IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 19th March 2024

Before:
The Honourable Marcus Smith
Alasdair Smith
Ian Forrester KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:
Professor Carolyn Roberts

Class Representative

v

(1) **Severn Trent Water Limited & Anor**
(2) **United Utilities Water Limited & Anor**
(3) **Northumbrian Water Limited & Anor**
(4) **Yorkshire Water Services Limited & Anor**
(5) **Anglian Water Services Limited & Anor**

Proposed Defendants

A P P E A R AN C E S

Rhodri Thompson KC, Julian Gregory & Lucinda Cunningham (On behalf of Professor Carolyn Roberts)
Rob Williams KC (On behalf of Severn Trent Water Limited & Anor)
Mark Hoskins KC & Matthew Kennedy (On behalf of United Utilities Water Limited & Anor)
Anneli Howard KC & Emily Neill (On behalf of Northumbrian Water Limited & Anor)
Daniel Jowell KC & David Bailey (On behalf of Yorkshire Water Services Limited & Anor)
Paul Harris KC & Anneliese Blackwood (On behalf of Anglian Water Services Limited & Anor)
Jessica Boyd KC (On behalf of Ofwat)

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Tuesday, 19 March 2024

(10.30 am)

Opening remarks

THE PRESIDENT: Good morning, everybody. We begin, first of all, with the usual live stream warning. These proceedings are being streamed and an official recording is being made and an authorised transcript will be produced. It is prohibited for anyone else to make a recording, whether audio or visual, to photograph or transmit these proceedings, and a breach of that directive is punishable as a contempt. I am sure it won't happen, but I need to say so every time.

Secondly, we have a number of different advocates before the Tribunal and we are being transcribed remotely. It would be helpful if you could introduce yourselves just for the transcriber so that we get the right points attributed to the right person. So thank you in advance for that.

Moving to the substance, can I thank the parties and Ofwat for their very helpful written submissions, which we have read. Certain themes have quite clearly emerged. Rather than hear themes being articulated from the written submissions orally without a steer from the Tribunal, what we are going to do is set out a few suggestions as to how we might try what I am going to call a substantive certification hearing. I will explain what I mean by that in a moment.

Then what we are going to suggest is that, having unpacked our suggestions, we allow you some time to consider those suggestions so that you can push back effectively, having considered what we say.

So what we have in mind is as follows. First of all, I want to just say a few words about the question of the stay. For reasons that we are going to come on to, it seems to us that questions of stay, because of parallel investigations, are best dealt

with at a certification hearing and not before a certification hearing. It is trite that proceedings before the Tribunal should only be stayed for good reason, and we do not consider that the regulatory collective proceedings interface can properly be decided short of a substantive certification hearing. In other words, we think that it is certify or not, and then stay, rather than stay and then certify, if we stay at all. So that's the first sort of general point about stay versus certification.

Secondly, timing. Assuming a substantive certification hearing, we think that we should allocate a week for that to be heard. Essentially, a time estimate of four days, which is intended to be generous. Reading would come on top of that, so that the hearing would start on a Monday and would end on the Thursday with Friday being a just-in-case day. We see no reason why such a hearing cannot take place either in early October, the first half of October this year, or the very end of September. We can see significant advantages in that sort of timing. So that is the sort of aspirational shape of the certification hearing.

Moving on to what I mean by a substantive certification hearing. First of all, we have the general aspects of certification. It seems to us that the general content of a vanilla certification hearing, that that content is pretty well known by both parties of this experience, or the representatives of the parties of this experience, and the Tribunal, simply because we have done a number of these vanilla cases already.

On the facts, leaving on one side the regulatory question that I am going to come to, on the facts there doesn't seem to be any particular Microsoft *Pro-Sys* problem that we have not dealt with already here, but the regulatory aspects, to which I am going to come, these are novel and it is why we have an aspiration of a four-day hearing rather than the two days plus two days in reserve as has been mooted.

But it seems to us that we don't really need to discuss the common or garden certification issues today. The respondents are perfectly capable of framing their

response to the application for certification in short order, and we are perfectly capable of determining those issues within a day or at most a two-day hearing. It is the regulatory aspects of the matter that warrant special attention and it is to those that I am now going to turn.

So regulatory aspects, which is a broad, and not really to be specifically defined today, area of points. We are very grateful to the parties for raising these as we requested that they do in their written submissions. The reason we wanted to raise them is not of course because we are in any position to decide these things today. I do not think any person could reasonably expect any kind of decision from the Tribunal on any of these points.

But that decision not to decide involves not dismissing the points out of hand on a nothing-to-see-here basis. That, in itself, would be to decide the point and we consider that there is a great deal to discuss in the points that have been raised by the parties, it's just that today is not the day for doing that. There are undoubted complexities in these claims. The question is how they should be addressed.

So we first of all consider that it would be an extraordinarily bad idea -- no one is putting this forward -- to leave these matters to trial assuming certification. I think we would have a car crash of a trial if we tried to do it in that way. Firstly, that's because these regulatory questions are likely to be relevant to certification in any event. Some of them are quite clearly joined at the hip. But in the second place, even if they are not directly relevant to certification or even indirectly relevant to certification, leaving them over to trial without at least narrowing them or parsing them closely is asking for trouble. It's inconsistent with the Microsoft *Pro-Sys* approach and it is simply bad case management, so we are not going to do that.

Although we consider that there are a number of matters closely related to certification, we think that these regulatory issues -- if I can call them that -- ought to

be framed as preliminary issues and/or strike-out issues and that they should be framed as extensively as possible. That will give the Tribunal a variety of options when it comes to the certification hearing. We could decline to certify, we could certify and strike out, we could certify and narrow the claims, we could certify and allow them to proceed unnarrowed. There are almost certainly other options beyond those and we would want to keep them open. To be clear, we do not want something unexpected to derail the trial, assuming we certify. We want these regulatory subjectivities aired early, even if that means a longer than normal certification hearing.

So the immediate critical task lies in the framing of these issues. We think that this can and should be done within the next 14 days, and that an agreed list of preliminary issues can be articulated within that time for the Tribunal to consider. We are not talking about arguments about who is right and who is wrong, we are simply talking about a shopping list of points that would be unpacked in written submissions and dealt with orally at the hearing.

I don't particularly want to try to list these preliminary issues or strike-out points, however you want to frame them, now. The parties will have a far better understanding of them than I do. But they would certainly include the question of a regulatory stay, as mentioned earlier; whether the regulatory regime displaces in whole the competition jurisdiction; whether the remedies sought are available at all given the regulatory regime or whether they exist in an attenuated form; and whether the existence of a theoretical parallel regime not exercised precludes the jurisdiction of the Tribunal. That's really a series of formulations of what is essentially the same point, but there may be other formulations and other points yet to be articulated. But we think that these points need to be articulated now.

Turning to the second large issue that would need to be determined or at least

discussed at the substantive certification hearing, that is the role of Ofwat. Ms Boyd, we are incredibly grateful that you are here and incredibly grateful for your submissions because you don't have to be here but it is really hugely appreciated that you are.

So we are very grateful to Ofwat for instructing counsel. Of course, we are very sensitive of the importance of protecting the integrity of other types of proceeding, particularly regulatory and in criminal types of proceeding, and that is something that we consider also needs to be aired at the substantive certification hearing.

I will make a few general points, but this is really intended to articulate what's on our mind rather than how we are going to go about deciding matters.

So our starting point, which may in itself be controversial, is that these parallel proceedings, or theoretical parallel proceedings, are not rivalrous but mutually supporting, and that the integrity of one process is actually supported by the other processes properly conducted. The mere fact, in other words, of parallel proceedings is not preclusive of collective proceedings.

One of the things we want to achieve is an active articulation of how different proceedings interact so that problems can be identified, resolved as appropriate, and if they can't be resolved then a stay considered. So that's how we see things operating.

The reason for that is not only speed, but also the fact that a stay, particularly of collective proceedings, needs to be closely justified given the public interest in the most literal sense of such proceedings and the classes' own Article 6 rights.

So that is our general sense of what needs to be debated in September/October if that's when we go for it.

We would also add that there may very well be synergies between different types of proceeding. For example, I would expect disclosure, if we get that far, in these

proceedings to be a pretty straightforward issue, because the respondents will have done a great deal of work as part of the regulatory investigative process.

I am not suggesting that Ofwat provides disclosure, what I am saying is that the respondents as part of the investigatory preparation will have their ducks in a row, and we anticipate the disclosure can be done pretty fast. But equally, looking the other way, we would invite Ofwat, if appropriate, to seek relaxation of Rule 102 in these proceedings -- the collateral purpose rule -- if so advised. We see no difficulty in disclosure in the appropriate case being transferred over, if it is needed, into Ofwat or the Environment Agency's own processes, and that, it seems to us, is precisely the sort of synergy that we ought to be considering. Again, I am not saying that's what we are going to do, I am saying that's what we want to talk about doing if it is appropriate.

So these are all matters for the substantive certification hearing. Obviously embraced in this would be Ofwat's role going forward, assuming certification, and Ofwat's costs. We have heard what you say about that, Ms Boyd. Again, not for today but something we have well in mind as needing articulation.

But looking at matters more generally, we would be quite surprised if this were the only time this interface between collective proceedings and regulatory proceedings were to raise itself. It does so particularly clearly here but it is obviously a general point of concern and one that we would want to get a grip on. So that is the sort of second big area for discussion at the substantive certification stage.

Two final points. First of all, costs of the respondents. We consider that the Tribunal would be assisted by a single response to certification from the respondents and not multiple mutually supporting and cooperatively drafted responses. I say that having had that view reinforced by reading the skeletons. The skeletons were crafted cooperatively, but frankly it would have been much easier for us -- I appreciate not

easier for the parties -- to have had one set of submissions from the respondents -- obviously Ofwat is a different kettle of fish, that is understood -- but it would have been helpful to have one set of submissions and fewer individual responses.

We are not going to lay down a directive, but I think our provisional thinking should be clear that were one at the end of a certification process to be contemplating a costs order against the class representative, our present thinking is that there would be only one set of costs recoverable, albeit that those would be assessed on a generous basis. If and to the extent that separate submissions or evidence would be required for certification, then we would suggest that be raised in advance of the certification hearing with the Tribunal so that the need for that can be discussed in advance rather than in arrears. That again is a provisional indication but we would invite careful thought to be given to that.

Lastly, Thames Water. We are not in favour of a stay at this point. Given what we have said about representation, we see no reason why Thames Water cannot be a party to and subject to the certification hearing. What happens thereafter, who knows. But if there is an insolvency situation, as well there might be in the case of Thames Water, then a certified claim may assist in proving the insolvency in any event. So we would want Thames Water in rather than out at this stage. Of course, that would be a matter for further consideration at the certification stage because there will be individual costs, particularly concerned with the ascertaining of infringements of the regulatory regime which probably would require separate representation and therefore separate costs being incurred.

So that has been a rather long spiel. I would invite anyone to push back now, but we certainly would be minded to give you half an hour, maybe three-quarters of an hour -- if you want more, say so -- in order to discuss and work out how far you want to push back on these things because we do welcome the push back. That's

very important to us.

I don't know if anyone has anything to say.

MR THOMPSON: Mr President, gentlemen --

MR WILLIAMS: Sorry to interrupt, I am told that the audio is not working on the live stream. I am sorry to interrupt.

THE PRESIDENT: That is unfortunate. We will look at that when we rise. We will try and promote the awareness to a resolution, but we will not hold things up. Sorry, Mr Thompson.

Submissions

MR THOMPSON: I make one observation which I suspect the Tribunal may not find the most exciting observation. It is simply that I am personally in some difficulty in the first half of October. So that will be a difficult period for me. But, otherwise, I will obviously take instructions from my clients about these very helpful observations and revert in due course, if I may.

THE PRESIDENT: I am grateful. Well, diaries are always the biggest problem in these things. And those were indicative dates. We will obviously want to work around the convenience of counsel, particularly I think on the class representative side because you are only one team. But at the end of the day we would say that speed trumps --

MR THOMPSON: Indeed, the second half of September would be fine.

THE PRESIDENT: That is a very helpful indication, Mr Thompson.

MR THOMPSON: I am grateful. Otherwise I will leave it to my learned friends if they want to say anything else.

THE PRESIDENT: I am very grateful.

Mr Hoskins.

MR HOSKINS: It reflects something that we raised in our skeleton, which is obviously we want the preliminary issues or strike-out to be effective and I assume from that sort of amalgamation/hybrid, what we are trying to avoid are arguments that you can't decide a novel issue of law because it is a strike-out. So you are asking us to craft the issues and to craft a sort of hybrid of the two which makes sure that, insofar as you want to decide things, you can decide them?

