INDUSTRY VIEWPOINT

Deemed contracts have caused turmoil in the energy market – now they are poised to do the same for water

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"Effectively, the legislative framework provides for a contract being 'deemed' to exist between the parties"

As a barrister with a practice in downstream energy supply litigation, who has frequently had to wrestle with the statutory concept of a deemed contract in that context, it was with interest that I learnt that the water industry was to be subjected to the same as a result of an opening of the water market.

Until the market opened, most premises in England and Wales took water and sewerage services from regional monopoly companies. Legislative changes introduced by the Water Act 2014, which took effect from April 2017, created the largest retail water market in the world.

Rather than being forced into an arrangement with a monopoly supplier, as happened historically, the changes permitted all non-household water customers in England, and some in Wales, to choose their water and wastewater retailer to cover billing, metering, and other customer care-related matters.

To be able to offer the service, suppliers have to obtain a Water Supply and Sewerage Licence (WSSL) from the regulator, Ofwat. Existing companies have to separate their wholesale and retail businesses.

The concept of a deemed contract feels alien to those with a legal background who have not come across one before. Effectively, the legislative framework provides for a contract being "deemed" to exist between the parties, rather than them taking steps to enter into an agreement and negotiate terms and conditions, supply dates and so on. Fundamentally, there is no offer or acceptance. Often there has been no interaction at all between the parties.

Deemed contracts may arise in the context of water supply when an existing monopoly company opts not to obtain a WSSL, or where a WSSL retailer can no longer offer a retail service – if insolvent, for example. In the former circumstances, the existing supplier transferred customers to a licensed retailer. In the latter, Ofwat would appoint an interim supplier. Also, when an entity moves into premises and does not enter into an express contract with a retailer, it becomes party to a deemed contract with the existing supplier. A deemed contract may also arise when a fixed term express contract comes to an end.

A water supplier must prepare a "scheme containing the terms and conditions that, in the absence of agreed terms and conditions, are to apply to [the services it supplies under its WSSL]". The scheme must be published on its website, and the relationship between the supplier and customer is heavily governed by requirements imposed by Ofwat. For example, customers are not tied into a deemed contract because that would, of course, be counter to the aim of customer freedom to engage with the market.

The supplier is also required to inform the customer that a deemed contract is in place, and to continue to regularly remind it of that fact, with information about terms available under other, express, contracts.

There is often no two-way contact between the parties, so it is difficult for the supplier to ascertain who its counterparty to a deemed contract is, and disputes arise when it pursues a party that denies liability.

That is particularly so in the case of smaller business premises where there may be a high turnover of occupiers.

The oldest deemed contract in the water industry can only have come into existence within the past 12 months or so, and it is safe to assume that any non-payment issues have been working their way through the water companies' debt-collection processes; but, as with energy it seems inevitable that litigation will be needed to hold a deemed contract counterparty to account, and that the same types of issues and disputes will arise.

EXPERT VIEW

RYAN DAVIES

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"The customer must be central to performance standards work"

The business retail market celebrated its first birthday in April. In 2019, we hope to look back on the successful implementation of a standardised approach to reporting market and operational performance standards, including clearly defined assurance activities for this.

The customer must be central to this work, with a focus on the quality of the work and the service provided.

This approach would help capture all customer outcomes, including cancelled work and outstanding tasks, reflecting the customer experience more accurately. Charging for operational performance standards (OPS) could then be introduced in April 2019 once the changes have been embedded.

A closer look at experiences on the market performance standards (MPS) so far will tell us if the recipe needs tweaking. If so, we shouldn't be afraid of taking the time to get OPS right.

The way in which fines from market performance are redistributed should be considered. Reinvesting the money into an industry-led continuous improvement forum and MOSL's digital strategy committee would enable faster, funded change for the market and better outcomes for customers. It is critical this is done alongside standardisation of reporting and assurance activities.

Also, data is essential to achieve successful customer outcomes. Can we bake more into the data dictionary to support future change and consistency?

MOSL is drafting a market performance operating plan – to be published in July – that will provide a prioritised approach to improvement. Customers and their outcomes should be the number one priority. It should also set out the assurance activities for MPS and OPS.

With the right conviction from market participants and MOSL, there is every chance wholesalers, retailers and, most importantly, customers will be enjoying birthday cake again next year. You just don't want me making it.