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Case No: CR-2024-007540

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 January 2025

IN THE MATTER OF THAMES WATER UTILITIES HOLDINGS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Before:

MR JUSTICE TROWER

- -

Between:

KINGTON SARL

Applicant

- and –

THAMES WATER UTILITIES HOLDINGS LIMITED

Respondent

Tony Singla KC, **Matthew Abraham** and **Charlotte Thomas** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Applicant**

Tom Smith KC, Philip Moser KC, Charlotte Cooke and **Andrew Shaw** (instructed by **Linklaters LLP**) for the **Respondent**

Adam Al-Attar KC and **Edouardo Lupi** (instructed by **Akin Gump LLP**) for the **Class A AHG**

Hearing date: 20 January 2025

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Approved Judgment

This judgment was handed down remotely at 9 am on 21 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE TROWER

MR JUSTICE TROWER:

1. This judgment contains my reasons for dismissing an application by Kington S.a.r.l. ("Kington") for permission to adduce expert evidence from a competition economist regarding the nature and effect of a term proposed to be included in a restructuring plan (the "Plan") proposed by the respondent, Thames Water Utilities Holdings Limited (the "Plan Company") pursuant to Part 26A of the Companies Act 2006 ("CA 2006"). The Plan Company and the group of which it forms part (the "Group") are in serious financial difficulties.

2. Kington is a member of an ad hoc group of junior creditors (the "Class B AHG") who have indicated their intention to vote against and oppose the sanctioning of the Plan. The Plan is supported by an ad hoc group of senior creditors (the "Class A AHG"), which was separately represented at the hearing.

3. On 17 December 2024, I made an order pursuant to section 901C of CA 2006 giving the Plan Company permission to convene seven meetings of its Plan creditors to be held on 21 January 2025. My judgment at [2024] EWHC 3310 (Ch) explained the background. One of the seven classes was described as the Class B Debt Class of which Kington is a member.

4. The sanction hearing is currently fixed for a four-day hearing before Mr Justice Leech commencing on 3 February 2025 (with two days allocated for judicial prereading on 30 and 31 January 2025). Members of the Class B AHG have also now taken steps to propose an alternative restructuring plan and a convening hearing for their alternative plan has recently been listed to be heard by Mr Justice Leech on 13 February 2025.

5. As well as the usual form of convening order, I gave a number of directions to deal with such matters as I considered were required to ensure that the sanction hearing proceeds as smoothly as practicable for the benefit of those with a legitimate interest in the outcome. Amongst the orders I then made were orders making provision for opposing Plan creditors to file and serve grounds of objection by 3 January 2025. I also gave the Plan Company and the Class B AHG permission to rely on expert evidence in relation to the relevant alternative to the Plan and the valuation of the Group. They were required to file and serve that evidence by 4pm on 17 January 2025, with directions for evidence in reply from the Plan Company by 24 January 2025, with skeleton arguments five days later.

6. A potential competition law argument was raised by the Class B AHG at the convening hearing, although it only mentioned a potential infringement of Chapter I of the Competition Act 1998 ("CA 1998"). There was no mention of a potential Chapter II infringement, and no application was made at the convening hearing for expert evidence to be adduced from a competition economist. However, the possibility that the Class B AHG may wish to do so was alluded to in a section of their skeleton argument which explained the nature of what was then thought to be the competition law argument:

   > "The existence of a restriction of competition will be a matter of factual and economic expert evidence that will need to be adduced at the sanction hearing".

   and

> "The Chapter I prohibition only applies where on the basis of proper market analysis it can be concluded that the agreement has actual or likely anti-competitive effects on the market. That type of market analysis will involve factual and economic expert evidence being adduced and tested at the sanction hearing."

7. The issue was also addressed by their leading counsel (Mr Mark Phillips KC) who explained their position as follows:

> "What we have in mind is that we will put before your Lordship what the draft expert evidence will look like. What I have got, at the moment, although I am not waiving privilege over it, which means I had to ask for it, I have got a report from (inaudible) that explains why, in their view, there is a plausible argument, but I cannot put it higher than that, and I am not going to come back to the court unless there is something more solid, …"

In response to this, I made clear that the court would need an explanation as to why such evidence was required because I did not really understand why it was. I then said, "So if you do come back, you need to have a proper explanation."

8. It was therefore then uncertain that the competition law point would be taken, and I do not accept Kington's submission (paragraph 15 of its skeleton argument for this application) that "it was agreed that the present Application would be brought once the draft expert evidence had been crystallised". It was also obvious that, if the point was to be taken, an application would need to be made in very short order in light of the tight timetable to which the proceedings were subject. As I said when setting the procedural timetable sought by the Plan Company:

> "But this is a tight timetable and the only way in which it will satisfactorily lead to a just and fair resolution of the dispute is by full cooperation on all sides."