THE PRESIDENT: That's exactly it. Because I can see some issues will be just determinative and they will kill the process off. The notion that there is a regulatory regime which in itself is self-standing, independent of and preclusive of a competition action is a point we obviously have in mind. If it is that that we are arguing about, we would obviously want to say these proceedings can go no further, that's it.

There are obviously halfway houses where it may be that it isn't a driving a stake through the heart of the action that occurs but it's a kind of partial dismembering, if I can be that graphic, in which case the action proceeds but in a different shape.

So we want to have all of the options available, including strike-out of the whole thing, but including also, of course, shaping the action and allowing it to proceed in a different way, but yes, that's what we want.

The other thing to bear in mind is almost certainly this would be going on to appeal. I can't see that being controversial. I suspect it is one of the points that everyone will agree on. So that's something which has again factored into our thinking about certification before stay. Because when we've rendered judgment on the points that are difficult here, we will have a year when the appeal process is unwinding.

MR HOSKINS: That's very helpful, thank you.

THE PRESIDENT: Ms Howard.

MS HOWARD: If I can just ask a question of clarification on the single response and how that would work for the parties in practice.

THE PRESIDENT: Yes.

MS HOWARD: Because there are what I call specific facts for specific water companies. Obviously there are confidentiality issues of combining such issues into a single response between competitors. Also the sensitivity of ongoing regulatory investigations. So if there was a single response, would there be the facility to, say, have confidential annexes where we could raise individual facts for specific operators? How would this flow into experts? Because the parties have adopted different approaches as to whether they use economic experts or regulatory experts, or perhaps forensic accountancy. Is this direction extending to a single expert report as well, or will there be the opportunity to present different disciplines if we feel that would assist the Tribunal?

THE PRESIDENT: First of all, are you talking about the certification stage or the post-certification stage?

MS HOWARD: I am talking about the certification stage.

THE PRESIDENT: So post-certification, we are saying nothing at all. Because we quite see that there will be different factual emphases which will require a degree of independent assessment. But pre-certification, we are giving a pretty firm steer that we are not going to be helped by multiple approaches to what is essentially the same question.

Now, we are not saying no. Matters are clearly too complex for that. But we do think that the issues that we are striking out on -- or not striking out on -- if they are to be struck out, they are going to be generic. In other words, we are not going to be in the situation where one party, by articulating a subjectivity that is unique to it, is going to be able to spring free from the certification process. That seems to us to be a pretty unlikely state of affairs given the generic nature of the various claims that have been articulated.

So we do think that the steer we are giving is a very firm one that we want one response. Now, it may be that there is a lowest common denominator approach where one set of parties are putting all their faith in the economist and another is putting all their faith in an accountant or a regulatory expert. In that situation, we certainly aren't going to say you can't have your regulatory expert or you can't have your accounting expert as well as your economist. But we don't want five economists. I love them dearly, but we don't want five economists. We don't want five regulatory experts. That's just not going to help us.

So to that extent, we think that the steer we are giving is quite a clear one. We stand open -- because we are not making orders -- to the parties raising with us points of detail to say, "Look, this is what we want to do, here's why, how unhappy are you going to be about that?"

That's something which I think we should have as a dialogue, but in the first instance I think the parties do need to think very carefully about how they can best put their case. Let me be clear, I think it is in the advantages of a crisply-framed argument that this could be done. Whatever happens post-certification, assuming we do get so far as a post-certification phase, whatever happens then, a monolithic position from the respondents makes their case stronger. Because we are in the realms of certification of general and rather similar claims which raise general and rather similar points, and as I said right at the beginning, it would be extremely odd if we refused to let through respondents one through four and said no, we are going to certify against five. That I think would be a remarkable outcome given the way the points have been phrased.

Now, if I am wrong about that, I am sure you will tell us in due course. But I don't think I am wrong about that.

MS HOWARD: We will take instructions and come back. There may be issues

about the evidential basis for the claims. A large part of the claims at present are extrapolating from the position of two water companies and then extending that analysis by analogy to the position of other water companies. But there are very specific facts and differences between the water companies.

I am speaking without instructions, but there may be -- we need to take this away and discuss -- specific facts that we need to raise at the certification stage.

THE PRESIDENT: That's the reason I have raised it. But let me be frank. If one is talking about a strike-out on a factual basis, that you just don't have the wherewithal, the standard is astonishingly low. You have to properly plead it. Pleading by inference is something which is perfectly permissible. You are right, if you are running a strike-out on that basis, then I can see some argument for an individual approach but I think I would be not being frank with you if I didn't say you didn't have better points.

MS HOWARD: That is helpful. We will take instructions and come back after the break.

MR JOWELL: We are also very grateful for the opportunity to take instructions. Before I do, may I just completely clarify my understanding on two points. Forgive me, because I think you have made yourself clear. But I just want to double-check. The first is that whilst you are against a stay application pre-certification, you would envisage that arguments for a stay would be heard at the October or September hearing?

THE PRESIDENT: Yes. To be clear, it seems to us that it would be unfair both to Ofwat and to the respondents not to have that firmly in mind as a matter for debate.

Essentially, for the extended certification hearing, the reason we have four days is not because we regard the vanilla certification questions as difficult -- and we regard Ms Howard's point as a vanilla certification point and not difficult -- I may be wrong

about that, but that's the present take -- the reason this is difficult is, first of all Mr Hoskins' point, do we just have to kill this off at certification? Is it not capable of certification? But as important, but logically secondary, even if we are minded to certify because the regulatory problems are not case-killing, does one then say because of the interplay between the two regimes that a stay is appropriate?

I have indicated that we don't like the idea of stays. That is obvious. No tribunal does. But that's when we want to debate it. So it would be, as I said earlier, certification then stay, not stay then certification because all we are doing then is building in delay for no good reason.

MR JOWELL: Understood. I am grateful for that clarification. May I ask another point which maybe has been less explicitly covered, which is to what extent is the Tribunal open to other potential preliminary issues or preliminary points for determination at that hearing?

So, for example, in addition to the points that Mr Hoskins has set out in his skeleton argument, there are other points of principle that could potentially be very important if the matter were to go forwards. So, for example, the question of what mens rea is required in relation to misleading the regulator, which is the allegation. So, for example, is it sufficient that the regulator simply is factually misled, and it is irrelevant whether there is any intent -- deliberate intent -- or even negligence, or whether there is some intent requirement or at least negligence or recklessness requirement? That's sort of an issue. Is that the sort of preliminary issue that the Tribunal would also be open perhaps at least to determining on that occasion?

THE PRESIDENT: Mr Jowell, it is certainly open in the sense that we are approaching this from a pretty low threshold of understanding.

So I would certainly welcome the identification at least in general terms of that sort of point. My instinctive reaction is that one might want to contemplate an articulation of

the two big areas for certification, which is the interplay between regulation and collective proceedings and the interplay between collective proceedings and stay. Those, it seems to me, fall within the certification area. Whether one would be better off having the point that you have raised dealt with with those, or at a separate strike-out preliminary issue hearing coming later on, or at trial, is a matter that I think is quite difficult.

My gut reaction -- and it is purely that -- is that you'd probably want to have it as a preliminary issue but detached from certification. But that's very tentative. So the answer is yes, the door is certainly open to other points, but I think the parties ought to bear in mind that we don't want to overload the four days and the point that you have raised might -- maybe not -- be coloured by how we decide the regulatory collective proceedings interplay. I don't know whether that wouldn't feed into it.

MR JOWELL: From a procedural point of view, would it be helpful then if we were to seek to liaise over these 14 days and then if we were to come up with a list of preliminary issues and the Tribunal will then determine which will go forward in October and which won't?

THE PRESIDENT: I think that will be helpful. If I may, again shooting somewhat from the hip, suggest that you articulate the ones that really -- I don't think I am sensing any pushback but it may come and please do push back if appropriate - I am not sensing that the idea of the preliminary issue strike-out certification points that we've articulated all ought to be dealt with as one is an issue. It's more the framing of them. I think it would be then helpful to have, as it were, separate “less related to certification” questions articulated in the fortnight. And then have the debate on “do they fit in, ought they to fit” in the first hearing, ought we to extend the four days to six, or ought we to say no, let's get these issues which are very closely aligned for certification done first and then deal with matters which are important

case-shaping and nevertheless not so closely attached to certification as to require being done then.

So I am absolutely with you on the example that you have raised that it would be unfortunate to have that discussed at trial.

MR JOWELL: Yes.

THE PRESIDENT: It seems to me that is pretty clear, but I am less clear as to whether it belongs right at the beginning. I think we have quite enough to be getting on with. My sense is that I would be assisted by a very good understanding of the regulatory regime before I approach the question of mental state, rather than doing it all in one go.

MR JOWELL: I am grateful for that indication. Thank you.

THE PRESIDENT: But the door is certainly open, that's the short line.

MR JOWELL: The door is open. Thank you.

THE PRESIDENT: Mr Harris?

MR HARRIS: Mr Harris for Anglian Water. I have a much more mundane point, I am afraid. Speaking from experience, if we are given half an hour now, we may well be able to take instructions from our own clients. But there are five water companies represented. If you give us more time, we may then be able to liaise and come up with a more streamlined manner of presenting our reactions. May I request 45 or 50 minutes? I suspect that will end up being more efficient.

THE PRESIDENT: That's absolutely fine. Let's go for 50 minutes. I know the parties will do their best to co-operate but there are a lot of you and these things always benefit from more time. So take 50 minutes. And if you need more, then speak to the staff and we will certainly accede to it.

MR HARRIS: I am most grateful, thank you.

MR THOMPSON: I don't want to take up more time --

THE PRESIDENT: Not at all.

MR THOMPSON: -- but on the question of the formulation of any strike-out or preliminary issue, it does strike me that in the end that is likely to be initiated by this side of the Tribunal and that our team and Ofwat indeed may have comments on what's proposed. So I don't know whether that needs to be built into the timetable. But we can obviously think about that over the 50 minutes. I am just raising it as a rather straightforward issue.

THE PRESIDENT: I don't want to get into the sort of argument as to whose application it might be.

MR THOMPSON: Indeed.

THE PRESIDENT: It does seem to me that there is a definite common interest in getting these points fully articulated. Because what I would not want to have happen -- I am sure it wouldn't -- would be for a point that was fatal to your case, if it went one way but not the other, being left off by the respondents so that they had something to knock you on the head with at trial if everything went wrong, which you could include.

So I see this as a necessary process involving the applicant as well as the respondents to make sure we have a comprehensive list of points which, frankly, I think the points will be susceptible to different points of articulation but they are really all going to go to the same area of the nexus between regulation and collective actions. So I see that as a respondent/applicant cooperative venture.

Similarly, Ofwat, it seems to me, on the stay questions you will have to be fully engaged in order to ensure that the issues as framed in a manner that Ofwat is happy to deal with and are dealt with in that way.

We don't have any problem in issues being differently framed. You might say, well, the way we see the argument is this way and the way someone else sees the

argument is that way. That's fine. It's not going to add any time to the argument if you have different ways of framing the same point. We welcome that. So I don't see this as a difficult document to agree. I see it as a way of setting the agenda as to how the arguments might go.

MR THOMPSON: I don't want to delay things, so perhaps we should come back at 12 o'clock?

THE PRESIDENT: We will say midday.

MR WILLIAMS: May I ask one thing? Rob Williams for Severn Trent. We are very grateful for your preliminary indications as always.

You identified a possible hearing in September/October. That is somewhat earlier than we had thought we were aiming at on this side of the court. Could I ask whether there are other potential windows in that term before we all go away and talk about what might be doable? Because we don't want to tilt at windmills to come back with a proposal and then find it is not convenient to the Tribunal.

THE PRESIDENT: I understand. The short answer is end September/early October was picked partly because it seemed like a fair but swift time for dealing with it, but it will come as no secret to you or anyone in this room, that I have Interchange II, the sequel to Interchange I, coming up in that term and that is occupying November/December, I think. I think it bleeds through into January the following year. So we did pick September/October as a date with that in mind.

So I think so far as 2024 is concerned, it is probably that window. For obvious reasons, we don't like anything ending in a 5.

MR WILLIAMS: Yes, I have now worked out what that means, thank you.

So far as September/October are concerned, we heard what Mr Thompson said, but from the Tribunal's point of view, could it be anywhere within the October month?

