Judgments

*Augean plc v Hutton and others

[2014] EWHC 2972 (Comm)

Queen's Bench Division, Commercial Court

Mr Robin Knowles CBE QC (Sitting as a Deputy High Court Judge)

12 September 2014

Company - Breach of contract - Purchase of company - Claimant company seeking to purchase waste management business from defendants - Claimant claiming defendants breaching warranties contained in specific performance agreement (SPA) - Defendants counterclaiming for breach of SPA - Whether defendant breaching warranties - Whether claimant breaching SPA.

Judgment

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR ROBIN KNOWLES CBE QC (Sitting as a Deputy High Court Judge):

Introduction

1. This case concerns the acquisition of a waste management business with material operations in Scotland.

2. By a share purchase agreement ("the SPA") dated 19 December 2007 the Claimant ("Augean") acquired the total issued share capital of Hitech Equipment Limited ("the Company") from the Defendants ("the Hutton Family").

3. Augean now claims for damages for breach of warranties contained in the SPA and a fixed sum said to be due under the SPA. The Hutton Family counterclaim for damages for breach of the SPA.

The SPA

4. The SPA provided for Augean to pay a 'Completion Payment' of £5,189,412.50, a 'Retention' of £700,000 and 'Additional Consideration' of up to £750,000.

5. The Retention was to be paid by reference to 'Completion Accounts', incorporating the results of a 'Completion Stock Take' and assessed against targets for net assets and net working capital as at 31 December 2007. The Additional Consideration reflected the performance of the Company during the 'Earn Out Period', of 1 June 2008 to 31 May 2009.

6. In relation to the Retention, Clause 5.3 of the SPA provided that the Sellers' Accountants would "count the Stock and the Waste Stock at a joint stock take conducted by the Purchaser and the Sellers or their agents on the Completion Accounts Date" and "... value the liability of treating and/or disposing of the Waste Stock".

7. Clause 5.4 provided that unless the Purchaser's Accountants notified the Sellers' Accountants in writing within 30 days after receipt of the draft Completion Accounts and Completion Statement that they did not accept that those drafts complied with clause 5.2 and clause 5.3 "the Purchaser shall be deemed to have accepted those drafts as complying with clauses 5.2 and 5.3". Clause 5.4 went on to make provisions for determination of any dispute notified within that 30 day period.

8. In relation to the Additional Consideration, Clause 6.1 of the SPA provided that its amount, subject to a cap of £750,000, would be equal to 750,000 multiplied by ("A" divided by 175,000) - where "A" is equal to the amount by which "EBIT (as determined or agreed in accordance with this clause)" exceeds £700,000. "EBIT" was defined as "the aggregate profits or losses of the Business for the Earn Out Period arising in the ordinary course of the Business calculated in accordance with [defined] Accounting Standards and UK generally accepted accounting principles and practices and as agreed and determined pursuant to clause 6", subject to certain specified adjustments.

9. Clause 6.2 provided that Augean should "procure as soon as practicable after the end of the Earn Out Period, the preparation of the Earn Out Accounts". The term "Earn Out Accounts" was defined as meaning "the profit and loss account of the Business for the Earn Out Period". Clause 6.3 contained various provisions as to the basis upon which the Earn Out Accounts were to be prepared. Clause 6.4 provided that Augean should procure that the Earn Out Accounts and a certificate ("the Certificate") stating EBIT for the purpose of calculating the Additional Consideration be sent to the Hutton Family as soon as reasonably practicable following their completion. Clauses 6.5 to 6.7 contained various provisions in relation to disputes following receipt of the Certificate.

10. Clause 6 of the SPA also set out terms as to how Augean and the Hutton Family would conduct the business of the Company during the Earn Out Period. In particular:

> (a) By Clause 6.12.1 "substantially all of the time" of, among others, Ms Gaynor Hutton ("Ms Hutton", the Fourth Defendant) would be expended on the affairs of the business and would not "be employed for any material time in anything other than the promotion and development of the Business of the Company".
>
> (b) By Clause 6.12.3 Augean undertook to the extent reasonably practical to allow the Hutton Family to continue to manage the day to day operations of the business in a similar manner to that in which they had been historically managed, provided always that the business was operated in accordance with legal and regulatory requirements.
>
> (c) By Clause 6.12.2 Augean undertook to act in good faith and not seek to manipulate the EBIT for the Earn Out Period in any way.

11. By Clause 7 of the SPA, together with schedule 3, the Hutton Family gave a number of warranties. These included that:

> (a) As at the date of the SPA, the Company had complied in all respects with all relevant licences and permits necessary to enable the Company to carry on its business lawfully, and there was no reason why any of them should be suspended, cancelled or revoked (warranty 20.1);
>
> (b) So far as the Hutton Family was aware, the Company had conducted its business in accordance with all applicable laws and regulations of the United Kingdom, and none of the Company's officers or employees had done or omitted to do anything in contravention of any regulation or the like in the United Kingdom (warranties 20.2 and 20.3);
>
> (c) So far as the Hutton Family was aware, the Company had not provided any service which did not comply fully with all laws and regulations (warranty 23.1);
>
> (d) All Environmental Licences necessary to enable the Company lawfully to carry on its normal business in compliance with United Kingdom or EU legislation or directives were valid and subsisting and any conditions or obligations therein imposed upon the Company had been complied with in all respects (warranty 29.2);
>
> (e) Accounts for the Company provided by the Hutton Family for the accounting period ending 31 May 2007 showed a true and fair view of the state of affairs of the Company as at 31 May 2007 and fully provided for all liabilities (warranties 4.1.4, 4.2.1 and 4.2.4);
>
> (f) Accounts for the Company provided by the Hutton Family for the accounting period ending 31 October 2007 fully provided for all liabilities (warranties 4.4.1 and 7.2);
>
> (g) "The Waste Stock now held by the Company is accurately identified and any liability associated with its treatment and/or disposal has been adequately provided for in the October Accounts" (warranty 7.2);
>
> (h) "All information disclosed in the Disclosure Letter ... was when given, and remains and will at Completion be, true, complete and accurate in all respects and is not misleading because of any omission or ambiguity or for any other reason" (warranty 28.1).

