Neutral Citation Number - [2022] EWHC 3321 (Ch)

Case No: BL-2020-MAN-000129

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 20/12/2022

Before :

HHJ CADWALLADER
Sitting as a Judge of the High Court

- -

Between:

BRENDON INTERNATIONAL LIMITED	**claimant**
- and -	
(1) WATER PLUS LIMITED	**Defendants**
(2) UNITED UTILITIES WATER LIMITED	

- -
- -

Mr Victor Steinmetz (instructed by **DLA Piper**) for the claimant
Mr James McCreath (instructed by **JMW**) for the Defendants

Hearing dates: 27, 28, 29 September and 20 December 2022

- -

JUDGMENT

HHJ Cadwallader:

Introduction

1. This trial concerned charges for surface water drainage and highway drainage services raised by the second defendant ("United Utilities") in respect of the period from 22 September 2000 until 31 May 2016, and by the first defendant ("Water Plus") thereafter. United Utilities was the sewerage undertaker for the area in which the claimant ("Brendon") has premises. Following the opening of the sewerage retail market, Water Plus provided wholesale/retail services to the customers of United Utilities. Brendon is a limited company established in 1982 which provides international import and export services including freight forwarding and export packing. It is a small company with 30 employees. In 1998 it purchased its current premises at Sankey Valley Industrial Estate, but did not move in to them until September 2000 from its previous premises, after its offices and warehousing had been constructed on site. In 2003 it sold a plot of the land which it had purchased, but bought it back again in 2009.

2. The claimant naturally discharges surface and foul water from its premises. The foul water discharges into a septic tank within its property, and the surface water discharges into a sewer, the route of which is now agreed to be shown on the plan at page E449 in the trial bundle, and runs under the roads which had been built on the estate, and then under other land to an outfall to a brook. Those roads are, it is now agreed, unadopted, although they have been built to an adoptable standard.

3. The claimant paid the charges for surface water drainage and highway drainage services until 16 September 2019 and then ceased to do so. It had also been

paying for foul water sewage services until it was appreciated that this discharged into a septic tank and not into the sewer, and a refund was made.

4. This is a dispute about whether the defendants were, and the first defendant is, entitled to charge for the services which they purported to provide, and whether the claimant is entitled to recover the sums which it has paid to them for those purported services.

The issues as pleaded

The claimant's case

5. The relief which the claimant claimed in its claim form was restitution for unjust enrichment by way of repayment of the sum of £174,395.02, or alternatively £155,404.72 (I will comes to the figures later), or damages for breach of contract and/or statutory duty, and/or common law duty not to overcharge customers or to charge them outside the defendants' statutory powers; a declaration that the claimant is not liable for and that the Defendants are not entitled to levy any charges for surface water and highways drainage in the future, and/or an adjustment of the claimant's account so as to delete any wrongful debits made and to have the resulting credit refunded to its account; in so far as necessary, a correction to the banding charges/drainage/ownership/charging records held by the Defendants, such that no charges will be levied for the Services in the future; together with interest and costs.

6. The primary basis of the claimant's claim is, in summary, unjust enrichment of the defendants by payments made by the claimant under the mistaken belief until 30 August 2018, that they were providing surface water and highway

sewerage services, when in fact they were not, because the sewer into which drainage was occurring was a private sewer. Moreover, most of the site's other occupiers had either not been charged for the supposed services, or had had their payments refunded by the defendants. As a result of the claimant's query about its surface water banding charge, United Utilities undertook a survey of the site on or around 23 January 2018, following which the sewer records for the sewer were changed from private to public, but it had never been validly adopted. United Utilities had failed to provide information to establish that it was public or to explain why it believed it to be public and United Utilities had previously asserted in a number of contexts that it did not have a public sewer there.

7. The parties agree that if the sewer is and was at all material times private, the defendants would not have been (and would not be) allowed to charge and receive payment from the claimant, as they would not have provided any services to it; and that the public sewer records actually showed the sewer to be private until United Utilities changed them in or around January 2019.

8. The claimant also relies on the doctrine of total failure of consideration, that is, that no part of the services for which these charges were levied was actually provided, such that the claimant is entitled to its money back. Although this aspect of the claim did not figure largely in argument, it was explicitly not abandoned. The claim for damages for breach of contract and/or statutory duty, and/or common law duty not to overcharge was also pursued at trial.

The defendants' case

9. The defendants both defended the claim, and although they submitted separate defences, they were not separately represented by the time the trial took place.

Water Plus admitted it became a water retailer in May 2016, and explained in its defence that it does not physically provide water supply or wastewater collection. Its primary commercial function is to provide water and wastewater retail services including billing and meter reading services and to act as a conduit between its customers and the relevant provider of water and wastewater infrastructure, in this case United Utilities. This was not in issue. Water Plus relied upon United Utilities' information in relation to the appropriate charges to levy against Brendon.

10. The defendants contended that the sewer was public, or at least denied that it was private. If the claimant had acted under the belief that the defendants were entitled to be paid, it was denied that the belief was mistaken. The result of the enquiry undertaken by a concern known as RPS Water dated 23 January 2018 had concluded that it was public. The defence of United Utilities stated at paragraph 14 that the basis upon which United Utilities reached that conclusion was as follows: the sewer was reconstructed as a concrete sewer with a diameter of 525mm in or around 2004, having previously been a 225mm diameter sewer. No occupants of units in the area had any records or recollection of having paid for that work. In the premises, it was to be inferred that the reconstruction of the sewer was carried out by the local authority, which at the time was acting as agent for United Utilities in respect of the construction and maintenance of sewers. Accordingly, it was to be inferred both that the sewer was public prior to the works undertaken in or around 2004 (as otherwise the local authority would not have undertaken them) and in any event, the consequence of the reconstruction by the local authority as United Utilities' agent was that the sewer vested in United Utilities pursuant to Water Industry Act 1991 section 179(1)(a), and accordingly was from its reconstruction a public sewer within

the meaning of section 219 (1) of that Act. The fact that it was not marked as public on the sewer map would in those circumstances be readily explained by the local authority's having failed to pass on to United Utilities sufficient details of the works undertaken to permit that to happen. In any case, any claim to monies paid before 10 February 2014 was time-barred under the Limitation Acts; and in particular, section 32 of the Limitation Act 1980 did not apply to extend time beyond the usual six years, because the claimant could with reasonable diligence have discovered the mistake before then.

11. Under CPR Part 18 the claimant requested confirmation whether United alleged that the sewer is not and was not public as a result of any public adoption of it (if any) but that the sewer is and was public, either before its alleged reconstruction in about 2004, or as a consequence of that reconstruction, and if not, for them to identify any additional facts, matters, allegations or arguments which they sought to rely upon. United Utilities responded that it did not allege that the sewer was adopted as the result of its status having been changed on its sewer maps in 2018; but that it was to be inferred that the sewer was public before the works allegedly undertaken in 2004, or alternatively as a result of those works. The basis of that primary contention was, it was said, as follows. If the sewer had not been adopted and remained private as at that date, the local authority would not have undertaken the works in question. The true owner of the sewer would have objected to the works being undertaken, which would have been a trespass. The roads at the site had been adopted as public highways, it was to be inferred. That would not have happened without the sewers, including this sewer, having also been adopted as public sewers. United Utilities alleged that it was to be inferred that the highways had been adopted as public

highways because they were constructed to adoptable standards, the street lighting columns were identical to those on nearby adopted highways, and the local authority had in fact maintained those roads. As I have mentioned, by the time of the trial it was accepted, however, that the roads at the site had never been adopted as public highways. Issues also arose over alleged breaches of contract or statutory duty with which I deal separately below.

List of issues

12. Accordingly, the parties agreed for trial a list of issues for determination, the final version of which was as follows.

"Key areas of common ground between the parties

1. Brendon is a limited company having its registered address at the Site.

2. United Utilities started to charge Brendon from 22 September 2000.

3. On or around 31 May 2016, United Utilities and Water Plus entered into an agreement by which United Utilities' non-household retail business was transferred to Water Plus.

4. Up until 1 April 2017, United Utilities as sewerage undertaker for the North-West of England was the sole provider of sewerage services using public sewers in that area.

5. On 1 April 2017, the English sewerage retail market was opened up, permitting customers to choose a retailer. Since then, United Utilities provides Water Plus with its wholesale services and Water Plus provides Brendon with its retail services. Accordingly, Water Plus became responsible for the provision of water supply and wastewater removal services to Brendon. Public sewers and other associated infrastructure remain vested in United Utilities in its capacity as sewerage undertaker.

6. From 22 September 2000 until 31 May 2016, United Utilities charged and received payment from Brendon for the Services, except that United Utilities stopped charging Brendon for foul sewage at some point. In or around 2008, United Utilities paid Brendon a refund for the payments it had received from Brendon in relation to the foul sewage charges.

7. Water Plus charged and received payment from Brendon from 1 June 2016 onwards. Water Plus did not levy any charges in relation to foul

sewage. The provision of the Services by Water Plus to Brendon is governed by the Deemed Contract, which was made in accordance with the Regulations and/or the Retail Exit Code.

8. *On or around 23 January 2018, United Utilities undertook a Survey following which it concluded that the Sewer was public and changed the sewer records to show the Sewer to be public.*

9. *At some point between March 2018 and January 2019, the public records for the Sewer were changed from private to public. Prior to that point, the public records showed that the Sewer was private.*

10. *On 10 September 2018, Cadantis launched the Appeal claiming that the Sewer was private.*

11. *Brendon paid the Charges invoiced by the respective Defendants from 22 September 2000 until 16 September 2019.*

12. *If the Sewer was (and is) private, the Defendants would not have been (and not be) entitled to charge and receive payment for the Services from Brendon.*

13. *The Conditions of Licence require United Utilities, subject to certain limits, not to show undue preference to or exercise undue discrimination against any class of customer in fixing or agreeing charges for the carrying out of the Regulated Activities.*

14. *Most of the Site's other occupiers have either not been charged for the Services or had their payments returned by way of a refund by United Utilities.*

<u>Key issues in dispute</u>

<u>Unjust enrichment</u>

15. *Have the Defendants been unjustly enriched at Brendon's expense as they charged and received the Payments for the Services from Brendon although the Sewer was (and is) not public and the Services have never been provided to Brendon?*

    15.1. *Was United Utilities (from 22 September 2000 to 31 May 2016) and Water Plus (from 1 June 2016 onwards) entitled to charge the Charges and receive payment for the Services from Brendon?*

        15.1.1. *Was Brendon connected for the Services and/or were the Services provided to Brendon?*

        15.1.2. *Was and is the Sewer private or public?*

        15.1.3. *Has the Sewer been reconstructed? If so, (i) when did such reconstruction take*

place, and (ii) was it reconstructed for and on behalf of the local authority? If so, did the local authority act as United Utilities' agent in respect of the construction and maintenance of the Sewer?