THE PRESIDENT: I will get further crystallisation of my own diary in that regard. My

sense is that the latter half of October is less good than first half, simply because of the writing of the judgment because I would want to get it out before embarking on the joys of pass on, but we will have a look at that.

I think I should say, for obvious reasons, that whilst we would have some regard -- I am not saying how much -- to counsel availability on the applicant's side, we would be rather less accommodating on the respondents' side simply because of what I said earlier about duplication and you are all coming from roughly the same direction. So although of course I would never dream of suggesting that you are fungible, you are fungible. So I hope that helps.

But I will get more clarity on October so that we can have a more informed debate later on.

MR WILLIAMS: That's understood, sir, thank you.

THE PRESIDENT: Thank you. In that case we will resume at midday but, Mr Harris, get word to us if you need more.

Thank you very much.

(11.11 am)

(A short break)

(12.01 pm)

THE PRESIDENT: Mr Thompson.

MR THOMPSON: Sir, I think our response is relatively brief. We are content to discuss the timetable for the service of the preliminary issues and, as I think I indicated before we broke, it seemed to us that, certainly insofar as this is a possible strike-out, it is probably more in the respondents' court than ours, but we are happy to contribute. We have obviously seen the two suggested issues that Mr Hoskins' clients put forward and indeed we have commented on them in the letter yesterday.

So if that's it, then we can go forward on that basis. If there are other points, as I think Mr Jowell and Mr Williams in particular suggested there might be, then they could obviously say what they are in slightly more formal terms than they have done already.

Otherwise, it seemed to us that it was largely a matter of working out a sensible timetable for the hearing including pleadings. It seemed to us if the Tribunal's indication is that they wish the hearing to go ahead in good time in the autumn, then that probably means that our reply needs to be served in the second half of July and the responses need to be some time before that, but beyond that I am not sure there is a lot more I can say, except possibly that as I understand it, given that the Tribunal is indicating that the preliminary issues/strike-out issues, will be a core part of the hearing, all of that will need to be addressed in the response, or possibly responses, together with anything that may be relied on of the kind that Ms Howard indicated.

If there is any evidential material that the respondents wish to put forward, that needs to be all in one place together with any expert evidence that they may wish to put forward. I think that probably goes without saying. Beyond that, I think we are to some extent in the hands of the respondents.

THE PRESIDENT: That's very helpful.

MR THOMPSON: If there is anything else you would like me to comment on now, I am very happy to do that.

THE PRESIDENT: No, that's very helpful to know that there is a broad measure of agreement.

Let me just say this: first of all, I think the timetable we would be minded to take offline and leave the parties to thrash out an agreed proposal which we would then review and resolve on any disagreements after today, provided everyone knows where they are coming from. Everyone is very sensible. We don't, I think, think it is

profitable to have a discussion -- a sort of six- or seven-way discussion about that. In terms of issues, we do think that Mr Hoskins' point about not wanting to go down the perils of strike-out with its asymmetries but going down the route of genuine preliminary issues that gives the Tribunal a full range of options is one we would want to stress in terms of the framing of the points but that is again a detail which I think we would want to take offline. So those are all points well-made and helpful. Perhaps I will hear, Mr Harris, from you and any other respondents, and then from Ofwat, because you are, I think, sort of secondary in terms of the stay and the regulatory interface.

MR THOMPSON: Yes, I think the only other point is I think Rule 79.4 makes express provision for issues of this kind to be raised, so we would anticipate that broadly speaking that would be the correct procedural route for these points to be raised. I have heard what the Tribunal says about timetable, but I think we do think that in some cases at least, if we serve a reply dealing with all the points, there may be some advantage in having sequential skeleton arguments rather than us saying the same things again without sight of what the respondents have to say.

THE PRESIDENT: I can see that.

MR THOMPSON: But that's a point of detail.

THE PRESIDENT: Frankly, one of the advantages of raising this as early as March is that there is room enough to ensure that no one is disadvantaged by, as it were, sequential approaches, if that's a sensible way of going about things. We have ample time to get a timetable locked down and clear. I think that's very helpful.

MR THOMPSON: Okay, thank you very much.

THE PRESIDENT: I am very grateful, thank you.

Mr Harris.

MR HARRIS: Sir, can I begin with the good news and a thank you to the Tribunal.

Thank you for the extra time. We have been able to liaise.

I am standing first and I am hoping I am going to identify some points upon which all of the front bench for the respondents are agreed. Obviously if I put my foot in it, one of them will stand and correct me that it is not their position or there is a nuance.

This is the good news. We have heard loud and clear what the Tribunal has had to say about a joint response. There is no pushback about doing a joint response with this caveat. If it seems sensible to do a core joint response -- and that may well be the bulk of the issues, one doesn't quite know at this stage -- but plainly we would like to reserve the position that if, for example, company A or company B had bespoke points, factual or possibly confidential, possibly couldn't be -- all of that would have to be dealt with separately.

The good news is, no pushback on joint response.

The same would go for the skeleton. The skeleton would be a core skeleton subject to addenda and bespoke points and that type of thing. Just for the sake of the record, I anticipate with respect, sir, that when you made the comment about very provisional views on the costs of a response if it was duplicative or if there was more than one, I anticipate the Tribunal did not mean disallowing the cost of the backroom teams that fed into the joint document, because plainly they are all always going to be different, but would be not so keen to allow costs of written documents if they were duplicative. Is that a fair –

THE PRESIDENT: That is a fair point. I think I need to make clear that there is no sense in which we were making even a provisional order. We were giving an indication as to how we would, after the event, assess costs. We are not ex ante imposing any regime. What we are doing is articulating expectations. I, for my part, would not be pushing back very hard on how you framed it, with a core common response but recognising that there are differences between the parties.

I would only say this in addition: that if, and to the extent, there is a difference of views as to whether there is a difference or whether there is a core question, it might be helpful to just raise that with the Tribunal to enable the Tribunal to assist on how it would be best assisted in the points being presented. But apart from that, I think we are on the same page.

MR HARRIS: I am very grateful. So that's the first piece of good news. Subject to me being corrected from my right.

I think I speak on behalf of all of us, the second piece of good news is there is no pushback in the sense of nobody here now is going to seek to persuade the Tribunal that there should a separate advance application for a stay hearing in advance of any CPO hearing that gets listed.

I am going to suggest in a moment what we say about the listing of that hearing, but I am certainly not going to try to persuade you that we should have a separate advance hearing of a stay application. We can see the sense of putting that together with the CPO issues whenever that gets listed.

THE PRESIDENT: I am grateful.

MR HARRIS: The third piece of I think at least semi-good news is that we take the suggestion that was mooted about putting forward a compendious list of I will call them now preliminary issues but by that I mean any issue of law, in whatever type of format, whether it be summary judgment, whether it be strike-out, whether it be a true preliminary issue, all the sorts of things that have been mooted in the skeleton that we were talking about this morning, we respectfully suggest that had it been, say, only one respondent, that might be something that the timetable that you were talking about is capable of being done in 14 days, but because it is likely to be more productive if there is liaison, we ask for 21 days.

Within that period, again subject to those on my right saying actually for some

particular reason they need more time, my understanding is that 21 days would do it. We would aim in that time to liaise with Mr Thompson and his clients too. Because the idea would be to try to put forward a list of the serious possibilities for that type of legal issue.

THE PRESIDENT: Exactly so. Erring really on the side of over-inclusion.

MR HARRIS: Yes.

THE PRESIDENT: Because I think we are all nibbling at the same basic issue. The way in which the parties see that basic issue clearly varies when one just looks at the written submissions but it is different ways of killing a cat that we are really talking about. We would want them all to be framed rather than one in preference to another.

So that seems helpful.

MR HARRIS: So that's three matters which I characterise as good news. It is not, of course, as though I am about to delve into bad news, it is a different genre of submission I am about to make.

THE PRESIDENT: You are dressing it up very nicely, Mr Harris, if I may say so.

MR HARRIS: The proposal that was mooted of having a CPO hearing for four days with one in reserve, possibly end of September/early October faces, in our respectful submission, presents some difficulties.

What I would like to identify for the Tribunal are some conceptual difficulties. Again, I am sorry to say this for the third time but it may be that others of my colleagues have a slightly different perspective. We have done our best to liaise -

THE PRESIDENT: That's understood.

MR HARRIS: Conceptual difficulties. Then there will be a separate category of observations that we would like to make about timetable and sheer fitting it in in a fair manner given all the things that would need to be done. That I will leave to others.

I am going to identify, if you like, four or five conceptual difficulties.

Where this is leading to is a submission on my part that we think it would be more sensible to have a longer CPO hearing in January. I am told -- though obviously this can be checked -- that Interchange II may be November/December but not January or February, and then there is another listing of it in March. I am only saying that, if you like, by way of hearsay but that's what I've been told.

So the conceptual, if you like, difficulties for doing it with four days with one in reserve in -- I am going to say October, everyone knows what I mean, end of September --

THE PRESIDENT: I understand.

MR HARRIS: -- as opposed to January are follows.

You may not have seen it but Messrs BCLP act for Thames Water. They are not represented by counsel today for obvious reasons but Mr Leitch is in court and his team have written a letter, which I now have in front of me, to the Tribunal and copied to the parties.

May I summarise what I understand to be the key points in it?

THE PRESIDENT: Please do.

MR HARRIS: Again, I will be corrected if somebody else is reading this whilst I am on my feet and I get it wrong.

Thames Water has not even been served with a claim form. So, for them, it presents a really profound difficulty to get up to speed to defend in the manner that was mooted substantively, let alone with all the other possible legal issues that would be added in by late September or early October. It is a sheer fairness point. They have not even been served and yet the suggestion is they now play a full part.

We respectfully concur with that. We see that as being a real difficulty.

I did know this, and I expect it is said in the letter, that in the case of Thames Water,

there is a different expert who is being retained by the PCR against Thames Water, and one doesn't know but presumably that results in some differences.

So, again, there is a fairness issue on their behalf. I don't act for them but I think it is only fair for me to begin by saying that one of the conceptual difficulties is that if Thames is to be involved, then they face that difficulty and we see the force of it.

That is issue number 1. These are not intended to be ranked.

But issue number 2 that I have on my little list is that in reality, let's say the case were to get certified, then the trial of that case has to be a long way off on any view. That's really because of the ongoing investigations, the Ofwat investigation, and in particular the EA investigation. You have seen in the skeleton arguments that although they are progressing, they are progressing at different rates for different people and they are not coming to a conclusion by the end of this calendar year, or very likely not, and certainly not for all people.

What that means, in my respectful submission, is that the actual trial of any collective action, were it to be certified, is probably quite a long way off. In that sense it takes the pressure off, in our respectful submission, having a, with respect, rushed hearing, particularly if it is not for long enough, a point I am about to develop, in, say, September/October.

The difference between, say, October and January is not much if you consider that, were the case to be certified, the trial has got to be a long way off. And that is for all the usual reasons about how one would not want the trial of this action to step on the toes of or let alone to prejudice any of the parties who are still being investigated.

I also take on board what Ms Boyd has said in her skeleton argument, at least on behalf of Ofwat, that they have to be extremely careful about how they proceed if they are involved in a collective action that moves forward, including with disclosure and submissions, whilst at the same time they are carrying on conducting a set of

regulatory investigations. At least as regards some people. That must apply in spades as regards the Environment Agency for the additional reason that that is a criminal action.

So it is very important that none of the respondents are prejudiced, let alone forced to engage in something that might be itself incriminatory or that infringes the privilege penalty. All I am really saying now is that because of those ongoing investigations and their timescale, the trial, if certified, is quite a long way off. It takes the pressure off from feeling the need to do something in September/October.

THE PRESIDENT: That is rather anticipating what the outcome of these issues might be. Because I quite understand that Ofwat and other involved regulators might have a great deal to say about the interplay between collective actions and other forms of investigation, but I wouldn't want you -- any of you -- to think that that has been prejudged. I mean, clearly that is something about which Ofwat would have a great deal to say. I don't see it as an automatic indicator that we are going to put a trial of the collective proceedings off until the regulatory investigations have been concluded. That may be the outcome, but it's not something that I am prepared to say is the automatic outcome.

More to the point, however, is that I do think that it is likely to be a cause of delay that what we say at this beefed-up certification hearing is likely to be appealed. Now, that I can see is an issue. One might be able to do things working towards a trial whilst an appeal is going on, but it would be quite difficult to synchronise those two streams. But that in itself is a pointer towards an early resolution of these matters so that the appeal can be got in play faster.

MR HARRIS: Shall I just run that example --

THE PRESIDENT: Please do.

