



Ofwat's final decision in respect of an appeal made by Mr R Spurling against Anglian Water under section 105b of the Water Industry Act 1991

1. Introduction

- 1.1. On 1 July 2011, the Water Industry (Scheme for Adoption of Private Sewers) Regulations 2011 (“**the Regulations**”) came into force, as did the Secretary of State’s scheme for the compulsory adoption of all private sewers, lateral drains and pumping stations in “the area of every sewerage undertaker whose area is wholly or mainly in England” (“**the Scheme**”).
- 1.2. The Regulations and the Scheme give effect to Government policy by placing a duty on sewerage companies to adopt all private sewers, lateral drains and pumping stations (other than those that are expressly exempt). Regulation 3(8) specified 1 October 2011 as the date for the compulsory transfer of all private sewers and lateral drains. Pumping stations must be transferred by 1 October 2016.
- 1.3. The Water Industry Act 1991 (“**the Act**”) provides for an appeal against a company’s compulsory transfer of private sewers and lateral drains. Such an appeal must be lodged under section 105B of the Act which allows an appeal on two grounds, namely:
 - i. that the sewerage company is not under a duty to transfer (for example, because a private sewer is on Crown land and is therefore exempt); or
 - ii. that the adoption would result in serious detriment to the appellant.
- 1.4. On 27 September 2011, the Water Services Regulation Authority (“Ofwat”) received an appeal submitted by Mr. Richard Spurling (“the Appellant”) of [REDACTED] (“the Property”) under section 105B of the Act against a proposal by Anglian Water Services Limited (“Anglian Water”) to adopt the lateral drain which runs from the curtilage of the Property to the public sewer which is located in the vicinity of numbers [REDACTED]

██████████ (“the Lateral Drain”).

- 1.5. This appeal is on both of the two grounds set out at paragraph 1.3 above. These are for the Appellant to demonstrate.
- 1.6. This document sets out Ofwat's final appeal decision. This document adopts the following structure:
 - i. The factual background (at part 2),
 - ii. Ofwat's procedure (at part 3),
 - iii. The issues to be decided (at part 4), and
 - iv. Ofwat's decision (at part 5).

2. Factual Background

The parties

- 2.1 We understand that the Appellant owns the Property.
- 2.2 Anglian Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in the area of the Lateral Drain.

The site

- 2.3 The plan attached at Annex A (“**the Plan**”) shows the Property and the Lateral Drain and (opposite the Property) an area of land labelled “possible new site for development” (“**the Development Plot**”).
- 2.4 The ‘Pipework’ as shown on the Plan includes, within the curtilage of the Property, a section of private drain (which is not a lateral drain) which is also owned by the Appellants. Such private drain is not the subject of this appeal (see paragraphs 5.1, 5.2 and 5.11 below). In this draft decision, we refer to the Lateral Drain (which is the subject of this appeal) and such private drain (which is not a lateral drain) collectively as “**the Pipework**”.

Chronology of key events

- 2.5 In 2008, the Appellant built the Property and installed the Lateral Drain, which is approximately 40 metres in length. In a telephone conversation with Ofwat on 16 January 2012, the Appellant set out that he paid approximately £15,000 to install the Lateral Drain
- 2.6 On 27 September 2011 the Appellant submitted an appeal under section 105B of the Act against Anglian Water's proposal to adopt the Lateral Drain compulsorily.

The Appellant's submissions

- 2.7 The Appellant does not accept that there is a duty on Anglian Water under the Regulations and the Scheme to adopt the Lateral Drain; and
- 2.8 The Appellant considers that the compulsory transfer of the Lateral Drain would cause serious detriment because:
- i. The Appellant would not be able to secure any financial contribution from potential developers of the Development Plot, for connecting to the Lateral Drain, if the Lateral Drain were adopted by Anglian Water; and
 - ii. The Appellant paid approximately £15,000 to install the Lateral Drain and would be unable to recover such monies from such developers.

3. Ofwat's procedure

- 3.1 Since receiving the appeal, Ofwat has gathered and considered the information necessary to make a decision. In particular, Ofwat spoke to the Appellant on 16 January 2012 to verify the age of the Lateral Drain and how much it cost to install, and whether there were any firm proposals to build on the Development Plot.
- 3.2 On 23 May 2012, Ofwat issued a draft decision to the Appellant and to Anglian Water for their consideration. We received no comments from the Appellant. Anglian Water replied in a letter dated 7 June 2012 which stated that it had no further written representations to make.
- 3.3 Ofwat has not sought to respond to every point made by the parties in their

submissions and correspondence in advance of making this final decision. However, where Ofwat has needed clarification or additional information from the parties, it has been obtained. Ofwat is satisfied that it now has sufficient information to issue a final decision

4. The issues to be decided

4.1. The issues to be decided are whether:

- i. Anglian Water has a duty under the Regulations and the Scheme to adopt the Lateral Drain; and
- ii. Whether the proposed transfer would result in serious detriment to the Appellant.

