Neutral Citation Number: [2024] EWHC 2283 (Ch)

Case Nos: BL-2019-002362, BL-2020-001318,
BL-2020-000937, BL-2021-000056,
BL-2021-000491

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (ChD)**

7 Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 3 September 2024

**Before** :

**THE HONOURABLE MR JUSTICE RICHARD SMITH**

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**Between:-**

**(1) SURREY SEARCHES LIMITED AND OTHERS**
**(2) PSG CLIENT SERVICES LIMITED AND 1 OTHER**
**(3) SEARCHFLOW LIMITED (IN ITS OWN RIGHT, AS ASSIGNEE OF WATERVALE LIMITED AND AS ASSIGNEE OF RICHARDS GRAY LIMITED AND OTHERS)**
**(4) P&S GRADWELL LIMITED AND OTHERS**
**(5) DYE AND DURHAM (UK) LIMITED AND OTHERS**

**Claimants**

**- and -**

**(1) NORTHUMBRIAN WATER LIMITED**
**(2) UNITED UTILITIES WATER LIMITED**

**(3) YORKSHIRE WATER SERVICES LIMITED**
**(4) SEVERN TRENT WATER LIMITED**
**(5) ~~DŴR CYMRU CYFYNGEDIG~~**
**(6) ANGLIAN WATER SERVICES LIMITED**
**(7) SOUTH WEST WATER LIMITED**
**(8) WESSEX WATER SERVICES LIMITED**
**(9) THAMES WATER UTILITIES LIMITED**
**(10) SOUTHERN WATER SERVICES**
**(11) SEVERN TRENT PROPERTY SOLUTIONS LIMITED (t/a SEVERN TRENT SEARCHES)**
**(12) WESSEX WATER ENTERPRISES LIMITED (t/a WESSEX SEARCHES)**

**Defendants**

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**Simon Browne KC, Gerry Facenna KC, Narinder Jhittay and Jenn Lawrence** (instructed by **Fladgate LLP**) for the **Claimants**

**Edmund Nourse KC, Timothy Pitt-Payne KC and James Nadin** (instructed by **Eversheds Sutherland LLP**) for **Defendants 1-3, 8-10 and 12**

**Clare Reffin** (instructed by **Herbert Smith Freehills LLP**) for **Defendants 4 and 11**

**Jason Coppel KC** (instructed by **Addleshaw Goddard LLP**) for **Defendant 6**

**Jacqueline Lean** (instructed by **Burges Salmon LLP**) for **Defendant 7**

Hearing date: 30 July 2024

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**APPROVED JUDGMENT**

## Introduction

1. On 30 July 2024, I heard from the parties on consequential matters arising from my judgment dated 28 June 2024 (**Judgment**) handed down following the 'Stage 1' trial in these proceedings. That consequential hearing was preceded by extensive written submissions from the parties.

2. The principal points arising for my determination were:-

    (i) The form of declaratory relief;
    (ii) Where liability should lie for the costs of the 'Stage 1' proceedings;
    (iii) The basis for costs - standard or indemnity;
    (iv) The amount of any payment on account of costs;
    (v) The rate of pre-judgment interest on any costs order;
    (vi) When judgment rate interest should commence on any costs order;
    (vii) Permission to appeal;
    (viii) The stay of these proceedings pending any appeal; and
    (ix) Possible further case management directions.

3. At the outset, I repeat my gratitude to the parties for their efficient preparations for, and economical submissions at, the consequentials hearing which meant that matters were dealt with efficiently despite the number of parties involved. At the hearing, I gave my decision on the above matters, with my reasons to follow. These are those reasons.

4. The background to this matter is set out fully in the Judgment. I do not repeat the substance here save to refer to any salient points as they arose at trial under discussion of the relevant consequential matter. I have used below (without definition) capitalised terms from the Judgment.

## Declaratory relief

5. The parties were agreed that my findings on each of the six issues canvassed at the 'Stage 1' trial (EIR Issues) should be made the subject of declaratory relief. Considering too that there was utility in that course, I acceded to the proposed agreed form of draft order, subject to two amendments. Those amendments reflected the fact that my findings in the Judgment on two issues were not 'at large' but applied in the case of (i) **Issue 3.1** to *the Claimant PSCs* and (ii) **Issue 3.8** in respect of **Question 2.8** (flood risk) to those *living* persons who were *current owners or occupiers* of the relevant properties at the time of the relevant CON29DW request. Those points are now reflected in the final form of order which I have since approved.

