**IN THE COMPETITION APPEAL TRIBUNAL**

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 23rd – Friday 27th September 2024

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

BETWEEN:
**Professor Carolyn Roberts**

**Proposed Class Representative**

**v**

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

**Proposed Defendants**

**-and-**

**The Water Services Regulation Authority ("Ofwat")**

**Intervener**

## A P P E A R AN C E S

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

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**Tuesday, 24th September 2024**

**(10.30 am)**

**HOUSEKEEPING**

**MR JUSTICE ROTH:** Good morning. We have received, Ms Boyd, the note this morning from Ofwat, for which we are grateful.

**MS BOYD:** Good, Sir. I just wanted to check you had received it. I am sorry it wasn't provided sooner. I don't propose to say anything more about it but, of course, if the Tribunal has questions --

**MR JUSTICE ROTH:** We have one question.

**MS BOYD:** Yes.

**MR JUSTICE ROTH:** We just wanted to understand what is the business retail market? Is it any non-householder, non-private customer? Is your solicitors' firm, for example, paying their water bill, is that in the business retail market?

**MS BOYD:** I can see Ms Jellis nodding behind me.

**MR JUSTICE ROTH:** So it is all non-private consumers?

**MS BOYD:** Non-domestic.

**MR FORRESTER:** So all the businesses around here in the City of London have a retail supplier, which is not Thames Water. They have to contract with someone else. Okay. Thank you.

**MR JUSTICE ROTH:** We also received a letter this morning copied to us from RPC, the Proposed Class Representative's solicitors. As we understand from that, there are no issues now about the ATE policy.

**MR HOSKINS:** I am not the person to answer.

**MS BLACKWOOD:** Sir, we just received that letter at 10 o'clock this morning. We do understand there are no issues about the ATE policy but I need to take instructions on that letter and we have not discussed it.

**MR JUSTICE ROTH:** During the day -- by the end of the day if you can let us know. There does seem to be something on the priorities agreement. We just wanted to be sure that we have the latest version of the priorities agreement in our bundles. If someone could check that. We are not going to reach funding issues today, but if someone could just make sure of that.

**MS BLACKWOOD:** Sir, I think we have the latest formal version from the PCR in the supplemental bundles, but there have been some suggested amendments to clauses 1.4 and 1.5 that have come up in correspondence, but that hasn't been agreed. It is not an official version as yet.

**MR JUSTICE ROTH:** Right. Thank you. We have got -- there is a draft revised priorities agreement that's referred to in the letter. We must make sure we have that one.

**MS BLACKWOOD:** That's at tab 50 of the supplemental bundle. Tab 50 is the PCR's letter and appended to that are updated versions of their ATE policy, the litigation funding agreement and their ATE policy.

**MR JUSTICE ROTH:** Right. Tab 50, 5-0.

**MS BLACKWOOD:** 5-0.

**MR JUSTICE ROTH:** My supplemental bundle --

**MS BLACKWOOD:** I am sorry, sir. I mean the correspondence bundle. Forgive me.

**MR JUSTICE ROTH:** Right. We have got that.

**MS BLACKWOOD:** There is just -- it may not trouble you now, Sir, but there is one oddity in that appended to that letter are both the red line versions of the documents and the clean copies, but where there should be a red line version of the ATE policy, there is accidentally yet another copy of the priorities agreement in red line. I don't think we need to turn it up, so --

**MR JUSTICE ROTH:** If it emerges we are not concerned with the ATE policy, then it

is not going to matter. If we are, someone can give us the right version. Good. Thank you.

Yes, Mr Hoskins.

**Submissions by MR HOSKINS (cont.)**

**MR HOSKINS:** Good morning, sir, members of the Tribunal.

In the competition issue, the second exclusion argument, and I would like to pick up -- sorry. I would like to pick up my argument with the Ofwat note. This is probably putting it too crudely, but what the Ofwat note tells us is that at the wholesale level there is no competition. We know that. We went through that yesterday. In relation to household supplies -- sorry. Are you okay for me to go? Yes. Okay. In relation to the household supplies, there is no competition. In relation to business retail supplies, there is competition. So that is, very broadly speaking, the matrix.

Can I ask you to turn up the claim form? It is annex 2 to the claim form. So that's bundle 1, tab 1, page 107.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** You will see -- so this is the claim form. You will see in relation to market definition the heading "Market Definition" and then paragraph 2(1):

"There is a distinct market for supply of sewerage services to household customers", defined as the household supply market.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** So we know there is no competition at the wholesale level amongst the WaSCs. We know there is a separate household supply market in which there is no competition, and our submission is that competition therefore does not apply to the household supply market. Our submission is the fact that there is competition in the retail market is not sufficient to apply competition law, to bring competition law into the

household supply market.

**MR JUSTICE ROTH:** Just to understand that, you would accept, would you, if these were retailers bringing an action against your clients, saying, "We have been overcharged because of the misreporting", same facts, same conduct, same defendants and abuse, in that situation competition would apply?

**MR HOSKINS:** My argument would not run in that instance.

**MR JUSTICE ROTH:** So there would be no exclusion of competition law, but because these are not retailers or indeed their business customers, but they are consumers, the same conduct by the same defendants is not an abuse?

**MR HOSKINS:** That's because, as I said yesterday, a policy decision had been taken to deal with that aspect of the water industry through regulation and not competition.

**MR JUSTICE ROTH:** The fact there is a policy decision to deal with an industry through regulation has never been a reason in itself to exclude competition.

**MR HOSKINS:** We don't say it is a reason in itself.

**MR JUSTICE ROTH:** No. So the only reason is you say -- the only distinction is because of its impact in a different market.

**MR HOSKINS:** That's right. I will show you, for example, in relation to statutory monopolies, where they have impact on a competitive market, then competition law can apply to the upstream market. We can go through some examples, and I will do.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** But our submission is that what you can't do is; where you have no competition at the statutory monopoly level and in the relevant market that we are looking at, the household market, there is no competition, you can't refer to a separate market to drag competition law into the statutory monopoly for the purposes of a claim in respect of household supply. That's the argument.

**MR JUSTICE ROTH:** Yes, because the victim is in a different market.

**MR HOSKINS:** Yes.

**MR JUSTICE ROTH:** So the conduct which is unlawful because of the effect it has in another market, the conduct is still unlawful, because it is an abuse. That's what I am struggling with. The conduct is unlawful, but you are saying that competition law can apply to the conduct, but these claimants have no right of recovery, although other claimants could.

**MR HOSKINS:** That's right. It is because of -- what we have here is we have a system of regulation. In relation to competition law, the fact that one has to look at and identify particular markets is a perfectly orthodox position, and the argument is that given the principle that I opened with in Deutsche Telekom, and given the fact that it is common ground that what we are dealing with is the household supply market, then competition law does not apply in that market for the purposes of the present claims. That's the argument.

**PROFESSOR SMITH:** With apologies for taking a step backwards in the discussion, if we had before us business customers appearing with a competition claim, you are saying they could come with a competition claim because they were business customers --

**MR HOSKINS:** Because there is competition in the relevant business market.

**PROFESSOR SMITH:** If they came before this court, would you be arguing that section 18(8) of the Water Industry Act and the exclusion of the action under -- against a breach of Environment Agency provisions meant that the action couldn't proceed?

**MR HOSKINS:** This is a separate -- I am not dealing with section 18(8) here. So if a business claim was brought on this basis, yes, that would be excluded by section 18(8) because the three conditions are fulfilled for section 18(8) regardless of whether you are a household or a business. Section 18(8) doesn't depend on the existence of competition or particular markets. So yes, section 18(8) would block

those claims.

**MR JUSTICE ROTH:** Of the two exclusion arguments as we now call them, the first one, which is section 18(8) and then sort of by analogy for the Environment Agency, that applies generally.

**MR HOSKINS:** Yes.

**MR JUSTICE ROTH:** But the second, which is wholly independent, namely that competition law does not apply at all irrespective of section 18(8) because there is no competition, that only applies to consumers, not to the retailers or business customers?

**MR HOSKINS:** That's the scope of the argument, yes.

**MR JUSTICE ROTH:** Yes, I understand the argument.

**MR HOSKINS:** Just to show you how far the case law goes, because the submission isn't that whenever you have a statutory monopoly competition law can never apply -- that's not our position -- I'd like to --

**MR JUSTICE ROTH:** You just accept it because it is a statutory monopoly in the wholesale market, so you accept it does apply.

**MR HOSKINS:** For example -- a good place to take this is probably the PCR's reply. So if we go to bundle 1, tab 7 at page 355 and it is sub (3) and the PCR says:

"The courts have repeatedly held that undertakings that benefit from statutory monopolies hold a dominant position, and there are several cases in which courts have held that such undertakings commit an abuse where they leverage their dominance into related markets."

We say that's absolutely right as long as you add the words "related competitive markets or markets in which there is competition".

A number of examples are given in the footnote. The sort of pure Article 102 case, if I can put it like that, is the GB-INNO-BMSA case.

**MR JUSTICE ROTH:** Yes. I don't think we are really concerned with that. It is really a step on the way. Sub-paragraph (4) is the pertinent one, isn't it?

**MR HOSKINS:** I was just showing you, because we are talking about statutory monopolies, with no competition in that market. When can competition law apply to them? It can apply to them when they do something in the dominant market which impacts a competitor market.

**MR JUSTICE ROTH:** I think that is common ground, you need not waste time on that. Let's move on.

**MR HOSKINS:** If we go to -- there is the Aéroports de Paris case you mentioned to me yesterday. We have had that added to the bundle. That's now in bundle 6, volume 4 at tab 70. If you go to page 3977. It has not got bundle pagination. It just has the hard copy report pagination. Professor Smith, do you need a hard copy or are you -- you have one. You should have one.

**PROFESSOR SMITH:** I think it is here.

**MR HOSKINS:** Bundle 6, volume 4, tab 70. It is the court report pagination.

**MR JUSTICE ROTH:** These bundles are bursting.

**MR HOSKINS:** It is the final tab in that bundle.

**MR JUSTICE ROTH:** Thank you.

**MR HOSKINS:** It should be page 3977 of the report. I want to start at paragraph 149. At paragraph 149 -- I should say this is a judgment of the Court of First Instance, December 2000. 149:

"Since the relevant market in the present case is the market in management services for the Paris airports, ADP indisputably enjoys a dominant position and even a legal monopoly. Under the Civil Aviation Code, ADP has a legal monopoly to manage the airports concerned and is alone able to confer authorisation to carry out groundhandling activities there and to determine the terms on which those activities

are carried out."

Then if you go to paragraph 154, you will see the heading "Arguments of the Parties".

"155. First, the applicant maintains that Article 86 of the Treaty cannot be applied to it since recital 134 of the contested decision finds that the fees in issue affect competition on markets, namely the market in airlines and the market in suppliers of ground handling services, on which it is not present."

Then if you go to paragraph 162, you will see the heading above that "Findings of the court".

"First, it contends that Article 86 cannot be applied to it, because it is not present on the markets in respect of which the Commission found, in recital 134 to the contested decision, that competition was affected."

Then at 164:

"That argument is entirely unfounded in law. The Court of Justice quite clearly stated in TetraPak that Commercial Solvents and CBEM provide examples of abuses having effects on markets other than the dominated markets. There is no doubt, therefore, that an abuse of a dominant position on one market may be censured because of effects which it produces on another market."

Then paragraph 165:

"In the present case, although the conduct of ADP to which the contested decision objects, namely the application of discriminatory fees, has effects on the market in groundhandling services and, indirectly, the market in air transport, the fact remains that it takes place on the market in the management of airports where ADP occupies a dominant position. Furthermore, where the undertaking in receipt of the service is on a separate market from that in which the person is supplying the service is present, the conditions for the applicability of Article 86 are satisfied, provided that owing to the dominant position occupied by the supplier, the recipient is in a situation of economic

dependence vis-a-vis the supplier, without their necessarily having to be present on the same market. It is sufficient if the service offered by the supplier is necessary for the exercise by the recipient of its own activity."

Then there is a reference to Corsica Ferries, etc.

What you have there is an example. The dominant company is not present on the downstream market, but acts and decisions taken by the dominant company in the upstream market affect markets in which there is competition.

**MR JUSTICE ROTH:** So that's why you accepted, in the retail market in this case, the same conduct in another market would be an abuse.

**MR HOSKINS:** Yes, because it is a competitive market. That's the issue for the Tribunal to determine. Given the Deutsche Telekom principle, given the case law I have shown you about when a statutory monopoly can be subject to competition law, is it sufficient for competition law to apply in the facts of this case where we are concerned with a market in which there is no competition and that is common ground between everyone?

**MR JUSTICE ROTH:** If we go right back to first principles and go to section 18 of the Competition Act 1998, which is no doubt somewhere in the bundle, in the purple book and fairly familiar:

"Any conduct which amounts to the abuse of dominant position in a market is prohibited."

Well, the conduct is the under-reporting or misleading of Ofwat. There is a dominant position, that's accepted. It has an effect, you have accepted, in the retail market. So the conduct is prohibited. Therefore, there is a breach of section 18. If there is a breach of section 18, why could a claimant who has been injured, ie damaged by that breach, not bring a claim? It doesn't matter what market the claimant is in. The claimant has been -- it's a very straightforward application of section 18 in breach of

statutory duty.

**MR HOSKINS:** There are two responses to that. The first is that section 18, because of section 6 of the Act, has to be read in light of the pre-existing EU case law, which I have shown you. So, I mean, yes, you can look at the language of section 18, but, as we all know, underneath that language there are multiple principles in all areas of competition. So it can't just be read starkly in our submission quite as simply, sir, as you suggest. I see the point, but my point is you have to look at the case law and that includes the Deutsche Telekom principle.

As a matter of domestic law every --

**MR JUSTICE ROTH:** Deutsche Telekom is saying in certain areas competition law won't apply to the conduct, but here it does apply to the conduct. The conduct at issue is an abuse. What you're saying is because these victims are in a different market, they cannot claim.

**MR HOSKINS:** That's right.

**MR JUSTICE ROTH:** But the conduct remains an abuse.

**MR HOSKINS:** Deutsche Telekom says that where the competitive activity does not -- this is my gloss, Sir. We can go back to it if you want. The principle is that competition law doesn't apply if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part. In order to have competitive activity there has to be a market in which competition is possible. I accept, as I have shown you, that doesn't necessarily have to be competition on the part of the statutory monopoly. That's the leveraging cases and that's Aéroports de Paris, but there has to be a possibility of competition. If there is not a possibility for competition in relation to the relevant activity, then the Deutsche Telekom principle will apply.

**MR JUSTICE ROTH:** The relevant activity is the under-reporting, misleading Ofwat. That's the relevant activity, isn't it?

**MR HOSKINS:** I understand that. So the relevant activity is under-reporting, but there are two separate markets here. So I am taking Deutsche Telekom -- I accept this is not covered in Deutsche Telekom. This hasn't been covered in any case before. This is a new issue for the court. You have to look at Deutsche Telekom and you have to look at the fact that the application of Article 102 is based on the definitions of markets and if you can't identify a relevant market in which there is competition, then my submission is, as a result of Deutsche Telekom, advanced in the way I have described, because it hasn't arisen before, because competition law is excluded on the facts of this case.

**MR JUSTICE ROTH:** Right.

**MR HOSKINS:** There is another aspect to the point you put to me about the language of section 18, which is that not every breach of a statutory provision is a breach of statutory duty. One has to ask whether it is intended to give a right of action to a particular class of person. I am trying to dredge back to my law school days to remember the appropriate authorities. It may be the sheep case about getting washed off the ship, which is Gorris v Scott, but it is a well-established principle that one of the questions for breach of statutory duty is, is it intended to protect the particular class which is seeking to bring the claim in damages?

That resonates here where we are looking at a claim brought by a class in relation to an activity and a market in relation to which there is no competition at all.

**MR JUSTICE ROTH:** Yes.

**MR FORRESTER:** That contention is unaffected, you say, by the under-reporting. Excuse me. You say that what you call the Deutsche Telekom principle has the effect of excluding "victims", even if those victims, to use the word, those “consumers”, would benefit -- would have benefitted from the absence of the condemned conduct.

**MR HOSKINS:** Yes, that's the logic of the argument, whether one is looking at it in

respect of the victims or whether one is looking at it from the question "is the relevant activity in a competitive market", then yes. But yes, that's the logic of the --

**MR FORRESTER:** So their only remedy, according to you, is to hope that the regulator does a better job.

**MR HOSKINS:** Their only remedy if section 18(8) -- sorry -- even if section 18(8) applies, is the suite of remedies that has been created by Parliament to deal with this sort of case. We can underplay it and see if the regulator does a good job. The powers are there. The question is not "how good a job is the regulator doing?" The question is "what is the suite of remedies that the regulator has?"

**MR JUSTICE ROTH:** The regulator doesn't have power to order compensation.

**MR HOSKINS:** No, it doesn't. It can only arise if there has been a failure to comply with an enforcement order or if an undertaking --

**MR JUSTICE ROTH:** They can make an enforcement order and if your clients nonetheless continue -- I am putting it crudely – to misbehave as they did before, at that point --

**MR HOSKINS:** Allegedly misbehave.

**MR JUSTICE ROTH:** We all appreciate all of this is an allegation and has not been established and we don't make any assumption of what the outcome will be, but we work on that assumption, because it is a sort of strike-out. Yes.

**MR HOSKINS:** We had -- this short point came up yesterday, which is Parliament has decided there shouldn't be an immediate damages claim. There should only be a damages claim if an enforcement order has been made and not complied with it. That we rely on because it shows you again what Parliament intended in relation to the bringing of claims.

There's a sort of small but potentially quite important, because of the financial impact, point in relation to this, which is even if competition law were to apply to household

supplies because of competition in the business retail market, it cannot apply to conduct pre-1st April 2017, because that is the date upon which the business retail market had competition introduced into it. There was no competition in the business retail market pre-1st April 2017.

**MR JUSTICE ROTH:** Can you remind me of the claim period? It is slightly different, isn't it, the Severn Water claim is a bit earlier, isn't it?

**MR HOSKINS:** I think it is 2017. It is actually 1st April 2017 for Severn and it is 2020 I think for the others, but the reason why the claim period is that, it is relying on PR14, so it is relying on conduct throughout PR14 which led to the sort of reckoning at the end of the PR14 period, which is 2020.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** So my argument is not just going simply to what is the duration of the claim. It is going to is the conduct from the start of PR14 up to April 2017 subject to competition law? That will then have an impact, but that would have to be worked out obviously at a later date.

