Neutral Citation Number: [2020] EWHC 1374 (TCC)

Case No: HT-2019-000090

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Remote hearing as if at
The Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/05/2020

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between :

CASTLE WATER LIMITED	**Claimant**
- and -	
THAMES WATER UTILITIES LIMITED	**Defendant**

- -

Neil Kitchener QC, Michael Clark and Andrew Lodder (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimant**
Simon Colton QC and James Nadin (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendant**

Hearing dates: 19th / 20th May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Friday 29th May 2020.

.....

MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith :

Introduction

1. This judgment arises out of disputes about disclosure that were heard remotely at the second CMC in these proceedings on 19 and 20 May 2020.

2. On 1 April 2017 a degree of liberalisation of the non-household water market in England occurred with the opening of the Non-Household Retail Market. With an eye to that liberalisation, the Claimant purchased the Defendant's non-household water and sewerage retail business by two agreements executed on 18 July 2016, which are known as "the Transfer Agreement" and "the Operating Agreement". The consideration paid by the Claimant for the Defendant's business was £100 million. The Agreements provided for data about the workings and customer base of the business to be migrated from the Defendant to the Claimant. The Agreements are suitably long and complicated and do not need to be set out extensively here.

3. Disputes have arisen which have led to proceedings involving claim and counterclaim, the details of which do not matter for present purposes save that the Court was told that both claim and counterclaim are in the region of £40 million. The parties have engaged representation of the highest order and are investing considerable resources in the prosecution of the litigation.

4. The parties have exchanged long pleadings. As a result of other orders made at the second CMC there will be a split trial with Stage 1 covering all issues going to the Defendant's alleged breach, including issues of principle about recoverability of loss. If there is a Stage 2, it will deal with factual causation and proof of loss, and issues specific to the Claimant that go to reduce recoverable loss (i.e. contributory negligence and failure to mitigate).

5. The parties have produced a List of Issues for the Stage 1 Trial. Separately, and as required by PD51U, they have collaborated to produce a List of Issues for Disclosure. The List of Issues for Disclosure is largely agreed, as are the questions to be asked where Model C is adopted. The discussions between the parties have, however, left some issues that have required decision by the Court. Hence this judgment.

6. In general terms, the disputes that have not been resolved by agreement have arisen because the Claimant has taken a more expansive view of the obligations that arise under PD51U than has the Defendant. It is therefore necessary to review the applicable principles before turning to the detail of the disputes.

The Disclosure Pilot: applicable principles

7. The principles emerge with reasonable clarity from the terms of PD51U itself. They have been helpfully clarified by two judgments of the Chancellor (*UTB LLC v Sheffield United Limited* [2019] EWHC 914 (Ch) at [75]-[79] and *McParland & Partners Limited v Whitehead* [2020] EWHC 298 (Ch) at [3]-[4], [44]-[54], [58]) and one (on slightly different points from those arising here) by Falk J (*Brearley v Higgs & Sons* [2020] EWHC 376 (Ch)). It is therefore not necessary to set out the terms of the practice direction or reprint extensively what has been said by others already. I bear in mind the passages cited above and merely highlight some of the points that are

most salient for the present dispute. With one possible exception, I believe them to have been essentially common ground:

i) The process of disclosure is important in achieving the fair resolution of civil proceedings by identifying and making available documents that are relevant to the issues in the proceedings: paragraph 2.1. There is no presumption that a party is entitled to Extended Disclosure: paragraph 8.2. The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed: paragraph 6.6;

ii) Issues for Disclosure means, for the purposes of disclosure only, "those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings": paragraph 7.3. As was explained in *McParland* at [44] this means that "it is the relevance of the categories of documents in the parties' possession to the contested issues before the court that should drive the identification of the Issues for Disclosure". In other words, "the starting point for the identification of the Issues for Disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession.";

iii) The phrase "reasonable and proportionate" is a recurring theme throughout the Practice Direction and was intended to effect a culture change: see *UTB* at [75]. Thus the court will be concerned that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate in order fairly to resolve those issues, and specifically the Issues for Disclosure: paragraph 2.4; any order must be reasonable and proportionate having regard to the overriding objective: paragraph 6.4; it is for the party requesting Extended Disclosure to show that what is sought is reasonable and proportionate: paragraph 6.5; where parties cannot agree that disclosure should be given, or the disclosure to be given, pursuant to Model C, then the Court will determine whether the request is reasonable and proportionate: paragraph 8.3; under Model D and Model E, the parties are required to undertake a reasonable and proportionate search in relation to the identified Issues for Disclosure: paragraph 8.3; the court may make an order varying an order for Extended Disclosure but only if it is satisfied that varying the original order is necessary for the just disposal of the proceedings and is reasonable and proportionate: paragraph 18.2; and, subject to CPR 35.10(4), the court may make an order requiring a document that is referred to in evidence to be produced if it is satisfied such an order is reasonable and proportionate: paragraph 21.4;

iv) The watchword for what is reasonable and proportionate is contained in paragraph 6.4, to which cross-reference is frequently made in the Practice Direction when "reasonable and proportionate" is mentioned. Paragraph 6.4 provides that in all cases an order for Extended Disclosure must be reasonable and proportionate:

> "having regard to the overriding objective including the following factors—

> (1) the nature and complexity of the issues in the proceedings;
>
> (2) the importance of the case, including any non-monetary relief sought;
>
> (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
>
> (4) the number of documents involved;
>
> (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
>
> (6) the financial position of each party; and
>
> (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

Of these factors, the third, fourth and seventh are likely to have particular importance in a complex and important case: *UTB* at [76].

v) Paragraph 9.5 requires the court to consider "all the circumstances of the case including the factors set out in paragraph 6.4 … and the overriding objective" when deciding "any question of what is reasonable and proportionate under a particular Disclosure Model";

vi) Model C is likely to be appropriate where vast documentation is likely to exist, most of which is irrelevant to the actual dispute: *McParland* at [57]. It is implicit in this that the questions asked where Model C is adopted need to be tightly focused, or the benefits of avoiding a general trawl will be diminished or lost altogether. It is made explicit in paragraph 8.3 which states that the Court adopting Model C:

> "may order a party to give disclosure of *particular documents* or *narrow classes of documents* relating to a particular Issue for Disclosure, by reference to requests set out in or to be set out in Section 1B of the Disclosure Review Document or otherwise defined by the court." (Emphasis added)

vii) The Guidance to section 1B of the Disclosure Review Document is to the same effect:

> "The parties' [Model C] requests should be focused and concise in order that the responding party may be clear as to the particular document(s) or narrow classes of documents relating to a particular Issue for Disclosure for which it is being asked to undertake searches. Broad and wide-ranging formulations such as "any or all documents relating to …" should not be used."

viii) Although it is contemplated that Extended Disclosure will be dealt with at an early CMC, the list of Issues for Disclosure may be revised or supplemented with time, and the court may make an order for Extended Disclosure in stages: see paragraphs 7.7 and 9.4;

ix) The parties should avoid an unduly granular or complex approach to disclosure even in high value disputes: *McParland* at [4], [57]. The obligations of disclosure fall both on the parties themselves and also on legal representatives who have conduct of litigation, who have a duty to take reasonable steps to advise and assist their client to comply with its Disclosure Duties: see paragraph 3.2.

8. The one area where there is as yet an absence of authoritative clarification and which may not be common ground is that of "adverse" and "known adverse" documents. A party is under an obligation once proceedings are commenced against it to disclose known adverse documents, regardless of any order for disclosure made, unless they are privileged: paragraph 3.1(2). This is described in the Practice Direction as a continuing obligation. The obligation arises under Models A and B, and is expressly mentioned as applying to known adverse documents "arising from a search directed by the Court" under Models C, D and E.

9. Paragraphs 2.7, 2.8 and 2.9 of the Practice Direction lay down that "a document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute". "Known adverse documents" are documents that a party is "actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse." For this purpose "a company or organisation is "aware" if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware."

10. The question then arises what the obligation of a party may be to discover whether it has any "known adverse" documents that must be disclosed. Paragraph 2.9 states that "for this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation." This provision, taken in conjunction with the fact that there needs to be a degree of assurance that adverse documents will not simply be ignored or buried, leads to the conclusion that a party is obliged to take reasonable steps to check whether it has any known adverse documents. The Practice Direction gives no guidance on what has to be done to amount to "reasonable steps to check" and the specific steps to be taken will be fact and context sensitive. However, it may be asserted with some confidence that, in a case of any complexity at all or an organisation of any size, reasonable steps to check whether a company or organisation has "known adverse documents" will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation, unless the issue in question is irrelevant to others.

11. There is a clear distinction between carrying out checks and carrying out searches. A known adverse document is one of which a party is aware without undertaking any further search for documents: see paragraph 2.8. However, the requirement to disclose known adverse documents would be emasculated if there was no obligation at all to look for adverse documents of which the party is aware. Paragraph 3.4 states that "where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make." To take an example cited by counsel during argument, it would be absurd if a party were able to say "I know I have an adverse document, but I don't know whether it is in the left-hand drawer or the right. I have therefore not located it."