## Liability for costs

6. The question of which way(s) liability for costs should fall and the basis of those costs was, by some measure, the most contentious. As to the former, the Claimants' position was that, having regard to all the circumstances of the case under CPR, Part 44.2(4), in particular, CPR, Part 44.2(4)(b) and whether a party has succeeded on part of its case,

there should be cross-orders for costs under CPR 44.6(b) to reflect the respective success of the parties on the different issues. Based on their assessment of the parties' level of success on, and percentage of the overall costs accounted for by, each issue, the Claimants invited the Court to order the Claimants to pay D4/11 and D8/12 50% of their costs of the 'Stage 1' trial, the Claimants to pay all other Defendants 40% and the Defendants to pay the Claimants 25%.

7. By contrast, the Defendants argued that, although they may not have succeeded on some elements of some of the issues that fell for my determination, they were the successful parties overall, effectively disposing of the Claimants' case that a CON29DW is subject to the EIR charging regime. However, even taking the issue-based approach pressed by the Claimants, the Defendants were still, by some considerable margin, the successful parties on those issues decided by the Court.

8. Having heard the parties' submissions, I came to the view that the Defendants should have 100% of their costs of the 'Stage 1' proceedings. It is correct to say that the 'Stage 1' trial was a trial of issues. Its purpose was to establish by reference to each of the EIR Issues whether the Defendants (i) were obliged to disclose the relevant information (either because it was not EI (**Issue 1**) or was not held by the relevant Defendant at the relevant time (**Issue 2**)) (ii) could avail themselves of an alternative method of provision of the information (**Issue 3.1**) (iii) were prohibited from disclosing the information (**Issue 3.8**) (iv) could avail themselves of an EIR exception so as to avoid disclosure (**Issue 4**) or (v) fell outside the EI regime because of what was requested by, and provided to, the Claimants in the form CON29DW (**Issue 5**) and, whether in light of the foregoing, the EIR charging regime was engaged (**Issue 6**). Although in one sense freestanding and argued as such, the overarching point to which, collectively, the Issues were directed was whether it was open to the Defendants to say that they were not required by the EIR to provide the CON29DW information, at least in the form requested.

9. For some issues, certain CON29DW questions did not arise for my consideration, having already been disposed of under prior issues. For other issues, I made findings, albeit not as extensive as the Defendants had sought. I also considered it inapt, given my other findings, to decide one particular issue (**Issue 4**). On some of the individual CON29DW questions, the Defendants were unsuccessful (at least in part) under some issues, albeit for most, they generally succeeded under a later issue and/ or those few matters (short of **Issue 5**) not ultimately decided in their favour were of marginal significance given the particular scenario(s) concerned and their relative unimportance in the context of the case as a whole. Many issues were agreed between the parties such that I was not required to make findings on them. Finally, in light of their individual circumstances, the relative success of some Defendants could be said to be greater on some issues. So, for example, D6 fared better than the other Defendants under **Issue 3.1** because of its more expansive approach to the publication of information. D4/11 and D8/12 fared better in another respect, having succeeded on the 'threshold' **Issue 2.1(d)** peculiar to those Defendants.

10. Some of the outcomes indicated above were reflected in the costs debate between the parties as to the 'weighting' suggested by the different parties for the different issues in the event the Court found favour with the Claimants' approach. So, for example, the Claimants suggested that **Issue 1** accounted for 20% of the 'Stage 1' costs of which the Defendants should receive 65% in light of their relative success. By contrast, **Issue 2.3** (skill and judgment) is said to have accounted for 25% of the 'Stage 1' costs, with the Defendants only winning one contested issue, the Claimants winning the rest such that they should receive 90% of their relevant costs. The Eversheds Defendants, by contrast, said that, if the Court were to entertain the Claimants' approach, the appropriate costs division for **Issue 1** was 5% and, for **Issue 2.3**, 16%, the Claimants' suggested attribution of success to the latter being considerably wide of the mark given that there was only one live issue, **Question 2.8** (flood risk), on which the Court found in the Defendants' favour.

11. Standing back from the minutia of what, facially, might seem a somewhat 'busy', 'mixed' or perhaps even 'messy' picture, the reality is that all Defendants were, in fact, overwhelmingly successful on the overarching point referred to above. That such overall success was achieved through the parties' agreed matrix of issues which happened to have been argued and decided in a particular sequence, or agreed in certain aspects, or not ultimately decided in whole or in part, and that some of the Defendants may have lost on a few of those issues that were live, does not diminish that success. Nor is it diminished by the fact that the impact of my findings for the later stages of these proceedings has yet to be determined. Nor did I consider that any of the arguments on which they may have lost were unreasonably pursued by the Defendants. I therefore awarded them their costs of the 'Stage 1' proceedings and, given the reality of the Defendants' success overall, I did not consider that any reduction or 'paring back' from a full award was warranted.

