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Case No: CA-2025-001337

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION TRIBUNAL
Mr Justice Roth, Ian Forrester KC and Professor Alasdair Smith
[2025] CAT 17

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2026

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE FALK
and
LORD JUSTICE ZACAROLI

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Between:

PROFESSOR CAROLYN ROBERTS	**Proposed Class Representative/ Appellant**
- and –	
(1) SEVERN TRENT WATER LIMITED & SEVERN TRENT PLC **(2) UNITED UTILITIES WATER LIMITED & UNITED UTILITIES GROUP PLC** **(3) YORKSHIRE WATER SERVICES LIMITED & KELDA HOLDINGS LIMITED** **(4) NORTHUMBRIAN WATER LIMITED & NORTHUMBRIAN WATER GROUP LIMITED** **(5) ANGLIAN WATER SERVICES LIMITED & ANGLIAN WATER GROUP LIMITED** **(6) THAMES WATER UTILITIES LIMITED & KEMBLE WATER HOLDINGS LIMITED**	**Proposed Defendants/ Respondents**
- and –	
THE WATER SERVICES REGULATORY AUTHORITY (OFWAT)	**Intervener**

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Jon Turner KC, Julian Gregory and Christopher Brown (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Mark Hoskins KC, Matthew Kennedy and Daisy Mackersie (instructed by **Freshfields LLP**) for the **Respondents**
Jessica Boyd KC and Daniel Cashman (instructed by **Ofwat Legal**) for **Ofwat**

Hearing dates: 11 and 12 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.00am on 5th March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Geoffrey Vos, Master of the Rolls and Lady Justice Falk:

Introduction

1. At its heart, this case concerns the proper construction and application of section 18(8) (section 18(8)) of the Water Industry Act 1991 (the WIA). It is, however, of great significance because the proposed class representative claimant (Professor Roberts) seeks to bring opt-out collective claims against six water and sewerage undertakings (the water companies) on behalf of the many consumers served by those statutory monopoly suppliers. Professor Roberts claims that each of the six water companies has misleadingly understated the number of incidents of water pollution in their areas. Those misleading statements are said to have caused the regulator, the Water Services Regulatory Authority (Ofwat), to allow the water companies to charge consumers more than would otherwise have been the case.

2. The Competition Appeal Tribunal (the Tribunal) was asked to make a Collective Proceedings Order under section 47B(4) of the Competition Act 1998 (the CA 1998). It refused to do so on the ground that Professor Roberts's representative claims that the water companies had abused their dominant positions contrary to section 18 of the CA 1998 were excluded by section 18(8). The question for this court is whether the Tribunal was correct as a matter of law.

3. Section 18(1) of the CA 1998 imposes what is known as the Chapter II prohibition that: "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom".

4. Section 18(8) provides as follows:

> Where any act or omission—(a) constitutes a contravention of a condition of an appointment under Chapter 1 of this Part or of a condition of a licence under Chapter 1A of this Part or of a statutory or other requirement enforceable under this section; or (b) causes or contributes to a contravention of any such condition or requirement, the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of this section) shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention.

5. The material parts of section 18(8) for the purposes of this case are: "Where any act … constitutes a contravention of a condition of [a water company's] appointment … the only remedies for … that contravention … shall be … those that are available in respect of that act … otherwise than by virtue of its constituting … such a contravention".

6. The words that need, therefore, to be construed are "remedies … that are available … by virtue of its constituting … such a contravention". It is only those remedies that are barred by section 18(8).

7. The UK Supreme Court (the UKSC) has recently decided in *United Utilities Water Ltd v Manchester Ship Canal Co Ltd (No 2)* [2024] UKSC 22, [2024] 3 WLR 356 (*MSC2*)

how section 18(8) is to be understood. In *MSC2*, Lord Reed and Lord Hodge (with whom the other 5 members of the court agreed) held at [57] that section 18(8) expressly preserved any common law remedies that are available in respect of acts or omissions which contravene a statutory requirement enforceable under that section "where the contravention of the 1991 Act is not an essential ingredient of the claim". The UKSC said that, in other words: "if a sewerage undertaker's act or omission gives rise to a cause of action at common law, the fact that it also contravenes … the 1991 Act does not prevent the courts from enforcing the affected claimant's common law rights and awarding any available common law remedies".

8. Accordingly, *MSC2* decided that, when section 18(8) bars "remedies … that are available … by virtue of its constituting … such a contravention", it is only barring remedies in respect of which the contravention is an essential ingredient of the claim. The simple question might, therefore, be to ask whether the remedies that Professor Roberts seeks for abuse of the water companies' dominant positions are in respect of contraventions of a condition of appointment under the WIA that are essential ingredients of her claims. Unfortunately, however, the read-across from the nuisance claims in *MSC2* (and in the House of Lords' decision in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 (*Marcic*) which it approved) is not straightforward.

9. The Tribunal's essential reasoning was encapsulated in [40]-[43] of its judgment. It did not uphold the water companies' submission that the water companies' alleged misreporting could only be determined in terms of the reporting requirements set by Ofwat (and in particular paragraph 9.2 of Condition B, which provided that they should "furnish to [Ofwat] such Information as [Ofwat might] reasonably require to enable it to carry out a Periodic Review …"). Instead, the Tribunal said that it saw: "some force in [Professor Roberts's] response that for a dominant undertaking to mislead a public authority [was] in any event an abuse". The Tribunal relied on the decision of the General Court in Case T-321/05 *AstraZeneca v Commission* [2010] 5 CMLR 28, upheld on appeal by the Court of Justice of the European Union (CJEU) in Case C-457/10 P, [2013] 4 CMLR 7 (*AstraZeneca*), deciding that AstraZeneca had abused its dominant position when it made highly misleading representations to patent offices in order to keep its monopoly of a pharmaceutical product and prolong its exclusion of generic rivals from the market for as long as possible.

10. The critical passage in the Tribunal's reasoning started at [41]:

> However, as [Professor Roberts] correctly recognised, abuse is not sufficient for the cause of action being pursued. The alleged abusive conduct has to cause damage to the claimants … Here, although the abuse is founded on under-reporting of [pollution incidents], the loss claimed is not the damage caused by the polluting activity, in sharp contrast to [*MSC2*]. [Professor Roberts's] loss arises from the fact that the [water companies] could charge higher prices under the price control regime set by Ofwat. Therefore, the counterfactual underlying the damages claim is not a world where the [water companies] caused less pollution, but one where they complied with the lower Revenue Allowances which Ofwat would have imposed had they reported their [pollution incidents] accurately, and thus charged lower prices to customers.

11. After referring to the pleaded summary of the way damages would be estimated, the Tribunal then said this at [43]:

> In our view, the price control mechanism imposed by Ofwat is therefore integral to the loss allegedly suffered by the [potential class members]. The damage they allegedly suffered, and the remedy they seek for the alleged over-charging, arise only by virtue of the fact that the reporting of [pollution incident] information fed into the determination by Ofwat of the Revenue Allowance of the [water companies], and the [water companies] contravened the conditions imposed on them to supply Ofwat with accurate information for that purpose. Put another way, the failure to supply accurate information for the statutory regime of price control under the WIA is an essential ingredient of the [potential class members'] claim for breach of statutory duty under the [CA 1998] …

12. Professor Roberts argued that the Tribunal was wrong to think that the remedies she claimed for abuse of dominant position were in respect of contraventions of conditions of appointment under the WIA that were essential ingredients of her claims. It could be seen from her pleadings that, while the breaches of the conditions imposed by Ofwat were part of the background, the misleading claims in relation to pollution incidents were free-standing incidents of misleading Ofwat, whether or not they were also breaches of Ofwat's reporting conditions. In *Marcic*, the failure to build a new sewer **was** an essential ingredient of the nuisance claim, which is why section 18(8) was engaged in that case (see [90] in *MSC2*). Section 18(8) was not engaged in *MSC2* because the act relied on gave rise to common law remedies in nuisance which, as in this case, did not depend on there "also being a breach of the statutory duty" (see [124] in *MSC2*).

13. The water companies argued that the Tribunal was wrong to contemplate that the remedies for abuse of dominant position could in any sense be free-standing. They were entirely reliant on the price control regime imposed by Ofwat. Absent that regime, the water companies had no obligation to report any pollution incidents to Ofwat. The water companies also sought to support the correctness of [43] of the Tribunal's judgment to the effect that Professor Roberts's claimed loss arose only from the fact that the water companies had been allowed to charge higher prices under Ofwat's price control regime.

14. We have decided that the Tribunal was right, though not exactly for the reasons it gave. An analysis of Professor Roberts's claim does indeed reveal that the claim could be construed as including an allegation that the claims for abuse of dominant position could succeed on the basis of false representations by the water companies to the Environment Agency (EA) and Ofwat about pollution incidents, even absent the detailed statutory price control regime. There are, however three main reasons why we do not think that this argument prevents section 18(8) being engaged in these cases.

15. First, the claimed abuse of dominant position is one of misleading Ofwat by misreporting pollution incidents to it (whether or not via the EA). However, Ofwat could only have been misled because it assumed that the information supplied to it was accurate. The basis of that assumption was the existence of the requirement in the water companies' conditions of appointment to provide information for the purposes of price control reviews, in this case accurate reports about pollution incidents. It was the alleged failure to comply with the obligation to report that led Ofwat to be misled into assuming that the information was accurate. The remedy sought is therefore in fact only available by virtue

of the act complained of constituting a contravention of a condition of appointment. In the terms used in *MSC2*, breach of a condition is an essential element of the pleaded claim.