12. Adopting the Practice Direction's touchstone of what is "reasonable and proportionate" I would hold that a party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and that, if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them. Any other conclusion seems to me to be a rogue's charter, which is not the intended purpose or function of the Practice Direction. If, however, the provisions about known adverse documents are operated in the manner I have suggested, the other party and the court should have some assurance that the most significant adverse documents are likely to be disclosed as a matter of routine without an order for Extended Disclosure.

13. Finally, the question arises: what is meant by the reference to the obligation to disclose known adverse documents being a "continuing" obligation? A clue is to be found in the references to the obligation to disclose known adverse documents arising from the search directed by the Court under Models C, D and E. Provided that the party makes appropriate checks when proceedings have been commenced against it and the case is formulated by reference to the pleadings, that should cause the party to discharge its initial obligation to disclose known adverse documents. The Practice Direction does not say or imply that, if nothing in the litigation context changes, a party is then obliged to revisit the question and renew its checks on a continuing basis (whether periodically or otherwise); and to interpret the "continuing" duty as implying such an obligation would be unduly onerous. However, circumstances might change (for example a party's case might shift materially) which could raise the need for the other party to review whether it has documents that were not previously known adverse documents but now are; and the Practice Direction makes clear that *if* a party becomes aware of adverse documents after its initial checks and disclosure, it is under an obligation to disclose them, including where that awareness arises in the course of searches directed by the Court. This approach, which reflects the traditional approach to the continuing obligation of a party to give disclosure of relevant documents of which it is or becomes aware, is both reasonable and proportionate.

Application of the principles to the present disputes

14. The issues that are the subject of dispute are set out in the table below. Where there is a dispute about the wording of the Issue, the disputed passage appears in italics.

Issues for Disclosure Giving Rise to Disputes

Issue 1	What expectations were shared by the parties and existed within the industry at the time of entering the Transfer Agreement and the

	Operating Agreement as to the completeness and accuracy of the types of customer data that were to be transferred to CWL?
Issue 2	As at the Transfer Date, were there any standards and practices in the water industry as to whether data would be considered reasonably complete and reasonably accurate, and if so, what were they?
Issue 3	What systems, controls, policies and/or plans, if any, did TWUL put in place ~~*(or consider putting in place or intend to put in place)*~~ and what steps did it take, to ensure that Customer Data was complete and accurate before it was entered onto CMOS and/or otherwise transferred to CWL, and to check that Customer Data had in fact been completely and accurately recorded in CMOS and/or transferred to CWL?
Issue 4	What information (if any) in relation to the below categories did TWUL own or control but fail to transfer, or to transfer completely and accurately, to CWL on the Transfer Date: (1) SPID account information relating to Relevant Customers; (2) Allowance and abatement information relating to Relevant Customers; (3) Business Assessed rates and charges information relating to Relevant Customers; (4) Legacy Debt balances owed by Relevant Customers; and (5) Tariffs, balances, meters and associations between meters and DPIDs in respect of Trade Effluent accounts relating to Relevant Customers (the "**Relevant Categories**")? For the avoidance of doubt, (1) the "Relevant Categories" are limited to the customers, accounts, SPIDs etc in each category specifically identified in the appendices to the APOC,[1] but (2) the relevant information under this issue includes information pertaining to Relevant Customers that TWUL had in its ownership or control showing that the Customer Data in the Relevant Categories was not complete and accurate.
Issue 7	What (if any) data improvement processes did TWUL have in place ~~*(or consider putting in place, or intend to put in place)*~~ following the upload and transfer of Customer Data, from the date of each migration of Customer Data until 7 July 2017 and thereafter?
Issue 17	Did ~~*TWUL know or have information prior to the Transfer Date showing that*~~ the debt balances for Relevant Customers that ~~*it*~~ TWUL provided to CWL include debts ~~*that were unlikely to be recovered by CWL, including*~~ (i) in respect of which TWUL had exhausted its collections process, (ii) that were statute barred, (iii) in respect of which TWUL was unable to provide documentary evidence, (iv) that related to insolvent accounts and/or (v) had been disputed by customers?
Issue 36	What meter read skip rate is consistent with Good Industry Practice?

[1] CWL agrees to model "D" disclosure in respect of SPIDs or accounts expressly identified in the appendices to the APOC, save that TWUL must disclose any known adverse documents (model "A") relating to accounts or SPIDs which CWL has not expressly identified.

Issue 1: What expectations were shared by the parties and existed within the industry at the time of entering the Transfer Agreement and the Operating Agreement as to the completeness and accuracy of the types of customer data that were to be transferred to CWL?

