



## COMPETITION APPEAL TRIBUNAL

### **NOTICE OF AN APPLICATION TO COMMENCE COLLECTIVE PROCEEDINGS UNDER SECTION 47B OF THE COMPETITION ACT 1998**

#### **CASE NO. 1628/7/7/23**

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (“the Rules”), the Registrar gives notice of the receipt on 8 December 2023 of an application to commence opt-out collective proceedings, under section 47B of the Competition Act 1998 (“the Act”), by Professor Carolyn Roberts (the “Applicant/Proposed Class Representative/PCR”) against (1) United Utilities Water Limited (the “First Proposed Defendant”); and (2) United Utilities Group PLC (the “Second Proposed Defendant”) (together, “the Respondents/United/Proposed Defendants”). The Applicant/Proposed Class Representative is represented by Leigh Day, Panagram, 27 Goswell Road, London EC1M 7AJ (Reference: Zoë Mernick-Levene).

The claims that the PCR seeks to combine in these collective proceedings (the “Claims”) are standalone claims on behalf of the Household Customers<sup>1</sup> of the First Proposed Defendant, which is (and at all relevant times has been) wholly owned by the Second Proposed Defendant, for loss and damage caused by breaches of statutory duty. As the parent company of the group to which the First Proposed Defendant belongs as a wholly owned subsidiary, the Second Proposed Defendant forms part of the same undertaking as the First Proposed Defendant for the purposes of the Act.

The PCR contends that the First Proposed Defendant has committed, and continues to commit, an abuse of a dominant position, in breach of section 18 of the Act (the “Chapter II Prohibition”), in providing misleading information to the relevant regulatory bodies, the Environment Agency (“EA”) and the Water Services Regulation Authority (“Ofwat”) (the “Infringing Conduct”). The effect of the Infringing Conduct has been to cause Ofwat to allow the First Proposed Defendant to charge its customers higher prices for Sewerage Services<sup>2</sup> than it would otherwise have been permitted to charge.

According to the collective proceedings claim form, companies such as the First Proposed Defendant that provide Sewerage Services are regulated by both the EA and Ofwat for good reason, as a matter of public policy and from the perspective of competition law. As a matter of public policy, the sewage that these companies remove from customer premises and transport and treat within their sewerage networks is noxious, and if released untreated into the environment is liable to cause significant harm – including by harming human and animal health, killing fish and other living things and destroying the native flora and fauna which is central to the ecology of rivers, seas and other watercourses. Water quality in English rivers is currently in a very poor state, in particular as a result of the discharges of untreated sewage by the First Proposed Defendant and the other Sewerage Companies appointed under the Water Industry Act 1991 (“WIA”) to act as a sewerage undertaker for a specified geographical area of England or Wales (“Sewerage Companies”).

The collective proceedings claim form states that from the perspective of competition law, the Sewerage Companies are natural monopolies that provide their services under statutory licence. They are regional monopolists serving Household Customers within their statutory areas of appointment. It is well recognised that an absence of competitive pressure can allow dominant companies to exploit consumers by subjecting them to unfair prices and terms and/or to run their businesses inefficiently or inadequately, contrary to the above public policy objectives. These problems are acute in this context because the Sewerage Companies have market shares at or approaching 100%, with almost all Household Customers having no meaningful

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<sup>1</sup> “Household Customers” means customers being provided with sewerage services at premises principally used as a home, within the meaning of section 17C of the Water Industry Act 1991.

<sup>2</sup> “Sewerage Services” means the collection, treatment, and disposal of wastewater from household, including the use of pipes and other sewerage infrastructure to transport wastewater (or sewage) from its source to a wastewater treatment works where it is treated before being discharged back into the environment. Sewerage services includes Retail Sewerage Services.

ability to switch providers (or self-supply). Similarly, as a result of the system of statutory licences, there is no possibility of rivals entering the market in response to supra-competitive prices or incumbent inefficiency. Effective legal controls are therefore required to prevent the Sewerage Companies from causing significant levels of pollution, contrary to the above public policy considerations, including by operating inefficiently or inadequately, and/or by setting prices at monopoly levels.

It is a criminal offence to operate a sewerage network asset or to discharge sewage save as permitted under a system of environmental permits issued by the EA (the “Permit”). Further, sewerage companies are subject to a Price Review regime operated by Ofwat that limits the prices they can charge customers for Sewerage Services, and as part of which, provides financial incentives for them to reduce the number of “pollution incidents” on their networks. In broad terms, pollution incidents are discharges of wastewater from sewerage network assets that adversely affect (or potentially adversely affect) the water environment as set out in relevant EA guidance.