16. Secondly, the legislation must in any event be applied realistically. Approaching the matter realistically, the remedy sought does ultimately depend on a contravention of a condition of appointment. The breach is not merely an underlying cause, but is fundamental to the complaint of abuse. In essence, the complaint is that the regime has been misused to abuse a dominant position. The nature of the alleged misuse is that there was a contravention of the conditions of appointment. Unlike *MSC2*, the claim cannot be pleaded and established without relying on that contravention. This is not a free-standing claim.

17. Thirdly and more broadly, the claim needs to be understood in the context of the regulatory regime, and in particular the price control mechanism. It cannot be divorced from it. Each proposed claim is being brought against a water company which enjoys a statutory monopoly. Those monopolies are granted on conditions that are intended to protect consumers from the excessive pricing that such monopolies would otherwise allow. The regime therefore both facilitates monopoly positions and is designed to protect customers from over-pricing. Ofwat's price control mechanism is, therefore, an essential tool in the statutory regime.

18. The water companies only misled Ofwat because of the requirement that they accurately report certain types of pollution incidents. Absent the conditions to which they were subject, the water companies would have had no need or requirement to report pollution incidents to Ofwat at all, and had they chosen to do so it would not have mattered whether the reporting was accurate. Thus, in a real sense, even if in not quite the same sense as in *Marcic*, the cause of action depends on the existence and breach of the conditions of appointment.

19. As to the Tribunal's suggestion that the losses claimed depend on a contravention of the price control regime, it is true that (on the basis of the pleaded case) the price control regime caused Ofwat to allow the water companies to charge higher prices than they should have done. But that was a faithful application of the price control regime based on the water companies' reporting of pollution incidents. It was not itself a contravention of the conditions. Nonetheless, Ofwat was only misled because of the contravention of the duty to report.

20. In short, the key question is whether Professor Roberts is claiming remedies that are available to her "by virtue of [the relevant acts] constituting" a contravention of the WIA. In our opinion, that is precisely what Professor Roberts is claiming and, therefore, section 18(8) was indeed engaged by her claims so as to bar them.

21. We have considered carefully Zacaroli LJ's lucid dissenting judgment. He correctly identifies the points of disagreement between us. Essentially, though, the difference between us is as to the proper construction of section 18(8) (see [62]ff below). Zacaroli LJ adopts a more black-letter approach to section 18(8) than we can accept. We look at section 18(8) purposively and realistically to divine what remedies it must have been intended by Parliament to exclude. In our judgment, looked at in this way, the remedies that Professor Roberts seeks are only available to her because the water companies' conduct contravened the conditions imposed on them under the WIA. Zacaroli LJ may

be right to say that, in one narrow sense, these remedies might have been available if there were only an "expectation" that pollution incidents would be reported, but that is not this case. The abuse relied upon is, in reality, the contravention of the conditions of the price control regime imposed to protect consumers.

22. We shall explain our decision as follows: (i) a summary of the regulatory regime under the WIA and the role of the EA; (ii) the issue on the appeal; (iii) an analysis of the pleaded claims; (iv) consideration of the *AstraZeneca* case, *Marcic* and *MSC2*; (v) our analysis of why section 18(8) precludes the claims; and (vi) our conclusion.

The regulatory regime under the WIA

23. The Tribunal summarised the relevant elements of the regulatory regime at [6]-[22]. In outline, and so far as relevant to this appeal, under Part II of the WIA a company may be appointed to be the water and/or sewerage undertaker for a designated area in England and Wales (section 6(1)). Such an appointment may be subject to conditions with which the undertaker is obliged to comply (sections 11(1) and 6(2)).

24. The licences granted to the water companies include Condition B, which relates to the control of charges. Using the numbering in the licence granted to Severn Trent Water, paragraphs 9.1 and 9.2 of Condition B provide:

> 9.1 The Appointee shall levy charges in a way best calculated to comply with the Price Control or Price Controls determined by [Ofwat] pursuant to sub-paragraph 9.3 or sub-paragraph 9.4.
> …
> 9.2 The Appointee shall furnish to [Ofwat] such Information as [Ofwat] may reasonably require to enable it to carry out a Periodic Review pursuant to sub-paragraph 9.3 or sub-paragraph 9.4.

It is paragraph 9.2 that is central to this appeal.

25. Paragraphs 9.3 and 9.4 give Ofwat the power to determine the appropriate nature, form and level of any price controls. In doing so, Ofwat has adopted a revenue control approach, setting "Revenue Allowances" that cap the maximum revenue that can be collected for specified activities. A water company is free to set prices up to the cap.

26. Ofwat has carried out a periodic price review every five years, those relevant to the claims being "PR14" and "PR19". These were published in 2014 and 2019 respectively, and set price controls for the following five financial years.

27. In its price review determinations, Ofwat sets performance commitments for each water company. These allow for financial rewards or penalties if a water company outperforms or underperforms against specified targets. Both PR14 and PR19 included a performance commitment relating to certain categories of pollution incidents, which were required to be reported to it in accordance with paragraph 9.2 of Condition B. The price review determinations incorporated incentives designed to reward outperformance through higher Revenue Allowances, or conversely penalise underperformance through lower Revenue Allowances. The effect was that, if relevant pollution incidents were significantly under-reported, then Ofwat's determination of the maximum permissible

revenue could be affected, with a consequential effect on the amount that could be charged to customers.

28. Where Ofwat is satisfied that a water company is contravening or is likely to contravene a condition of appointment, it is under a duty to make an enforcement order to secure compliance pursuant to section 18 of the WIA. This is subject to exceptions, which include the acceptance of an undertaking (section 19(1)(b)) or a case where Ofwat "considers that it would be more appropriate to proceed under the Competition Act 1998" (see section 19(1A) and (1B), and section 31 which confers concurrent functions with the Competition and Markets Authority (CMA)). If an enforcement order is made, breaches of it are actionable at the suit of any person who suffers loss as a result (section 22).

29. Section 22A also empowers Ofwat to impose financial penalties on a water company that either has contravened or is contravening a condition of appointment. Penalties are paid into the Consolidated Fund. As with the duty to make an enforcement order, the power to levy a penalty is subject to Ofwat considering whether it would be more appropriate to proceed under the CA 1998 (section 22A(13) and (14)).

The role of the Environment Agency

30. In addition to regulation by Ofwat, the water companies are subject to environmental rules that are the responsibility of the EA. In particular, the water companies require permits to operate network assets and are subject to regulations prohibiting sewage effluent discharges except to the extent allowed by the relevant permit. Under EA guidance, the water companies are expected to self-report pollution incidents that are in breach of a permit, as well as reporting to Ofwat. Professor Roberts's position is that, while the guidance is advisory, it reflects the EA's understanding of the environmental reporting obligations.

31. The EA's guidance includes a classification scheme for pollution incidents, divided into four categories according to their impact. The EA logs the reported pollution incidents, and their categorisation, on a central system which is used to provide annual reports to Ofwat. Ofwat cross-checks the information received from the EA and the information it has received directly from the water companies. In doing so it adopts the EA's categorisation system.

The issue

32. The sole ground of appeal is that the Tribunal misconstrued section 18(8) and *MSC2* and misapplied it to the facts, wrongly leading it to conclude that the claims were precluded by that provision.

33. Section 18(8) is set out at [4] above. Both parties proceeded on the basis that the act of providing inaccurate information about pollution incidents (in the form of under-reporting) "constituted" a contravention of a condition of appointment. It was also common ground that there is no other relevant "express provision" under an enactment as referred to in section 18(8) (Tribunal decision at [27]).

34. The key issue lies in the closing words of section 18(8), namely whether the remedy "for … [the act or omission that constitutes the] contravention" is one that is "available in

respect of that act … otherwise than by virtue of its constituting … such a contravention". If it is, then the appeal succeeds. In contrast, if the remedy sought is only "available … by virtue of its constituting … such a contravention" (or in other words because it constitutes such a contravention) then the appeal fails. (The words shown in square brackets are not in the statute but help to make sense of the provision. As *Marcic* illustrates, section 18(8) is obviously not limited to cases where the remedy in question is sought explicitly for the "contravention" as such, or for causing or contributing to it; rather the focus is on the remedies available "in respect of" the act or omission complained of, as the closing words indicate.)

35. There was a Respondent's Notice raising four points. The first related to the manner in which the Tribunal decided the section 18(8) issue, by reference to the position on causation and loss rather than the way in which the water companies' case had been put. That point is addressed in the course of the discussion below. The other points relate to the role of the EA. The position of the EA is addressed below insofar as it is necessary to do so.

The pleaded claims

36. The essentials of the pleaded claims can be derived from a summary at [21] of the claim form relating to Severn Trent Water. In essence:

    a) Each water company had a dominant position in the relevant market, since it was the only licence holder for the provision of sewerage services in the relevant area.

    b) The water companies abused their dominant positions by providing misleading information both to the EA and Ofwat concerning the number of pollution incidents on their networks relevant to the PR14 and PR19 performance commitments.

    c) That led Ofwat to permit the water companies to charge higher prices than would have been permitted had accurate information been provided.

    d) The judgments of the General Court and CJEU in *AstraZeneca* confirm that it is an abuse for a dominant firm to mislead a public body exercising regulatory powers in respect of that firm.

    e) The abuse caused loss due to the higher Revenue Allowances imposed, as compared to the counterfactual where pollution incidents were accurately reported.