15.1.4. *Was United Utilities entitled to change the records changing the nature of the Sewer from private to public? [*Ds do not understand this to be an issue arising. Ds accept that if the Sewer was not in fact public, the amendment of the records would have been inaccurate and would not have made the Sewer public, or given rise to an entitlement to charge which would otherwise not have existed*]*

16. *Did Brendon pay the Charges to the Defendants by mistake, believing the Services were being provided, which itself induced its mistaken belief as to the existence of a liability to continue to pay?*

17. *If Brendon was so mistaken, when could it with reasonable diligence have discovered that mistake?*

18. *Is Brendon entitled to be repaid the Payments or part thereof? If so, what is the amount that Brendon is entitled to recover?*

<u>*Breach of contract and statutory duties*</u>

19. *Did the Defendants act in breach of contract and/or statutory duty?*

20. *If so, did Brendon suffer loss and damage as a result of any such breach?*

21. *If so, what is the amount Brendon is entitled to recover?*

<u>*Breach of the common law duty not to overcharge*</u>

22. *Was United Utilities under a common law duty to charge end users only a reasonable amount for the provision of the Services and/or a duty not to charge outside its statutory powers?*

23. *If so, did United Utilities breach such duty by charging Brendon for surface water and highway drainage although such services had never been provided to Brendon?*

24. *If so, did Brendon suffer loss and damage as a result?*

25. *If so, what was the amount Brendon is entitled to recover?*

<u>*Interest*</u>

26. Is Brendon entitled to interest and if so, in what amount?"

Application to strike out evidence

13. On or about 16 September 2022, not long before the start of the trial, the claimant issued an application for an order striking out or redacting certain passages in four witness statements on behalf of the defendants, on the ground that they did not comply with PD 57AC and/or CPR 32.4(b). Effectively, the complaint was that they contained content of which the witnesses had no personal knowledge, included speculation about what others did and thought, contained inadmissible opinion evidence, amounted to commentary on documents that the witnesses did not see at the time, and repeated and adopted inadmissible matter in other witness statements, and contained argument. I rejected the claimant's invitation to hear that application at the outset of the trial for the reasons which I then gave, and adjourned it for closing submissions and to be dealt with in this judgment. I have dealt with those matters under the heading The defendants' witnesses.

Pleading points

14. During the course of trial an issue arose as to how far the evidence of either party could properly go beyond the allegations contained in their statement of case. Again, I declined to take metaphorical scissors to either the written or oral evidence during the trial, as a matter of practical case management given the volume of material that needed to be got through in any event; but I made it clear that I would not have regard to matters which did not fall within the ambit of the respective statements of case when considering my judgment. It was noteworthy that neither party made an application to amend their statement of case in consequence of the debate about these matters. As I was reminded at the

time, particulars of claim must include a concise statement of the facts on which the claimant relies: CPR 16.4(1)(a), that is, the primary facts, and not the evidence. Similarly, a defence must state which of the allegations the defendant denies, and the reasons for doing so, and if is intended to put forward a different version of events, must state their own version of events: CPR 16.5(1)(a), (2). The object is to inform the other party of the case brought against them, and to inform the court of the issues: *Towler v Wills* [2010] EWHC 1209 [18]. I have applied these principles in the passages where I deal with what issues are and are not open to one or other party.

Burden of proof

15. A further issue also arose out of the way in which the parties presented their respective cases, each complaining that the other's evidence was inadequate, and that it was the other upon whom the evidential burden of proof lay, while the legal burden lay upon the claimant as claimant. Effectively, the claimant said that it was for the defendant to show that it was entitled to charge, therefore to show that the sewer was public; while the defendant said that it was for the claimant to show both that it believed that the defendants were entitled to charge, and that that belief was mistaken because the sewer was private - so that the burden lay on the claimant to show that the sewer was private, or at least not public. I was told that there is no authority on how to approach these questions in the context of a claim over the status of a sewer.

16. In considering this, the place to start, it seems to me, is the statutory framework. A public sewer is a sewer for the time being vested in a sewerage undertaker in its capacity as such: s.219(1) of the Water Industry Act 1991 ("WIA 1991").

The vesting may have occurred in one of three specific ways, “or otherwise”: in other words, it does not matter how the vesting occurred as long as it did. A private sewer is a sewer which is not a public sewer: *ibid*. If all sewers are private sewers unless they are public sewers, the burden of showing that any particular sewer is public, rather than private, must fall upon the person asserting that it is public. A person asserting that a sewer is private, or denying that it is public, is not mounting a positive case, since all sewers are private unless they are public.

17. It follows that a sewerage undertaker asserting, for example, a right to charge for sewerage services, ought to be ready if challenged to prove its title to do so. It is not for the person challenging it to prove that it is not entitled to do so.

18. But, it is said on behalf of the defendants, it is for the claimant to prove its case; and part of its case is a positive assertion that it made payments for sewerage services under a mistake, so that the burden of proof that there was a mistake lies upon the claimant: and it follows from that, that the burden of proving that the sewer is not public but private lies upon the claimant after all, and not the defendants.

19. I agree that the legal burden of proof of payment for sewerage services under a mistake does indeed lie upon the claimant. But since the question involves a sewer, which is private unless it is public, it seems to me that the evidential burden lies on the person asserting it to be public to establish on the balance of probabilities that it is; and if it does not, it will be found to be private.

20. In the present case, it was accepted in the defendants’ skeleton argument that because the sewer in question had not, until recently, appeared on the records

of public sewers, there was a *prima facie* case that it was private; albeit, in oral submissions counsel for the defendants resiled from that position somewhat. It is not a proposition which I would accept, at least not expressed in those terms. That is because the evidential burden of showing that the sewer is private does not lie upon the claimant, which therefore does not need to establish a *prima facie* case.

21. It is worth noting that whether a sewer is a public sewer depends upon who owns it, and in what capacity. It is a matter of where title lies. In that context, it is noteworthy that the registered title to the claimant's property, from which the water discharges, did not form part of the evidence before the court, although the registered title to various other parcels in the vicinity were in evidence. It is not surprising that the defendants did not adduce such evidence, since part of its case was that the claimant, in asserting that the sewer was private, had failed to prove who owned it. As I have already indicated, the claimant did not strictly need to do so.

22. Before turning to the evidence, it is necessary to set out the legal framework in more detail. In doing so, it is useful to have regard to the fact that, as stated in the defendants' skeleton argument, while the status of a sewer is obviously relevant for charging purposes, as in this case, the consequences of a sewer's vesting and being or becoming public are considerably greater than that, and have implications both for undertakers and for members of the public more generally.

23. I take the following largely from the skeleton argument of the defendant, in passages which I did not understand to be in dispute.

Obligations of the undertaker

24. First, if a sewer is public, the undertaker comes under a duty (under WIA 1991 s.94) to cleanse and maintain it. The undertaker is given various powers to enter onto land, and carry out ancillary works, to effect such repairs (see WIA 1991, ss.158, 159, 168). In the case of a private sewer, obligations and rights regarding maintenance will be a matter of private law. Those rights may be less extensive and less certain, making it more difficult for a private landowner to respond to issues requiring urgent maintenance (such as a collapse, a leak, or a blockage). Indeed, regardless of the legal position, it is unlikely that most private landowners would have the expertise or resources to respond as quickly and effectively to such an issue as an undertaker.

25. Second, the same section requires the undertaker to make provision for the emptying of the sewers and to effectually deal with their contents. Thus, once a member of the public has put matter in a public sewer, it is the responsibility of the undertaker to deal with it.

26. Third, a feature of the sanitary legislation is that the public (including developers of large developments) has a statutory right to connect into and drain their premises into the public sewer of any sewerage undertaker. That right is now contained in WIA 1991 s.106. Public sewers are thus available for the use of the public as a matter of right. In the case of a private sewer, it would be an unlawful trespass for someone other than the owner to connect into it or use it, absent some private law right allowing them to do so. (Obviously, the exercise of that right depends upon there being sufficient proximity or access to a public sewer.)

27. Fourth, under WIA 1991 s.116, while an undertaker may discontinue the use of a public sewer and stop it up, it must provide an equally effective alternative sewer for those using the original sewer, and connect their properties to the new sewer at its own expense.

28. Fifth, where a public sewer discharges into a watercourse through an outfall constructed before 1 December 1991 (the date of commencement of WIA 1991), that discharge is statutorily authorised: see *Manchester Ship Canal Ltd v United Utilities Water Plc* [2014] UKSC 40. In the case of a private sewer, such a discharge might be unlawful unless authorised by some private right.

29. Sixth, it is a criminal offence under WIA 1991 s.111 to put certain harmful materials in a public sewer.

30. Finally, and relevantly for present purposes, undertakers are under a statutory duty pursuant to WIA 1991 s.199 to keep records of the locations of all public sewers.

How sewers may vest as public sewers

31. To understand the various ways in which a sewer might vest, and the circumstances affecting the accuracy of records under s.199 WIA 1991, it is necessary to go into the history of the sewerage industry a little. Again, it is simplest to take this uncontroversial account largely from the defendants' skeleton argument.

32. Although the industry is now privatised, the structure of the statutory framework for sewerage derives to a substantial extent from the Public Health Act 1875 ("PHA 1875"), the first comprehensive national sanitary legislation. That

created 'urban sanitary districts' and 'rural sanitary districts', each subject to the jurisdiction of its own sanitary authority, called 'local authorities'. Under s.15 local (sanitary) authorities were charged with making and maintaining sewers to serve their district. Authorities were empowered by s.16 to make sewers. S.13 provided that "all existing and future sewers" within an authority's district would vest in the undertaker, subject to certain exceptions, including an exception of the sewers made by any person for his own profit, or by any company for the profit of the shareholders. (It can be seen that under this act the burden of proving that a sewer was not public but private might well have fallen upon the person seeking to establish that, in contrast to what I have taken to be the present position.)

33. The next legislative milestone was the Public Health Act 1936 ("PHA 1936"), in force from 1 March 1937, which transferred responsibility for sewers from local (sanitary) authorities to the local authorities in the modern sense, i.e., the local borough or county council. The authorities were required under section.14 to provide such sewers as might be necessary for effectually draining their district, and empowered under section 15 to construct them. The provision in PHA 1875 for automatic vesting of sewers was however removed: under section 20 all sewers within the meaning of PHA 1875 and which had vested in the local (sanitary) authorities under that Act, remained so vested; and those sewers which the authority had constructed or acquired, and those which they had adopted, were also to vest in the local authorities. Adoption was a new procedure introduced in the PHA 1936 and survives today, permitting the authority to declare that a previously private sewer was vested in them. All

sewers vested in a local authority by virtue of section 20 PHA 1936 were public sewers. Any others, presumably, were private.