12. Clause 1.10 provided:

> "Any reference or statement which is qualified by the expression "so far as the Sellers are aware" or "to the best of the Sellers' knowledge and belief" or any similar expression, unless expressly stated to the contrary, shall be deemed to include an additional statement that it has been made after reasonable enquiry of each of the [Hutton Family] and the directors, officers and senior management of the

Company."

13. Clause 7.2 and 7.3 of the SPA provided:

> "7.2 The Warranties are given subject to matters fairly and accurately disclosed (with sufficient detail and copy documents to enable [Augean] to identify the nature and scope of the matters disclosed and any limitations or restrictions to the Warranties) in the Disclosure Letter.
>
> 7.3 No information (other than that fairly and accurately described in the Disclosure Letter) relating to the Company, of which [Augean] or its advisers or agents has knowledge (whether actual, imputed or constructive), shall prejudice any claim made by [Augean] under the Warranties or operate to reduce any amount recoverable in respect of any breach of any of the Warranties."

14. The Disclosure Letter itself stated that the matters disclosed to Augean included the following:

> "The contents of the Disclosure Letter
>
> All matters apparent from the face of the documents, copies of which had been furnished to [Augean] and its professional advisers in the course of the Due Diligence process and which were listed in the Inventory attached to the Disclosure Letter."

15. Clause 12.1 of the SPA provided that the Hutton Family should pay "an amount equal to the costs and expenses incurred ... in undertaking works required to improve the effluent treatment systems ... so that the limits on discharge imposed by the current discharge consent from Scottish Water (the Discharge Limits) are met on not less than 80 per cent of the days on which [the Paisley site] is operational in any calendar month and [the Hutton Family] shall procure that the discharge levels are monitored and daily records kept and preserved so as to allow both [Augean] and [the Hutton Family] to identify consistency of compliance with the Discharge Limits".

Legislation and regulation

16. I was provided with a written overview of key legislation and regulation in the area, and with one exception (addressed below), there was no substantive issue over this overview.

17. I set out in particular the following as the most material of the legislation and regulations applying to the present case:

> (a) Section 33(1)(c) of the Environmental Protection Act 1990, including words substituted by Waste (Scotland) Regulations 2011/226 (Scottish SI) regulation 2(3), provides:
>
> "33.Prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste

(1)Subject to [certain exceptions] a person shall not -

...

(c)keep or manage controlled waste in a manner likely to cause pollution of the environment or harm health."

(By section 31(6) of the 1990 Act a person who contravenes section 33(1) commits an offence. By section 31(7) it is a defence for a person charged with an offence to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.)

(b) Regulation 17A of the Special Waste Regulations 1996, as added by the Special Waste Amendment (Scotland) Regulations 2004, provides:

"Duty to separate mixed wastes

17A(1) An establishment or undertaking which carries out the disposal or recovery of special waste, or which collects or transports special waste, shall, where such waste is already mixed with other waste, substances or materials, effect separation as soon as reasonably practicable where -

a.technically and economically feasible; and

b.necessary in order to comply with the provisions of Article 4 of the Waste Directive set out in paragraph (2)

(2) The provisions referred to in paragraph (1)(b) are to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without -

a.risk to water, air, soil, plants or animals;

b.causing a nuisance through noise or odours;

c.adversely affecting the countryside or places of special interest."

(It was not in issue that what I describe in this judgment, as did the parties throughout the trial, as hazardous waste (including rags sufficiently contaminated with oil) was "special waste" within regulation 17A.)

18. In addition in the body of this judgment I refer to the waste management licence held by the Company, and to the

Criteria and Procedures for the Acceptance of Waste at Landfills (Scotland) Direction 2005.

19. In the course of argument there was a particular disagreement over the application of Regulation 9(11) of The Pollution Prevention and Control (Scotland) Regulations 2000, made by the Scottish Ministers pursuant to powers conferred upon them by the Pollution Prevention and Control Act 1999. These Regulations prohibit the operation of an installation except under and to the extent authorised by a permit granted by SEPA.

20. Paragraphs (11) and (12) of Regulation 9 provide:

> "(11) Subject to paragraph (12), there is implied in every permit a condition that, in operating the installation ..., the operator shall use the best available techniques for preventing or, where that is not practicable, reducing emissions from the installation ....
>
> (12) The obligation implied by virtue of paragraph (11) shall not apply in relation to any aspect of the operation of the installation ... in question which is regulated by a condition imposed under any other paragraph of this regulation."