9. In simple terms, the Plan is designed to facilitate the injection of new super senior funding to be provided in two separate tranches pending a longer-term solution to the Group's financial difficulties. That longer-term solution has been described as a more holistic recapitalisation of the business itself to be implemented by a further restructuring plan in due course. The first tranche of new super senior funding is £1.5 billion on the Plan becoming effective and the second is a further £1.5 billion if two conditions are satisfied. The second of these conditions is of central relevance to the current application and is called the June Release Condition ("JRC").

10. The effect of the JRC is that no additional super senior funding (whether from the second tranche or from any undrawn portion of the first tranche) will be available to the Group after 30 June 2025 unless the JRC has been and remains satisfied. The Plan documentation explains that:

> "The June Release Condition will be satisfied if, by 30 June 2025, a lock-up agreement in respect of a recapitalisation solution, whether by way of an equity raise or a creditor led solution has been entered into by at least (i) 66 2/3% of the Super Senior Funding … and (ii) 66 2/3% of the aggregate Class A Debt … to implement such solution through a restructuring plan…."

11. It is said by Kington that the JRC therefore allows the Class A AHG to exert veto control over the selection of the form of, and participants in, the eventual recapitalisation. It is also said that this control goes beyond the rights that any Class A creditor would otherwise enjoy as a result of their position as a senior, secured creditor of the Group and that, by imposing a deadline of 30 June 2025 as a condition of the further debt funding, the JRC also dictates the timing of the recapitalisation transaction.

12. It was submitted by Kington that the control which the JRC confers on the Class A creditors infringes competition law. For this purpose, it now relies on:

    i) the Chapter I prohibition in s.2 of CA 1998 (i.e., that the JRC "consists in an agreement between undertakings which is anticompetitive by object and/or effect") and

    ii) the Chapter II prohibition in s.18 of CA 1998 (i.e., that the imposition of the JRC amounts to an abuse of the collective market power enjoyed by the Class A AHG.

13. In their grounds of objection, the Class B AHG describe the competition law consequences of the JRC in the following terms:

> "Objection 4
>
> 9. There is a 'blot' on the Plan because the June Release Condition infringes the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 and/or the imposition and/or inclusion of the June Release Condition in the Plan infringes the Chapter II prohibitions contained in (respectively) section 2(1) and section 18(1) of the Competition Act 1998. The June Release Condition is thus unlawful and void and the Court should not exercise its discretion to sanction a restructuring plan which contains such a term.
>
> 10. In particular:
>
> 10.1 As to the Chapter I prohibition:
>
> 10.1.1 The June Release Condition is or results from an agreement between "undertakings", namely the Class A Creditors who have agreed to impose and/or include it in the Plan; further or alternatively, the June Release Condition is or results from an agreement between the Plan Company and the Class A Creditors.
>
> 10.1.2 The June Release Condition has the object and/or effect of restricting or distorting competition between rival sources of funding for the purposes of the Recapitalisation Transaction. In particular, by imposing and/or including the June Release Condition in the Plan, the Class A Creditors have agreed to reserve to themselves in substance a right to control, or at least a significant degree of control, over the Recapitalisation Transaction, which right or control they otherwise would not have in the absence of the Condition. This is illegitimate, being

detrimental to the competitive process for the provision of funding through the Recapitalisation Transaction and, thereby, to the outcome of the Group's future restructuring.

10.1.3 The June Release Condition affects or may affect trade within the UK.

10. 2 As to the Chapter II prohibition:

10.2.1 The Class A Creditors together have market power arising from their status as Class A Creditors and the imminent liquidity crisis facing TWUL. They are exercising that market power collectively (i.e., they are collectively dominant).

10.2.2 By imposing and/or including the June Release Condition in the Plan, the Class A Creditors are abusing that dominant position. In particular, they are using their position to reserve to themselves in substance a right to control, or at least a significant degree of control, over the Recapitalisation Transaction which right or control they otherwise would not have in the absence of the Condition. This is illegitimate and not ordinary competition on the merits, being detrimental to the competitive process for the provision of funding through the Recapitalisation Transaction and, thereby, to the outcome of the Group's future restructuring.

10.2.3 The June Release Condition affects or may affect trade within the UK."

14. As to the Class B AHG's case that the JRC is anticompetitive by object, it was submitted that the court needs to understand the economic context to the current debt refinancing and the proposed eventual recapitalisation in order to have a full understanding of why the JRC by its very nature distorts competition. It is said that expert competition economics evidence is of assistance in considering the rationality of the decision-making absent collusion, which are matters of assessment and judgment and so cannot simply be addressed by factual witness evidence, which in any event would lack the independence and objectivity of expert evidence.