34. The Water Act 1973 ("WA 1973") set up ten water authorities with responsibility under section 14 for sewerage services in their area, but section 15 required them to put in place arrangements for those functions to be discharged by *"*relevant authorities*"*, for the most part the new district councils established by the Local Government Act 1972 (which commenced on 1 April; 1973, the same day as the Water Act 1973). Section 20 of the PHA 1936 was amended by section 33 WA 1973 so that all sewers vesting in local authorities now vested in water authorities, together with any constructed by water authorities or by local authorities under section 15, and any sewers adopted by them. Any such sewers so vested were to be referred to as public sewers.

35. The Water Act 1989 ("WA 1989") brought about the privatisation of the industry by transferring water supply and sewerage functions from water authorities to new companies, shares in which were then sold. The assets of the water authorities were statutorily transferred to the new privatised undertakers under 'Transfer Schemes' under WA 1989 s.4 (save for certain assets transferred to the new environmental regulator, the National Rivers Authority, since subsumed in the Environment Agency): thus, all sewers which had vested in the previous authorities vested in the new undertakers.

36. The legislation was consolidated into the WIA 1991, which remains the statute governing the industry. The new privatised undertakers however retained the power (but not a duty) to enter into arrangements with local authorities to carry out their sewerage functions (WA 1989 s.73, WIA 1991 s.97). (It was the

defendants' case that that happened in this case from privatisation until around 2004.) The new privatised entities were regulated by a new regulator, originally the Director General of Water Services, and now OFWAT (there is also an environmental regulatory regime overseen by the Environment Agency).

37. Under WIA 1991 (replicating the position under WA 1989), as well as sewers vesting by reason of Transfer Schemes, s.179 vests in an undertaker every sewer it has itself constructed, and every sewer with respect to which a declaration of vesting was made by that undertaker under Chapter II of Part IV of that Act; as well as every sewer which is laid in the area of that undertaker under Part XI of the Highways Act 1980 (making up private streets) and is not a sewer belonging to a road maintained by a highway authority.

38. Section 179(5) further provides that anything done by a local authority acting under arrangements under s.97 of that Act (the power to enter into arrangements with local authorities to carry out their sewerage functions), is to be treated as done by the undertaker. Thus, if a local authority acting pursuant to arrangements under s.97 constructs or adopts a sewer, that sewer vests in the undertaker.

39. Thus, a sewer may be or become public in a wide variety of ways.

The charging regime for sewerage services

40. In the context of this case, it is important to understand the charging regime for sewerage services. Again, I take the account which follows largely from the uncontroversial account contained in the defendants' skeleton argument for trial.

Until 1 April 2017

41. The maintenance and improvement of the sewerage system needs to be paid for. Undertakers are therefore given powers to fix and recover charges. Until 1 April 2017, the charging regime worked as follows. Under WIA 1991 s.142(1), undertakers were given the power to fix charges and to demand and recover charges *"from any person to whom [it] provides services."*: I am not concerned here with how those charges are fixed. By section144(1) WIA 1991 sewerage services provided by a sewerage undertaker shall be treated for the purposes of the relevant Chapter of the Act as provided to the occupiers for the time being of any premises which- (i) are drained by a sewer or drain connecting, either directly or through an intermediate sewer or drain, with such a public sewer of the undertaker as is provided for foul water or surface water or both; or (ii) are premises the occupiers of which have, in respect of the premises, the benefit of facilities which drain to a sewer or drain so connecting. In short, it is the occupier of premises which drain, either directly or through some intermediate drain, to a public sewer, who is treated as receiving sewerage services for which they may be charged.

From 1 April 2017

42. The position changed on 1 April 2017. On this date, as a consequence of the Water Act 2014, it became possible for 'sewerage licenses' to be granted to companies by Ofwat, which allowed them to offer retail sewerage services to non-household customers. Undertakers such as United Utilities are required to allow licensees to use their sewers. The licensee is known as the "retailer" and the undertaker as the "wholesaler." Because United Utilities exited the non-

household retail market on that date and the claimant did not choose an alternative licensee, Water Plus became the claimant's licensee from then on pursuant to the Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016 (**"the Exit Regulations"**). Under regulation 26, the terms and conditions on which those services are to be provided are those provided in a scheme under regulation 29. Water Plus sets its charges through a scheme of charges which it updates every year. The provision of services by Water Plus to Brendon, if there are any, is governed by what is in effect a deemed contract under those regulations.

The Facts

43. The basic facts are largely undisputed. The account which follows is taken from the claimant's agreed chronology, and the defendants' comments upon it. In 2004 the claimant raised the issue of its being incorrectly charged for foul sewerage, surface and highway drainage services with United Utilities. On 4 August 2004 United Utilities stopped charging the claimant for foul sewerage services. On 7 October 2004 it refunded the claimant in respect of those charges (although there is a dispute whether that was a full or partial refund). On 19 December 2006 United Utilities sent a letter to St Helens Council confirming that 'the nearest public sewer is approximately 300 m away'. The defendants say that this was just a standard letter issued in connection with a planning application, and point out that it is not disputed that at this point the sewer was not shown as public on the records of United Utilities, and since neither side suggests that any investigations had been done at this point, this letter should not be given too much weight. On 31 January 2013 United Utilities issued a

letter again saying that is had “no public sewers within the immediate vicinity of the site’. The defendants make the same point in respect of this letter. On 1 July 2013, the records of United Utilities still did not show, and never had shown, any sewers on the Sankey Valley Industrial Estate. It is not obvious, therefore, upon what basis United Utilities had been charging the claimant for services.

44. However, on 13 December 2013 the internal sewer record of United Utilities (but not the public sewer record) was updated to show a red line of a surface water sewer 525 mm in diameter, marked, however, as private. On 27 January 2014, the contractors engaged by United Utilities, RPS Group plc (‘RPS’), in respect of another property on the estate recorded that United Utilities sewer records did not show any sewers serving the estate, and identified a surface water sewer with a pipe diameter of 600 mm. On 17 February 2014 United Utilities wrote to another occupier on the estate stating that ‘your property is not connected to the public sewer for surface water drainage’. On 25 August 2014 United Utilities internal sewer records were changed, following a visit by a site operative, to show the status of the sewer to be public, and the plotting of the sewer was changed slightly. Between late 2014 and early 2015, Cadantis Associates Limited (“Cadantis”) was instructed by various occupiers on the estate, but not the claimant, to consider appealing the charges raised. On 1 October 2014 Mr Gregory Moore of Cadantis visited United Utilities’ sewer record office and discovered that the public sewer records showed United Utilities as having no sewers on the parts of the estate occupied by the clients of Cadantis at the time. During November 2014, United Utilities itself advised its contractors, RPS, that it considered that it had no assets of the estate. In early

2015, United Utilities informed Cadantis that because the estate was a complex site, its appeals on behalf of its then clients on the estate would be dealt with as a whole, rather than by way of individual appeals. On 24 March 2015 Mr Ken Poole of RPS sent an email to Jo Lee of United Utilities stating that the site of one of its clients connected to the private sewer draining to the south: that appears to have been a reference to the sewer in question in this case. On 9 April 2015 United Utilities updated its sewer records, firstly, to make 'live' the red line plotted on 13 December 2013 and adjusted in accordance with a subsequent revision and, secondly, to change the diameter of the surface water sewer from 525 mm to 225 mm. On 6 July 2015, a joint survey was carried out by Cadantis and RPS of other units on the estate, in consequence of which it was confirmed that (apart from one company) Cadantis' then clients were not connected to public and surface water lines. The defendants do not accept that they formed an independent view about this, beyond consulting the records of United Utilities. Nonetheless, on 10 February 2016 United Utilities stated, among other things, that it did not have any sewers on the estate. A few days later, on 12 February 2016 it updated its own records to map the surface water sewer all the way to the outfall for the first time; and also, to show the ownership status of the sewer (and certain connection points to it) as private. Consistently with that, in early 2016 it made refunds to Cadantis' then clients on the basis that their drainage was through private sewers. On 1 March 2016 it again confirmed that those clients were not connected to public sewers for surface water drainage.

45. On 1 June 2016 Water Plus began providing retail services from the claimant following the transfer of United Utilities non-household retail businesses to Water Plus.

46. On 7 February 2017 United Utilities issued a letter stating that "the culverted watercourse located within the public highway is not a United Utilities asset and therefore contact should be made with the riparian owner and or the Lead Local Flood Authority with regard to seeking consent to discharge the surface water flows generated from the new development". The defendants argue, however, that not only is this merely a standard letter issued in connection with the planning application, but in any event the sewer is still not shown as public on United Utilities records, and the sewer is not a culverted watercourse so that this letter cannot be referring to it. In the event, I do not need to determine that issue.

47. In 2017 the claimant enquired of United Utilities about its surface water banding charges. On 23 January 2018 RPS, instructed by United Utilities, undertook a survey of the site and concluded that the claimant was not connected to a public sewer network at all. However, on 16 February 2018, Jo Lee of United Utilities raised the question internally whether the sewer was correctly shown as private before she would issue a full refund in respect of the claimant's surface water and sewerage charges. On 19 February 2018 RPS confirmed they recorded CCTV of the surface water sewer at the claimant's property and found 'no connections', that is, none to a public sewer. The defendants say this was simply a repetition of the conclusions reached in the RPS report of 23 January 2018.

48. On 8 March 2018 Joshua Jones of RPS emailed United Utilities stating that the site "isn't connected to your sewers for foul or surface water". The defendants again say that this was not an independent conclusion reached by RPS.

49. On 13 March 2018 one David Hollins stated in an internal email of United Utilities that the sewer had not transferred under the Transfer of Private Sewers Regulations 2011 and was therefore private. On 14 March 2018 one Lynton Makison stated that the public sewer records were correct, and that the sewer was private.

50. On 27 March 2018, however, Mr O'Riordan of United Utilities carried out a survey and concluded that the surface water from the claimant's property passed through a public sewer: it appears that this was the first time such a conclusion had been reached. It is common ground that he thought that it followed a route different from the route of the sewer previously established by Cadantis and RPS, but it is not common ground how long he held that view.

