CL-2017-000088

[2018] EWHC 53 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Date: 17/01/2018

BEFORE
DANIEL TOLEDANO Q.C.
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between:

BOOTS UK LIMITED
- and -

SEVERN TRENT WATER LIMITED

Jonathan Davies-Jones Q.C. and **Christopher Bond** (instructed by **DLA Piper UK)** for the **Claimant**

Simon Colton Q.C. (instructed by **Eversheds Sutherland**) for the **Defendant**

- -

Hearing dates: 19/20 December 2017

JUDGMENT

Daniel Toledano Q.C.:

Introduction

1. This is an application for summary judgment under CPR Part 24 issued by the Defendant ("Severn Trent") against the Claimant ("Boots") on the basis that the claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial.

2. The application raises a question of law concerning Severn Trent's entitlement to charge Boots on the basis that it did over the period 1996 to the present in relation to the discharge of trade effluent from Boots' property in Beeston, Nottingham (the "Property"). The answer to this question turns on the correct interpretation of the definition of "*trade effluent*" under the Water Industry Act 1991 (the "WIA 1991") as well as on the correct construction of Severn Trent's schemes of charges issued under the WIA 1991.

3. In addition, this application for summary judgment concerns: (1) whether certain claims in contract and for unjust enrichment based on undue discrimination have no real prospect of success, (2) whether all of the claims prior to 8 July 2010 have no real prospect of success on limitation grounds and (3) whether all of the claims prior to 1 October 1996 have no real prospect of success on the basis of a lack of evidence.

Summary of factual background and claims

4. I have set out in the paragraphs that follow a summary of the factual background to this case and to the claims and defences that have been advanced. This summary is largely based on the Agreed Case Memorandum.

5. Boots is the well-known manufacturer of health and beauty products. It manufactures medical, cosmetic and toiletry products at the Property. Severn Trent is a supplier of water and sewerage services in the Midlands. Its parent company is Severn Trent plc, which was formed in 1989 as part of the privatisation of the water industry. Prior to privatisation, the predecessor of Severn Trent plc was Severn Trent Water Authority ("STWA"), which was formed in 1974 as a state-owned water authority. After privatisation, Severn Trent became the successor to STWA in respect of the provision of sewerage services within its region.

6. Severn Trent (or its predecessor, STWA) has since 1974 supplied water and sewerage services to Boots at the Property. These services include the drainage of surface water including rainfall and the discharge of trade effluent. Severn Trent has charged Boots for surface water drainage either according to the rateable value or to the area of the Property. The discharge of trade effluent has been charged according to the volume recorded by the meter in use from time to time at the Property.

7. The meter used at the Property to measure trade effluent has changed over time. However, it has not been suggested by either side that these changes are material to the issues which the Court is asked to decide. What appears to be common ground, is that at all times the metering and sampling took place at the "D" sump point prior to the discharge of the metered liquid into a private sewer from which the liquid was then discharged into the public foul water sewer.

8. Severn Trent's provision of its trade effluent functions, and the basis on which it may charge Boots for trade effluent discharge at the Property, are subject to a regulatory regime and, from 1991, to the WIA 1991. As described in more detail below, the term "*trade effluent*" is defined in section 141(1) of the WIA 1991. Since 1991, Severn Trent's powers to charge Boots for the carrying out of its trade effluent functions are derived from section 142 of the WIA 1991 and, pursuant to section 143 thereof, it has published annual schemes of charges.

9. In this action, Boots alleges that, from 1974 to date, varying quantities of surface water including but not limited to rainwater have been draining through the meter at the Property that measures trade effluent. Severn Trent has included these quantities of surface water in the volumetric charge for trade effluent discharge, while at the same time also charging Boots for the drainage of surface water by rateable value or area. Although Severn Trent does not admit that surface water has passed through and been measured by the relevant meter at any time, it has been assumed for the purposes of this summary judgment application that this was the case. Since the mixing of the surface water with the trade effluent has occurred prior to the discharge of the liquid into the private sewer, it follows that the liquid which is then discharged into the public sewer is necessarily, on Boots' case, a mixed liquid.

10. Boots claims that Severn Trent's charging for the drainage of surface water as if it were trade effluent discharge is and was an ultra vires exaction, in particular having

regard to the definition of "*trade effluent*" in section 141(1) of the WIA 1991, which Boots says excluded surface water. Boots claims that this overcharging resulted in recoverable payments, being payments within the *Woolwich* principle and/or payments under compulsion, alternatively severable or divisible payments for a basis which was absent or totally failed. Further, or alternatively, Boots claims that it made payments in accordance with this overcharging in the mistaken belief that it is and was legally obliged to do so; and/or that this overcharging has constituted unlawful discrimination between classes of customers in breach of conditions of Severn Trent's licence. Boots also claims that at all material times Severn Trent supplied trade effluent services to Boots in accordance with a contract, and that this overcharging was a breach of the express and/or implied terms of that contract.

11. Boots seeks restitution of the sums which it claims to have overpaid, estimated to be in the region of £7.8m, on the grounds that Severn Trent has been unjustly enriched at Boots' expense. Boots also seeks damages in the same amount as a result of Severn Trent's breaches of contract.

12. Severn Trent's primary defence to each of these claims is that it was at all times entitled to charge for trade effluent services in the way that it did on one or both of the following grounds:

    (1) On a true construction of section 141(1) of the 1991 Act, surface water which passed through and was measured by the meter formed part of the "*trade effluent*" discharged by Boots, because it mixed with the liquid produced in the course of Boots' industrial processes, and

    (2) Under the Charges Schemes promulgated by Severn Trent since 1996, Severn Trent was permitted to impose trade effluent charges on Boots calculated by reference to a deemed volume taken from the meter installed at the Property, regardless of whether the volume recorded by the meter measured only "*trade effluent*" within the meaning of the statute. Further, for the period 1996-2000, the position at the Property was regulated by an Agreement between The Boots Company Plc ("Boots plc") and Severn Trent which expressly defined trade effluent to include surface water.

13. If either or both of these answers is correct, then Boots would at all times have been legally obliged to pay the trade effluent charges imposed by Severn Trent, and Severn Trent would have been entitled to receive the sums paid to it. In that case, Severn Trent's enrichment would not have been unjust and the restitutionary claims would be bound to fail, as indeed would the contract claims.

14. So far as the contract claims are concerned, Severn Trent contends that no contract existed at any time between Boots and Severn Trent (the 1996 Agreement, and a subsequent Agreement entered into in 2000, being between Boots plc and Severn Trent) and also denies any breach of contract on the basis that the charges levied were lawful.

15. Severn Trent contends that all claims for the recovery of payments made before 8 July 2010 or for damages are time barred by operation of section 5 of the Limitation Act 1980 ("LA 1980"). In response to this limitation defence, Boots relies on section 32(1)(c) of the LA 1980 in so far as its claims are for relief from the consequences of mistake. Boots also relies on section 32(1)(b) of the LA 1980 and alleges that Severn Trent deliberately concealed from it the fact that the overcharging was unlawful. Boots contends that it could not with reasonable diligence have discovered its mistake, or Severn Trent's deliberate concealment, before 8 July 2010.

History of the statutory and regulatory regime

16. Although the issues before the Court concern the correct interpretation and application of the WIA 1991, it is necessary to set out a short summary of the legislative history in order to set the WIA 1991 in its proper context.

17. The relevant history begins in 1936 with the passing of the Public Health Act of that year (the "PHA 1936"). Section 34 of the PHA 1936 granted a right to owners and occupiers within a district to "*have his drains or sewer made to communicate with the public sewers of [a local] authority, and thereby to discharge foul water and surface water…"* However, this right was subject to a proviso which stipulated that the right to drain into public sewers was restricted in a number of ways, two of which are material for present purposes, namely (a)(i) there was no right to discharge into a public sewer any liquid from a factory, other than domestic sewage or surface or storm water, or any liquid from a manufacturing process and (b) where separate

public sewers were provided for foul water and for surface water, there was no right to discharge surface water into a sewer provided for foul water except with the approval of the local authority.

18. The first of these two restrictions was relaxed by a statute passed the following year, the Public Health (Drainage of Trade Premises) Act 1937 (the "PHDTPA 1937"). Section 1 of this Act granted a new right to discharge trade effluent into public sewers with the consent of the local authority.

19. The term "*trade effluent*" was defined in section 14(1) of the PHDTPA 1937 as follows:

> *"trade effluent" means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises, and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises, but does not include domestic sewage*;

20. This definition of trade effluent remained in force until the WIA 1991. It was then replaced although, as will be seen below, the changes to the definition that were made by the WIA 1991 are not material for the purposes of this application.