15. The parties agree that this Issue for Disclosure goes to the factual matrix relevant to the formation of their contracts. The Issue for Trial to which this Issue for Disclosure is linked emerges from paragraph 2.1.9 of the Amended Particulars of Claim, which alleges that it was an implied term of the Transfer Agreement that the information transferred by the Defendant to the Claimant pursuant to that agreement would be "reasonably complete and reasonably accurate and/or that the Defendant would take reasonable care to ensure that it was complete and accurate." The basis for this is said by Mr Kitchener QC in oral submissions to be the commercial necessity test for the implication of implied terms. The Claimant goes on to plead that whether the information transferred from the Defendant to the Claimant was reasonably complete and reasonably accurate is to be assessed by reference to industry standards and practices at the Transfer Date. It also pleads that the industry standard for reasonable completeness and reasonable accuracy was that the data in question would have no (alternatively no material or more than *de minimis*) errors. It is therefore apparent that the Claimant maintains that there were industry standards and practices about the completeness and accuracy of data which form part of the factual matrix for the parties' contracts.

16. The Defendant, at paragraphs 11-28 of the Amended Defence, sets out its case on the factual, legal and regulatory matrix. With one exception, it pleads matters of public record, the one exception being a statement made by the Claimant's CEO and published on the Claimant's website about the likelihood of errors occurring in data. It does not plead any published or formal standards (as commonly understood) about data accuracy, and it later denies that any standards existed; but it alleges at paragraph 29(5) of the Amended Defence that the relevant benchmark adopted across the industry for data accuracy was "only that the quantity and quality should be good enough to allow Market Opening". There is, accordingly, a wide gap between the positions for which the Claimant and the Defendant respectively contend.

17. The Claimant proposes Model C; the Defendant proposes Model B.

18. The Defendant emphasises that "factual matrix" has a specific meaning in this context, namely the background knowledge which would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract. By reference to the present formulation of Issue 1 it submits that the only documents that could be relevant are either those that were shared between the parties or that were reflected in public information, such as published standards.

19. Since it is common ground that Issue 1 goes to the factual matrix, the use of the word "shared" is potentially misleading. The factual matrix is not dependent upon information being shared between contracting parties but is to be identified by reference to an objective assessment of what was reasonably available to the parties, whether or not they individually availed themselves of the knowledge or shared the information between them. That said, documents evidencing the actual knowledge of one party could, at least in theory, be of evidential value when deciding what information was reasonably available to both.

20. To focus the issue more closely on the requirements for inclusion in the factual matrix, Issue 1 should be reformulated as:

> "What background knowledge would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract about the expectations that existed within the industry at the time of entering the Transfer Agreement and the Operating Agreement as to the completeness and accuracy of the types of customer data that were to be transferred to CWL?"

21. The question then arises, should Extended Disclosure be given and, if so, has the Claimant shown that Model C and its requests are appropriate? The Defendant submits that nothing beyond Model B is required because (a) if there were relevant expectations within the water industry they would be reflected in published information such as public standards, which each party will be able to access and disclose the standards upon which they rely, and (b) if documents were shared between the parties, they have them already. The second objection falls because of the adjustment to the wording of Issue 1, removing the need for "sharing". Turning to the first objection, the Claimant submits that the Defendant, as a major player in the water industry over the years, is likely to have in its possession documents that evidence the existence of generally accepted standards or practices other than published standards such as those to which the Defendant refers. The Claimant submits that, although not a nationwide monopoly before market liberalisation, the Defendant was in a monopolistic position over a substantial geographic and demographic area that makes it inherently likely that it would have engaged in internal discussions as well as in discussions with public bodies such as Ofwat or external industry consultants, among others, about what standards of data accuracy were generally accepted practice within the water industry. It points to the importance of this Issue for Disclosure for major parts of its case.

22. Amplifying these submissions orally, Mr Kitchener submitted that the question to be answered is whether the Defendant was likely to have in its possession documents that may be adverse to its case. The example he chose was of a document that would be adverse to evidence to be given by a witness on behalf of the Defendant. His assertion in submissions was that the question of data accuracy was a "huge" issue in the industry at the time and that therefore internal debates and communications with Ofwat are both likely to exist and to be contemporaneous documents that are required in order to determine fairly whether there were in fact relevant practices and standards.