37. The claim is therefore one of abuse of a dominant position, contrary to the Chapter II prohibition, as set out at [3] above, the domestic equivalent of Article 102 of the Treaty on the Functioning of the European Union (TFEU).

38. One of the points taken below by the water companies was that their position as statutory monopolies excluded the operation of the Chapter II prohibition. There is no appeal against the Tribunal's rejection of that point. As the Tribunal observed at [71], it is well-established that a statutory monopoly can abuse its dominant position contrary to Article 102 despite the absence of competition. One of the forms of abuse is so-called "exploitative abuse" ([73]). Further, as the Tribunal noted at [69], Article 102 and the Chapter II prohibition do not include the express reference to competition included in Article 101, which prohibits agreements and concerted practices which both may affect

trade and "which have as their object or effect the prevention, restriction or distortion of competition". The absence of any express reference to competition in Article 102 and section 18 of the CA 1998 reflects the nature of a dominant position, namely the power to behave in ways not limited by the normal effects of competition: as the CJEU defined it in Case 27/76 *United Brands v Commission* at [65], the ability to "prevent effective competition being maintained on the relevant market by giving [the undertaking] the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".

39. A dominant position may of course be abused in a variety of ways. Professor Roberts places particular reliance on *AstraZeneca*. Based on the decisions of the General Court and CJEU in that case, the claim form maintains that misleading a regulator was "an established head of abuse" ([162]). The abuse is said to comprise the provision of incorrect information to the EA and Ofwat relating to pollution incidents that affected Ofwat's assessment of the Defendant's performance against the performance commitments, both directly (in relation to information provided by the Defendant to Ofwat) and indirectly (in relation to information first provided to the EA and passed on to Ofwat) ([164]). The provision of pollution incident information both to Ofwat and to the EA is said to have affected Ofwat's assessment of performance against the performance commitments, and therefore (via the level of Revenue Allowances imposed) the maximum prices permitted to be charged ([165]). It is claimed that the Defendant was aware or ought to have been aware of these matters ([166]). It is further claimed at [167] that the pollution incident information was misleading because it significantly understated the number of pollution incidents relevant to the performance commitments, leading Ofwat into error in setting Revenue Allowances at a higher level than would have been set if accurate information had been provided.

40. The claim form continues at [168]:

> The provision of information that significantly and/or systematically misleads relevant regulatory bodies in the exercise of their regulatory functions does not constitute normal competition on the merits and has led to a situation where Ofwat has erroneously permitted the Defendant to charge, and the Defendant has in fact charged (and continues to charge), customers higher prices than it would have been able to charge had accurate [pollution incident information] been provided. Accordingly, the Defendant has committed an abuse of a dominant position.

41. In addition to reliance on misleading the regulator, the claim form observes that the categories of abuse are not closed, such that whether or not the case falls within the "four corners" of the *AstraZeneca* case the conduct was in any event abusive in all the circumstances of the case ([174] and [175]). The Defendant enjoyed a position of "super-dominance" through its possession of a statutory monopoly and was subject to price regulation to limit its ability to exploit customers. The provision of inaccurate information that resulted in higher Revenue Allowances being set than would otherwise have been the case was not normal competition on the merits and allowed unfair exploitation of customers ([176]). A number of additional points are relied on in this regard, relating to the monopoly held, the fact that prices would not be "self-correcting", and the aim of the price review mechanism, which worked to prevent exploitation only on the basis that accurate information was supplied in accordance with the Defendant's regulatory obligations ([177]).

42. The pleading as to causation and loss is, in essence, that the breach of the Chapter II prohibition has caused loss, being the difference between the amounts paid for sewerage services and what would have been paid had misleading pollution incident information not been provided ([178] and [179]). Absent the abusive conduct, misleading information would not have been provided to the EA or to Ofwat, Ofwat's assessment would have been based on a higher number of pollution incidents, and that would have led to lower Revenue Allowances, and in turn lower prices ([182]).

AstraZeneca and its relevance

43. *AstraZeneca* concerned a complaint that AstraZeneca had acted to prevent two competitors introducing generic versions of the drug omeprazole on a number of EEA markets. The Commission decided that there had been abuses of a dominant position, including by making representations to patent offices as part of a strategy involving the obtaining of supplementary protection certificates (SPCs) to keep generics out of the relevant market. That conclusion was upheld by the General Court and the CJEU.

44. The General Court observed at [355] that the submission to public authorities of "misleading information liable to lead them into error" was "not in keeping with the special responsibility of an undertaking in a dominant position not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market". The misleading nature of representations must be assessed on the basis of objective factors ([356]). It went on at [357]:

> The Court would point out that the question whether representations made to public authorities for the purposes of improperly obtaining exclusive rights are misleading must be assessed *in concreto* and that assessment may vary according to the specific circumstances of each case. In particular, it is necessary to examine whether, in the light of the context in which the practice in question has been implemented, that practice was such as to lead the public authorities wrongly to create regulatory obstacles to competition, for example by the unlawful grant of exclusive rights to the dominant undertaking ...

45. At [361] the court concluded that the Commission had correctly taken the view that the submission by an undertaking in a dominant position of misleading information to the patent offices which led to the grant of SPCs to which it was not entitled constituted an abuse. Whether the representations were misleading had to be "assessed in the light of the specific circumstances and context of each individual case". (Similar points are repeated at [375] and [377].)

46. In upholding the General Court's decision, the CJEU observed at [98] that recourse to "highly misleading representations with the aim of leading public authorities into error" was manifestly not consistent with competition on the merits and the "specific responsibility" of an undertaking in a dominant position not to prejudice effective and undistorted competition. It also repeated at [99] that the assessment of whether representations were misleading "must be made *in concreto* and may vary according to the specific circumstances of each case".

47. *AstraZeneca* is the leading authority on abuse of a dominant position by means of misleading a public authority (the only other authority we were shown in that connection

is the Commission decision in Case COMP/38.636 *Rambus*, 9 December 2009 (*Rambus*), referred to below). *AstraZeneca* confirms that abuse can occur by that means, but it is important to understand that it does not establish a claim for "misleading a regulator" as such. The question remains whether there has been an abuse of a dominant position which may affect trade, in breach of the Chapter II prohibition. This is reflected in the references in the judgments in that case to making an assessment by reference to the context and the specific circumstances of the case. Whether the provision of particular information to a public authority does amount to an abuse falling foul of the Chapter II prohibition obviously calls for a fact-specific enquiry. Put another way, it is not simply a question of whether incorrect information was provided. The question is whether, in the particular circumstances, the provision of incorrect information gives rise to a breach of the Chapter II prohibition.

48. The complaint in *AstraZeneca* was one of exclusion of competitors from a market by making misleading representations to public authorities. This case is of course different. The water companies benefit from statutory monopolies by virtue of their appointments. The alleged abuse is not one of excluding competitors, but of action that is said to have enabled the water companies to charge higher prices than they would otherwise have done. Those counterfactual prices are not the prices that would have been charged in a competitive market, because there is none. Rather, they are the prices that would have been permitted by reference to the price controls that would otherwise have been set. It is in that sense that it is said that trade was affected, contrary to the Chapter II prohibition.

MSC2 and *Marcic*

49. In *MSC2*, the owner of the Manchester Ship Canal had threatened to bring a claim in nuisance and trespass against United Utilities, seeking damages for the discharge of inadequately treated effluent into the canal when the capacity of the sewerage system was exceeded following heavy rainfall. The discharges fell within sections 117(5) and 186(3) of the WIA which made clear that such discharges were not authorised. United Utilities sought a declaration that the threatened claim could not be brought as a private law action, the only remedies being the machinery provided by the WIA. Fancourt J granted the declaration and his decision was upheld by this court, but the canal owner's appeal to the UKSC was unanimously allowed by a 7-member court, distinguishing rather than departing from the earlier case of *Marcic*.

50. The UKSC held that the WIA did not oust common law causes of action to which sections 117(5) and 186(3) applied. On the contrary, those provisions were predicated on the existence of those causes of action where limits on discharges were exceeded. Further indicators that supported the survival of common law rights included that section 117(6) preserved the duty to carry out functions so as not to create a nuisance, section 186(7) provided for the option of arbitration but provided no statutory consequential remedy, section 180 provided compensation for damage caused by authorised, but not unauthorised, acts, and an alternative interpretation would involve a substantial change in the law being made by what was intended to be a consolidation statute. Further, the matter was put "beyond doubt" ([124]) by the only ouster provision, section 18(8). Lord Reed and Lord Hodge summarised the position as follows at [133]:

> In summary, the 1991 Act contains no express ouster of all common law causes of action and remedies to protect the enjoyment of the property of the persons to whom section 186(3) refers, ie those who would have been entitled

> by law to prevent or be relieved from the injurious affection of the watercourse. Nor do the provisions of the Act oust those rights and remedies by necessary implication. On the contrary, sections 117(5) and (6) and 186(3) and (7) envisage that the common law rights survive and that a common law remedy remains available to protect those property interests. Those provisions are consistent only with the preservation of a common law remedy for polluting discharges. A further factor pointing in that direction is the incoherence of the statutory arrangements that provide compensation for damage if those common law rights and remedies were removed: para 121 above. The only ouster, by section 18(8), is of causes of action of which a contravention of a condition of an undertaker's appointment or licence, or of a statutory or other requirement enforceable under that section, forms an essential ingredient. A cause of action in trespass or nuisance brought against a sewerage undertaker on the basis of the discharge of polluting effluent from its sewers, sewage treatment works or associated works into a watercourse does not normally include, as an essential ingredient, the contravention of a statutory requirement, and in those circumstances is therefore not excluded.