21. Section 2(3) of the PHDTPA 1937 provided that the consent of the local authority could be given unconditionally or subject to conditions. The conditions could include a requirement to pay to the local authority a charge (section 2(3)(e) in combination with section 5(1)(f)) as well as a requirement for the provision and maintenance of meters (section 2(3)(e) in combination with section 5(1)(h)). Section 2(5) made it an offence to contravene section 2 or to discharge trade effluent without consent. Section 7 allowed local authorities to enter into agreements with traders for the reception and disposal of trade effluence.

22. The conditions that local authorities could attach to consents were replaced by section 59 of the Public Health Act 1961 (the "PHA 1961") although the changes are not material. Section 67(1) of the PHA 1961 provided that meters would in any proceedings be presumed to register accurately until the contrary was shown. As will be seen further below, this was the precursor to section 136 of the WIA 1991 which is an important provision for the purposes of this application.

23. The Water Act 1973 (the "WA 1973") created new regional Water Authorities (including STWA) and a National Policy for water. By section 14(2), the trade effluent functions previously conferred on local authorities were thereafter to be exercisable by water authorities. Part III of the WA 1973 contained the Financial Provisions. This Part included a duty on water authorities to ensure that revenue would meet total outgoings. Section 30(1) granted the power to water authorities to recover "*such charges … as they think fit*". By section 30(2) this could be done in one of two ways: either by a scheme of charges under section 31 or by agreement. By section 30(3) water authorities were granted a wide discretion to fix charges by reference to such criteria as appears to them to be appropriate. This wide discretion was continued in subsequent legislation as described further below. By section 30(4), when fixing charges water authorities were bound to have regard to the cost of performing services. Section 31 concerned charges schemes. Section 32 concerned meters installed on a premises by a water authority and provided that the register of the meter would be prima facie evidence of the volume.

24. The Water Act 1989 (the "WA 1989") concerned the privatisation of the water industry and provided for the transfer of the functions of the water authorities to companies which would act as water undertakers and sewerage undertakers (sections 4 and 11).

25. The WA 1989 provided in section 5 for the appointment of a Director General of Water Services as the regulator of the newly privatised industry. The continuing role of this regulator was provided for in the WIA 1991. The regulator is now known as Ofwat and I will refer to it as Ofwat in this judgment. Section 6 of the WA 1989 provided for the establishment of customer services committees (the "committees"). The precise content of the powers of the regulator and of the committees is not material in the present case but it is important to note that the issues arise in the context of a regulated industry where Parliament has entrusted to Ofwat and to the committees the protection of the interests of customers.

26. The wide discretion afforded to water authorities in relation to the fixing of charges under section 30(3) of the WA 1973 was essentially repeated as regards undertakers by section 75(3) of the WA 1989.

The WIA 1991

27. In 1991 a suite of five statutes was enacted, one of which repealed previous legislation. Of the remaining Acts, the two that I need to deal with are the WIA 1991 and the Water Resources Act 1991 (the "WRA 1991"). I will deal with them in turn.

28. The WIA 1991 was divided into eight Parts. Separate Parts or Chapters of the WIA 1991 deal with (1) water supply (Part III), (2) sewerage services including domestic sewage and surface water (Part IV, Chapter II) and (3) trade effluent (Part IV, Chapter III). There is also a separate Part of the WIA 1991 dealing with Financial Provisions.

29. Section 106 of the WIA 1991 contained what was effectively a re-enactment of the right and restrictions contained in section 34 of the PHA 1936 referred to above. However, this was subject to section 118 of the WIA 1991 which, like the PHDTPA 1937, provided for a right of discharge of trade effluent into the public sewers if done with the undertaker's consent. The discharge of trade effluent without consent was an offence as provided for in section 118(5). Section 121 set out a number of conditions that a sewerage undertaker might attach to its consent including relating to the payment of charges (section 121(2)(e)) and relating to the provision, testing and maintenance of meters (section 121(2)(g)). The contravention of any condition was also an offence (section 121(5)). A sewerage undertaker was also given the power to enter into agreements with traders instead of granting a consent (section 129).

30. As foreshadowed above, section 136 re-enacted section 67(1) of the PHA 1961 relating to meters. Section 136 of the WIA 1991 provided as follows:

> *Any meter or apparatus provided in pursuance of this Chapter in any trade premises for the purpose of measuring, recording or determining the volume, rate of discharge, nature or composition of any trade effluent discharged from those premises shall be presumed in any proceedings to register accurately, unless the contrary is shown.*

31. This section would appear only to apply to meters provided by the undertaker in pursuance of the trade effluent chapter of the WIA 1991 rather than to those meters provided, as in the case of Boots, by the discharger. However, in so far as section 136 is relevant to the construction of Severn Trent's scheme of charges, I accept that it must be assumed that some meters will be provided by Severn Trent even if some are provided by its customers and a sensible construction adopted accordingly.

32. Section 141 contained a definition of trade effluent in terms that were very similar to section 14(1) of the PHDTPA 1937. The new definition in section 141 of the WIA 1991 was as follows:

> *"trade effluent"—*
>
> *(a)means any liquid, either with or without particles of matter in suspension in the liquid, which is wholly or partly produced in the course of any trade or industry carried on at trade premises; and*
>
> *(b)in relation to any trade premises, means any such liquid which is so produced in the course of any trade or industry carried on at those premises,*
>
> *but does not include domestic sewage;*

33. It is this definition of trade effluent that I am asked to construe by this application for summary judgment. The issue that I must determine is whether a liquid which contains a mixture of the product of trade or industry and surface water constitutes trade effluent within the meaning of the statutory definition.

34. So far as the Financial Provisions of the WIA 1991 are concerned, section 142 granted undertakers the powers to fix and recover charges which powers would be exercisable either in accordance with charges schemes under section 143 or in accordance with agreements. Section 142(4) re-enacted the wide discretion as to the fixing of charges already found in the WA 1973 and the WA 1989. Section 142(4) of the WIA 1991 provided as follows:

> *Except in so far as this Chapter otherwise provides, a relevant undertaker may fix charges under this section by reference to such matters, and may adopt such methods and principles for the calculation and imposition of the charges, as appear to the undertaker to be appropriate.*

35. Section 143 of the WIA 1991 related to charges schemes and contained provisions in similar terms to those found in the earlier WAs.

36. Both sections 142 and 143 have been amended by subsequent legislation. However, the only material change was that, from December 1999 until October 2015, a charges scheme did not take effect unless it had been approved by Ofwat. From November 2015 onwards, a charges scheme did not need prior approval but could be the subject

of a direction from Ofwat if it did not comply with certain statutory and/or regulatory provisions.

The WRA 1991

37. The WRA 1991, like Part III of the WA 1989, was concerned with the protection and management of rivers and other waters, including by controlling pollution and providing for specified pollution offences. In that context, each of the WA 1989 (section 124(1)) and the WRA 1991 (section 221(1)) defined *"trade effluent"* as follows: *"'trade effluent' includes any effluent which is discharged from premises used for carrying on any trade or industry, other than surface water and domestic sewage…"* It is not clear why the WRA 1991 used a different definition of trade effluent to that used in the WIA 1991.

The Premises: 1996 to 2005

38. On 1 October 1996 Severn Trent entered into an agreement with The Boots Company Plc (the "1996 Agreement") pursuant to section 129 of the WIA 1991. By clause 3 of the 1996 Agreement, Severn Trent agreed to the discharge of Trade Effluent by Boots plc to the public sewer via the private sewer in accordance with the terms of the agreement. The definition of Trade Effluent contained in clause 1 of the Agreement differed materially from that contained in the WIA 1991 in that it expressly included "*surface water run-off from the Premises … and…domestic sewage from the Premises*".

39. By clause 6.1.2 Boots plc was obliged to provide Apparatus adjacent to the Sampling Point adequate for measuring and automatically recording the volume and flow rate of Trade Effluent discharged. The Apparatus had to be maintained and tested to the reasonable satisfaction of Severn Trent.

40. Under the 1996 Agreement, the way in which charges were to be calculated and paid was that Boots plc calculated at the end of each month the charges that were due to Severn Trent in accordance with a calculation set out in Appendix 2. This Appendix set out what is known as the Mogden Formula which takes the volume of trade effluent discharged in cubic metres and multiplies it by C which is made up of a number of inputs relating to various charges for the reception and treatment of trade effluent. Clause 6.2.3.1 of the 1996 Agreement provided that the volume of Trade

Effluent discharged would be determined by readings taken from the Apparatus. Boots plc was required each month to provide to Severn Trent a written statement of charges due. Severn Trent would then submit invoices to Boots plc based on the written statement.