As part of the system of regulatory incentives adopted by Ofwat for the purpose of its PR14 (2015 to 2020) and PR19 (2020 to 2025) Price Reviews<sup>3</sup>, Sewerage Companies have specific performance commitment targets (“Performance Commitments”) relating to the number of Pollution Incidents on their networks. If the companies outperform these targets, Ofwat increases a revenue allowance that limits the amount of money that they can charge Household Customers for Sewerage Services. If they under-perform, the revenue allowance is lowered. Certain Sewerage Companies such as the First Defendant chose in PR19 to be subject to ‘enhanced’ Pollution Incidents Performance Commitments, over and above their standard Performance Commitments, which gave the First Defendant the ability to earn enhanced outperformance rewards and underperformance penalties when their performance went under or above the ‘standard’ Performance Commitment.

In order for these controls and incentives to operate effectively, the Sewerage Companies must provide the EA and Ofwat with accurate and complete information relating to the number of Pollution Incidents on their networks, as they are required to do under their licences.

If they provide the EA and/or Ofwat with misleading information that understates the number of Pollution Incidents, the Sewerage Companies may avoid financial penalties and be permitted higher revenue allowances by Ofwat, thereby allowing them to charge their customers higher prices than they would have been permitted to charge if accurate information had been provided.

The PCR alleges that this is exactly what many of the Sewerage Companies, including the First Proposed Defendant, have been doing over an extended period.

The proposed class of claimants for the purpose of the Claims (the “Proposed Class” and “Proposed Class Members” or “PCMs”) consists of: *“All Persons<sup>4</sup> who have paid for the provision of sewerage services to Household Customers by United Utilities Water Limited during the Class Period<sup>5</sup>, either Directly<sup>6</sup> or as part of their Rent<sup>7</sup>”*.

The PCR estimates that there will be approximately 5.6 million Class Members for the First Proposed Defendant falling within the Proposed Class, and that the average damages per individual PCM will be at least £24.98 and as high as £66.98 if the extent of unreported Pollution Incidents is such as to meet the enhanced penalties. In aggregate, the damages are likely to be substantial: at least £141 million and as high as £378 million including interest under the enhanced regime.

According to the collective proceedings claim form, it would be just and reasonable for Professor Roberts to act as the PCR in the Proposed Collective Proceedings for the reasons summarised below:

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<sup>3</sup> “Price Reviews” means Ofwat’s five-yearly reviews that decide the price, investment and service package that household customers receive.

<sup>4</sup> “Persons” means natural persons.

<sup>5</sup> “Class Period” means the period between 1 April 2020 and (a) the date of filing of the Claim Form or (b) such later date as may be ordered by the Tribunal

<sup>6</sup> “Directly” refers to any of the specific ways of making payment detailed on the First Proposed Defendant’s customer bills from time to time during the class period.

<sup>7</sup> “Rent” is rent paid by Persons who constitute Purchasers for the purpose of the Water Resale Order 2006.

1. Professor Roberts has over 30 years' experience in the fields of environmental science and water management. She has been an environmental and water consultant since 1988 and has held various professorships and academic posts relating to the impact of human activity on the water environment, floods and environmental sustainability.
2. Professor Roberts is currently the Vice President of the Institution of Environmental Sciences, a Fellow of the Chartered Institution of Water and Environmental Management and continues to advise local authorities and government agencies (such as Innovate UK) on technical areas involving the water sector. She was previously the first Frank Jackson Professor of the Environment at Gresham College, delivering lectures on a number of environmental subjects, including water management.
3. Professor Roberts has extensive experience of court proceedings gained through assisting the police and acting as an expert witness in criminal proceedings and in the coroner's court. She therefore has the expertise, organisational and representational skills required for these proceedings.
4. Professor Roberts has significant experience of managing large and complex projects, including of leading large teams, putting together, reviewing and assessing budget proposals, and working to deadlines – in particular as a result of her time as Head of the School of Environment at the University of Gloucestershire.
5. Professor Roberts' motivation to act as the class representative stems from her personal and professional commitment to supporting the minimisation of adverse impacts on the water environment, her concerns regarding the volume of sewerage discharged into rivers, beaches and seas, and a sense of unfairness that, as a result of Sewerage Companies having misled regulators, consumers have been forced to pay for services (i.e. the effective treatment, and safe return to the environment, of sewage) that were not performed satisfactorily.
6. In addition to her own experience and qualifications, Professor Roberts has instructed an experienced legal team and expert economists with substantial experience both in collective proceedings claims and of regulation in the water and sewerage sectors, along with Angeion Group which has extensive experience in claims management including in collective proceedings claims.
7. Professor Roberts is supported by an advisory group comprising individuals with extensive expertise in consumer rights and collective proceedings.