51. As can be seen from this, section 18(8) formed only part of a comprehensive analysis which took careful account of the relevant provisions of the WIA, which themselves provided strong indicators, and also relied on the historic position at common law and the fact that it was unlikely that a consolidation statute would make important changes to it (see further [53] and [123]). In particular, Lord Reed and Lord Hodge relied on the principle of legality, namely "that fundamental common law rights, such as rights of action to protect private property, are not taken to be abrogated by statute in the absence of express language or necessary implication" ([123]; see also [17]). Lord Reed and Lord Hodge also undertook an analysis of the earlier case law in relation to nuisance claims involving water and sewerage undertakers, setting out a detailed summary at [50], and analysed both the WIA and its statutory predecessors in some detail, concluding at [67] that the relevant provisions "demonstrate a continuity of the parliamentary policy seen in the earlier legislation", including the duty not to create a nuisance.

52. One of the cases discussed was *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 (*Pride of Derby*), which concerned a nuisance claim by an angling club in relation to pollution in the River Derwent caused by discharges from, among other things, Derby Corporation's sewage works. This court upheld the claim against Derby Corporation on the basis that it was responsible for the discharges, even though it argued that the problem could only be resolved by enlarging the works, which could not be done at that time. As Lord Reed and Lord Hodge observed in *MSC2* at [46], the court focused on the nature of the cause of action, in that case causing a nuisance in the form of noxious discharges for which the defendants were responsible. It was not a necessary part of that cause of action that there had been a failure to enlarge the works.

53. *Marcic* was distinguished in the following way. Mr Marcic's property had been repeatedly flooded when a surface water sewer which was the responsibility of Thames Water became overloaded by heavy rain, and sewage had also backed up into the property. The sewer had become inadequate as additional houses were built and connected to it (connections which Thames Water was obliged to accept). Mr Marcic

brought a claim in nuisance which was unanimously dismissed by the House of Lords relying on section 18(8).

54. Lord Reed and Lord Hodge observed at [135] of *MSC2* that Mr Marcic's claim did not engage the same statutory provisions as were in issue in that case. Moreover (and importantly), Mr Marcic's claim was not that Thames Water had created or adopted a nuisance, but that they had continued it by failing to take reasonable steps to avert it by constructing a new sewer (see also [105]). However, previous authorities had established that a duty to construct a public sewer could only arise under statute. Further, the question whether constructing a new sewer would be reasonable "could not be determined by the court consistently with the regime created by the 1991 Act". Thus the duty to build more sewers arose only under that Act. In contrast, in *MSC2* United Utilities was responsible for the discharges, and it was those discharges that created the nuisance ([136]).

55. Reference to the "essential ingredient" test first appears in the summary of the pre-privatisation case law at [50] of *MSC2*, namely that a claim "cannot be brought against a sewerage authority at common law where it is an essential ingredient of the cause of action that the authority has failed to drain its district effectually", but may lie where that is not an essential ingredient ([50](10) and (13)). After setting out section 18(8), adding emphasis to the closing words (starting "and those that are available …"), Lord Reed and Lord Hodge said this at [57]:

> The words which we have emphasised … expressly preserve any common law remedies that are available in respect of acts or omissions which contravene a statutory requirement enforceable under that section, or cause or contribute to that contravention, where the contravention of the 1991 Act is not an essential ingredient of the claim. In other words, if a sewerage undertaker's act or omission gives rise to a cause of action at common law, the fact that it also contravenes or contributes to the contravention of the 1991 Act does not prevent the courts from enforcing the affected claimant's common law rights and awarding any available common law remedies. That reflects the pre-privatisation law …

56. Lord Reed and Lord Hodge also explained *Marcic* on the basis that an essential ingredient of the cause of action in that case was a failure to perform an obligation to construct a new sewer, a duty that arose only under section 94(1) of the WIA, such that section 18(8) applied ([82]; see also [90] and [105]). Lord Hoffmann's observations in *Marcic* about the court not being in a position to assess the reasonableness of construction of a new sewer did not preclude a claim where the inadequacy of the infrastructure was only an "underlying cause" of the nuisance complained of. That explained why *Marcic* had approved rather than overruled *Pride of Derby* ([83]-[84]). In the latter case the complaint was not one of failure to the provide the citizens of Derby with a sewerage system, in breach of the statutory duty to drain the district effectually. Rather, the problem was the (literal) downstream consequences of the discharges that performed part of the function of draining Derby. The case law distinguished between discharges where the system was operating as it was supposed to and involuntary escapes; the former could give rise to an actionable nuisance even though the underlying cause was inadequate infrastructure ([85]-[87]).

57. At [125]-[132] of *MSC2*, Lord Reed and Lord Hodge discussed whether the grant of an injunction would cut across the operation of the statutory scheme, including the making

of enforcement orders and the acceptance of undertakings in lieu (see [28] above). They observed that the potential incompatibility did not provide the basis for excluding common law causes of action and awards of damages, but could militate against the grant of injunctions requiring the upgrading of sewerage systems. In contrast, an award of damages was not inconsistent with the regime and permitted the continuation of a common law remedy, in accordance with the principle of legality.

Whether section 18(8) applies in this case

58. As already indicated, the issue on this appeal is one of the construction of section 18(8) and its application to the facts. The question is whether the Tribunal was correct to conclude that the remedy sought for the provision of incorrect information is only "available … by virtue of [the relevant act] constituting … a contravention" of a condition of appointment.

59. *MSC2* provides authoritative guidance on the interpretation of section 18(8) and explains *Marcic*. We have paid careful regard to that guidance. However, both *MSC2* and *Marcic* concern actions in nuisance where the "essential ingredient" formulation is perhaps easier to understand and apply without falling into error than it is to the very different facts of this case. It is a formulation that helpfully rationalises and explains the different outcomes in *MSC2* and *Marcic*, but it is important to bear in mind that the ultimate task is always one of interpreting the statute and applying it to the facts.

60. Mr Turner KC's submissions that section 18(8) does not preclude Professor Roberts's claim were put attractively and have considerable force. At its core, the argument is that the claim is based on the fact of misleading Ofwat and the EA, with the consequences that is said to have had for the setting of Revenue Allowances and, therefore, pricing. That was an actionable wrong under section 18 of the CA 1998, without more. Once that fact had been established then the calculation of the loss caused by it was an exercise in economics. The claim did not depend on establishing that the act of misleading was a contravention of a condition of appointment; it did not depend on the act having a particular legal status under the WIA. Further, the fact that the same act also constituted such a contravention was immaterial, as the facts of *MSC2* itself illustrate. Ofwat's pricing regime was no more than the basis on which the water companies were able to achieve distortion through the provision of misleading information. The existence of the reporting obligation and its breach was, in effect, mere context.

61. However, in our view the analysis cannot stop there.

The nature of the abuse claimed

62. The critical starting point is to identify the "abuse" said to fall foul of the Chapter II prohibition. It is that abuse that must be demonstrated in order to obtain the remedy sought. Identifying the abuse obviously requires an examination of the pleaded case.

63. We have already observed that "misleading a regulator" is not a discrete basis for a claim. It is necessary for the relevant act to amount to an abuse of a dominant position which had at least the potential to affect trade in the United Kingdom (see [47] and [48] above). That question must be answered by reference to the particular factual circumstances. This is reflected in *AstraZeneca*. As explained at [44]-[46] above, in that case both the General Court and the CJEU emphasised the importance of considering the context and the

specific circumstances of the case to determine whether a public authority was misled, in that case "such as to lead [it] wrongly to create regulatory obstacles to competition": see the General Court's judgment at [357].

64. The alleged abuse in this case comprises the provision of "misleading" (or inaccurate) information about pollution incidents. However, the way in which the information was said to have been misleading cannot be assessed in a vacuum. It is said to have been misleading because the water companies under-reported the pollution incidents that should have been reported. Ofwat had required certain information about pollution incidents under paragraph 9.2 of Condition B of the conditions of appointment. It relied on the accuracy of that information in setting Revenue Allowances, but accuracy could only be assessed by reference to what pollution incidents would have been reported if the obligation to provide the specified information had been properly complied with.

65. Further, the obvious basis for Ofwat's reliance was the legal obligations on the water companies to provide information when required to do so. Ofwat would (reasonably) have proceeded on the basis that the information accurately and fully complied with the request, because that was what the water companies were obliged to do. Any "misleading" was by reference to Ofwat's assumption that the information was accurate and complete, but that assumption would have been based on: a) its legal power to require information, b) the particular information it required to be provided, and c) the duty of the water companies to respond by providing the specified information in an accurate manner. It would have been of no moment if (for example) a water company had failed to supply details of pollution incidents which were not in the categories required to be provided. That could not have had an effect on the setting of Revenue Allowances and thereby on prices, which is the relevant impact on trade.

66. Although the claim form seeks to avoid this point by focusing on the provision of "misleading" information, it recognises, as it has to, the regulatory context and the relevance of the duty to report. The claim form includes a detailed description of the regulatory regime and specifically the water companies' reporting obligations to the EA and Ofwat. In relation to Ofwat, there are descriptions of the legally binding obligations to supply pollution incident information to Ofwat, for example at [120]:

> … the Defendant has at all relevant times been under (and continues to be under) a legally binding obligation to report certain information relating to Pollution Incidents accurately and completely to Ofwat because, as detailed in the following paragraphs: (a) in its Price Reviews Ofwat imposed on the Defendant certain Pollution Incident targets based on the approach to the self-reporting of such incidents set out in the EA Guidance; and (b) under its Licence Conditions the Defendant was under a legally binding obligation to report accurate and complete information relating to the number of Pollution Incidents on its network relevant to those targets.

