



Ofwat's final decision in respect of an appeal made by Mr and Mrs Guy 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(s).
- 1.4. On 24 August 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal by Mr David and Mrs Dorothy Guy (“**the Appellants**”) of [REDACTED] (“**the Property**”) under section 105B of the Act against a proposal by Severn Trent Water Limited (“**Severn Trent Water**”) to adopt the private lateral drain which serves the Property (“**the Lateral Drain**”) and which runs from the curtilage of the Property and under 3 [REDACTED] to a public sewer or public lateral drain

located under [REDACTED].

- 1.5 This appeal is on both of the two grounds set out at paragraph 1.3 above. These are for the Appellants to demonstrate.
- 1.6. This document sets out Ofwat's final appeal decision (following a draft decision issued 6 December 2012). This document adopts the following structure:
 - iii. The factual background (at part 2),
 - iv. Ofwat's procedure (at part 3),
 - v. The issues to be decided (at part 4), and
 - vi. Ofwat's decision (at part 5).

2. Factual Background

The parties

- 2.1 We understand that the Appellants own the Property and the Lateral Drain.
- 2.2 Severn Trent 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 approximate locations of the Property, neighbouring properties at No [REDACTED] and 3 [REDACTED], and the Lateral Drain.
- 2.4 The pipework shown on the Plan (by a dotted line highlighted yellow) includes, within the boundary of the Property, a section of private drain (which is not a lateral drain) which is also owned by the Appellants. The private drain is not the subject of this appeal (see paragraphs 5.1 and 5.2 below). In this final decision, we refer to the Lateral Drain (which is the subject of this appeal) and the private drain (which is not a lateral drain) collectively as “**the Pipework**”.

Chronology of key events

- 2.5 The Lateral Drain serves the Property and no other property. In 2011, the Appellants spent a considerable amount of money to replace 24 metres of the Lateral Drain. This was required because of root ingress from neighbours' trees.
- 2.6 On 24 August 2011, the Appellants submitted an appeal under section 105B of the Act against Severn Trent Water's proposal to adopt the Lateral Drain compulsorily.

The Appellants' submissions

- 2.7 The Appellants do not accept that there is a duty on Severn Trent Water under the Regulations and the Scheme to adopt the Lateral Drain; and
- 2.8 The Appellants consider that the compulsory transfer of the Lateral Drain would cause serious detriment because:
- i. the Appellants would lose the ability to control connections to the Lateral Drain from possible future developments in the garden of 3 [REDACTED], which would be to the Appellants' financial detriment ("**the No.3 Development Issue**");
 - ii. while 3 [REDACTED] currently drains under [REDACTED] to the public sewerage system located under [REDACTED] on transfer of the Lateral Drain the Appellants would (to their financial detriment) lose their ability to control a connection to the Lateral Drain by the owners of 3 [REDACTED]. The owners of 3 [REDACTED] may want such a connection if problems develop with their property's current drainage arrangements ("**the Replacement Connection Issue**");
 - iii. the transfer would diminish the ability of the Appellants and future owners of the Property to develop the Property ("**the Ability to Develop Issue**");
 - iv. if Severn Trent Water required a payment for allowing a development at the Property to connect to the Lateral Drain, this would represent financial detriment to the Appellants ("**the Connection Charge Issue**"); and
 - v. the transfer would represent the loss of an asset on which the Appellants expended considerable costs in 2011 ("**the Asset Loss Issue**").

3. Ofwat's procedure

3.1 On 6 December 2012 Ofwat issued a draft decision to the Appellants and Severn Trent Water for their consideration. We received a response to the draft decision from Severn Trent Water on 18 December 2012 stating that it had no comments on the draft decision. We received an email from the Appellants on 2 January 2013, which provided representations. The Appellants have not provided any new arguments or evidence in support of those representations, and reiterated points previously considered in the draft decision. In summary the Appellants made the following points in their representations:

i. On the No. 3 Development Issue:

“[...] Taking into consideration the development which has taken place and is continuing to take place in the immediate area in recent years and the use of gardens for new house building. We consider the effect of serious detriment to be of more actual consequence than the draft decision has taken into account [...] Although speculative presently, the result of transfer would result in a loss of considerable future premium to the Appellants [...]”