12. I was reinforced in my view by the parties' suggested 'weighting' of the various issues by reference to relative success as well as their assessment of the percentage of the case each issue is said to have consumed. Although the Claimants argued that their approach would avoid the pitfalls of a costs judge having to assess costs on an issue by issue basis, it would not avoid the need for the initial allocation of those weightings, the wide gulf between the parties on a number of them emphasising the somewhat arbitrary and overly-forensic nature of that approach. Although I did, of course, oversee the trial and, in that sense, had greater visibility than the costs judge into what suggested weightings might be appropriate, and I could discern that the Claimants were (perhaps unsurprisingly) straining matters too far in their favour, that approach would still have been a precarious one. At a more general level, it also rather lost sight of the aim and purpose of the 'Stage 1' trial. However, given the Defendants' success overall, that approach was not one on which it was necessary or appropriate for me to embark.

13. The costs I have ordered will be subject to detailed assessment forthwith.

**Basis of costs**

14. As to the appropriate basis for assessment of costs, the Defendants relied on a number of matters which they said took the case 'out of the norm'. Those matters were (i) the so-

called 'reverse ferret' as explained in the Judgment (ii) the related allegations of dishonesty said to have been directed by the Claimants to the Defendants (iii) the failure by the Claimants to provide sufficient information about the 'PAC issues', as those were reflected in Schedule 4 to the PoC (iv) the related weakness or thinness of the Claimants' case on **Issue 3.1** (iv) the suggested lack of utility of the Claimants' cross-examination generally (v) the challenges made in closing submission to the evidence of factual witnesses who were not cross-examined at all or on material aspects (vi) the withdrawal of admissions in closing submission and (vii) the Claimants' complaints of non-compliance by some of the Defendants' witnesses with CPR, PD 57AC.

15. It is fair to say that I commented on a number of these matters in the Judgment in a manner unfavourable to the Claimants. As for the so-called 'reverse ferret', the Defendants were, as I have found, justified in their consternation concerning the Claimants' argument only introduced very late that some of the EIR Issues, as had been expressly agreed by the Claimants years earlier as suitable for determination at the 'stage 1' trial, ought not to be decided now after all. However, even if not willing, the Claimants were ready and able to deal with all the EIR Issues, the Defendants argued for the continued utility of doing so and all of them were, in fact, fully argued. As such, although a surprising stance by the Claimants, I cannot say that it reflects conduct so unreasonable as to take the case out of the norm. Nor, apart from limited costs of dealing with the argument shortly before and at trial did the argument meaningfully contribute to or increase the costs of the 'Stage 1' proceedings.

16. As for the suggested allegations of dishonesty, during the course of opening argument on the so-called 'reverse ferret', Mr Facenna did express himself concerning the Defendants' beliefs as to how the Claimants were putting their case in a manner which, I suspect, he might well have framed differently with the benefit of hindsight. However, at the time, I did not discern him to be impugning the honesty of the Defendants or their legal teams and, when umbrage was immediately taken, he made clear that he was not doing so. In my view, that is the end of the matter. It is not a cause for visiting increased costs on the Claimants.

17. The Defendants also argued that the Claimants failed to give them adequate particulars of their case on **Issue 3.1** such that this could only be discerned upon the service of witness statements for which a special regime for sequential exchange was required. The Claimants said that the short answer to **Issue 3.1** was that, the public availability point being one run by the Defendants, the burden lay on them to prove their case. However, even looking at the procedural aspects, the steps ultimately taken followed extensive discussion and negotiation between the parties, with the Defendants' case on this issue itself not pinned down until very close to trial. Although there were, no doubt, different views on both sides as to how the different issues were best advanced procedurally and frustrations with the stance taken by the other, I was unable to discern conduct so unreasonable on any party's part so as to take the case outside the 'norm'.

18. As for the Claimants' case on **Issue 3.1** more generally, although powerfully articulated by their legal team, there was, as I found, an air of unreality about many of the points advanced. Had the 'Stage 1' trial been solely concerned with the existing availability of, and ease of accessibility to, EI, I might have been more amenable to making an indemnity costs order. However, although it took up a lot of time at trial and, no doubt, in pre-trial preparation, it was argued as one of a number of EIR Issues. As such, I did not consider that the Claimants' **Issue 3.1** case warranted singling out for an indemnity costs order, albeit the Defendants' resounding success on this issue was one factor in my decision on liability for costs.