15. As to the Class B AHG's case that the JRC is anticompetitive by effect, it was submitted that this involves an assessment of the potential impact on competition as compared with a hypothetical counterfactual scenario. This is said to be just the kind of analysis that the court would expect to be advanced by an economic expert as opposed to a witness of fact, which is why expert evidence is necessary and, on any view, will assist the court.

16. As to the Chapter II prohibition, Kington submitted that abuse of dominance requires an assessment of both (a) market power and (b) the likely effects of the conduct in question. Both issues are said to be matters of assessment which require expert competition economics input, rather than merely being matters of factual determination and are of the sort classically addressed by economic expert evidence.

17. Kington stressed that this is very high value litigation in which the Class B creditors have a significant interest (a face value of £1 billion although its actual value and whether or not they are out of the money is a matter for the sanction hearing), which affects a large number of different stakeholders, including 16 million consumers and engages a wider public interest. It submitted that expert evidence is required to resolve the Class B AHG's Objection 4 argument, or as a minimum, that it will be of assistance to the court in resolving it. Indeed, it is submitted that without expert evidence the Class B AHG will effectively be deprived of the opportunity to pursue its competition law argument and therefore put forward its best case at the sanction hearing.

18. The proposed expert evidence is in the form of a draft (final but unsigned) report from Mr Richard Murgatroyd, a partner in RBB Economics (the "draft Murgatroyd Report"). In his curriculum vitae, Mr Murgatroyd explains that he is an economist with significant experience in the application of competition economics to private litigation, damages estimation and regulatory disputes. He also has experience spanning mergers, abuse of dominance, anti-competitive agreements and market investigations. It is not suggested by the Plan Company or the Class A AHG that he does not have sufficient expertise to opine on the matters in respect of which he has been instructed.

19. The parts of the draft Murgatroyd Report to which Kington refers as supportive of its case that the JRC is a horizontal and/or vertical agreement between undertakings which infringes the Chapter I prohibition of an agreement which is anticompetitive 'by object' are said to be:

    i) Section 3.3, which explains that the Class A creditors who have proposed the JRC are in a horizontal relationship, in that they are (at least) potential competitors for the provision of both debt and equity funding to the Group (although it is accepted that the characterisation of the agreement as horizontal or vertical is a matter of law and that the JRC itself appears in a vertical agreement between the Plan Company and its creditors);

    ii) Section 3.3.1, which explains that the JRC shares several economic features with bid rigging, which is a 'by object' infringement under competition law because the JRC confers on the Class A creditors the ability to control the outcome of the recapitalisation transaction, an outcome which will (from the perspective of other stakeholders) be worse than the outcome which would occur under a fully competitive process; and

    iii) Section 4.2, which explains that the Class A creditors have an incentive to collude in order to achieve this outcome because it enables them to choose a 'bid' which favours them (either their own bid, or a bid from a third party which protects their position).

20. The parts of the draft Murgatroyd Report to which Kington refers as supportive of its case that the JRC results from an agreement that infringes competition law 'by effect' are contained in section 4.2. Mr Murgatroyd explains more generally the likely effects of the JRC on the competitive process for the selection of equity funding for the recapitalisation transaction. He said that, where Class A creditors participate in that competition, the JRC enables them to "self-preference" by choosing their own bid. It is said that, where they do not participate, the JRC chills competition from third parties who will anticipate that the Class A creditors will "self-preference" and encourages

those who do bid to provide bids which deliberately favour the Class A creditors in order to improve the chances of the bid being selected.

21. Mr Murgatroyd also said that the timing element of the JRC has the potential to dampen competition. He explains that the result is that the JRC has the potential for harm to competition as a whole on the equity funding market (however narrowly defined).

22. The parts of the draft Murgatroyd Report to which Kington refers as supportive of its case that the JRC infringes the Chapter II prohibition as an abuse of the Class A AHG's market power (or collective dominance) are contained in section 3.3.2. Mr Murgatroyd explains that the members of the Class A AHG (acting collectively) are likely to possess an appreciable degree of market power in the current context, arising from their position as Class A creditors and the limited alternatives for short-term debt financing available to the Group. It is said that the JRC is the means by which they can leverage that market power in order to control the competitive process for selection of equity funding to the Group under the recapitalisation transaction, with the likely harmful effects on competition as a whole on the equity funding market described in section 4.

23. Pursuant to CPR 35.1, expert evidence must be restricted to that which is reasonably required to resolve the proceedings. Leaving aside questions of admissibility, all parties submitted that this requires the court to consider two questions. The first is to consider whether the evidence is necessary to resolve the proceedings, in which case it must be admitted: *British Airways plc v Spencer* [2015] EWHC 2477 (Ch) at [68(a)]. The second arises where the evidence is not necessary for that purpose but may still be of assistance to the court in resolving the issue to which the evidence is said to relate: *British Airways plc v Spencer* at [68(b)] and [68(c)].

