000	£47,750
Total	**£3,900,000**	**£1,027,000**	**£286,500**

53. Standing back, that produces an overall total of a little over £5.2 million. Bearing in mind that this comprises a mixture of joint costs and individually incurred costs of six PDs in meeting a high value and complex set of claims, we regard this, in line with the provisional indication of the Tribunal at the CMC, as generous but still reasonable and proportionate.

54. The PCR has chosen not to file a schedule of costs, although she received no dispensation in that regard from the Tribunal. On the contrary, although her solicitors wrote to the Tribunal on 27 March 2025 seeking directions that there should be a two-stage approach to costs, whereby the Tribunal first issued a determination of liability for costs and thereafter the parties would make further submissions on the question of interim payments, that was opposed by the PDs and the Tribunal made no such direction. While we have determined that the PCR should recover the majority of the reasonable costs incurred on her experts after receipt of the PDs' expert's report (see para 31 above), we have not been provided with those costs and have no basis on which to direct an interim payment on account. Therefore, no such order will be made.

SUMMARY AND CONCLUSION

55. For the reasons set out above, we therefore decide that:

(a) the PCR is refused permission to appeal;

(b) the PCR's application to stay the determination of costs is refused;

(c) the PCR shall pay each PD 20% of its reasonably incurred joint expert costs and one third of its legal costs of solicitors and counsel, all those costs to be subject to detailed assessment on the standard basis;

(d) as regards the PCR's costs incurred after 14 June 2024 on her economic experts:

(i) the PDs shall pay her costs of Mr Holt and Alix Partners, in the following proportions:

Thames Water	8%
United Utilities	18%
Severn Trent	18%
Anglian	18%
Northumbrian Water	18%
Yorkshire Water	10%

(ii) Thames Water shall pay her costs of Dr Latham and Charles River Associates;

those costs to be subject to detailed assessment on the standard basis, if not agreed;

(e) the application to vary the order of 18 September 2024 concerning Ofwat's costs is refused; accordingly, the PCR is to pay Ofwat's costs, subject to detailed assessment on the standard basis, if not agreed.

(f) the PCR is to make interim payments on account of costs to each of the PDs, within 21 days of the date of this Ruling, as follows:

Thames Water	£176,883
United Utilities	£301,217
Severn Trent	£301,217
Anglian	£301,217
Northumbrian Water	£309,550
Yorkshire Water	£309,550

56. In light of the disposition in this Ruling of the applications consequential on the Judgment, there shall be no order for costs of these applications.

57. This Ruling is unanimous.

The Hon Mr Justice Roth
Acting President

Ian Forrester KC

Professor Alasdair Smith

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 20 May 2025