"Emission" is defined by regulation 2(1) to mean:

> "(a) in relation to Part A installations, the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in an installation into the air, water or land;
>
> (b) in relation to Part B installations, the direct release of substances or heat from individual or diffuse sources in an installation into the air;
>
> ..."

Regulation 2(3) adds:

> "In these Regulations, a reference to a release into water includes a release into a sewer ...".

21. Augean argued that regulation 9(11) applies where hazardous waste is taken by truck from the installation and wrongly consigned to non-hazardous landfill. I do not think that the wording of this particular regulation can bear this meaning in light of the word "from" in the regulation, and the definition of "emission" in regulation 2(1). A purposive construction, urged by Augean, does not improve Augean's argument; the purpose of this particular regulation (whatever other regulations may deal with) appears to be to deal with the prevention or reduction of emissions from an installation (or mobile plant).

The Allegations in Summary

22. The Company operated from two sites, Ellesmere Port and Paisley. The Ellesmere Port site continued to make a profit (albeit reduced) in the second half of the Earn Out Period while the Paisley site went from being profitable to loss-making.

23. In summary, Augean's case is that, during the Earn Out Period, Augean became aware that the state of affairs of the Company was not as warranted by the Hutton Family in the SPA. In particular, according to Augean:

> (a) At the time of the SPA, the Company was not conducting its business in accordance with all applicable laws and regulations, and was not complying with all relevant permits and consents, in particular as regards the way in which the Site dealt with oil-contaminated wastes.
>
> (b) The accounts warranted by the Hutton Family did not show a true and fair view of the Company and/or fully provide for all liabilities, because the accounts did not identify the true costs of treating and disposing of waste stored on the Company's premises; and
>
> (c) In light of the above, the information disclosed to Augean by the Disclosure Letter was not true, complete and accurate in all respects, and was misleading.

24. According to Augean it has a claim for £2.5 million as a result. Augean also claims the sum of £60,000 for costs incurred by Augean in respect of the 'effluent discharge system', pursuant to the specific provision of the SPA in that connection.

25. At the same time, the Hutton Family allege that Augean breached the SPA. In particular, according to the Hutton Family:

> (a) Ms Hutton was required to spend a significant proportion of her time on work for other businesses owned by the Augean rather than for the Company during the Earn Out Period.
>
> (b) The Hutton Family was prevented from continuing to manage the day to day operations of the business during the Earn Out Period.
>
> (c) Augean sought to manipulate the Earn Out Accounts, by changing accounting practice part way through the Earn Out Period, and by purporting to increase disposal costs during the last month of the Earn Out Period.

26. According to the Hutton Family the Earn Out Accounts prepared by Augean are therefore incorrect, and they are entitled to a payment of Additional Consideration.

Some context to the dispute

27. The waste management business is heavily regulated and very complex. There are areas for different judgments to

be made, approaches to be adopted and techniques to be used.

28. Augean and the Hutton Family each have significant experience in the waste management business. However they come from different worlds. The former is intensely corporate and process driven; the latter intensely practical and hands-on. In buying the Company Augean was acquiring a business that it was always going find was not operated to its liking. In selling the Company the Hutton Family were putting a business into hands that would not operate things to their liking. The tension was illustrated when Ms Hutton said in her evidence that what the Company did when the Hutton Family were running it was to take problematic waste that others like Augean would not want to deal with.

29. There was emphasis from the Hutton Family that things were the same for some time after Augean had acquired the Company as they were before it had acquired the Company. So Ms Hutton said at one point in her cross examination: "I think that the non-compliances are consistent before they bought us during the due diligence, and after they bought us. So the only thing that changes is their attitude towards them.".

30. Her reference to "non-compliances" will be noted, but cannot be taken too far: it too must be seen in context. So too when the waste experts called by the parties to give evidence at trial agreed that the Paisley site was "routinely non-compliant". Mr Paul McMillan, the expert instructed by the Hutton Family, said "it is commonplace in my experience for most industrial sites regulated under the same PPC permitting regime as the Hutton Family (and [Augean]) to be affected by such incidences of non-compliance". Mr Gary Bower, the expert instructed by Augean, accepted in cross-examination that it was "common" for industrial sites to be affected by incidences of minor non-compliance.

31. Mr Nigel Bowen was at material times Group Operations Director for Augean. Mr Bowen has worked in the waste sector for many years, and holds several professional qualifications in the field. He identified what he regarded as the issues and oversaw attempts to address them during the Earn Out Period. Ms Hutton, herself very experienced, and very successful in sales, was the member of the Hutton Family that had most dealings with Mr Bowen. The difficult atmosphere between them was tangible in the courtroom; I can well imagine it would have been more difficult still at the time. Take an issue as fundamental to this business as the use of Hi-Pods (considered below); Ms Hutton's evidence had the ring of truth when she said "Nigel simply didn't get Hi-Pods", whereas to her mind it was important to the business that it developed the use of Hi-Pods.

32. Both sides called evidence from a number of people who gave their assessment of what they had seen and who had done what well or poorly. I have taken all this evidence into account. I do not reject the account of any witness but found much of the evidence of value only in relation to individual events and not as a sure objective overview of what was happening across the business as a whole. Given the particular challenge to the quality of their evidence, I wish to record that I did not regard the evidence of Mr Kenneth Priestley or that of Mr Andrew Murdoch and Mrs Lesley Murdoch as unreliable. Similarly, whilst Ms Hutton's recollection was not always accurate and she was not always objective, her evidence was not given in bad faith or without honesty.