41. The 1996 Agreement was originally due to last until 31 March 1997. However, it appears to have been extended by the parties on a number of occasions. There is a letter of extension dated 12 March 1998 which renewed the 1996 Agreement until 31 March 2000 subject, in particular, to the charges payable being those set out in the Severn Trent charges schemes for 1998/1999 and 1999/2000 as appropriate. On 1 April 1999 Severn Trent and Boots plc entered into an agreement which also continued the 1996 Agreement until 31 March 2000 but which this time set out the applicable charges in a Charges Table.

42. On 1 April 2000 Severn Trent and Boots plc entered into a replacement Agreement which appears to have governed the position until 2005 (the "2000 Agreement"). Unlike the 1996 Agreement, the 2000 Agreement used the statutory definition of trade effluent found in section 141(1) of the WIA 1991. The 2000 Agreement contained a charges table which stipulated that if the agreement ran beyond a 12 month period the charges would automatically adjust in line with Severn Trent's published charges (i.e. Severn Trent's scheme of charges).

The Premises: 2005-present date

43. In 2005, the parties moved away from having agreements and instead utilised a system of consents. The first such consent was dated 26 August 2005 (the "2005 Consent") and addressed to Boots plc. By the 2005 Consent, Severn Trent consented to the discharge of trade effluent from the Premises into the public foul water sewers subject to a number of conditions. Condition 8 stated that Apparatus for measuring and recording volume, rate and composition of trade effluent discharged would be provided (although not stated it would seem that this meant in context provided by Boots plc) and maintained and tested to the satisfaction of Severn Trent. This Condition also stated that if the measuring and recording apparatus ceased to record or was suspected of not measuring correctly, then Severn Trent had the right to make estimates of the volume and composition until such time as the apparatus was again operating to the satisfaction of Severn Trent. Condition 9 stated that payment was to

be made in accordance with Severn Trent's charging scheme in force from time to time. Appendix II concerned quality and volume measurement. Paragraph 2 of this Appendix stipulated that a particular type of meter was to be provided.

44. The 2005 Consent was varied as from 15 August 2015 by a further Consent dated 15 June 2015 (the "2015 Consent"). The 2015 Consent was, in so far as material, in similar terms to the 2005 Consent save that an additional sentence as follows was inserted into paragraph 2 of Appendix II: "*The volume measured shall be that of the trade effluent excluding domestic sewage, rainwater and uncontaminated surface water.*"

The Severn Trent Schemes of Charges

45. Severn Trent has published schemes of charges annually in accordance with section 143 of the WIA 1991. Although there have been some changes to the language of the key provisions, it is common ground that nothing turns on these changes. I have analysed below the scheme of charges for 2005 (the "2005 Charges Scheme"). The 2005 Charges Scheme was divided into four sections. Section A contained general information, section B concerned charges for the supply of water, section C concerned charges for sewerage and sewage disposal (which included surface water and domestic sewage) and Section D concerned trade effluent charges.

46. As made clear in the general information section, charges could be unmeasured or measured but all non-households were required to be metered. Three elements of measured charges applied: (1) a water supply charge based on the water supplied as measured by a meter, (2) used water (which would include domestic sewage) also based on the water used and measured by the meter and (3) surface water drainage normally based on the rateable value of the property and covering the costs of draining rainwater. A fourth charge would apply if trade effluent was discharged.

47. So far as surface water charges were concerned, Part C, paragraph 10 set out 22 bands for non-household premises with a sliding scale of charges which increased as the chargeable area of the premises increased (it is common ground that the Property fell into the highest band, band 22).

48. Part D, paragraph 2 provided that the statutory definition of trade effluent in section 141 of the WIA 1991 would apply. Part D, paragraph 4 indicated that the charges

were based on a standard unit charge per cubic metre of trade effluent discharged into the public foul water sewer and received and treated at Severn Trent's sewage treatment works. Part D, paragraph 5 set out how the trade effluent charges would be calculated utilising the Mogden Formula. The key provisions that I am asked to construe for the purposes of this application are Part D, paragraph 5, sub-paragraphs (vi) and (vii). These provided as follows:

> *"(vi) Subject to (…) immediately below the volume of trade effluent deemed to be discharged from any premises for the purposes of calculating the charge under this Scheme shall be determined by [Severn Trent] on the basis of the volumes of water taken at or supplied to, or used water or trade effluent discharged from, the premises in question as recorded by the meter, meters, gauge recorder or other apparatus installed in manner and location approved by [Severn Trent] in accordance with the terms of the relevant trade effluent consent.*
>
> *(vii) Every discharger shall provide to [Severn Trent] full details of the recordings and reading of the volumes of such water, used water or trade effluent on or before such dates and in accordance with such arrangements as [Severn Trent] may require provided that if [Severn Trent] ceases to be satisfied that the meter, meters gauge recorder or other apparatus so installed is or are accurately recording volumes required to be so measured or if the discharger fails to provide to [Severn Trent] full details of such volumes in accordance with the requirements of [Severn Trent] the charge under this Scheme shall, unless otherwise agreed by [Severn Trent], be based on [Severn Trent's] assessment of the volume of trade effluent discharged, taking into account all relevant information and such assessments shall be binding on the discharger."*

The Issues

49. As summarised at the outset of this judgment, the issues that the Court has to deal with on this summary judgment application are as follows:

(1) Whether the definition of trade effluent in section 141(1) of the WIA 1991 extends to a mixed liquid made up in part of the product of trade or industry and in part of surface water, where the mixing has taken place prior to discharge into the public foul sewer;

(2) Whether, pursuant to its scheme of charges, Severn Trent has deemed the metered volume of liquid to be the volume of trade effluent for the purposes of the calculation and payment of charges, regardless of whether some part of the metered volume does not fall within the statutory definition of trade effluent;

(3) Whether the contract claims have a real prospect of success;

(4) Whether the unjust enrichment claims based on undue discrimination have a real prospect of success;

(5) Whether all of the claims prior to 8 July 2010 have no real prospect of success on limitation grounds; and

(6) Whether all of the claims prior to 1 October 1996 have no real prospect of success on the basis of a lack of evidence.

50. Issues 1 and 2 raise discrete questions of law. The parties have therefore invited the Court to decide these questions on this application there being, subject to one caveat, no factual dispute that might need to be resolved at trial. The one caveat is that in its skeleton argument Severn Trent relied on a number of points to give context to its schemes of charges. Boots contended that certain of these points were unsupported by evidence and, even where supported by evidence, were matters that would need to be tested at trial. I am satisfied that I can decide the issues on this application without resort to any disputed contextual points. I have therefore decided that I should "*grasp the nettle*" and decide issues 1 and 2 in accordance with the guidance set out in ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** [2007] EWCA Civ 725, at [12] (Moore-Bick LJ). As I mentioned above, it is accepted that if I decide either or both of issues 1 and/or 2 in favour of Severn Trent, then all of Boots' claims will necessarily fail.

51. There was some debate between the parties as to the correct order in which the Court should consider issues 1 and 2. I do not consider that anything turns on the sequence in which the issues are considered. However, it seems to me more appropriate to consider issue 1 first as requested by Boots, because the statutory definition of trade effluent is used in the scheme of charges such that the scheme of charges cannot be construed without first identifying what the statutory definition means.

52. The issue for the Court in relation to issues 3-6 is whether Boots has a real prospect of succeeding on the claim or issue. I have applied the principles for determining whether a real prospect of success has been shown for the purposes of a summary judgment application set out by Lewison J in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15].

Issue 1: the statutory meaning of trade effluent

53. There was no dispute between the parties as to the proper approach to the construction of the statutory definition. Mr Davies-Jones Q.C., appearing on behalf of Boots, relied on the following propositions which are supported by the relevant passages of Bennion on Statutory Construction, 6th Ed, to which I was referred, and which I adopt:

(1) In construing the definition, the Court must strive to give it a *"fully informed construction"*.

(2) That requires the Court to have regard to the *"context"* of the statutory provision as well as to its terms.

(3) The *"context"* of a statutory provision includes its legislative history, its statutory purpose and other Acts *in pari materia*.

(4) The Court must also have regard to the consequences of rival constructions.

(5) The Court should presume that the legislator did not intend a construction which would operate unjustly or anomalously and did intend one which promotes consistency in the law.

(6) The Court may have regard to the views of official bodies charged with functions under the statute.

54. I start with the words of the statutory definition in section 141(1) of the WIA 1991 set out above. The key words are "*any liquid…which is wholly or partly produced in the course of any trade or industry carried on at trade premises*" and the words "*but does not include domestic sewage*".