**MR JUSTICE ROTH:** Yes, but PR14 starts in April 2017.

**MR HOSKINS:** No. PR14 starts in 2015.

**MR JUSTICE ROTH:** I see, but the conduct complained of only starts in April 2017.

**MR HOSKINS:** It is complained that we misreported throughout the PR14 period, ie from 2015 to 2020.

**MR JUSTICE ROTH:** Sorry. I am a bit lost and I am sure it is my fault. The complaint is you misreported throughout the period starting in 2015, but the claim only starts in April 2017.

**MR HOSKINS:** Because the loss is not suffered immediately at the start of the PR14 period because of the way the incentives work and the way -- and the times at which they take effect. So there's a disjunct, if you like, between the conduct which is relied

upon and the period when the loss is said to have commenced. So my argument is that competition --

**MR JUSTICE ROTH:** The claim is not complete upon the conduct taking place because you need loss as an ingredient of the course of action.

**MR HOSKINS:** Indeed, yes.

**MR JUSTICE ROTH:** Until you have loss you have no cause of action. I see. So it is not because of the claim period -- yes.

**MR HOSKINS:** It is not because of the claim period. It is because of when the conduct took place that gives rise to the claim.

**MR JUSTICE ROTH:** Yes, I see.

**MR HOSKINS:** In relation to the Deutsche Telekom principle I have shown you how it came to be and how it has been recognised throughout by the European courts, but it's also recognised in the Ofwat guidance. I would like to show you that. So Ofwat itself has recognised --

**MR FORRESTER:** Sorry, may I just interrupt?

**MR HOSKINS:** Sorry.

**MR FORRESTER:** You speak of the Deutsche Telekom principle as a principle.

**MR HOSKINS:** It is shorthand, but yes.

**MR FORRESTER:** Mrs Schmidt feels that her phone bill is too high and one of the contributing factors is that Deutsche Telekom was doing a nasty margin squeeze, does Mrs Schmidt have the right, notwithstanding the so-called principle, to seek damages from Deutsche Telekom?

**MR JUSTICE ROTH:** For there to be a margin squeeze it would have to be, presumably, in relation to the supplier to Mrs Schmidt. We are assuming there is competition in that market because otherwise the margin squeeze would not matter or that Deutsche Telekom is competing with --

**MR FORRESTER:** The consequence of a margin squeeze case is that the giant enterprise purports to sell its services -- make available its service -- to retailers and to leave them free to price, but the giant company is sometimes inclined to squeeze the small retailer. Now I am just speculating. Let us imagine that Deutsche Telekom was indeed squeezing unacceptably the small retailer, and the good lady has a representative who studies competition law with passion, or maybe she herself does that. Would she be entitled to seek damages from Deutsche Telekom?

**MR HOSKINS:** On the basis that there was competition in the retail market, i.e., for the supply to Mrs Schmidt, then yes, because that is the leverage case we have been looking at, ie GB-INNO-BMSA. There has to be competition in the market in which Mrs Schmidt is supplied, yes.

**MR FORRESTER:** And a mere excessive pricing contention -- it wouldn't be an excessive pricing contention -- well, I guess it could be. It would be an excessive pricing contention. If that were all that she was saying, you are saying she would not be able to prevail?

**MR HOSKINS:** So it is the same hypothetical scenario with a competitive market supplying Mrs Schmidt.

**MR FORRESTER:** We are fencing.

**MR HOSKINS:** Sorry. I don't want to give an answer that's not helpful. I am trying to understand the question. Sorry.

**MR FORRESTER:** I accept my questions may be, as they frequently are, unintelligible.

So your contention is that there is a big principle. If competition is non-existent, then there are consequences to that. My suggestion is that you are perhaps too confident in establishing the principle of Deutsche Telekom. Where competition is impossible because of the government regulation, then there are consequences for the entity,

which is ordered to behave in a particular way. Now there are lots and lots of cases over the decades in which those -- where entities have said "This is compulsion" and other people have said "No, no, no, it is collusion", Heng, Ora, Rife(?), the three famous cases from the '90s, where the parties got together, arranged something and then got compelled. They went to the government and said "Please compel us". The government did that. So lots and lots of cases about that.

I am resisting -- I am suggesting that you may be too absolute in asserting that the prohibition or the impossibility of competition has the consequence of totally excluding claims by injured parties.

**MR HOSKINS:** That's not my submission and I apologise if I have not been sufficiently intelligible on that basis. For example, there are the leveraged cases. We have just looked at Aéroports de Paris. If conduct in the monopolist's market impacts a separate competitive market, then the statutory monopoly is subject to competition. The submission is, where there's an activity by the statutory monopoly and that has no effect in any market -- sorry -- it has no effect in a particular market in which there is competition, then competition law does not apply to the activity in that respect.

**MR FORRESTER:** Right.

**MR HOSKINS:** Sir, I am going to take you to the Ofwat guidance. That is bundle 6, volume 4, tab 48B and the page number is --

**MR JUSTICE ROTH:** The same volume as Aéroports de Paris. That is the one we have.

**MR HOSKINS:** That's right. The page number is 3219.34.

**MR JUSTICE ROTH:** Yes, we have it at tab 48 B.

**MR HOSKINS:** That's right. You will see the March -- I am sorry. I will wait for -- this is Ofwat's guidance on the approach of the application of the Competition Act 1998.

If we could pick it up at point 65, so 3219.65, page 32 of the document numbering, if

that's easier.

**PROFESSOR SMITH:** Apologies, Mr Hoskins. I can't find it in my electronic.

**MR HOSKINS:** 48B and it is page 3219.65.

**PROFESSOR SMITH:** Thank you.

**MR HOSKINS:** You will see the heading "Competition law and regulation". It is the final paragraph on that page I want to draw your attention to:

"Even where the scope for competition is limited, the CA98 provisions will continue to apply where there remains some residual scope for competition or potential competition. Similarly, even though the regulatory framework may, for example, encourage certain behaviour, the CA98 prohibitions continue to apply to the extent that an undertaking retains a degree of discretion in the way in which it implements sector specific rules or codes."

Now that's the two parts of what I have called the Deutsche Telekom principle, compulsion and lack of competition, and if you look at the footnote to that, footnote 54, you will not be surprised to see the references to Deutsche Telekom. So this is a principle that's recognised in the Ofwat guidance.

Just to be clear, and I hope this is clear, we are not saying that Ofwat has no powers under the Competition Act. It has powers where there is competition.

**MR JUSTICE ROTH:** Oh yes.

**MR HOSKINS:** So you have examples if you need them for your note. There are examples that are cited at footnote 41 of our skeleton argument. That's bundle 1, tab 13, page 723. And there are also examples given to Ofwat's skeleton. That's bundle 1, tab 14, page 748.

I was referring you to paragraph 23 of Ofwat's skeleton. We are not going to look it up. I am just giving it to you for the note. It is where there are examples of Ofwat exercising Competition Act powers in relation to competitive activities.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** Do you want to ask me a question?

**PROFESSOR SMITH:** I hesitate, because I am going back again to section 18(8) of the Water Industry Act. Would you contend that if -- we are looking at this Ofwat guidance on the application of CA98. There ought to be a statement here that, if the behaviour arises from a breach of the statutory conditions, appointment of the water supplier, then CA98 cannot apply.

**MR HOSKINS:** No, because I think this is guidance given in 2017. The section 18(8) point is not specific to competition law. It is general. So I think it would be hard to criticise Ofwat's, for example, guidance for not referring to it, but equally, and I am not criticising them and I know you are not, but equally one cannot read anything into the absence of guidance on competition law from the fact that section 18(8) is not referred to because it is not a competition provision.

**PROFESSOR SMITH:** No, I am not seeking to criticise Ofwat. I am just saying, would you say that if you were writing this paragraph now for Ofwat, you would insert a provision referring to the fact that section 18(8) excludes CA98 provisions in certain circumstances?

**MR HOSKINS:** The trouble is it only excludes in certain circumstances -- it doesn't exclude all CA98 cases, as we discussed yesterday. It depends if the conditions of section 18(8) are satisfied or not. If you decide this case in the way I've suggested, then they might want to say in certain circumstances section 18(8) applies in this way. My submission really is you can't read anything into an absence of section 18(8) in the guidance. We have to deal with it on first principles.

**MR JUSTICE ROTH:** If we decide the case contrary to the way you have argued, they might --

**MR HOSKINS:** They might put it in as well. That's absolutely fair.

There are just some arguments that the PCR has put forward in the Reply in relation to this that I need to deal with.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** I am aware of the time. Sir, I know you have been looking at the clock. I think, unless Mr Robertson corrects me, we are going to be comfortably finished on this material today. I would much rather -- if you want to -- if it is a question of taking extra time for my reply, I would rather use it now because it is far more important to ventilate all these issues now.

**MR JUSTICE ROTH:** No. That's alright.

**MR HOSKINS:** It we can get the PCR's Reply open again. So it is bundle 1, tab 7, page 355. This is where they set down a sort of series of responses to our arguments on the competition issue.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** I have dealt with sub (3) already, for example, but I want to deal with the other arguments that are made.

So sub (1) at the top of the page is this:

"The CJEU has expressly stated that “the application of Article [102] is not precluded by the fact that the absence or restriction of competition is facilitated by laws or regulations”."

The footnote is the reference to Bodson in 1987. If we can keep this response open, because I am going to come back to it for each of the points so you can see what they were. Let's go to Bodson, which is bundle 6, volume 2.2, tab 34.

**MR FORRESTER:** This is about funerals.

**MR HOSKINS:** It is about funerals, French funerals.

**MR JUSTICE ROTH:** Before you go there I am just trying to understand -- they are not your references, because you have just given us a reference for Bodson and you

say it is in authorities bundle.

**MR HOSKINS:** 6, volume 2.2.

**MR JUSTICE ROTH:** I am just trying to understand what are the -- can someone help me? What are the references we actually have in the skeleton?

**MR HOSKINS:** There was -- with this Reply or this Response rather there was a Response bundle and authorities were included in that Response bundle.

**MR JUSTICE ROTH:** Oh, I see. So that's not the bundles we have got now.

**MR HOSKINS:** No. You may have those -- you know, the complete response bundles somewhere, but that's --

**MR JUSTICE ROTH:** So we ignore those basically. Yes.

**MR HOSKINS:** So Bodson, tab 34. We are going to pick it up at page 1781, which is the first page for the electronic bundle. It is a judgment of the Court of Justice of May 1988.

If you turn through to page 1814, the snippet that appears in the PCR's response is taken from paragraph 26, which you should see on page 1814. If you read paragraph 26 and the first sentence of paragraph 27, you will see the fragment that they reply upon is actually in the section of the judgment dealing with the existence of a dominant position. It is not part of an analysis of the circumstances in which competition law may apply at all to dominant companies. It is dealing with a separate issue.

**MR FORRESTER:** My recollection of that case is that there was a network of funeral operators which came into conflict, into physical battle with local undertakers. Madame Bodson, I think, was one of the locals who claimed that she had exclusivity and the court -- I find these cases, or this at least not terribly helpful because it is circumstances that are so wildly different to where we are today. It occurs in France when local monopolies and special privileges were very common and where there was

a battle between the local favourite and the big bully who claimed the benefit of competition law, those kind of things are really quite a long way away from the case we are confronting today. So I am -- but go ahead.

**MR HOSKINS:** Sir, I have nothing to say. I wholeheartedly agree with that. That was the submission I was going to make to you. This is the PCR relying on a particular sentence from Bodson. It is taken out of context. It is dealing with dominance, and I was going to say Bodson was decided in 1987.

**MR FORRESTER:** We agree on that.

**MR HOSKINS:** Before Suiker Unie, which I think you described yesterday as medieval. Suiker Unie is medieval. Bodson is pre-medieval. Given the case law that followed on from Suiker Unie, it can't seriously be suggested that Bodson gives you the key to Deutsche Telekom. That's the short point.

**MR JUSTICE ROTH:** I am with you on that except it was 1988, not 1987.

**MR HOSKINS:** I am so sorry. Mr Forrester and I agreed on the wrong date.

So we go back to the PCR's response and if we go to sub (2) --

**MR FORRESTER:** But just before we leave (1) the statement:

"the application of Article 102 is not precluded by the fact that the absence of restriction of competition is facilitated by laws or regulations."

That's not a false statement.

**MR HOSKINS:** No, it is not controversial. It is adopted in further cases. My point is it doesn't take account of the Deutsche Telekom judgment which I rely upon. So it would be wrong, given Deutsche Telekom, to say that competition law can apply in all cases regardless of laws or regulations. One has to look at -- where there are laws or regulations is there state compulsion or is there an eradication of competition? That's what Deutsche Telekom tells us.

**MR FORRESTER:** Well, the facts are always relevant.

**MR HOSKINS:** Say again. Sorry.

**MR FORRESTER:** I said unhelpfully the facts are always relevant.

**MR HOSKINS:** I accept that. I have been careful not to try to pitch things too high, hopefully showing you the limits of our argument as well. That has certainly been my intention.

So we are in the response. Sub (2):

"Similarly, Advocate General Jacobs has stated that “undertakings enjoying exclusive rights remain subject to the competition rules”."

The reference is to Advocate General Jacobs' opinion in Albany, paragraph 372. If we could turn that up. That's bundle 6, volume 2.2, tab 35. So indeed it is the next tab. Paragraph 372 is at page 1903. Again, to put the snippet that's relied on in the paragraph:

"Secondly, it is necessary to bear in mind that the applicability or even an infringement of Article 90(1) has no automatic consequences as to the applicability of Articles 85 and 86 to the undertakings involved."

I will need to come back to that sentence, but then crucially:

"Undertakings enjoying exclusive rights remain subject to the competition rules."

That's what the PCR relies upon. However, the Advocate General continued:

"The only exception to that rule is where the actual conduct under scrutiny is not attributable to the undertaking, namely where anti-competitive conduct is required by national legislation or where that legislation creates a legal framework which itself eliminates any possibility of competitive activity."

The reference in footnote 180 is to Ladbroke. So the paragraph of Advocate General Jacob's opinion in Albany supports our position and makes it clear there is this exception. You might want to keep Albany out. We are going to come back to it very shortly.

I dealt with (3), which is the leverage point. Therefore, I need to deal with subparagraphs (4) to (6). These refer to the judgments in Sacchi and Deutsche Post. Both those cases were preliminary references from national courts, which raised questions concerning what was then Article 90(1) of the EC treaty, which is now Article 106 of the TFEU.

As you will be aware, that provision of the Treaty concerns the powers of Member States to grant special or exclusive rights to undertakings.

If you want to see Article 106.1, which is the modern-day provision, that's the bundle 6, volume 4, tab 49, page 3222, so if you have that, you will see at the bottom of the page Article 106(1):

"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."

So a Member State may be liable under Article 106 for activities that are contrary to Article 102. However, the question of whether a Member State is in breach of the competition rules through Article 106 is legally distinct from whether the undertaking is in breach of Article 102.

We see that clearly if you go back to Advocate General Jacobs in Albany, which I hope you have kept out --

**MR FORRESTER:** Well, just before you leave Article 106, what's your comment on the second paragraph of Article 106 over the page?

**MR HOSKINS:** There is a wealth of case law. We don't rely on it. The other side doesn't rely on it. If you want to ask me a specific question, obviously I am happy to try and deal with it.

**MR JUSTICE ROTH:** Is Deutsche Post under Article 106(1) or 106(2)?

**MR HOSKINS:** If you want to look at Deutsche Post, it is -- I can look it up and give you the answer.

**MR JUSTICE ROTH:** I thought it was 106(2). I may be wrong.

**MR HOSKINS:** The court said at paragraph 36 of Deutsche Post:

"Having regard to the foregoing considerations the national court is to be understood in the first three questions as essentially asking whether it is contrary to Article 90 of the Treaty, read in conjunction with Articles 86 and 59 thereof, for a body such as Deutsche Post to exercise the right provided for by Article 25(3) of the UPC [universal postal code] to charge" certain charges.

**MR JUSTICE ROTH:** So it was about the undertaking, not the Member State.

**MR HOSKINS:** Well, then at paragraph 40 the court deals with paragraph 90.1, etc. Sorry. Article 91 is referred to at paragraph 40. Article 90(2) is referred to at paragraph 54. The ruling relates to Deutsche Post because that's what the referring court had asked about. It was held that certain activities were not contrary to Article 90 read with Article 86. It was also then held that the exercise of other rights were contrary to Article 90(1) of the treaty read in conjunction with Article 86 thereof. So Deutsche Post is a bit of a muddle in a sense, in that it is a reference about the state undertaking with the court relying upon and referring to Article 90(1) and 90(2) in the reasoning and referring specifically to 90(1) in the answer to the preliminary reference.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** I am not going to pretend it is not a difficult area of the law in terms of the relationship between Articles 90(1) and 90(2). I am going to obviously answer any question you want on Article 90(2) but I am dealing with the point that's been put to us in relation to Sacchi and Deutsche Post which I am going to say is answered by Advocate General Jacobs who shows the relationship between how these provisions addressed to Member States are to be understood vis-a-vis the provisions directed to

undertakings.

**MR FORRESTER:** Undertakings given these privileges "shall be subject to the rules contained in the Treaties, in particular to the rules in competition, insofar as the application of such rules does not obstruct the performance of the tasks assigned to them."

Isn't that the manifestation of a big principle that, even though your enterprise is given by public law a privilege, a monopoly, or a special status, that enterprise is not immunised from the rules contained in the Treaty, in particular the rules on competition?

**MR HOSKINS:** In certain circumstances yes, but you have to look at the particular circumstance to see if 90(2) applies. This issue was initially on the agenda as one of the potential issues for this hearing, but we decided it wasn't appropriate to pursue it at this hearing, largely because you would have to do factual enquiries, etc, and it just wasn't a keen enough point to take a 90(2). So it may come up later in the case, but it wasn't for today.

**MR JUSTICE ROTH:** I can see you have very good grounds for saying "We come within 106(2) as an undertaking having the character of a revenue-producing monopoly and that is then subject to the competition rules."

**MR HOSKINS:** The trouble is that 106(2) then has the words:

"Insofar as the application of such rules does not obstruct the performance in law or fact of the particular tasks assigned to them."

