



**Ofwat's final decision in respect of an appeal made by  
Wollen Michelmores solicitors on behalf of Ms M Whatman  
against South West 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 9 September 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal by Wollen Michelmores Solicitors on behalf of Ms Marilyn Whatman ( “**the Appellant**”) of [REDACTED] (“**the Property**”) under section 105B of the Act against a proposal by South West Water Limited (“**South West Water**”) to adopt the lateral drain and sewer between the Property and the public sewer located in [REDACTED] (“**the Lateral Drain and Sewer**”).

- 1.5. This appeal is on the ground that the adoption would result in serious detriment to the Appellant. This is 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 final decision (at part 5).

## 2. Factual background

### The parties

- 2.1. The Appellant owns the Property.
- 2.2. South West Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in [REDACTED].

### The Site

- 2.3. This appeal is in respect of the Lateral Drain and Sewer outside the boundary of the Property. The plan at Annex A ("**the Plan**") shows the approximate location of the lateral drain outside of the Property in [REDACTED]. The Plan also shows the drain (which is not a lateral drain) at the Property which is not the subject of this appeal. The Plan does not show a drain from the [REDACTED] (**the Visitor Centre**) that the Appellant says was unlawfully connected to the Lateral Drain.

### Chronology of key events

- 2.4. The Property was until 14 February 2006 connected to the public sewer in [REDACTED] by the Lateral Drain.
- 2.5. On 15 February 2006 a neighbouring land owner, [REDACTED] (**the Trust**) which operates the Visitor Centre<sup>1</sup>, excavated

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<sup>1</sup> The visitors centre is a commercial operation with café, and toilet facilities.

the land outside of the Property and connected a drain from the Visitor Centre to the Lateral Drain without the Appellant's consent.

- 2.6. Since the drain from the Visitor Centre was connected to the Lateral Drain the Appellant has experienced foul odours, which the Appellant alleges are a direct result of the Visitor Centre's discharge of sewage into the Lateral Drain and the Trust's failure to install the right equipment to prevent odours.
- 2.7. To resolve this issue the Appellant's has permitted the Trust to use the Sewer to drain the Visitor Centre under licence for an unspecified annual consideration.
- 2.8. At the time when notice of the proposed transfer was served, the Appellant was on the point of finalising an agreement with the Trust to allow the Visitor Centre to continue to use the Sewer on a permissive basis.
- 2.9. The terms of the licence allow for:
  - i. The Appellant to receive an (unspecified) annual payment for the inconvenience suffered;
  - ii. The Appellant (or Trust) to terminate the licence and require the disconnection of the Visitor Centre's drain (on notice);
  - iii. The Trust to install equipment to combat the odours experienced by the Appellant;
  - iv. The Visitor Centre not to increase its use of the drain in the future.

### **The Appellant's submissions**

- 2.10. The Appellant considers that the compulsory transfer would cause serious detriment because the Trust has refused to enter into the licence agreement since the announcement of the proposed transfer.
- 2.11. The Appellant states that she will lose control over the future use of the drain and would suffer serious detriment if the transfer is allowed because:
  - i. The Appellant will no longer be able to ask the Visitor Centre to disconnect its drain if the odour problems persists, or if she wanted to sell the property;
  - ii. The Appellant would no longer receive the annual payment for the

inconvenience;

- iii. The Appellant would no longer be able to compel the Trust to take action to combat odour problems;
- iv. The Appellant would have no power to control future development of the Visitor Centre which could result in an increase in use of the drain.

### **3. Ofwat's Procedure**

- 3.1. Since receiving the appeal, Ofwat has considered the information necessary to make a decision. Particularly, Ofwat
  - i. asked South West Water what would be their likely response to the apparently illegal connection which is said to be causing serious odour problems for Ms Whatman.
  - ii. wrote to the Appellant's solicitor proposing options for her to consider, to help make a decision on the appeal.
  - iii. asked the Trust to set out their understanding of the issue relating to the connection of the Visitor Centre's drain to the Appellant's Lateral Drain and Sewer.
- 3.2. On 20 June 2013, Ofwat issued a draft decision to the Appellant, South West Water and The Trust for their consideration, setting out the reasons why Ofwat considers a transfer would cause serious detriment. All three parties confirmed to Ofwat by email on 9 July 2013 that they will not be responding to the decision.
- 3.3. Ofwat has not sought to respond on every point made by the parties in their submissions and correspondence in advance of making this final decision. Ofwat is satisfied that it now has sufficient information to issue a final decision.