And at [150]:

> In summary, at all relevant times the Defendant was under an obligation, pursuant to its Licence Conditions, to provide to Ofwat … the Ofwat [Pollution Incident] Information, namely information of the number of Pollution Incidents on its sewerage network (identified on the basis of the same approach as it was required to adopt for the purpose of reporting

> Pollution Incidents to the EA) relevant to its [Pollution Incident] Performance Commitments, and to report such information accurately and completely.

67. Mr Turner submitted that these descriptions formed part of the "factual and regulatory background" section of the claim form and could be excised without losing any essential element of the pleaded claim. However, we do not accept that they could be excised without rendering the pleaded claim incoherent and, in reality, incomplete. This is well illustrated by the first paragraph that describes the alleged abuse ([164]), the opening words of which cross-refer back to [120]. [167] and [168] plead, in effect, why the provision of misleading information is said to have resulted in an actionable abuse, namely that Ofwat was led into error in setting Revenue Allowances. But as we have said, any such error arose by reference to Ofwat's reasonable assumption that what had been provided properly complied with the duty to provide the information in question. Indeed, this is expressly recognised at [177(6)], which states as follows:

> At all relevant times, the Defendant was (and remains) under extensive and detailed regulatory obligations to ensure that the [Pollution Incident] Information that it provided to Ofwat was complete and accurate. The Defendant provided signed statements warranting that that was the case (see §149(2) above), and Ofwat determined its Revenue Allowances on the assumption that the Defendant had complied with those obligations.

68. Mr Turner further submitted that the closing words of section 18(8) require consideration not of whether the claim relies on the existence of an act (here misreporting), but of whether the claim is dependent on that act having a particular legal status (here the contravention of a condition); only the latter type of claim is excluded. That is really another way of saying that section 18(8) is not engaged merely because the act complained of is also a contravention of the conditions, which is uncontroversial. Rather, the claim must rely on there having been a contravention of the conditions. But as we have sought to explain, the claim does rely on the existence of the reporting obligation and its breach, since otherwise Ofwat would not have been misled.

69. The critical relevance of the reporting obligation is, if anything, further supported by the Commission decision in *Rambus* (see [47] above), on which Mr Turner sought to place some reliance. *Rambus* concerned a failure to provide information to a standard-setting body about relevant patents and patent applications. The Commission's preliminary assessment that there had been an abuse of a dominant position expressly relied on a duty of good faith to make the relevant disclosures (see for example at (28) and (38)). While there is a difference between a failure to report at all, which is not culpable absent some form of duty to do so, and the provision of (positively) incorrect information, the distinction is far from clear cut. The water companies' alleged under-reporting can readily be characterised as a failure to report information which should have been reported.

70. It is convenient to respond at this point to two points raised by Zacaroli LJ in his judgment. First, he notes at [126] that the EA took account of information reported by members of the public, and questioned whether it was therefore safe to assume that Ofwat relied on the legal obligation to report accurately. However, it is also clear from the claim form that the main source of information was the water companies ([164]), and the focus of the claim is of course Ofwat's reliance on that information. It is also common ground

that Ofwat cross-checked information received from the EA with that received directly from the water companies: see [31] above.

71. Secondly, Zacaroli LJ refers at [132] and [133] to scenarios where there is only an expectation, rather than an obligation, to provide accurate information, or alternatively where incorrect information is provided by mistake. Those are of course not the facts of this case, and we do not consider that they assist. There was in fact an obligation to report accurately, and Ofwat reasonably assumed that it had been complied with. That is the basis on which the claim is put.

72. In summary, the existence of the duty to report accurately is an essential ingredient of the cause of action asserted. Professor Roberts's claim is that the water companies abused their dominant positions by misleading the regulator, but that "misleading" depends on demonstrating that the duty to report accurately was breached. Just as in *Marcic* the nuisance could not be established without relying on the duty to construct a new sewer, the claim in this case depends on, and would not exist but for, the breach of duty.

The legislation must be applied realistically

73. Further and relatedly, section 18(8) should be applied in a realistic way. In *Rossendale Borough Council v Hurstwood Properties* [2021] UKSC 16, [2022] AC 690 (*Rossendale*) the UKSC approved as a general principle of statutory construction a dictum of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 52 (2003) 6 ITLR 454 at [35], to the effect that what is required is both a purposive approach and a realistic and unblinkered approach to the application of the relevant provisions to the facts. This approach applies generally, beyond tax and areas such as the business rates with which *Rossendale* was concerned: see for example the references to it in *R (on the application of Wang) v Secretary of State for the Home Department* [2023] UKSC 21, [2023] 1 WLR 2125 at [2], [3] and [31].

74. While Professor Roberts's case is attractive at a technical level, we do not consider that it is consistent with this general principle. Approaching the matter realistically, the remedy sought in this case does ultimately depend on the existence of a breach of duty, in the form of a contravention of a condition of appointment. It is only Ofwat's assessment of the accuracy of the information, determined by reference to the information required to be provided, that resulted in it allegedly being misled in a way that had the potential to affect (and on Professor Roberts's case did affect) trade in the form of the prices that the water companies were able to charge.

75. One response to this might be that Ofwat was misled because it trusted the water companies to comply with their licence conditions, and that is not the same as a cause of action which arises only by virtue of a contravention of a condition as section 18(8) requires. In other words, the claim has as an essential ingredient the existence of the licence conditions rather than their breach. But realistically the two are different sides of the same coin. Ofwat was only misled because information that it was entitled to assume was accurate was inaccurate.

76. The contrast with the facts of *MSC2* is a sharp one. In that case the act that amounted to a common law nuisance was also a regulatory breach, but that was happenstance. The claim could be, and was, coherently pleaded and established without reference to the regulatory regime, unlike *Marcic* where an essential component of the claim could not

be established without resort to the statutory duty to construct sewers. As Lord Reed and Lord Hodge said in *MSC2* at [124], remedies are not excluded by section 18(8) if they "do not depend upon [the act or omission] also being a breach of the statutory duty".

77. In this case it is unrealistic to say that there would be any kind of free-standing claim absent a breach of the regulatory regime, in the form of a contravention of the conditions of appointment. The breach of those conditions is not merely an "underlying cause" of the kind referred to in *MSC2* at [84], it is fundamental to the complaint. The claim depends on the breach of the obligation to make an accurate report.

78. In essence, the complaint is that the regime has been misused to abuse a dominant position. The nature of the misuse is that there was a contravention of the conditions of appointment.

79. In those circumstances, the approach urged on us by Mr Turner is too narrow, and would require the wearing of judicial blinkers. It requires the duty to provide information to be disregarded, with the focus confined entirely to the fact that the information supplied was misleading. However, a determination of whether that information was in fact misleading, and that it involved an abuse (which is not the same question: see the discussion of *AstraZeneca*, above), requires a contextual, realistic, assessment. In this case the allegation that the information was misleading was necessarily founded upon the duty to make an accurate report of the required information, and could not be made out without it.

The relevance of the statutory scheme

80. There is a further, broader, point. Pursuant to the WIA the water companies are subject to a comprehensive and detailed regulatory regime operated by Ofwat. A large part of that regime is designed to protect the water companies' customers. In particular, the price control mechanism exists to protect customers from the excessive charging that the water companies' monopoly positions would otherwise allow them to impose – in other words, to prevent abuse of their dominant positions. Professor Roberts's expert describes price regulation by Ofwat as a "proxy" for the prices that could be charged under conditions of effective competition. In effect, price controls are part of a *quid pro quo* for the grant of a monopoly. The regime also contains its own sanctions for non-compliance.

81. It is unrealistic to regard the misreporting alleged to have occurred as detached from the statutory price control regime, which is in place precisely in order to prevent inappropriate over-pricing in the monopoly situation facilitated by the same legislation. Indeed, the reporting in question was specifically for the purposes of the operation of price controls, and the claim depends on the misreporting having had an impact on them. The manner in which the price control regime is operated depends, among things, on compliance with obligations to report information accurately.

82. While section 18(8) is intended to preserve independently actionable claims, it is not in our view intended to permit claims which cannot, in reality, be divorced from Ofwat's operation of the regulatory regime and, specifically, a breach of that regime. Professor Roberts could not succeed in her claims in the absence of the regulatory regime, but she also could not succeed in the absence of its alleged breach. Absent the conditions to which they were subject, the water companies would either not have reported pollution incidents to Ofwat at all, or had they chosen to do so they would have been at liberty to

report none, some or all of them. Whether the reporting was accurate or inaccurate would have been neither here nor there. The misreporting relied upon is only such because it breaches, and so undermines, the very regime that the legislature has put in place in order to protect customers. To put the matter another way, the misreporting relied upon is in respect of a regime that Parliament has put in place in order to protect consumers and as part of the framework of the statutory monopoly that allows the water companies to operate in the first place.