24. In this second context, the court must strike a balance between the extent to which the evidence is relevant and the proportionality of its admission, having regard to such disparate factors as "the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)" per Warren J in *British Airways plc v Spencer* at [63].

25. Kington submitted that the evidence is necessary to resolve the proceedings, but if it is wrong about that, it said that it will on any view assist the court. It became apparent during the course of its submissions that the argument in relation to necessity was not that it was impossible for the Class B AHG to make its case without the evidence. Rather it was that the Class B AHG would be seriously prejudiced in its ability to advance the competition law arguments without the evidence from Mr Murgatroyd.

26. The argument that it would assist the court was more strongly advanced. In making that argument Kington submitted that in competition cases it is routine for expert evidence to be admitted in relation to issues similar to those which arise in these proceedings, and indeed that it would be out of the ordinary for permission not to be granted. To that end, it relied on:

    i) *Unique Pub Properties v Roddy* [2018] EWHC 4019 (Ch) at [21] in which Barling J commented that competition cases: "almost invariably require the

assistance of an expert economist and/or an expert who can assess and define the relevant market": and

ii) *Phones 4U Ltd v EE Ltd* [2021] EWHC 2879 (Ch) at [13] in which Roth J said that "evidence of economic experts is of course regularly admitted in competition cases". He also said at [33], by reference to these parts of Phones 4U's case which set out a modelling of the expected effect on market share and profitability of a decision to cease supply, that:

> "… this is just the kind of analysis that the Court would expect to be advanced by an economic expert as opposed to a witness of fact. It involves an analysis of expected effect, taking into account the nature of the competition, the character of the customers and the overall market conditions. Indeed, I consider that for analysis and projections of that nature expert evidence is necessary."

27. I do not doubt for one moment the accuracy of what has been said about the practice of the court in competition cases by two such expert judges as Barling J and Roth J. However, as the Plan Company pointed out, when *Phones 4U* came to trial Roth J made a point of explaining that even that case was not one "where the critical issues which the Court has to decide turn on close analysis of the expert evidence" (*Phones 4U Ltd v EE Ltd* [2023] EWHC 2826 at [50]). Mr Moser KC submitted that the tendency in competition law cases to have lengthy expert's reports which sometimes stray from the regime contemplated by CPR 35.1 is because they go on for a very long time, they are very well funded, and there is long lead in during which experts can (and do) debate at length the matters that may assist the CAT in what may be many weeks of trial. If that is right, it is obvious that that is not the situation the court is faced with in the present case.

28. Furthermore, whatever the result in particular cases, the test for the admission of expert evidence in a competition case is not in principle any different from the test to be applied in any other form of commercial litigation. In this regard, the Plan Company gave two examples of instances in which opposed applications for permission were refused (*HCA International Limited v Competition and Markets Authority* [2014] CAT 10 and *Socrates Training Limited v The Law Society of England and Wales* [2016] CAT 19). This is also apparent from what the Competition Appeal Tribunal ("CAT") said about the admission of additional expert evidence in *BGL (Holdings) Limited and others v Competition and Markets Authority* [2021] CAT 23, when refusing to grant permission in that case:

> "It is clear that the rule in relation to the admission of additional expert evidence, the adduction of which is not envisaged by or laid down in a directions order, is that the overriding objective must be fulfilled. It is important that the process is conducted in a manner that is fair to all of the parties concerned."

29. Mr Singla KC submitted that these examples were not conventional competition law cases: *HCA* was a judicial review type application under section 179 of the Enterprise Act 2002 and *Socrates* was subject to a fast-track procedure under the CAT Rules. He also said that the present case was a novel context in which a competition law argument was to be advanced and so the court should be slow to depart from what was normally done in competition litigation and should not eschew the opportunity to have assistance

from an economist on the competition law issues which are said to be arise. On one level I see the force of that point, but it also seems to me that the very fact that the current proceedings are a novel context in which competition law arguments are to be advanced means that the court should apply first principles and pay particular attention to the question of whether the evidence proposed to be adduced does indeed satisfy the requirements of CPR 35.1.

30. It was Kington's starting point that the conclusions in the draft Murgatroyd Report are based on facts which were largely common ground, and therefore that the hearing of the competition law arguments described in Objection 4 should not entail any material factual disputes. The Plan Company does not disagree with this submission, and I can proceed on the basis that it is correct.

31. In its evidence Kington said that an application of the relevant legal tests when determining whether a breach of competition law has occurred (or in this case will occur) requires an analysis of the economic effects of specific acts or omissions in the relevant market concerned. It is also said that input from a competition economist is necessary to delineate and describe these effects. Neither the court, nor the parties' legal teams or factual witnesses can be expected to have the knowledge or expertise required to analyse and opine upon them and for that reason the court would be assisted by a short expert report from an economist (and more specifically the draft Murgatroyd Report). The assistance includes an explanation of the relevant "theory (or theories) of harm" to competition arising out of the JRC and analysing and opining on whether the JRC has the potential to restrict or distort competition in any relevant markets. It said that it was even more important for this court to have the assistance of an expert on these points because, unlike the CAT, it does not sit together with an economist.