33. Criticisms were made of the lack of thoroughness of the disclosure of documents in the case, especially of the disclosure by the Hutton Family. It is certainly the case that there were shortcomings, but I do not in the result feel I can form any reliable conclusions from that fact, and I do not consider the shortcomings were the result of a deliberate failure to comply with the disclosure obligations that applied.

34. Augean submits that the evidence showed that when the Site was managed by the Hutton Family, commercial considerations and the drive for profit trumped any real concern for compliance with the laws, regulations and permits

applicable in the waste business. In response to the suggestion put to her in cross-examination that the business was fundamentally geared to maximise sales rather than to ensure compliance, Ms Hutton said that "our balance was very different from Augean, and that's kind of the point of this, that they bought us knowing what the balance was". The Hutton Family pointed to awards that the Company had won for innovative techniques for treating waste. I reject the submission made by Augean that compliance was "what the site could get away with".

35. Mr John Gilmour, at material times General Manager of Site Operations, was however right, in my judgment, to accept that, in the period leading up the SPA, sales may have been winning out over operations. This was in large part because of Ms Hutton's ability, drive and imagination in sales. It is consistent with the conclusion of a Renaissance Risk Report in September 2008, which stated that "Although operations would like to create time to process existing materials on site and reduce storage, the objective of sales is to maximise materials coming through the gates. At the moment, sales appear to have the upper hand, and operations are perhaps therefore under pressure, which results in corners being cut".

Classification, treatment and disposal of waste received in Hi-Pods

36. Hi-Pods are large waste containers. The Company would send them out empty to customers, collect them when full of waste and bring them back to the Company's site. The waste in them could be across the range, from cardboard through to rags contaminated with oil; from non-hazardous to hazardous. As Ms Hutton explained, Hi-Pods looked like they held a ton but they did not; the Company was able to charge profitably for them.

37. Augean submits that the evidence shows that the Company was periodically disposing of Hi-Pod waste direct to landfill without any form of treatment after arrival at the Company's site. I accept that this happened, and happened to the knowledge of the Hutton Family, but not that it happened on the scale alleged by Augean.

38. It is plain to me on the evidence that some Hi-Pods arrived full of non-hazardous waste. But for others it was hard to tell and with still others there was plainly a mix of hazardous and non-hazardous waste. There was a picking-line process and some Hi-Pods were put through that but some were not. Sometimes this was because some obviously non-hazardous waste could be separated out in the waste reception area of site and moved direct to skips for non-hazardous waste for disposal. But sometimes, confirmed in particular (but not only) by the evidence of Mr Jeremy Stewart, Transfer Station Manager for the Company, Hi-Pods were simply emptied into a skip and then a visual assessment would be made of the skip contents. Mr Stewart spoke of the position in 2008 but there was evidence from the Hutton Family themselves that the site was not run differently before then.

39. I am not satisfied that a visual assessment once waste was in a skip was in any way sufficient. It was common ground between the waste experts that treatment can include sorting performed as the result of visual assessment, but their Joint Memorandum entered the caveat that visual assessment is inadequate in distinguishing levels of contamination "near the hazardous waste threshold". In any event the structure of a skip allowed no more than a view of the surface. I reject the evidence of Mr McMillan when he suggests that "it is entirely conceivable that simply emptying Hi-Pods into a skip and then visually assessing the skip contents would be sufficient to identify whether or not the contents were potentially hazardous or whether they were non-hazardous and could be consigned for disposal to a non-hazardous landfill".

40. Oily rags which arrived as hazardous waste could be rendered non-hazardous by washing. The Hutton Family accept that not all of this waste received at the Paisley site was washed. They point out that it was not envisaged that it would be; it was acceptable that it was sorted so that hazardous waste would not be sent to non-hazardous landfill. Under

Regulation 2(1) of the Landfill (Scotland) Regulations 2003, "treatment" includes sorting. However not all the waste was sorted.

41. The Hutton Family are right to say that if a small number of contaminated items may be missed during visual assessments that does not necessarily mean that any regulations are broken: the level of concentration of the contaminant is material. There is also force in their point that the Company's premises were frequently inspected by regulators yet the Scottish Environmental Protection Agency ("SEPA") did not raise concerns about the Hi-Pod process resulting in the sending of hazardous waste to non-hazardous landfill. Furthermore, rigorous compliance audits were conducted by representatives of customers, many of them large companies and each shouldering responsibilities as waste producers, without concerns being raised. Both waste experts called to give evidence at trial recognised that the SEPA reports would provide site owners or operators with some comfort that there was no material issue in relation to sending hazardous waste to non-hazardous landfill.

42. These points reinforce my assessment that problems did not occur on the scale alleged by Augean. But they do not dislodge the clear view that the evidence gave me that not all waste received in Hi-Pods was properly classified, treated and disposed of, and that this was appreciated by the Hutton family at all material times.

43. I mention separately one aspect. Augean alleged that some Hi-Pods were collected as part of "multi-collection rounds" and that this was not permissible by regulation or licence. In closing, Augean made little reference to this part of its case, save to argue there would have been additional costs associated with ensuring that Hi-Pods were not collected as part of multi-collection rounds, and a loss of revenue. There was, in my judgment, no satisfactory evidence to support its allegation on this aspect.