Furthermore:

Professor Roberts is not a member of the Proposed Class as she has excluded herself.

Professor Roberts has, with the assistance of her legal advisors and claims management company, developed a comprehensive Litigation Plan, which sets out:

- (a) a method for bringing the proposed collective proceedings and for notifying represented persons of the progress of the proceedings;
- (b) a procedure for governance and consultation which takes into account the size and nature of the class; and
- (c) estimates, and provides details of arrangements as to, costs, fees or disbursements which the Tribunal may order that the PCR shall provide.

Professor Roberts has adequate funding for the Claim and will be able to pay the Proposed Defendants' recoverable costs (if ordered to do so).

The PCR submits that the Claims are eligible for inclusion in collective proceedings:

1. They have been brought on behalf of an identifiable class of persons. The Proposed Class has been defined in such a way that it will be possible objectively to ascertain whether any given person is or is not a class member. In order to tell whether or not they fall within the Proposed Class, individuals

will need to be aware of, or verify, four matters: (1) they paid for Sewerage Services supplied by the First Proposed Defendant; (2) they paid for Sewerage Services provided to Household Customers rather than to non-household customers; (3) in the case of PCMs who paid Directly, that they in fact made payments to the First Proposed Defendant; and (4) in the case of PCMs who paid through their Rent, that their Rent included a charge for Sewerage Services. Generally, it is likely that PCMs will (i) know whether or not they fall within the scope of the Class Definition and (ii) if necessary be able to verify the position, given that the Claim Period commenced on 1 April 2020, such that both PCMs and the First Proposed Defendant are likely to have access to relevant online accounts, emails and/or paper documentation.

2. The Claims raise issues of fact or law which are the same, similar or related (the “Common Issues”):
  - (a) The definition of the relevant product and geographic markets.
  - (b) Whether the First Proposed Defendant has at all relevant times held, and continues to hold, a dominant position on the relevant markets.
  - (c) Whether the First Proposed Defendant abused its dominant position on the relevant markets (the “Abuse Issue”). The Abuse Issue concerns in particular whether the First Proposed Defendant provided misleading information to the EA and Ofwat that understated the number of Pollution Incidents on its sewerage network relevant to its PR14 and PR19 Performance Commitments.
  - (d) The duration of the abusive conduct, in particular the period during which the First Proposed Defendant has provided regulators with misleading information relevant to its PR14 and PR19 Performance Commitments relating to the number of Pollution Incidents on its network.
  - (e) Whether any abuse(s) of dominance by the First Proposed Defendant has caused loss or damage to the Proposed Class Members during the Claim Period
  - (f) If the First Proposed Defendant’s abuse of dominance has caused actionable loss, the aggregate quantum of the losses for which the Proposed Class Members should be compensated.
  - (g) The rate at which, and the period over which, the Proposed Class Members are entitled to pre-judgment interest.
  - (h) Whether the Second Proposed Defendant is liable for the abuse committed by the First Proposed Defendant.

The PCR further submits that the Claims are suitable to be brought in collective proceedings. In particular, (i) the principal issues in the proceedings are Common Issues, (ii) there is an identifiable class and (iii) the claims could not realistically be brought on an individual or opt-in basis.

Moreover, the proposed collective proceedings present an appropriate means for the fair and efficient resolution of the Common Issues, the substantial benefits of continuing the Claims in collective proceedings considerably outweigh the anticipated costs to the parties and the Tribunal and the Claims are suitable for an aggregate award of damages.

As regards to the method(s) of distributing any aggregate award of damages, it is likely that the most suitable method(s) can only be determined once the class size and aggregate award have been precisely calculated. The PCR nevertheless considers that it may be possible to distribute any aggregate damages award without any active participation of a large number of PCMs.

The relief sought in the proposed collective proceedings is:

1. damages on behalf of the Proposed Class, to be assessed on an aggregate basis pursuant to section 47(C) of the Act;

2. simple interest thereon, at a rate of 8% per annum (or such other rate as the Tribunal may consider appropriate);
3. the PCR's costs; and
4. such further and other relief as the Tribunal may see fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email ([registry@catribunal.org.uk](mailto:registry@catribunal.org.uk)). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, KC (Hon)*

Registrar

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