



Ofwat's final decision in respect of an appeal made by Mr J A Reynolds 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 31 August 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal by Mr. J A Reynolds (“**the Appellant**”) of [REDACTED] (“**the Property**”) under section 105B of the Act against a proposal by Thames Water Utilities Limited (“**Thames Water**”) to adopt a private lateral drain and sewer at the Property (“**the Lateral Drain and Sewer**”).

- 1.5. This appeal is on both of the grounds set out at paragraph 1.3 above.
- 1.6. This document sets out Ofwat's final appeal decision. 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. Thames Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in the area of the Lateral Drain and Sewer.

The Site

- 2.3. The plan attached at Annex A (“**the Plan**”) shows the Property, the adjoining property at [REDACTED] and in red the approximate location of the Lateral Drain and Sewer that is the subject of this appeal. Access to the Lateral Drain and Sewer is behind locked gates to a carriage entrance.

Chronology of key events

- 2.4. On 11 August 2011, the Appellant wrote to Ofwat objecting to Thames Water’s proposal to adopt the Lateral Drain and Sewer compulsorily, and on 31 August 2011, the Appellant submitted an appeal under s105B of the Act against this proposal.
- 2.5. In the Appellant’s appeal form he sets out that “

There is a private easement provided for in the Deeds to both [the Property] and [REDACTED]” and “There are binding legal agreements on both properties regarding the access to & maintenance of the two properties – details of these no longer

appear on land registry entries”.

By these statements we understand the Appellant to mean that, in relation to the Lateral Drain and Sewer, the owners from time to time of both the Property and ██████ have rights and obligations with regard to each other in relation to the use, maintenance and repair of the Lateral Drain and Sewer (“**the Rights and Obligations**”).

The Appellant’s submissions

- 2.6. The Appellant does not accept that there is a duty on Thames Water under the Regulations and the Scheme to adopt the Lateral Drain and Sewer.
- 2.7. The Appellant also seems to consider that the compulsory transfer of the Lateral Drain and Sewer would cause serious detriment because:
 - i. this would interfere with the Rights and Obligations (“**the Rights and Obligations Issue**”); and
 - ii. this would result in Thames Water having rights to access the Property which would be a gross invasion of the Appellant’s privacy (“**the Privacy Issue**”).

3. Ofwat’s Procedure

- 3.1. Since receiving the appeal, Ofwat has considered the information necessary to make a final decision.
- 3.2. On 9 November 2012, Ofwat issued a draft decision to the Appellant and to Thames Water. We received no comments from the Appellant. Thames Water replied in an email dated 22 November 2012 which stated that it had no further written representations to make.
- 3.3. Ofwat has not sought to respond on every point made by the Appellant in his submissions and correspondence in advance of making this final decision. However, 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. Thames Water has a duty under the Regulations and the Scheme to adopt the Lateral Drain and Sewer; 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. The Regulations and the Scheme apply to private sewers and lateral drains but do not apply to private drains which are not lateral drains. In summary, a private drain is a drain within the boundary of the relevant property. Thames Water's proposal specified in paragraph 1.4 above does not relate to any drain which connects the building on the Property to the Lateral Drain and Sewer.
- 5.2. Applying the statutory definitions to the facts of this case, the Lateral Drain and Sewer which is part of this appeal comprises the following
 - i. the Lateral Drain and Sewer running from the boundary of No.93 to the point at which the drain from the Property first connects to it ("**the Connection Point**") – lateral drain; and
 - ii. the Lateral Drain and Sewer from the Connection Point to the boundary of the Property which adjoins the [REDACTED] sewer.

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

- 5.3. The Appellant maintains that Thames Water does not have a duty to adopt the Lateral Drain and Sewer because it is situated behind a locked gate.
- 5.4. 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 Sewer and that therefore:
- i. the Lateral Drain and Sewer is not exempt from the Scheme; and
 - ii. Thames Water has a duty under the Regulations and the Scheme to adopt the Lateral Drain and Sewer.