Sampling, testing and characterisation of waste generally

44. On the evidence I heard I am satisfied that confirmatory testing was not routinely carried out, and that this too was appreciated by the Hutton Family at all material times.

45. Notwithstanding their differences, the waste experts were right to agree that the failure to carry out confirmatory testing meant that the Paisley site did not properly comply with the requirements of basic characterisation as required by the Criteria and Procedures for the Acceptance of Waste at Landfills (Scotland) Direction 2005. In cross-examination, Mr McMillan entered the qualification that different wastes might require different degrees of characterisation, but he did not suggest that it would never have been necessary to test the wastes leaving the site.

46. At times in the litigation, the disposal of grinding sludge was a topic in its own right. In light of the way the evidence at trial progressed it is sufficient to record that Mr Bowen observed in October 2008 that the site was classifying grinding sludge as non-hazardous waste. It was in fact hazardous, and that was indicated by guidelines issued by the Scottish Environment Protection Agency ("SEPA").

Waste storage on site (including related documentation) and impermissible waste on site

47. In his report on general yard and storage issues dated 8 February 2008 Mr Gene Wilson wrote 'There are issues in respect of access, condition of containers, spillages, uncovered waste, labelling, stability and no clear organisation of waste types'. A Renaissance Risk Report also noted congested storage at the Paisley site.

48. Mr Stewart accepted that not all stock was labelled and that a concerted effort was necessary to clear waste stock on site because too much had built up and there were not good enough records as to what was there. Mr Gilmour accepted that there were always a number of items on site that were not allowed under the relevant permit, the PPC Permit. He also accepted that it was open to question how effectively the site dealt with situations where a customer had sent waste which the site was not allowed to process. Further evidence of impermissible waste on site is again contained in reviews by Mr Wilson, in an October audit, and in SEPA inspection reports.

49. The Hutton Family accepts that the waste on site occasionally included materials which were not permitted by the existing PPC permit. However, the Hutton Family contends that the fact that such material was occasionally on the site had been disclosed within the meaning of clause 7.2 of the Agreement. The documents furnished to Augean and its professional advisers in the course of the Due Diligence process included copies of reports of inspections by SEPA. Those that were disclosed were listed in the Inventory attached to the Disclosure Letter. Matters apparent from the face of those documents included the fact that some of the waste on the site at certain times in the past was not permitted waste.

50. However, very regrettably and although (I find) through inefficiency rather than deliberate concealment, far from all the SEPA reports that existed were disclosed by the Hutton Family. As regards storage of waste on site and waste precluded by the PPC Permit, I accept Augean's submission that the (limited) SEPA reports that were disclosed by the Disclosure Letter present a qualitatively different (that is, rosier) picture of the state of affairs at the Paisley site to the reality. The reality was in my judgment plainly known to the Hutton Family.

Effluent discharge

51. Ms Hutton accepted in cross-examination that the site had received letters from Scottish Water notifying the Paisley site of failures to comply with its effluent discharge consent. Letters from Scottish Water, not disclosed with the Disclosure Letter, also referred to serious parameter failures.

The warranties concerning compliance

52. The material warranties have been set out above. It will be noted that they are very widely drawn; so widely drawn that it would not be surprising in the disposal of a complex business of this nature that one or other of them would be breached to some degree. Add this to the fact that the SPA does not enable a comprehensive defence on the simple lines of "Augean knew what it was buying" and the likelihood of some finding of liability is high.

53. Augean highlights four aspects of the warranties concerning compliance:

> (a) They are not all qualified by reference to the awareness of the Hutton Family. Warranties 20.1 and 29.2 are in unqualified terms. In any event, those warranties which are qualified by awareness must be read with Clause 1.10.
>
> (b) There is no 'de minimis' threshold. Warranties 20.1, 23.1, and 29.2 refer to full compliance, or compliance in all respects.

> (c) Warranty 20.1 not only refers to full compliance but provides that 'there is no reason why any of them [necessary licences or consents] should be suspended cancelled or revoked'
>
> (d) To the extent that the Hutton Family sought to give disclosure against these warranties, they were required to do by the provision of information in the Disclosure Letter which fairly and accurately disclosed the relevant matters "with sufficient details and copy documents to enable the Purchaser to identify the nature and scope of the matters disclosed" (Clause 7.2).

54. Having regard to the findings made above I am satisfied that warranties concerning compliance have been breached. In particular the Company had not conducted its business in accordance with all applicable laws and regulations of the United Kingdom. The Hutton Family was aware of this, and also (with reference to Clause 1.10 of the SPA) any reasonable inquiry would have made it apparent. In addition waste on site included waste that was not within the permit held by the Company.

55. As I have already mentioned, Ms Hutton in fact accepted the existence of non-compliances. The waste experts agreed that the Paisley site was "routinely non-compliant". The non-compliances were not all disclosed in accordance with Clause 7.2 of the SPA.

Waste Stock

56. The issue of the amount and type of waste stock on site ("Waste Stock") additionally gave rise to a number of allegations of breach of the warranties that concerned accounting rather than compliance. Again the material warranties have been set out above.

57. Exercises conducted by Mr Rice on 31 December 2007 and by Grant Thornton on 3 January 2008 in connection with the Completion Stock Take were not comprehensive in relation to Waste Stock. Augean relies instead on a later, May 2009 stocktake. Ms Hutton and Mrs Murdoch did not take up Augean's invitations to review that stocktake at the time. The volume of the Waste Stock, and the costs of disposing of that Waste Stock taking into account its nature were, according to Augean, higher than had ever previously been identified.