That is generally quite a detailed investigation and so not fit for the --

**MR JUSTICE ROTH:** If you say that correct reporting of pollution incidents obstructs your ability to do your job and would prevent you operating as sewerage undertakings, no doubt you would have a good defence, but it may be that's not regarded as a very effective argument and I don't think it is at the moment pleaded.

**MR HOSKINS:** It is not for today, as I say. It was identified as a potential issue for this sort of hearing. It is not being run today because it requires factual investigation. I am not saying it won't come back and we will investigate it.

**MR JUSTICE ROTH:** Yes, but the point made by Mr Forrester is that that provision suggests that competition law does apply but there is a recognition of your special position as a monopoly, given that character in the public interest, and therefore it is open to you to seek a qualification of the application of competition law by invoking these facts, and therefore isn't that -- I think this is the thrust as I understand the questioning -- consistent with the notion that no competition is ex ante excluded completely.

**MR HOSKINS:** This provision in its previous guises has existed since the Treaty was first established. It is longstanding. The Deutsche Telekom -- you will forgive me for using the word principle just as a shorthand. I know we had this discussion earlier. The Deutsche Telekom line of case law came into being with Suiker Unie in the '70s and has continued up to the present day. So the Court of Justice, obviously knowing full well that article 90(1) and (2) exists have nonetheless established the Deutsche Telekom line of case law.

So when one is asking what does 90(2) mean generally for the application of competition undertakings, in my submission it must be read in light of what the court has said in Deutsche Telekom and those related cases.

**MR FORRESTER:** I think you and I would agree that the Deutsche Telekom principle and the other cases where the defence of the accused party, usually the big one, is "We had no choice. The state law said that. Well, yes, we drafted the state law in conjunction with the Ministry but that's the law and we are obeying it. So don't blame us for what the law is". I think you and I would agree that expressions as we find them in 106(2) tells us that it is not a get out of jail free card.

In other words, the fact that the enterprise is protected in its view, compelled in the lawyers' view, to act in a particular way -- it is within a corset -- it is not a get out of jail free card and there might be, for the most protected and the most regulated company, nonetheless situations where "Ah hah, we didn't promise you that" would be the answer of the competition official. Would you agree? I am pushing you a little bit, but I don't think what I am saying is really controversial. Maybe I am wrong.

**MR HOSKINS:** My answer is that insofar as there are any inconsistencies, one has to read Deutsche Telekom and Article 106(2) so as not to be inconsistent.

Can I show you the quote from Advocate General Jacobs. Tantalisingly it refers to Article 90 and it shows the relationship between 90(1) and Deutsche Telekom. It doesn't deal with 90(2) but again Advocate General Jacobs would be well aware both of 90(1) and 90(2).

Can I show you --

**MR FORRESTER:** This is Albany again, is it?

**MR HOSKINS:** Yes. So, Albany, which we have at bundle 6, volume 2.2, tab 35, page 1903.

**MR FORRESTER:** Just before you start these are -- Albany is a fiendishly complicated case, with difficult, exceptionally complicated facts, because it deals with insurance and pensions. These are heavily regulated fields. They vary importantly from country to country and attempts to achieve harmonisation or approximation have generally been unsuccessful. So I am absolutely not criticising or resisting the invocation of Francis Jacobs' opinion in Albany, but I am asserting again the proposition that one has to be cautious about -- I don't know what sentence you are going to refer to.

**MR HOSKINS:** Maybe I can allay your fears. I am not going to unpick and explain the detail of Albany and then say "Look, that's the answer". Simply there is a statement

of principle by Advocate General Jacobs.

**MR FORRESTER:** Show us where it is.

**MR HOSKINS:** Paragraph 372. We saw it earlier. I said the first sentence is going to be important again, because the Advocate General said:

"…it is necessary to bear in mind that the applicability or even an infringement of Article 90(1) has automatic consequences as to the applicability of Articles 85 and 86 to the undertakings involved."

So you could find a Member State liable on 106(1) -- then he goes on to say:

"Undertakings enjoying exclusive rights remain subject to the competition rules."

But then:

"The only exception to that rule is where the actual conduct ...."

You then have Deutsche Telekom, the two limbs. The reason I draw that to your attention is obvious, because obviously the question of the relationship between Article 90 and the case law, the Deutsche Telekom case law is -- you could write a thesis on it, but here is a very pithy, as you would expect from Advocate General Jacobs, encapsulation of the relationship between Article 90, the application of competition law generally to state monopolies or exclusive right-holding companies, but recognising the Deutsche Telekom exception exists in that world. That's why I think this is such an important and helpful statement of principle. We could spend a long time on Article 90 but hopefully that's sufficient for present purposes.

I have a few short points left and then I will be done. Mr Robertson can get cracking.

**MR ROBERTSON:** We need to give the transcriber a break.

**MR HOSKINS:** Sure. I would like to look at --

**MR JUSTICE ROTH:** Can I ask -- your few short points, how short? It is just whether we should take our break now or after you have finished?

**MR HOSKINS:** It will take about ten minutes.

**MR JUSTICE ROTH:** I think let's have your ten minutes.

**MR HOSKINS:** Certainly.

**MR JUSTICE ROTH:** No. Your ten minutes. Let's have them now. Let you finish. Just ten minutes.

**MR HOSKINS:** Bundle 6, volume 4, if you could turn that up, please, tab 47, page 3185. So this is the Water Industry Act again. You see the heading "Functions of Authority with respect to competition". If you see section 31(3):

"The Authority shall be entitled to exercise, concurrently with the CMA, the functions of the CMA under the provisions of Part 1 of the Competition Act 1998."

So this was the point that Ofwat has concurrent powers with the CMA in respect of the Competition Act. The PCR relies on this provision to suggest that this shows that Parliament intended:

"that the full rigour of the Chapter II prohibition should apply to the Parallel Defendants."

So they rely on this provision for that.

Now it is certainly correct, obviously, that pursuant to this provision Ofwat does have concurrent powers with the CMA to apply the Chapter I and Chapter II prohibitions. However, this provision establishes who may exercise competition powers. It doesn't establish the substantive scope of those powers. So this can't tell you what the substantive scope of competition law is. The Deutsche Telekom case law is a -- it establishes principles of substantive competition law. So this really doesn't take us any further. It is the wrong question.

**MR JUSTICE ROTH:** Yes.

**MR FORRESTER:** May I take the liberty of pointing out that for umpteen drafts, umpteen drafters have overlooked the typo "Appointment" under Part II. I wonder how often we have looked at that page and not noticed that it was wrongly spelt. That's

not, I think, going to change our conclusions today.

**MR HOSKINS:** I don't want to blame the statutory drafters for their mistake. I am not sure much will turn on that. You keep me on my toes, though, with these points. There is a similar point. We can pick it up, so we are still in the Water Industry Act. If we go to page 3162 and section 19 and I would like to go to section 19(1A). That provides:

"Before making an enforcement order or confirming a provisional enforcement order, the Authority shall consider whether it would be more appropriate to proceed under the Competition Act 1998".

19(1B): "The Authority shall not make an enforcement order or confirm a provisional enforcement order if it considers that it would be more appropriate to proceed under the Competition Act 1998".

There are similar provisions in relation to Ofwat 's powers to impose financial penalties under the Water Industry Act, to consider whether it should exercise competition powers first. Those are sections 22A, sub (13) and sub (14) but it is the same point. The PCR relies on those to say "Look, that shows that Parliament intended competition law to apply here" but it is the same point I have already made.

**MR JUSTICE ROTH:** I don't think these arguments really take one anywhere.

**MR HOSKINS:** So that concludes my submissions on the two exclusionary points. There is a point of detail, Sir, you asked me about yesterday and I wasn't able to answer about the explanation of the tables --

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** -- in the Consolidated Response. If I can deal with that then I am done.

**MR JUSTICE ROTH:** That's in bundle 1.

**MR HOSKINS:** So, bundle 1, tab 6 at page 325. I know Ms Boyd has looked at this

as well. If I am getting this wrong she will jump up and correct me.

So, first of all, we have at paragraph 309 -- this is the PR14 Performance Commitments.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** These figures I understand are expressed as the absolute number of spills. So that is the way that the performance commitments were drafted and produced.

**MR JUSTICE ROTH:** Yes. I think it is in the heading. "Total number of Recognised Pollution Incidents".

**MR HOSKINS:** So it is an absolute number rather than a number per 10,000 kilometres of sewer, for example. It is absolute numbers. Over the page you asked about --

**MR JUSTICE ROTH:** When you say it is an absolute number, it is number of incidents per 10,000 kilometres. You see that at sub-paragraph (a) at the top.

**MR HOSKINS:** No. That is the point I was sort of groping towards yesterday. So they started with that as a basis to reach what the performance could be, but the final performance commitments were expressed in an absolute number.

**MR JUSTICE ROTH:** Oh, I see.

**MR HOSKINS:** In contrast -- we can pick up this point now -- if you go to paragraph 312, which appear as PR19 PC levels, and you said "Why are those so obviously different?" That's because they are expressed as spills per 10,000 kilometres. So it is just the way in which the particular PCs were laid down.

**MR JUSTICE ROTH:** The fact that Northumbrian Water is much lower than Anglian Water might be a reflection of the fact that it has a much smaller expanse of sewerage piping.

**MR HOSKINS:** I don't know if that's right, but one can see that that may well be right.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** Then the other question you asked was over the page at 326, the fact that for United Utilities and Yorkshire Water there are these sort of split numbers. Now remember these are absolute numbers. This is PR14.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** If you look at footnote 386, you will get the explanation for United Utilities. It is the final sentence of 386:

"The figures in the table are shown in the format [Category 1 and 2 pollution incidents / Category 3 pollution incidents]."

So for United Utilities the performance commitment was set as four category 1/2 pollution incidents and 207 category 3 pollution incidents. It was split by category. It is the same for Yorkshire Water, as explained in footnote 387. I hope that covers all the questions you had. Unless there are any further questions those are our submissions.

**MR JUSTICE ROTH:** We will now take our break and come back just after midday.

**MR HOSKINS:** Thank you very much.

**(Short break)**

**Submissions by MS BOYD**

**MR JUSTICE ROTH:** Yes, Ms Boyd.

**MS BOYD:** Sir, could I very briefly address one point that has arisen this morning and yesterday relating to the unavailability of compensation under the statutory scheme?

**MR JUSTICE ROTH:** Yes.

**MS BOYD:** We have addressed this point in our skeleton but possibly not as explicitly as it might have been addressed, and in light of exchanges this morning it seems as well to draw it into focus.

As you know, it is very much Ofwat's position that misreporting would be a breach. Misleading Ofwat in relation to the number of PIs insofar as relevant to measurement against the PCs would be a breach, and recovering charges from consumers on the basis of such misreporting would be a breach. That is paragraph 9.1 of Condition B of the Licence, which we refer to at paragraph 13 of our skeleton, which states:

"The appointee shall levy charges in a way best calculated to comply with the price control."

Now as regards remedies or enforcement action in relation to any such breaches it is absolutely right that there is no power to -- no power generally to order companies to compensate consumers for breaches of their conditions of appointment, but section 18 does permit and require enforcement orders in cases of regulatory breach that make such provision as is requisite for the purpose of securing compliance, and it is Ofwat's position that, in the case of a breach of a condition requiring the levying of charges in a way best calculated to comply with the price control, securing compliance could include some direction that the companies undo the effect of the overcharge, i.e., there is, under that statutory enforcement power, a route by which in the case specifically of a breach of this kind which concerns overcharging, where that money could find its way back to the pockets of consumers under the statutory scheme.

Now that is Ofwat's position. It hasn't been tested. It hasn't been applied. It hasn't arisen. So I am mentioning it simply to put it on the record, as it were. Ofwat would not want the Tribunal to proceed on the basis that Ofwat agreed that there was nothing that Ofwat could do save for accepting undertakings to restore money to consumers in the case of a finding of breach of that sort.

**MR JUSTICE ROTH:** Yes. Section 18 is in -- the Water Act is split up under different tabs, which is rather annoying, but it is --

**MR HOSKINS:** It is bundle 4, tab 47. Page 3160 is section 18(8). Sir, was it

section 18 you wanted?

**MS BOYD:** Section 18.

**MR HOSKINS:** It begins at page 3158.

**MR JUSTICE ROTH:** Give me a moment. The breach of condition you refer to as Condition B --

**MS BOYD:** Yes.

**MR JUSTICE ROTH:** -- which is the provision of information requirement. Is that right?

**MS BOYD:** Condition B has two relevant paragraphs. 9.2 is the provision of information. 9.1 is the one I was referring to just now.

**MR JUSTICE ROTH:** Where do we actually find that set out?

**MS BOYD:** Well, we have set it out in paragraph 13 of our skeleton, if that helps, which is bundle 1, tab 14.

**MR JUSTICE ROTH:** Ah, yes. So this is the Ofwat skeleton argument:

"The appointee shall levy charges in a way best calculated to comply with the price controls determined by Ofwat."

**MS BOYD:** Uh-huh.

**MR JUSTICE ROTH:** But you have set your price control.

**MS BOYD:** Yes.

**MR JUSTICE ROTH:** And if their charges comply with your price control --

**MS BOYD:** Then there is no breach.

**MR JUSTICE ROTH:** -- then there is no breach.

**MS BOYD:** That is correct, but the price control identifies the maximum revenue they can recover by reference to various factors, which include performance against the performance commitments. So levying charges in a way that was based on an assessment that was based on incomplete or inaccurate or misleading information

about pollution incidents would not, it is Ofwat's position, be levying charges in a way best calculated to comply with the price control, because performance against those commitments affects how much you are entitled to recover pursuant to the price control.

**MR JUSTICE ROTH:** This is separate from the price control levels being set by reference to past performance.

**MS BOYD:** Yes. So the way it works is in the price review process, the outcome of the price review process is effectively a schema or a methodology which allows the companies to determine the maximum revenue they can recover from their customers. One factor affecting that is how they perform against performance commitments. So for the purpose of arriving at the maximum figure they need to feed in information about their performance against those performance commitments.

**PROFESSOR SMITH:** So if I have understood that right, so the price control is not - companies supply Ofwat with spill information. Ofwat sets prices. It is - Ofwat sets a price regime. The companies report spillages and they themselves know how the spillages should affect prices they can set.

**MS BOYD:** That, Sir, is exactly my understanding.

**PROFESSOR SMITH:** Okay. I understand.

**MR JUSTICE ROTH:** This seems to me important in a number of respects for our case, but does it follow from that that if one knows the correct -- say there's under-reporting of spillages and that needs the companies to set price X, but you can tell from the regime that if there is correct reporting of spillages, then the companies would set price Y. So you can tell once you know the degree of under-reporting the degree of overcharge.

**MS BOYD:** Yes. You have relevant information about the quantity and the nature of the spills there were, in fact, as compared with those that were registered and reported

and form the basis for assessing --

**MR JUSTICE ROTH:** Yes, the case under the regime. That's why you say -- the furnishing of the information is for the benefit of the periodic review and therefore the next price control and by way of monitoring that they have complied with the existing price control correctly, but -- yes. Yes, I see. So if any fixed price control is set, the direct reporting of the degree of spillage which determines whether you are within or if you are above the commitment, then what happens to the price you can charge? The revenue allowance is sort of -- it is a formulaic result, is it, of the amount of spillage as against the commitment?

**MS BOYD:** That's right, yes.

**PROFESSOR SMITH:** I am not clear how this relates to what we have been told in the PCR's claim form about the decision which Ofwat made in relation to Southern Water.

**MS BOYD:** In that case Southern Water offered undertakings, so there was no enforcement order under section 18.

**PROFESSOR SMITH:** Indeed, but the words quoted by the PCR, so this is paragraph 12, page 9 of bundle 1, and quoting only their quotes, not quoting any of the PCR's words:

"we… cannot rely on the company's historic reporting of pollution events to us...
the cumulative duration of unreported historic spills likely ran into thousands of hours…
this amount reflects the penalties it would have incurred for underperformance under Ofwat's price review regime had it reported data correctly in the first place..."

**MS BOYD:** Yes.

**PROFESSOR SMITH:** These words don't quite read exactly as what I understood from what you said, because this rather reads like Southern Water's business was to report its spills. Ofwat then sets the price regime and there is no reflection in these

words of the fact that Southern Water should have known that the prices were -- the correct prices were different from ...

**MS BOYD:** May I just ...

**PROFESSOR SMITH:** Yes, sure.

**MS BOYD:** Sir, what I am told is that Ofwat would not necessarily now endorse the way it was put in the Southern Water decision. It might, were it being written now, be written up in a slightly different way.

**PROFESSOR SMITH:** I understand. So the account which you gave a few minutes ago is a more accurate account than the one written up in the Southern Water commitment decision, which after all is just a commitment decision, not a legal file. Thank you.

**MR JUSTICE ROTH:** Yes, Mr Robertson.

**Submissions by MR ROBERTSON**

**MR ROBERTSON:** Sir, in relation to that last exchange with Ms Boyd we will, of course, reflect upon it.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** If we have anything further that we wish to add we will do so, but it won't be I suspect until tomorrow.

**MR JUSTICE ROTH:** Yes. Well, it may be relevant it seems to me to the alleged -- to the methodology of calculating compensation as well, because now that I understand how the actual charges are set by ratio sort of in direct relation to -- it was potentially meeting or exceeding the commitment, that factual point.

**MR ROBERTSON:** Yes, Sir. That will be a point for Mr Gregory maybe later today, maybe tomorrow morning.

**MR JUSTICE ROTH:** Yes. It may be helpful if Ofwat, in light of what you said, could

attend that part of the submissions, because that really goes to what happened, what Ofcom (sic) would have done in the counterfactual. Yes.

**MR ROBERTSON:** I hope to be quite brief. You probably hope I am going to be quite brief as well. I have three topics to address you on.

The first is the nature of this strike-out application, because that's what in substance the Tribunal has indicated the Proposed Defendants, the Parallel Defendants, brought in advancing what we now refer to as the two exclusion issues. I will just address the legal test for that. There are some familiar authorities that I think are worth putting on record. Then secondly, I will address the first exclusion issue and I am going to take the Tribunal to Marcic and Manchester Ship Canal just to throw light on the essential ingredient test, where that actually comes in. Secondly, I will deal with the second exclusion issue.

So those are my three topics.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** So in substance this has been treated as a strike-out under rule 41 of the Tribunal Rules. Possibly it could be said to be summary judgment under rule 43.

