Neutral citation [2024] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 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

19 March 2024

Before:

SIR MARCUS SMITH
(President)
IAN FORRESTER KC
PROFESSOR ALASDAIR SMITH

Sitting as a Tribunal in England and Wales

BETWEEN

PROFESSOR CAROLYN ROBERTS

Applicant/Proposed Class Representative

-and-

(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

Respondents/Proposed Defendants

Heard at Salisbury Square House on 19 March 2024

RULING (FUTURE CONDUCT OF THE PROCEEDINGS)

APPEARANCES

Rhodri Thompson KC, Julian Gregory and Lucinda Cunningham (instructed by Leigh Day) appeared on behalf of Professor Carolyn Roberts.

Rob Williams KC (instructed by Herbert Smith Freehills LLP) appeared on behalf of Severn Trent Water Limited & Anor.

Mark Hoskins KC and Matthew Kennedy (instructed by Slaughter and May) appeared on behalf of United Utilities Water Limited & Anor.

Anneli Howard KC and Emily Neill (instructed by Norton Rose Fulbright LLP) appeared on behalf of Northumbrian Water Limited & Anor).

Daniel Jowell KC and David Bailey (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Yorkshire Water Services Limited & Anor.

Paul Harris KC and Anneliese Blackwood (instructed by Linklaters LLP) appeared on behalf of Anglian Water Services Limited & Anor.

Jessica Boyd KC (instructed by Ofwat Legal) appeared on behalf of the Water Services Regulation Authority.

1. The Tribunal has before it five applications for certification of proceedings as collective proceedings. The allegations in those pleadings involve allegations of abuse of dominance. The Proposed Class Representative ("PCR") in each action is Professor Carolyn Roberts, and she has brought separate but very similar collective proceedings against various water companies (the "Respondents"). Those companies, the Respondents, for the record, are: (1) Severn Trent Water Limited and Severn Trent PLC; (2) United Utilities Water Limited and United Utilities Group PLC; (3) Yorkshire Water Services Limited and Kelda Holdings Limited; (4) Northumbrian Water Limited and Northumbrian Water Group Limited; and (5) Anglian Water Services Limited and Anglian Water Group Limited, all of whom have appeared by counsel before the Tribunal today.

2. There is a sixth respondent, Thames Water Utilities Limited and Kemble Water Holdings Limited (together, "Thames Water"). Thames Water is not formally represented before the Tribunal today and nothing in this Ruling can affect the position of Thames Water. It may be that in the coming days or weeks Thames Water can join in the proceedings or the process that will be articulated in this Ruling, but that is not a matter for today. The Tribunal would not feel comfortable in making orders against a party not represented before it. We will leave it to the PCR to articulate and approach Thames Water with a view to rationalising the process as far as they are concerned. We are going to leave the position of Thames Water at that.

3. The collective proceedings brought by the PCR, for which an application for certification is made, raise what we will call the "usual" or "vanilla" certification questions. These vanilla questions do not particularly trouble us for today. We would obviously need the "usual" response from the Respondents on those questions, but we would, apart from the complexities to which we will come, see no issue in dealing with these matters before the end of the legal year, that is to say, before the end of July 2024.

4. Dealing with "usual" or "vanilla" certification questions is not the point of real concern before us. The point of real concern is this: the allegations in the collective proceedings claim forms (the "Claims") concern alleged breaches of the regime for dealing with the treatment of waste water in the United Kingdom.

We shall refer to that as the "regulatory regime": we do not propose to describe it any further because it is likely to be controversial in the future and has already been set out in some detail by the PCR in her Claims. Suffice it to say, that regime is likely to be of quite fundamental importance to questions of certification.

5. The regulatory regime is operated under the aegis of a regulator, the Water Services Regulation Authority ("Ofwat"), but with the involvement of other regulators, notably the Environment Agency ("EA"). Ofwat is before the Tribunal today and we are very grateful to Ms Boyd KC (counsel instructed by Ofwat) for her assistance. The EA was not notified of the hearing and is not present before us. What we say about Ofwat also goes for the EA, but until consulted we make no orders in regard to the EA. We would invite the PCR to engage with the EA after the hearing so that appropriate orders about the participation of the EA, if so advised, can be made.

6. We are of the view that Ofwat should be a party to these proceedings and should have intervener status. The same obviously goes for the EA should they seek that status. We make no order as to the cost basis on which Ofwat or the EA should participate, but when that involvement crystallises, as it will, we consider that it should be on the basis that Ofwat, and (if participating) the EA, should have their costs discharged as costs in the case and payable by the losing party.

7. We are happy for a different order to be framed by the parties provided that Ofwat's and (if participating) the EA's, costs are recoverable by them, but we do not, unless made by agreement, actually make such an order on this occasion. We propose to adopt a "wait and see" approach. But the moment Ofwat or (if participating) the EA are in danger of incurring serious costs, they should write to the Tribunal, copying in the other parties, for a protective costs order along these lines. We have not heard specific argument on this point, but it seems to us that we should at this stage make this clear indication as to how we see costs working; and we hope that that will not prove to be controversial in the future for the reasons that we hope are obvious.