58. The position of Mr Iain Webster, the accounting expert called by the Hutton Family, was that an historic provision for Waste Stock could not sensibly be estimated. I do not accept that, though I do accept that there is room for an appreciable margin of difference in any estimation. The May 2009 valuation of Waste Stock liability formed a starting point for the analyses of the accounting expert called by Augean, Mr Simon Cuerden, and I think sensibly so.

59. As recorded above, Clause 7.2 of the SPA provided that the warranties were given "subject to matters fairly and accurately disclosed (with sufficient details and copy documents to enable [Augean] to identify the nature and scope of the matters disclosed and any limitations or restrictions to the warranties) in the Disclosure Letter". The Disclosure Letter included a statement in these terms:

> "7. Historically Waste Stock has not formed part of the Accounts, either as an asset or as a liability. It is currently estimated by the Sellers that the cost of treating Waste Stock is approximately £25,000. Waste Stock held has already been invoiced. Recycled oil from the treatment of Waste Stock is estimated by the Sellers at approximately £5,000".

60. It was therefore clear to Augean that the Accounts (to 31 May 2007) did not include provision for liabilities in respect of Waste Stock. I do not think that Augean's argument, that because the Accounts should be read with the Disclosure Letter so the warranty that the Accounts showed a "true and fair" view applies to the estimate of £25,000, is correct.

61. However the Disclosure Letter did include an estimate. The estimate is attacked by Augean in its expert evidence on the basis that it was not a "reasonable" estimate. Contrary to the submissions of the Hutton Family, in my judgment this is a case where the reasonable person in the position of Augean (the representee) would understand by the words used that the estimate was based on reasonable grounds.

62. The Completion Accounts and Completion Statement did include a provision for Waste Stock of £74,637. Augean did not dispute this provision at the time. In fact in a letter in April 2008 Augean expressly confirmed that the Completion Accounts and Completion Statement "are agreed by Augean Plc without amendment" and went on to state "We also confirm that at today's date there are no known matters which we believe give rise to a claim under the Warranties ...". The Hutton Family are entitled to, and do, observe that Augean did not see the difference between £25,000 and £74,637 as a material misstatement at that time.

63. The Hutton Family argue that it is neither necessary nor appropriate for the Court to attempt to determine the actual extent of liabilities in respect of disposing of Waste Stock. This is because the Completion Accounts value the liability of treating and/or disposing of the Waste Stock, and are deemed to do so accurately. Clause 5.4 of the SPA results in Augean being deemed to accept the Completion Accounts "as complying with clauses 5.2 and 5.3" i.e. as reflecting a count of the Waste Stock and as valuing the liability of treating and/or disposing of the Waste Stock.

64. In my judgment, contrary to the argument of Augean, the deeming provision is not limited to disputes about the Completion Accounts. In any event I also agree with the submission of the Hutton Family that the fact that there was no challenge to an estimate of about £75,000 nor a suggestion that a difference between £25,000 and £75,000 was material, weighs evidentially against Augean in any attempt to say a different assessment should be reached now.

65. Augean's figures for the cost consequences of the Waste Stock were in any event, in my judgment, exaggerated. The majority of the waste on-site was oily-based sludges and liquids. Mr Bowen's cost estimates in October onwards took the price charged by other sites to treat waste. Mr Bowen however accepted in cross-examination that these costings were applied without knowing whether those items could simply be treated on-site or not. In fact on the evidence at trial a large proportion could be processed on-site.

66. In a list of issues helpfully provided by Augean the issues in relation to Waste Stock were identified as follows:

> (a) Taking into account the Disclosure Letter, did the May 2007 Accounts show a true and fair view of the state of affairs of the Company as at the Accounts Date and of the results of the Company for the financial year ended on that date?
>
> (b) Taking into account the Disclosure Letter did the May 2007 Accounts fully provide for all liabilities associated with the treatment and disposal of Waste Stock?

(c) Taking into account the Disclosure Letter, did the October 2007 Accounts accurately identify the Waste Stock held by the Company?

(d) Taking into account the Disclosure Letter, did the October 2007 Accounts fully provide for all liabilities associated with the treatment and disposal of Waste Stock?

(e) Was all information disclosed by the Hutton Family in the Disclosure Letter or otherwise true, complete and accurate in all respects and not misleading because of any omission or for any other reason?

67. In my judgment in this particular case the answer to each is "yes", because of the terms of the Disclosure Letter, and the fact it made clear the Waste Stock did not form part of the Accounts. In any event whilst there is evidence that the liabilities were different from the provision in the Disclosure Letter, Augean has not satisfied me that they were materially different. In relation to issue (e), in my judgment, in this particular case no other criticism by Augean is well founded in relation to Waste Stock.

Quantum on the claim: generally

68. Augean claims for damages for loss measured by the difference between the value of the shares in the Company as warranted, and the value of the shares in fact. It is common ground that that is the correct measure. The Hutton Family did not advance a positive case as to the amount. Augean's case in closing was that the amount should be £2.5 million.

69. Whilst there were respects in which the Company was not as warranted, I cannot begin to accept that a figure of this magnitude, not so far away from one half of the total price, represents a realistic assessment of the loss in fact experienced.