**MR JUSTICE ROTH:** Well, I mean, it isn't actually because, of course, these proceedings haven't been approved, but what's being said is if they were approved then they could be struck out, because competition law wouldn't apply.

**MR ROBERTSON:** Yes. So in our submission they have to meet the strike-out test.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** The relevant principles. As I say, they are familiar. They are set out in the Tribunal's judgment in Gutmann (Boundary Fares), which is in the authorities bundle at 2.1, tab 17, page 1092, paragraph 52. The test there is set out reciting the well-known judgment of Mr Justice Lewison in Easy Air. Perhaps if I can

invite the Tribunal to read --

**MR FORRESTER:** Sorry. Pardon me.

**MR ROBERTSON:** So we are in bundle 2.1, tab 17, page 1092.

**MR FORRESTER:** Thank you.

**MR ROBERTSON:** Paragraph 52 down by the second hole punch. If I can invite the Tribunal to read over the page to paragraph 53. (Pause.)

Very familiar. It is a high hurdle that the defendants have to overcome. Just keeping that authority open for a moment, as I say, they essentially have to show there is no realistic prospect of the PCR succeeding on her case in light of the two exclusionary issues. In other words, the proposition that the PCR has a cause of action in competition law which is not excluded by the statutory framework must be shown to be fanciful and beyond argument there's a reasonable prospect of success, and likewise the proposition that competition law applies to statutory monopolists where there is no competition from alternative suppliers must also be shown to be a fanciful or extraordinary proposition. We say --

**MR JUSTICE ROTH:** It doesn't have to be fanciful. It has to be clearly wrong in law and we have the same -- on the basis that we have the same legal argument now that one would have at trial. This is a legal objection and it doesn't depend on facts being found and so on.

**MR ROBERTSON:** To make it clear, my client wants the Tribunal to decide these points of law now.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** We don't want to incur the expense of going down the line --

**MR JUSTICE ROTH:** You don't want to have a huge expensive exercise if at the end of the day we say because of Deutsche Telekom competition law doesn't apply.

**MR ROBERTSON:** The other points to bear in mind are those made by the Tribunal

later on in this judgment, paragraphs 60 to 65 where the Tribunal noted – at paragraph 62 -- the Court of Appeal judgment in Intel Corp v Via Technologies Inc, which stated:

"where it can be seen that jurisprudence… is in the course of development, it is dangerous to assume that it is beyond argument with real prospects of success that the existing case law will not be extended or modified so as to encompass the case being advanced."

Now in that case, the Tribunal concluded that the law on unfair abuses was in a state of development. The categories of abuse were not closed, and it was neither an extraordinary nor a fanciful proposition or wrong in law for the PCR in that case to categorise as an abuse a system operated by a dominant firm which failed to be transparent.

The Tribunal also points out at paragraph 65 that in relation to exploitative abuses, such as the present case, it was the special responsibility of dominant companies to avoid them and it was relevant that the customers charged were end users, predominantly individuals, such as in our case.

The Court of Appeal endorsed those observations on appeal. I don't think you need to turn it up, but it is paragraph 91, and that's in volume 1 of the authorities bundle, tab 8, page 494.

We also note that this is the first time any court or Tribunal has considered whether competition law is precluded by the Water Industry Act post Manchester Ship Canal.

That's really all I wanted to say by way of the test the Tribunal is applying. So I can move on to the first exclusion issue, which is essentially whether we are excluded by section 18(8) of the Water Industry Act in the light of the Marcic and Manchester Ship Canal judgments?

You have had extensive written submissions on this. The Parallel Defendants' case

really boils down to an assertion that my client's claims for abuse of dominance are precluded by the regulatory structure applicable to Ofwat and the Environment Agency and particularly the claim is ousted by section 18(8).

Put simply, in our submission, the proposed cause of action in tort for breach of statutory duty to comply with the Chapter II prohibition is not ousted or precluded by the legislation. This may be the only cause of action through which claims for damages may be pursued on behalf of customers.

Of course, we have heard just now that Ofwat thinks that is it may be able to secure compensation through a different route or for different reasons to those which it sets out in its Southern Water case. As I say, we will have to revert on that.

Now the first point I wish to make here is that we have pleaded a detailed cause of action for breach of the Chapter II prohibition. Mr Hoskins took you to our pleading.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** We have pleaded, just to run through it -- but I am not going to run you through the claim form again -- the defendant groups are undertakings. That's in the Severn Trent claim form, paragraphs 88 to 90.

Second, we have pleaded dominance, which doesn't seem to be seriously in dispute. It is essentially their principal line of defence.

Thirdly, we have pleaded abuse in detail at paragraphs 154 to 177. Now obviously that issue is hotly in dispute.

Fourthly, that we have pleaded loss or damage to the class. That's paragraphs 178 to 183, and then we have set out the methodology for calculating loss and damage at paragraphs 184 to 220, and, of course, that's also hotly disputed.

**MR JUSTICE ROTH:** Yes. There is no doubt you have pleaded, leaving aside the second exclusion issue, an arguable cause of action for abuse of dominance, and if it wasn't for section 18(8), the fact that there's a regulatory regime, and that the regulator

might be able to provide some relief for the class you represent, wouldn't stop this case from going ahead.

The real question is how does section 18(8), which is a limited ouster of certain claims, bite, if it does, or not?

**MR ROBERTSON:** For that I think it is helpful then to turn, first of all, to the Marcic case --

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** -- and then see how that's applied in Manchester Ship Canal. We can see then that what Mr Hoskins relies upon, the essential ingredient of cause of action, is actually of very limited application and narrowed down in scope considerably when Marcic is correctly understood in the light of what the Supreme Court say in Manchester Ship Canal.

So if I just start off with Marcic, which is in the authorities bundle 1, tab 3, page 287. This is the speech of Lord Nicholls.

**MR JUSTICE ROTH:** What page?

**MR ROBERTSON:** Page 287. Paragraph 8, towards the end Lord Nicholls describes: "Mr Marcic sought an injunction restraining Thames Water from permitting the use of its sewerage system in such a way as to cause flooding to 92 Old Church Lane, a mandatory order compelling Thames Water to improve the sewerage system, and damages."

So it's about forcing Thames Water to build new sewers or improved sewers. That is summarised again at paragraph 34 on page 294 by Lord Nicholls:

"In my view the cause of action in nuisance asserted by Mr Marcic is inconsistent with the statutory scheme. Mr Marcic's claim is expressed in various ways but in practical terms it always comes down to this: Thames Water ought to build more sewers."

Then we turn to Lord Hoffmann's speech on page 298 at paragraph 52. Actually if

I start at the bottom of paragraph 51, where Lord Hoffmann says:

"So all that Mr Marcic could do by way of enforcement of the section 94(1) duty" -- that's 94(1) of the Water Industry Act -- "was to make a complaint to the director, in which case it would be the duty of the director to consider the complaint and take such steps, if any, as he thought appropriate ...

Mr Marcic chose not to avail himself of this route. Instead, he issued a writ claiming an injunction and damages for nuisance. Section 18(8) ..." --

**MR JUSTICE ROTH:** Just to interrupt you, he is claiming damages as well as an injunction.

**MR ROBERTSON:** For failure to build sewers.

**MR JUSTICE ROTH:** The damages are for the damage suffered to his house and then he wants an injunction to stop future damage.

**MR ROBERTSON:** Yes. You see that in the next paragraph, how it is analysed:

"The flooding has not been due to any failure on the part of Thames Water to clean and maintain the existing sewers. Nor are they responsible for the increased use."

That's the sewers in the locality.

"They have, as I have said, a statutory duty to accept whatever water and sewage the owners of property in their area choose to discharge. The omission relied upon by Mr Marcic as giving rise to an actionable nuisance is their failure to construct new sewers with a greater capacity."

So it is the actionable nuisance that then gives rise to the claim in damages.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** He says the question is: “is there such a cause of action?”

If we go down to paragraph 55, it then refers to -- sorry. At the end of paragraph 54, having reviewed 19th century authorities:

"But the courts consistently held that failure to construct new sewers was not such

a nuisance.

The principal authorities for this last proposition were three cases in the late 19th century. It is not necessary to examine them in detail because their effect was summed up with customary lucidity by Denning LJ in Pride of Derby.

Then there is the quote.

**MR JUSTICE ROTH:** Shall we read that quote to ourselves?

**MR ROBERTSON:** If the Tribunal would like to read that quote and the following paragraph, paragraph 56, as well. (Pause.)

Then in paragraph 57:

"Mr Marcic can therefore have a cause of action in nuisance only if these authorities are no longer good law."

He says:

"The Court of Appeal decided that they should no longer be followed",

and he goes on to say the Court of Appeal were wrong to do so.

Paragraphs 61 and 63, page 301, explain that there were good reasons why the law of nuisance did not extend to a common law duty requiring the construction of new sewers, including at paragraph 64:

"These are decisions which courts are not equipped to make in ordinary litigation. It is therefore not surprising that for more than a century the question of whether more or better sewers should be constructed has been entrusted by Parliament to administrators", i.e., Ofwat, "rather than judges."

Then the conclusion at paragraph 70, page 302 refers to the judgment and says he is rejecting the existence of a common law duty to build new sewers. At the end of paragraph 70:

"It would subvert the scheme of the 1991 Act if the courts were to impose upon the sewerage undertakers, on a case-by-case basis, a system of priorities which is

different from that which the director considers appropriate."

**MR JUSTICE ROTH:** It is not a nuisance. There is no claim in nuisance at all. It is not -- does it say anything about section 18(8)? Perhaps it refers to it in paragraph 52.

**MR ROBERTSON:** It is paragraph 52.

**MR JUSTICE ROTH:** Paragraph 52?

**MR ROBERTSON:** Yes.

"It follows that if the failure to improve the sewers to meet the increased demand gives rise to a cause of action at a common law, it is not excluded by the statute. The question is whether there is such a cause of action."

They decide that there is not.

**MR JUSTICE ROTH:** The only reference to section 18(8) is in a sense to say --

**MR ROBERTSON:** If there were a cause of action, it wouldn't be ousted. Question: is there a cause of action?

**MR JUSTICE ROTH:** But they don't consider the -- whether if there were a cause of action, it would come within -- the otherwise being a -- it would be a contravention of the duty point at all. They just consider whether this is a case that vests in nuisance based on the nature of the complaint.

**MR ROBERTSON:** But the one observation is in paragraph 52. If there were a cause of action, it wouldn't be ousted. The question is: is there a separate cause of action, and there isn't.

**MR JUSTICE ROTH:** Lord Nicholls doesn't say anything about it, does he? He quotes at paragraph 14 -- I see. No, he does. He says -- it is in paragraph 22, isn't it?

"... Mr Marcic seeks to sidestep the statutory enforcement code. He asserts claims not derived from section 94 ... Since the[y] do not derive from a statutory requirement, section 18(8) does not rule them out even though [it] is on its face a contravention of [the] duty under section 94."

**MR ROBERTSON:** The claim being brought is found to derive from section 94 of the Act. It is trying to enforce section 94.

**MR JUSTICE ROTH:** It says:

"He asserts claims not derived from section 94 ..."

**MR ROBERTSON:** That's the argument that was being put to the contrary. That's not what the court found.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** At the very end of paragraph 22 Lord Nicholls says:

"The closing words of section 18(8) expressly preserve remedies for any causes of action which are available in respect of an act or omission otherwise than by virtue of its being a contravention of a statutory requirement enforceable under section 18."

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** That's Marcic.

Then we have the Manchester Ship Canal case, which is in the same bundle at tab 5, and you have already been shown certain parts of this, but they are summarised on page 379. It is actually in a passage that begins on page 378, but the relevant passage I think for our purposes begins on 379 at sub-paragraph (10):

"A claim cannot be brought against a sewerage authority at common law where it is an essential ingredient of the cause of action that the authority has failed to drain its district effectually. It is under no common law duty to do so: such an obligation can only be imposed by statute",

and citing the 19th century authorities referred to in Marcic.

"Since the duty is one arising only by statute, and the statute provides a means of enforcement, that is the only remedy for non-performance: Pasmore",

which is the authority Mr Hoskins showed to you. Then at paragraph 13 -- sub-paragraph (12):

"The existence of a statutory remedy will not bar an action where the relevant act or omission is not only a contravention of a statutory duty but also constitutes a tort ..."

Separate action in tort , section 18(8) doesn't apply as it is a limited ouster.

**MR HOSKINS:** There's a heading on page 378 above paragraph 50. This is a section which is summarising the law prior to privatisation in summary and therefore it is the law pre-section 18(8). Therefore this summary cannot relate to the meaning of section 18(8). I am sorry to rise.

**MR ROBERTSON:** Well, I was going come on to that. Then sub-paragraph (13):

"An action may lie against a sewerage authority in respect of a nuisance for which the authority is responsible, where the cause of action does not include as an essential ingredient that the authority has failed to drain its district effectually. That is so, notwithstanding the nuisance that has been caused by such a failure ..."

The duty and essential ingredient referred to here is the general duty to provide a sewerage system pursuant to section 94(1) of the WIA91. In other words, a claim in nuisance cannot be based upon an allegation of a failure to provide an effective drainage system or build newer or better sewers. There was no reason to extend the law of nuisance to provide such a common law duty where a statutory duty already existed under section 94.

**MR JUSTICE ROTH:** Sorry. Where are you?

**MR ROBERTSON:** Sorry. I was just making that submission. That's on the basis of those joined together, those paragraphs.

The Supreme Court then moves on at paragraph 57. This is the point that I said to Mr Hoskins I would be coming on to. It is under the heading "The Water Industry Act 1991", which is on page 381.

On page 382 at paragraph 57 it cites section 18(8), adding emphasis:

"The words which we have emphasised" -- those italicised in

paragraph 56 -- "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 -- the section 94 duty -- trying to enforce section 94 through a claim in tort.

**MR JUSTICE ROTH:** That's where the essential ingredient concept comes in. It's a brief explanation of what the italicised words of section 18(8) -- how they should be understood.

**MR ROBERTSON:** Yes.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** They continue in paragraph 57:

"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. That reflects the pre-privatisation law, as we explained at paragraph 50(12) above."

That is what had Mr Hoskins leaping to his feet.

The Supreme Court then discusses the speeches in Marcic. At paragraph 79 on page 387:

"Like Lord Nicholls, Lord Hoffmann focused on the cause of action asserted by Mr Marcic. He accepted that the effect of section 18(8) was that “if the failure to improve the sewers to meet the increased demand gives rise to a cause of action in common law, it is not excluded by the statute. The question, he said, “is whether there is such a cause of action”. Like Lord Nicholls, he observed that “the flooding has not been due to any failure on the part of Thames Water to clean and maintain the existing

sewers. Nor were they responsible for the increased use of the sewers. The omission relied upon as giving rise to an actionable nuisance was their failure to construct new sewers with a greater capacity."

Then at paragraph 80, second sentence:

"Pausing there, Lord Hoffmann was correctly recognising that, quite apart from the exclusionary effect of the statutory remedy, the earlier authorities had established that there was no cause of action in nuisance in the first place, where the failure to construct a public sewer was an essential ingredient of the claim."

So, in other words, there is no common law duty to construct new sewers in the first place and no need to impose a duty of common law in nuisance where one already existed under statute.

On our case, the same issue does not arise, since we do have a cause of action based upon breach of statutory duty under the Competition Act, which arises independently from and does not depend upon the Water Industry Act 1991.

Sir, I have got about another five minutes.

**MR JUSTICE ROTH:** Yes. Why don't you --

**MR ROBERTSON:** Shall I just finish on it?

**MR JUSTICE ROTH:** Yes, and then we will break.

**MR ROBERTSON:** So paragraph 82 at the bottom of page 388:

"In summary, therefore, an essential ingredient of the cause of action asserted by Mr Marcic was that Thames Water had failed to perform an obligation to construct a new sewer."

It's a statutory obligation imposed by section 94 and not an obligation that would otherwise exist.

"It followed that the claim was excluded by section 18, since subsection (8) only preserved common law remedies where a contravention of the statutory duty was not

an essential ingredient of the cause of action. Mr Marcic therefore had no cause of action in nuisance."

Then moving on to paragraph 86, perhaps if I just invite the Tribunal to read paragraph 86 rather than me reading out aloud. (Pause.)

Setting out two scenarios, a nuisance not arising at common law in the first scenario and by contrast arising in the second scenario. Then the Supreme Court summarises this at paragraph 90. Ms Cunningham has just reminded me that of those two scenarios, the first scenario is essentially Marcic and the second scenario is Manchester Ship Canal.

Then paragraph 90 on page 391:

"As Lord Hoffmann explained, the statutory enforcement procedure does not exclude common law remedies for common law torts. Mr Marcic's difficulty was that he had no cause of action at common law. Thames Water had not created or adopted the nuisance caused by the escape of sewage on to his property. They were said to be liable because they had failed to take reasonable steps to avert the nuisance by constructing a new sewer. This was said to amount to “continuing” the nuisance in the sense explained in Sedleigh-Denfield. An essential ingredient of the cause of action was accordingly that Thames Water were under a duty to construct a new sewer. That cause of action was excluded by section 18 of the 1991 Act, consistently with the long-established position that there is no common law duty to build public sewers."

So Marcic was really all about whether a duty arises at common law in the first place, but that's in stark contrast to our case, where we have a cause of action, a well recognised, well understood cause of action under the Competition Act for breach of statutory duty, which arises independently of anything under the Water Industry Act.

Final two passages to refer to. On page 395, paragraph 105, overturning the Court of Appeal below in Manchester Ship Canal regarding their interpretation of Marcic:

"Accordingly, the problem with the claim was not merely “Thames' special position as a sewerage undertaker”, or that in some broad sense “it would undermine the statutory scheme applicable to the enforcement of sewerage undertakers' duties in relation to sewage”, but specifically that it was based on the contravention of a statutory duty for which section 18 of the 1991 Act provided an exclusive remedy. The difficulty was not that a contravention of the statutory duty was an underlying cause of the nuisance, but that it was an essential ingredient of the cause of action for which there was no independent basis at common law."

That's key. We have an independent basis at common law for bringing this claim.