51. On or about 4 April 2018 Mr O'Riordan and Mr Ashcroft of United Utilities discussed the nature of the sewer, and on that day United Utilities updated its internal sewer records. On 6 April 2018 they were updated again to remove an incorrectly plotted surface water sewer line present in the sewer record dated 4 April 2018, and also to note the diameter of the surface water sewer through which the claimant's property ultimately drained as 525 mm and the ownership status of the entire length of the sewer as public. That was the first time it had been shown as such on the internal records of United Utilities.

52. On 18 April 2018 United Utilities asked RPS to update their report of 23 January 2018 to record that the claimant was partially connected to a public sewer and

on 19 April 2018 RPS issued an amended report. On 5 August 2018 Cadantis carried out a site visit and confirmed that the claimant's surface water drainage was through the sewer, that is, the same route as established for the other occupiers on the estate, including during the 6 July 2015 site visit.

53. On 22 August 2018, the claimant was placed into band six for surface water and was refunded £22,672.68. On 30 August 2018 it instructed Cadantis to act for it, and on 10 September 2018 Cadantis issued an appeal claiming that the sewer was private. That appeal was rejected by 12 October 2018. It was not until January 2019, however, that the public sewer records were changed to show the sewer as public.

54. On 5 February 2021 Cadantis carried out a survey to test the accuracy of Mr O'Riordan's report, found that what they described as a private manhole he had been unable to locate did indeed exist, and that the claimant's surface water drainage discharged through it.

55. It was not until 9 November 2021 that St Helens Council highways department confirmed to Cadantis that the roads around the estate were unadopted.

The witness evidence

56. The claimant relied on the evidence of three witnesses. They were Hazel James, the owner of the claimant; Simon Stanley, the managing director of Cadantis; and Gregory Moore, a senior surveyor and the head of research at Cadantis. Mr Moore's evidence was agreed, but the other two witnesses were cross-examined.

57. The defendants relied on the evidence of nine witnesses. Taking them in the order in which they were called, they were Tony Griffiths, the Wastewater Network Technical Manager of United Utilities; Anna Lawson, the Lead Data Maintainer of United Utilities; Steve Littler, the Assistant Director for Property and Economy at St Helens Borough Council, whose responsibilities include the management of the Sankey Valley Industrial Estate; Kenric (or Ken) Pool, a consultant engineer employed by RPS; Joshua Jones, a delivery manager for RPS, who is responsible for interpreting sketches from site surveyors in the field, and drafting detailed reports summarising their findings; Keith Ashcroft, a drainage area manager employed by United Utilities, whose responsibilities include overseeing all work, from delivery to performance, for the sewer network in the Manchester area; Joanne Lee, a data resolutions technician in the billing department of United Utilities, and at the relevant time a Customer Adviser Specialist within the Wholesale Commercial Services team; Debbie Kay, the Charging Policy Manager employed by United Utilities; Frances Lickley, an Assistant Wholesale Contract Manager for United Utilities.

The defendants' witnesses

58. It is appropriate in this case to refer to the evidence called on behalf of the defendants before that of the claimant. Because of the application to strike out, I need to deal with each of the defendants' witnesses separately.

Tony Griffiths

59. Mr Griffiths, the wastewater network technical manager, gave evidence that he had visited the estate about six times, the last occasion being in December 2021, for the purpose of investigating the sewer system there, and particularly to see

whether there was any evidence to suggest that any of it was public or private. In considering whether the sewers had been built to an adoptable standard, he had in mind a guide of which he was aware setting out the minimum standard to which sewers should be built in order to be adopted by United Utilities, which dealt with pipe configuration, the provision of ladders, manhole covers, and so on. He had asked a colleague, one Mark Dane (a drainage performance engineer who did not give evidence) to photograph the sewer so Mr Griffiths could review its size, condition, construction method and upkeep, from which he would be able to form a view as to whether the sewer had been built to such a standard. He said that the standard of construction, and in particular the size or material of the sewer, was normally a good indication as to whether it was public or private, because public sewers tend to be of a higher construction standard. The photographs and plans which were in evidence showed that the sewer pipe was 525 mm in diameter, and of concrete construction. His experience suggested that a full and proper drainage scheme had been implemented, which, being a large job, was more in line with what you would expect from a civil engineering project; the only private owner who had installed a private sewer to that standard had laid it around the Trafford Centre in Manchester. Further, it was material that the sewer served more than one property, which he regarded as an indication that it was a public asset. In his view, the sewers were built to an adoptable standard, suggesting that they had been built with the intention that they would be adopted by United Utilities (the question with which he was concerned). He referred to Mr O'Riordan's conclusion from trench marks in the road that St Helens Borough Council was likely to have 'upsized' the sewer. In cross-examination he said that he had quickly formed the view, on his first visit

in January 2021, that the sewer was public. He was asked about certain other employees of United Utilities who had not given evidence. In re-examination he confirmed that he was regarded as United Utilities' internal sewer expert.

60. The claimant took objection to his evidence on a number of points and sought to have it struck out to that extent.

(1) Objection was taken to his evidence about the guidance document on the basis that it was not relevant to any issue in the case, amounted to commentary on documentation, and represented inadmissible opinion evidence. In my judgment, his evidence was irrelevant to the question whether the sewer was public or private: it was not the defendants' case that United Utilities had adopted the sewer at any point, so reference to the standards to which it might have had regard was unimportant. I have not had regard to it

(2) Objection was taken to his evidence that he would be able to form a view about whether the sewer had been built to an adoptable standard from the photographs taken by Mr Dane on the ground that it was inadmissible opinion evidence. In my judgment, this was not opinion evidence relating to the question whether the sewer was private or public, and in any event of no assistance in relation to that question.

(3) Objection was taken to his evidence that the standard of construction and the size and material of the sewer were normally a good indication whether it was public or private, and the public sewers tended to be of a higher standard of construction, on the basis that it was inadmissible opinion evidence. This was opinion evidence, presented otherwise than in accordance with Part 35 of the Civil Procedure Rules. There was nothing upon the basis of which I can

conclude that he was qualified to give expert evidence, evidence on the point being entirely self-serving for the defendants, and not itself demonstrating expertise, so that it was not admissible under section 3 (1) Civil Evidence Act 1972 (quite apart from the procedural requirements of CPR Part 35) , and fell outside the ambit of s. 3(2) of that Act because the expression of opinion was intended to convey no facts of which it might be evidence. It is not admissible.

(4) Objection was taken to his comments on the photographs, and in particular to his observation as to the diameter and construction material of the sewer, on the basis that it was commentary on documents, argument, speculation, and/or inadmissible opinion evidence. In my judgment, his conclusion that the sewer pipe was 525 mm rather than 225 mm or 300 mm in diameter, and the construction material was concrete, is relevant admissible evidence from a person having relevant experience as to those facts.

(5) Objection was taken to his discussion in paragraph 14 of his witness statement of the conclusions to be drawn from the diameter of the pipes, and its serving more than one property, on the ground that it was argument, speculation and/or opinion evidence. I regard it as inadmissible as to whether the sewer was public or private, but potentially admissible as to the reasonableness or otherwise of the defendants' conclusions.

(6) Objection was taken to his evidence that the view he formed was that the sewers had been built to adoptable standard, suggesting that they were built with the intention that they be adopted, on the same grounds. This was admissible evidence of his assessment (relevant to the reasonableness of the

defendants' position, which had been put in issue by the claimant), and relevant, but not highly persuasive, evidence as to his experience of the characteristics of public and private sewers. It was not expert evidence as to whether the sewer in question was public or private, and had it been, it would have been inadmissible.

(7) Objection was taken to his reference to Mr O'Riordan's conclusions, on the ground that he had no personal knowledge of the matter, and on the same grounds as above. In my judgment this evidence was admissible as to the fact that the trench marks are no longer visible; and is admissible (but not necessarily persuasive) evidence by a non-expert as to the conclusion that the road had been resurfaced.

61. What I primarily take from his evidence in relation to the primary question, and accept, is in summary that the diameter of the sewer in question is 525 mm and it was made of concrete, and that in his experience such sewers are more commonly public than private.

Anna Lawson

62. The evidence of Anna Lawson, United Utilities' Lead Data Maintainer, was directed to the process by which the sewer records of United Utilities were updated, and how they had been updated in the present case. As she described it, the records are contained on a software system known as ArcMap, which holds maps of customers premises, but allows the plotting of the relevant sewerage network onto those maps. It went live in May 2013. If field operatives notice something new or different, they 'redline' it by sketching electronically on mobile devices at the end of their job, and sketches are sent through to a

stored display; but these additions are not permanent. Her team would have reviewed these redlines and, if they approved them, would make them permanent on the records, where they are visible to all ArcMap users. The usual practice was only to query the field operatives' redlines if they were significantly different from the existing records. The team can view archived versions as well. All relevant information on this matter is from after 2013. As at 1 July 2013, nothing was mapped on the estate, suggesting that no sewers, either public or private were known then. The record dated 13 December 2013, which had never been made permanent and so would not have been shown on the system, showed a sewer, made of concrete with diameter of 525 mm, marked as private. For reasons which she gave, she thought it represented an investigation after a blockage or flood. On 25 August 2014, following a site visit, the sewer is shown as of 525 mm diameter and concrete, but the ownership is recorded as public, and the plotting of the sewer had changed slightly. The next iteration was 9 April 2015, which adjusted the plotting slightly, and recorded the sewer as having a diameter of 225 mm, being public. She could not say why the pipe size had changed. On 21 August 2015, the records depicted the off-site diagonal sewers, but did not show how they connected. The next iteration, on 12 February 2016, showed both on-site and off-site sewer lines and their connection. Then, two days after United Utilities received the RPS survey, the records were amended to show the sewers as private. She speculates that RPS assumed the sewer was private because it discharged to a watercourse. The records on 4 April 2018 showed, among other things, what was found to have been the wrong route of part of the surface water sewer following investigations in April 2018, and was removed on 6 April 2018. The network performance

technician used a sketch tool to add the information that the sewer is of diameter 525 mm, and public. This reflected the findings of the field operatives in April 2018. However, the line of the sewer was plotted incorrectly. The update of 27 November 2019 simply added a manhole that had previously not been plotted.

63. In cross-examination she explained that her role gave her access to information which had not been made live, which was not available to people outside her team. It was more usual nowadays for them to question the findings of field operatives than it was in 2013. Once the information became visible on the internal system outside her team, it would automatically update the public records overnight, but they could not be interrogated in the way that the information available to her could be. The public could only see the latest iteration of the records. United Utilities had used the data originally from the local authority to create its first records, and it looked as if there had been no such information in relation to this estate. United Utilities did not only keep records of public sewers, because it put private sewers on the system if they helped people to understand (for example, if it might help locate a problem), but it did not have to. She did not understand where the figure of 225 mm had come from. She was also asked about employees who were not giving evidence.