19. I take together the remaining points since they all concern the Claimants' approach to the evidence. As to these, I did observe in the Judgment that aspects of the cross-examination were not particularly useful to the Court. Nevertheless, I can understand why the Claimants took the approach they did and I certainly cannot say that it was improper. If it was, I would have stopped it. Likewise, as I have found, some of the challenges made by the Claimants in closing submission to the evidence were inapposite in circumstances in which the witness concerned was not challenged on the relevant (material) point. Likewise, I also refused permission for the Claimants to withdraw certain admissions since this risked unfairness for those aspects of the proceedings. Finally, I found largely misplaced the Claimants' complaints about the non-compliance by some of the witnesses with CPR, PD 57AC. Although an unhelpful diversion, and raised far too late in the day, I cannot say that it took the case out of the norm.

20. Although I have addressed above the arguments for indemnity costs by reference to the individual points, I should add that, even considering them in the aggregate, as I did, I was not persuaded that they rendered the Claimants' case and/ or their conduct thereof, so unreasonable as to warrant an indemnity costs order, whether for all or part of the costs.

**Payment on account**

21. On the basis of the 'one direction' costs order I made, there was no dispute that the Claimants should make a payment on account of costs. The question was the level of that payment, with the Claimants suggesting in oral submission that, given the likely skirmishes on detailed assessment, anything approaching 50% of incurred (unbudgeted) costs and 100% of estimated (budgeted) costs for the 'Stage 1' proceedings would be resisted. The different Defendants sought between 65 and 75% of their incurred costs (depending on the basis of assessment) and 100% of their estimated costs, save for D6 which, for the latter, sought 90%.

22. It was common ground that the Court was making an assessment of the sum that the receiving party was likely to receive on detailed assessment. It was not seeking to identify an irreducible minimum but a realistic estimate of recovery, subject to an appropriate margin of error and the potential effect of other factors impinging on recoverability and/or risk of recovery. As to the estimated (budgeted) costs, CPR Part 3.18 provides that, where there has been costs management, when assessing costs on the standard basis, the Court will not depart from the agreed or approved budget unless there

is good reason to do so. For interim payment purposes, Coulson J (as he then was) indicated in *MacInnes* v *Gross* [2017] EWHC 127 (QB) that he regarded "a reduction of 10% …. as the maximum deduction that is appropriate in a case where there is an approved costs budget."

23. The Claimants pointed to the significant 40% reduction of the Defendants' estimated (budgeted) costs imposed during the costs budgeting exercise such that the Court should approach the incurred (unbudgeted) costs with similar caution. The Defendants argued that the Claimants' calculations were simply wrong, the actual reduction being considerably less than suggested.

24. In relation to the estimated (budgeted) costs, the Claimants relied on specific aspects of the conduct of the case such as the excessive disclosure exercise undertaken by the Defendants as well as the shorter period of trial than originally planned. As to these matters, the Defendants argued that it was not appropriate to look at the points in isolation. On detailed assessment, the Court would look at the circumstances of each separate phase as a whole. In any event, the fact that there were fewer days spent in Court than allocated to the trial did not mean that they were not spent working full-time on the case. Likewise, that the Defendants spent significantly more time on the disclosure exercise was simply the concomitant of the disclosure burden falling on them.

25. Having considered the parties' submissions, the amount of costs claimed by the different Defendants and the guidance offered by the authorities and the CPR, I was satisfied that the appropriate figure for payment on account purposes for all Defendants was 65% of their incurred (unbudgeted) costs and 90% of their estimated (budgeted) costs. In relation to the former, I agree that the Claimants had overstated the extent to which the Master had reduced the Defendants' costs budgets such that the circumspection suggested for the incurred (unbudgeted) costs was similarly overstated. As to the latter, although I did not find particularly persuasive the Claimants' points about the length of trial and disclosure, it did seem to me that the assessed sum might turn out to be less such that I should not simply award the budgeted sum.

26. I am grateful to the parties for having agreed the interim payment figures as figures which are also reflected in the final form of order I have since approved.

## Interest

27. There was no dispute that the Defendants should have pre-judgment interest on their costs but there was an argument as to the appropriate rate and when this should cease and statutory interest at the judgment rate take over.

28. As to the former, the Defendants contended for a rate of 4% on the basis that this reflected an average commercial rate of base rate plus 1% over the period in which the relevant costs were incurred. The Claimants proposed 3%. Having regard to the attributes of the Defendants here, and considering what was reasonable in this case, I was

satisfied that the appropriate rate of pre-judgment interests was 3.5%, payable from the date of payment by the relevant Defendant of the relevant costs invoice.