MR HARRIS: That's my next one on the list. It is really this. We see greater merit

for exactly -- or at least speaking I think on behalf of at least some of us -- we see greater merit in having all legal issues that do arise with the involvement of Ofwat to the extent they feel able to do so, and potentially the involvement of the Environment Agency to the extent they feel able to do so, in a properly listed hearing that is not -- I would use this phrase -- we say crammed into September/October.

I make a couple of points in this regard. Let say for the sake of argument there are four or five meaningful legal issues. You have already seen some of them in the skeleton, the so-called competition issue, the Marcic issue, we have this issue that Mr Jowell has identified about what are the proper contours of an *AstraZeneca* misleading type claim and what have you. Some of those issues, if they are properly to be characterised, as we believe they are, as preliminary issues properly so-called, they will require evidence. That is obviously part of a preliminary issues trial. It is conceivable it might require cross-examination.

Take Marcic as an example. Marcic, on our side of the fence, would involve some of the respondents, perhaps all of them, saying, well, what this case properly characterised means is that we would have to spend a lot more resource and money on this type of monitoring in these types of places with these types of pipe, with this type of staff, and it would cost X and Y and it would interrupt Z and A and B and the counterfactual would look like the following. Whatever you say, that certainly requires evidence. It might be contested. That lends itself in favour of a longer time estimate than four days with one in reserve, particularly if we are going to do several of these issues.

I accept that some of them might not require evidence. But if there are going to be several of them, together with what we were calling earlier the vanilla CPO issues, that may well take us beyond a week. To pick up your point about the appeal track, we, on behalf of Anglian, respectfully suggest that it would b, p.3 e better to have all

of the issues dealt with at this one hearing, which I suggest may be bigger than one week, in January so there aren't twin tracks of appeal. It is one thing to say some of these issues might precipitate an appeal. We agree. That must be highly likely. But it is another thing to say that you might pick, say, two of them for a hearing in October and then they get appealed in November and set off on one track but then, if the case is certified, there are issues 3, 4, 5 and they don't even get heard until, say, March next year and then they're appealed, before you know it you have a bifurcated non-synchronised appeal track. We respectfully suggest that the Tribunal should pay careful regard to perhaps having a bigger hearing with all of the issues ventilated with facts and evidence, and if necessary cross-examination, and then if and to the extent that any are going to be appealed, they are all appealed together.

That is, to coin a phrase from Mr Jowell's, I think, skeleton, "more haste, less speed". You end up not being delayed by the appeals further than you would if you did it in two separate hearings.

I add to the mix the following point. Again, militating against a hearing of the sort of shorter variety I say crammed into, say, October is that come June it seems clear from the skeleton arguments that we are very likely to have a lot more public information, at least from Ofwat, as regards the decisions that are made at least to some of the respondents. Not all, but some. That's what seems most likely.

What that would mean, then, is that then instead of trying to -- I appreciate others on my right are going to deal with what we say are housekeeping difficulties for a hearing end of September and October - But it would mean that if one doesn't receive that sort of information from Ofwat, which on any view is going to be relevant, one doesn't then have a terribly crammed timetable leading to an October hearing including during August. If instead the hearing were to be a slightly longer one to encompass all issues without the danger of the twin appeal track then that

could be taken into account following June. We are only talking a difference of a few months, instead of --

THE PRESIDENT: How much longer are you looking for, for January?

MR HARRIS: No, I am saying January --

THE PRESIDENT: No, no --

MR HARRIS: I see, yes. Eight to ten is my provisional estimate. More than a week is what I am driving at.

THE PRESIDENT: Yes, I see.

MR HARRIS: I think that would be the sensible -- the other aspect of Ofwat making available publicly more material that is bound to be germane on any view, even in the PCR's claim form there has been a suggestion that we would take into account what Ofwat reveal when they reveal it, it gives rise to the difficulty that would otherwise face this Tribunal of repleading.

Let's say you are not with me. You say we will have a shorter hearing, I say crammed into October, but then the landscape changes in June for all of us. Then the pleadings that by definition will to some extent have to have been done and the evidence prior to June in order to facilitate a hearing in October, they will then have to be repleaded. That, we say, doesn't promote efficiency and is actually not that helpful for the Tribunal. You will end up getting amendments or different documents and it won't be as coordinated.

So, those are the key -- that's, if you like, by my categorisation five conceptual reasons why it might be better to not cram a shorter hearing into October and to go instead for January.

I am going to pause there, unless you have questions for me. But the sixth category will be developed by others. Which is if you're not with me on that, really it is very, very tight and we think it would be more sensible and fairer at a later date or at any

rate if it is not to be a later date, we need to carefully manage that process.

So unless I can assist further, those are --

THE PRESIDENT: That's very helpful. I am very grateful.

MR HARRIS: Thank you.

THE PRESIDENT: Anyone else on the respondents' side to deal with non-repetitive points?

Ms Howard.

MS HOWARD: I would concur with my learned friend's submissions about the risk of repleading. We did flag in our skeleton that similar issues have arisen in the Boyle CPO, where there has had to be a change to the class representative's case because of supervening events. If we were to look at a timetable that proceeds with pleadings after the list of issues, for example, if there was a response due in mid-June, we may very well have, hot on the heels of that response, potential decisions from Ofwat. It may not just be a case of being able to address those findings in a supplementary submission. It may be that the proposed class representative has to go back, reconfigure their abuse or reconfigure their theory of harm and feed it into their methodology. Then we are into wholesale repleading of responses and replies. The PCR would not be able to address Ofwat's decisions in a reply, for instance, and a short supplemental pleading might not be possible if they needed to submit additional evidence.

So we would support my learned friend's submissions on that point.

The other point is just to flag for the Tribunal's benefit, in Gutmann v Boyle, I think the Tribunal did have a kind of regulatory teach-in -- we have flagged this again in our skeleton. We wonder whether it would help the Tribunal to have a regulatory statement or overview of how this regulatory regime works and how the price controls work? You might want to build time into the timetable for the parties to

agree a version of that statement for you, if that would help give you, you know, some illustrative guidance of how the cost stack and incentives work and the other considerations that are taken into account by Ofwat.

But that again would need additional time.

THE PRESIDENT: Yes.

MS HOWARD: And we would reiterate again the invitation for the Environment Agency to participate as well. We take on board your comments about Ofwat's intervention, how helpful that is. We do think that the Environment Agency should participate in whichever hearing is set.

THE PRESIDENT: That is a matter for it.

MS HOWARD: It is. But I am not sure the proposed class representative has written to the Environment Agency. We have asked them but they have not come back to us as to whether they have been approached.

THE PRESIDENT: Yes, thank you.

Mr Williams.

MR WILLIAMS: Sir, we also favour a hearing early in 2025 for the reasons Mr Harris gave. In particular, we think it is in everyone's interests to broaden the range of issues to be tried at that hearing to try and establish the legal framework for these claims on a slightly wider basis. We agree with the example Mr Jowell gave in relation to mens rea. We anticipate there will be other issues of that nature which deal with the theory of harm and the elements that are required to establish an abuse on the current fact pattern, which we suggest ought to be dealt with as part of that trial as well. In part for the reasons Mr Harris gave about the difficulties arising from two appeal tracks, but it does also seem to us that those points may also have implications for the blueprint for trial and the triability of the action. Because insofar as the Tribunal decides that particular elements need to be established, one would

need to look at those as part of the certification question too.

So we would favour dealing with those issues and we are certainly closer to Mr Harris' estimate of something more like eight days than the three or four days that the Tribunal had in mind.

If you don't support a January hearing, we would favour the latest available date in the window the Tribunal provisionally identified. So we would favour late October to the extent that that is an option over late September. I understand that that wouldn't in itself cause particular difficulty for Mr Thompson.

You have said --

THE PRESIDENT: Why is that?

MR WILLIAMS: Why would we?

THE PRESIDENT: Yes. Why is that favourable?

MR WILLIAMS: You've said you are not going to make directions today, but obviously one needs to think about the shape of the directions.

THE PRESIDENT: Well, we are not going to make directions on certain matters, but we are certainly minded to get a date in the diary.

MR WILLIAMS: Exactly.

THE PRESIDENT: Yes.

MR WILLIAMS: You were not minded to make specific timetable --

THE PRESIDENT: I see, yes, indeed.

MR WILLIAMS: Obviously we need to think about the shape of those directions and that's what I am going to do.

THE PRESIDENT: I am with you.

MR WILLIAMS: As Mr Thompson said, what we are looking at is something roughly like a date in July for any reply and a date in June probably in advance of that for us to put in our responses to the CPOs, working backwards. Obviously we would then

need skeletons on the basis of that material --

THE PRESIDENT: When you say "responses to the CPOs", you don't mean that, do you?

MR WILLIAMS: I mean responses to the applications.

THE PRESIDENT: Yes.

MR WILLIAMS: I beg your pardon.

THE PRESIDENT: You are talking about issues that go to whether one certifies or not, not issues as to whether the claim is proper or not.

MR WILLIAMS: I am talking about the suite of issues that we are talking about dealing with at this hearing. So it would be certification -- to use your language, vanilla certification issues --

THE PRESIDENT: You are not talking defence?

MR WILLIAMS: No, I am not talking about a defence, I am talking about what you characterised as vanilla certification issues and then the expanded range of legal questions that we have been talking about throughout the course of the morning.

So that material has to be prepared. You have our submissions about the timetable for that. There wasn't an awful lot between the parties in relation to that timetable. We were proposing a date towards the end of June, Mr Thompson was proposing, I think, a date some time around the end of the first week of June. So we were always looking at June for that material.

Now the Tribunal has in mind that there will be a significant process of coordination in relation to that stage which will obviously take time in itself. It is a matter of spending time in the short term to save time in the long run.

That will take us into June, we then are looking at some date in July inevitably for the PCR's reply. My short point is really that one then loses time in August inevitably and then one has to put submissions in, in advance of a hearing which could be end

of September, could be end of October. The short point is it will be very compressed if we have this staged process in the summer and then the skeletons for the hearing to be prepared by very early in September for a hearing at the end of that month. That extra month really will make quite a big difference, sir. So if you are not with us on January, we would favour that sort of timetable.

THE PRESIDENT: I am grateful, thank you very much.

Mr Jowell.

MR JOWELL: We also concur with what has been said, and we certainly won't repeat it. But there is one point that maybe merits some emphasis because it is in a sense of a different order, it's not really one of the ordinary discretionary considerations but is something that really goes to fairness, and that is the position of Thames Water. You will have seen the letter. Not only have they not been served yet with a claim that will have a separate expert report, but they also make the point that they have not been copied in on the correspondence as between the parties due to the operation of Rule 102. So they are truly unsighted as to the nature of the issues that might go into these preliminary issues.

So to expect them to go from a standing start to either the identification of -- with no claim against them having been served -- the issues within a mere two weeks, and then to a hearing of all of these issues in September or October, is a very tall order, in our respectful submission.

THE PRESIDENT: I am very grateful, thank you.

MR HOSKINS: I think I am last in line --

THE PRESIDENT: I am sorry, Mr Hoskins.

MR HOSKINS: No, that is absolutely fine. We have had a panoply of arguments about what months. I will be perfectly frank, if it is a toss up between September and October, September is better for us and that is only because of availability.

I just wanted to make it clear that we are not all in the same position.

THE PRESIDENT: I am very grateful, thank you.

MS BOYD: Jessica Boyd for Ofwat. We found it very useful to hear the Tribunal's thoughts this morning and we have listened very carefully to what others have said, including about the scope of the issues that may potentially arise for some form of preliminary determination.

Our priority, as you know, sir, is to protect the regulatory process and to be able to drive that through to a timely conclusion in the interests of consumers. We are grateful for the Tribunal's understanding of that.

We are happy to participate in these proceedings and to assist to the extent we can, as long as that regulatory process can be appropriately safeguarded.

The position we had reached on that, as you will have seen from our skeleton, is that we see no issue with the Tribunal determining high-level in-principle points about the interface between the regulatory process, the regulatory regime and competition or damages actions while our process is ongoing. There may be issues we have not yet spotted but that's our current position.

It doesn't seem to us that determination of those points ought to interfere at all with us getting on with the regulatory job. We may or may not have observations to make on those points. We would be grateful for the opportunity to make them, we will consider our position when we have seen how they are put. And in any event, we consider we ought to be able to provide assistance in understanding the regime and potentially certain aspects of the factual context.

So we have no problem with the suggestion of those issues being rolled into a CPO hearing later this year or next year in which Ofwat can participate.