55. It is immediately notable that there is an express exclusion of domestic sewage but no express exclusion of surface water. I do not feel able to read too much into this point, however, because the draughtsperson might have considered it to be necessary to include an express exclusion of domestic sewage in order to ensure that the product of, for example, toilet or washing facilities on a trade premises did not fall within the definition of trade effluent. An equivalent concern does not arise in the case of surface water.

56. Importantly, the key words of the definition indicate that the liquid need not be wholly produced in the course of the trade or industry. It is enough if it is partly so produced. Boots contended that there needed to be a direct connection between the liquid and the trade. It submitted that the liquid would be "*wholly produced*" if it was first created by and a 100% by-product of the relevant trade and would be "*partly produced*" if the liquid was in part newly created in the course of the trade and in part pre-existing before involvement in the course of the trade. In my view, this construction would require a number of words to be read into the definition in order to restrict the scope of its application. Absent such additional words, it would seem to me that, prima facie and subject to considering all of the other matters described below, a mixed liquid consisting of (1) the product of a trade and (2) surface water would come within the concept of a liquid partly produced in the course of a trade or industry, regardless of whether the water was itself involved in the course of trade.

57. I derive support for this conclusion from the decision of the Divisional Court (Lord Goddard CJ, Lynskey and Pearson JJ) in ***Yorkshire Dyeing and Proofing Co Ltd v Middleton Borough Council*** [1953] 1 WLR 393. Although that case was concerned with the definition of trade effluent in the PHDTPA 1937, it was common ground that the statutory definition in that Act is very similar to the statutory definition in the WIA 1991 such that the decision remains authoritative in relation to the later definition.

58. In the ***Yorkshire Dyeing*** case, a company occupied a dye works on premises A and, with local authority consent, discharged trade effluent into the public sewer. The company later acquired adjoining premises B and made them part of their works. Trade effluent was then produced both at premises A and at premises B. The effluent from premises B was carried to premises A where the two were blended and then discharged into the sewer. The quantity and rate of discharge did not exceed the quantity and rate of discharge that preceded the acquisition of premises B. The company had not applied for a consent from the local authority for the (indirect) discharge from premises B. Instead it relied on section 4(1) of the PHDTPA 1937 which granted an exemption from the provisions in the Act requiring local authority consent for the discharge of trade effluent which was lawfully discharged at some time within the period of one year ending 3 March 1937. The company was convicted of contravening section 2 of the Act and it appealed first to the quarter sessions and

then to the Divisional Court. The Divisional Court upheld the conviction on the basis that the exemption did not apply because the trade effluent being discharged into the sewer was not produced at the same premises as those in which the effluent was produced before 3 March 1937.

59. In the course of his judgment, Lord Goddard stated (at p. 398):

> *"I think that the words "wholly or in part" relate to the composition or constitution of the trade effluent, and that "trade effluent" for the present purpose means a fluid which is partly composed, or may be partly composed, of the product of the trade or business and of something else which in the ordinary course would be water. It is not to be said, therefore, that the effluent is not a trade effluent because part of it is water. It must be wholly or in part produced in the course of the business carried on at trade premises, and in relation to any trade premises it means any liquid which is wholly or in part produced in the course of a trade or industry carried on at those premises."*

60. Lord Goddard clearly considered that a mixture of trade effluent and water would still constitute trade effluent. Mr Davies-Jones Q.C. sought to downplay the significance of this point on the basis that Lord Goddard must have been referring to water which would be used as part of the dyeing process rather than surface water which had no part to play in the trade. However, there is nothing in this passage to indicate that Lord Goddard was intending to limit the reference to water in this way. Moreover, Lynskey J (at p. 399) described the definition as requiring "*an effluent in part produced by the trade operation and in part coming from other sources*". He too did not suggest that the part coming from other sources would nonetheless have to find its way into the trade process in some way.

61. Boots submitted that the result in the ***Yorkshire Dyeing*** case was inimical to Severn Trent's construction of the statutory definition in that the Divisional Court was not willing to treat the mixed trade effluent as if it were "*in part produced*" in the course of a trade at premises A so as to come within the exemption. I do not accept this submission. It seems to me that the result in the ***Yorkshire Dyeing*** case turned on whether the trade effluent was produced at the same premises as it had been prior to 3 March 1937. It was because the Divisional Court concluded that the premises had changed by the introduction of a new dye house at premises B that it felt constrained to conclude that the exemption did not apply.

62. The second authority to which both parties referred on the meaning of the 1937 statutory definition was ***Thames Water Authority v Blue and White Laundrettes***

[1980] 1 WLR 700. That case concerned whether the liquid produced by a laundrette was trade effluent or whether it was excluded from the definition of that term by reason of the exclusion of domestic sewage. The Court of Appeal held that the liquid was trade effluent rather than domestic sewage even though it was identical to the liquid discharged by domestic washing machines. This was because of the trade purpose of the activity at the laundrette. Mr Davies-Jones Q.C. relied on the fact that Stephenson LJ considered (at 710C) "*everything directly produced in the course of the trade or business…is trade effluent, except the effluent from any lavatories or wash basins…*" However, I do not regard the words "*directly produced*" as indicating anything one way or the other as regards whether a mixed liquid can fall within the statutory definition if at least part of it is directly produced in the course of the trade. Furthermore, Stephenson LJ referred in the next paragraph of his judgment to the domestic sewage exception as only applying where it was "*separately discharged*". This reference does at least suggest that, if the domestic sewage was not separately discharged but was rather mixed with the trade effluent, it would then be capable of becoming trade effluent. The same analysis would seem to apply in the case of surface water mixing with trade effluent.

63. So far as the history and the purpose of the statutory definition is concerned, it is clear from the legislative history that I have set out earlier in this judgment that the first definition of trade effluent was required in order to allow the PHDTPA 1937 to relax the restriction contained in section 34 of the PHA 1936. In order to do so, the PHDTPA 1937 needed to identify a category of liquid resulting from trade processes which could be discharged with consent into the public sewers. As a result of the combination of the PHA 1936 and the PHDTPA 1937, a three-fold categorisation was produced: surface water, domestic sewage and trade effluent.

64. I accept Boot's submission that each category was separately referred to and dealt with in the various Acts to which I have referred earlier including the WIA 1991. However, I do not accept that merely because the legislation has referred to and defined different categories of liquid, it therefore follows that each category must in all circumstances be mutually exclusive.

65. In the ordinary course and absent any specific approval, it would be expected that surface water would not be discharged into the public foul water sewer because of the

restriction first contained in section 34 of the PHA 1936 and now contained in section 106(2)(b) of the WIA 1991. However, it does not follow from this that, if some surface water did enter the public foul water sewer as part of a mixed liquid containing trade effluent, the surface water could not thereby be counted with the trade effluent as one mixed trade effluent liquid. I see no reason why the three-fold categorisation in the legislation would, in this situation, require the surface water to be treated separately and still to count as surface water.

66. Boots submitted that Severn Trent's construction might produce anomalous and unjust consequences. In particular, it was suggested that on a day of high rainfall an occupier of trade premises would find it impossible to comply with any conditions of its trade effluent consent e.g. as regards the maximum quantity of discharge or rate of discharge, even though failure to comply with such conditions was a criminal offence. However, it seems to me that this submission significantly overstated the concern. First, surface water would not ordinarily be discharged with the trade effluent since a specific approval would be needed for this to take place. If such discharge was nonetheless taking place, the answer might be expected to lie in drainage infrastructure alterations. Secondly, any specific approval might itself be expected to cater for any complications that would result from heavy rainfall (as indeed occurred in the case of the 1996 Agreement which in clause 4.4 stated that none of the limits would apply during any 24 hour period when rainfall on the Premises exceeded a particular amount).

67. Boots also submitted that Severn Trent's construction would promote inconsistency in the law because it would mean that surface water might come within the defined term trade effluent in the WIA 1991 but could not come within the defined term in the WRA 1991 because of the express exclusion in that definition of both surface water and domestic sewage. However, the answer to this point seems to me to lie in the concept of "*separately discharged*" referred to by Stephenson LJ in the ***Blue and White Laundrettes*** case. If the surface water is separately discharged then it does not fall into either the WRA 1991 or the WIA 1991 definition of trade effluent but if it is mixed with the trade effluent prior to discharge into the public foul sewer then it would be trade effluent within either definition.