83. Mr Turner stressed the principle that legislation should not be construed as depriving individuals of their rights unless it does so expressly or by necessary implication: see for example *MSC2* at [20]. However, this is a very different case to *MSC2*, where success by United Utilities would have removed long-established common law rights, and in particular what Lord Reed and Lord Hodge described at [17] as the "fundamental right" to peaceful enjoyment of property. Here, the claim can only be maintained by relying on the regulatory regime provided by the WIA, and specifically the obligation to report specified pollution incidents.

84. In effect, the alleged abuse is an abuse of the regulatory regime, and it is inseparable from it. It was the failure to comply with the obligation to report that led Ofwat to be misled into assuming that the information was accurate. The claim is in a real sense inconsistent with the statutory scheme, just as Lord Nicholls found Mr Marcic's claim to be (*Marcic* at [34]).

85. Mr Turner relied on the provisions of the WIA which expressly require Ofwat to consider whether to proceed under the CA 1998 (see [28] and [29] above). He submitted that Ofwat could have reached a competition law infringement decision under those provisions in respect of the water companies' behaviour, and in that case it would have been plain that Professor Roberts could have brought a follow-on damages claim which would not rely on any contravention of conditions of appointment.

86. We are not persuaded by this. Leaving to one side that the premise is hypothetical and that provisions to which Mr Turner refers were not included with section 18(8) in the legislation as originally enacted, there are different types of competition claim and there is no suggestion that all of them would fall foul of section 18(8) (for examples involving Ofwat, see *Albion Water v Water Services Regulation Authority* [2006] CAT 23, [2006] All ER (D) 222 and *Albion Water v Water Services Regulation Authority* [2008] CAT 31; the further case of *Albion Water v Dŵr Cymru Cyfyngedig* [2013] CAT 6 concerned a private competition law damages claim). Section 18(8) clearly excludes certain claims, and the fact that another part of the legislation refers to the CA 1998 does not mean that no claims under that Act can be within the scope of the exclusion.

87. We are also not persuaded by Mr Turner's reliance on the allegation that misleading information was provided to the EA, under a regime which has no equivalent to section 18(8). The fact that the EA may have been misled could not, by itself, have had any relevant effect on trade. Although the pleaded claim relies on the fact that information was provided both to the EA and Ofwat, the relevance of the former is that the information was thereby provided indirectly to Ofwat, affecting Ofwat's assessment and misleading it into setting higher Revenue Allowances ([164] and [165] of the claim form, [39] above). The provision of information to the EA alone could not constitute an abuse falling foul of the Chapter II prohibition, and is not relied on as doing so independently of its onward provision to Ofwat.

88. Mr Turner also made submissions about what are said to be limitations on Ofwat's ability to ensure that consumers obtain redress in the way sought to be achieved by the claim, in particular by reference to the fact that the power to make enforcement orders relates only to existing or anticipated breaches, in contrast to the penalty position (see [28] and [29] above). We had the benefit in that connection of brief written and oral responsive submissions from Ms Boyd KC for Ofwat, for which we are grateful. In the course of those submissions, Ms Boyd confirmed that the statement in the Tribunal's judgment at [51] that Ofwat "considers that it has power through an enforcement order pursuant to s. 18(1) WIA to direct a [water company] in breach of condition to reimburse customers the amount of the overcharge" remains Ofwat's position, albeit that Ms Boyd explained that the point has never needed to be tested. We also note that Ofwat provided examples to the Tribunal of accepting undertakings in lieu of imposing penalties which have involved reimbursement to customers who had been overcharged as a result of misreporting in connection with price controls.

The Tribunal's approach

89. Finally, we should add some brief observations about the Tribunal's own analysis. The Tribunal approached the matter somewhat differently. It saw "some force" in Professor Roberts's argument that misleading a public authority was an abuse, notwithstanding the submission by Mr Hoskins KC for the water companies that the alleged misreporting could be determined only by reference to the reporting requirements and paragraph 9.2 of Condition B (see at [40]) but it did not determine the issue on that basis. Instead, and as already explained, it decided that the claim was excluded by section 18(8) because the alleged loss could not be established except by reference to the regime.

90. Mr Turner's criticisms of the Tribunal's reasoning on this point have some merit. The relevant statutory question is whether the remedy sought is available only "by virtue of" the act in question contravening a condition of appointment. The act complained of is the provision of inaccurate information, and that is what must be considered in order to determine whether section 18(8) is engaged. Ofwat's action in setting the Revenue Allowances was merely an application of the price control regime founded upon the information supplied, and by itself involved no contravention of any condition. Nonetheless, the Tribunal's consideration of causation and loss is not entirely misplaced. The alleged failure to make accurate reports is said to have led Ofwat to set higher Revenue Allowances, and it was by that means that loss was suffered. But as already explained, Ofwat was only "misled" into doing that in the context of the duty to report. The asserted loss can properly be said to have arisen from the contravention of the duty to report, which caused Ofwat to be misled into setting higher Revenue Allowances, and not from a free-standing claim of abuse of dominance.

Conclusion

91. In summary, and on a realistic assessment of the claim, the remedy sought is one that is available only "by virtue of" the act complained of constituting a contravention of a condition of appointment. That contravention is, in reality, an essential ingredient of the claimed abuse. The claim is therefore excluded by section 18(8). We would dismiss the appeal.

Lord Justice Zacaroli:

92. I have reached a different conclusion to that of the Master of the Rolls and Falk LJ on the central question raised by this appeal and, for the reasons which follow, I would have allowed the appeal.

93. The question posed by section 18(8), is whether the remedy which is sought in the competition claim is one that is available (1) in respect of the act or omission that constituted a breach of the licence conditions, but (2) otherwise than by virtue of that act or omission constituting a contravention of the licence conditions.

94. The relevant act or omission by the water companies was providing inaccurate information to Ofwat. It is common ground that the provision of inaccurate information would constitute a breach of the licence conditions, specifically that set out in paragraph 9.2 of Condition B requiring the water companies to furnish to Ofwat such information as it may reasonably require to enable it to carry out its periodic price review.

95. It is common ground that if a water company's act or omission gives rise to a cause of action at common law, then it is not ousted by section 18(8) even if the same act or omission also contravenes or contributes to the contravention of the licence conditions: see *MSC2* at [57]. It must be shown that the fact of the contravention of the licence conditions is an "essential ingredient" in the claim giving rise to the remedy (*MSC2*, see [7] and [8] and [49] to [56] above). Put another way, it must be shown that the availability of the remedy *depends* on the act or omission constituting such a contravention: *MSC2* at [124].

96. On the other hand, it is not enough, in order to conclude that a remedy avoids being excluded under section 18(8), to say that the claim being advanced is a competition law claim, framed as an abuse of dominance contrary to Chapter II of the CA 1998. That is clear from *MSC2* and *Marcic*: both claims were framed in nuisance, but one was excluded and the other was not.

97. This appeal turns less on the interpretation of the words in section 18(8), than upon their application in the circumstances of this case. The critical question is whether it is an essential ingredient of the competition law claim which Professor Roberts seeks to bring that the provision of inaccurate information to Ofwat constituted a breach of the licence conditions.

The cause of action asserted by Professor Roberts

98. Two factors combine to make that question more difficult to answer here than, say, in cases such as *MSC2* and *Marcic*, where the act in question was the discharge of pollution onto others' property said to give rise to the common law tort of nuisance. First, the elements of a claim for abuse of dominance are less straightforward to identify. Second, that is compounded by the unusual circumstance here, where each water company has a statutory monopoly such that there is no possibility of competition.

99. As to the first difficulty, Professor Roberts pleads the case in two ways: abuse of dominant position by misleading Ofwat as regulator, based on *AstraZeneca*, and abuse "in all the circumstances of the case", which is said to turn on whether there is a "credible 'theory of harm' in respect of the structure of competition, customers and/or end consumers". This is mostly mitigated by the fact the pleading of the second basis of claim relies predominantly (although not exclusively) on the same facts and matters that

underlie the first basis of claim. The alternative basis of claim was not much developed in submissions before us.

100. There is a broader point, however. As the Master of the Rolls and Falk LJ say at [47], it is wrong to regard *AstraZeneca* as establishing a claim for "misleading a regulator" as such (and therefore too simplistic to say, as Professor Roberts does, that this is an "established head of claim"). The question in any case remains whether there has been an abuse of a dominant position which may affect trade in the United Kingdom. That will always require an examination of the impugned conduct in the context of all the circumstances. It makes identification, for the purposes of section 18(8), of the essential ingredients of the claim more challenging.

101. The elements of the claim as pleaded in the claim form are set out in the judgment of the Master of the Rolls and Falk LJ above at [36] to [42] above). They may be summarised as follows:

(1) The water companies provided inaccurate information to the EA and to Ofwat relating to the number of pollution incidents on their networks that are relevant to and affect Ofwat's assessment of how the water companies performed against their performance commitments;

(2) The information provided by the water companies, both that provided directly to Ofwat and that provided to the EA which the EA included in its reports to Ofwat, affected Ofwat's assessment of how the water companies had performed;

(3) Ofwat's assessment of the water companies' performance affected the level of the Revenue Allowances imposed on them by Ofwat;

(4) The water companies knew or ought to have known of the above matters;

(5) The water companies' conduct in providing inaccurate information which had the effect of significantly and/or systematically understating the number of pollution incidents relevant to each water company's performance commitments, and which led Ofwat to set in error the Revenue Allowances at a higher level than if accurate information had been provided, does not constitute normal competition on the merits and constituted an abuse of dominance.

102. None of these core elements of the claim, as pleaded in the claim form, relies upon the fact that the provision of inaccurate information to Ofwat constituted a breach of the licence conditions. The claim form does include numerous references to that fact, but in a section headed "Factual and regulatory background".