The final passage that I will draw the Tribunal's attention to is to be found on page 400 at paragraph 124:

"The question whether common law remedies in trespass and nuisance have been preserved by the 1991 Act is put beyond doubt by section 18(8), which expressly preserves common law remedies that are available in respect of an act or omission which contravenes a condition of an appointment or licence or of a statutory or other requirement enforceable under that section, or causes or contributes to such a contravention, so long as the remedy does not arise “by virtue of [the act or omission] constituting, or causing or contributing to, such a contravention”.", the wording of the Act. "Such an act or omission might, in particular, constitute a contravention of a duty imposed by section 94. But if the act or omission gives rise to remedies at common law which do not depend upon its also being a breach of the statutory duty, such common law remedies are not excluded by section 18(8)."

**MR JUSTICE ROTH:** I think what is said against you is that there is no independent basis at common law to have a duty on the water undertakings to supply information about pollution incidents to Ofwat. That only rises under the terms of their appointment and therefore a breach of those terms is, adopting the language of Lord Reed,

essential to your case, because there is no -- it is not that you can't bring claims for abuse of dominance generally, but in this particular case the abuse is not reporting as required under the -- not carrying out the reporting exercise that arises only by reason of the appointment and there is no independent basis for saying they have a duty to report.

**MR ROBERTSON:** That's certainly the factual matrix as pleaded in our claim form. The abuse, as we will see when we get to AstraZeneca, is supplying misleading information to your regulator.

**MR JUSTICE ROTH:** Applying AstraZeneca, the information was provided to the Patent Office not pursuant to a statute under which the remedy was excluded. Here, the supply of the information is pursuant to the appointment under the Water Industry Act, otherwise there would be no basis for supplying information to Ofwat at all.

**MR ROBERTSON:** Well, wouldn't there be in a regulated environment in which it was crucial to supply correct information to the regulator to come up with correct prices an obligation, but the distinction is drawn in Manchester Ship Canal between the “underlying cause" -- in Manchester Ship Canal -- you know, what is the underlying cause of the abuse of dominance here? It is the provision of the misleading information, but we are not suing for breach of the Water Industry Act. We are suing for abuse of dominance.

You get that from paragraph 105 of Manchester Ship Canal:

"The difficulty was not that a contravention of the statutory duty was an underlying cause of the nuisance, but that it was an essential ingredient of the cause of action for which there was no independent basis at common law."

That was the problem with Mr Marcic's case. There was no underlying cause of action at common law.

Here there's an obvious underlying cause of action at common law. It is for breach of

statutory duty imposed by the Chapter II prohibition.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** So that's why Marcic is very limited to the essential ingredient being tied up with the specific statutory duty, in that case section 94. Here it is not. Obviously supplying misleading information, that's the underlying cause of what has gone wrong. The cause of action for abuse of dominance is the provision of misleading information to the regulator. So that's the crucial distinction. Hence section 18(8) operating only as a limited ouster, not as a general ouster.

**MR JUSTICE ROTH:** We will come back at 2.05.

**MR ROBERTSON:** 2.05.

**(1.16 pm)**

**(Lunch break)**

**(2.05 pm)**

**MR JUSTICE ROTH:** Yes, Mr Robertson.

**MR ROBERTSON:** Sir, I move on now to the second exclusionary issue. We have to say we find the submission by the Parallel Defendants that UK competition law doesn't apply to them in their dealings with the consumers even though they have been granted statutory monopolies under UK law as a tad on the ambitious side, to put it mildly.

The starting point: what's the abuse of dominance prohibition seeking to do? Well, if you could turn up authorities bundle 1, tab 8 and this is Gutmann, Boundary Fares, in the Court of Appeal. I mentioned the case earlier on today without opening it, as endorsing this Tribunal's analysis, but the passage I want to refer the Tribunal to is at paragraph 93 on page 495.

**MR JUSTICE ROTH:** Just one minute.

**MR ROBERTSON:** It is Lord Justice Green. Paragraph 93 on page 495:

"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. These are often described as “exploitative” abuses. There is no single definition of unfairness set out in the case law".

We say this is our case. This is straightforward: unfair prices charged to consumers. It is exactly the sort of conduct that the Chapter II prohibition is intended by Parliament to apply to.

Indeed, Gutmann itself is a case about local monopolist train companies allegedly charging unfairly high prices to consumers when the Court of Appeal -- Lord Justice Green on a previous page, 494, paragraph 91 says:

"We agree with the CAT's general analysis; it is clearly arguable that for a dominant undertaking to create a system which routinely double-charges consumers may be unfair and abusive."

**MR JUSTICE ROTH:** I am not sure they were monopolists, with respect.

**MR ROBERTSON:** I said monopolists. I appreciate that there are different train companies sometimes operating on the same tracks.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** We submit as a matter of black letter law there is simply no legislative basis on which it could be inferred that Parliament has decided to remove or diminish the full application of the Chapter II prohibition to the Parallel Defendants. When the Competition Act 1998 was adopted -- some of us were around at the time already in practice -- there was no exclusion of the water industry. So the Competition Act 1998 has always applied substantively in the water sector. This is not just

a procedural issue, as Mr Hoskins referred to this morning. Substantively, the Act has always applied. It has never been excluded.

As to Parliamentary intent, yes, as Mr Hoskins explained, Parliament conferred upon Ofwat concurrent powers with the CMA to exercise the CMA's functions under Part I of the Competition Act in relation to abusive conduct of undertakings which relates to "commercial activities connected with… the provision and securing of sewerage services", as we set out in paragraph 20 of our Reply.

There are some exclusions in the Act. If you can grab your purple tome, Butterworth's Annual Competition Text, you see -- if it is operating from the 29th edition it is on page 58, schedule 3, general exclusions. This is just to point out in relation to the discussion that we had earlier today about Article 106 and in particular Article 106, paragraph 2; we see the domestic equivalent. The page numbers are in the middle at the top. I have got page 58 if it is the 29th edition.

**MR JUSTICE ROTH:** Yes, that's right.

**MR ROBERTSON:** We see there the exclusion, the general exclusion for services of general economic interest. Neither the Chapter 1 nor the Chapter 2 prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly insofar as the prohibition will obstruct the performance in law or, in fact, of the particular tasks assigned to that undertaking.

I thought it would just be helpful to show you that's the domestic equivalent to Article 106, paragraph 2 that we were looking at this morning.

We also see in the next paragraph, paragraph 5:

"The Chapter I prohibition does not apply to an agreement to the extent which it is made to comply with legal requirements. The Chapter II prohibition does not apply to conduct to the extent to which it is engaged in in order to comply with a legal

requirement."

Then legal requirement defined in paragraph 3. So that's the domestic state compulsion exclusion written into the Act.

If Parliament had wanted to go further in relation to the water sector or indeed any other regulated sector, it could have done, but it didn't. That's what we've got and the Parallel Defendants are not at this stage anyway seeking to place reliance on those paragraphs.

**MR JUSTICE ROTH:** Yes. They are not saying that the law doesn't apply to them in particular claims. I think they have accepted now that in so far as what they do affects competition in another market it will apply to them.

**MR ROBERTSON:** Yes. If the downstream market has been opened up to competition, competition takes place and we looked at one example. There are other examples but I am not going to state them.

**MR JUSTICE ROTH:** Clearly if they sort of agreed between themselves how much they would pay for piping, to purchase pipes they need for sewers, that would be a cartel, a biased cartel. I am not suggesting they are outside competition.

**MR ROBERTSON:** They are dealing with a household supply monopoly.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** They are saying that they enjoy a carve-out because that's a statutory monopoly. We say no, the Chapter II prohibition applies to it. It hasn't been carved out by any legislation and, in fact, all the direction of travel from Parliament has been to emphasise the importance of applying competition law to this sector. There is now a primary duty on Ofwat to consider competition law when considering its regulatory powers. We explained that. I am not going to ask you to turn up the reply. It is paragraph 21 of our reply, which is for your note core bundle 1, tab 7, page 344, but that was introduced by the Enterprise and Regulatory Reform Act

of 2013. So it is an attempt to beef up enforcement of competition law in various regulated sectors, including the water industry. So we just say it is simply inconceivable that Parliament intended there to be -- well, intended the Chapter II prohibition to be emasculated when it comes to consumers in the way that the Parallel Defendants contend for in this hearing.

So they don't base their submission on the basis of UK legislation. They don't base their submission on the basis of UK jurisprudence either. There is nothing that they have cited by way of domestic jurisprudence in support of their contention.

Again the direction of travel, you see it --

**MR JUSTICE ROTH:** To be fair, Mr Robertson, that's not really such a powerful point, because there is limited domestic jurisprudence and there's a great mass of European jurisprudence and section 60 brings in the European jurisprudence. The fact they reply on European jurisprudence; you rely on European jurisprudence for your abuse because you based it on AstraZeneca and that is no criticism of you.

**MR ROBERTSON:** That's a fair point to pull me up on. I do want to make it clear that we don't dispute the applicability of European jurisprudence, but the point has not arisen so far in UK case law. The leading case is the Albion Water case, which is about wholesale supply in a commercial context, a different context, where the Tribunal -- we quoted it in paragraph 164 of our claim form.

The Tribunal in that case had no doubt that the 1998 Act applied in that case and they observed that no provision of the Water Industry Act 1991 disapplied the 1998 Act and several provisions confirmed its continued application.

So we are dealing with European jurisprudence, but even when we get to European jurisprudence my learned friend conceded yesterday afternoon and again this morning that there is not actually a decided case applying the principle for which he contends to clear activity, to exempt activity, from the Chapter II prohibition or Article 102.

So he refers to the Deutsche Telekom principle, which is based upon a misreading of the Deutsche Telekom case, but actually this principle has never been applied. He says "there's always a first case". We say this isn't it.

**MR JUSTICE ROTH:** Yes. Well, it is not a question whether it's it. It is a question of what is this principle and what meaning does one give to those words. They have never been applied, so we have no case that helps us.

**MR ROBERTSON:** No case and no textbook authority either that I can see. We have cited -- we have provided in the bundle Bellamy & Child, Which -- sorry -- Whish & Bailey. I mustn't forget that.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** Van Bael & Bellis, Faull & Nikpay, all of the textbooks with the relevant extracts, what they refer to as a state compulsion defence, but my learned friend said "Ah, you have misunderstood it as a state compulsion defence and then there is this principle," but when they refer to Deutsche Telekom, Ladbroke Racing and they refer to the extracts he refers to, they do so under the heading "State Compulsion" and that's how it is understood.

So those textbooks, we have got the extracts in the bundle, but basically, they do essentially recite the passages to which he refers in Deutsche Telekom.

I think the best -- well, let's go to two of them. It won't surprise you that Bellamy & Child has been my first pick, which is at bundle 4 of the authorities bundle, tab 60 and I am afraid on the copy I have got the page is -- the pagination, some of it has got blanked out, but it is page 3750, heading section 2.7. Sorry. I have turned up the wrong one. I have turned up the second authority I was going to take you to. So it is tab 60.

**MR JUSTICE ROTH:** 3741.2, is it?

**MR ROBERTSON:** Yes.

**MR JUSTICE ROTH:** Is that it or not, or are there two extracts?

**MR ROBERTSON:** "State Compulsion" starts at 3743.

**MR JUSTICE ROTH:** Just a minute.

**MR ROBERTSON:** We will see there about halfway down -- I am afraid on the OUP -- when you print off the OUP website, you get end notes rather than footnotes. So the end notes are provided at the end at 3746 and 3747. Halfway down:

"The critical question is whether or not the individual undertakings enjoyed commercial autonomy. In Commission and France v Ladbroke Racing, the Court of Justice stressed that it is only if anti-competitive conduct is required of undertakings by national legislation or if the legislation 'creates a legal framework which itself eliminates the possibility of competitive activity' that the restriction of competition is not regarded as attributable to the autonomous conduct of the undertakings. Articles 101 and 102 may apply, therefore, if the national legislation does not preclude undertakings from engaging in autonomous conduct."

So we say it is autonomous conduct, the ability to engage in autonomous conduct, which is the touchstone of the applicability of Articles 101 and 102 in a state regulated context.

**MR FORRESTER:** That's looking at scope for residual competition, the second sentence there.

**MR ROBERTSON:** Yes. You will see the passage on page 3744 headed "Scope for residual competition".

"The judgment of the Court of Justice in Ladbroke envisages the possibility that the competition rules will not apply if national measures preclude the possibility of independent competition. However, arguments to that effect made by parties subject to investigation seldom succeed and the Commission is concerned to protect such residual competition as may be possible."

We say competition in that sense has to be understood in the context of dominant undertakings as if they were behaving in a competitive market vis-a-vis not only their competitors but consumers. Exploitative abuses -- sorry -- exclusionary abuses and exploitative abuses. That is what is being targeted. If I go into the next tab.

**MR JUSTICE ROTH:** Just one minute.

**MR ROBERTSON:** One point, Sir, I was tempted to put in extracts from the fifth and sixth editions, the editions that you co-edited but I decided not to flatter the Tribunal in that way, but that's the like effect.

Then over the page the next tab we have Van Bael & Bellis, which is 6th Edition 2021 and again -- I think this really brings out the point quite clearly at page 3750 where under state compulsion -- it is talking about this in the context of both Articles 101 and 102:

"An undertaking may therefore argue that its behaviour is dictated by a national measure and therefore should escape the application of Article 101 (or 102). Two conceptually different types of state compulsion or interference can be distinguished. The first type concerns government measures which require undertakings to behave anti-competitively.

The second concerns government measures or a framework of measures which themselves restrict competition. In neither case does Article 101(1) apply, since the restriction of competition is not caused by the undertaking's autonomous behaviour."

Again, the touchstone is autonomous behaviour.

So to pick up the point we saw in Bellamy & Child on the scope of residual competition, that comes in on page 3753. Citing Ladbroke:

"... the Court of Justice held that where a national legal framework in itself eliminates any possibility of competitive activity on the part of undertakings, Article 101(1) does not apply, given that the restriction of competition is not attributable to the autonomous

conduct of the undertakings. To successfully invoke this argument, it appears that the legal framework concerned must not leave any appreciable residual competition available for the undertakings to restrict."

It goes on to cite Suiker Unie. It observes the cases have essentially never been successfully applied. It then concludes the section:

"This is the case if their conduct cannot appreciably restrict competition, where competition is already fundamentally restricted through State measures, or if they do not enjoy any form of autonomy. Essentially, it needs to be determined whether the anti-competitive effects are attributable directly and solely to State measures or, at least partially, to autonomous conduct on the part of the undertakings. In the latter situation, the existence of State measures does not serve as an excuse for undertakings to engage in anti-competitive practices."

So Whish & Bailey, which is now the extract that I -- is at tab 62. I am not going to take you to it, but that's now the 11th edition, published about a month ago. I have also included at tab 59 Faull & Nikpay, third edition from 2014, which is the most recent edition.

So the leading textbooks all indicate that the touchstone is autonomous conduct and that's what we say the Parallel Defendants have the ability to engage in, engage in price setting which is seeking, it would appear, to maximise the prices that they charge to consumers. Classical autonomous conduct.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** As to the cases, just to go to the case that Mr Hoskins says started it all, Deutsche Telekom -- he doesn't say it started it all, but he says it is the key case for him, that's to be found in authorities bundle 3 at tab 41, and the passage I particularly rely upon is to be found at page 2812, paragraph 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 ..."

**MR FORRESTER:** Sorry. Give us time.

**MR ROBERTSON:** It is authorities bundle 3, tab 41, page 2812, paragraph 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 and 82 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 and 82 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 the undertakings."

They then go on to find that the fact that their telecoms regulator had approved their prices did not absolve them of responsibility for a margin squeeze abuse.

The point about margin squeeze. It is at paragraph 85. The appellant had scope to adjust its retail prices for end user access services, notwithstanding the intervention in its national regulatory authority described in paragraph 84, the General Court was entitled to find on that ground alone the margin squeeze at issue was attributable to the appellant.

Then finally paragraph 92 over the page on 2814:

"It is common ground that the 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 ..."

So it is there. It is talking about prices to end users for access to services. So it is talking about pricing and there is still scope for autonomous conduct in relation to the pricing and for that to be found to be an abuse contrary to Article 102.

So you have my submission that autonomous conduct is the touchstone. Unless the Tribunal wants to revisit Ladbroke Racing, which is to like effect as the textbook extracts indicate.

**MR JUSTICE ROTH:** No.

**MR ROBERTSON:** Okay. The same goes for Atlantic Container. Essentially it is the recitation of the wording from Deutsche Telekom that appears in each of these cases.

**MR JUSTICE ROTH:** Yes.

**MR ROBERTSON:** EDP: that was a question decided because the merger regulation didn't apply because there was a monopoly, so how could you try to strengthen the dominant position? So I think those are the authorities on this point. They really don't bear the weight, the intellectual weight, that Mr Hoskins seeks to place upon them.

Sir, unless I can assist the Tribunal further, those are our submissions on the second exclusion issue.

**MR JUSTICE ROTH:** Thank you very much.

**Submissions by MR HOSKINS**

**MR HOSKINS:** A bit of heavy lifting physically rather than intellectually. So three issues to address in reply.

First of all, the suggestion that the strike-out test should be applied to the issues before the Tribunal today. With respect, I foreshadowed that at the CMC precisely to avoid this sort of submission being made.

Can I show you the transcript and then the ruling which set up this hearing? So the transcript is at bundle 8, tab 8 and if we can begin at page 117. The very bottom of the page you will see "Mr Hoskins". Then over the page at page --

**MR JUSTICE ROTH:** Sorry.

**MR HOSKINS:** 117.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** Over the page:

"Mr Hoskins: It reflects something that we raised in our skeleton, which is obviously we want the preliminary issues or strike-out to be effective and I assume from that sort of amalgamation/hybrid, what we are trying to avoid are arguments that you can't decide a novel issue of law because it is a strike out. So you…", that's you, the President, "…are asking us to craft the issues and create a sort of hybrid of the two which makes sure that, insofar as you want to decide things, you can decide them. The President: That's exactly it. Because I can see some issues will be just determinative and they will kill the process off."

Then at page 129, you will see this was the President speaking at the top of 129 opposite line 2:

"In terms of issues, we do think that Mr Hoskins' point about not wanting to go down the perils of strike-out with its asymmetries but going down the route of genuine preliminary issues that gives the Tribunal a full range of option is one we would want to stress in terms of the framing of the points but that is again a detail which I think we would want to take off-line. So those are all points well-made and helpful."

So the particular point that was being put to the Tribunal was we don't want to meet this argument. It is just the strike-out test and the President was saying "Yes, I agree that is not what we want to happen".