ii. On the Replacement Connection issue:

“If the private sewer were transferred to Severn Trent, this would disadvantage the Appellants and future owners of the property in having to first seek permission [...] to connect into their sewer and at a cost decided by Severn Trent. No current connection costs, other than infrastructure costs, presently exist. Future expensive connection costs would benefit the profits of a private company (Severn Trent), if transfer proceeded [...]. This situation would not exist if the line were not to transfer.”

iii. On the Replacement Charge issue:

“Half the total run of pipework of the proposed transfer [...] has already been replaced to a high standard with low maintenance plastic sewer piping in 2011, cost to the Appellants. The loss of ownership of the line would cause detrimental loss to the Appellants based on this action. There would be no financial benefit to the Appellants in the transfer of responsibility for maintaining the line [...]”

iv. On the Asset Loss issue:

“The Appellants have already accepted the costs and their liability for maintaining the private sewer line [...] the actual effect of the loss of future potential revenue, which would far exceed the potential future maintenance costs of the line [...] We therefore consider that such a transfer of our private owned sewer would have no other benefit of **actual effect** other than of future financial revenue to Severn Trent Water. This future financial revenue would **not** benefit the public interest and would be of detriment to the Appellants.”

- 3.2 We address each of the arguments raised by the Appellants in their response to the draft decision in section 5 below.
- 3.3 Ofwat has not sought to respond to every point made by the Appellants in their submissions and correspondence throughout the course of this appeal. However, Ofwat has responded to what we consider to be the material issues raised by either party. Where Ofwat has needed clarification or additional information from the Appellants, this 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. Severn Trent 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 Appellants.

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. In terms of those definitions, the Pipework currently comprises a private drain which is not a lateral drain, and a lateral drain (i.e. the Lateral Drain) which runs from the boundary of the Property to the public sewer or public lateral drain located under 3 [REDACTED].

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, Severn Trent 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 Severn Trent 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 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).

5.4 Ofwat is satisfied that neither paragraph 5.3 i. nor paragraph 5.3 ii. above applies in relation to the Lateral Drain and that therefore:

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

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

5.5 The Appellants consider that the transfer of the Lateral Drain would be seriously detrimental for the five reasons set at paragraph 2.8 and 3.1 above. Each of those reasons is considered below.

The "No.3 Development Issue"

5.6 We consider that in order to make out serious detriment there has to be actual effect. In the draft decision, we explained that the Appellant did not submit any evidence to suggest that there were firm proposals or any planning permission to develop 3 [REDACTED] or evidence to suggest there were proposals in place for the Lateral Drain to serve any development of that property. In response to the draft decision, the Appellant confirmed that the No.3 Development Issue is

“speculative presently”. . We consider that in order for there to be serious detriment there has to be actual effect. We consider that there is no actual effect if a future connection is merely proposed or envisaged and no firm proposals are in place regarding a possible connection to the Lateral Drain.

5.7 A connection to the Lateral Drain might not be needed at all if 3 [REDACTED] is not developed, or if 3 [REDACTED] is developed and an alternative route is found to connect to any development to the public sewer without a need to use the Lateral Drain. We therefore consider any potential case of detriment with regard to the No. 3 Development Issue to be speculative and transfer of the Lateral Drain will not cause the Appellants serious detriment.

The “Replacement Connection Issue”

5.8 In the draft decision we explained that we were not aware of any issue concerning the current drainage arrangements for 3 [REDACTED] which might prompt the current or future owners of that property to seek to change how that property connects with the public sewerage system. Further, even if such issues were to arise, that would not necessarily mean that the owners of 3 [REDACTED] would seek a connection to the Lateral Drain.

5.9 The Appellants in their response to the draft decision reiterated their previous arguments and have not presented new evidence to suggest that the current or future owners of 3 [REDACTED] are currently proposing or planning in the future to connect their drain to the Lateral drain and any such connection is speculative.

5.10 We therefore consider that a transfer of the Lateral Drain will not cause serious detriment with regard to the Replacement Connection Issue.