103. The pleading is, however, only a starting point. The essential ingredients of the claim must be determined as a matter of law. It does not necessarily follow that the fact that a particular allegation is made in a pleading means that it forms an essential part of the cause of action. Conversely, the fact that a particular ingredient is left out of the operative part of a pleading does not preclude it constituting an essential element in a claim.

104. There is no single definition of "abuse of a dominant position", and it is trite to say that the categories of conduct that might constitute such abuse are not closed. The principles

to be derived from *AstraZeneca*, which is the bedrock of Profesor Roberts's case, are summarised above at [43] to [48] above. I highlight the following points.

105. The starting point for the General Court's reasoning (at [352]) was the "settled case law" (particularly *Hoffmann-La Roche v Commission*, Case 85/76 EU:C:1979:36) which described abuse as:

> an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of traders' performance, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

106. *AstraZeneca* itself concerned conduct which may cause damage to consumers through its impact on an effective competition structure, but the Court noted (at [353]) that Article 82 (the equivalent to section 18 CA 1998) is aimed equally at practices which may cause damage to consumers directly.

107. Article 82 (now Article 102 TFEU) prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position "by using methods other than those which come within the scope of competition on the merits", but those methods need not consist in the use of economic power conferred by a dominant position (see [354]).

108. The misleading nature of AstraZeneca's conduct (i.e. submitting misleading information to the public authorities liable to lead them into error and therefore to make possible the grant of an exclusive right to which it was not entitled) was relevant because it constituted "a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition" ([355]).

109. Given the objective nature of the concept of abuse, the misleading nature of the representations made to public authorities must be assessed on the basis of objective factors. Proof of bad faith is not necessary ([356]). On the other hand, where the dominant undertaking does intend to cause harm, that may be taken into account to support the conclusion (otherwise based on objective factors) that the undertaking abused a dominant position ([359]).

110. At [357] (quoted at [44] above), the General Court observed that the assessment must be made "*in concreto*" (i.e. not in the abstract) by reference to the specific circumstances of the case.

111. The special responsibility of a dominant undertaking would extend to a case where it obtained an unlawful exclusive right as a result of an error by it in communicating with a public authority, in which case, "its special responsibility not to impair, by methods falling outside the scope of competition on the merits, genuine undistorted competition in the common market requires it, at the very least, to inform the public authorities of this so as to enable them to rectify those irregularities" (see [358]).

112. Aside from the fact that the shorthand label "abuse of dominance by misleading public authorities" is best avoided for the reasons given above at [47], care is needed in relation to the concept of "misleading" a regulator, because it is used by the General Court in *AstraZeneca* in two different senses. It is first used in the sense that a representation is misleading because it is false or inaccurate. It is also used in the sense that it causes the public authority to take action that it would not have taken had the representation been accurate. It is in the latter sense that the Court referred, at [357], to the need to assess its misleading nature "*in concreto*" in light of the context.

113. The next step is to determine how the principles derived from *AstraZeneca* apply to the present claims. As the Tribunal said at [73] of its judgment, it is generally recognised that section 18 CA 1998 covers two kinds of conduct, exclusionary abuse and exploitative abuse. *AstraZeneca* is an example of the former, while the present case is of the latter kind.

114. One of the points taken by the water companies before the Tribunal was that, because the water companies had a statutory monopoly, competition law, and specifically the prohibition on abuse of a dominant position, does not apply to the conduct alleged against them. It is certainly difficult to see how a case of exclusionary abuse could ever lie in circumstances where each water company has a statutory monopoly over the provision of water and sewerage services to retail consumers within its geographical area, so that whatever the water company does it cannot have the effect of excluding competitors for those services.

115. In an exploitative abuse case, to the extent that it depends upon showing that consumers are harmed by conduct otherwise than that consistent with competition on the merits (or normal competition), there is also some force in the point, because there cannot be competition on the merits.

116. Nevertheless, the Tribunal rejected that contention (at [53] to [78]), and there is no appeal against its conclusion on that point. Having observed that a specific example of exploitative abuse is directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (see section 18(1)(a) CA 1998), it noted that the water companies are free to set prices within the constraints of the Revenue Allowances, so that it was the "autonomous decision" of the water companies to charge their customers higher prices. While the Tribunal accepted that an exemption of regulated firms from competition law in respect of actions for which the legal and regulatory framework gives them no autonomy seems logical and uncontroversial, that was not the case so far as concerns the prices charged to customers: see [77].

117. There being no appeal against that conclusion, this appeal must be determined in the context that – unless excluded by section 18(8) – a claim for abuse of dominance arising from exploiting consumers by charging excessive prices for the services provided can lie against the water companies.

118. A consequence of the fact that there can be no competition on the merits is that the question of whether conduct is abusive cannot be judged by reference to what the position would have been had there been normal competition on the merits. As the Master of the Rolls and Falk LJ point out, the price control mechanism operated by Ofwat is a 'proxy' for prices that could be charged under conditions of normal competition. Where I part company with them is the implications of that for the purposes of section 18(8). The fact

that Ofwat was misled by the water companies, or that the manipulation of the price control regime is an essential ingredient in the claim, does not mean that it is also an essential ingredient that the provision of inaccurate information constituted a breach of the licence conditions.

119. Applying the principles summarised above to the circumstances of this case, I consider that the essential ingredients of Profesor Roberts's claim that the water companies abused their dominant position to the detriment of trade within the UK can be summarised as follows: (1) the water companies gave inaccurate information to Ofwat; (2) Ofwat was induced by reason of the provision of that inaccurate information to set Revenue Allowances for the water companies at a higher level than if they had been provided with accurate information; (3) the water companies took advantage of the increased Revenue Allowances to increase the amount customers were required to pay; (4) as a consequence, customers were harmed because they were required to pay more to the water companies than they would have been required to pay had the correct information been provided to Ofwat. (I do not here address the necessary state of mind of the water companies. *AstraZeneca* suggests that intention is a relevant, but not necessary, element in the claim advanced there: see [359] of the General Court's judgment. Profesor Roberts here pleads that the water companies knew or ought to have been aware of the above matters, and it may well be that it is essential to establish that they were. The point was not in issue before us, however, and I say no more about it.)

120. That summary does not include the fact that the provision of inaccurate information constituted a contravention of the licence conditions.

121. Mr Hoskins submitted that the breach of the licence conditions is nevertheless an essential ingredient because without reference to those conditions the allegation that the information was misleading is meaningless: it is only said to be misleading because the licence conditions impose an obligation to provide information and to provide it in a certain way.

122. I do not accept that. The question whether the information provided was accurate or inaccurate is to be judged by the purpose for which it was required and the use to which it was put. The relevant information provided by the water companies was required by Ofwat for it to operate the price control mechanism by which it set the Revenue Allowances, and thus the maximum prices that could be charged to customers. Specifically, the number of relevant pollution incidents occurring in a water company's area is one of the inputs into the calculation which Ofwat carries out to determine the Revenue Allowances. Simplified for the purposes of clarity, the fewer such incidents, the higher the Revenue Allowances. If a water company informs Ofwat that it has suffered six relevant pollution incidents, but it has in fact suffered ten, the information is inaccurate simply because the relevant input into Ofwat's calculation of Revenue Allowances is supposed to be based on the number of incidents that have in fact occurred. The fact that the water companies were obliged to provide accurate information, so that not to do so is also a breach of the licence condition, does not play any part in the analysis that the information is "inaccurate".

123. The Master of the Rolls and Falk LJ provide three main reasons for their conclusion, which I address in turn.

124. The first main reason (see [15] above, which is repeated in the context of the second two main reasons, for example at [19], [72] and [82]) involves the following propositions: Ofwat could only have been misled because it assumed that the information supplied to it was accurate; the basis of that assumption was the existence of the requirement in the licence conditions that the water companies provide information for the purpose of the price control regime; it was the failure to provide accurate information which led Ofwat to be misled; and the remedy sought is therefore in fact only available by virtue of the provision of inaccurate information constituting a contravention of the licence conditions.

125. I see the force of this point, but am unable to agree with it. First, I observe that it does not identify the breach of the licence condition as the essential ingredient in the cause of action. The relevant ingredient here is causation: was Ofwat induced by the water companies' behaviour to input the wrong number of pollution incidents into its calculation of the Revenue Allowances? The contravention of the licence condition is instead relied on as part of the factual background to evidence the fact that Ofwat was so induced. Moreover, what is relied on is *not* that the provision of the inaccurate information *constituted a contravention* of the licence conditions, but that the licence condition *existed*: the basis of Ofwat's assumption that the water companies provided accurate information is said to be that it could trust the information because they were obliged to provide it. I accept, as the Master of the Rolls and Falk LJ say at [75] above, that this could be said to be another side of the same coin: it can equally be said that Ofwat relied on the fact that the water companies would, if they provided false information, be committing a contravention of the licence conditions. But I do not think that is an answer. The fact that Ofwat assumed that the water companies had complied with their obligations, because otherwise the water companies *would have been* committing a breach of the licence conditions, does not in my view turn the fact that the provision of inaccurate information constituted a contravention of the licence conditions into an essential ingredient in the claim.