32. Kington stressed that it had sought to keep the evidence as confined as possible and contrasted the length and expense of the draft Murgatroyd Report with the extensive nature of the Plan Company's expert evidence relating to valuation and the issue of the relevant alternative within the meaning of section 901G(4) of CA 2006, which ran to 275 pages between them. It also said, having regard to CPR 35.4(2), that its incurred and anticipated costs of producing its competition law expert evidence was a relatively modest £150,000 to £200,000. This was also said to bear on the practicability of the Plan Company being able to respond in time for the beginning of the sanction hearing on 3 February, more especially because the form of the argument was raised in the Class B AHG's skeleton for the convening hearing.

33. As to the impact on the timetable for the sanction hearing itself, Kington's evidence estimated that the oral presentation of the Objection 4 competition law arguments and the cross examination of its expert would take less than a day which could be accommodated within the existing hearing. Alternatively, it was suggested that a separate hearing could be fixed. It was unclear whether this estimate took into account the time required for submission from the Plan Company (and indeed any other parties) or for cross examination of any expert they may wish to call, but I assume that it did, not least because Mr Singla recognised in his oral submissions that as, on any view, time is short, "people should cut their cloth accordingly". It was suggested that 7 days was sufficient for the Plan Company to file and serve any evidence in reply.

34. The Plan Company put forward two essential arguments in answer to the application. The first was that as a matter of basic fairness and proper case management the

application is too late and if successful will lead to unacceptable disruption to the just determination of the core issues which arise in these proceedings. Those core issues have required disputed evidence relating to valuation and the relevant alternative, so as to enable the court to determine whether it should exercise its cross-class cramdown power under section 901G of CA 2006.

35. The second is that the proposed evidence does not meet the essential precondition for the grant of permission: viz. that the evidence is reasonably required to resolve the proceedings. In the Plan Company's skeleton argument this aspect of its case was grounded on a submission that the whole competition law argument was misconceived. In oral argument, and without eschewing that submission, Mr Moser did not develop his argument that what he said was a lack of merit in the competition law argument of itself made expert evidence inappropriate. Rather, he concentrated on the tentative and qualified nature of the draft Murgatroyd Report as an adequate basis for concluding that this evidence was reasonably required.

36. I think that there is real substance in the first of these arguments. I do so, even though I accept for these purposes that the speed with which the matter is now being advanced is not driven by the conduct of the Class B AHG or Kington. I will also assume for present purposes that the Class B AHG is entitled to take the view that the Plan Company might have been able to move earlier to commence these proceedings in order to give more time for an examination of the Plan before the expiry of the liquidity runway. Nonetheless, since the time of the convening hearing the need to proceed with expedition was clear to all who wished to participate in the process, and the parties' subsequent conduct is the most relevant consideration.

37. Although the Plan Company was on notice from shortly before the convening hearing that the Class B AHG might make an application for permission to adduce expert evidence containing what was called a proper market analysis, the competition law point seemed to have been restricted to an argument on infringement of Chapter I of CA 1998 and there was a very real possibility until 3 January 2025 that the competition law argument would not be pursued at all. Even then, until the draft Murgatroyd Report was served after close of business on 8 January 2025 there was no certainty that the foreshadowed application to adduce expert evidence would be made.

38. While some allowance can be made for the holiday period over Christmas and the New Year, the court had already made clear that the proceedings as a whole needed to be treated as very urgent and recognised that the timetable for the sanction hearing (with the judge required to start prereading for a heavy sanction application 44 days after the convening hearing) was very tight. As it is clear that the Class B AHG was already in possession of a draft report from an expert economist at the time of the convening hearing, I regard it as unsatisfactory that 17 days expired before the Plan Company was informed that the competition law argument would indeed be advanced, and that 22 days had expired before the draft Murgatroyd Report (and its substantial appendices) was served together with this application. No explanation has been advanced for the delay.

39. The consequence of this is that very little time has been left for the Plan Company to prepare any response, if that is what it is required to do. It is one thing to be faced with new legal arguments (and the Chapter II legal arguments were new), but it is quite another to be faced with a substantial body of new evidence while at the same time

being required to deal with a complex body of expert evidence in relation to the valuation of a substantial national utility and an assessment of the relevant alternative to the Plan. The Plan Company submitted that it was unrealistic for it to be able to instruct a competition economist and respond within 7 days. I was told by Mr Smith KC that, although a competition expert has been identified and spoken to, he has not yet been instructed, which he says was a reasonable position for the Plan Company to take.

