



Ofwat's final decision in respect of an appeal made by Mr and Mrs Bradford against Severn Trent 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 28 September 2011, the Water Services Regulation Authority (**“Ofwat”**) received an appeal by Mr. and Mrs. D. Bradford (**“the Appellant”**) of [REDACTED] (**“the Property”**) under section 105B of the Act against a proposal by Severn Trent Water Limited (**“Severn Trent Water”**) to adopt a private sewer at the Property (**“the Sewer”**).

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 decision on this matter. It 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 draft decision (at part 5).

2. Factual Background

The parties

2.1. The Appellant owns the Property.

2.2. Severn Trent Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in the Edingley area.

The Sewer

2.3. The plan attached at Annex A (“**the Plan**”) shows the Property and the approximate location of the Sewer. The Sewer is located at the Property but does not serve the Property. The Plan also shows [REDACTED] and [REDACTED] [REDACTED] which adjoin the Property and are served by the Sewer via pipework on those properties.

Chronology of key events

2.4. On 14 February 1978, the Appellant entered into a deed (“**the Deed**”) with Abbey National Building Society and [REDACTED]. Under the Deed, the Appellant granted an easement to [REDACTED] and subsequent owners of [REDACTED] to lay a sewer or drain (i.e. the Sewer) at the Property and for the same to be used for the passage of sewage from [REDACTED] and [REDACTED] to the public sewer in [REDACTED].

2.5. Amongst other matters, the Deed stipulated that owners of [REDACTED] would keep the Sewer in good repair and condition and promptly reinstate land and

fences at the Property to the satisfaction of the Appellant in the event of works to repair, renew or maintain the Sewer.

2.6. The Deed also set out (at clause 3(b)) that the Appellant (and successive owners of the Property) “may divert the line of the [Sewer] to permit the development of their said land subject to making good any damage caused to the said sewer or drain provided nevertheless that the perpetuity period in respect of this clause shall be Eighty years from the date hereof”. This means that the Appellant (and successive owners of the Property) has the right to divert the Sewer, at their own expense, to allow the development of the Property until 14 February 20[58].

2.7. On 28 September 2011, the Appellant submitted an appeal under section 105B of the Act against Severn Trent Water’s proposal to adopt the Sewer compulsorily.

The Appellant’s submissions

2.8. The Appellant does not accept that there is a duty on Severn Trent Water under the Regulations and the Scheme to adopt the Sewer, because the Deed provides for the repair and maintenance of the Sewer.

2.9. The Appellant also considers that the compulsory transfer of the Sewer would cause serious detriment because the Appellant would lose the right under the Deed to divert the Sewer to accommodate future development at the Property with the Appellant controlling costs and access.

3. Ofwat's procedure

3.1. Since receiving the appeal, Ofwat has gathered and considered the information necessary to make a draft decision. In particular, the Appellant has provided a copy of the Deed.

3.2. On 20 September 2012, Ofwat issued a draft decision to the Appellant and to Severn Trent Water for their consideration. We received no comments from the Appellant. Severn Trent Water confirmed that it had no representations to make.

3.3. Ofwat has not sought to respond to every point made by the Appellant in its submissions and correspondence in advance of making this decision. However, to the extent that Ofwat has needed clarification or additional information from the parties, it has been obtained. Ofwat is satisfied that it now has sufficient information to make a final decision.

4. The issues to be decided

4.1. The issues to be decided are whether:

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

5. Ofwat's decision

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

5.1. 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).

5.2. Ofwat is satisfied that neither paragraph 5.1. (i) nor paragraph 5.1.(ii) above applies in relation to the Sewer and that therefore:

- i. the Sewer is not exempt from the Scheme; and
- ii. Severn Trent Water has a duty under the Regulations and the Scheme to adopt the Sewer.

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

5.3. The Appellant considers that the transfer of the Sewer would be seriously detrimental for reasons set out at paragraph 2.9 above.

5.4. The current right of the Appellant under the Deed to divert the Sewer ("**the Contractual Right**") is set out at paragraph 2.6 above. In essence, the Appellant currently has a right to divert the Sewer, at its cost, to enable the development of the Property.

5.5. If the Sewer were to transfer to Severn Trent Water, the Sewer would be a

'relevant pipe' for the purposes of section 185 of the Act. In these circumstances, the Appellant would have a statutory right on the terms set out in section 185, to require Severn Trent Water to alter or remove the Sewer to enable the Appellant to develop the Property ("**the Statutory Right**"). Under section 185(5), Severn Trent Water would be entitled to recover its expenses reasonably incurred in altering or removing the Sewer for the Appellant.

- 5.6. Given the similarities between the Contractual Right and the Statutory Right, to divert the Sewer at the Appellant's cost to enable development, Ofwat does not consider that a loss of the Appellant's Contractual Right constitutes serious detriment. This is because the Appellant would have a Statutory Right and not a Contractual Right to divert the Sewer.
- 5.7. In order to make out serious detriment we consider there has to be actual effect. A development that is merely proposed or envisaged does not result in actual effect. In this case, there are no firm proposals to develop the Property and there are no firm proposals with regard to any diversion of the Sewer. A diversion of the Sewer might not be needed at all if the Property is not developed, or if it is not developed so as to require a diversion of the Sewer. We therefore consider any potential case of detriment to be entirely speculative at this stage.
- 5.8. For completeness, we also note that if the Sewer were to transfer to Severn Trent Water, Severn Trent Water would become responsible for maintaining and repairing the Sewer in place of the owner from time to time of [REDACTED]. The liability for these costs, which could be substantial, would come to an end upon the transfer of the Sewer. We do not consider that this transfer of responsibility would constitute serious detriment to the Appellant.
- 5.9. 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 Sewer to Severn Trent 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 Sewer to Severn Trent Water.
- 5.10. Therefore, we consider that the Appellant would not suffer serious detriment as a result of the adoption of the Sewer.

Conclusion

5.11. Ofwat final decision is that Severn Trent Water's proposal to adopt the Sewer should be allowed and that the Sewer should transfer to Severn Trent Water with effect from **2 April 2013**.

5.12. In making its decision under section 105B(9)(a) of the Act, Ofwat is able to specify conditions including payment of compensation by Severn Trent 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.