



Ofwat's final decision in respect of an appeal made by Mr O Biswas against Thames 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 19 September 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal by Mr O Biswas (“**the Appellant**”) of [REDACTED] (“**the Property**”) under section 105B of the Act against a proposal by Thames Water Limited (“**Thames Water**”) to adopt the sewer that serves the Property and connects to the public sewer located in [REDACTED] (“**the 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. Thames Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in St. Albans.

The Site

- 2.3. The plan at Annex A (“**the Plan**”) shows the Property, a neighbouring property [REDACTED] and a property called [REDACTED].
- 2.4. The Plan also shows the approximate location of a drain from [REDACTED] that connects to the drain at [REDACTED] to form a sewer which crosses the Property to connect to the public sewer in [REDACTED].
- 2.5. The Sewer that serves [REDACTED] and the Property and connects to the public sewer in [REDACTED] is the subject of this appeal.

Chronology of key events

- 2.6. The Property and [REDACTED] were connected to the public sewer by a private sewer that served those two properties alone. At an unspecified date in the past a drain was laid from [REDACTED] and connected to the sewer in the vicinity of [REDACTED]. Since the connection of the drain from [REDACTED] the Appellant claims that he and the owner of [REDACTED] have experienced blockages in the Sewer. The

Appellant claims that the blockages are caused by inappropriate materials entering the Sewer from [REDACTED] drain.

- 2.7. The Appellant does not believe that the owner and occupiers of [REDACTED] a NHS facility, have the right to use the Sewer and instead should use the drains that pass under [REDACTED]. The Appellant also considers that the Sewer does not have the capacity to deal with the waste from [REDACTED] which is causing blockages on a regular basis.
- 2.8. The Appellant has plans to build a conservatory over the Sewer and has reached agreement with the owner of [REDACTED].

The Appellant's submissions

- 2.9. The Appellant considers that the compulsory transfer would cause serious detriment because he will not be able to stop the owners and occupiers of [REDACTED] from using the Sewer and the recurring blockages will continue.
- 2.10. The Appellant's plans to build a conservatory at the rear of the Property will be frustrated as he would lose his rights to build over the Sewer.

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 provided additional information in a letter dated 4 July 2012.
- 3.2. On 24 May 2013, Ofwat issued a draft decision to the Appellant and to Thames Water for their consideration. We received no comments from either party.
- 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 decision. However, where Ofwat has needed clarification or additional information from the parties, 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 issue to be decided is whether the proposed transfer would result in serious detriment to the Appellant. Ofwat is satisfied that the Sewer in

question is not exempt from the Scheme and that Thames 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

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 whether there is actual effect we consider two issues:
- i. The unlawful connection of the [REDACTED] [REDACTED] drain to the Appellant's Sewer; and
 - ii. The Appellants loss of right to build over the over the Sewer.

The unlawful connection of [REDACTED] drain to the Appellant's Sewer

- 5.2. 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.
- 5.3. 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.
- 5.4. 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 be 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.
- 5.5. 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.

We also note that the Appellant claims that blockages in the Sewer have been caused by inappropriate materials entering the Sewer from [REDACTED] [REDACTED] drain. The liability for the costs of removing these blockages and other maintenance costs will come to an end on transfer.

The proposed building works

- 5.6. The Appellant considers that the transfer of the Sewer would be seriously detrimental as it would prejudice his ability to proceed with certain building works that are proposed.
- 5.7 We consider that in order for there to be serious detriment that there has to be actual effect. We consider that there is no actual effect if a development is merely proposed. We note that the Appellant submitted plans to us showing the proposed building works dated April 2010 and obtained planning permission in December 2010 but the Appellant has provided no evidence to suggest that he has entered into agreement with a building contractor to carry out the building works. We therefore consider any potential case of detriment to be speculative at this stage.
- 5.8 Therefore, we remain of the view, set out in our draft determination, that the Appellants would not suffer serious detriment as a result of the adoption of the Sewer.

European Convention on Human Rights

- 5.9 We also note that we have considered separately the Appellants' appeal by reference to Article 1 of the First Protocol of the European Convention on Human Rights and we have concluded that a payment of compensation to the Appellants would not be needed on the transfer of the Sewer to Thames Water in order to ensure a fair balance between the Appellants' 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 Thames Water.

Conclusion

- 5.10 Ofwat concludes that Thames Water proposal to adopt the Sewer should be allowed and that the Sewer should transfer to Thames Water with effect from 31 July 2013.

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