40. I do not agree with Mr Singla's submission that the Plan Company has only itself to blame for not instructing a competition economist any earlier. Nor do I agree that it therefore has only itself to blame for any prejudice it may suffer from the very tight timetable for production of expert evidence in answer. It is also no answer to say (as Mr Singla did on at least one occasion) that the court need have no concerns about prejudice to the Plan Company if the expert evidence sought by the Class B AHG is admitted, because it is always open to the Plan Company to have the courage of its convictions and not call their own. While it is reasonable for the court to expect that the Plan Company should take some steps to prepare for anticipated eventualities, I do not consider that in the context of the present case it would have been a sensible or proportionate use of resources for substantive work on a reply report to be commenced against the possibility of the permission sought by Kington being granted, more particularly in the light of the qualified nature of the draft evidence which had been served in the form of the draft Murgatroyd Report.

41. I also agree that, even if the Plan Company were to be in a position to adduce its expert evidence before the start of the trial, the timetable for the trial itself leaves very little room for dealing adequately with this new evidence, whether as adduced by Kington or as adduced by the Plan Company. It may be that it would be possible to extend the estimate of the trial by a day to enable the competition economist evidence from both sides to be challenged by efficient cross examination, but given the number of other issues thrown up by these proceedings, I have real concerns that it may be impossible for this to be done in a manner which is consistent with the requirements of the overriding objective of trying the case justly and at proportionate cost.

42. Of course, another theoretical alternative would be to adjourn the start of the trial. While that must be considered (as I have done), it would be a solution of last resort. Quite apart from the grave difficulty of fitting a later 4/5-day hearing into the court's diary, I have already rejected the Class B AHG's request at the convening hearing for the sanction hearing to take place later in February. I did so after reaching the conclusion that the hearing needed to be concluded by the end of the week commencing 3 February, so as to allow sufficient time both for the judgment and for a possible expedited appeal, before the expiry of the Group's liquidity runway on 24 March 2025. Nothing that I have been told affects my view that there are compelling reasons in the interests of the Group and its stakeholders as a whole why the sanction hearing date should be maintained. In my view, admission of the draft Murgatroyd Report would (as a minimum) jeopardise the current date for concluding the sanction hearing and that, in the particular circumstances of this case, that is a powerful consideration for refusing the relief sought by Kington.

43. Kington has also floated the possibility that a later and separate hearing could be held to deal with the competition law argument and expert evidence. I have given that suggestion careful consideration, but regard it is fraught with practical (including

timing) difficulties and given the practical problems and the additional costs which would be incurred, it is not a suggestion to which very much weight should be attributed.

44. This leads on to the next and very important question, which is whether the proposed evidence is reasonably required to resolve the competition law argument in any event. I have already explained the principles (paragraphs 23 to 29 above). The Plan Company submitted that the draft Murgatroyd Report should not be admitted because Kington had failed to establish that it is so required, both because it is not necessary and because it is incapable of assisting the court in the achievement of that end. In support of that submission the skeleton argument of the Plan Company, supported by the Class A AHG, mounted a root and branch attack on the merits of Objection 4. But, as I have already explained, in his oral submissions Mr Moser concentrated on the alternative way of his putting his client's case, viz that the draft Murgatroyd Report is neither sufficiently relevant nor sufficiently probative of the matters which it can properly address for it to be of any real assistance to the court in resolving the competition law arguments.

45. Before describing those weaknesses, I should explain that much of the draft Murgatroyd Report seems to me to provide background information about how it is said that competition law works, and more theoretical questions such as the economic features of the JRC which are said to be shared with well-established economic theories of harm. There are also a number of occasions on which the justification for describing and developing what is in reality legal analysis or a point of law is that Mr Murgatroyd explains that he is able to look at the problem from an "economic perspective" or that particular conduct can be expected "as a matter of economics" or can be looked at "in economic terms". This is advanced at a relatively high level of abstraction, but when it comes to providing evidence on what might be described as the harder-edged market analysis, such as questions of market description and a dominance assessment on the facts of the present case, there is very little on which the court can rely because of the qualified and tentative terms in which it is expressed. I think that Mr Moser was justified in describing much of it as both inconclusive and speculative.

46. In making that finding, I cast no aspersions on Mr Murgatroyd himself. He has identified the limitations in the information which has been made available and the areas of further investigation which he would have preferred to have had clarified. But the simple fact is that much of his report asserts what the position "may" be and what consequences "may" then follow as a result of events which not yet occurred. This is a very unsure basis for thinking that his evidence may be of real assistance in resolving the competition law arguments.

47. This does not of itself mean that the competition law arguments are unsustainable, but the time-critical nature of the current application means that this is a paradigm of a case in which the court must do its best to ensure that the proposed expert evidence really is reasonably required to resolve the proceedings. The court will not be assisted by what is said in the draft Murgatroyd Report unless it is clearly focussed on expert economic opinion directly applicable to the facts of the case and is not treated as a convenient means to describe what are in fact legal arguments dressed up as economic expertise. In my view, much of what is said in the draft Murgatroyd Report suffers from that failing and, where it does not, it is heavily qualified. For those reasons alone, I have

reached the conclusion that the expert evidence sought by this application is not reasonably required.