70. I accept Augean's evidence that the Company was valued using a multiple of eight times projected EBITDA for the year ended 31 May 2009. I also accept on the evidence in this particular case that that approach to valuation is an appropriate one, subject always to due allowance where (in particular) any impact on projected EBITDA is likely to be short-term. With that qualification, in the present case the core question is by what amount (if any) was EBITDA over-projected if one takes into account the true costs of compliant operation overall.

71. It is not possible to calculate this with any precision, and there are a great many variables. Having regard to my findings of fact, and the totality of the evidence, factual and expert, that I have heard and doing the best I can I have reached the conclusion that the EBITDA was over-projected by about £100,000 per annum (a figure that gives due allowance where impact on projected EBITDA was likely to be short term). This would lead to a difference between the value of the shares in the Company as warranted, and the value of the shares in fact, of £800,000. That is the figure that I reach as a conclusion.

72. In reaching that conclusion I have been particularly influenced by these considerations:

(a) The expert evidence of Mr Cuerden, called by Augean, estimated an increase in disposal costs of 10% as a percentage of sales, but this assumed a materially greater incidence and impact of breach of

warranties concerned with compliance than I have found in fact to be the case. I also incline to the view that Mr Cuerden did not give sufficient weight to other factors that affect disposal as a percentage of turnover, from general factors (including wider economic changes) to particular factors (including variation in waste allowed on site, and the loss of Ms Hutton's talent in sales).

(b) Disposal costs did in fact increase, both after Mr Bowen had undertaken his October 2008 audit and in the year following the end of the Earn Out Period. There is considerable variance across particular figures, and I do not find the higher figures useful, but nonetheless the absolute level increases materially and remains increased. Again not all of this should however be treated as attributable to the cost of running the business as warranted.

(c) Ms Hutton undertook some calculations, at the time, of the additional costs if waste was shredded and incinerated rather than washed and treated. Mr Webster produced a refined calculation. On the findings I have made a wholesale shift in process was not required to produce a business that was as warranted, but the calculations do suggest higher costs. Indeed as I listened to Ms Hutton giving her evidence at trial I was helped to appreciate another illustration of the cultural difference between Augean and the Hutton Family: the Augean approach would strongly incline to send waste to incinerators; the Hutton Family approach would strongly incline to rely on visual inspection. A business as warranted did not require the former approach.

(d) Some problem areas might be sorted out relatively easily and quickly, rather than have continuing effect. It was put to Mr Neil Canwell, Director of Land Resources for Augean, in cross examination that compliance issues would not automatically result in a decrease in what Augean would be prepared to pay for a business. His response was a fair and sensible one: "It doesn't automatically. We would take a view as to what the management challenge would be in resolving these issues". Another example of a problem being sorted out is by the later change allowed to the Company's permit to increase the range of waste.

73. My assessment of both parties to the SPA is that neither would have walked away had the business been warranted to be as it in fact was. Both would have negotiated further. For completeness, and doing the best I can on very imperfect material, I also record that the reduction that would have resulted in such a negotiation would have been in my judgment, on a balance of probabilities, £800,000.

Quantum on the claim: effluent discharge

74. I take effluent treatment separately. In December 2007 a due diligence report to Augean had highlighted a likely expenditure of £100,000 in relation to effluent treatment systems. Learning about this problem did not cause Augean to offer less for the Company than it had before. However provision was made in Clause 12.1 of the SPA entitling Augean to a contribution of up to £60,000. A £25,575 deduction was made by Augean in respect of the effluent discharge system through the Completion Accounts. Mr Canwell gave evidence that £100,000 was spent by Augean and I see no reason not to accept that evidence.

75. The issue formulated by the Augean in this regard is as follows:

"Are [the Hutton Family] liable to pay Augean £60,000 in respect of costs incurred to improve the

> effluent treatment systems at the site, pursuant to clause 12.1 of the SPA. In particular, on its true construction, does clause 12.1 operate independently of the provisions for determining the final consideration payable for the sale and purchase of the Shares, including determination of the Retention?"

76. In my judgment the answers are that clause 12.1 does not operate independently, that £25,575 of the £60,000 has been accounted for, and that a balance of £34,425 is due.

The counterclaim: Ms Gaynor Hutton's time

77. In the period from January 2008 to 2 December 2008, Ms Hutton contends she spent the equivalent of at least six months of her time working for Augean on business unrelated to the Company, and incurred expenses which she contends would not have been incurred if she had not been working for Augean on business unrelated to the Company.

78. Mr Canwell accepted that Ms Hutton did work from Augean's offices in Wetherby in 2008, and did do some work for Augean in her role as Central Sales Team manager. I accept his evidence as accurate when he said this: "I am not disputing that she spent some time on this work. It was not full time, and it was declining during the six month period...I am not challenging that she was involved in this work but it was not -you know, if I can put it another way, I think in her statement she very much exaggerates the level of involvement she had".

79. It was in the nature of Ms Hutton's job, before and after the Company had been acquired, that she would be away from the Paisley site for part of the week, and often on the road. Initially the Hutton Family claimed that her attendance at what were termed ORA meetings as instances of diversion by Augean, but Ms Hutton accepted in cross-examination that she would have attended those meetings on behalf of the Company anyway. There was a lot of inconclusive evidence about how many days she spent at Wetherby but I was quite satisfied that she could be at Wetherby on business for the Company.