29. As to the latter, the Claimants argued that judgment rate interest should not become payable until three months after my order, coinciding with the expiry of the period for commencement of detailed assessment. However, I was satisfied that this was not one of those cases in which it was appropriate to permit the paying party more time to understand the costs position before the judgment rate 'kicked in.' There has already been detailed costs budgeting in this case and the Claimants will already have a good grasp of the amounts in issue. As such, I considered them well placed now to take steps to seek to resolve the costs issue and to protect their own position in that regard. I therefore considered it appropriate for judgment rate interest to start to run 21 days after my order, coinciding with the date by which it was agreed that the payments on account of costs would be paid.

## Permission to appeal

30. The Claimants sought permission to appeal on the five grounds below. For the reasons given below, none of them appeared to me to have a real prospect of success. Nor did they raise any novel point of law rather than, at their highest, being concerned with the application of well-established principles to the particular factual context here. I therefore refused permission.

### Ground 1

31. The Claimants argued that the Court erred in holding that certain items of information responsive to questions in the CON29DW are not EI, in particular that its approach was wrong in law and inconsistent with the principles underlying the EIR as well as the guidance of the Court of Appeal in *Henney* and *Hastings*. The Court analysed *Hastings* and *Henney* closely, giving effect to those authorities and the objectives of the EIR by taking into account (i) the purpose for which the CON29DW information was obtained and used (not the requesters' motives) (ii) the nature and quality of the information provided (iii) the wider context of the responsive information and (iv) the extent to which it meaningfully advanced the objectives of the EIR. Applying those principles to the particular context of the relevant to the CON29DW question(s) was a fact-sensitive exercise.

### Ground 2

32. The Claimants argued that the Court erred in finding that each of D1-D3, D7 and D9-D10 did not 'hold' information within the meaning of the EIR where an initial check indicated that the property was, or might be, at risk of internal flooding. This seeks to challenge a finding of fact as to the level of skill and judgment employed by each of the relevant Defendants in answering a particular CON29DW question. Having analysed the related evidence presented for each Defendant, the Court was entitled to make the findings it did.

### Ground 3

33. The Claimants argued that the Court erred in finding that the Claimants' claim necessarily rested on their requests for CON29DWs comprising requests for EI under the EIR. The Court was entitled to the view that the Claimants' claim (at PoC [23.1]) was premised on a CON29DW order being treated as a request for EI. That was evident from the Claimants' pleaded case, including the reference to the Reg 8 charging regime, and the articulation of that case (and their alternative claims) in the Claimants' related written and oral submissions. In any event, it is unclear where this point takes matters. The Court did not decide the Claimants' liability case. The Court decided **Issues 1-6** as all parties, including the Claimants, had agreed it should at the 'Stage 1' trial.

**Ground 4**

34. The Claimants argued that the Court erred in its approach to making findings in relation to the application of Reg 6(1) of the EIR, a fact-sensitive provision. However, all parties (including the Claimants) had expressly agreed that **Issue 3.1** was to be decided by reference to a set of sample orders from the test Claimants. Moreover, where the Claimants did advance particular characteristics of individual Claimants, the Court considered these and held that they made no difference. The Court was entitled to that view.

**Ground 5**

35. Finally, the Claimants argued that the Court erred in finding that the information responsive to the question on internal flooding in a CON29DW constitutes personal data within the meaning of the UK GDPR and that disclosure of such personal data in this context under the EIR would not be proportionate. The Court applied well-established principles concerning personal data to the particular CON29DW question in issue for the particular factual scenario presented (current property owners and occupiers). It then went on to evaluate proportionality of the potential disclosure in this context. The Court was entitled to the view it reached.

36. It was not necessary for me to consider the Defendants' related application since this was contingent on the Claimants being given permission to appeal.

**Final matters**

37. The Claimants may, of course, wish to renew their application to the Court of Appeal. Given the (then) impending vacation period, the parties agreed a revised timetable for the filing any Appellant's and Respondent's Notices. I was content to endorse this, as is also now reflected in the final form of order I have since approved.

38. With the exception of D6, the parties also agreed a stay of the proceedings pending any such application and, if successful, any appeal. I agreed that this was the appropriate course, with D6's related concerns being met through the addition of a provision for liberty to apply to lift the stay. I was not persuaded that it was appropriate to make any further case management directions at this stage.

39. May I again thank the parties and their legal teams for all their hard work, helpful submissions and support that they have provided to the Court to this point. I reiterate the hope expressed in the Judgment that the parties can now resolve their outstanding differences.