As regards the stay of the substantive claims -- the potential stay to make way for Ofwat's investigations -- you have seen we flagged in our skeleton some provisional

thoughts about things that might concern us if the proceedings were to progress in parallel and that might constrain our involvement. We hear what you say about potential creative solutions and the advantage of synergies and of course we will go on and think about our position in relation to those points. We appreciate we will have the opportunity to make any points we want to make on that at the rolled-up CPO hearing.

We respectfully agree that is not a certification issue, but a "what happens next?" issue, on which we will share our thoughts in due course.

The one point of complexity we wanted to flag on the basis of the discussion this morning relates to -- well, it was Mr Jowell's question initially, but it has been taken up by others -- about the scope of the issues that might be in play. Really, we would be grateful for the Tribunal's guidance or creative thinking on this issue.

Mr Jowell asked whether this would also be the forum for determining other preliminary issues such as the mens rea needed for regulatory breach. The Tribunal's response, if I have it right, was to express an instinct that those issues should be divorced from the CPO hearing itself but nonetheless be articulated as points for preliminary determination at some point.

Although, as I've said, we do not see that it would cause difficulties for Ofwat's process if the Tribunal were to determine high-level points about the interface, if I can put it that way, the position may be different from Ofwat's perspective if the Tribunal were to be considering on a preliminary basis issues of law that bear directly on what Ofwat is currently doing. In other words, if the preliminary issues include issues that go to the foundations of what it is doing or what it should be doing, and may indeed be live in those regulatory proceedings, or become live in them, then it seems to us that it is difficult for Ofwat to simply carry on with its enforcement processes knowing that those issues are live before the Tribunal.

Ofwat would have to be considering whether it could simply continue, and if it was going to simply continue, what the implications would be for regulatory certainty and other questions of the prospect of the Tribunal and Ofwat potentially making inconsistent decisions on those issues, or proceeding on different bases.

Now, what that means practically for the purposes of today, subject to the Tribunal's thoughts, is that we would support the Tribunal's instinct that the CPO hearing should be limited to the high-level questions that do not, as we see it, impact on what Ofwat is currently doing.

In relation to the issues of law that do potentially impact on what Ofwat is currently doing, we would respectfully want an opportunity to make submissions on that potential impact on our regulatory processes, even if it is just in terms of delay the implications of the Tribunal determining those issues in parallel to our processes before they are completed.

If the CPO hearing were to proceed on the sort of limited high-level basis, and then that were to be subject to an appeal, it is possible the issue may go away because the processes may have been completed.

THE PRESIDENT: What is the sort of aspirational timing for the completion of the Ofwat investigatory processes?

MS BOYD: Sir, I am afraid I can say no more than we have said in our skeleton already.

THE PRESIDENT: I see.

MS BOYD: Which is that we hope that those enforcement cases in relation to which provisional decisions have been issued will be completed by the end of the year at the latest. Ofwat very much hopes it will be sooner than that. We can't say more at the moment about the status of the other ones. There are cases that are subject to investigation not yet subject to enforcement action and then there are cases subject

to enforcement action but which have not yet had provisional findings made in relation to them.

In circumstances where Ofwat imposes heavy confidentiality obligations on the parties --

THE PRESIDENT: I don't want you to stray, obviously, beyond what you can properly say.

MS BOYD: Yes.

THE PRESIDENT: These are administrative decisions which are taken -- it is the Administrative Court for review, is that how it works?

MS BOYD: Sir, I believe it is a regulatory appeal to the Tribunal, but I may be wrong about that.

THE PRESIDENT: Yes. The trouble is it depends on which particular jurisdiction you are exercising. So there is clearly a parallel jurisdiction, but I think it rather depends on the jurisdictional basis of your investigation. So to cut to the chase --

MS BOYD: Yes.

THE PRESIDENT: -- it seems to me that there are a number of reasons why Mr Jowell's sort of point isn't really suited for a preliminary issue at the time of certification. My instinct was that one would need to understand the regulatory position before one goes into question like mental element. I just feel that rolling it all up into one is quite dangerous. So my instinctive reaction -- we will obviously hear what others have to say and discuss it amongst ourselves -- is that there is a great deal of force, leaving Ofwat's position on one side, in identifying preliminary issues that go directly to certification, your high-level points. But the nexus is not high level but to what extent do they derail a certification order that we would otherwise be making.

Then other points which are points which absolutely need to be determined before

trial, but which are not certification points. It seems to me that the mental element question is one that is absolutely something that needs sorting out before trial, but very much is a complication which we don't really want to attach to what is already going to be quite a complicated certification question.

On the other hand, the Ofwat points seem to me to point very clearly in favour of that course, in addition to the need to control certification. Because we obviously have some extraordinarily difficult questions which we have been debating in the abstract in the Tribunal for some time now. What does one do when one has a collective proceeding being dealt with in the Tribunal and the potentiality of an investigation which is itself appealable to the Tribunal?

Now, that is something which we have had theoretically in mind as being a problem. We have no idea what the answer is, but it is clearly a problem. Now, it would appear that we have a ready-made forum for debating these things. Without in any way suggesting what the answer might be -- because frankly I don't know -- it does seem to me that we ought to be dealing with the processes so that we have a template for at least debating the very difficult questions that arise. I say that whether the appropriate review tribunal for your decision is the Tribunal, the High Court or quite conceivably both.

I mean, the fact is the jurisdiction in this area is, well -- let me try to be polite -- not straightforward. But we need to ensure that we are debating these things because instinctively the automatic reaction is to say let's stay one or other of the processes. It may be the correct answer, but it's not the most satisfactory answer, because you are just delaying the process, and you do need to have a very good reason for doing so. I am not saying you don't have a very good reason, but we ought to be working out whether these processes can coexist. That, it seems to me, is pretty inextricably tied to the certification question, because we will be discussing at certification where

one goes, assuming there is certification, and that's where I think Ofwat really do need to be heard.

So I think what you say about high level versus other things is something which chimes very much with our way of thinking.

MS BOYD: I think that's right, sir. I think these points push in the same direction so far as case management goes. Ofwat has not yet taken a position on stay --

THE PRESIDENT: Absolutely. All we are doing is unpacking the problem, lovingly gazing at it and working out that we are going to have to think very hard about it later on.

MS BOYD: Yes. The only point I wanted to draw into focus from Ofwat's perspective is that not all issues of law, preliminary issues, are in the same basket as regards their potential impact on those processes --

THE PRESIDENT: I completely understand. I was rather long-windedly violently agreeing with you on that. It seems to me that that is a point very well made.

MS BOYD: Sir, that's all we have to say, thank you.

THE PRESIDENT: I'll turn to the respondents to see whether there is anything arising.

Mr Harris, I think one of the points that is crossing my mind -- and I would be grateful for your assistance on this -- is that there is some mileage in separating out preliminary issues that go directly to certification and parallel regulatory processes and dealing with those in the last week of September, and then having the other stuff, which hopefully will be the evidential stuff, in a week in January. Because we would be able to get a judgment out on the issues concerning certification directly and then we would be able to deal with, if necessary -- it depends on how the certification goes -- these other questions. Mr Jowell's mental state point is, it seems to me, an excellent example of something which we would want to grapple with well

ahead of trial but not, my sense is, at the same time as the hard-edged certification questions.

But I raise that so you can push back.

MR HARRIS: Sir, yes, I have three reactions or observations. The first is that that proposal doesn't obviate the twin appeal track difficulty. So observation number one, which you doubtless will take into account.

Observation number 2 is that it also doesn't get round the fact that the hearing that I would say would be crammed into end of September may be too short. So one of the issues that's on the table, the Marcic issue, that obviously bears upon certification. That is at least one where there might have to be evidence -- well, there will be evidence. The question is how long will it then take to deal with. Will it be disputed, will it need more time, will it require cross-examination? My proposal deals with that, but this alternative proposal, in my respectful submission, doesn't deal with that.

The third observation is this -- and perhaps I should have made this a little clearer before when I was talking about the prospects of some further developments in the Ofwat investigations in June, which is what we gleaned from the skeletons from those who are at that stage, is that under Rule 79(2)(g), with which you are doubtless extremely very familiar, all the suitability criteria, that's the one that talks about "is it suitable?" because there have been other means of addressing the "damage", the problem. Whether there be alternative dispute resolution, whether there be any other formulate of statutory, non-statutory, collective redress, anything along those lines.

What I would say in that regard is that that's another reason for not cramming it into the end of September. Because if it is right that we are going to get meaningful substantive progress in the Ofwat investigation in June, it is very difficult to take that

properly and fully into account for a hearing crammed into the end of September. And yet it bears directly upon the suitability criteria which are in issue on this hypothesis at the end of September.

Better, in my respectful submission, to see -- and it might slip a little bit, it might not be June, it might be July and then it is even more difficult -- it is better, in my respectful submission, for this Tribunal to be able to take stock of what is said by the regulator about possible other collective means of redress -- and in that regard, and we obviously pray in aid that which we've put in our skeletons about Southern Water, it is obviously not beyond the bounds of possibility that if findings are made against some of the respondents in these decisions that will be publicised in June, we anticipate, or at any rate June and July, then that will have a direct bearing upon how the Tribunal considers it to be suitable for these collective actions to proceed. It is all too cramped unless it is put in January. There is much more time.

Those are my respectful, I hope helpful, observations as regard what has been said.

If you are not with me on that, then, yes, the case would be, it seems to me, with respect, one tries to identify to the extent possible in this window issues that most directly bear upon certification. Then to put other issues so that they are not too divorced in time into a hearing in January. But that's very much, at least on my part, a fallback position.

THE PRESIDENT: Thank you very much.

Ms Howard?

MS HOWARD: I don't want to take up too much of your time. Just two short observations. We want to make this system workable. These are stand-alone claims but a key issue is going to be what is the status of these decisions that are issued by Ofwat if they are going to be published in June.

This brings in the vexed question of the choice between a “top-down” broad-brush

approach or the granular “bottom-up” approach and whether this applies not just to economic methodology and quantum, but also applies to establishing the abuse. Because what we have here is the PCR is applying a broad-brush approach in extrapolating from one or two water companies to level accusations and allegations at the other water companies. The Ofwat decisions will obviously be very material and may change the landscape fundamentally, in either direction.

If you look at the *Gutmann v Apple* case, the *ProSys* test does not just apply to the economic methodology, it also applies to the evidential and legal basis for the claim, which feeds into the blueprint to trial. Is there an abuse in the first place? What is the theory of harm, what is the counterfactual, and how does that feed into the quantum methodology?

So the Ofwat decisions will have a material bearing, potentially, not just on the blueprint to trial, but also on certification. So I think Mr Jowell's point about the mens rea element, whether that is objective, whether it is subjective, reckless, negligent, intentional or deliberate, as in *AstraZeneca*, is a very fundamental question. It's not just a discrete preliminary issue after certification, I think it is relevant for the fundamental question of whether there is any evidential or legal basis for the abuse and the theory of harm for certification, which goes to the suitability requirement.

That was my first point. I don't have an answer for it, I just wanted to flag it.

My second point is that the parallel appeal / CPO issue does arise a lot in the TCC. There are often procurement challenges under the procurement regulations which at the same time have a route to the Admin Court on exactly the same issues. How the TCC has resolved the issue in the cases it has had, is to have a judge who has a ‘dual hat’ who sits in both the Admin Court and in the TCC so they can jointly hear the claims together in one forum. It may be a possibility to use the Tribunal’s case

management powers to hear a common issues trial across separate claims. I just wanted to flag that possibility. It's not for today, that's for later in the process.

THE PRESIDENT: Thank you very much, Ms Howard, much obliged.

MS HOWARD: Thank you.

THE PRESIDENT: Any other takers on the respondents' side before I call on Mr Thompson to have the last word?

No.

Mr Thompson?

MR THOMPSON: I am grateful, sir.

In our respectful submission, despite the best efforts of the respondents, they have not really come up with any substantial reason to depart from your initial indications. So far as Thames Water is concerned, I think it possible that Mr Harris and Mr Jowell have only limited information. In fact, Thames were served with all of the five claim forms and the expert evidence that we are concerned with directly today, I believe on 6 March. They could be served with their own documents today if that would be appropriate.

THE PRESIDENT: They are not present before court now, are they?

MR THOMPSON: I believe there is a solicitor present, but I don't think --

THE PRESIDENT: Not a representative. That's why I am very grateful to Mr Harris for raising those, and Mr Jowell.

