SLAUGHTER AND MAY/

15 APRIL 2025

COMPETITION APPEAL TRIBUNAL REJECTS PROPOSED CLAIMS IN WATER COLLECTIVE PROCEEDINGS

On 7 March 2025, the Competition Appeal Tribunal (the "**CAT**") delivered its judgment in respect of applications made by Professor Carolyn Roberts (the "**PCR**") for collective proceedings orders ("**CPOs**") in parallel proceedings brought against six water and sewerage companies ("**WaSCs**").[1] In this significant decision, the CAT refused to certify the PCR's claims on the basis that they were excluded by section 18(8) of the Water Industry Act 1991 ("**WIA 1991**").

This is the first set of environmental claims brought under the UK's collective proceedings regime and an example of the non-traditional types of claims that have more recently emerged – seeking to take advantage of the opt-out nature of the regime. It is also one of only a handful of cases in which the CAT has declined certification. The judgment is important for its consideration of claims that arise from an alleged or actual breach of obligations under the WIA 1991 (particularly a WaSC's conditions of appointment), and may also encourage proposed defendants subject to other (complex) regulatory regimes to consider whether any other "exclusions" of a similar nature may exist.

Legal framework

The privatisation of water and sewerage services in the UK and the appointment of WaSCs was originally effected by the Water Act 1989, which was later replaced by the WIA 1991. WaSCs are private companies which operate as monopolies for the supply of water and sewerage services in distinct geographical areas across England and Wales. They are subject to regulation by the Environment Agency and the Water Services Regulation Authority ("**Ofwat**"), with the latter responsible for conducting period price reviews for water and sewerage services. WaSCs are also subject to reporting obligations and performance commitments in respect of pollution incidents ("**PIs**"), which can affect permitted revenue calculations under the price review regime.

Summary of the claims and arguments from the WaSCs

The PCR alleged that the six WaSCs had been under-reporting the number of PIs on their respective networks, which led to them charging customers higher prices than they otherwise would have been permitted to charge. The PCR sought to bring the proceedings on behalf of several million household customers on the basis that the alleged under-reporting of PIs and higher prices consequently charged constituted an abuse of a dominant position contrary to the Chapter II prohibition under section 18 of the Competition Act 1998 ("**CA 1998**").

The WaSCs challenged the PCR's CPO applications on two independent grounds, which they contended meant that the claims should be dismissed outright by the CAT. The WaSCs argued that: (i) the claims advanced by the PCR were excluded under section 18(8) of the WIA 1991; and (ii) as the statutory structure left no scope for competition in the supply of water and sewerage services to household customers by the six WaSCs, the alleged conduct fell outside the scope of UK competition law.

The WaSCs also argued that the claims were not suitable for certification under section 47B of the CA 1998 and the Competition Appeal Tribunal Rules 2015.

[1] The six WaSCs are (1) Anglian Water (2) Northumbrian Water (3) Severn Trent (4) Thames Water (5) United Utilities and (6) Yorkshire Water.

Exclusion under section 18(8) WIA 1991

This proposed exclusion gave rise to three questions:

- Do the claims concern acts or omissions which constitute a contravention of a relevant condition of appointment?
- Are remedies expressly provided for such a contravention under any enactment (apart from those under section 18)?
- Are the remedies sought in the proceedings available in respect of those acts or omissions otherwise than by virtue of their "*constituting, or causing or contributing to*" that contravention?

As the answers to the first two questions were not in dispute between the parties, the key question was whether the remedies sought by the PCR were available in respect of the relevant acts/omissions otherwise than by virtue of their "*constituting, causing or contributing to*" a contravention of a relevant condition of appointment.

Section 18(8) WIA 1991 has recently received authoritative interpretation by the Supreme Court in *United Utilities Water Ltd v Manchester Ship Canal (No 2)*.[2] The Supreme Court considered the final words of section 18(8) and explained that the ouster only applies to causes of action that are based on a breach of a statutory or other requirement that is enforceable under section 18, and where that breach forms an "essential ingredient" of the cause of action.

The WaSCs argued that the alleged contravention of their conditions of appointment was an essential ingredient of the PCR's claims and therefore the only remedies available were those provided for under the WIA 1991, rather than by way of the private law damages sought by the PCR from the CAT.

No scope for competition

The WaSCs noted that, as a matter of UK and EU competition law, where national legislation creates a legal framework that eliminates any possibility of competitive activity, the prohibition on abuse of dominance does not apply. In this case, it was common ground that:

- At all relevant times, each of the WaSCs had supplied sewerage services under their respective appointments.
- Through their appointments, each WaSC was the monopoly supplier to all household customers in its appointment area.
- There was no possibility of rivals entering the market.

It therefore followed, according to the WaSCs, that the prohibition on abuse of dominance was excluded because there was no competition (nor any scope for competition) in the supply of sewerage services to household customers by each of the WaSCs.