23. Although these submissions are not supported by a witness statement made for the purposes of this application, the Claimant's pleadings are pleaded by Counsel who are well aware of the need for sufficient evidence to justify pleading contentious matters of fact, and they are supported by Statements of Truth. Furthermore, it is apparent from the competing Statements of Case that the scope of the factual matrix, with particular reference to whether there were accepted standards of (or practices relating to) data accuracy is both highly contentious and a major issue in the litigation. If, as I am told by leading counsel, it was a major issue for the industry as well, it will have generated documentation. That being so, it seems highly likely that the Defendant would have documents relating to such practices, as it would have required to be

knowledgeable about them in the normal course of its business. Furthermore, I do not accept the Defendant's submission that the documents it (or the Claimant) is likely to have in its possession are limited to published standards, or that factual matrix documents are necessarily limited to documents that are common to the parties. Particularly with a major player such as the Defendant, it is inherently likely that it would have been involved in the discussion about and development of such standards or practices, even if the fact that it was not a national monopoly means that it does not have a monopoly in determining or promulgating standards. Its involvement in such debates and developments is likely to have been influential and its documents are likely to be informative about whether there were such generally accepted industry standards and practices and, if so, what they were.

24. For these reasons I am satisfied that disclosure in relation to Issue 1 is important for the fair resolution of the Issue for Trial that underpins it; and I am satisfied that Extended Disclosure is necessary, reasonable and proportionate. It is easy to envisage that there may be a vast number of documents that broadly relate to the role of standards or practices applying to data accuracy of which only a relatively small number will be truly relevant to this Issue 1. I therefore agree with the Claimant's submission that Model C is appropriate.

25. The devil, however, is in the detail – as will often be the case for Model C because of the requirement that parties request "particular documents or narrow classes of documents". Here, the Claimant's requests are as follows:

> The Claimant … requests:
>
> Documents (including email correspondence, meeting minutes, file notes, accounting system data, database spreadsheets and downloads and/or reports) setting out or evidencing the parties' expectations or standards of data accuracy within the industry (including in respect of the 'no worse-off' principle) for the non-household retail water market, including:
>
> (a) Correspondence and discussions between and among TWUL employees, contractors and consultants regarding data accuracy.
>
> (b) Correspondence and discussions between TWUL and industry bodies (including Ofwat and MOSL) regarding data accuracy and the 'no worse-off' principle.
>
> (c) Data tables provided by TWUL to industry bodies, including Ofwat and MOSL, reporting accuracy of data held in respect of non-household retail customers in the period from 18 July 2015 to 18 July 2016;
>
> (d) Correspondence between TWUL and industry bodies, including Ofwat and MOSL, in respect of accuracy of data as provided in data tables in the period from 18 July 2015 to 18 July 2016;

(e) Standards and benchmarks of data accuracy set by TWUL's internal audit function; and

(f) Standards and benchmarks of data accuracy set by TWUL's external auditors (e.g. Deloitte).

26. The preliminary paragraph is far too wide to be appropriate for a Model C request, for two main reasons. First, it is not sufficiently focused on the Issue for Disclosure either as originally drafted or as I have decided it should be. Second, it is so broad as to approximate to a Model D search exercise.

27. Turning to the sub-categories:

i) (a) is far too wide to be appropriate for a Model C request both because of the range of people involved and the lack of focus implied by the word "regarding";

ii) (b) is far too wide because of the use of the word "regarding data accuracy" which is not focused on the Issue for Disclosure or its concentration on industry standards or practices;

iii) (c) - data tables are not of themselves informative unless they set out or evidence industry standards or benchmarks;

iv) Similarly, correspondence "in respect of accuracy of data as provided in data tables" as requested in (d) is too wide and unfocused unless it is tied more closely to the existence of industry practices and standards;

v) "Standards and benchmarks of data accuracy set by TWUL's internal audit function" as requested in (e) may potentially be relevant, particularly if they are in documents that relate them to industry standards, benchmarks or practices;

vi) Similarly, standards and benchmarks set by the Defendant's external auditors as requested in (f) are potentially relevant, particularly if the documents in which they are contained explain their basis by reference to industry standards or practices.

28. In my judgment, at this stage of the proceedings and on the basis of present information, the Claimant has shown that it is reasonable and proportionate for the Defendant to provide Model C disclosure of documents that it is likely to have and which evidence the existence of industry standards, practices or benchmarks that could be relevant to the factual matrix as follows:

i) Documents passing between the Defendant and Ofwat and/or MOSL referring to or evidencing the existence of industry standards, practices or benchmarks for the completeness and accuracy of the types of customer data that were to be transferred to the Claimant and the 'no worse-off' principle;

ii) Data tables (and/or documents accompanying data tables) provided by the Defendant to Ofwat and/or MOSL, (a) referring to or evidencing the existence of industry standards, practices or benchmarks for the completeness and

accuracy of the types of customer data that were to be transferred to the Claimant and/or (b) reporting accuracy of data held in respect of non-household retail customers by reference to such standards in the period from 18 July 2015 to 18 July 2016;

iii) Standards and benchmarks of data accuracy for the completeness and accuracy of the types of customer data that were to be transferred to the Claimant set by the Defendant's internal audit function and any documents relating those standards and/or benchmarks to industry standards, practices or benchmarks for the completeness and accuracy of the types of customer data that were to be transferred to Claimant in the period from 18 July 2015 to 18 July 2016; and

iv) Standards and benchmarks of data accuracy for the completeness and accuracy of the types of customer data that were to be transferred to the Claimant set by the Defendant's external auditors (e.g. Deloitte) and any documents relating those standards and/or benchmarks to industry standards, practices or benchmarks for the completeness and accuracy of the types of customer data that were to be transferred to the Claimant in the period from 18 July 2015 to 18 July 2016.