48. In order to illustrate this conclusion, I think it is appropriate to explain the Plan Company's arguments on why the competition law arguments are misconceived, but it is appropriate to do so quite shortly. I do not do so in order to address an application to strike out Objection 4 as unarguable or to give a direction that the arguments it makes cannot be pursued at the sanction hearing, because neither of those applications are made. I do so in order to set the context for (and identify the significance of) the tentative manner in which the draft Murgatroyd Report is expressed.

49. The Plan Company set the scene for its submissions on the merits by characterising the Chapter I prohibitions as cartel-type behaviour between different undertakings which have as their object or effect the restriction, distortion, or prevention of competition. It characterised the Chapter II prohibitions as monopoly-type situations where there is an abuse of a dominant position in a defined market. I did not understand Kington to disagree with these descriptions, and it is important to bear them in mind when assessing the Plan Company's three principal reasons for concluding that deficiencies in the competition law argument, and the evidence sought to be adduced in its support, meant that permission to rely on the draft Murgatroyd Report should not be granted.

50. The first reason arose out of the Plan Company's submission that market definition was a core issue for the process of establishing whether or not particular agreements or conduct fall within the scope of either the Chapter I or the Chapter II prohibitions (c.f. OFT, Market definition: (OFT403, 204 at [2.1] and [2.2]). This is of particular relevance to an alleged infringement of the Chapter II prohibition because it is impossible to come to a meaningful conclusion in the absence of a market definition: a dominant position does not exist in a vacuum and cannot be determined without first identifying the relevant market.

51. It was then said that the draft Murgatroyd Report was unnecessary and incapable of assisting the court in resolving the competition law arguments as a whole because it provided no adequate market definition. The conclusions on this important point were expressed in highly qualified terms, were said to have been completed under great time pressure and were compromised by a number of statements that further information which Mr Murgatroyd would clearly liked to have seen was required to enable him to complete his analysis. In short, the Plan Company submitted that the draft Murgatroyd Report does not contain the basic assessment required to define a relevant market or to substantiate findings of anti-competitive object or effect, or abuse of collective dominance. To that extent it does not amount to the proper market analysis suggested by the Class B AHG at the convening hearing as being necessary.

52. Indeed, as the Plan Company also pointed out, the only market which the draft Murgatroyd Report had been able to suggest for the purposes of the Class B AHG's competition law argument was "the specific investment opportunity in Thames Water that exists in the case in hand". There was a suggestion earlier in the report that there might be an unspecified (and wider) potential market for the provision of debt funding to the Plan Company, but Mr Murgatroyd said that, although in theory that could be broader than the "specific investment opportunity … in the case in hand", the evidence he reviewed did not support a case that it was. The Plan Company made two submissions based on this evidence.

53. The first was that it was not seriously arguable for Kington to contend that the relevant market could be reduced to a specific investment opportunity. It was simply wrong to suggest that there is a "market" between different sources of funding which is independent of the decision which the Plan Company may take as to how it should fund its business. It was submitted that, if this were to be the case, it would mean that any investment opportunity could potentially be said to be its own market as to which it would necessarily follow that the investors would hold a dominant position and in which any agreement between them would inevitably have appreciable effects. It was said that this would lead to an absurd result and no precedent for it was referred to either in Kington's written and oral submissions or in the draft Murgatroyd Report.

54. The second submission arose out of the tentative terms in which the draft Murgatroyd Report was expressed. This consideration, and the lack of evidence on which Mr Murgatroyd's discussion of market definition was based, meant that the opinion expressed was inconclusive and as a result was not capable of being able finally to resolve the competition law argument.

55. I cannot determine the first of these points at this hearing, but in my view there is real force in what the Plan Company had to say about the second. This is illustrated by Mr Murgatroyd's statement that he would be able to refine his market definition analysis with the benefit of disclosure from the Group and the Class A AHG "pertaining to the funding element of the [Plan]". Quite what this meant was not spelt out, but it seemed to be a reference forward to a later paragraph in his report which made clear that what he required to firm up his opinion was evidence that speaks to the extent to which investors might consider various investment opportunities to be distinct from the investment opportunity in relation to the Group, in terms of the factors that might motivate them to undertake a particular investment. He said that, as the assessment was being undertaken *ex ante*, it was not possible to benefit from what he expected would be:

> "very helpful evidence of the specific considerations of those parties intending to bid to provide equity funding to Thames Water, including evidence on what alternatives these investors may have been weighing up. If more evidence of this kind (or other relevant evidence) became available, I would seek to update my analysis accordingly."