Then in the ruling itself, that's behind tab 9, page 187, paragraph 10:

"It seems to us, therefore, that these issues" and that's the exclusion issues as we are calling them "do need to be dealt with alongside the "vanilla" questions of certification. We will call them for that reason the "non-vanilla" certification issues. They are, we stress, not necessarily certification issues, they may very well (and this would be our preference) be framed as preliminary issues."

So that's the whole basis upon which this hearing was set up. We were asked to identify particular legal issues that could be determined.

**MR JUSTICE ROTH:** Well, to be honest, it seems to me a rather arid debate, not what's said by the President obviously, but the debate here. Yes, the strike-out test has various hurdles, but it is not suggested that this has not been fully argued and that we are in as good a position to decide it now as we would be if the matter was certified and then it turned up as a preliminary issue after certification. No-one is suggesting we can't decide it or that it depends on further facts being found or evidence.

So I think we are -- indeed, Mr Robertson very frankly said he would like us to decide it. So I don't think you need worry about that.

**MR HOSKINS:** Thank you.

So then the second issue is section 18(8). It is not enough for the PCR simply to say the class members have a cause of action for breach of statutory duty. Section 18(8) requires a more granular assessment. Let me make that good by taking you back to Manchester Ship Canal. Bundle 6.1, tab 5. I would like to pick it up at page 395, paragraph 105. You have seen these paragraphs. I took you to them and Mr Robertson did. So I can take them quickly. 105:

"As we have explained, this was a misreading of Marcic."

Then if you go down to E:

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

So it is not enough to say "Is there a cause of action in nuisance?" You have to actually look at what the essential ingredients of the particular claim in nuisance is or are. That point is made on a number of occasions.

Paragraph 124 on page 400. Just below G, the final sentence of that paragraph:

"Common law remedies remain available where a contravention of a condition of an appointment or licence, or of a statutory or other requirement enforceable under section 18, is not an essential ingredient of the cause of action."

Again, you are not just looking at the name tag of the cause of action; breach of statutory duty or nuisance. You are looking at what the essential ingredients are, the particular claim that is brought.

I am now labouring the point, but on page 403, para 133, opposite E:

"A cause of action ..."

Actually, I should start the sentence above:

"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 ... 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."

Again, you have to look at the essential ingredients of the particular claim of nuisance or breach of statutory duty which is being brought.

You have our case on that. You framed it for Mr Robertson. We say one way of putting it is that there is no common law duty to supply information to Ofwat. That only arises under the conditions of appointment and therefore breach of the condition is an essential part of our case. You very fairly summarised what we are arguing.

That's it. That's the section 18(8) point. So you have the three criteria. Is it an essential ingredient of these claims that there were conditions and that we failed to comply with them? The answer is yes. Does that constitute a convention of a condition? Answer, yes. Is there an express provision in another statute that

provides for the remedy? No. That's it. That's section 18(8) and that is our case.

**PROFESSOR SMITH:** Section 18(8) applies only in circumstances where there is a breach of statutory conditions.

**MR HOSKINS:** Contravention of a condition is one of the requirements of section 18(8).

**PROFESSOR SMITH:** So contravention of conditions cannot be part of the essential criteria, because every case being considered under 18(8) involves a contravention of some statutory requirement. So which of them -- for which of them is this contravention essential and for which of them is it not essential, given that they all involve some breach of statutory requirement?

**MR HOSKINS:** So it is essential for the condition that says it must be the contravention of the condition of a licence, and in relation to the third element, is it an essential ingredient of the claim that there existed these conditions, these reporting obligations, that certainly has to be included.

We have the additional argument that in relation to that other element it is also an essential part of the claim that we didn't comply with the conditions.

Now the fact that the existence of a contravention exists in relation to both those parts doesn't mean section 18(8) isn't fulfilled. It simply means that on the facts of this particular case, you get an allegation of contravention for the essential ingredient and by definition -- I see the point you are putting to me, and it is common ground, it is a contravention of a condition, but the fact that the essential ingredient includes a contravention of a condition doesn't mean that section 18(8) doesn't apply.

I understand the dichotomy you are putting to me. I hope I have addressed it fairly.

**PROFESSOR SMITH:** I am just struggling to think of a case that you would say was not -- that the breach of conditions was not an essential feature of the claim, but nevertheless 18(8) applies.

**MR HOSKINS:** There could be in a competitive market or indeed -- yes, there could be in a competitive market where competition -- there is an anti-competitive act that takes place and it is nothing to do with a condition as such.

**MR JUSTICE ROTH:** But it has to be a breach of the condition.

**MR HOSKINS:** That's right and then section 18(8) wouldn't apply. So the point is section 18(8) won't exclude all competition claims.

**MR JUSTICE ROTH:** That's not quite what the Professor was putting. He was saying you only ask the question under section 18(8) if you have a breach of the condition, if the act complained of is a breach of the condition.

**MR HOSKINS:** Oh, I see. Yes.

**MR JUSTICE ROTH:** You only get to the third point once you have. So in what circumstances is the ouster limited, that the claim is saved, because it is always going to be -- the act is always going to be a breach of the condition for these purposes, whichever side of the line it falls.

**MR HOSKINS:** Not necessarily in a competitive market, because where you have a competitive market there may be an act by a relevant undertaking which constitutes an infringement of competition law but doesn't constitute an infringement of a condition.

**MR JUSTICE ROTH:** No, no, but that's missing the point, I think.

**MR HOSKINS:** I am sorry if I am missing the point. You put it to me.

**MR JUSTICE ROTH:** The wording in section 18(8), you made the point that there were three steps. The first step is does the act constitute a contravention of a condition?

**MR HOSKINS:** Yes.

**MR JUSTICE ROTH:** If it doesn't, then section 18(8) doesn't apply at all. So we have an act that does constitute a contravention of the condition.

**MR HOSKINS:** Yes.

**MR JUSTICE ROTH:** Then you say the only remedies are those except those available in respect of that act otherwise. So there will be acts which constitute a breach -- a contravention of the condition -- but are saved by the final words because there are common law remedies for that act.

**MR HOSKINS:** Yes.

**MR JUSTICE ROTH:** And I think the question is in what circumstances do you have common law remedies for an act which is a breach of the contravention and where the breach of the contravention is not an essential element of the --

**MR HOSKINS:** This isn't --

**MR JUSTICE ROTH:** That's the question.

**MR HOSKINS:** This is not restricted to competition law.

**MR JUSTICE ROTH:** No.

**MR HOSKINS:** Let me get this right because I got confused yesterday. In Manchester Ship Canal it was not possible to rely on section 18(8). It was possible to bring a cause of action in nuisance that didn't fall foul or didn't fall within, rather, the three conditions of section 18(8).

**MR JUSTICE ROTH:** In Manchester Ship Canal we had that debate, but presumably the act was -- the flooding -- it wasn't flooding -- I think discharge -- was a breach in contravention of the conditions.

**MR HOSKINS:** Mr Kennedy has had the misfortune to have to go through all the judgments to try to get to the bottom of this. Let me just get the notes so I get this right. So at first instance Mr Justice Fancourt found that the discharges were in breach of section 94 of the Water Industry Act. So that's at first instance. Then in the Court of Appeal the court held that it was not necessary to decide whether that was correct or not, because the claims were precluded by the Marcic principle.

The Marcic principle, because this is obviously by definition prior to the Supreme Court in Manchester Ship Canal, at that stage was: regardless of section 18(8), a claim which required there to be expenditure would undermine the statutory framework of price control. So decided at first instance. The Court of Appeal says it was not necessary to decide because of the way it understood the Marcic principle, and then you come to the Supreme Court in Manchester Ship Canal where they don't actually decide on the first and second parts of section 18(8) because they decide the third part is not satisfied, i.e., the essential ingredient part was not satisfied in that case.

**MR JUSTICE ROTH:** It is implicit in that that they are saying even if it were a breach of section 94, it will not be precluded.

**MR HOSKINS:** Well, implicit -- yes. Even if it were the case, you are not going to get into section 18(8) because you don't satisfy the third bit of section 18(8), but you don't get that reasoning in the judgment. You will understand, I hope, now why I have been struggling to give a definitive answer to that point.

**MR JUSTICE ROTH:** We are grateful to Mr Kennedy for doing that work.

**MR HOSKINS:** All his hard work, sir, and he deserves the credit.

Are you happy for me to leave section 18(8)? So we are into the competition issue. I am not going to repeat myself or respond to points that I have already dealt with in opening.

In relation to the textbooks, they actually confirm the law as we suggested. They help us.

Bellamy & Child, bundle 6.4, tab 60, page 3744.

**MR JUSTICE ROTH:** Yes.

**MR HOSKINS:** You saw this, but it was read in a way --

**MR FORRESTER:** Sorry, I missed the page number.

**MR HOSKINS:** 3744. You see the heading "Scope for residual competition". So this

is separate from state compulsion:

"The judgment of the Court of Justice in Ladbroke envisages the possibility that the competition rules will not apply if national measures preclude the possibility of independent competition."

So that's precisely the principle that we rely upon and it is different from state compulsion. It is not defined by autonomy. It is a free standing principle:

"However, arguments to that effect made by parties subject to investigation seldom succeed."

I accept that, but it doesn't mean the principle doesn't exist. So you have in Bellamy & Child a recognition of the principle we rely upon. Now Bellamy & Child cites Ladbroke. I think the relevant footnote is over the page. It is quite hard from the layout. There is a reference to above, so that's just to Ladbroke again. Then below there is Suiker Unie, etc. I have shown you the consistent case law. It is not just Ladbroke. This has been confirmed now on a number of occasions as a separate principle.

Van Bael & Bellis is to the same effect. That's tab 61, page 3753. Again, a section separate from state compulsion. The bottom of page 3753:

"State Measures Restricting Competition.

In Ladbroke v Commission, the Court of Justice held that where a national legal framework in itself eliminates any possibility of competitive activity on the part of undertakings, Article 101(1) does not apply, given that the restriction of competition is not attributable to the autonomous conduct of the undertakings. To successfully invoke this argument, it appears that the legal framework concerned must not leave any appreciable residual competition available for the undertakings to restrict."

That's precisely -- sorry, Sir.

**MR JUSTICE ROTH:** Yes. That's on page 60 --

**MR HOSKINS:** It is on page 60 internally.

**MR JUSTICE ROTH:** In Ladbroke, yes.

**MR HOSKINS:** That's precisely the principle that we rely upon identified by Van Bael & Bellis. Over the page at page 61 you will see -- oh, sorry.

**PROFESSOR SMITH:** But would you agree that "any appreciable scope for autonomous conduct" would be a better wording than "residual competition"?

**MR HOSKINS:** No, I don't agree with that because the way it is put in Deutsche Telekom is you have the test as put and then an explanation of the test is given by relation to autonomous conduct, but the test is not autonomous conduct. The test is whether all possibility of competition is eliminated.

**MR JUSTICE ROTH:** Is that the rationale for the test? That is what --

**MR HOSKINS:** It is the justification that is given, whether it is a complete one for each of the heads. I understand why it is more relevant to state compulsion than it is to complete elimination of competition, but where there is a complete elimination of competition, there is no possibility of an independent competitive act by the monopoly.

**PROFESSOR SMITH:** I suppose my question arises, and it is really a semantic question, there being no residual competition is in danger of being interpreted as there are no competitors, the state monopoly -- the monopoly fails, there is no competitor or no threat of competition.

**MR HOSKINS:** It can't apply in a general competitive framework where someone has 100%.

**PROFESSOR SMITH:** Still absence of residual competition could be taken as that there isn't any scope -- this monopoly is not under pressure from competitors. What we are looking at here is an allegation that companies not under pressure from competitors nevertheless were behaving in a way that affected the market. So it is not --

**MR HOSKINS:** Well, that is the crucial point, the market, and you have my submission from earlier that the claim relates to the household market in relation to which there is no competition, not the business retail market in which there was some competition.

**PROFESSOR SMITH:** There is no competition, but the question is, is there any behaviour possible that has an effect on the market that would be regarded as a competitive effect in the market?

**MR HOSKINS:** And my response to that is a competitive effect on a market in which there is competition. There has to be a residual possibility of competition in a relevant market. That's what the test is, the legal test. Whether it is a good test economically I understand might be up for debate but that's the legal test as expressed by the court and as expressed in these textbooks and understood in these textbooks.

**PROFESSOR SMITH:** Expressed by the court -- sorry. I have forgotten which textbook it is. One of the textbooks refers to the case law of the European court. You yourself said there are not actually any cases. They are referring to case law but when we hear the case law, they are quoting what's said in Deutsche Telekom again and again and this is the case law.

**MR HOSKINS:** What we are looking for is what is the legal principle. That's what I say -- we find it in a number of places, including Deutsche Telekom. Then the question is how do you apply -- given that legal principle that exists, which I say is beyond doubt, given the case law and these textbooks, the question is then how do you apply that principle in particular cases, particularly this one, and that's where the devil is in the detail. I accept that, but there can be no doubt the principle exists.

**PROFESSOR SMITH:** But the meaning of the phrase "residual competition", I see why as an economist, because there is an element of ambiguity in it, that's not a phrase that has ever been tested in an actual case.

**MR HOSKINS:** Well, it has in the sense that people have failed in the argument. So,

for instance, in the leverage cases we have a state monopoly. There is a possibility -- it has an effect on a relevant market in which there is competition and then it is applied.

**PROFESSOR SMITH:** Yes. So there is no problem understanding cases where there are effects from the monopolies in an adjacent market. There is competition, residual competition and we look, no question. It is defining the hypothetical case where there is no "residual competition", no scope for autonomous market behaviour by the statutory monopolist.

**MR HOSKINS:** That is because I say it is not a hypothetical case. You know what I am going to say next. It is common ground here there is no competition amongst the WaSCs. It is common ground that there is no competition in the household market.

**PROFESSOR SMITH:** It is common ground that the WaSCs face no competitors in their market.

**MR HOSKINS:** No actual or potential.

**PROFESSOR SMITH:** That's it exactly, but does that in itself imply that there is no possibility of autonomous behaviour on their part that would be regarded as an abuse of a dominant position?

**MR HOSKINS:** If there is no possibility of competition, there is no possibility of autonomous competitive conduct, because by definition there is no competition.

**PROFESSOR SMITH:** I understand what you say.

**MR HOSKINS:** We are becoming quite philosophical. I accept that.

The final point is just a point of detail on Deutsche Telekom. It is not a paragraph I addressed. That's bundle 6.3 at tab 41 and it is going to be page -- I will get the page number for you. It is page 2814. So we are in bundle 6.3, tab 41, page 2814. You were shown paragraph 92 where the court said:

"The same applies to the appellant's claim that the purpose of RegTP's regulation is

to open the relevant markets up to competition. 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 ..."

They said, "Ah, look! Retail prices". The point is the end user access services were subject to competition, so this is just another example of a monopoly engaging in activity that did have an effect on the market in which there was competition. It doesn't move the debate on from what we have been discussing.

Unless you have any further questions, those are our submissions. Thank you very much.

**MR JUSTICE ROTH:** And that concludes the two exclusion issues.

**MR HOSKINS:** It does, ahead of schedule I should add. That is unless Mr Robertson gets up.

**MR JUSTICE ROTH:** We go next to certification issues.

**MR GREGORY:** Sir, I don't know if you want to break now.

**MR JUSTICE ROTH:** Just to remind us of the sort of breakdown, you are going to be addressing which issue now? You are going to be addressing?

**MR GREGORY:** The certification issues, in particular the counterfactual point which has been raised by the defendants and then after that, possibly tomorrow morning, I will address you on the class definition point plus any other issues -- certification issues -- you would like to be addressed on. The two potential issues I have on my list at the moment are perhaps just explaining exactly how the penalties and rewards against performance targets feed through into the prices which are paid by consumers.

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** And, secondly, any comments we may have on Ms Boyd's comments earlier about paragraph 13 of Ofwat's skeleton.

**MR JUSTICE ROTH:** Yes. Very well. We will come back at 3.15.

**(Short break)**

**Submissions by MR GREGORY**

**MR JUSTICE ROTH:** Just before you start, Mr Gregory, we did have what we found a very helpful explanation this morning from Ofwat of how the reporting of pollution incidents as against the performance commitments fed into the allowable -- the revenue allowance and therefore the pricing in this formulaic way. We will look at the transcript and everyone can look at the transcript tomorrow. If it is not clear, and reading a transcript, certainly for myself things I say on the transcript, I look at them and think "Well, I wish I had put it slightly differently", then it might be helpful to have a short note from Ofwat just explaining in clear terms how the reporting of incidents feeds through into the prices that the water undertaking can charge.

**MS BOYD:** We are happy to provide that. Most of the material is across the documents but I can see how it could be helpful to have a condensed version.

**MR JUSTICE ROTH:** Yes, and if you want to cross-refer to documents, it would be helpful to have a few sheets of paper, that would be helpful.

**MR GREGORY:** Unless Ofwat's note completely covers it, I will take you through in the morning exactly how that happens, there are passages in Mr Holt's report that explain that so I can take you through those sections. Part of his methodology is actually essentially cranking the handle on the Ofwat charge control methodology, replicating what we are doing in that situation.

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** So, as I said, I am going to address you on the certification issues. The good news from your point of view is you can put away your Manchester Ship Canal judgments, at least until you have to write the CPO judgment. The bad news is because the collective proceedings regime is quite recent, I will not be able to take

you to any medieval or even any pre-medieval authorities, which is, of course, a sadness.

**MR JUSTICE ROTH:** We will conceal our disappointment, Mr Gregory.

**MR GREGORY:** One housekeeping point. The counterfactual issue will involve consideration of the expert materials. You may have noticed that Mr Holt is Professor Roberts' expert in five of the claims and Dr Latham is her expert in the claim against Thames Water. That resulted from the fact that AlixPartners, Mr Holt's firm, was engaged in other work for Thames Water.

In his report, Dr Latham has reviewed and independently assessed Mr Holt's approach and in a couple of instances carried out some additional cross checks, but at least for certification purposes their approaches are materially identical. In fact, in his report, the defendants' expert, Mr Williams, says that the initial Holt and Latham reports are interchangeable for the purpose of his comments on the PCR's methodology.

Just for your note the reference to that is bundle 4, tab 3, page 439. Accordingly, I am proposing to do everything by reference to Mr Holt's materials.