8. Having dealt with participation, we turn to the harder questions concerning certification. There are various questions, which may very well overlap. We have framed these questions into three different categories as follows:

(1) The first category concerns the interaction of the collective proceedings regime, and specifically these collective proceedings as framed by the PCR in her Claims, with what we have termed the regulatory regime. Although the Respondents have put the point in various different ways, essentially what is said is that the collective proceedings regime as articulated in the pleadings in this case, advancing as they do a case of abuse of dominance, cannot subsist with the regulatory regime as it exists. The point, as we say, is variously put: either there is no abuse or there is no dominance or there is a displacement of the competition regime altogether by the very fact of the existence of the regulatory regime. We say nothing more about how the point might be framed – it is not for us to frame it. But, obviously, the nature of the regulatory regime and how it works is quite fundamental to an understanding of these points, and to their resolution.

(2) The second broad area of questions (or category) concerns the interaction of investigations or proceedings under the regulatory regime brought either by Ofwat or the EA. To be clear, such investigations or proceedings are on foot. We will say no more about those, save that they are on foot, and they may (or may not) bear fruit in terms of an outcome before much longer. That is a point on which Ofwat (quite rightly) was quite coy. There are issues of confidentiality which for present purposes we respect. We think we can anticipate some outcome or resolution before the end of the year, but frankly the development of those investigations or proceedings is not particularly material to the process that we envisage in these collective proceedings in terms of addressing the very difficult questions that arise between the interaction of ongoing investigations or proceedings under the regulatory regime and the parallel course of collective proceedings before the Tribunal. This second category raises important but logically secondary questions to the category one questions that we have already articulated. These

secondary questions might be: How do investigations or proceedings under the regulatory regime interrelate with collective proceedings?; Ought one set of proceedings to be stayed in preference to the other?; Ought there to be parallel proceedings?; If so, how does one maintain the integrity of both and prevent problems in the future? These issues are raised by the Claims and they affect not necessarily certification but how the collective proceedings ought to proceed if certification were to be granted.

(3) The third category is one that concerns the interrelation between the Claims – the abuse of dominance claims against the Respondents – and the fact that Ofwat has a concurrent competition jurisdiction under the Competition Act 1998 (the "Act"). It is possible that it may be argued that the existence of this concurrent competition jurisdiction in Ofwat has some bearing on the manner in which collective proceedings, also based on the Act, may be framed. We say no more than that, but it does seem to us that that is also something that may need to be addressed as part of the broader certification question that we are concerned with.

9. All three categories of issue, it seems to us, potentially can quite fundamentally affect the question of certification, or if the proceedings are certified, the conduct of the collective proceedings thereafter, in particular whether they are, once certified, stayed in favour of the investigations or proceedings under the regulatory regime.

10. It seems to us, therefore, that these issues 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.

11. These issues are of potentially enormous importance to the framing of the collective proceedings. It is important that the Tribunal, at an early stage, gets clarity as to how these questions interact with the question of the process of bringing forward collective proceedings. We stress that there may very well be

other matters preliminary to trial which are different to what we have termed the non-vanilla certification issues. For example, Mr Jowell KC, who appears for Yorkshire Water Services Limited, suggested that the mental state that accompanied the alleged non-reporting of breaches of the treatment of waste water under the regulatory regime might very well need further articulation. We accept that. But these are questions which are not, we think, tied to certification. They would certainly affect the way in which the trial of the matter is to be framed, and we would certainly not discourage the framing of preliminary issues in this regard, but we do consider them to be materially different from the three categories of question already articulated.

12. We propose to articulate a process by which the non-vanilla certification issues can be dealt with. The process is clearly not going to be as straightforward as the normal certification process. There are undoubtedly considerable complexities and one of those complexities that we bear in mind is the importance of, if we can use a Victorian expression, not "embarrassing" Ofwat in framing the issues that are to be tried at an early stage as part of the certification process. Ofwat quite rightly is jealous of its jurisdiction and of the fact that it is not to be drawn unnecessarily into another jurisdiction, albeit one related to its regulatory jurisdiction. That means that the integrity of Ofwat's processes need to be respected and Ofwat must not be dragged into the nuts and bolts of an alleged infringement of a regulatory regime in a context which is nothing to do with investigations or proceedings by or before Ofwat.

13. On the other hand, Ofwat has a clear interest in ensuring that the Tribunal is properly informed as to the shape and nature and meaning of the regulatory regime which it is the regulator over. It is to that extent that we encourage and welcome Ofwat's (and possibly the EA's) participation in these proceedings. That is why we are distinguishing between what we call the non-vanilla certification issues and other forms of preliminary issue which might be heard later on in the process, if the Claims are certified.