MR THOMPSON: Indeed. The reason, if I can just digress slightly, why they have a separate expert -- or we have a separate expert in relation to Thames doesn't relate to a change of case. It relates to a sort of quasi conflict issue which meant that Mr Holt couldn't appear in relation to Thames. But I don't think I need to trouble the Tribunal with any details of that. But I clearly don't want to go into the substance. It is Dr Latham who has produced a report on behalf of the PCR in the Thames case.

But, in my submission, while Thames would obviously have less time than the other respondents, in my submission that's not necessarily to decide today, but also not necessarily fatal to the Tribunal's suggestions.

The second question about the issues of law, there I think I largely adopt what Ofwat was saying, as I understand it, that it would actually be beneficial both for the Tribunal and for the regulatory process for the complex issues of law that the Tribunal has already identified, plus the possible issue of the Tribunal's double jurisdiction both as an appellate body and as a primary finder in relation to damages cases, for those issues to be addressed and determined sooner rather than later. That is certainly not a reason to put back the CPO hearing insofar as those issues arise.

The only qualification -- and that partly arises from the terms of our letter that we served yesterday in relation to Mr Hoskins' two points -- is that we are by no means persuaded that any of the preliminary issues that the respondents are likely to put forward are any good or that they are likely to be the subject of a successful application for permission to appeal were they to be dismissed by this Tribunal. So I certainly would not accept any of their points are any good.

THE PRESIDENT: Mr Thompson, that sort of falls into the camp of you "would say that, wouldn't you?", that point.

MR THOMPSON: Indeed, sir. But just in case there were any assumption that there was going to be an appeal. But it is, as it were, a counter factor as to whether there is any reason for delay.

THE PRESIDENT: If I can reframe your point, it seems to me -- and of course I am speaking with the very limited knowledge one has at the moment -- it seems to me, given the nature of the points we have been discussing, that the idea of an appeal not going forward is fairly remote. But that is, I think, a reason for accelerating rather

than slowing down. Because if one is going to have an appeal then you probably want it going faster rather than slower because it is likely to delay the trial of the matter if certified.

So it does seem to me that there is a distinction between the sort of fundamental point of certification and process to take the Ofwat and the certification concerns as one. And the very important points Mr Jowell has raised about mental state, they are rather different. I can see that the mental state point is one that very well might not go on appeal. It's important for the trial but it's not, as it were, foundational to the collective proceedings point. Whereas I must say that I take the Ofwat and the certification points as being foundational.

Maybe you are right, maybe they are so open and shut that when we see your submission the scales fall from our eyes and it seems blindingly clear, but at the moment I have to say I see nothing but complexity, and not complexity of the bad sort but complexity of the good sort or the interesting sort in that we have a very interesting problem that arises on two levels. One is the coexistence of a collective process against a regulatory process in the abstract, and then superimposed on that we have a regulatory process that has actually been engaged in and taken forward. And that in itself raises separate questions.

Ms Boyd's interest is primarily in the second. The respondents' interest is primarily in the first. There is obviously some bleed across but they are both -- I mean, I would be delighted to be proved wrong, but they both seem rather difficult points.

MR THOMPSON: If I may, I am well aware that they are matters that both the Tribunal has raised and the respondents are very likely to raise.

So far as the points, I think the other conceptual points that Mr Harris raised, we obviously noted that what I thought had been a broad agreement that four days was a reasonable allowance has suddenly become completely inadequate and it is now

eight to ten days. We would respectfully submit that the apparent agreement was well-founded and that the expansion largely seems to be on a rather speculative basis that there may be substantial evidential questions and I think Mr Harris raised the possibility of Marcic and Ms Howard raised the question about possible extrapolation issues.

THE PRESIDENT: Yes.

MR THOMPSON: I should say, first of all in relation to Marcic, there is obviously the question about what the Supreme Court may in due course say about Marcic, but there is also the point that whatever Marcic may have been, it included an application for an injunction and mandatory orders, whereas this case is squarely an action for damages. So we would not necessarily say that the Tribunal needs to think about the implications for Ofwat's general regulatory role in the context of Marcic because we would say that this is a damages claim pure and simple and doesn't necessarily have any implications for what the respondents should or shouldn't be doing in the future, which are matters for Ofwat to regulate.

But so far as the timetable goes and whether or not other issues, as I think Mr Williams as well as Mr Harris and Mr Jowell indicated, such as mens rea, should be addressed now, I think I would only qualify the Tribunal's immediate reaction as being: these questions did sound quite highly fact-sensitive, and that we do raise at least the question as to whether they will actually be suitable for preliminary issues independent of trial, or whether they are not issues where, in outline, the legal questions are reasonably straightforward as to whether or not intention is a necessary feature of abuse of dominant position, which I think there is quite a lot of case law that it is not a necessary feature, but then there would be the question about what is the correct standard to apply and there is at least a question whether that issue might be best decided on the facts. That to some extent interacts with,

I think, the concern that Ms Boyd was expressing in relation to Ofwat, that they would not want to be pre-empted on questions of mens rea, particularly if they were decided without any facts, because that might be something which would potentially embarrass or inconvenience Ofwat in the conduct of its regulatory functions where it made factual findings and would then have to apply a legal ruling which had perhaps been made without the benefit of so much factual evidence. So that seemed to us a potential problem in going down that route at this stage.

I think the only last question was I think Ms Howard and to some extent Mr Harris raised the possibility that a regulatory decision might be brought or might be reached at some point during the timetable, and that that might somehow derail the pleadings or the skeleton process.

In my submission, that can't really be avoided as a risk, because I think Ms Boyd quite candidly said that she wasn't actually sure that they would actually reach a decision this year. So there is obviously the possibility that one or more of the respondents might settle, they might pay compensation, they might settle with us. They might find that their case is for some reason less meritorious than other ones. But, in my submission, that's looking behind the Wizard of Oz's curtain and that we can't really take it any further and it's not really a basis to delay anything now.

So those were my submissions unless anyone else wants me to say anything else.

THE PRESIDENT: That's helpful, Mr Thompson.

Just picking up on the last point, it does seem to me that this is a problem that we are going to come across sooner or later. I mean, maybe a decision comes out sooner, maybe it comes out later, but either which way we are going to have to grapple with the significance of parallel proceedings, whether they are concrete or in the abstract. The fact is the interplay between the two matters and is something which we do need to get a grip on, not just for this case but generally.

Whether it makes a difference to your pleadings obviously requires the decision to be published before we have the hearing. But whether you adjust your pleadings and what adjustments to the timetable you seek must, in the first instance, be a matter for you. You may say Ofwat's decision, let's say comes out in July, doesn't require any form of adjustment to your pleadings at all. Or you may say it's so in line with what you have pleaded that all you need to do is say "It's great, it supports us". Equally you may say yes, it does require amendment but it doesn't derail the question of certification or the in-principle questions of relationship between regime which is to follow. In other words, we are dealing here with a very complex set of issues. It may be that one has a contingent certification. It may be one has a separate hearing to deal with amendments in a case that would otherwise be certified, who knows? But I don't think we want to be making ourselves the subject of a hidebound process that makes assumptions which may or may not be the case.

MR THOMPSON: Yes, I am grateful for that.

There is of course also the point that there are two very substantial claims against United Utilities and Severn Trent which I don't believe have got to the regulatory starting gate. So any implications of those two cases would obviously have to be by extrapolation, to use Ms Howard's words, from any findings that were made, for example, in relation to Anglian or Northumbrian. And at the moment, for the purpose of CPO at least, that seems to us slightly unlikely. Certainly if it is the type of interface issues that the Tribunal has identified so far.

I see the time, I don't know how the Tribunal wishes to proceed.

THE PRESIDENT: I have one more point which I am going to raise before we rise. We will then adjourn until 2.30, when we will give a ruling as to where we go from here.

MR THOMPSON: I am grateful. Shall I sit down or is it to me?

THE PRESIDENT: It is actually, I think, in the first instance to Ms Boyd that I want to address this point. It is this. The way in which the regulatory regime works is obviously going to be pretty central to both elements of the hearing that we are really talking about. So we can leave on one side Mr Jowell's other points and Mr Harris' other points, but let's just talk about the stuff that you are interested in and I am interested in for the purposes of certification.

The question running through my mind is who takes the first cut in terms of describing the regulatory regime? My initial thinking was that it ought to be Ofwat because it is your regime.

Thinking about it further, though, it seems to me that it is actually a point that is, to a very considerable extent, weaponised in that it is actually going to be used aggressively by the respondents to say that the collective proceedings just don't get off the ground because there is a fundamental problem in having this regime and these collective proceedings. In other words, it is not a neutral point, it is actually a weaponised point. In those circumstances, it seems to me that we ought to be saying that the respondents ought to have the first go at describing the regime and saying why the collective proceedings as framed cannot stand with both Ofwat and the applicant responding and saying, well, you would be saying you have mischaracterised the regime if you wanted to, you wouldn't have to, you could say "It is beautifully described and we adopt it", but you ought to have the opportunity to say "No, this is not how we see it working" because it plays into your concern about the interrelationship if the collective proceedings go forward.

Equally Mr Thompson will want to be saying, no, the way you have described the regime is incorrect because actually the two processes subsist perfectly well. So it seems to me that the proper order of batting is precisely the reverse one that I initially thought. It is respondents go first, Mr Thompson responds and you then

respond to that because you might well disagree with both sets of parties and it seems to me that in this case the regulator ought to have the last word.

I wanted to get your sense of whether that is a correct instinct or whether my first instinct that Ofwat goes first is the better one.

MS BOYD: I am grateful, sir. I will take instructions. But what you propose sounds to me eminently sensible. Ofwat wishes the regime to be accurately characterised but it does not wish to be weaponised. There is also a resources question. Ofwat has an overspilling desk at the moment. Taking the first cut at describing the regime is likely to take up more of its time and resources than commenting. So subject to instructions, those are my initial reactions.

THE PRESIDENT: That's very helpful. It seems to me that if Ofwat were to take the first cut it almost certainly wouldn't be fit for the respondents' purposes because we would get a neutral and collective actions regime neutral articulation of the situation, whereas in fact that's precisely what we don't want.

What we want is an aggressive articulation of why the regimes can't sit together because that's the critical point on which we welcome submissions. Because it is a point which is not directly for the regulator to deal with, but really for the respondents to make that point.

Mr Hoskins?

MR HOSKINS: I think there are just two points wrapped up there. One is a description of the regime and the other is what are the arguments about the Marcic issue and competition law issue.

THE PRESIDENT: Yes.

MR HOSKINS: In relation to the description of the regime, I am not saying it is perfect and it can certainly be added to but we have tried to do that to a certain extent in our skeleton and indeed Ofwat have done the same in their annex and

I was pleased to see there was not actually a great deal of difference between us. So in terms of the basics of what does the regime look like, I don't think that that should be that big a job. I cross my fingers as I say that.

Then there is the question of, you know, articulating the arguments. Now, you want a process which says these are the issues which are going to be the preliminary issues and then we will have to develop it in our response to the CPO. There will be a reply and then there will be skeletons. So there is going to be plenty of development of the arguments before they come to you. But I do think those are two separate things.

THE PRESIDENT: You may be right. My sense is, though, that there is a close nexus between the articulation of the regime and the arguments in relation to it, in the sense that of course you can do a neutral description, and maybe we already have it in play and that is fine, but when one deploys it, and weaponising is a loaded term I recognise, as an argument -- which, let me be frank, is one that we welcome and positively want to hear because this is a difficult and important question for not just this case but generally -- one is inevitably going to be looking at aspects of the regime which support the point that it pushes out competition law. So there will be points being made about how the regime works which will be drawing out from the neutral description points which, yes, they may be argument but they may also be based upon a particular view as to how the regime does or doesn't work.

It is in that situation where I think you would want positive push back from both the applicant, to say the argument fails for whatever reason, and Ofwat, not to say that the argument fails for whatever reason, I mean, Ofwat don't have skin in the game there, but they do have skin in the game in wanting the regime to be as they think it operates. That's really what I am getting at in terms of order of submission. I am quite sure that a vanilla description of the regime, if it isn't before us now, could be

done very quickly; but I am just not sure how far it would actually help us on the rather difficult points going forward.

MR HOSKINS: The points in relation to that, sir, insofar as there are two things, there is the description of the scheme and that could be done, one would have thought relatively quickly, and without hopefully too much controversy. When one then steps into the "yes, but they say that's how it works and that's not how it works", that's pulling Ofwat into the legal dispute -- which you have heard submissions on, it's not for me to make those submissions on behalf of Ofwat, but it obviously requires careful handling. But I think they have to be kept separate for that reason. Ofwat may disagree, but I can see nodding from my left --

MS BOYD: We would be keen that any such exercise not involve us commenting on articulations or constructions of regulatory provisions which may be relevant to what we are doing at the moment.