68. Indeed, Mr Davies-Jones Q.C. was constrained to accept that if a company discharged into a lake a mixture of trade effluent and surface water it would have committed an offence under the WRA 1991. He said that this was because part of the mixture was trade effluent which one is not allowed to discharge into a lake. However, in my view it is somewhat unreal to refer to the offence as being made out by one part only of a mixed liquid. I accept Mr Colton Q.C.'s submission that, in the real world, it makes little sense to talk about separate parts of a mixed liquid where the parts are no longer capable of being separately identified. Common sense would suggest that it is the mixed liquid which gives rise to the offence, not only some part of it with the balance being blameless. In one sense, all that has happened by the mixing is a dilution of the trade effluent which still retains the character that it had prior to the mixing.

69. Boots' next point was that Severn Trent's construction was irreconcilable with Ofwat guidance contained in a letter from Ofwat to a consultant dated 31 March 2014. Since this is not published guidance from Ofwat, I am doubtful that it ought to be given too much weight. More significantly, the letter itself is somewhat unclear. The letter states that "*By definition, clear surface water that is drained via a trade effluent meter is not trade effluent. The volume used to calculate the volume-related trade effluent charges should exclude the amount of the surface water recorded by the trade effluent meter.*" However, in the very next sentence it goes on to state that "*If surface water has been contaminated when running over the site, then that water maybe technically trade effluent which therefore becomes subject to trade effluent charges*". So, on the one hand, the surface water is not trade effluent but, on other hand, if it is contaminated, then it may be trade effluent. In view of the ambiguity in the letter itself, I do not think that it advances either side's construction.

70. Finally, Boots placed some reliance on Severn Trent's own documents although these would not of course be of assistance in construing the statutory definition. In any event, I do not consider that the various references relied upon in the schemes of charges demonstrate anything more than that separate categories of sewage were identified and addressed. The various references relied upon do not answer the specific issue that the Court is faced with concerning a mixed liquid. Similarly, I do not consider that the 2005 and 2015 Consents assist. Boots relied in particular on the additional sentence in paragraph 2 of Appendix II of the 2015 Consent. As set out above, this provided that the volume to be measured should exclude domestic sewage,

rainwater and uncontaminated surface water. However, this sentence is also not directed at the specific issue that the Court is faced with concerning a mixed liquid.

71. Taking into account the words used in the definition, the history, purpose, context and consequences of that definition and in light of all of the considerations set out above, I have concluded that a blended liquid formed by the mixture, prior to discharge into the public sewer, of trade effluent and surface water would fall within the definition of trade effluent contained in section 141(1) of the WIA 1991. It follows that at all relevant times the meter at the Premises recorded the correct volume of trade effluent and the trade effluent charges were therefore lawfully imposed.

Issue 2: Interpretation of the schemes of charges

72. In view of the conclusion that I have reached on issue 1, it is unnecessary for me to decide any of the other issues raised by the summary judgment application. However, I have set out my conclusions on each of those issues as they were fully argued and may become relevant were issue 1 to be decided differently on any appeal.

73. The second issue that arises concerns the true construction of Severn Trent's scheme of charges.

74. Severn Trent emphasised the width of the discretion afforded to water and sewerage undertakers when making a scheme of charges. This has been a consistent feature of the relevant legislation over time, including in the WA 1973 and in the WA 1989, and is now enshrined in section 142(4) of the WIA 1991 set out above. Severn Trent also emphasised that it has been a consistent regulatory objective since 1973 to secure proper financing of water and sewerage functions. Effect is given to this objective in the WIA 1991 by section 2(2)(b) which requires the Secretary of State and/or Ofwat to secure that undertakers are able to finance the proper carrying out of their functions.

75. Mr Colton Q.C. for Severn Trent relied on a number of authorities concerning schemes of charges, three of which I will refer to below.

76. In ***Yorkshire Water Services Ltd v Hall*** [1994] Lexis Citation 1867 the Court of Appeal (Simon Brown and Roch LJJ) refused an application for permission to appeal against a judgment in favour of the water company. The applicant contended that he used the foul effluent connection but discharged no surface water into the sewers such

that it was unlawful for him to be charged for both services. This contention was rejected on the basis that water undertakers were entitled under the legislation to formulate their scheme of charges as they saw fit.

77. In ***Thames Water Utilities Ltd v Hampstead Homes (London) Ltd*** [2002] EWCA Civ 1487 [2003] 1 WLR 198 the Court of Appeal (May LJ and Bodey J) held that an infrastructure charge levied by the water and sewerage undertaker was lawful. In the course of his judgment, May LJ (at [34]) approved the analysis in ***Thames Water Utilities Ltd v Magdalen College, Oxford (Bursar)*** of Mr Goldring Q.C. sitting as a deputy judge of the High Court. In his analysis, the learned deputy judge referred to the "*broad discretion*" in the setting of charges afforded to water and sewerage undertakers and stated "*The limits set upon the undertaker in fixing the charges are specified in the provisions [of the WIA 1991]. Provided the undertaker acts within those limits, it can set charges and decide the factors it wishes to take into account*".

78. Finally, in ***Thames Water Utilities Ltd v Ministry of Defence*** [2006] EWCA Civ 1620 the Court of Appeal (Pill, Jonathan Parker and Moses LJJ) upheld the right of the water and sewerage undertaker under the WIA 1991 to fix and levy a charge for sewerage services at the barracks based on the volume of water supplied to the site, rather than the volume of water discharged to the sewers, even though a lesser volume may have been discharged. Pill LJ emphasised (at [19]) the discretion conferred on the undertaker in relation to charges and concluded that a charge based on the amount of water supplied to the site was not beyond the powers granted by the Act.

79. In light of the statutory provisions and the relevant case law, Mr Davies-Jones Q.C. did not dispute that a wide discretion as to how to fix charges was afforded to undertakers. The real issue, he submitted, was as to precisely what approach to charges for trade effluent discharge Severn Trent had in fact adopted. This turned on the true construction of the scheme of charges, and in particular of sub-paragraphs (vi) and (vii) of paragraph 5 of Part D of the 2005 Scheme of Charges set out above.

80. I will first explain the rival contentions of the parties before setting out my conclusions.

81. Mr Colton Q.C. contended that sub-paragraph (vi) provided that the metered volume would be treated as if it were the volume of trade effluent discharged. This followed,

he submitted, from the use of the word "*deemed*" in the first line. It meant, he said, that even if all or part of the metered volume was not trade effluent within the meaning of the statutory definition, it would not matter since the entire volume would be treated as though it were trade effluent for charging purposes.

82. Mr Davies-Jones Q.C. submitted that Severn Trent's construction failed to have regard to the words used. In particular, he pointed to the fact that the term "*trade effluent*" which was to be given its statutory meaning was to be found not only in the first line but also in the fourth line of sub-paragraph (vi). In other words, he submitted that what was deemed to be the relevant volume for charging purposes was not the metered volume as such but rather the metered volume of trade effluent discharged from the premises. If the metered volume recorded something other than trade effluent as defined, then it would have to be adjusted in some way in order to ensure that the deemed volume was the actual volume of trade effluent. This, he submitted, was consistent with the reference in the sub-paragraph to the relevant volume being "*determined*" by Severn Trent, meaning that a process of determination might be needed that went beyond simply reading a volume from the meter and this determination would have to be carried out rationally, and in a way which was not arbitrary or capricious. Such a determination was, he said, also consistent with paragraph (vii) in which Severn Trent was obliged to make an assessment of the volume of trade effluent discharged taking into account all relevant information in circumstances where (1) it ceased to be satisfied that the meter was accurately recording the volumes required to be measured or (2) the discharger failed to provide full details of the volumes measured.

83. Mr Davies-Jones Q.C. also relied on the fact that only three data points were provided in sub-paragraph (vi), namely, (1) volumes of water taken at or supplied to the premises, (2) volumes of used water or (3) volumes of trade effluent discharged from the premises. None of these data points allowed the volume of surface water to be included.

84. In relation to the word "*deemed*" in the first line of sub-paragraph (vi), Mr Davies Jones Q.C. relied on an extract from Lewison on The Interpretation of Contracts, 6th Ed, in which the learned author referred (at p. 715) to a judgment of Cooke J, ***Lafarge (Aggregates) Ltd v Newham London Borough Council*** [2005] 2 Lloyd's Rep 577 in

which he concluded that the word "*deemed*" can mean "*presumed until the contrary is proved*". However, Lewison also stated that, in most cases, a deeming clause would be definitive, except where the deeming clause made it explicit that the contrary may be proved. In this context, Mr Davies-Jones Q.C. relied upon section 136 of the WIA 1991 which, as stated above, provides that any meter shall be presumed in any proceedings to register accurately, unless the contrary is shown. He said that Severn Trent's construction of a binding deeming provision in the scheme of charges allowed Severn Trent to contract out of section 136 of the WIA 1991 and that this demonstrated that Severn Trent's construction must be wrong.