126. In addition, I question whether it is a safe assumption that, in relation to each occasion on which Ofwat input the number of pollution incidents in a water company's area into its calculation of the Revenue Allowances, it actually relied on the fact that the water companies were legally obliged to report that information accurately. If it did not do so – for example if it did not address its mind to that question at all (I note that it is pleaded that Ofwat relied on the information provided by the water companies and/or by EA, which included incidents reported to them from other sources such as members of the public) – the claim still lies. That reinforces the view that the contravention of the licence conditions is not an essential ingredient.

127. At [66] and [67], the Master of the Rolls and Falk LJ refer to the pleading in the claim form of the water companies' obligation to provide accurate and complete information under the licence conditions. I do not agree with their assessment that the pleading would be incoherent without pleading those matters. It is true that [120] of the pleading (in the background section) pleads the obligation to provide information under the licence conditions. The fact, however, that [164] of the claim form cross-refers to [120] when asserting that the water companies provided information that was relevant to Ofwat's assessment of their performance against performance commitments, does not incorporate as an essential ingredient in the pleaded claim the fact that licence condition was breached. The more important question is in any event whether as a matter of legal

analysis the remedy sought is available only *by virtue* of the provision of inaccurate information constituting such a breach (See [6] above).

128. The second main reason of the Master of the Rolls and Falk LJ is that the legislation must be applied realistically, which involves the following propositions (see [16] above): approached in that way, the essential complaint is that the regime has been misused to abuse a dominant position; the nature of the alleged misuse is that there was a contravention of the licence conditions; unlike *MSC2* the claim cannot be pleaded and established without relying on that contravention; so the remedy sought does ultimately depend on a contravention of the licence conditions.

129. This risks, in my view, conflating (1) the manipulation of the price control regime and (2) the breach of the licence condition. The fact that causing the regime to operate in a way that it was not supposed to is fundamental to the competition law claim, does not make the claim dependent on the provision of inaccurate information constituting a breach of the licence conditions. True it is that the manipulation was achieved by the provision of inaccurate information, and this did constitute a breach of the licence conditions. It does not follow, however, that the "nature of the alleged misuse" was that there was a contravention of the licence conditions. This risks equating (1) the fact that the claim depends on an act or omission which is *also* a contravention of the licence conditions with (2) the proposition that the claim depends on the fact that the act or omission *constitutes* such contravention (see above at [95]). For similar reasons, I also disagree that the claim could only be pleaded by relying on that contravention: it can be (and is) pleaded without relying on the fact that the act or omission *constituted* a contravention.

130. The point made as to the similarity with *Marcic* has some attraction: it might be said that, just as the claim in *Marcic* was dependent on the existence of the obligation in section 94(1) WIA to provide an effective system of sewers, the claim here is dependent on the existence of an obligation to provide accurate reports to Ofwat. I do not think it is right, however. In *Marcic*, it was the fact that the failure to perform the obligation to build new sewers constituted a contravention of the Act which was the essential ingredient in the cause of action, *because otherwise there was no actionable wrong on which the claim could be based*. The only place such an obligation could be found was section 94(1) WIA. No such obligation – and therefore no claim in nuisance – existed at common law. The failure to provide sewers was actionable at all, therefore, only because it constituted a breach of the obligation in section 94(1) (see, for example, the explanation of Lord Reed and Lord Hodge at [105] of *MSC2*).

131. The situation in this case is similar in one respect, in that there is no freestanding obligation accurately to report pollution incidents to Ofwat, and the sole source of that obligation is the licence conditions. The difference, however, is that the competition law claim does not depend on the provision of inaccurate information being an actionable legal wrong in itself. It is not an essential ingredient in an abuse of dominance that the conduct in question constitutes a legal wrong. That can be contrasted, for example, with a claim in unlawful means conspiracy. In such a case, where the unlawful means consist of the provision of inaccurate information, the tort claim only exists where the provision of inaccurate information is itself an actionable legal wrong.

132. The point can be illustrated by the following examples. First, as submitted by Mr Turner, the competition law claim would lie if there was no licence condition requiring the water

companies to provide information, merely an expectation that they would answer requests for information accurately. Although I accept that we must address the regime which in fact exists (which *does* include a requirement for accurate reporting under the licence conditions), this example illustrates that the competition law claim would lie irrespective of the fact that provision of inaccurate information constituted a breach of the licence conditions. That suggests it is not an essential ingredient.

133. Second, as observed by the General Court in *AstraZeneca*, in the competition law context, "misleading" a public authority is not necessarily dependent on the making of a misrepresentation at all. The special responsibility of a dominant undertaking extends, where inaccurate information had been provided to the authorities by mistake, to being required to inform the authorities of that mistake. It would follow, in my view, that a claim for abuse of dominance would at least arguably lie where a water company takes advantage of an increase in Revenue Allowances by increasing its charges to customers, knowing that its ability to do so is the result of a mistake (which it fails to point out) in the number of pollution incidents input into Ofwat's Revenue Allowances calculation. And that would be so, in light of the reliance placed by Ofwat on information both from the water companies and from the EA, whether the mistake originated with the water company, with the EA in its reporting to Ofwat, or with Ofwat itself.

134. I emphasise that it is not relevant that, had there been no breach of the licence conditions, there would have been no inaccuracy. If United Utilities had complied with its statutory obligations in *MSC2* there would have been no pollution and therefore no claim in nuisance; but that did not make the contravention of the statute an essential ingredient of the claim.

135. The third main reason of the Master of the Rolls and Falk LJ (summarised at [17] to [18] and developed at [80] to [84] above) is that the claims need to be understood in the context of the regulatory regime, and in particular the price control mechanism, and cannot be divorced from it. Because the regime both facilitates monopoly positions and is designed to protect customers from over-pricing, Ofwat's price control mechanism is an essential tool in the statutory regime.

136. Those propositions are uncontroversial, but I do not think they lead to the conclusion that in a "real sense" the claims depend on the existence and breach of the licence conditions (or more accurately, as section 18(8) requires, that the claims depend on the inaccurate reporting constituting such a breach).

137. First, I do not accept (as to [18] and [82] above) that absent the licence conditions, the water companies would have had no need or requirement to report pollution incidents to Ofwat at all, and had they chosen to do so it would not have mattered whether the reporting was accurate. *AstraZeneca* had no obligation to make representations to the authorities, but it mattered whether those representations were accurate because they caused the authorities to grant them SPCs which enabled them to exclude others from the market. Similarly here, as explained above at [132], the competition law claim would lie even if there was no obligation, but merely an expectation that the water companies would self-report pollution incidents.

138. Second, I agree (as pointed out at [80] and [81]) that the price control mechanism exists to protect customers from excessive charging by the water companies, that the price controls can be seen as a quid pro quo for the grant of a monopoly, that the regime

contains its own sanctions for non-compliance, that the price control mechanism depends upon accurate reporting, and that it is therefore unrealistic to regard the misreporting alleged to have occurred as detached from the statutory regime. But I do not agree that section 18(8) is intended to exclude claims because they cannot in reality be divorced from Ofwat's operation of the 'regulatory regime', or because they contravene that regime.

139. The water companies rightly do not contend that the answer here lies in the principle that where a statute provides a comprehensive regime for dealing with a matter, this may be taken as an indication that common law remedies should not apply (see, e.g. *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed, para 25.11). That argument cannot be made because the statute in question expressly addresses the extent to which remedies are excluded, namely by section 18(8), and does so in a way that precludes any argument that a remedy is excluded because the Act provides a comprehensive regime. The test is the narrower one: whether the remedy sought for the relevant act or omission depends on establishing that it constituted a contravention of the Act.

140. I see the force of the argument made at [82], that the misreporting relied upon is "in respect of" a regime that Parliament has put in place in order to protect consumers as part of the framework of the statutory monopoly that allows water companies to operate in the first place.

141. Specifically, I see how that argument might support the conclusion that, standing back from the detail of section 18(8), the fact that Parliament has created a statutory monopoly and created a regime intended to protect consumers from being charged excessive prices, claims for abuse of dominance under competition law which have the same objective of protecting consumers should not apply to the alleged conduct of the water companies.

142. That, however, is the proposition which was rejected below, and against which there is no appeal (see [114] to [116] above). I do not think the argument leads to the application of section 18(8) so as to exclude the competition law claim advanced here where, for reasons set out above, it is not dependent on showing that the provision of inaccurate information was a contravention of the licence conditions. It conflates, in the same way as the second main reason, contravention of "the regime" with contravention of the obligation imposed on the water companies by the licence conditions. The concurrent applicability of claims for abuse of dominance, notwithstanding the statutory monopoly and price control regime, is recognised by section 31(3) WIA, which entitles Ofwat, concurrently with the CMA, to exercise various functions, including under section 18(1) CA 1998. Although section 31 was not in that form at the time the WIA was enacted, the original version made similar provision in relation to powers exercisable under the Fair Trading Act 1973 and the Competition Act 1980.

143. Mr Turner rightly submitted that legislation should not be construed so as to deprive individuals of their rights unless it does so expressly or by necessary implication. The Master of the Rolls and Falk LJ, at [83] above, refer to this being a very different case to *MSC2*, because the claim can only be maintained by relying on the regulatory regime provided by the WIA, specifically the obligation to report specified pollution incidents. As to the last, specific, point, for the reasons set out above I do not think this claim can only be maintained by relying on the reporting obligation in the licence conditions. As to the more general point, as I have sought to explain in dealing with the second main point above, excluding claims which rely on the regulatory regime, or which rely on that

regime being manipulated, is fundamentally different from excluding claims which depend on the fact that the act or omission constitutes a breach of the licence conditions. The latter is achieved by section 18(8), the former is not.