It may be that an alternative approach would be for the Tribunal to invite/instruct the parties to agree an articulation of the relevant aspects of the regime with, you know, further things that people wanted to rely on being --

THE PRESIDENT: I understand. I mean, I think the answer to this is that it is absolutely clear that Ofwat go last. Whether one has a neutral articulation that is actually worth the candle, or whether we would have to rely upon Ofwat's judgment in seeing the totality of the argument and coming back and saying, "look, we are neutral on the argument, it would be not just ill-advised but probably improper to involve ourselves, but that being said, we see how certain points of the regime have been characterised and just so the Tribunal knows this is not how we see it working", that, it seems to me, is something which you not only could properly do but positively should be doing in order to ensure that the Tribunal, when dealing with the contentious points which Ofwat would need to stay out of, could nevertheless have

Ofwat's views factored in, not because you are taking part as a party but because you were wanting to have the regime properly characterised.

To be clear that might be a point you would be taking against the respondents or against the applicants. I have no idea which. You may not take a point at all. But it seems to me you ought to be taking that point when you can see the full thrust of the arguments even though you only respond to perhaps a tiny fraction of them.

MS BOYD: We can certainly look at what is said about our regime and correct things we feel we can properly correct.

THE PRESIDENT: Exactly.

MS BOYD: And if there are things we feel we can't properly comment on, then say so.

THE PRESIDENT: That, I think, is the most one can possibly ask. I think we are, in terms of sequencing, still on the same page.

Yes?

MR HOSKINS: There are two times that could happen: obviously we are going to have to put in a CPO response and maybe a reply from the class representative, and Ofwat could and should have an opportunity at that stage to do the sort of job that you have described. That has the advantage that it is before any skeletons.

THE PRESIDENT: I can see the mileage in that. That's something I think which I will take away and think about.

But my sense would be that we would want to do that on a sort of fac oblig basis, in that you lot are obliged to do both rounds, the evidence and the skeleton; Ofwat would be obviously copied in on everything and could come in at either point or both, rather than be obliged to come in at any point.

MR HOSKINS: Sir, the point I was making was I think slightly different. Ofwat should be allowed to come in, but if they are going to come in it would be helpful

before our skeletons --

THE PRESIDENT: I agree.

MR HOSKINS: I just wanted to double check.

THE PRESIDENT: Indeed, I think that's right. But what I am saying is I would leave it to Ofwat's good judgment when they jump in, rather than saying we would expect Ofwat to jump in because it's, as I say, their regime and they are a non-party party, if I can put it that way.

MS BOYD: Sir, in that regard, you yourself raised the question of costs. It seems to me that that is the sort of exercise in respect of which it might be appropriate for Ofwat to seek its costs as costs in the case, in the sense that it is effectively acting as part of the machinery of the process rather than a party with a position.

THE PRESIDENT: I can see that. It seems to me that that's something on which I probably can provide only a steer.

I will think about this over the short adjournment. One would hope that a steer would ensure that the parties consider whether that sort of order can be made by agreement before I debate whether it absolutely has to be ordered by the Tribunal.

To be clear, just to conclude the thought: your status would be what, an intervener, really, wouldn't it?

MS BOYD: I think so.

THE PRESIDENT: Yes. Okay, that's very helpful.

MR THOMPSON: I don't want to delay time or lunch --

THE PRESIDENT: Not at all.

MR THOMPSON: -- but just to say, I don't know whether the consensus between myself and Mr Hoskins is going to continue indefinitely --

THE PRESIDENT: I doubt that very much.

MR THOMPSON: -- but I obviously agree with him on the dates of the hearing.

For what it is worth, the Tribunal will of course have in mind that we have described the regime as we see it in some detail in our claim form; there are two witness statements from the respondents which also touch on it; and Ofwat has itself provided a skeleton and an annex. So there is quite a lot of material in there already.

THE PRESIDENT: Indeed.

MR THOMPSON: Which I am sure the respondents will comment on in their response and we may well risk commenting on in the reply. So I think the Tribunal will have quite a lot of material.

If Ofwat then expresses a considered view in addition to what it has already put in, that sounds like a good basis for the skeletons and for the hearing whenever it may take place. That would be my broad submission, which I think is pretty much what Mr Hoskins was saying slightly more economically.

THE PRESIDENT: I am very grateful to you all.

Mr Harris?

MR HARRIS: Can I make what I hope is a constructive suggestion with a nod in the direction of Ms Boyd for her helpful skeleton and that of her clients. At the end of it, were you to turn it up, you will find there is a five and a half page annex.

THE PRESIDENT: I read it last night.

MR HARRIS: This is my, I hope, constructive suggestion. If I could draw your attention to the final paragraph, 27, on bundle page 1086 or page 17 of the skeleton itself?

THE PRESIDENT: Yes.

MR HARRIS: She and those instructing her have helpfully set out over the preceding pages various subsections, et cetera, but under the heading "Enforcement", at the end in paragraph 27, the second sentence reads:

"Under the Water Industries Act, Ofwat is required to consider if it should instead proceed under the Competition Act 1998 ..."

Just pausing there, that is of course one of the critical questions: what is that interrelationship?

Then, though helpful, it is rather terse:

“Ofwat makes this determination in the particular circumstances of each case and it has in the past used its concurrent competition powers."

To some degree, that is the nub of what we want to get at. Then Ofwat goes on to say it:

"... notes that there are often industry-specific provisions and requirements at its disposal which more readily and directly address the issues it investigates."

My submission is this -- and I think it ties into what you described earlier as your first instinct -- what I think would be helpful sooner rather than later, and indeed to go first, is perhaps a two-page further elucidation of those two sentences at the back of 27.

So it says, and this is true, "It has in the past used its concurrent competition powers." We could perhaps have a page on: "There were three cases, Albion Water is one and there are a couple of others (however many cases there are) and this is how and why neutrally , [no problem] we have used our competition powers because the features which provoked us or caused us to use those competition powers concurrently in those cases were X, Y and Z ..." and then in the last sentence perhaps another page on “there are industry-specific provisions or requirements which means it more readily and directly doesn't do that in other cases.” Perhaps if we could have an elucidation.

I say that because it feeds in, at least for my client, because we are very substantially interested in how our regulator sees the regime that we fit into before

we go into print saying well it obviously has to be done like this, let alone in a weaponised fashion. It really matters to us what our regulator says about that. So a little bit of further elucidation sooner rather than later will be of substantial assistance.

THE PRESIDENT: So you are suggesting Ofwat go first?

MR HARRIS: Go first at least in the sense that I have identified. Maybe two or so pages on those last two, to further set out what is meant by those last two sentences of paragraph 27.

THE PRESIDENT: I am grateful, Mr Harris.

Ms Boyd, it looks like a rope. I don't know whether there is a noose at the end of it, but if you were wanting to put your head in it, I would not stand in your way. But I am not making you --

MS BOYD: Sir, if I may, I will consider with my clients over the adjournment. We will have to consider whether we could usefully provide something and if so what it might say and how long it might take, but we hear the request.

THE PRESIDENT: Okay. It is just not a request coming from me. That's, I think, the point.

Very good. We will resume then at 2.30 where I hope to give at least pretty clear directions as to where we go. There are probably some details to work out, but that's what we will do.

2.30.

(1.27 pm)

(The short adjournment)

(2.30 pm)

MS BOYD: Sir, if I could just briefly address the issue that was carried over.

THE PRESIDENT: Did you seek instructions?

MS BOYD: I have. I have. It remains our view that the most efficient and most appropriate approach is for the parties to set out a description of the regime and for Ofwat to comment on that description as appropriate. So, in other words, our preference is to go last. That will enable us to make our comments having careful regard to what we can properly comment on given the extant proceedings to the extent that there is anything contentious or tendentious in those descriptions.

We don't feel inclined to supplement that exercise with a description to our approach to our use of our concurrent competition powers, as was kindly suggested.

What those powers are is clear. We can look at any description given of them and correct that as necessary. Ofwat has published guidance on its general approach to the application of the Competition Act, which is in the bundle. But, as we've said in our annex, Ofwat makes a decision on how to proceed on a case-by-case basis. In those circumstances, we don't see a need -- and I am afraid we certainly have no appetite at the moment -- to further explain our approach in relation to specific cases at a more granular level, which is I think what was being suggested.

If, in the course of the articulation of the parties' cases going forwards, it becomes clear that there is such a need, then of course the Tribunal can ask Ofwat those questions and we will do our best to answer them. But, for now, at this stage, we would politely decline the invitation to put our heads in the noose.

THE PRESIDENT: Thank you very much, Ms Boyd. That is very helpful.

I am going to make a ruling as to where we go from here, but I will, with my colleagues, revise from the transcript the terms of that ruling as appropriate. I just want that to be clear.

(2.33 pm)

(Ruling given)

(2.56 pm)

(Post-ruling discussion)

THE PRESIDENT: Mr Thompson, confidentiality ring is agreed. Do I have that right?

MR THOMPSON: Yes, it is, in terms of it's an overarching collective confidentiality ring. I think that's now resolved.

In the draft order there was provision for individual confidentiality rings insofar as regulatory issues were said to be confidential as between individual respondents. That sort of interacts with the progress of the regulatory regimes and I don't know how far we are going to need to progress that. I suspect we don't need to progress it now, but we may, I suppose, need to progress it quite urgently if any of them progress, or indeed if the progressing individual procedures become relevant to what I think the Tribunal has called the non-vanilla certification issues. So I suppose it is possible it might do, so I think there is a mechanism for us to try to agree it within a timetable and if we can't agree, to come to the Tribunal for a ruling.

THE PRESIDENT: Yes.

MR THOMPSON: So there is that matter.

THE PRESIDENT: I think you are right that it is not something for today. We obviously need a confidentiality regime which deals with the general matters, but I hope I have given a pretty clear steer that the non-vanilla certification issues are intended to be general and not specific. We would hope that the granularity of individual proceedings under the regulatory regime don't impact upon those issues. If they do, then clearly a regime would need to be put in place.

MR THOMPSON: Yes.

THE PRESIDENT: But otherwise not.

MR THOMPSON: I suspect it is in the respondents' hands. If any of them want to illustrate whatever they say the point is by reference to their particular facts,

I suppose there could be a confidentiality issue. But at the moment we are not really in a position to judge because I think they and Ofwat probably know more than we do about the state of play of individual cases.

THE PRESIDENT: I am sure that is right. The problem is in order to understand the point, let's suppose one is articulated, all of the parties will need to see it. So that probably implies, what, an external-lawyer-only set of rings for specific granular matters?

MR THOMPSON: If, for example, Ms Howard suddenly says there is some important development for Northumbrian which casts light on the general issues, we can't really debate it sensibly unless there are specific provisions made, presumably an inner ring for discussion of that particular issue.

THE PRESIDENT: But, you see, clearly you would need to see it, and clearly Ofwat would need to see it, but it might well be, to take random counsel, Mr Hoskins would need to see it in order to embellish one of his points. So what we are really talking about is a separate, external counsel-only granular regulatory confidentiality ring which -- I mean, why not put it in place just to ensure that we are ready for trouble if it emerges?

MR THOMPSON: We can certainly discuss the preparation of an inner ring, as it were. It probably just requires a slight modification of what has been agreed already, if that's the way the Tribunal is thinking.

THE PRESIDENT: I think it would be useful to do that.

MR THOMPSON: Yes. More generally, the draft order that we prepared has probably been knocked about a bit, but some of the issues, such as the single response, we made a proposal that the, as it were, default position would be a single response but the respondents could apply to the Tribunal if they wanted to put in an individual response. That's a slightly more formal approach than I think the one

that the Tribunal is suggesting but probably something needs to be ordered so that people know what they are doing. I don't know whether some variant of that would be useful.

THE PRESIDENT: What I think ought to be done is that, taking your order as a template, maybe we should -- since Mr Harris took the lead on this -- Mr Harris, would Anglian Water mind revising the order, because we had a discussion this morning about a general response, but with the ability to supplement it, which was a little less formal than that articulated by Mr Thompson in his draft?

If you could take that forward with the respondents to reflect what I have said in the ruling, and then get it back to both Ofwat and the PCR so that, if possible, it can be agreed and, if not, alternate versions presented for the Tribunal's approval, that would be very helpful.

MR HARRIS: Yes, sir, I can do that. We will liaise with the respondent and do that.