85. In my judgment, Severn Trent's construction of the relevant sub-paragraphs of the 2005 Scheme of Charges is the correct one. It seems to me clear that the intention behind sub-paragraph (vi) was to deem the metered volume to be the relevant volume for charging purposes and to do so in a way which was not thereafter to be open to challenge. I do not consider it to be correct that, by the use of the statutorily defined term "*trade effluent*" in the fourth line of this sub-paragraph, the actual volume of trade effluent as defined became the relevant one rather than whatever was recorded on the meter. This construction would, for all practical purposes, undermine the utility of the deeming provision. It seems to me that the purpose of the term "*trade effluent*" in the fourth line was to explain that, depending on the terms of the relevant trade effluent consent, a particular discharger might be metered for water supplied to the premises, used water or trade effluent discharge (i.e. the three data points; in the case of Boots, the relevant consents make it clear that the metering is to be for trade effluent discharge). In all of these cases, it was to be the metered volume that would be treated as if it were the volume of trade effluent and charges would be calculated accordingly. It follows that if surface water which is not one of the three data points gets mixed up with trade effluent and flows through the trade effluent meter it will count as part of the relevant volume for charging purposes.

86. I also do not consider that there is any scope for importing into sub-paragraph (vi) a duty on Severn Trent to carry out the determination required by that sub-paragraph in a manner which is rational, and not arbitrary or capricious, if by importing this duty it results in Severn Trent being required to discard or adjust the metered volume. This approach too would undermine the utility and purpose of the deeming provision.

87. Nor do I accept that the word "*deemed*" in context meant only "*deemed for the time being and until proven otherwise*". Such a construction would not work since it would leave it entirely open to a discharger to come along years after the event and dispute a meter reading and seek to prove the contrary. In the absence of machinery dealing with how and when challenges to the metered volume would take place, I do not consider that this can have been the intention of the relevant provision. It seems to me that the only circumstances in which a metered volume will be put to one side and something else used in its place are those specifically identified in sub-paragraph (vii).

88. Moreover, in my judgment Severn Trent's construction does not amount to the undertaker impermissibly contracting out of section 136 of the WIA 1991 concerning evidence from meters. That provision, like its predecessor in section 67 of the PHA 1961, shifted the burden on to dischargers to prove that a meter had not registered accurately. This would be relevant, for example, to a prosecution for breach of a condition of a consent relating to the volume, rate of discharge, nature or composition of trade effluent discharged. I accept Severn Trent's submission that this section of the WIA 1991 did not prevent Severn Trent deciding to fix charges by reference to a deemed volume, namely the volume shown on the meter. That would be entirely in keeping with the wide discretion afforded to water and sewerage undertakers under sections 142 and 143 of the WIA 1991 as explained in the authorities I have referred to above. It is up to undertakers to decide what approach to take to the fixing and calculation of charges and the use of a deemed volume seems to me to be one entirely lawful approach.

89. I accept that the result of Severn Trent's approach is that the metered volume will be treated as if it were the volume of trade effluent for charging purposes even if the meter is faulty. However, the scheme of charges caters for this possibility through the machinery in sub-paragraph (vii). This requires Severn Trent to cease being satisfied that the meter is recording accurately before it comes under an obligation to make an assessment taking into account all relevant information. Unless and until that happens, the metered volume is deemed to be the relevant volume for charging purposes. It should be borne in mind that, at least in the case of a meter supplied by the discharger, it will likely be the responsibility of the discharger to maintain and test the meter to the satisfaction of Severn Trent (as was the case with Boots, for example

under clause 6.1.2 of the 1996 Agreement and Condition 8(a) of the 2005 and 2015 Consents).

90. Boots urged me to take into account statements over time by Severn Trent itself, by Ofwat and by the Environment Agency. I have considered all of the material relied upon. However, I do not think that any of it sheds light on the issues that the Court has to answer or alters the conclusions that I have reached.

91. I should add that there was some debate between the parties as to whether the contra proferentem rule could play a part in the analysis. Boots submitted that any ambiguity in the language of the provisions should be resolved against Severn Trent. On the other hand, Severn Trent submitted that the contra proferentem rule did not apply to a scheme of charges issued under statute and no authority was cited to me in which the rule has been applied in this or any other similar context. I am doubtful that the rule does apply in a scheme of charges context but I do not need to decide the point since I consider that the issue can be answered without resort to this rule.

92. It follows from my conclusions on issue 2, that I consider the 2005 Charges Scheme to have designated the metered volume as the relevant volume even if the metered volume included a volume of liquid that did not fall within the statutory definition of trade effluent. This means that, even if my conclusion on issue 1 is wrong such that the surface water part of the mixed liquid fell and continues to fall outside of the statutory definition of trade effluent, I would nonetheless conclude that the entire volume of the mixed liquid as measured by the meter has been deemed by the scheme of charges to be the volume of trade effluent for charging purposes. I therefore answer issue 2 in favour of Severn Trent.

93. My conclusion on issue 2 applies in relation to the period from 2005 to the present date since the consents in place during that period have stipulated (in paragraph 9) that charges will be payable in accordance with the scheme of charges in force from time to time.

94. So far as the period of the Agreements is concerned from 1996 to 2005:

(1) It seems to me that Severn Trent's position is unanswerable as regards the 1996 Agreement. Not only did that Agreement contain an expanded definition of Trade Effluent that expressly included surface water, it also provided that it

was Boots which had to calculate the charges in accordance with the values in Appendix II of that Agreement and using the volume determined by readings taken from the Apparatus. Boots was then obliged to submit a written statement to Severn Trent and Severn Trent invoiced based on the written statement. This machinery appears to have been implemented at the relevant time in accordance with these provisions, or at least it has not been suggested otherwise. The charges were therefore lawfully due and payable.

(2) The 1996 Agreement continued until replaced by the 2000 Agreement although, as I indicated in the factual background section of this judgment, the 1996 Agreement was varied by a letter dated 12 March 1998 and by an Agreement dated 1 April 1999. The letter stated that the charges payable would thereafter be payable in accordance with the scheme of charges whereas the Agreement referred instead to the charges set out in a charges table. In so far as the scheme of charges became applicable for part of the period of the 1996 Agreement, then my conclusions under issue 2 would apply.

(3) The 2000 Agreement referred in Recital B to the supply of services by Severn Trent on the terms of the Agreement and in accordance with the scheme of charges. It also contained a charges table but this table said that it would adjust in line with Severn Trent's published charges. It seems, therefore, that my conclusions under issue 2 also apply for the period of the 2000 Agreement as Boots accepted.

Issue 3: contract claims

95. This issue concerns whether Boots' claims in contract in respect of alleged trade effluent overcharging have a real prospect of success.

96. In the Particulars of Claim, Boots alleged that:

> "*16 At all material times, Severn Trent has supplied services to Boots, and Boots has made payments to Severn Trent for those services, in accordance with (or purportedly in accordance with) the provisions of the Scheme of Charges in force at the time and the Consent (together, the 'Agreement'). In the premises, the provisions of the Agreement constituted the terms of a contract between Severn Trent and Boots…*
>
> *17 The following are implied terms of the Agreement:*

> *17.1 that Severn Trent will levy charges under the Agreement within the applicable regulatory framework set out above (implied as being necessary for business efficacy and/or as being so obvious as to go without saying) ('regulatory implied term'); and/or*
>
> *17.2 that Severn Trent will carry out the services it performed for Boots at the Property with reasonable care and skill (implied by virtue of section 13 of the Supply of Good and Services Act 1982) ('statutory implied term').*"

97. Boots then pleaded that the alleged overcharging constituted a breach of the express terms of the scheme of charges and therefore of the Agreement as defined and also a breach of each of the implied terms.

98. Severn Trent contended on this application that Boots' contract case had no real prospect of success on three bases: (1) the 1996 Agreement, the 2000 Agreement and the 2005/2015 Consents were all between Severn Trent and Boots plc, not Boots; (2) since 2005 there has been no Agreement at all, only the 2005/2015 Consents which are not contracts; and (3) the 1996 and 2000 Agreements had contractual effect but were not agreements for the supply of services.

99. Boots did not appear to have an answer to the corporate personality point. This would itself seem to be a good basis for granting summary judgment against Boots on the claims as pleaded although, if that were the only obstacle, Boots might seek to deal with it by applying to amend to add Boots plc as a party.

100. As to the suggestion that there was no contract at all from 2005 onwards, Boots contended that this suggestion was wrong. Boots submitted that from 2005 onwards there was a "*statutory contract*" in place between the parties on the basis of the Consents and the annual schemes of charges. Pursuant to this "*statutory contract*" Severn Trent agreed to provide trade effluent discharge services in return for payment of charges in accordance with the applicable scheme of charges.