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

- 5.6. The Appellant considers that the transfer of the Lateral Drain and Sewer would be seriously detrimental for reasons set out at paragraph 2.7 above (i.e. the Rights and Obligations Issue and the Privacy Issue).

The Rights and Obligations Issue

- 5.7. If the Lateral Drain and Sewer were not to transfer to Thames Water, the current position regarding the use of the Lateral Drain and Sewer and associated costs would continue. We understand that under the Rights and Obligations the owners of the Property and ██████ are both entitled to use the Lateral Drain and Sewer and that both are potentially liable to an extent for costs of repairing and maintaining the Lateral Drain and Sewer.
- 5.8. Ofwat considers that a transfer of the Lateral Drain and Sewer to Thames Water would constitute an interference with the Appellant's current rights regarding the Lateral Drain and Sewer. However, if the Lateral Drain and Sewer were to transfer to Thames Water, the Appellant and subsequent owners of the Property would continue to benefit from the use of the Lateral Drain and Sewer, but their liabilities for costs of repairing and maintaining the Lateral Drain and Sewer would come to an end upon its transfer. If the Lateral Drain and Sewer were not to transfer, the Appellant and owner of ██████ would be liable for all the future costs of maintenance which could be considerable. We do not consider that the Appellant's loss of ownership of the Lateral Drain and Sewer, when weighed against the benefit of no longer being liable for the costs of maintaining it, constitutes serious detriment.
- 5.9. Accordingly, we consider that the Appellant would not suffer serious detriment as a result of the transfer of the Lateral Drain and Sewer to Thames Water in connection with the Rights and Obligations Issue.

The Privacy Issue

- 5.10. Following a transfer of the Lateral Drain and Sewer, Thames Water would have duties under the Act in relation to the Lateral Drain and Sewer, and

under section 159 of the Act, Thames Water would have powers to enter onto the Property in order to carry out necessary works in relation to the Lateral Drain and Sewer. Thames Water's exercise of those powers must be consistent with its code of practice which is required under section 182 of the Act.

- 5.11. The extent to which and how Thames Water might be required to exercise its powers under section 159 of the Act in connection with the Lateral Drain and Sewer is uncertain, and would depend on the nature of any issues which arise regarding the Lateral Drain and Sewer at any particular time. However, we consider that in order to make out serious detriment there has to be actual effect. Ofwat does not consider that the Privacy Issue gives rise to actual effect in that there is no evidence that the following would necessarily arise:
- i. That Thames Water would be required to access the Property during the Appellant's occupation of it; or
 - ii. Even if Thames Water were required to access the Property during the Appellant's occupation of it, that any rights of privacy (or similar) of the Appellant at the Property would be infringed as a result.
- 5.12. We do not consider that the mere possibility that either of the above might arise is sufficient to make out a case of 'serious detriment' to the Appellant, particularly given the protection available to the Appellant under section 181 (Complaints with respect to the exercise of works powers on private land) of the Act. Under section 181, the Appellant may be entitled to a payment in connection with the exercise by Thames Water of the powers conferred on it by virtue of section 159 of the Act (e.g. if Thames Water were to fail adequately to consult with the Appellant before exercising its powers under section 159 or were to exercise those powers unreasonably).
- 5.13. Accordingly, we consider that the Appellant would not suffer serious detriment as a result of the transfer of the Lateral Drain and Sewer to Thames Water in connection with the Privacy Issue.

European Convention on Human Rights

- 5.14. 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 and Sewer to Thames 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 and Sewer to Thames Water.

- 5.15. Therefore, we consider that the Appellant would not suffer serious detriment as a result of the adoption of the Lateral Drain and Sewer.

Conclusion

- 5.16. Ofwat's final decision is that Thames Water's proposal to adopt the Lateral Drain and Sewer should be allowed and that the Lateral Drain and Sewer should transfer to Thames Water with effect from 2 April 2013.

- 5.17. 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.