64. The claimant took objection to her evidence on a number of points and sought to have it struck out to that extent.

(1) Her evidence that nothing being mapped at 1 July 2013 suggested there were no known sewers, either public or private, at the time, was inadmissible, on the ground that she had no personal knowledge, or was speculation or inadmissible opinion evidence, and comment on documents. In my

judgment, the evidence is in principle admissible as an explanation of documents with which she was familiar, but I reject this evidence because, since private sewers did not have to be recorded, failure to record them does not indicate that no private sewer was known. I accept, however, that this is evidence from which it can be inferred that no public sewers were known.

(2) Objection was taken to her interpretation of a reference to silt as indicating that the sewer had been investigated and redlined because of a blockage or flood, on the same grounds. I regard this as admissible opinion evidence. However, I do not see that it assists substantially in relation to the primary issue, and it should not have formed part of the witness statement, since it adds nothing to the primary records, contrary to Practice Direction 57 AC.

(3) Objection was taken to paragraph 13 of the witness statement, on the ground that she had no personal knowledge of those matters, and was merely commenting on documents or supplying narrative. In my judgment, it should not have formed part of the witness statement, since it adds nothing to the primary records, contrary to Practice Direction 57 AC.

(4) Objection was taken to evidence at paragraphs 14, 16 and 20 of her witness statement, on the same grounds. In my judgment, this evidence should not have formed part of the witness statement, since it adds nothing to the primary records, contrary to Practice Direction 57 AC.

(5) Objection was taken to evidence at paragraph 21 of her witness statement, on the ground that it is speculation as to why RPS assumed the sewer was private. I agree. It should not have formed part of the witness statement.

(6) Objection is taken to evidence at paragraph 25 of her witness statement, on the ground that it is speculation that the field operative assumed the sewer was private because it discharged to a brook. I agree. It should not have formed part of the witness statement.

65. What I principally take from her evidence, and accept, is that at the relevant time the records at best merely reflected information which had been supplied from the local authority as updated by field operatives without the application of substantial investigation or independent thought by the data maintenance team; and that the absence of records of a sewer on the estate suggested that there was no knowlege of a public sewer there at that time.

Steve Littler

66. The evidence of Steve Littler, the assistant director for property and economy at St Helens Borough Council, with responsibility for the management of the estate, was important. He had been responsible for highways management from August 2017 to November 2020. He confirmed that the council was the freehold owner and registered proprietor of the land in which the sewer was located, and he referred to the various title numbers. He confirmed that the council made no claim to ownership of the sewer and that as far as he was aware, had not undertaken any repair and maintenance of it, and had no records indicating that it ever had. Contrary to the defendants' original case, he confirmed that the road running through the estate (under which the sewer runs) had not been formally adopted by the council, though it had accepted responsibility for repairing and maintaining it.

67. In cross-examination he explained that if the council had thought the sewer was public, there would generally be a map or records, and if it had been owned by the council and transferred to United Utilities there would be documentation, and the maps would have been transferred to United Utilities. Reconstructing the sewer would have been a major undertaking, and the council did not do work for others for nothing. If it had happened, there would have been meetings and a paper trail. It would have recouped its money had it undertaken work as agent for United Utilities. There were no such records.

68. No objection was taken to his evidence. I accept those parts of his evidence summarised above. Further, what I take from his evidence is in summary that the council owned the roads under which the sewer passed, that it did so under the title numbers which he mentioned, that it had not adopted those roads, that it did not positively assert that it did not own the sewer but laid no claim to ownership of it, that if it had been thought to be public there would generally have been documentation to that effect, that had the local authority done substantial work to the sewer, there would have been a paper trail and there was not, and if the sewer had been transferred to United Utilities (which was not the defendants' case in any event) there would also have been a paper trail, and there was not.

Ken Pool

69. The evidence of Ken Pool, the consultant engineer employed by RPS, was that he had been involved in the 2014 investigations at the estate, and had refreshed his memory by reference to certain documents. He described its role as being to determine connectivity and not independently to determine the status of any

sewer. RPS assumes a sewer is private unless told otherwise. I accept this evidence.

Joshua Jones

70. The evidence of Joshua Jones, a delivery manager within RPS responsible for interpreting sketches from site surveyors and drafting detailed reports summarising their findings, relates to his role in the production of the 2018 report of RPS, and its amended report dated 18 April reflecting United Utilities' update to its sewer records of 18 April 2018. His evidence was that RPS was not responsible for identifying which assets belong to United Utilities or are private, but that RPS relied on United Utilities to do that. In cross-examination he stated that no reason was given for the change in the status of the sewer in 2018. He was taken to the amended report but accepted that it showed the same survey date as before, and did not state that it had been amended or the date upon which it was amended.

71. What I take from his evidence, and accept, is that where the reports of RPS specified the status of the sewer, that was entirely on the basis of what they were told by United Utilities.

Keith Ashcroft

72. The evidence of Keith Ashcroft, the drainage area manager employed by United Utilities, was that his first involvement with the claimant in or about March 2018 had been limited, but he had been aware that Jo Lee was querying the status of the sewer because United Utilities was about to refund approximately £150,000 to the claimant. He delegated the query to Mr O'Riordan, a member

of the future performance team, telling him at the time that he thought ‘we’ were happy that the sewer was private, although he could not now remember why. He confirmed that it was not for RPS to advise whether it was public or private: the usual process was for United Utilities to tell RPS, and RPS would discover whether any property was connected to that sewer. If United Utilities’ records were wrong, then RPS’ conclusions as to connectivity would also be likely to be wrong. He himself did not look at United Utilities’ sewer records, but would have worked from the plan of RPS. Mr O’Riordan told him by email dated 8 March 2018 that some of the water went to a public tank sewer (that is, an oversized sewer to deal with excess water), but he could not say how much. He described the way in which United Utilities would tend to come to a conclusion as to the status of an asset. First, they would check the existing sewer record. Then, they would do a site visit and might do a camera survey or dye test, and would look at what the sewer was designed to take in terms of volume and what it was designed to serve in terms of number and type of properties. If a sewer served two or more properties this would suggest it might be a public sewer. They would also look at its construction method and material, and then make an assessment based on all the information taken as a whole. They would make an assessment as to whether the sewer had been constructed to an adoptable standard but had not been added to the records by omission, or whether it was constructed in such a way that it was deemed to be a private asset at all times.

73. On this occasion, because of the size of the pipe and the number of properties it served on the land that went through the view was formed that it was a United Utilities asset. It was not normal for a sewer of this size to be in private ownership, especially when it served more than one building. His evidence then

referred to an email from Mr O'Riordan to Jo Lee, and to his report dated 27 March 2018 in which Mr O'Riordan concluded that some of the surface water went through the tank sewer, and that it was probably a public sewer, connected to the claimant's premises. Mr Ashcroft agreed with him having reviewed his report.

74. In cross-examination he said that he had relied entirely on Mr O'Riordan. The role of RPS was not to determine the status of the sewer. He had not been aware of the original RPS report dated 6 July 2015 which had stated that with some exceptions (not including the claimant) the site was drained by private water lines to the brook. Mr O'Riordan however had had sight of that report. Mr Ashcroft did not know how Mr O'Riordan had arrived at his conclusion that the claimant's land was partially drained through a public sewer. He could tell that Mr O'Riordan had checked the sewer record. Mr Ashcroft accepted that Mr O'Riordan's report made no reference to the construction of the sewer, or other indications that it was public. He accepted that the factors mentioned in paragraph 15 of his witness statement, size of the sewer, the number of properties, and the land that it went through, were none of them part of Mr O'Riordan's reasoning. In re-examination he was taken to an email dated 4 April 2018, shortly after Mr O'Riordan's report, which referred to a conversation between Mr Ashcroft and Mr O'Riordan about the size of the sewer being shown as 225 mm initially, and then upgraded to 525 mm, and Mr O'Riordan's thought that this was probably done 'back in the council era for water attenuation'. On that footing, he thought that by then Mr O'Riordan's view was informed by that understanding.

75. A substantial number of objections were taken to large parts of Mr Ashcroft's witness statement, including to a long passage from paragraph 15 to 22, and 26.

(1) Paragraph 8 of the witness statement contained inappropriate and valueless commentary on an email, contrary to Practice Direction 57 AC. I agree.

(2) The same applies to the references in paragraph 12 of the witness statement to the email of Mr O'Riordan. I agree.

(3) Paragraph 14 of the witness statement contains a statement of usual practice. I consider that to be admissible. It also refers to the plan at March 2018 and explains that he and Mr O'Riordan must have checked it, because a copy is contained in his report: this is inadmissible commentary on documents.

(4) Paragraph 15 of the witness statement contains the statement of usual practice. I consider it to be admissible. It also contains a statement of the reasons why United Utilities formed a particular view: I regard that as admissible evidence of fact as to the formation of that view, but inadmissible as opinion evidence as to the primary issue.

(5) Paragraph 16 contains reference to a document and a substantial quotation from it. That ought not to have been contained in the witness statement as being contrary to the Practice Direction.

(6) Paragraph 17 contains reference to Mr O'Riordan's 'Job Pack', which Mr Ashcroft says he did not see at the time. He offers comment on it. That ought not to have been contained in the witness statement as being contrary to the Practice Direction.

(7) Paragraph 18 contains a passage merely commenting on documents. That ought not to have been contained in the witness statement as being contrary to the Practice Direction.

(8) Paragraph 19 contains a passage merely commenting on documents. That ought not to have been contained in the witness statement as being contrary to the Practice Direction.

(9) The same is true of the objective passage in paragraph 20 of the witness statement. That ought not to have been contained in the witness statement as being contrary to the practice direction. It also contains the statement that having reviewed the job pack Mr Ashcroft agreed with Mr O'Riordan's conclusion: Mr Ashcroft's own opinion is potentially relevant as to the reasonableness or otherwise of United Utilities' conclusions but, to the extent that it was advanced to support the defendants' evidence that the sewer is public, it is inadmissible opinion evidence.

(10) Paragraph 21 of the witness statement contains a passage merely reiterating the contents of certain emails. That ought not to have been contained in the witness statement as being contrary to the Practice Direction.

(11) Paragraph 22 of the witness statement contains a mixture of an admissible recollection of a discussion, and inadmissible commentary on documents or repetition of their contents. It also contains the statement of Mr Ashcroft's own current opinion about an excavation having been carried out by the local authority: in my view, this is admissible as non-expert opinion evidence capable of supporting the factual conclusion to which he has come within section 3(2) Civil Evidence Act 1972.