14. The complexity means that we really cannot aim, as a matter of certainty, to solve every certification issue in one go. Obviously, that is our desire, but it may be that a phased approach to certification is necessary and that we can, come

certification, only conditionally certify or make certain findings without actually finally certifying matters. That we would want to avoid, obviously, but not at all costs. The prospect of a phased approach is one that simply reflects the complexity of the questions before us. We consider that we should not be deterred in dealing with these matters sooner rather than later, and we should certainly not be deterred by the fact that we may not neatly be able to resolve all certification questions in one go, even though that is our aim.

15. We do, however, aim only to resolve the certification issues in the first instance. Other preliminary issues or preliminary questions which are relevant to the trial of these matters can come later when once the vanilla and the non-vanilla certification issues have properly been resolved, assuming, of course, that certification is ordered.

16. We accordingly are going to list two hearings, each of one week. Week 1 will commence 23 September 2024. Week 2 will commence 13 January 2025. That second date is subject to diary checking on the part of the Tribunal and the parties. This Ruling is concerned with the Week 1 issues, which we stress are intended to deal with the vanilla and non-vanilla certification issues.

17. We consider that the issues for trial in Week 1 need to be framed very quickly. This should be done by the Respondents within one week, with the PCR to comment one week later. The issues should avoid seeking to raise specific factual issues which will be the subject matter of the process towards trial, should these proceedings actually be certified.

18. One example of an issue that has the potential to develop into a factual question is what has been termed the *Marcic* issue (*Marcic v Thames Water Utilities Ltd* [2003] UKHL 66). We refer to the very helpful submissions of United Utilities at paragraph 8(2), where the *Marcic* issue is described in the following terms:

> "Even if the [Competition Act 1998] were potentially applicable to the claims, a claim for breach of statutory duty would be excluded by virtue of the *Marcic* principle because permitting such a claim would be inconsistent with the scheme and purpose of the Water Industry Act 1991 and the Environmental Permitting (England and Wales) Regulations 2016."

The *Marcic* issue is one that can operate on two levels. One is the granular articulation of how that principle interacts with the granular claims pleaded by the PCR. That, it seems to us, is a matter for trial and for further elucidation of the pleadings once the general principle has been articulated. That general principle, which is the extent to which the *Marcic* issue or *Marcic* principle derails the points as pleaded by the PCR at the moment, is one suitable for Week 1, whereas the more granular points are not and must be dealt with later.

19. In short, it seems to us that it is the latter principal question that we want to be addressing, and we will resolve that in Week 1. Then, as necessary, the PCR's claims will either fail or require repleading or can stand unamended: but we need to deal with the general question first. This is, we think, a very good example of the importance of framing clearly the preliminary issues that form part of the non-vanilla certification issues.

20. So much for the time-frame for the articulation of these issues. We stress that it is quite likely that the framing of those issues will evolve as our understanding of the case evolves. What we want is a very clear first cut, agreed, of the issues that need to be tried in Week 1. We obviously are not going to stand in the way of a further articulation or supplementation of those issues, but we do consider that within a fortnight the parties need to have a clear and agreed first cut, subject always to the ability to amend or supplement. Whilst Ofwat is not directly interested in the framing of these issues, Ofwat obviously ought to be kept "in the loop".

21. That brings us to the other aspects of the timetable. It seems to us that the response to the applications for certification should be 31 May 2024. That is a little tighter than the Respondents wanted. It is tighter because we want to be absolutely clear that we are not expecting a defence to the claims pleaded by the PCR. That would be entirely inappropriate for purposes of an application for certification. We would expect a granular articulation of any defence to follow certification (if that occurs). What we are expecting by 31 May 2024 is such material as will enable us to decide whether certification should or should not be made. In other words, the response needs to deal with the vanilla and non-vanilla certification issues only.

22. A reply to this we expect by no later than 15 July 2024. Skeletons or written submissions should be exchanged by 16 September 2024. That should include, we stress, any skeletons by any regulator choosing to appear. That would be Ofwat and, if so advised, the EA.

23. Now, that means that Ofwat's first intervention comes late in the day. That is deliberate, because we want to keep Ofwat's role to a minimum. We do consider, however, that it would be appropriate for Ofwat to provide a response to what is said by the parties about the regulatory regime a little sooner than that, if that can be done. Ideally, it would be done by the end of July. In other words, two weeks after the reply by the PCR to the response of the Respondents. Two weeks is tight. But given that all that will be addressed will be the inaccuracies in the regime that will have been articulated by both the Respondents and the PCR in their work up to 15 July, we hope that that two-week period is enough. We would obviously be sympathetic to an application for an extension of time if necessary. But we consider that the real meat of the hard work that Ofwat will have to do will be in the skeleton, which will obviously have to deal with the interrelationship between the ongoing regulatory proceedings and the collective proceedings, if certified. In other words, whether there has to be a stay or whether the two sets of proceedings can subsist happily in tandem, and, if so, how.

24. So that is how we see Ofwat's involvement, and we think that is consistent with the way in which we have been addressed by all of the parties, including, in particular, Ofwat.

Sir Marcus Smith
President

Ian Forrester KC

Professor Alasdair Smith

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 19 March 2024