56. This amounted to a recognition by Mr Murgatroyd that a firmer and therefore less speculative view required further evidence from or relating to a disparate group of Class A creditors. But this will simply not be available to any expert for the purposes of the sanction hearing. I accept that an expert with Mr Murgatroyd's experience might have expected that something equivalent would have been available to him in examining the question of market definition in other forms of competition litigation, but that is not what these proceedings are. In my view it would be both disproportionate and unjust in the current case (and doubtless other restructuring plans as well) for an analysis of other funding opportunities to be required from an extensive and diverse group of creditors.

57. The Plan Company's next point related to the allegation by the Class B AHG that the JRC amounted to an infringement of the Chapter I prohibition. It was said that the draft Murgatroyd Report was misconceived in the analogy it drew with bid rigging and self-preferencing. As to bid-rigging it was said that the analogy was a false one because, as

a matter of competition law, there is no obligation for the recapitalisation to be subject to a competitive process. The Plan Company is entitled to enter into a recapitalisation transaction on such terms as it considers to be in the best interests of the Group and its stakeholders. It is far removed from an illegal, hidden or tacit agreement between undertakings which aims to distort competition in a tendering process. It is also said that the draft Murgatroyd Report only refers to the JRC having economic features in common with bid rigging. It does not assert that it would permit bid rigging.

58. I do not propose to determine the strength of the Plan Company's submission that the Class B AHG cannot establish that the JRC represents conduct which could be considered to have as its object the restriction, distortion or prevention of competition. Nor do I need to determine whether or not the JRC might amount to an agreement which falls within any of the categories of conduct (such as bid rigging or self preferencing) which are usually understood to be by-object restrictions. I can see that the submission has some force, but the important point for present purposes is that the question of whether the analogous situations in which particular categories are said to be anti-competitive in breach of the Chapter I restrictions support the Class B AHG's arguments is a legal issue to be argued by reference to the essential characteristics of those other situations. I do not think that an economist's perspective is either necessary or (in the present context) of assistance to the court in resolving that issue and therefore these proceedings.

59. I also agree that the basis on which Kington says that the JRC amounts to an 'effect' restriction is unclear, not least because the JRC allows for either an equity raise or a creditor led solution and does not prescribe which, nor does it prescribe which providers of equity or debt finance the Plan Company must ultimately contract with in either case. In other words, it does not prescribe that the Company should only consider a recapitalisation proposal from super senior creditors or holders of Class A debt to the exclusion of other creditor groups, and still allows for the Plan Company to run an open financing process.

60. As to the Chapter II arguments, the Plan Company submitted that the weakness of Mr Murgatroyd's evidence in relation to market definition are replicated in the weakness of his assessment of market power - itself a necessary aspect of the market dominance with which Chapter II is concerned. He simply says that there is a "distinct possibility" that Class A creditors are likely to possess an appreciable degree of market power in the current context and there is a potential to chill competition. However, Mr Murgatroyd makes clear that the extent to which this might apply would be dependent on the particular circumstances of any potential bidder which he was not in a position to assess given the evidence available. In short he had not had sufficient time to carry out a proper market assessment, which would normally be a necessary precondition to the expression of a firmer view.

61. The Plan Company also submitted that there is similar uncertainty and speculation repeated in relation to the significance of the time limit in the form of the 30 June deadline, which is part of the JRC. It is said in the draft Murgatroyd Report that this could also constitute a form of self-preferencing, "to the extent that existing creditors bidding to provide equity funding have a significantly greater pre-existing insight into the Group's business than de novo bidders, and the timeframe available is insufficient for the latter to mitigate this initial information asymmetry". I agree that on this point as well Mr Murgatroyd's evidence is inconclusive because he accepts that whether this

is the case depends on "the existence of a particular factual matrix, which I am not in a position to assess given the evidence available".

62. It is also submitted that it is difficult to understand how the argument in relation to dominance can work in practice, given that in the present case the dominance must be said to have been collective. It sems to me that there is also substance in this point because there was no market assessment of whether or how the various members of the group of Class A creditors might be envisaged as working together in concert. Indeed there is nothing in the draft Murgatroyd Report to underpin how the requirement for collective dominance might be satisfied in this case, notwithstanding that the Chapter II competition law argument is only capable of getting off the ground if collective dominance is established.

63. Having regard to the submissions that have been made on the merits of the competition law arguments, I reached the clear conclusion that the draft Murgatroyd Report was either commentary on the law looked at from an economist's perspective or was expressed in such tentative, caveated and incomplete terms that it is not reasonably required to resolve the proceedings. If it were to be admitted, it would indeed be an "inappropriate distraction" (per Sales J sitting in the CAT in *HCA* at [16]).

64. These reasons, taken together with the fairness and case management issues I addressed earlier in this judgment explain why I refused Kington's application at the end of yesterday's hearing.