101. Mr Davies-Jones Q.C. submitted that "*statutory contracts*" arose in a number of legislative contexts. The only example that he cited, however, was ***Collin v Duke of Westminster and others*** [1985] 1 Q.B. 581 (CA). This case concerned the right to obtain the freehold of a property under the Leasehold Reform Act 1967 (the "LRA 1967"). It is true that in the course of his judgment Oliver LJ (with whom May LJ and Sir Roger Ormrod agreed) referred (e.g. at p. 602E) to the obligation on the

landlord to enfranchise pursuant to section 8(1) of the LRA 1967 as giving rise to a "*statutory contract*". However, Oliver LJ made it clear that (1) the statutory rights were not the same as a simple contract and did not attract the limitation period applicable to simple contracts and (2) the statutory rights were to be classed as a speciality with a different and longer limitation period. Oliver LJ stated (at p. 602E): "*…any cause of action which the applicant has derived from the statute and from the statute alone.*"

102. I do not regard the ***Collin v Duke of Westminster*** case as indicating that the Consent together with the scheme of charges would give rise to a contract between the parties actionable as such. If anything, the decision in ***Collin*** would suggest that the relationship between the parties in the present case outside of the period of the written Agreements was a creature of statute only.

103. In my judgment, Boots does not have a real prospect of succeeding on its contract claims for the period from 2005 to the present date. It seems to me fanciful to suggest that a contract between the parties arose from the grant of a consent by Severn Trent in combination with the making of a scheme of charges. These were statutory matters governed by the provisions of the WIA 1991. There is no suggestion in the WIA 1991 itself that a consent with associated conditions would give rise to a contract. One way of testing the matter would be to consider what would happen if the discharger was not happy with the conditions that an undertaker sought to impose to its consent. In an ordinary contract situation, this would give rise to a negotiation and the resulting contract would be the product of that negotiation. In the case of trade effluent consents, the discharger would need to appeal to Ofwat instead (section 122(1)(c) of the WIA 1991). The statutory and regulatory context of the regime for consents is all important.

104. I consider the position to be not dissimilar to that which arises where a fee is paid in return for a licence such as a television or driving licence. Although I accept that such analogies are not precise matches, they nonetheless illustrate that the payment of a fee in return for a service or function required to be provided under statute or by regulation would not ordinarily be characterised as giving rise to a contractual relationship.

105. So far as the period between 1996 and 2005 is concerned, and putting to one side the issue of which Boots entity was the relevant contract party, there were during this period Agreements in place between the parties under section 129 of the WIA 1991. However, I have already concluded under issue 2 that Boots' case under the 1996 Agreement cannot succeed because of the expanded definition of "*trade effluent*" in that agreement and because of the way in which the calculations and payments were dealt with in it. That leaves the 2000 Agreement.

106. In response to Boots' contract claim under the 2000 Agreement, Severn Trent fell back on the argument that the 2000 Agreement was not truly an agreement for services such that no term would fall to be implied into it under section 13 of the Supply of Goods and Services Act 1982. Even if that submission is correct, it would not dispose of the other alleged implied term (described in the Particulars of Claim as the regulatory implied term). Moreover, in my judgment it is not fanciful to suppose that Boots might succeed in establishing at trial that the 2000 Agreement was an agreement for the provision of services (for example, on the basis of clause 1.2 of that agreement).

107. In light of my conclusions above, I would grant summary judgment on the contract claims as regards the periods (1) 1 October 1996 to 31 March 2000 and (2) 26 August 2005 to date. However, had it not been for my earlier conclusions on issues 1 and 2, I would not have granted summary judgment in respect of the period from 1 April 2000 to 25 August 2005, assuming that in respect of that period Boots had been able to persuade the court that it had an appropriate way of dealing with the point about the correct contractual counterparty.

Issue 4: Undue discrimination

108. Issue 4 concerns whether Boots' claim in unjust enrichment based on undue discrimination has a real prospect of success.

109. Boots accepted that its claim based on undue discrimination only applied for the period between 1 April 1981 and 1 September 1989.

110. Boots' claim was based on Condition E of Severn Trent's Licence. This provides:

> "*It shall be the duty of the Appointee in fixing or agreeing charges* [defined as including any charges under a charges scheme] *to ensure that no undue*

preference is shown to, and that there is no undue discrimination against, any class of customers or potential customers".

111. In its Particulars of Claim, Boots pleaded that the alleged surface water overcharging constituted unlawful discrimination between classes of customers in breach of this Condition. Boots identified the relevant classes as being those customers who did not pay for surface water drainage according to volume and those who did. The latter were said to have been unduly discriminated against by having to pay for the same service twice: once by volume and once by surface area or rateable value of the property.

112. In order to establish undue discrimination Boots would need to establish: (i) that it was a member of a class; (ii) that that class suffered detriment as compared to some other class; and (iii) that that detriment was "*undue*": ***Severn Trent Water Authority v Cardshops Ltd*** (CA, 29 January 1987).

113. Severn Trent contended on this application that Boots had failed to identify a relevant class of persons. It contended that any metered customer might allow surface water to run into its drainage system and to be measured by its trade effluent meter. It also contended that a relevant class could not sensibly be defined by reference to customers who had contravened the statute or the conditions of their consent. Severn Trent also submitted that there was no discrimination, let alone undue discrimination, since all customers ran the same risk of being charged by Severn Trent in the same way as Boots.

114. I do not accept Severn Trent's submissions on this part of the application. It seems to me that, were it not for the conclusions I have already reached on the other issues addressed above, Boots would have had a more than fanciful prospect of success on this claim. The Licence does not indicate what tests should be used to identify relevant classes and nor do any applicable statutory provisions. I do not consider that a summary judgment application is an appropriate occasion on which to decide this point. The same applies in relation to whether there has been discrimination and also to whether, if so, it was undue. Severn Trent accepted that in some situations it did grant customers a reduction or exemption from the obligation to pay for surface water drainage through the banded surface water charge. It claimed, however, that this was only where it had consented to surface water being discharged into the foul water

sewer. Severn Trent's approach raised a factual issue that would, in my judgment, have needed to be explored further at trial.

Issue 5: Limitation

115. Issue 5 is whether all of the claims prior to 8 July 2010 have no real prospect of success on limitation grounds. The significance of this date is that the parties entered into a standstill agreement on 8 July 2016. It is accepted that all of the claims advanced by Boots have a primary limitation period of 6 years from the date of payment. Accordingly, claims prior to 8 July 2010 would prima facie be time barred. However, that is subject to the operation of section 32 of the LA 1980.

116. Section 32 provides, in so far as material, as follows:

> "*32 Postponement of limitation period in case of fraud, concealment or mistake.*
> *(1) …where in the case of any action for which a period of limitation is prescribed by this Act, either—*
> *(a) the action is based upon the fraud of the defendant; or*
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
> *(c) the action is for relief from the consequences of a mistake;*
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*
> *References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*
> *(2)For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty…*"

117. Boots relies on both section 32(1)(b) (deliberate concealment) and on section 32(1)(c) (relief from the consequences of mistake).

118. Severn Trent accepts that, to the extent that the claim advanced by Boots is for restitution of alleged overpayments made by reason of a mistake, that is a claim within the scope of section 32(1)(c). It is, however, common ground that section 32(1)(c) does not apply to the other causes of action advanced by Boots.

119. Seven Trent contends that Boots has no real prospect of establishing deliberate concealment within section 32(1)(b). Further, Severn Trent contends that Boots has no real prospect of establishing that it could not, with reasonable diligence, have discovered both the alleged mistake and the alleged concealment prior to 8 July 2010. These are therefore the two issues that arise for determination on this application. I will consider each in turn below.

120. Boots relied on evidence from a number of factual witnesses (Messrs Bryce and Willmott and Ms Rayner) on the question of what Severn Trent told Boots and on Boots' capacity to go behind those statements. None of this evidence is or could be challenged by Severn Trent at this summary judgment stage. Severn Trent has also chosen not to lead any evidence for the present hearing from, in particular, Mr Andy Taylor, who was Severn Trent's relationship manager with Boots at the time, notwithstanding that it has indicated that, if a trial were to be needed, it would then intend to call him as a witness at trial. In these circumstances, I remind myself of the note of caution sounded by Lewison J who had also been asked to determine a limitation defence summarily without a full investigation of the facts in ***J D Wetherspoon Plc v Van de Berg & Co Limited*** [2007] EWHC 1044 (Ch) at [30]: "*…I should be cautious about making a summary determination where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*".