The CAT's judgment

On section 18(8), the CAT focussed not on the alleged abuse (i.e. the misreporting of PIs which led to a contravention of the WaSCs' conditions of appointment) but rather the causation of damage (i.e. the price control mechanism being integral to the alleged loss suffered).

The CAT found that the damage allegedly suffered by Proposed Class Members, and the remedy sought for the alleged over-charging, arose only by virtue of the fact that the reporting of PI information fed into the determination of the revenue allowance by Ofwat, and the WaSCs would have contravened their conditions of appointment in supplying Ofwat with inaccurate information for that purpose.

Therefore, the alleged failure of the WaSCs to supply accurate information for the statutory price control regime under the WIA 1991 was an essential ingredient of the PCR's claims for breach of statutory duty. Accordingly, the claims for abuse of dominance were excluded by section 18(8) WIA 1991.

Although not a basis for its decision, the CAT also noted that Ofwat's administrative process was much better suited to determining the level of any under-reported PIs / reimbursement due to customers, and that this appeared to reflect Parliament's intention in establishing the regime for privatised WaSCs, in that enforcement of a WaSC's conditions of appointment should rest primarily with Ofwat.

The CAT rejected the WaSCs' submissions on the alleged conduct being outside the scope of competition law, holding that:

[2] United Utilities Water Ltd v Manchester Ship Canal Co Ltd (No 2) [2024] UKSC 22.

- a statutory monopoly can abuse its dominant position by its conduct towards third parties (as found, by example, in Case C-82/01P *Aéroports de Paris*, EU:C:2002:617, [2002] ECR I9297);
- it would be unfair for the WaSCs' conduct to give rise to a remedy under competition law for adversely affected business customers but not household customers (as it was accepted that competition existed in the retail market, where the supply of sewerage services to business customers was opened to competition in April 2017); and
- this was not a case where the monopolists were charging specific prices set by the regulator, as each WaSC was able to set their own prices so long as the aggregate maximum revenue collected complied with their overall revenue allowance.
- Given the CAT's determination that the claims were excluded by section 18(8), any assessment of the conditions for certification was academic. The CAT found, however, that if the PCR's claims were not so excluded, it would have granted a CPO in each set of proceedings, having found no issues with the PCR satisfying the "authorisation condition" and "eligibility condition" which form the tests for certification.[3]
- The "authorisation condition" is concerned with whether it is "just and reasonable" for the PCR to act as a representative in the proceedings. The CAT noted that: (i) there was no question of the PCR having a conflict of interest with the class members; (ii) she was well qualified to act in the role of PCR based on her experience; (iii) she had an effective litigation plan in place; and (iv) the issues raised by the WaSCs and the CAT in relation to deficiencies in the PCR's funding arrangements were resolved shortly after the certification hearing.
- The "eligibility condition" is concerned with whether the claims are eligible for inclusion in collective proceedings (i.e. whether the claims are brought on behalf of an identifiable class of persons, raise common issues and are suitable to be brought in collective proceedings). The WaSCs argued that the PCR did not satisfy the suitability requirement because her expert methodology failed to consider that Ofwat could have introduced a different price control regime had the WaSCs reported higher numbers of PIs. However, the CAT considered that this possibility was unlikely based on Ofwat's proposals for its 2025-2029 price review ("**PR24**") and the trend in the overall regime becoming stricter rather than more generous.

Implications

The CAT's judgment has confirmed the interpretation of section 18(8) WIA 1991 in the context of the collective proceedings regime and claims for breaches of competition law. Although the judgment is specific to provisions of the WIA 1991 and the regulatory regime that applies to the provision of water and sewerage services, the judgment demonstrates that the CAT is willing to recognise certain boundaries to the collective actions regime. This is a welcome recognition in view of the novel (non-traditional competition) claims that are now being brought under the regime. The judgment may also encourage proposed defendants subject to other (complex) regulatory regimes to consider whether any "exclusions" of a similar nature may exist.

More generally, the CAT has recently demonstrated a more critical approach to certification, having declined certification in *Riefa*[4] earlier this year on the basis that the PCR failed to satisfy the authorisation condition. In this case, the PCR failed to demonstrate that she was able to represent her class members' interests independently of her funders' and solicitors' interests. This is the only other outright refusal of the CAT to grant a CPO post-*Merricks*,[5] and it remains to be seen whether future proposed collective proceedings – particularly those that are novel and which stretch the traditional boundaries of competition law – will face greater scrutiny at the certification stage.

Slaughter and May acts for United Utilities in these proceedings.

[3] Section 47B of the CA 1998 and the CAT Rules set out the requirements for a CPO.

[4] Christine Riefa Class Representative Limited v Apple Inc. & Ors [2025] CAT 5.

[5] In 2017, the CAT declined certification in *Merricks v Mastercard* [2017] CAT 16, concluding that the claims were not suitable to be brought in collective proceedings. This was overturned by the Court of Appeal in [2019] EWCA Civ 674, and the Supreme Court dismissed Mastercard's further appeal in [2020] UKSC 51. The case was then remitted back to the CAT.

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