80. Activity of the sales team which Ms Hutton was supervising for Augean in the months between July and November 2008 generated new work for the Paisley site. In keeping with the dynamic person I saw in the witness box, she led sales energetically and continued to generate ideas and proposals, some no doubt of use both to the Company and to Augean.

81. Augean submits that a reasonable assessment would be that over a six month period during the Earn Out Period she spent one day a week on "non-Paisley matters for Augean". In my view that is a reasonable assessment. Taking into account the fact that there is not a bright line between the business of the Company and that of Augean, and between her work on one rather than the other, I do not consider this proportion in the circumstances of this case places Augean in breach of the requirement that "substantially all of the time" of Ms Hutton would be expended on the affairs of the business and would not "be employed for any material time in anything other than the promotion and development of the Business of the Company".

The counterclaim: alleged interference by Augean at the site

82. The evidence of Mr Canwell was that "the only matters where [Augean] was forced to step in were in relation to regulatory issues" and that "the only steps [Augean] took were to ensure compliance ...".

83. On the evidence I heard at trial I find that Augean asserted quite considerable control over all operational matters at the site. Notes of a meeting on 2 December 2008 refer to Mr Bowen, Group Operations Director for Augean, taking overall management responsibility for the site. Following the meeting, Mr Bowen made it clear to staff that he was in "full control".

84. Crucially however, Augean took control as a result of its concerns about the treatment of waste, and including about the process for Hi-Pod waste. There was some basis for those concerns. Although the basis was not as large as Augean suggested I am not prepared to conclude that Augean exercised undue control in the circumstances. Given the tenor of some of the allegations in this area, I record that I find also that Augean was properly motivated by its genuine concerns, and was not motivated by a desire to interfere for an ulterior commercial motive.

85. However this must all have seemed very heavy handed to the Hutton Family. There was more to come. At a meeting on 17 February 2009 the Hutton Family was informed that until further notice the site would be managed by a Mr John Weetman. On 19 February 2009, Mr Canwell sent an email to Ms Hutton stating that Augean had "changed the management of the operations on site in order to ensure that the site is operating within its permit. John Weetman is responsible for site operations until further notice". By 20 February 2009, Augean had arranged for Mr Bowen, a Mr Sharif and Mr Weetman to "take overall management responsibility" and to approve each skip prior to removal from site. On 22 February 2009, Mr Canwell told the Hutton Family not to "engage directly with operational staff on the site". In March a new control structure was imposed by Augean. It also made an announcement in these terms: "we require you from now on to consult with Nigel Bowen before any instructions are issued to site operational staff. We will not contradict your reasonable requests but we require you to consult with Nigel so that Nigel can be confident that the site is operating compliantly...".

86. The Hutton Family argue that Clause 6.12.3 of the SPA does not enable Augean to take over the management of a site merely because of a view (even if in good faith or reasonable) that the business was not being operated in accordance with legal and regulatory requirements. Furthermore, properly construed Clause 6.12.3 requires the non-compliance to be material. The answer to this line of submission is that there was in fact sufficient material non-compliance with legal and regulatory requirements to justify the steps that Augean took, even if others might have taken fewer steps in like circumstances.

87. In this part of the case, a number of particular allegations, principally levelled by Ms Hutton, did not survive scrutiny on cross examination as, I think, she herself came to realize. These included her challenge to the correctness of Mr Bowen's approach to the treatment of grinding sludge, her challenge to the response of Augean to the handling of sodium stearate, and her challenge to the treatment of overtime arrangements.

88. Overall Ms Hutton also accepted, to her credit, that Augean did not 'invent' the compliance issues it raised. Augean was entitled to make the submission it did in closing that that acceptance disposes of any case, hinted at and felt by at least some of the Hutton Family, that there was an Augean conspiracy aimed at damaging the Company's business.

The counterclaim: the Earn Out Accounts

89. The allegation that Augean deliberately manipulated EBIT to affect the Earn Out Accounts is a strong allegation of impropriety. It has no foundation in my judgment.

90. There was a decision to dispose of waste stock at an increased rate during the Earn Out Period. However the reason

for this was that a concerted effort was necessary to reduce stock because waste could not be stored on site for more than a permitted period.

91. There was some evidence that Augean accepted a tender from Avanti in May 2009 before another entity responded with its (perhaps more competitive) tender, but this took things nowhere to my mind. There was some evidence that Augean charged a profit element where waste was routed through other sites owned by Augean, but this does not begin to make out the allegation of manipulation.

92. I was not impressed by the evidence attempting to suggest that the Earn Out Accounts were inconsistent with the Completion Accounts in a way that would support the allegation of manipulation. Nor was I persuaded that there was a change in accounting practice. I was not satisfied that various adjustments to the Earn Out Accounts in respect of April and May 2009, proposed by Mr Webster (at paragraph 5.2 of his first report) were appropriate. Overall I preferred the evidence of Mr Cuerden in relation to the Earn Out Accounts.

Conclusion

93. In my judgment the claim is made out but only in part, and the counterclaim is not made out.

94. Having seen the cost and energy devoted to this trial and diverted from the area of business in which so many of the witnesses have experience and expertise, I add that it is most unfortunate that a matter of this nature should have ended up at trial. At times, on both sides, I could see it being driven by strength of feeling rather than by objective assessment. In these circumstances I am especially grateful to the legal teams for their part in helping to ensure that the trial was conducted appropriately and without distraction.