Deliberate concealment

121. Boots alleges that the fact relevant to its causes of action that was deliberately concealed by Severn Trent was that Severn Trent had no legal justification for the overcharging. In order for this alleged fact to have been concealed, Severn Trent would have had to have known that it had no legal justification. A fact that is not known cannot be deliberately concealed, hence in ***Cave v Robinson Jarvis & Rolf (a firm)*** [2002] UKHL 18, [2003] 1 AC 384 the House of Lords held that a failure to disclose a negligent breach of duty that the actor was not aware of committing did not amount to a deliberate concealment within the meaning of the statute.

122. Boots' allegation is therefore a particularly serious one. It amounts to saying that, despite knowing it had no legal justification for its charging, Severn Trent deliberately hid that fact from Boots and continued to charge in an unlawful manner.

123. In its Response to Severn Trent's Request for Information, Boots alleged only "*that Severn Trent knew (or ought to have known) that it had no entitlement*" to make the charges it made. Mr Davies-Jones Q.C. rightly accepted that this "rolled-up" plea was not adequate for the purposes of the deliberate concealment case. He said that it was clear from the totality of Boots' pleadings that knowledge was being alleged and that if necessary Boots would amend this Response to remove the words in parenthesis.

124. The allegation of knowledge is based on one document only, namely a letter from a Mr Mark Gibson of Severn Trent to a water consultant, Mr Willmott dated 8 August 2003. The letter does not appear to relate either to Boots or to the Property. There is a sentence in the letter in which the author states that "*Surface water (i.e. rainwater) cannot be incorporated into the [Trade Effluent] tariff…*" Boots alleged that it was to be inferred from this sentence that there was at least a body of opinion within Severn Trent at the relevant time to the effect that surface water could not under any circumstances be counted as part of the volume of liquid charged for as trade effluent. Severn Trent contended that the letter was written in the specific context not of the ordinary trade effluent tariff but rather of the special (lower) trade effluent tariff which applied where the undertaker allowed trade effluent of a higher purity to be discharged to a public surface water sewer. Severn Trent also contended that it could not in any event be inferred from any statement in the letter that Severn Trent knew that its charging in the Boots' context was unlawful.

125. So far as concealment is concerned, Boots alleges that at a meeting in or around 2004, Severn Trent (either through Mr Andy Taylor or his successor), in response to a question from Boots as to whether its charges were correct, confirmed that both the charge for surface water by volume and the separate *"surface water drainage charge"* were valid. Boots alleges that Severn Trent re-confirmed the validity following an internal discussion involving its relationship manager's superior. As I have already indicated, Severn Trent did not challenge this evidence on this application. Boots also relied on Severn Trent's non-disclosure of the alleged unlawfulness of its charging as amounting to concealment in the context of the commercial relationship between the

parties and Severn Trent's quasi-public position as a statutory water and sewerage undertaker.

126. Although I accept that the evidence in relation to knowledge is very limited as things currently stand, I do not consider that Boots' case on deliberate concealment is hopeless or fanciful. In my judgment, it raises issues that need to be explored at trial including as to the true meaning and significance of the letter of 8 August 2003. The same is also true as regards concealment. I would not therefore grant summary judgment on this ground.

Reasonable discoverability

127. The meaning of reasonable discoverability was described by Millett LJ in ***Paragon Finance plc v D B Thakerar & Co (a firm)*** [1999] 1 AER 400 (at 418b-d) as follows:

> *"The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."* (emphasis in original)

128. In ***Law Society v Sephton & Co*** [2004] EWCA Civ 1627 Neuberger LJ (with whom Maurice Kay LJ agreed at [133]) stated at [116] that it followed from Millett LJ's construction of section 32(1) that there must be an assumption that the claimant desired to discover whether there had been a fraud (or deliberate concealment, or mistake), and that the concept of reasonable diligence carried with it the notion of a desire to know, and indeed, to investigate.

129. However, in the ***J D Wetherspoon Plc*** case Lewison J stated at [42] that "*If there is no relevant trigger for an investigation, then it seems to me that a period of reasonable diligence does not begin.*" Mr Davies-Jones Q.C. relied on this statement in particular in order to explain much of the period between 2004 and 2010. He

accepted that by 2004 Boots (Mr Bryce) knew that surface water was draining through the trade effluent meter at the Property and being charged for on a volume basis and that surface water drainage was also being charged for on the banded rateable value/area basis. However, it was submitted that Boots did not know, and could not with reasonable diligence have discovered, prior to 8 July 2010 that this approach to charging was unlawful or that the unlawfulness had been concealed. There was, it was submitted, no trigger for an investigation during this period. On the contrary, Boots was "put off the scent" by the confirmations it had allegedly received from Severn Trent in or around 2004.

130. Mr Colton Q.C. submitted that, given the facts known to Boots, all that would have been required for it to uncover the unlawfulness and the concealment would have been the taking of legal advice which must have been readily available to a company the size of Boots. He also submitted that Boots could at any time have sought advice from a water consultant such as Cadantis. Indeed Boots did consult Cadantis in 2009, although, according to the evidence before the Court, it was not until October 2010 that Cadantis first brought the potential overcharging issue at the Property to the attention of Boots (and it was not until even later that Mr Willmott/Cadantis provided to Boots a copy of Mr Gibson's 8 August 2003 letter referred to above).

131. As regards the alleged lack of a trigger for investigation during the period 2004 to 2010, Mr Colton Q.C. contended that the requirement for a trigger before the period of reasonable diligence begun was impossible to reconcile with the Court of Appeal analysis in the ***Law Society v Sephton & Co*** case referred to above in which it was held that a desire to know and to investigate was to be assumed. He pointed out that ***Law Society v Sephton & Co*** is not referred to by Lewison J in the ***J D Wetherspoon*** case. In any event, he submitted that if a trigger were needed, there was a trigger each month when Boots was paying for trade effluent charges knowing that surface water was draining through the relevant meter.

132. Having considered these submissions, I am unable to conclude on a summary basis that Boots has no real prospect of success on the point. Whilst a long period clearly elapsed during which time Boots paid charges knowing that the volume was being increased by surface water draining through the meter, I consider that there is a triable issue as to whether it could with reasonable diligence have discovered the

unlawfulness and/or the concealment prior to the cut-off date. I consider that the issue of whether a trigger is required and, if so, whether there was a relevant trigger can only be properly determined in the context of a full trial and not on a summary determination. The same is true in relation to the impact of the alleged confirmations that Boots received in 2004 and how much reliance it was reasonable for it to place on them and for how long. I would not therefore grant summary judgment on this point either.

Issue 6: pre 1996 claims

133. The basis of the summary judgment application on this issue was the lack of documentary records relating to the pre-1996 period. As things currently stand, there are no consents or agreements, nor any documents evidencing what measurements were made by the meters at the Property, what charges were imposed or what charges were paid. Severn Trent investigated the position itself but was only able to unearth certain additional but limited billing data going back to 1999.

134. On any view, if matters remain in this state, Boots will have considerable difficulty formulating, evidencing or establishing its pre-1996 claims. The issue, however, is whether the Court can be satisfied that those claims therefore have no real prospect of success.

135. Mr Davies-Jones Q.C. relied on four points:

(1) Severn Trent had not suggested that schemes of charges for the period pre-1996 were not available.

(2) Additional documents might come to light in due course following further searches and investigations.

(3) Boots would be entitled to rely on evidence of fact from witnesses such as Mr Bryce who worked at the Property from the mid-1980s. They would be able to say whether the activities at the Property were of a similar nature and scale to the activities that took place post-1996.

(4) Quantum could be calculated by using assumptions backed by expert evidence. Doubtless Severn Trent could challenge the assumptions and the

expert evidence, but it was impossible to say now that the case had no real prospect of success.

136. As with the limitation arguments addressed above, I have concluded that it is not possible to determine the pre-1996 claims on a summary basis. They may ultimately fail for lack of documentary records or other evidence. However, I do not consider that it is possible to conclude on this application that such claims would have no real prospect of success, particularly in circumstances where much will turn on expert evidence and the appropriateness of assumptions which can only be properly dealt with at trial. Accordingly, I would not grant summary judgment on issue 6.

Conclusion

137. For the reasons set out in this judgment, I have decided issues 1 and 2 in favour of Severn Trent. The summary judgment application therefore succeeds. I would also have granted summary judgment on issue 3 save that, had it not been for my earlier conclusions on issues 1 and 2, I would not have granted summary judgment on issue 3 in respect of the period from 1 April 2000 to 25 August 2005 (subject to the point concerning the correct Boots entity). I would not have granted summary judgment on issues 4, 5 or 6.