5. Ofwat's decision

The Pipework

5.1 Section 219 of the Act sets out statutory definitions of the terms 'drain', 'lateral drain' and 'sewer' which are applicable to the Regulations and the Scheme. We set out those definitions in Annex B. In terms of those definitions, the Pipework currently comprises a private drain which is not a lateral drain, and a lateral drain as follows:

- i. from the curtilage of the property to the public sewer located in the vicinity of [REDACTED] – lateral drain; and
- ii. within the curtilage of the Property – drain (and not a lateral drain).

Duty to adopt (section 105(B)(3)(a) of the Act)

5.2 As set out at paragraph 1 above, the Regulations and the Scheme apply to private sewers and lateral drains. However, the Regulations and the Scheme do **not** apply to any private drain which is not a lateral drain. Accordingly, and to confirm, Anglian Water's proposal specified in paragraph 1.4 above does not relate to the drain which forms part of the Pipework which is not a lateral drain, and that drain does not transfer to Anglian Water by virtue of the Regulations and the Scheme, i.e. the part of the Pipework that is situated

within the curtilage of the Property.

- 5.3 The extent to which the Pipework is a lateral drain (i.e. the Lateral Drain) and a drain which is not a lateral drain, depends on the issue of the extent of the curtilage of the Property. Notices issued by sewerage companies under the Regulations and the Scheme do not address such issues and it is not necessary for Ofwat to address this issue as part of this draft decision. The issue will fall to be determined by interested parties in the future, as and when necessary.
- 5.4 With regard to the Lateral Drain: Regulations 5(1) and 5(2) (Exempt private sewers and exempt private lateral drains) set out that a private sewer or private lateral drain is exempt for the purposes of the Scheme if the sewer or lateral drain:
- i. is owned by a railway undertaker; or
 - ii. is situated on or under "Crown land" (as defined in Regulation 5(4)) (and Regulation 5(2)(b) also applies).
- 5.5 Ofwat is satisfied that neither paragraph (i) nor paragraph (ii) above applies in relation to the Lateral Drain and that therefore:
- i. the Lateral Drain is not exempt from the Scheme; and
 - ii. Anglian Water has a duty under the Regulations and the Scheme to adopt the Lateral Drain.

Serious detriment (section 105B(3)(a) of the Act)

- 5.3. The Appellant considers that the transfer of the Lateral Drain would be seriously detrimental as it would result in a loss of potential income from the development of the Development Plot (for a connection to the Lateral Drain). However, the Appellant confirmed in a telephone conversation with Ofwat on 16 January 2012, that he is not aware of any firm plans to develop the Development Plot.
- 5.4. We consider that in order to make out serious detriment there has to be actual effect. We consider that there is no actual effect if a development is merely proposed. In this case, there are no firm proposals to develop the Development Plot and there are no arrangements in place with regard to any

connection to be made to the Lateral Drain by any developer of the Development Plot. Such arrangements might not be needed at all if the Development Plot is not developed, or if it is not developed so as to require a connection to the Lateral Drain. We therefore consider any potential case of detriment to be entirely speculative at this stage.

- 5.5. The Appellant also cites his payment of approximately £15,000 to install the Lateral Drain, and considers that the inability to recover such monies would represent serious detriment. However if the Lateral Drain were not to transfer, the Appellant would be liable for all the future costs of maintaining it. The liability for these costs would come to an end upon the transfer of the Lateral Drain. We do not consider that the loss of an opportunity to recover part or all of the costs of providing the Lateral Drain, when weighed against the benefit of no longer being liable for the costs of maintaining the Lateral Drain, constitutes serious detriment.
- 5.6. Therefore, we consider that the Appellant would not suffer serious detriment as a result of the adoption of the Lateral Drain.
- 5.7. We also note that we have considered separately the Appellant's appeal by reference to the Appellant's rights under the European Convention on Human Rights, notably Article 1 of the First Protocol to the Convention. We have concluded that a payment of compensation to the Appellant would not be needed on the transfer of the Lateral Drain to Anglian Water in order to ensure a fair balance between the Appellant's interests and the public interest in a more integrated sewerage system. Furthermore, we do not consider that the Appellant would suffer serious detriment if compensation were not paid to the Appellant on a transfer of the Lateral Drain to Anglian Water.

Conclusion

- 5.8. Ofwat's final decision is that Anglian Water's proposal to adopt the Lateral Drain should be allowed and that the Lateral Drain shall therefore transfer to Anglian Water with effect from [date 21 days from the date of our decision]
- 5.9. In making its decision under section 105B(9)(a) of the Act, Ofwat is able to specify conditions including payment of compensation by Anglian Water. Ofwat has concluded that in this case it would not be appropriate to specify any conditions, including any condition directing the payment of compensation.

Annex A

[redacted]

Annex B – Some of the definitions set out in section 219(1) of the Water Industry Act 1991 (“the Act”), and subsection (2) of section 219 of the Act

“drain” means (subject to subsection (2) below) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage;

“lateral drain” means—

(a) that part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate; or

(b) (if different and the context so requires) the part of a drain identified in a declaration of vesting made under section 102 above or in an agreement made under section 104 above;

“sewer” includes (without prejudice to subsection (2) below) all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings;

Subsection (2) of the Act:

(2) In this Act—

(a) references to a pipe, including references to a main, a drain or a sewer, shall include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and

(b) references to any sewage disposal works shall include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes;

and, accordingly, references to the laying of a pipe shall include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another.