### **4. The issues to be decided**

- 4.1. The issue to be decided is whether the proposed transfer would result in serious detriment to the Appellant. Ofwat is satisfied that the Lateral Drain and Sewer in question are not exempt from the Scheme and that South West Water therefore has a duty to adopt it.
- 4.2. We address the issue of whether the proposed transfer would result in serious

detriment to the Appellant in section 5 below.

## 5. Ofwat's Final Decision

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

- 5.1. We consider that to establish serious detriment there has to be actual effect. In order to consider the actual effect we consider two issues:
- i. The unlawful connection of the Visitor Centre's drain to the Appellant's lateral drain.
  - ii. The licence agreement with the Trust.

### 5.2 The unlawful connection of the Visitor Centre's drain to the Appellant's lateral drain

- 5.2. The effect of the connection of the Visitor Centre's drain to the Lateral Drain is to create a sewer between the point of connection and the public sewer in [REDACTED].
- 5.3. The legal framework for the transfer of private sewers and lateral drains does not distinguish between connections that were made lawfully and those that were made unlawfully.
- 5.4. The effect of [regulation 3\(5\) and 3\(7\) of the Regulations](#) is that **all** private sewers and private lateral drains, irrespective of the lawfulness of the connection (and subject to certain exemptions), transferred to the relevant sewerage undertaker on 1 October 2011 in the absence of an appeal under section 105B of the WIA 1991.
- 5.5. There is nothing in these definitions to suggest that, to meet the definition of a "private sewer" or "lateral drain" for the purposes of the 2011 Regulations, the connection in question must have been lawfully made. The definitions are entirely functional: connections that are physically as described within those definitions come within the remit of the transfer scheme, irrespective of the circumstances that led to those connections being made.
- 5.6. It therefore appears to Ofwat that the Appellant's grievance about the unlawful connection should not be an impediment to the implementation of that scheme, absent "serious detriment" and that "serious detriment" would be unlikely to be established purely on the basis of an unlawful connection given that the effect of the compulsory transfer renders any dispute as to the lawfulness of the connection academic.

## The licence agreement

5.7. The Appellant considers that the compulsory transfer of the Lateral Drain would cause her serious detriment. The Appellant has explained how, shortly before the Scheme was announced, she was on the point of finalising an agreement with the Trust which would allow for the continued existence of the unlawful connection on mutually agreeable terms. We are told that draft terms had been agreed which would provide:

- 1) for the Appellant and the Trust to be able to terminate the licence and require disconnection upon giving notice;
- 2) for the Appellant to receive an annual payment for the inconvenience that she suffered as a consequence of the unlawful connection;
- 3) for the Trust to install equipment at the property, at its expense, to seek to combat the odour impact emanating from the unlawful connection;
- 4) for the Trust to undertake not to intensify its use of the drain in future.

5.8. The Appellant submits that the compulsory transfer of the Lateral Drain would have the effect of depriving her of the ability to finalise these terms, causing her serious detriment.

5.9. We have carefully considered the facts of this case as presented to us. We note that, for a significant period before the Scheme was announced, the Appellant had entered into negotiations with the Trust in good faith to seek to resolve the issues arising from the unlawful connection. The parties were on the point of finalising an agreement to the effect that the unlawful connection could only continue if, amongst other matters, both parties had the right unilaterally to require disconnection upon giving notice. In our judgment, allowing the compulsory transfer to proceed in these circumstances would be unfairly to frustrate the Appellant's pursuit of a remedy that the Trust has already accepted should be hers.

5.10. We are satisfied that allowing the compulsory transfer to proceed in these circumstances would cause the Appellant serious detriment. In our judgment, it is clear that there is an unresolved dispute between the Appellant and the Trust and that the Appellant should not be frustrated in her efforts to bring these to a fair conclusion. Any outstanding issues in relation to that dispute are a matter properly for the parties to resolve and if necessary a court, not for Ofwat in discharging its appellate function under the Scheme.

## European Convention on Human Rights

5.11. We have also considered whether the proposed transfer would infringe the Appellant's rights under the European Convention on Human Rights, notably Article 1 of the First Protocol to the Convention ("**Article 1P1**"), which provides:

**(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.**

**(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.**

5.12. However, as we have concluded that the transfer should not take place, we are satisfied that this decision does not constitute an interference with the Appellant's right to the peaceful enjoyment of her possessions. It follows that Article 1P1 is not engaged in this case.

5.13. Therefore, we consider that the Appellant would suffer serious detriment as a result of the adoption of the Lateral Drain and Sewer.

## Conclusion

5.14. Ofwat concludes that South West Water's proposal to adopt the Sewer should not be allowed, and that the Sewer should not transfer to South West Water.

5.15. In making its decision under section 105b(9)(a) of the Act, Ofwat is able to specify conditions including payment of compensation by South West 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.