Issue 2: As at the Transfer Date, were there any standards and practices in the water industry as to whether data would be considered reasonably complete and reasonably accurate, and if so, what were they?

29. The questions that arise under Issue 2 are similar to those for Issue 1 but are focused on the existence of industry standards and practices as at the Transfer Date about what levels of accuracy and completeness of data should be achieved. By paragraph 42(3K)(a) of the Amended Defence, the Defendant denies that there were any relevant industry standards or practices at the Transfer Date. The parties agree that Model C is appropriate, but the Defendant submits that the Claimant's proposed requests are too broad.

30. The Claimant requests:

> 1. Documents (including email correspondence, meeting minutes, file notes and/or reports) referring to published standards on data accuracy, including published minutes of meetings of industry bodies and published communications of Ofwat.
>
> 2. Documents (including email correspondence, slide decks, consultation papers, seminar or workshop notes, supporting materials) relating to data accuracy created by third party consultants (including Oxera and PA Consulting) or industry bodies (including Open Water, Water UK and MOSL).

31. The Defendant's suggestion is:

> Published standards on data accuracy, including published minutes of meetings of industry bodies and published communications of Ofwat.

32. The Defendant submits that paragraph 1 of the Claimant's request is too broad because it captures all documents (e.g. emails) "referring to" published standards (rather than just the standards themselves) and that the documents sought in paragraph 2 of the Claimant's request are not relevant to the Issue for Disclosure.

33. It appears that the first of the Claimant's requests is intended to go to (published) standards while the second is intended to go to industry practices. By aggregating the requests, clarity is lost; and the Claimant's request is too broad because of the breadth of types of documents and the broad meaning of "referring to". On the other hand, it is likely that the Defendant will have important documents over and above any published standards, for reasons explained under Issue 1.

34. In my judgment, at this stage of the proceedings and on the basis of present information it would be reasonable and proportionate for the Defendant to search for and disclose:

    i) Published standards on data accuracy as at the Transfer Date;

    ii) Documents created or published by the Defendant, Oxera, PA Consulting, Open Water, Water UK, Ofwat and/or MOSL that set out or evidence the existence of industry practice(s) on what constitutes reasonable accuracy or completeness of data as at the Transfer Date.

Issue 3: What systems, controls, policies and/or plans, if any, did TWUL put in place ~~(or consider putting in place or intend to put in place)~~ and what steps did it take, to ensure that Customer Data was complete and accurate before it was entered onto CMOS and/or otherwise transferred to CWL, and to check that Customer Data had in fact been completely and accurately recorded in CMOS and/or transferred to CWL?

35. The Defendant wishes to delete the disputed words because there is no pleaded issue about what it considered putting in place or intended to put in place. This is an overly granular approach. The Claimant brings its claims in both contract and tort, alleging that the Defendant was negligent (and/or acted in breach of a contractual duty to exercise reasonable care) in failing to ensure that Customer Data was complete and accurate, as much more particularly set out in the Amended Particulars of Claim. As an Issue for Disclosure it is potentially important to know what the Defendant may have considered putting in place or may have intended to put in place but did not. This is because the fact that the Defendant considered doing something or intended to do something that it subsequently did not do, and the reasons why they did not do it, may inform the question whether their not doing it was negligent or not.

36. The disputed words should be included.

Issue 4: What information (if any) in relation to the below categories did TWUL own or control but fail to transfer, or to transfer completely and accurately, to CWL on the Transfer Date:

1 SPID account information relating to Relevant Customers;

2 Allowance and abatement information relating to Relevant Customers;

3 Business Assessed rates and charges information relating to Relevant Customers;

4 Legacy Debt balances owed by Relevant Customers; and

*5 Tariffs, balances, meters and associations between meters and DPIDs in respect of Trade Effluent accounts relating to Relevant Customers (the "**Relevant Categories**")?*

For the avoidance of doubt, (1) the "Relevant Categories" are limited to the customers, accounts, SPIDs etc in each category specifically identified in the appendices to the APOC,[2] but (2) the relevant information under this issue includes information pertaining to Relevant Customers that TWUL had in its ownership or control showing that the Customer Data in the Relevant Categories was not complete and accurate.