THE PRESIDENT: Mr Harris, I am very grateful to you. Thank you very much.

MR THOMPSON: I think the only other two questions really were the January hearing, is that effectively a sort of week held in reserve to be specified at a later date?

THE PRESIDENT: It is. We have two contingencies in mind. First of all, there is Mr Harris' point that we may not neatly resolve everything in the week allocated as week one. We very much anticipate and hope to do so, but these are knotty issues and we are at an early stage. So we want to have that adverse contingency covered off.

But also we have in mind Mr Jowell's point about there being other preliminary questions which might benefit from a hearing separate from the certification question.

Now, it may very well be that the point articulated by you, Mr Jowell, would not really

be appropriate for a January hearing. It is probably too close to September. But never say never. There may be other points in any event. It all rather depends on what happens to certification. I mean, if, for instance, we were to certify but then give permission to appeal and there will be an appeal with a general stay pending the outcome of that appeal, well, we probably don't want to waste time on a preliminary issue that is genuinely preliminary to trial and not really supplementary to certification. But we think it is better to have a date in the diary for use rather than to wish after the event, when the diaries are all full, that we should have made provision for it later on.

MR JOWELL: That all, with respect, seems very sensible to us. I suppose it does raise the issue of when the Tribunal would like us to start formulating those issues, potential issues.

THE PRESIDENT: We are not going to make an order, but we think that it would be useful for the parties to start thinking about that sooner rather than later. We don't want to put undue pressure on parties who are busy enough already, but we do think that the sooner these things are articulated, so that we can think about them, the better. But we are not imposing the two-week deadline that we have for the non-vanilla certification issues.

MR JOWELL: Indeed. So would the Tribunal envisage, if you like, going nap on them at the conclusion of the September hearing perhaps?

THE PRESIDENT: That makes very good sense, Mr Jowell. If you could, in a more relaxed way, articulate those. I confess the one that you raised this morning is not one that struck me, but you having articulated it, it clearly is something we want to think quite seriously about. There are no doubt others which require careful thought when we are really considering aspects of the Microsoft *Pro-Sys* test, I suppose is the way one could articulate it. We are really talking about triability and how one

ensures that a trial goes off efficiently and predictably. I for one am extremely grateful to you for the thought you have given to this question.

MR JOWELL: Not a bit.

Of course, we think that it does lend itself to a preliminary issue, because it is essentially purely a question of law which doesn't really require factual evidence, it seems to us. But as you say, sir, there may well be others which we will need to give consideration to. We will certainly liaise and come back to the Tribunal.

THE PRESIDENT: You are absolutely right. But I think as a general steer and without in any way seeking to limit what you consider as an appropriate preliminary issue, given that we have five different parties with different factual constellations in each, what we are looking for is preliminary issues which shape the way in which you frame the factual evidence for trial.

MR JOWELL: Understood.

THE PRESIDENT: That's why your mental element case is so compelling. Because if you start saying, well, this is what needs to be shown, it immediately frames five different cases for trial through the formulation of one single general issue. I suspect that there will be many like that.

We would be slightly more reluctant to have, as it were, five preliminary issues on discrete factual points where everyone is saying, well, my case is this.

MR JOWELL: Absolutely, understood.

THE PRESIDENT: I am very grateful.

MR THOMPSON: The two weeks, 14 days process. I think I am bound to note that four of those days are bank holidays or the Easter weekend. I'm not quite sure what the end of the 14 days is intended to produce, but I wondered whether 5 April, which is the end of that week, might be a more suitable deadline.

THE PRESIDENT: You've put your finger on a weakness that is regularly and rightly

directed at me, which is my grip of diaries is nebulous at best and almost always wrong. Can I leave it to the parties' good sense to articulate dates that don't ruin someone's Easter and ensure that we have an articulation of the issues quickly but without traversing Easter. So I will leave it to you. That seems very sensible.

MR THOMPSON: The end of that week, that would be in the spirit of urgency but might be a bit more likely to actually happen.

THE PRESIDENT: Indeed. I am going to leave it, because everyone is going to have their own arrangements for breaks, to the parties to get that sorted out as quickly as possible. The key really is that everyone knows what they are tilting at in terms of the evidence, and that is primarily of importance for the respondents because of course you go first.

I want to be quite clear, I want an agreed list of non-vanilla issues which is all-embracing. I don't want there to be a row about different formulations. If there are two ways of framing what might be seen as the same issue, well, I think both should go in, not one or the other. Because what we are interested in is the framing of very difficult questions.

I think you could frame the preliminary issue unhelpfully as: how do we make the regulatory regime interrelate with the collective proceedings regime and can the two coexist? You could frame it that way, but that's not very helpful. There are, I think, four or five different ways of putting it and, to be clear, I would like all four or five in there, or more if necessary, because that will enable us to understand where the parties are coming from well in advance of their written submissions. So I hope that helps in terms of what we would see as a useful way of framing these matters.

MR THOMPSON: I only wanted to make one other remark about the mens rea point, which obviously we can take forward at a slightly slower pace. But it is obviously familiar from other areas of law that questions of this kind evolve by

reference to actual cases and actual facts, rather than by way of academic opinions on the relevant status. So I just put down a marker that it may not actually be very easy or indeed very helpful to debate the matter in abstract as to whether it could be strict liability or negligence or some specific competition standard.

So it is possible that this is an issue that will need to be determined at trial, but may not very helpfully be debated in the abstract. That's just a possibility which I would like to raise at this stage because I think that is a real possibility which reflects practice in other areas of the law. But we will obviously wait and see what Mr Jowell comes forward with.

THE PRESIDENT: Yes. I mean, that's an entirely fair point. I want to be quite clear: the fact that I have indicated that I am sympathetic to the way Mr Jowell has put it, is not an indicator that that's something we are going to direct. I have to say, I am sympathetic to the way Mr Jowell has put it, because although you are of course right, the facts that go to whether there has or has not been appropriate reporting is self-evidently fact-dependent.

MR THOMPSON: Yes, indeed. The issue is definitely going to have to be decided.

THE PRESIDENT: It is. If you were running a strict liability case and Mr Jowell was saying "it's not a strict liability case, you need negligence", to put it at that level, intention raises an altogether different question, but let's just say negligence, you have a whole different raft of evidence. You would need expert evidence on the negligence side. You wouldn't, you'd just need non-compliance with the regime for your strict liability case. If you had intention or recklessness then you are going to have to go into the operations of the relevant organisations, you are going to have to go into controlling mind, the factual scope will be vastly different.

So it does seem to me that you are going to need some sort of steer from the Tribunal, unless you are going to cover all bases to trial. That seems to me on the

face of it quite inefficient.

MR THOMPSON: I can certainly see this is a post --

THE PRESIDENT: It is definitely a post-certification issue.

MR THOMPSON: It is part of how you prepare for trial.

THE PRESIDENT: It is. I think I have said enough. It is a matter for the parties to debate. If my initial sympathy for Mr Jowell's suggestion is misplaced or indeed Mr Jowell repents himself of the suggestion, then we can take that forward. But it does seem to me that this is a good example of something that needs thinking about before we get to trial.

MR THOMPSON: We may all agree in due course.

THE PRESIDENT: We may.

MR THOMPSON: We live in hope.

THE PRESIDENT: We live in hope but not expectation. Thank you.

Is there a question?

MR HOSKINS: The Marcic issue that you want to hear September.

THE PRESIDENT: Yes.

MR HOSKINS: Because in Marcic itself there were two leading speeches, one of which was adopted by everyone and one was adopted by everyone except one, the classic sort of worst example of differing speeches in the House of Lords but there is a certain differentiation. But one of the principal bases of the dispute before the House and indeed the decision was the extent to which imposing a liability in nuisance would lead to capital expenditure. We were intending to put in some evidence just to confirm what one might think would be obvious, which is if you want us to do what the PCR says we should do, that would involve capital expenditure.

Now, if you don't want any evidence, we are sort of closing ourselves off potentially from quite an important bit of the Marcic principle. We would have to come back to it

at a later stage of evidence. I think for obvious reasons it is important I clarify that with you now are rather than us turning up in September and you saying "Why didn't you put in evidence?"

THE PRESIDENT: It is helpful you have raised it, Mr Hoskins. I tried to touch upon it, but probably --

MR HOSKINS: That's what made me rise, just to make sure I know what you want from us.

THE PRESIDENT: -- (overspeaking) in the ruling. I want to be quite clear that we are not going to, at this stage, say that what we are debating now as being preliminary issues for week one are going to be binary in the sense that you win or you lose and the matter will never trouble us again.

We anticipate that there will be some issues where we can only achieve, as it were, a partial resolution or clarification of what is going on. Marcic seemed to us to be precisely such a case, where what we are really talking about is the extent to which the principle you rely on -- in this case the Marcic principle -- properly understood sits inconsistently with the way in which the case has been pleaded.

It maybe that one needs to proceed on the basis of an assumption that significant capital expenditure is required, which can be agreed. And then one says, well, assuming that is the case, can the claim as pleaded survive or not? It does seem to me a little surprising if that were to be the case, but there might be an argument for saying, well, we dispute that significant capital expenditure would be required, even though, if it were, our case fails. Now, in those circumstances one would have to have evidence of fact at trial. But we would not want that evidence of fact to be promoted into the preliminary issue.

MR HOSKINS: I understand, sir.

THE PRESIDENT: So there might -- and it is unsatisfactory if it happens -- very well

be two bites of a particular cherry, and Marcic is a potentially good example of that but there might very well be others. I think the whole question of how the regulatory regime and the collective proceedings regime interacts could be redolent with issues like this, in that we might very well say, yes, you can have both, the regulatory regime and the collective proceedings regime, but not the way you, Mr Thompson, have pleaded it at the moment. In other words, there is the possibility of both sets of claims, subject to the question of stays, but not the way it has been done now and then amendment is required. But it may be -- and I anticipate this will be the thrust of your case -- that the regime is just fatal to the pleading however it is put.

To be clear, we are expecting that. But we are not expecting only such points to be brought. What we are looking to do is clarify the nature of the dispute between the parties so as to avoid a car crash at trial. Because it will be entirely unfortunate if one had, jumping out of left field, a point at trial which just hadn't been anticipated or budgeted for because it hadn't been addressed earlier on. That's really how we see the non-vanilla issues arising.

So I am very grateful to you for raising it now, because it is now on the record --

MR HOSKINS: Absolutely.

THE PRESIDENT: -- how we see it.

MR HOSKINS: I didn't want it to be held against us not producing evidence when we were trying to deal with it. So we can make the arguments, we may have to make assumptions for the purposes of the argument and those assumptions may have to be tested at a later date --

THE PRESIDENT: Exactly. It may be that there is a segment of evidence that is so short and so clear-cut that you say "Well, we are just going to put something in because the Tribunal needs some sort of evidence which will inform its legal consideration", that would be fine. But what we don't really want -- although we are

not closing it out -- is witnesses and cross-examinations.

MR HOSKINS: Absolutely.

THE PRESIDENT: Because that, I think, really is not consistent with four days and is more consistent with a proper articulation of the issues and then having the evidence at trial.

MR HOSKINS: I understand. That is incredibly helpful, thank you.

THE PRESIDENT: No, thank you, I am very grateful to you.

MS BOYD: A very quick point, sir, on 14 days. I think there was provision for the respondent to formulate the issues and for the PCR to comment. I understand these are intended to be issues that would not embarrass Ofwat, so we are probably fine, but I wonder if Ofwat might have the opportunity to look at them as well.

THE PRESIDENT: Yes, of course, I think that is entirely fair. I left you out for exactly that reason. It seemed to me that you really were in this regard takers of the way in which principally the respondents but also the applicants are framing matters. But I am quite sure that provision can be made for you certainly to see them. Absolutely you should be copied in. Can I be clear about this? I think Ofwat should be, unless they do not want to be, copied in on everything.

So I may be giving you rather too much there, but you know what I mean. Whether you comment, I am going to say nothing because --

MS BOYD: It will be more to check that there is nothing there that might embarrass us. That would be --

THE PRESIDENT: I understand. It seems to me that Ofwat's role as a non-involved intervener is now very clear. I am sure your interventions, even if not directed by the Tribunal, will be taken in the helpful spirit that they will be offered and I will say no more than that.

MS BOYD: I am grateful.

THE PRESIDENT: Anything more that has fallen off my list of items on the agenda or are we done for today? Silence, excellent.

Thank you all very much. We are really very grateful to you all for the very considerable help you have given us and we look forward to seeing you in September, if not before. Thank you very much.

(3.20 pm)

(The hearing concluded)