The “Ability to Develop Issue” and the “Connection Charge Issue”

5.11 The Ability to Develop Issue and the Connection Charge Issue are related so we respond to them together.

5.12 The Appellants confirms that there are no firm proposals to develop the Property that would require a connection to the Lateral Drain and as noted at 5.6 the Appellants states that the prospect of future development at No. 3 [REDACTED] is ‘speculative presently’.

5.13 If the Lateral Drain was not to transfer and the Appellants developed their Property by building an additional dwelling on it, the Appellants would have to pay their own contractor to connect a new dwelling to the Lateral Drain. Equally

if the Lateral Drain did transfer to Severn Trent Water, and the Appellants built an additional dwelling on the Property the Appellants could ask Severn Trent Water under section 106 of the Act to allow drains or sewers to connect with the Lateral Drain. Severn Trent Water could charge its reasonable costs for carrying out such a connection under section 107 of the Act. Ofwat has powers to decide disputes about a sewerage company's connection costs.

5.14 Furthermore if the Appellants decided to develop the Property in a way that required the Lateral Drain to be moved and relocated and the Lateral Drain did not to transfer the Appellants would have to pay their own contractor to do the work. Equally if the Lateral Drain were to transfer to Severn Trent Water the Appellants would have a statutory right, under section 185 of the Act to require Severn Trent Water to alter or remove the Lateral Drain to enable the Appellants to develop the Property. Under section 185(5), Severn Trent Water would be entitled to recover its expenses reasonably incurred in altering or removing the Lateral Drain for the Appellants.

5.15 If the Lateral Drain were to transfer we do not consider that a right of Severn Trent Water to charge for the connection of new premises to the Lateral Drain or to charge to divert or relocate the Lateral Drain would cause serious detriment when weighed against the fact that the Appellants would have to pay their own contractor to do the same work if the Lateral Drain were not to transfer.

5.16 We do not consider that the Appellants would suffer serious detriment in connection with the Ability to Develop Issue and Connection Charge Issue, for the reasons set out above.

The “Asset Loss Issue”

5.17 The Lateral Drain was installed to provide an important drainage service to the Property. Without it the Appellants could not have connected the Property to the public sewer. We note that the Appellants paid its own contractor to install the Lateral Drain. Had the Appellants not paid its own contractor to install the Lateral Drain it would have to have paid the relevant sewerage authority to install it instead when the Lateral Drain was installed in 1972. Either way the Appellants had to pay the cost of installing the Lateral Drain. The Appellants have not provided any evidence to show that there were alternatives to laying the Lateral Drain to connect the Property to the public sewer. Nor has the Appellants submitted evidence to show that the Lateral Drain was built for any other purpose than to drain the Property and that the cost of construction could be re-couped through future connections to it.

5.18 We note the Appellants response to the draft decision that it accepts the costs and liability of maintaining the Lateral Drain. We also note that the Appellants spent a considerable sum of money in 2011 replacing 24 meters of the Lateral Drain. The liability for these costs would come to an end upon the transfer of the Lateral Drain. We do not consider that the Appellants loss of ownership of the Lateral Drain, when weighed against the substantial benefit of no longer being liable for the costs of maintaining it, constitutes serious detriment.

European Convention on Human Rights

5.19 We also note that we have considered separately the Appellants' appeal by reference to the Appellants' 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 Appellants would not be needed on the transfer of the Lateral Drain to Severn Trent Water in order to ensure a fair balance between the Appellants' interests and the public interest in a more integrated sewerage system. If the Lateral Drain were to transfer it would become the responsibility of Severn Trent Water which is a well-resourced company with expertise in maintaining sewers and drains. Furthermore, we do not consider that the Appellants would suffer serious detriment if compensation were not paid to them on a transfer of the Lateral Drain to Severn Trent Water.

5.20 Therefore, we consider that the Appellants would not suffer serious detriment as a result of the adoption of the Lateral Drain.

Conclusion

5.21 Ofwat concludes that Severn Trent Water's proposal to adopt the Lateral Drain should be allowed and that the Lateral Drain should transfer to Severn Trent Water with effect from 14 June 2013.

5.22 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.