37. SPIDS are unique reference numbers (Supply Point IDentifier numbers) that identify locations where water and/or sewerage services are provided. Paragraphs 1-5 adopt a degree of shorthand to indicate the heads of claim being pursued by the Claimant: they do not need further translation or explanation here.

38. The parties have agreed the terms of the issue and agree that Model C should apply to the Claimant and Model D to the Defendant. The dispute is about the words "For the avoidance of doubt… appendices to the APOC." The footnote records that the Claimant agrees this limitation but asserts that the Defendant must disclose any known adverse documents relating to accounts or SPIDs which the Claimant has not expressly identified. The Claimant insists on the inclusion of this proviso because it alleges that it is still discovering inaccurate data some three years after the Transfer Date.

39. The Defendant resists this proviso for three reasons:

    i) It submits that disclosure is given in relation to pleaded issues and there are no pleaded issues in relation to SPIDs that have not been identified and included in the appendices to the APOC. It is therefore said to be contrary to principle for the Defendant to be obliged to disclose documents that would enable the Claimant to plead a claim that is not yet in issue between the parties;

    ii) It submits that to describe such documents as "known adverse documents" is misconceived because documents of the type sought by the Claimant cannot be adverse within the meaning of PD51U as there is no issue between the parties and therefore no contention being advanced by the Defendant that could be materially damaged in relation to as-yet-unpleaded SPIDs;

[2] CWL agrees to model "D" disclosure in respect of SPIDs or accounts expressly identified in the appendices to the APOC, save that TWUL must disclose any known adverse documents (model "A") relating to accounts or SPIDs which CWL has not expressly identified.

iii) It submits that to order such disclosure would impose "a continuous and unlimited obligation to scrutinise its documentation and data for indications that the data transferred" to the Claimant was incomplete and inaccurate in ways that the Claimant has not yet identified.

40. I reject these submissions:

i) The Amended Particulars of Claim make clear that the particulars included in the appendices are the best particulars that the Claimant can give at present of inaccurate or incomplete data. Its case is that the provision of inaccurate and incomplete data was widespread – the Claimant uses the word "systematic". Disclosure of additional errors or inaccuracies may assist the Court in determining whether the Claimant's existing allegations of error and incompleteness are well founded. This would be sufficient justification for ordering disclosure even if one accepted the technical argument that other (as yet unidentified) errors are not yet directly in issue because they are not included in the appendices to the Amended Particulars of Claim;

ii) It is at present the Defendant's case that the Claimant's allegations of error and incompleteness are either ill-founded or do not amount to breaches of duty. The disclosure of further errors or incompleteness is capable of contradicting or materially harming the Defendant's case on this issue;

iii) The Defendant mischaracterises the nature of the obligation that is imposed upon it by the requirement that it discloses "known adverse documents". It does not impose a continuous and unlimited obligation to scrutinise its documentation and data time after time after time: that is not what is meant by the Practice Direction when it speaks of an obligation to give disclosure of known adverse documents when Model D is used. As outlined above, its obligation is to make reasonable and proportionate checks to discover if it has any known adverse documents and to take reasonable steps to locate them. Once the Defendant has taken that process to its reasonable conclusion, it will have discharged its duty to disclose known adverse documents unless there are developments in the Claimant's case that require a different exercise to be undertaken or it happens to become aware of others. The only additional gloss is that if, in the course of carrying out Model D searches, it becomes aware of additional adverse documents, the Defendant will be under an obligation to disclose them: see [8]-[13] above.

41. For these reasons, I endorse the Claimant's proviso as set out in the footnote.

Issue 7: What (if any) data improvement processes did TWUL have in place ~~(or consider putting in place, or intend to put in place)~~ following the upload and transfer of Customer Data, from the date of each migration of Customer Data until 7 July 2017 and thereafter?

42. The dispute between the parties is the same as for issue 3, as is the outcome, for the same reasons.

Issue 17: Did ~~TWUL know or have information prior to the Transfer Date showing that~~ the debt balances for Relevant Customers that ~~it~~ TWUL provided to CWL include debts ~~that were unlikely to be recovered by CWL, including~~ (i) in respect of which TWUL had exhausted its collections process, (ii) that were statute barred, (iii) in respect of which TWUL was unable to provide documentary evidence, (iv) that related to insolvent accounts and/or (v) had been disputed by customers?