(12) Paragraph 24 contains a passage to which objection was taken but which is admissible as to usual practice.

76. What I take from his evidence, and accept, is that it was Mr Ashcroft who delegated the query to Rob O'Riordan of United Utilities, and it was not for RPS to advise whether the sewer was public or private. His understanding of the usual process was that first, they would check the existing sewer record. Then, they would do a site visit and might do a camera survey or dye test, and would look at what the sewer was designed to take in terms of volume and what it was designed to serve in terms of number and type of properties. If a sewer served two or more properties this would suggest to them that it might be a public sewer. They would also look at its construction method and material, and then make an assessment based on all the information taken as a whole. They would make an assessment as to whether the sewer had been constructed to an adoptable standard but had not been added to the records by mere omission, or whether it was constructed in such a way that it was deemed by them to be a private asset at all times. I note that the size of the sewer, the number of properties, and the land that it went through were none of them part of Mr O'Riordan's expressed reasoning at the date of his report, though a supposed change in the size of the sewer had been pressed into service by Mr O'Riordan in support of his conclusion shortly afterwards.

<u>Joanne Lee</u>

77. The evidence of Joanne (or Jo) Lee, the customer advisor specialist, was directed to her involvement with the claimant, and to the procedures of United Utilities. She explained that the 2018 investigations were commenced as part

of a periodic process of data cleansing, not as a result of any complaint or claim. The claimant's account had been identified as unusual because it was being charged for surface water and highways drainage (suggesting there was a sewer) but not (following a complaint investigated in 2004) for foul sewage. It was she who arranged for RPS to visit the site in 2018 but that was to determine connectivity, not to opine on the status of the sewer, which was a matter for United Utilities' network engineers. United Utilities was only concerned to determine the correct position as between public and private ownership. By reference to recollection and documents, she described the process which the investigation followed. Her cross-examination added nothing of significance.

78. The claimant took objection to her evidence on a number of points.

(1) The claimant objected to a passage at paragraph 17 of her witness statement referring to her normal process, where she could not remember what actually happened. This was on the ground that she had no personal knowledge of it and was speculating. I disagree: evidence of the normal process is admissible, though of less value than specific direct recollection.

(2) Objection was taken to a passage in paragraph 18 referring to certain documents saying that she cannot remember them. This is admissible evidence of her recollection of those documents, to the limited extent that it was relevant.

(3) Objection was taken to a passage in paragraph 19 on the ground that it is speculation as to how the allowance was queried. That is admissible evidence as to her lack of recollection. Objection is also taken to her reciting

or commenting on an email of 15 February 2018: I agree that is commentary on documents which should not have been included in the witness statement.

(4) Objection was taken to a lengthy passage in paragraph 21 of the witness statement, on the ground that it consists of commentary on documents contrary to Practice Direction 57 AC. I agree: it should not have been included.

(5) Paragraph 23 refers to an email and visit on 8 March 2018. Objection is taken on the ground that it relates to facts of which she had no personal knowledge. In fact, it appears she did have personal knowledge of the email, but was otherwise simply reciting what it said, contrary to Practice Direction 57 AC. It should not have been in the witness statement.

(6) Paragraph 24 of her witness statement refers to her inference from another email that she had a discussion which she did not remember in detail. It is not commentary on documents or narrative, but evidence of the state of her recollection. It is not especially relevant, but it is admissible.

(7) Paragraph 25 refers to an email and report of Mr O'Riordan but merely summarises the contents, contrary to Practice Direction 57 AC. The defect is not cured by recitation of the mantra, 'which I have read to refresh my memory.' It should not have been in the witness statement.

(8) Paragraph 26 of her witness statement contains a passage merely summarising the contents of email, contrary to Practice Direction 57 AC. It should not have been in the witness statement.

(9) Paragraph 27 of her witness statement contains a passage referring to an email of Mr O'Riordan of 4 April 2018, reciting its contents, and saying how she understood it, contrary to Practice Direction 57 AC. Her explanation adds nothing. The passage should not have been in the witness statement.

(10) Paragraph 28 contains a recitation of the contents of an email, contrary to Practice Direction 57 AC. The passage should not have been in the witness statement.

(11) Paragraph 29 contains a recitation of the contents of an email, contrary to Practice Direction 57 AC. The passage should not have been in the witness statement.

(12) Paragraph 30 refers to her being sent a copy amended report. That added nothing to the email itself. The passage should not have been in the witness statement, being contrary to Practice Direction 57 AC.

79. What I take from her evidence was that as far as she was concerned, United Utilities was impartial whether any particular sewer, and the sewer in question, was public or private, and was merely concerned to ascertain the true position. I do not draw any sinister inference from that organisation's wanting to double check the position before making a substantial refund, nor from the fact that the outcome was the conclusion that the sewer in question was public, and therefore chargeable.

The application to strike out evidence

80. It follows from what I have said that I reject the defendants' submission that the application was misconceived. On the contrary, it was substantially justified. It was unfortunate that it had to be heard at trial, given the time that it would take out of an already tight timetable, but that was not a reason not to make it. By leaving it to the end of the trial, and hearing oral submissions in a fairly summary way, the trial was not prejudiced. It has, however, taken a good deal of time to consider in this judgment. It would obviously have been better had it been possible to determine the application in good time before the trial date, but it was not possible.

81. Although the oral submissions were taken shortly in the end, I was referred to, and have taken into account *New Media and Kagalovsky* [2018] EWHC 2742; *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC) at paras. 671-674; *Rogers v Hoyle* [2015] QB 265; and *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [9] – [10]. There is little point now in striking out the offending passages, although they ought not to have been in the witness statements to start with. The court does not have to do so: *Blue Manchester Limited v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC) at [11]. I have simply not had regard to them in forming my conclusions.

82. It is not necessary for me to summarise the claimant's evidence in the same way since no application of a similar kind was made in relation to it. I will refer to it as necessary during my discussion of the substantive issues.

Public or private

On the defendants' pleaded case

83. The second defendants' pleaded case is that following the results of the survey by RPS on 23 January 2018, United Utilities concluded that the sewer was public. That sounds as if United Utilities relied upon the report in doing so. However, their case is that they did not. It is amply clear from the evidence that RPS never expressed an independent opinion about whether the sewer was public or private, but merely reflected the view of United Utilities on that point, and issued an amended report accordingly when Ms Lee of United Utilities asked it to do so. Read carefully, the RPS report only expresses views about connectivity, and that was the proper role of RPS. It follows that United Utilities had reached its conclusion before, not following, the amended RPS report, which however (and unfortunately, for the purposes of transparency) bore the same date as the original RPS report.

84. The defence of United Utilities sets out the basis upon which United Utilities reached its conclusion. The defendants relied upon that basis as supporting the proposition that the sewer was indeed public. The first point was the contention that the sewer had been reconstructed as a concrete sewer with a diameter of 525mm in or around 2004, having previously been a 225mm diameter sewer. The contention arose from the fact that, as noted above, on 9 April 2015 the records had been amended to note the smaller diameter. Previously, the first record of any sewer on the site (on 13 December 2013) showed it to be a 525mm private sewer - but that record had not been made live on the system until 9 April 2015, when the diameter was noted as the lesser figure. The witnesses did not know why the reduction had been made, and it remains unexplained. Taking the evidence as a whole, the plain inference is that it was a mistake, most likely

a clerical or typographical error. It cannot form the factual basis of an inference that the sewer was ever reconstructed.

85. On 25 April 2019 Mr O'Riordan had emailed Claire Thomson of United Utilities to say that the surface water network had been upgraded before being adopted by United Utilities, and that there were trench markings on the road running the whole length of the sewer, which supported that conclusion. That is not part of the defendants' pleaded case and in my judgment not a point which is available to them. If it were, I would have been prepared to accept that the roads showed the mark of works carried out in at least the surface. Mr O'Riordan would hardly have referred to them if they did not at least exist. But there are no photographs of them, his evidence did not provide enough detail to form a view of what any marks which he saw might have signified, and of course he was not available to give evidence and to have it tested. Mr Moore, in his unchallenged statement states that on his visit in early 2021 there was no sign of any such scarring between manhole covers in the highway along the length of the sewer. Mrs James, the owner of the claimant, gave evidence that she did not recall any reconstruction works ever taking place, and would have been aware of them had they done so: I accept her evidence. The absence of any evidence from the local authority supporting the idea of a reconstruction, when had it occurred one would have expected there to be a substantial paper trail, is telling. Mr Littler's evidence, which I accept, is that as far as he is aware the local authority has not undertaken any repair or maintenance of the sewer. That is consistent with the stance that they do not claim ownership of it. The defendants' pleaded case was that no occupants in the area had any records or recollection of having paid for any reconstruction work: that is consistent with

its not having taken place. To the extent that it was pursued, therefore, I would reject the suggestion that the trench marks support the idea of a reconstruction. I find that at all material times the diameter of the sewer was 525 mm, and that it was never ‘upsized’.

86. The defendants’ pleaded case was that it was to be inferred that the reconstruction of the sewer was carried out by the local authority, which at the time was acting as agent for United Utilities in respect of the construction and maintenance of sewers. Accordingly, it was to be inferred both that the sewer was public prior to the works undertaken in or around 2004 (as otherwise the local authority would not have undertaken them) and in any event, the consequence of the reconstruction by United Utilities agent was that the sewer vested in United Utilities pursuant to Water Industry Act 1991 section 179(1)(a), and accordingly was from its reconstruction a public sewer within the meaning of section 219 (1) of that Act. Given that I have found that no reconstruction occurred, the proposed inference lacks a factual foundation. The defendants’ pleaded case on this therefore fails and I conclude that the sewer was and is private and not public.

<u>On the defendants’ skeleton argument</u>

87. In their skeleton argument, the defendants sought to mount a different case. On the basis that it was located entirely on land owned by the council, appears to date from a time when the council undertook sewage functions for the area, was a large sewer, served multiple properties on the estate, and discharged into a watercourse, and that the claimant had provided no evidence of any private rights which it might have in respect of the use of the sewer, it was more likely

to be public than private. That was because the council must have been responsible for its construction (although it was a question whether it built it as a statutory delegate for the sewerage undertaker or adopted it, on the one hand, or as a private landowner, on the other), since it ran through its land; the council made no claim to own it; and if the council (or anybody else) had intended it to be private, it would have ensured that there was an appropriately documented scheme regulating the necessary private rights, in particular as to putting material into the sewer, and the costs of maintenance; whereas it made no sense to build a substantial sewer for gratuitous and uncontrolled use by others. This argument does not depend on there having been a reconstruction of the sewer.