**MR JUSTICE ROTH:** Yes. I have not really read Dr Latham's report I have to say other than there is a rather useful map of the areas of the water authorities in his report I think in figure 2, which is quite useful. So we will concentrate on Mr Holt's report and Mr Williams' reply.

**MR GREGORY:** Yes. In support of their counterfactual argument the defendants filed an expert report of almost 50 pages but it can, in fact, be stated quite simply. In the claim form and expert reports, Professor Roberts and her experts assume that the pollution incident Performance Commitment targets in the counterfactual would have been the same as those in the actual world, i.e. the targets that were, in fact, imposed in PR14 and PR19.

The defendants say that, if in the counterfactual they had reported more pollution

incidents, Ofwat would have set them different targets. Specifically, they say that Ofwat would have set them less demanding targets. You might think that is somewhat counterintuitive and I will come on to that. The defendants say that the PCR's counterfactual is therefore flawed and that the standard certification test is not met and there is no blueprint to trial.

In summary, we say that this is a dispute on the merits that is not suitable for determination at certification. If the claims are certified, the parties will be able to plead out their cases on this issue and advance legal argument and evidence in support of their respective positions and the Tribunal will be able to determine the issue, the appropriate counterfactual targets, at trial in the usual way.

The only genuine certification issue is the blueprint to trial question of whether this issue is triable, and we say it very obviously is. I don't know if it is helpful for your note to have the references to the relevant paragraphs in the pleadings and skeletons dealing with this. I can give them to you if it would be convenient.

**MR JUSTICE ROTH:** Yes. I think there are two things that probably you can clarify for me. As regards PR14 -- is it PR14? The first period. There is no misreporting alleged prior to that. I don't know if there was even a reporting requirement prior to that, was there?

**MR GREGORY:** My understanding is there certainly weren't pollution incident performance commitments prior to PR14.

**MR JUSTICE ROTH:** Yes. So those targets were set and there was reporting and from what we heard this morning that led to certain prices, and if more incidents had been reported, the prices would have been lower. I don't understand at the moment how this objection applies to that period. I can understand the point being made that if there had been more incidents reported under PR14, then PR19 might have set different targets. I don't see how it applies to the PR14 period, but perhaps you

can -- I appreciate it is not your argument, but you are meeting it. Explain that.

**MR GREGORY:** I was going to show you the bits in the defendants' materials where they do advance an argument in respect of PR14. Our position is the instinctive position that you just articulated, that it can't apply to PR14 because no abuse is advanced prior to PR14.

**MR JUSTICE ROTH:** Then in PR19 there is an issue as to which is the correct approach. Do you keep the performance commitments or do you say they would have been adjusted? But I think it is relevant to ask at this stage well, if the defendants are right that they might have been -- it would have led to them being adjusted, well, then how would the Tribunal, on what basis would one approach assessing the adjustment? Obviously, we don't decide what the adjustment would have been. Still less do we decide which is necessarily the right method, but just to have an understanding of how one might then consider that.

**MR GREGORY:** Yes. Well, I agree. I think that is the real issue here, the blueprint to trial question.

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** In summary, my answer is the parties would put forward their legal arguments on the correct approach to the counterfactual. They may lead factual evidence in support of the targets that they say would have been adopted in the counterfactual and then in terms of the experts the only question is well, imagine that you have slightly different targets. Can they be plugged into the methodology to -- so you can still produce an aggregate damages figure at the end of it, or if the targets are slightly different, does the expert throw his hands up in the air and say "This renders my methodology completely unworkable"?

**MR JUSTICE ROTH:** Is there a way -- if the defendants' approach is correct that there would have been different targets set, is there a plausible way by which the Tribunal

could go about determining what those targets would have been?

**MR GREGORY:** Yes. We say yes, on the factual evidence and then it will be completely straightforward.

**MR JUSTICE ROTH:** Yes. Well, if the answer is yes, then that consequence follows, but that seems to me one of the key questions.

**MR GREGORY:** Yes, and that's what I am going to be addressing you on.

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** For this point to constitute a bar to certification, it would have to mean that the Claims fail the standard certification test set out in the Microsoft case.

Sir, you are obviously aware of the certification requirements from previous CPO judgments. I don't know if Professor Smith and Mr Forrester have been avidly following all the CPO judgments which the Court of Appeal and the Tribunal have been handing down, but just in case you have not, we have summarised the applicable principles at paragraphs 39 to 52 of our skeleton. I would be grateful if you could turn those paragraphs up. Bundle 1, tab 12, internal page 17.

**MR JUSTICE ROTH:** Just one moment.

**MR GREGORY:** We are concerned here with the eligibility condition and particularly whether the claims are suitable to be brought in collective proceedings. If you just turn over the page to paragraph 41, I just highlight a few pages. Paragraph 41.

"It is well-established that the Tribunal is generally not required to assess the merits of the PCR's case at the certification stage." The authority for that is the Supreme Court's judgment in Merricks. So, the mere fact that the defendants disagree with the substance of part of our case, is not a good basis for opposing certification.

Paragraph 42. "There is a low threshold for PCR to meet in order to demonstrate compliance with these certification criteria. The PCR is merely required to show some factual basis for thinking that the certification requirements are met."

Paragraph 45. This test originated in the Canadian Pro-Sys v Microsoft case, which was endorsed in the domestic context by the Supreme Court in Merricks. Right at the top of page 19, the quote from the Microsoft case judgment:

"…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."

Then a few paragraphs down at paragraph 47:

"In the UK Trucks Claim v Stellantis NV, the Court of Appeal: …

(iii) stated that “it does not require the PCR's methodology to anticipate and address at certification stage every point that might be raised in defence”."

Paragraph 48 discusses the Court of Appeal judgment in the Gutmann Boundary Fares case where it provided quite extensive guidance on the Microsoft test. Several passages are set out, but if you could just turn over the page and read for yourself the final paragraph quoted, which is paragraph 60 from that judgment. (Pause.)

On page 21 you will see the "Blueprint to Trial" heading concept referred to by the Court of Appeal. The essential thinking is this: that collective proceedings claims are complex, costly and burdensome for the parties and the Tribunal. You do not want to be certifying claims where there is a real chance that they will collapse down the line because it turns out there is no way to try them properly. So at the certification stage, it is relevant to ask whether the claims and the methodology provide a blueprint to trial. On the other hand, it is accepted that the proposed methodology will inevitably have to be developed over time, for example, in the light of disclosure and how the parties plead out their cases. It is not realistic to think that at certification, PCRs will be able to present the issues in the same sort of exhaustive fully fleshed out way that they will be able to by the time of the PTR.

Returning to the skeleton at paragraph 51, "The Court of Appeal has also made clear

that the methodology should provide an initial blueprint to trial, whilst recognising that "a starting methodology will rarely, if ever, reflect a perfect blueprint for the trial and that rough edges can be smoothed by the courts making adjustments in due course, including at trial using broad axe powers".

Finally at paragraph 52, "the Tribunal has also stated that the Microsoft test is a "low order test for a blueprint to trial…".

In the final sentence:

"Ultimately, "it is only when the Tribunal can see no clear way of trying the case that the Microsoft test should act as a bar to certification."

Against that background we can consider the arguments advanced by the defendants. They are summarised at paragraph 85 of their Response. I would be grateful if you could turn that up. That's bundle 1, tab 6, page 250. In the main body of paragraph 85 notice how the point is put in the second sentence:

"The methodology proceeds on the basis of a flawed counterfactual that does not account for how the price control regime, in fact, operated."

The defendants say the methodology is flawed, language which is suggestive of a disagreement on the merits.

Paragraph 85(a):

"The methodology failed to take account of how an increase in the number of Recognised Pollution Incidents in the counterfactual might have affected the PI Performance Commitments set by Ofwat in the counterfactual."

That's the nub of the argument. Sub-paragraph (b):

"No consideration is given to Ofwat's obligation to set the price controls package as a whole in accordance with its wider statutory duties, including the need to balance the interests of consumers with considerations of financeability."

I am going to skip over sub-paragraph (c) and come back to it, because although it is

bundled in here it, in fact, concerns a slightly different issue.

Sub-paragraph (d):

"No account is taken of the fact that Ofwat's determination of the relevant PCs and Outcome Delivery Incentives ("ODIs") were determined on the basis of the performance of all WaSCs."

That point is explained a little more precisely in paragraph 87, sub-paragraph (c) on the next page:

"At each of PR14 and PR19, Ofwat set the PCLs for each WaSC on the basis of the upper quartile level of Recognised Pollution Incidents performance across the industry."

Paragraph 86 on the previous page notes that these points are based on the expert report of Mr Williams, and I would be grateful if you could turn that up. That's in bundle 4, tab 3.

**MR JUSTICE ROTH:** Before we go there, that first sentence of 87(c), I thought that the annex 2 shows that the PCLs in PR14 are set specifically for each undertaking based on -- is it based on their performance, or it is based on everyone's performance?

**MR GREGORY:** I think I might be able to show you this in Mr Williams' report, but my understanding is that the commitments were set either based on the upper quartile performance or based on the proposals which have been advanced by each individual defendant, and what actually resulted is, you had slightly different performance commitments for the different companies. There wasn't a standard single commitment in PR14 in the same way there was for PR19.

**MR JUSTICE ROTH:** Yes. They were clearly separate for each company. So Mr Williams is bundle 4.

**MR GREGORY:** Bundle 4, tab 3. The defendants present their preferred counterfactual as if it is obviously correct and grounded in how the charge control

regime actually operated. I am going to show you a couple of paragraphs that illustrates why their approach is, in fact, highly contentious.

The standard approach in competition claims is that if the claimant establishes that the defendant committed an infringement, the defendants' infringing conduct is removed from the counterfactual. Changes to the counterfactual can potentially be more expansive. You might, for example, have to make consequential adjustments on the basis that, if the infringing conduct had never taken place, the defendant or other parties might have done other things differently as well, but removing the defendants' infringing conduct is the starting point.

I would be grateful if you could turn to page 455 within the report. You can see from the heading half way down that this is discussing the targets that would have been set in PR14.

At paragraph 3.38:

"My main observation, therefore, is that as the PCL set by Ofwat was based on historical data, it logically follows that, had WaSCs (including the Proposed Defendants) reported higher numbers of pollution incidents historically, as is alleged (under these Claims) they should have done, then, plainly, the PCL set by Ofwat at the PR14 Final Determinations would have been different under that counterfactual, relative to the factual."

So just to note a couple of points. First, it assumes that in the counterfactual you should assume that all sewerage companies would have reported more pollution incidents, not only the six defendants. The defendants may want to argue for that approach, but it is not obviously correct given that no allegation of abuse has been advanced against any sewerage companies other than the six defendants.

It is not even obvious that, in each individual claim, the counterfactual should be adjusted to assume higher levels of reporting by the defendant to the other five claims.

The six claims have been case managed together to date, but they are individual claims and it is not clear how they will be case managed in the future. The approach proposed by the defendants may be arguable, but that issue is going to be contentious. The other point that I would highlight from paragraph 3.38 is --

**MR JUSTICE ROTH:** I think, looking at blueprint to trial, they are likely to be tried together for all sorts of reasons, that are obvious.

**MR GREGORY:** Yes. The context is in terms of case management, what the PCR has proposed, is either they be case managed together all the way through or that there is a sort of test or lead case structure and that issue will obviously have to be considered at the first CMC if the claims are certified. But even if they are tried together, there may still be an argument as to whether, given that they are individual claims, you should adjust the counterfactual to take into account the conduct of defendants who are not party to that individual claim.

I am not asking you to decide the points now. I am just pointing out that this is a legal issue that is likely to arise as the proceedings go forward.

The other point I would highlight in paragraph 3.38 is the one that we have already discussed, that Mr Williams is saying that you should assume that all sewerage companies would have reported more pollution incidents before the start of the PR14 period. The basis for that appears to be at least in part what he says in paragraph 3.41 over the page on page 456, here, the observation is that:

" under the Claims, it is not clear ‘for how long’ the PCR alleges the Proposed Defendants have been misreporting the number of Pollution Incidents. From my review of the Claims, it seems: (i) this matter has not been considered by the PCR; or (ii) if the PCR has considered it, has potentially not reached a conclusion, or not chosen to set out their view in the Claims."

With respect, that is just not true. Yesterday, you saw several passages in the Claim

Form that made it clear that the alleged abuse is the provision of misleading information relating to Ofwat's assessment of the defendants' performance against their PR14 and PR19 performance commitments.

**MR JUSTICE ROTH:** When I read 3.38 I actually didn't understand it, because it says in the first sentence:

"Had WaSCs… reported higher numbers of Pollution Incidents historically, as is alleged ...",

but I don't think it is alleged.

**MR GREGORY:** It is not alleged.

**MR JUSTICE ROTH:** I mean, you would have to allege it. You can't just come up at trial saying they have been misreporting for a previous period. That would be quite unfair to the defendants.

**MR GREGORY:** We are not alleging it and in fairness to Mr Hoskins, Mr Hoskins seems to have understood that we are not alleging it in his comments he made earlier. Those are the defendants' arguments. Why did Professor Roberts and her experts not adopt the approach advanced by Mr Williams in the Claim Form and expert reports? That was for a variety of reasons. First, it was not because Mr Holt was not aware that the PR14 and PR19 targets were set in the light of past performance, specifically based on performance of the top 25%, or that Ofwat took into account whether the sewerage companies were adequately financed.

I am going to ask you to go to Holt 1, which is bundle 4, tab 1 and go to page 163. If you look at paragraph A4.1.5:

"Ofwat carried out where possible, ‘detailed comparative analysis across all companies where they had proposed similar measures” across PCs and ODIs… These comparative assessments allowed Ofwat to “challenge companies to deliver an upper quartile (UQ) level of performance to protect customers and to ensure that

any outperformance is rewarded only when it is generally stretching”."

Down to the next paragraph:

"The main outcome of these comparative assessments was to incentivise Sewerage Companies to aim to provide customers with an Upper Quartile level of performance by 2017/18 across five different service delivery aspects. These included..."

You can see underlined, “number of sewage pollution incidents”. The next paragraph:

"To calculate upper quartile performance, Ofwat calculated the average historical performance of all Sewerage Companies over the three-year period 2011-12 to 2013-14."

So, in fact, the approach, in fact, adopted by Ofwat, and that's specifically referring to the PR14 approach, is common ground.

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** We did not adopt the approach urged on us by Mr Williams in part because we were not sure what the defendants' case was going to be on this issue, and we did not want to anticipate it.

I have shown you that the Court of Appeal has stressed that the Microsoft test does not require the PCR to anticipate every point that might be raised by the defendant. We certainly did not anticipate that they would raise this argument in respect of the PR14 performance commitment targets and we were not --

**MR JUSTICE ROTH:** Slightly odd for defendants to come and say "We were not just misreporting as alleged and polluting more than we told anyone in this period in this claim. We have actually been doing that for years".

I mean, that would be a very odd position for them to adopt.

**MR GREGORY:** And we were not sure they would raise it in relation to the PR19 targets because, as I will show you in a moment, it has the potential to backfire against them and, in fact, lead to the level of damages increasing rather than reducing.

**MR JUSTICE ROTH:** It is a bit different in PR19, which is the consequence of your allegation.

**MR GREGORY:** We were aware they might raise this argument, but we did not know exactly how it was going to be put. We did not anticipate it.

**MR JUSTICE ROTH:** No, but hold on a minute. Your counterfactual for PR14 is that there was a higher level of pollution incidents. That is the counterfactual which you must progress into your counterfactual for PR19. So it follows from your counterfactual. That seems to be a quite different point.

**MR GREGORY:** Yes. We were aware that they may raise this issue.

**MR JUSTICE ROTH:** Well, it is not -- it is the logic of your argument. It's not some independent argument. The point in Gutmann Trains was -- no, it was Trucks, I think, where it was said that you could not anticipate everything. It was a completely separate argument that might be advanced. It was about pass through and how far and in what way they would say there is pass through as a defence, but this is different. This is just carrying forward your counterfactual analysis from PR14 to PR19. I don't think it depends on -- I think it is quite different from the first point which I slightly facetiously characterised.

**MR GREGORY:** The impacts it will have depends on the approach you adopt to the counterfactual. If, for example, your approach is that the only conduct that should be adjusted in the counterfactual is that of the defendant to the individual claim, it is possible that the upper quartile targets will not be affected at all.

**MR JUSTICE ROTH:** Yes, I see.

**MR GREGORY:** I mean, the defendants have now raised this point. We say it can be pleaded out, they can set it out in their defence and we will obviously respond to it in the reply, and the methodology going forward can obviously take it into account.

**MR JUSTICE ROTH:** One needs to -- I think it having been raised, what we need to

understand is how it could be taken into account.

**MR GREGORY:** And to think about how this issue is likely to play out over the course of proceedings and if there is any conceivable risk it could play out in a way that would render the claims un-triable.

**MR JUSTICE ROTH:** At least for the PR19 period.

**MR GREGORY:** Yes. What we say is that the issue -- it is a fairly standard issue and it will play out in the usual way. There is a danger of thinking that anything to do with the methodology is the exclusive domain of the experts and I don't think that is right. Mr Holt is -- and the same is true of Dr Latham -- is an expert in economics and in quantitative analysis, including econometrics. He is also through his work familiar with how price control regimes operate, including those of Ofwat, but this issue, in fact, is going to be resolved through three different types of submissions and evidence.

The first two will involve legal argument and factual evidence to determine what the relevant pollution incident targets would have been in the counterfactual. Mr Holt is only directly responsible for what is stage 3, which is plugging those targets into his methodology for estimating aggregate damages.

Taking those three areas in turn, as I have already mentioned, there are going to be legal questions about the correct approach to the counterfactual. Should you only be adjusting the relevant defendants' reporting numbers or the reporting numbers of all six defendants or of all sewerage companies, even those against whom no allegation of abuse is made? And is there any basis for adjusting reporting figures prior to the start of PR14?

Those are legal questions which the Tribunal is going to have to resolve. We say they can be resolved in the usual way. The parties can set out their position in the pleadings and we can advance legal arguments as to the correct approach to the counterfactual at trial and the Tribunal can determine the point.

Turning to factual issues, there will no doubt be competing factual evidence as to what targets Ofwat would have set in the counterfactual. Again, we say this is really only an issue for PR19. We are imagining a world in which it has become clear that sewerage companies have been discharging sewage into our rivers much more than had previously been thought.