43. The Operating Agreement required the Defendant to provide to the Claimant information about "Legacy Debt", which were debts owed by customers for services provided by the Defendant in the period prior to the Transfer Date and which were to be collected by the Claimant and paid to the Defendant after the Transfer Date. To that end, the Defendant was meant to provide the Claimant with an Opening Statement and a draft Closing Statement that would enable the calculation of the Legacy Debt. It is the Claimant's case that the Defendant failed to provide these Statements and that therefore the Claimant had no reliable data in respect of debt owed by customers that would enable Legacy Debt to be calculated and collected. The Defendant makes partial admissions about the provision of formal Statements but asserts that it provided customer account data for each relevant customer (apart from Trade Effluent customers) and that accordingly the Claimant had the Defendant's best estimate of the debt owed by each relevant customer: see paragraph 96 of the Amended Defence.

44. By paragraph 67(b) its Reply, the Claimant responds as follows:

> The information provided by [the Defendant] as to the debt owed by each Relevant Customer from the date on which that customer was migrated to [the Claimant] until Market Opening was systemically unreliable. Without prejudice to the generality of the foregoing, the said information provided by [the Defendant] included debts or purported debts:
>
> (i) in respect of which [the Defendant] had already exhausted its collections process and/or that were statute barred;
>
> (ii) in respect of which [the Defendant] was unable to provide documentary evidence to support the supposed debt;
>
> (iii) that related to insolvent accounts; and/or
>
> (iv) that had been disputed by customers.

45. On this state of the issues as disclosed by the Pleadings, the difference in approach between the formulation of Issue 17 proposed by the Claimant and the more limited approach proposed by the Defendant becomes clear. The Claimant bases its formulation on the general joinder of issue about whether or not the Defendant supplied it with reliable information. The Defendant latches onto the words in the numbered sub-paragraphs from the Amended Reply as set out above.

46. In my judgment the Defendant's approach is (a) too granular and (b) mischaracterises the nature of the issue between the parties. On a plain reading of the Amended Reply, the numbered sub-paragraphs are stated to be non-exhaustive examples of categories of errors and the issue between the parties remains founded on the Claimant's assertion that the migration data provided to it in respect of Legacy Debt was

unreliable. The Defendant's knowledge that its data was unreliable is highly material to that issue, which can only be fairly resolved with access to relevant documentation.

47. I therefore endorse the Claimant's formulation.

Issue 36: What meter read skip rate is consistent with Good Industry Practice?

48. Under the Operating Agreement, the Defendant was responsible for providing meter reading services. The Defendant's obligation was to act in conformity with "Good Industry Practice", which was defined in the Operating Agreement as:

> "the exercise of that degree of skill, care, prudence, efficiency, diligence, foresight and timeliness as would reasonably and ordinarily be expected to be exercised by a skilled and experienced company engaged in the same type of undertaking under the same or similar circumstances and shall as a minimum be to a standard at least as high as the standard achieved by Thames in respect of the Relevant Customers".

49. It is inevitable even in the best regulated circumstances that some meters will not get read: this is called meter skipping. The Claimant claims that, if the Defendant (or its sub-contractors) had acted in conformity with Good Industry Practice, the meter skip rate would have been about 12-13% but that it was in fact between 25% and 35%.

50. The parties agree the wording of Issue 36 and that Model C disclosure is appropriate. I agree.

51. The Claimant's proposed Model C question is:

> Documents (including email correspondence, meeting minutes, file notes and/or reports) referring to industry standards on meter read skip rates and published industry data on meter read skip rates.

52. The Defendant's counter-proposal is:

> Published standards on meter read skip rates and published industry data on meter read skip rates.

53. This dispute raises similar questions to Issues 1 and 2 above. The Claimant's formulation is too wide, being akin to the scope of Model D disclosure. At the same time, the Defendant's restriction to *published* standards and data is too narrow, particularly in light of the Defendant's plea that it "is unaware of any published materials setting out the rate of skipped meter readings which would be consistent with Good Industry Practice."

54. For reasons similar or identical to those set out in relation to Issues 1 and 2 above, requests of essentially the same scope as I have determined for Issue 2 would be reasonable and proportionate for Issue 36. I do not have the necessary information to know whether any or all of Oxera, PA Consulting, Open Water, Water UK, Ofwat and/or MOSL are the appropriate entities for Issue 36. I therefore direct that the parties liaise about the entities to be included in the request for this Issue. Subject to

that, the form of the Claimant's questions shall be in accordance with the questions directed under Issue 2. If the parties are unable to agree terms, they shall provide a concise composite document setting out their respective positions on the entities to be included with a short explanation for their points of difference. I will then decide.

Post-script

55. I thank both Leading Counsel and their supporting teams for written and oral submissions of consistently high quality.