88. I do not consider that this argument was available to the defendants, since the primary facts and the inferences to be drawn from them were not pleaded. In case I am wrong about that, however I will still consider it on the merits.

89. It was not in dispute that the sewer was located entirely on land owned by the council, was a large sewer, served multiple properties on the estate, and discharged into a watercourse.

90. As to the date of the sewer and the ownership of the land, the position is not altogether clear. Some inferences may nonetheless be drawn from the documents of title in the trial bundle, and to which Mr Littler's evidence referred. At least some of the site under which the sewer passes was not owned by the local authority until as late as 1990: for example, the local authority acquired the land in title MS303658 from British Coal in 1990 and was registered as proprietor on 2 May of that year. Since the sewer in question

follows the roads, I conclude that it is likely that it was constructed as part of the same process of development and at the same time as the roads.

91. Mrs James' evidence, which I accept, was that the site was under construction in 2000, before Brendon moved in. That is of course not the estate. But it is possible from the title documents inferentially to bracket the development of the estate as falling somewhere between 1990 and 2000. The estate roads appeared on the title plans to MS303658 by 2009, but must have already been in place by 2000. They cannot realistically have been constructed before the site had started to be assembled in 1983 or 1984 (the local authority was registered proprietor of MS 180737 on 27 April 1983, and the date of the restriction on title MS 203650 indicates that the local authority was registered proprietor of that land in 1984, as also of title number MS 209309), and probably not until it had been substantially assembled (MS303658, a substantial part of the estate, under which the sewer runs) was not acquired by the local authority until 1990.

92. That would tend to support the proposition that the estate roads, and probably the sewer in question, was constructed on its land by or at the behest of the local authority. However, Mr Littler, of the local authority, gave no evidence as to this. It is just possible that his evidence is not strictly inconsistent with it, since he actually gave no evidence about his knowledge of the construction of the sewer, either in chief or in cross examination (asserting only that it had never been repaired or maintained or reconstructed by the local authority; and that there was no paper trail relating to a transfer to United Utilities whereas if it were public and had been so transferred there would have been; and that if it had done that work as agent for United Utilities there would have been a record

of that, which there was not). However, I would have expected him to say it had been built by the local authority if he knew it had been, consistently with his obligation as a witness to tell the whole truth. Given the submission now under consideration, it was perhaps all the more odd a gap in the evidence. But, given that gap, I cannot accept for present purposes that the estate roads, and the sewer in question, were constructed by or at the behest of the local authority. The defendants' argument falls down at this point, therefore.

93. Even if the estate roads, and the sewer in question, had been constructed on its land by or at the behest of the local authority, there was no evidence that it built the sewer as a statutory delegate for the sewerage undertaker or adopted it: here again, the absence of evidence is evidence to the contrary; but even if it were not, the defendants have not satisfied the evidential burden. Absent such evidence one would have to conclude that the local authority had built it as a private landowner. The defendants' argument would then fall down at this point, therefore.

94. If not, though, the defendants' argument was that it makes no sense for any private owner to have constructed a private sewer for the benefit of others without regulating private rights and obligations and making a return. I do not consider that the absence of evidence of such a scheme is, in this case at least, a sufficient basis for the inference that a sewer is public. But if it were, it is interesting to note (I was invited to consider the various registered titles by Counsel for the defendants, although my attention was not drawn to this point specifically during the trial or in the skeleton arguments by any party) that, as mentioned in the title to MS180737 in entry 13 on the Property Register, by the

year 2000, a Development Scheme seems to have been created over part or perhaps even the whole of the area of the estate, involving drainage pipes and, apparently, roads. That title is said to have the benefit of the right to connect to and use all drains pipes cables services and all other conducting media to be constructed and installed under the Development Scheme or constructed or installed on the property within 79 years of the date of a transfer of title MS 430952 and other land dated 28 March 2000 and made between the local authority and the claimant itself; together with the benefit of the like right to connect with and use all roads constructed or installed or to be constructed or installed as aforesaid (it also referred to the new road bridge to be constructed). That transfer, and title MS 430952, were unfortunately not in evidence. But it seems at least possible that there was a scheme of development, only incompletely referred to in material before the court, which granted relevant private rights in relation to a sewer serving the estate. That is at least consistent with the fact that the estate roads are owned by the local authority and are unadopted: prima facie, the local authority owns anything under the roads, including the sewer. The possibility undermines the defendants' argument at this final stage too. The mere fact that the local authority does not assert ownership to the sewer does not assist the defendants, since it may have taken that stance for any number of reasons.

95. Accordingly, I do not accept the proposition that it is inherently unlikely that the sewer was private, regardless of its size and quality and multi-property connection: it seems to me, moreover, that an adoptable sewer might well be built by a local authority developing an industrial site as a private landowner. While I accept that the fact that the sewer did not appear on the original sewer

map might simply be an error or gap in the records, on balance it is more likely that it was because the sewer was private.

Conclusion

96. It follows that the conclusion of United Utilities that the sewer was public was mistaken, and the records which it was under a statutory obligation to keep, were wrong as a result from that point on.

97. It follows, too, that the defendants were never entitled to payment for the use of the sewer, and never provided the supposed to services for which payment was levied.

Failure of consideration or basis

98. It seems to me to follow quite shortly that there was a total failure, or rather complete absence, of basis (or, in the older language, of consideration) in relation to the fees which the claimant actually paid, and that the defendants must repay their respective overpayments. There was no deemed contract between the claimant and either defendant at all. No services were provided for these fees. No statutory basis upon which the claimant might have been liable ever arose. Retention of the payments is unjust for those very reasons. The case of *Dagarmo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, where there was a valid contract, is of limited assistance here, where there was none.

Payment under a mistake

99. In case I am wrong, however, and since the limitation period potentially differs, I also need to consider the claim on the basis of payment under a mistake. As the claimant's skeleton argument points out, a claim for unjust enrichment requires consideration of the following four questions: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant? (*Menelaou v Bank of Cyprus Plc* [2015] UKSC 66, at [18]; Goff & Jones, *The Law of Unjust Enrichment*, 9th ed., at [1-09].) An "*incorrect conscious belief*" (being a situation where a claimant, owing to his ignorance of some fact held an incorrect conscious belief which caused him to act) or an "*incorrect tacit assumption*" (being a situation where a claimant acts on the basis of an incorrect tacit assumption) can both support relief on the ground of mistake, but a state of ignorance will not, except in so far as the claimant's ignorance of some state of affairs "*lead*[s] *to an* [incorrect conscious] *belief or* [tacit] *assumption which the law will recognise as a mistake*." (Goff & Jones, at [9-43]-[9-47], *Pitt v Holt* [2013] UKSC 26, at [105].) It has long been clear that money paid under a mistaken belief of the payer as to the existence of a liability to pay is recoverable: Chitty, *Contracts*, 34th ed., at [32-039])

100. The claimant's case on this is that the charges were paid by mistake. At all material times, Brendon assumed (the Particulars of Claim say 'believed') the invoices were correct, and thus that the services were being provided and that payment was therefore due. However, this was not the case and the defendants' enrichment was therefore unjust. Had it known that the services were not in fact being provided, Brendon would not have paid any of the charges. There

are no defences available to the defendants and none have been pleaded in any event.

101. The defendants' pleaded case put the claimant to proof as to whether any belief was held and its content, as well as the causal effect of any such belief. Their case was that the claimant pleaded it had a (positive) belief but it was not clear that it had any belief as to the true position, rather than a case of simple ignorance. Ignorance is not enough, on the basis of *Pitt v Holt* [2013] UKSC 26 [2013] 2 AC 108 at [108], *Goff and Jones*, 9-41 – 9-43, and 9-48 to 9-54. Further, even if the claimant did have a positive belief, it undoubtedly had reason to doubt that belief at various stages, for example in 2009 when it was advised there were no public sewers nearby, or in 2014 when Cadantis were canvassing the occupiers of the Estate for business. Doubt may prevent a mistake from being found: see *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm) [2010] 1 Lloyd's Rep 631; and the existence of doubt is a forensic barrier to demonstrating that the mistake caused the payment: *ibid*. Moreover, a deliberate waiver of inquiry when put on notice can preclude recovery: see *Derby v Scottish Equitable Plc* [2001] EWCA Civ 369, [19] – [25]. (Although deliberate waiver of inquiry was not specifically pleaded, no objection was taken to the defendants' pursuing the point.)

Mrs James' evidence

102. Mrs James' witness statement explained that as finance director of the claimant, and then its managing director and owner, she oversaw the payment of water bills to United Utilities. The company received one bill a year, which United Utilities divided into 12 monthly payments. The bill was paid by direct debit.

She arranged each payment to be made in good faith on the assumption at all material times that the invoices were correct, that United Utilities provided the services for which it charged, and that the claimant was therefore liable to pay for them. The question of ownership of the sewer had not been in the forefront of her mind when she arranged payment, and even if she had known the sewer was not public she would not have realised that meant she should not be paying: she was the managing director of an export packing and freight forwarding business and was not familiar with the operation of water services. The claimant would not have paid if it had known that no services were being provided. She began to question the scale of the bills the claimant was receiving for surface water drainage having realised in 2004 that the company was being charged for foul sewerage even though it had a septic tank. She raised a query about the area for which the company was being charged which affected its 'banding', which in consequence was reduced. Though she thought it was still too high she did nothing because she was busy and just thought United Utilities had investigated the position properly. Her query had not been about whether the company was liable at all.

103. When she had acquired the balance of the shares of the claimant, her solicitors oversaw the due diligence which included all necessary investigations of its premises, as well as the valuation organised by NatWest bank, nothing was specifically raised at any time concerning drainage or ownership. Part of those premises had been sold in 2003 and then repurchased in 2009 and on the latter occasion her solicitors confirmed to her that that parcel was not connected to the public sewer, although the fact had not been specifically pointed out to her,

and she did not understand its relevance or importance, so she had not remembered it.

104. In January 2018, the company had been contacted by RPS on behalf of United Utilities who undertook a survey on 23 January 2018. Some time later the company received a large number of credit notes and re-invoicing which she thought had to do with the reduction in the banding, although it was very confusing. She contacted Cadantis which (through Mr Patterson) explained that it would be able to investigate the bills. She also spoke to Mr Stanley, the managing director of Cadantis, to say she was unhappy about the banding. He undertook to carry out a survey to establish whether the claimant was paying what was due.