The defendants say that, in this scenario, Ofwat would have responded by making its targets less, rather than, more demanding. The basis for that somewhat counter-intuitive approach is in part that when setting its targets, Ofwat must take into account how the sewerage companies are financed. This is obviously to caricature the defendants' position somewhat, but there is a flavour of "Ofwat would not have set us demanding targets that we might not have been able to meet, because that would involve us incurring financial penalties, and the most important thing is that we should have sufficient amounts of money."

But let's assume for a moment -- I will come on to the question of what Ofwat would actually have done. Let's just assume for a moment, that what the defendants say is true, that Ofwat faced with these revelations would simply have maintained its PR14 approach of basing its targets on how the top 25% had performed historically.

I have noted that if the only change you make is to the reporting of the individual defendants in the claim, the upper quartile target might not change at all, but even if it did, it would be straightforward for that slightly higher target to be plugged into the methodology.

If I could ask you to turn to the PCR's skeleton at paragraph 68. I would be grateful if you could read paragraph 68 to yourselves. (Pause.)

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** As I said, in the morning I can take you through the relevant bits of Mr Holt's methodology in a bit more detail. Perhaps I can just try to illustrate it with

a really simple piece of mathematics now.

Let's say the pollution target is 10. The defendants under-perform -- a defendant under-performs and has 20 spills, so it has missed the target by 10. The ODI, which is a financial rate, is, say, £5. So you multiply 5 by 10, the amount by which they missed the target, and you have 50. That is then the amount you use to adjust the revenue allowance. It's not quite a straight subtraction. I will show you in the morning, but let's just say, in the defendants' counterfactual, all that would happen is that instead of the target being 10 it might be 15. So now they have got 20 spills. They have missed the target by 5 rather than 10. So then you take 5 and you multiply it by the £5 ODI rates. Then you get a figure of 25. That's the figure that you then use to adjust the revenue allowance.

**MR JUSTICE ROTH:** I see all that. Sorry to interrupt you. If you know the target, the counterfactual target. I may have misunderstood it, but I thought the point is unless you are right that you just use the targets that are there in PR19, in that case it is easy, but it is not paragraph 68 that is the problem. It is paragraph 69 of the skeleton when you say:

"As to what PI Performance Commitment targets should be used in the counterfactual, this question will turn on issues of law."

Well, may be an issue of law as to whether you use the existing target or you can change it. You say use -- but if you change it, then the question is how do you come to the changed target? That is not an issue of law. It can't be. That's an issue of fact, but hypothetical fact, because you are looking at a counterfactual. What would the target have been if it were to be adjusted? I thought that is what they're saying. Well, there's no methodology, no way that's suggested of how one could possibly approach that question. Is that right, Mr Hoskins?

**MR HOSKINS:** Yes.

**MR JUSTICE ROTH:** So it is not paragraph 68 that you need address.

**MR GREGORY:** The question of law is summarised in the following paragraph, what I have in mind is these questions about the correct approach to the counterfactual, whether you should simply adjust it for the reporting of the individual defendants to the claim, or the reporting of all six defendants or of all sewerage companies. So it is perhaps a question of approach, rather than a question of law, is perhaps a better way of putting it.

**MR JUSTICE ROTH:** How are you going to do it?

**MR GREGORY:** The question of approach will be for determination by the Tribunal. It is a question of the correct way of constructing the counterfactual.

**MR JUSTICE ROTH:** One must have some sense of how one is going to do that if Ofcom (sic) would have changed its targets. We need to then have some means by which we can approach that question of looking at what the target would have been and I think that is a relevant question now, because it is clear that defence is going to be raised and it is appropriate to say. I am not saying there is not a means of approaching it, but I think we need to address our minds to it, whether today or tomorrow morning.

**MR GREGORY:** So there's a question of method, which is whether in the counterfactual in PR19 Ofwat would simply have maintained the same method to setting the targets, which is, for example, the upper quartile method, and if that is the position, then all you need to do is you plug in the number of pollution incidents that would have been reported during PR14 or the relevant years and that will come out of the main part of the methodology.

**MR JUSTICE ROTH:** Yes.

**MR GREGORY:** Because the main part of the methodology aims to identify the number of pollution incidents that should have been reported, if the defendants had

been reporting them accurately.

**PROFESSOR SMITH:** And would you have the information to do that calculation to identify who the upper quartile were and how their reports have changed?

**MR GREGORY:** Well, the methodology will be applied to the defendants in the six claims. So that will produce the numbers for those six defendants and, obviously, if your approach to the counterfactual is that you should only be adjusting the reported number of incidents for the six defendants, you will have the numbers that you need.

**MR JUSTICE ROTH:** You have the numbers for everybody else.

**MR GREGORY:** Yes, because the methodology has to produce those numbers to make the case on abuse and loss.

If you decided that actually in the counterfactual for some reason we should also be adjusting the reported numbers of other defendants against whom no allegation of abuse has been made, then there won't be the detailed numbers, but if you really decided that and you wanted to do it, I think that question would have to be addressed through the use of the broad axe. You would know, for example, say that the six defendants in the claims had all underreported by, say, 50% and you could make an appropriate assumption about whether the other sewerage companies had a broadly similar level of underreporting.

I think if the conclusion you reach in the counterfactual is that Ofwat, despite being told about the fact that there is a big problem with pollution incidents, would simply have used the same methodology that it did, in fact, use, then plugging the numbers in should be relatively straightforward, because the methodology will produce the numbers for the six defendants.

Then there is the question about the method. What sort of targets and financial incentives for pollution incidents would Ofwat have set in PR19 if it had become apparent during PR14 that levels of pollution incidents were much higher than had

previously been thought? One way of getting a feel for that is to consider how Ofwat has approached these issues in its PR24 price control review, given that it has become apparent during PR19 that the number of pollution incidents is higher than previously thought.

To do that I would be grateful if you could take out bundle 8. Turn to tab 27.

Ofwat's price review decisions --

**MR FORRESTER:** Sorry. Can you give me a bundle page number?

**MR GREGORY:** Page 557 is the first class of documents.

Ofwat's price review decisions including the Performance Commitment target that it sets need to reflect the government's strategic priorities for Ofwat which are periodically published. The document you have just turned up is the government's February 2022 strategic priorities for Ofwat. What I will show you is that the recent revelations about the level of sewage spills that has caused the public outcry have been taken on board by the government in terms of the priorities that it sets.

I would be grateful if you could turn to page 561. Towards the bottom of the page the heading "Protecting and enhancing the environment". A couple of paragraphs down: "Water companies pay a key role in protecting and enhancing the environment. To improve the quality of our water environment, water companies must reduce pollution of sewerage and wastewater. The public and government expect the environment to be at the heart of water company decision-making. Companies need to prioritise actions to reduce pollution and considerably improve their environmental performance while delivering long-term value for money."

Then if you turn over the page.

"Priority: Working with other regulators and government, Ofwat should challenge water companies to improve their day-to-day environmental performance to enhance the quality of the water environment. The water industry's environmental performance

has stagnated, and in certain cases deteriorated in recent years. Poor environmental performance is not acceptable and poorly performing companies need to rapidly improve. All companies must comply with permits and regulation, and we expect companies to have processes in place to achieve this. We want to see far less reliance on storm overflows, which discharge sewage into our watercourses… We therefore expect water companies to significantly reduce the frequency and volume of sewage discharges from storm overflows, so they operate infrequently, and only in cases of unusually heavy rainfall."

That is what the government has said to Ofwat. Ofwat has not yet published its final approach for PR24, but its intended approach is apparent from its final methodology published in December 2023 and its draft determinations which were published in July this year.

If you turn over to the next tab in the bundle, which is tab 28 and turn to page 580:

"The sector is facing significant challenges and expectations have risen – customers, regulators and Governments are clear that change is needed: greater resilience to drought, significantly better outcomes for the environment and more responsive services for customers."

Next paragraph:

"People."

And at the end the line:

"…are concerned at the overuse of storm overflows."

Just below the "Improving performance" heading:

"The sector faces challenges because of how it performs. All companies have a number of obligations that are non-negotiable; they must deliver on them. If companies fail to deliver, we step in."

Then over the page just under the heading "Rebuilding public trust":

"Companies need to recognise that the public's trust in them has been shaken as investors and executive teams appear to be rewarded despite companies failing customers and the environment."

Then down just below the heading "Rapid progress needed":

"We share the public's concern about the need to see rapid progress on the operation of storm overflows. In response to Ofwat's challenge, several companies have made commitments to improve river water quality and substantially reduce storm overflows by 2025. Of course, all companies must meet their legal obligations and we expect them to at least match the most ambitious commitments made by the leading companies."

So the revelations that have taken place about the number of pollution incidents has led Ofwat to make reducing them a priority in its charge role review.

I would be grateful if you could turn ahead to page 592. This sets out Ofwat's statutory duties:

"The PR24 final methodology reflects our statutory duties and the strategic policy statements (SPSs) from the UK government and the Welsh Government that we must act in accordance with when we set price controls at PR24."

That's the document from the UK government we have just seen:

"Our statutory duties require us to set price controls in the manner we consider is best calculated to:

Further the consumer objective.

Secure that the water companies properly carry out their functions.

Secure that the companies are able to finance the proper carrying out of those functions, and

Further the resilience objective."

So Ofwat has approached its PR24 charge control determinations in exactly the way

that the defendants say, which is taking into account its statutory objectives, including the requirement that the company should be able to finance the proper carrying out of their functions. I am going to show you that what Ofwat is proposing is a set of much more demanding pollution incident targets that it appears to consider to be compatible with its financeability duties.

I would be grateful if you could turn to page 593. Just under the section heading “Key challenges and our ambitions for PR24”:

"…the sector is not where it needs to be- and it must take urgent action to deliver better service for customers, communities and the environment. The challenges before us are clear:"

If you look at the second bullet:

"protecting and enhancing our environment, including sustainably managing our natural resources, and making rapid progress on the operation of storm overflows."

So those are the higher level considerations which are outlined.

I would grateful if you could turn ahead to page 638 in this document. Figure 5.1 that you can see there, shows the Performance Commitments that will be common across all companies. The bold text indicates Performance Commitments that are new. If you look at the right-hand column in the row with environmental outcomes, you can see the top target is “Total pollution incidents”. That's the existing PR19 target, but then there are two new Performance Commitments relating to pollution incidents, “Storm overflows”, in the same column, and in the first column, “Serious pollution incidents”.

Not only is Ofwat proposing introducing new Performance Commitments, it is also proposing aggressive targets and increased financial penalties if they are not met. We can see that from their final draft -- from their draft final determination document from July, which is at the next tab in the bundle, tab 29. I would be grateful if you could go

to page 744. The second paragraph down:

"Our starting assumption is that companies will meet their PR19 PCLs [targets], which we will only move away from if there is compelling evidence to support a different approach. The target levels for the PCLs [performance commitments] will then require companies to improve performance at PR24."

So Ofwat is not saying "You failed to meet your PR19 targets so we are going to set you less demanding targets for PR24".

If you could turn ahead now to page 766. You will see the heading "Amplifying strategically significant performance commitments". I would be grateful if you could just read the text there starting "In 2022 ..." down to the first bullet point. (Pause.)

The financial incentive rates have been increased, or at least that's what Ofwat is proposing to do.

If you turn ahead to page 803. We are now in a section that comments on all the individual performance targets. This particular section relates to one of the new proposed targets, serious pollution incidents. That is pollution incidents in categories 1 and 2 in the Environment Agency's four-tier classification scheme.

If you look at page 804 just under the heading "Baseline":

"Companies are expected to reach zero serious pollution incidents (category 1 and 2) as soon as possible. This expectation is identified in the UK Government's SPS [strategic priority document] as one of the key parts of getting the basics right to protect the environment."

So two points from that. Zero is obviously a demanding target and, secondly, Mr Holt has a methodology for identifying the number of serious pollution incidents. That is summarised in paragraphs 17 and 18 of the PCR skeleton, which I took you to in opening.

**MR FORRESTER:** I also note the last sentence in 8.5.1.

**MR GREGORY:** Where are you looking?

**MR FORRESTER:** Page 803. “Definition changes”.

**MR GREGORY:** **“**Definition changes”.

If you could turn to page 854, this concerns the total pollution incidents performance commitment. That's the one which was also used in PR19.

If you go over the page to page 855 and down to the bottom, where you see the heading "Baseline":

"We set the 2024-25 baseline position aligned to the PR19 PCLs… for all companies" with the exception of the Welsh company. "We consider this appropriate as companies have been funded at PR19 to deliver these levels. While only three of the 11 companies are proposing to meet the 2024-25 PR19 PCL [targets], two of the three cost-efficient companies are proposing to meet this level by 2024-25."

Lower down under the "Performance from base expenditure".

"From the level of stretch from basic expenditure, we set the 2029-30 position at 13.65, a 30% reduction over the 2025-30 period from the 2024-25 baseline."

Then over the page to page 857. Under the heading "ODIs":

"For all companies, the rate proposed for PR24 is significantly stronger than the PR19 rate. This is consistent with our overarching aim to set powerful incentives on performance."

Three points about this. First, Ofwat is proposing to maintain the PR19 targets as a baseline, even though eight out of ten of the companies are not hitting them.

Second, I have shown you that they are proposing to increase the ODI rates. They are proposing beefed up financial incentives.

Third, this performance commitment target uses the same metric, all pollution incidents, as the industry-wide PR19 target. So plugging it into the methodology will not create any problems.

We will obviously have to see the extent to which this approach is maintained in the final determination. My understanding, given the length of the process, is it will be surprising to see dramatic changes at this late stage, but what is clear is that Ofwat did not respond to disclosures about higher levels of pollution incidents in the way that Mr Williams suggests. They did not simply maintain the previous approach and adjust the targets down to make them less demanding, what we described in our skeleton as a sort of "carryon polluting" stance.

Instead, Ofwat introduced new pollution incident performance commitments, set aggressive targets, including no serious pollution incidents and target levels that were higher than those in PR19, and ramped up the potential level of financial penalties.

In terms of the blueprint to trial issue, what I have been suggesting so far is that it is not clear that Ofwat would simply have maintained the same methodology that it used in 2019 if it had known that the number of pollution incidents was a lot higher than it previously thought. It might have changed its method, and it might have changed its method broadly along the lines that we see in the proposed PR24 documents. Even if it did that, it would be perfectly possible to plug in targets that are like these into Mr Holt's methodology, because the targets were exactly the sort of targets that his methodology will produce figures for, total numbers of pollution incidents, total numbers of serious pollution incidents and so on.

**MR FORRESTER:** May I just ask -- you are describing a regulatory context which is going to become increasingly -- is becoming increasingly demanding and your argument is advocating that a very large number of people would be entitled to claim substantial amounts of damages.

What's your comment on the suggestion that breaking the camel's back -- that these burdens for an industry which is going through very, very important changes and difficulties might be unsustainable, too much to cope with?

**MR GREGORY:** I can't imagine. That's really a matter for Ofwat, that Ofwat can take into account in the future. These are competition damages claims and the purpose of the claims is to compensate the class members for the losses they have suffered as a result of the abuses of dominance that we allege, assuming that they are made out. If the consequence of that is that the companies have to pay out money, then that is the consequence of the claims. If the companies then want to go to Ofwat and say "Well, this places us under increasing financial pressure. We want you to do X, Y, Z," that's a matter in the regulatory sphere for Ofwat to deal with. It is not an issue that this Tribunal has to determine. This Tribunal has been asked to determine the competition damages claims that we have brought before it in the usual way.

**MR FORRESTER:** Yes. Thank you.

**MR JUSTICE ROTH:** This is a good moment to break. Can I just ask, and maybe it is a question for Ofwat, is there an estimate of when the final determination -- we have seen the draft published I think in July -- when is it expected that the final determination might be published?

**MS BOYD:** I am told it is December.

**MR JUSTICE ROTH:** Yes. Thank you very much.

**PROFESSOR SMITH:** Can I ask one question while all of this interesting presentation is fresh in our minds? You very clearly described how Ofwat for PR24 is responding in the current environment to what we now know about pollution, but the question that we will have to face in making this counterfactual calculation is how the PR19 targets or general regime would have responded had Ofwat had accurate pollution figures for PR14. It is a hypothetical jump to say that the PR24 reaction to what they know now might be a good guide to what the PR19 reaction would have been had they known about PR14. It is still quite a hypothetical jump. It is not -- it may be easy to plug these in into Mr Holt's model. The bigger issue is does this provide us with an arguable and

defensible set of numbers to plug into the model or is it too hypothetical to be triable?

**MR GREGORY:** I think the short answer to that is that, in respect of this issue, the parties are bound to be leading factual evidence on it. The defendants will, you know, advance their case as to what they think the targets would have been set in PR19 if higher incidents had been reported in PR14, and we will advance factual evidence as well. We may well do that relying on the PR24 determination and the defendants may say "Well, but things would have been different and PR19 are different circumstances." So evidence will be led and the Tribunal will have to form a view as to what sort of targets it thinks Ofwat would have set in PR19.

I think the blueprint to trial question is well, is the issue triable and we say it is clearly triable. Courts determine complex factual issues all the time. This is not an untriable factual question of what targets would have been set.

Then, secondly, whether once you have identified a counterfactual set of targets, whether you can then plug those into the methodology. Hopefully what I have shown you is that you should be able to do that. There is no reason to think that you won't, because if they had maintained the same method as they actually used in PR19, you can plug in a higher target using exactly the same metric incredibly easily, and even if the revelations had taken place and PR14 had caused Ofwat to adopt a slightly different approach along the lines they adopted in PR24 what we see in the PR24 review is they were proposing slightly different targets, but even the new targets can still be plugged into the methodology in a straightforward way, number of serious pollution incidents, the total pollution incidents, targets and so on. The methodology will produce the numbers that can be plugged into them.

**MR JUSTICE ROTH:** You say that once you have decided on what is the target to use, you can plug it into the methodology. At least that is my understanding, subject to anything further we hear.

Very well. We will resume at 10.30 tomorrow. I think, Ms Boyd, it may be that it is helpful -- you can no doubt discuss, for this part of the argument for Ofwat to be here to assist us, because, as you see, it is all about what Ofwat would have done or how one can approach that question.

**MS BOYD:** We will come tomorrow morning.

**MR JUSTICE ROTH:** Yes. Thank you. 10.30 tomorrow.

**(4.34 pm)**

**(Hearing adjourned until 10.30 am on Wednesday, 25th September 2024)**