105. Cadantis carried out its survey in August 2018 and told her that the sewer was private, which meant that United Utilities was not actually providing services for which they could charge. It raised an appeal on behalf of the claimant, but the appeal was rejected by United Utilities. She decided to withhold further payments, and instructed solicitors.

106. In cross-examination she confirmed that she had joined the claimant in March 2000, after it had bought the site, but before it had moved in, in September 2000. Construction of the site was under way by the time she joined, but it had nothing to do with her at all: she was a part time credit controller at that stage. United Utilities had started to charge the claimant in September 2000. The finance team had initially been responsible for the bills, and Andrew Brown, who had been involved in the purchase of the site and whom she would imagine would have been party to any advice about drainage in the context of the purchase, would

have authorised the payments at that stage. From September 2001 she had been jointly responsible with Mr Brown for bills, until she became finance director, when she took charge, although Mr Brown could still authorise payments. They had discussions at the time, although not at length; neither of them had been aware of a problem with the bills at the time. The first time the septic tank had had to be emptied was not until 2003 or 2004. She had always believed the roads on the estate to have been unadopted and she had always thought the payments to United Utilities were for the use of a drain, though she did not know which. She had positively believed that the claimant was getting the service for which it was paying, which was why the bill was paid.

107. The report on drainage obtained on behalf of the claimant dated 11 February 2009 states that ‘there are no public sewers shown on the public sewer maps that serve the property’ and ‘the public sewer map does not show any public sewers within the boundary of the property. However, historically it has not been a requirement for all public sewers to be recorded on the public sewer map. It is therefore possible for unidentified public sewers to exist.’ The answer to the question ‘Does the public sewer map show a public sewer within 30.48 metres (100 feet) of the buildings within the property?’ was in the negative. The question ‘What is the basis for charging for water supply and sewerage at this property?’ was ‘Please refer to vendor or pre-contract documentation’. So the company had been informed on the repurchase that there appeared to be no public sewer. And it had been referred to other documentation. That documentation was not, unfortunately, disclosed in these proceedings. I do not know why. Mrs James made it clear she was not saying she had not read this document, but she was saying that she did not understand the difference between

private and public sewers at the time, and had not understood the significance, and in any case it had not been at the forefront of her mind at the time. She had not been referred to the documentation mentioned, and never raised a query with her solicitors. She did not agree that she had been put on notice that the sewer might be private: her concern had always been banding. Moreover, although due diligence must have been undertaken in 2008 when she purchased the balance of the shares, nothing specific was raised about the drainage at the time. That documentation was not disclosed either, and she did not have it. She doubted due diligence would have been done to the same degree when she acquired her initial shareholding in 2004.

108. She did not remember in detail what Mr Patterson said when he contacted her in late 2014 or early 2015, and they had not engaged Cadantis until 2018. The email from Mr Stanley of Cadantis to Water Plus stated that there was no public sewer, and that the claimant advised that in 2006 they discussed the site's foul and surface water arrangements with a Mr Bellis (United Utilities' catchment manager) and that this was evidence to show that United Utilities should have been aware of the fact. However, Mrs James did not remember any discussion with a Mr Bellis.

109. Mrs James gave her evidence in a serious, and rather anxious and defensive way, but struck me as being a witness of truth. I accept her evidence. I therefore find that she and other officers of the claimant had authorised payment of the drainage bills in the belief, induced by the bills themselves, that the services now in dispute were being provided. I regard that as a wholly normal, reasonable and natural belief to hold upon that basis. One would not expect such

bills to be raised if there was no liability. It is not a matter of not knowing whether or not services were being provided, but a belief (no doubt quite casual) that they were. That applies equally to her as to any other person involved in the claimant and responsible for authorising these payments. She had been informed by at least February 2009 that there was no connection to a public sewer, but I find she had not realised that meant that none of the services now disputed, and for which the company was paying, was actually being provided. She was a busy person with no particular knowledge of the basis upon which drainage bills ought to be raised, and in effect she did not put two and two together.

110. That is hardly surprising. United Utilities is under a statutory duty to maintain records of public sewers. No doubt they are supposed to be accurate records, at least as far as reasonably possible. United Utilities is the body with the access to the information, including information which is not available to the public. I would hope that it was not a common practice for charges to be levied in circumstances where the undertaker's own records did not indicate that the sewer in question was public, leaving it up to members of the public to raise a challenge to any bills which might be submitted. However, that is what happened here.

111. Although it is unfortunate, perhaps, that whatever documentation there might have been in relation to due diligence on Mrs James' share purchases or the claimant's land transactions was not before the court, I am not prepared to accept that this can found an adverse inference as to her or its state of knowledge on those occasions. I take note, additionally, that on a share purchase, the

reporting on the rights or liabilities attaching to land owned by the company in question will typically be fairly modest, if undertaken at all. Particularly given that, as I accept, her concern was banding, rather than whether there was liability at all (and if that was the concern, why raise a banding query and not a liability query?) I accept that at the point she instructed Cadantis, she still held the relevant belief. I find that it was not until Cadantis reported back to her that she understood that the sewer was or might be private and that there was no liability. I do not accept the proposition that as part of its sales process, Cadantis would have told its prospective customer that it already knew or suspected that the sewer in question was private and there was no liability: the company would not get much work on that basis. I accept Mr Stanley's evidence about this.

112. I find that the claimant was not in a state of doubt about whether liability existed at all until it received the report of Cadantis, when it ceased to believe that it could rely on the defendants' invoices. I do not consider that at any point before then it had been put on notice that it might not be liable in a way which required it to make enquiries which it had deliberately chosen not to undertake.

Conclusion

113. I am therefore satisfied on the balance of probability that the defendants were enriched by demanding and accepting payments to which they were not entitled from the claimant, were so enriched at the claimant's expense, and that the enrichment was unjust. The injustice arises, it seems to me, from the fact that payments were made to which the defendants were not entitled. But it is an aggravating feature of this injustice that the defendants appear to have raised charges at a time when their own records did not indicate that they were entitled

to do so. (Although it is debatable, and was debated, whether even when United Utilities concluded that the sewer was actually public, it had any reasonable basis for reaching that conclusion, I do not consider that the issue arises for determination, though the weaknesses in the reasoning process adopted by Mr O'Riordan are apparent, and appeared to be largely accepted by Mr Ashcroft in his oral evidence.) I will consider limitation separately, but there are otherwise no substantive defences available to the defendants to the claim for reimbursement on the basis of unjust enrichment.

114. Following the report of Cadantis, and the launch of the claimant's appeal, I accept that the claimant no longer believed that the defendants were providing services for which it was entitled to be paid. The claimant stopped making payments on 16 September 2019, almost a year after that report. If and to the extent it is suggested that the claimant thereby lost the right to reimbursement of the sums claimed since September 2018, I reject that proposition: those sums were paid in the context of a dispute about whether they were owed and, if they were not, I cannot see how it can be said that they must not be reimbursed. That cannot be a defence to the claim.

Limitation

115. United Utilities maintains that any claim Brendon may have for such reimbursement is time-barred in respect of the period before 10 February 2014 (the parties entered into a standstill agreement on 10 February 2020). The relevant limitation period is indeed 6 years, but the claimant relies on section 32 Limitation Act 1980, which provides so far as relevant that in the case of any action for which a period of limitation is prescribed by that Act, where the action

is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the claimant has discovered the mistake or could with reasonable diligence have discovered it. I was not addressed on the question whether this provision could save an otherwise statute-barred claim based on total failure of consideration, but it obviously applies to a claim based on mistake. The burden of proof is on the claimant to show that it could not have discovered the mistake without exceptional measures which it could not reasonably have been expected to take: *Paragon Finance Plc v DB Thakarar & Co (A Firm)* [1999] 1 All ER 400, at 418. The concept of reasonable diligence involves two considerations: first, was the claimant put on inquiry or otherwise given reasonable cause to take the steps which would have led to the discovery of the mistake; second, whether having been put on such inquiry it acted sufficiently diligently to ascertain the existence of the mistake: *Davies v Sharples* [2006] EWHC 362 (Ch), at [59].

116. I have already found, however, that the claimant did not discover the mistake until February 2018, and had not been put on enquiry as to the mistake before that date. Accordingly, no part of the claim for sums paid after time started running is statute-barred.

Quantum

117. Quantum was not agreed and the explanation of the dispute over it was not perspicuous. The claimant claims the sum of £155,207.43, less £3179.90, amounting to £152,027.53. That is on the basis of an internal United Utilities memorandum dated 14 February 2017 (but I am told actually created in 2018) from Jackie Leadbetter to Louise Durbin and Jo Lee, covering the period from

22 September 2000 to 11 February 2018. That is to be divided between United Utilities and Water Plus: the last date for United Utilities is 31 May 2016, and the first for Water Plus from 1 June 2016. Brendon started to withhold payment on 4 September 2019, and the last bill which it paid, which was dated 11 September 2019, covered the period 6 May 2019 to 4 September 2019. The total claimed from United Utilities is therefore £122,013.28, and from Water Plus the sum of £30,014.25.

118. The defendants' counter-schedule proposes that the liability for United Utilities would be £113,010.56 and for Water Plus £25,230.17. It assumes that the cut-off date for quantum in relation to Water Plus is 5 August 2018, being the date of the last payment made under a mistake. That this was a cut-off date was not conceded and, for the reasons I have already given, I have concluded that the knowledge acquired as a result of the Cadantis report does not stop liability arising. Accordingly, I prefer the claimant's calculation.

Breach of contract and/or statutory duty

119. The claimant mounted an alternative case for breach of the deemed contract between the claimant and the defendants, and the defendants' respective statutory duties. In view of the conclusions to which I have already come, I can take these points quite shortly. There was no deemed contract: if there had been, it would have meant that the claimant was liable for the charges raised. Making such charges and accepting payment would scarcely have been in breach of it. Changing the records from private to public could not have been a breach of it either, because the sewer would have been public. Neither defendant failed to adopt or follow the correct process and formally record the public adoption of

the sewer, because it was never the defendants' case on the pleadings that the sewer had been adopted. None of the loss claimed would have been suffered as the result of any of the alleged breaches on the part of either defendant. In the circumstances, the question whether any such duties as are alleged by the claimant arose at all does not require to be determined in this case.

Interest

120. The claimant claims interest pursuant to section 35A of the Senior Courts Act 1981. It seems to me that it is entitled to simple interest and that having regard to the low base rates over the relevant period the appropriate rate down to the date of judgment is 4%. I suspect a rough and ready method of calculating an approximate sum will be found necessary, but I would invite the parties to agree a figure if possible, and if not, a methodology together with competing calculations; and if that cannot be agreed, I will specify a figure.