



OFWAT'S FINAL DECISION IN RESPECT OF AN APPEAL MADE BY
[REDACTED]
AGAINST ANGLIAN WATER SERVICES LTD 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 29 September 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal from [REDACTED] on behalf of [REDACTED] (referred to as “**the Appellant**”) of [REDACTED] about private drains owned by the Appellant at [REDACTED] (“**the Site**”) under section 105B of the Act. This appeal is against a proposal by Anglian Water Services Ltd (“**Anglian Water**”) to adopt the surface water drains and the foul water drains on the Site (“**the Drains**”).
- 1.5. This appeal is on the ground that there is no duty for Anglian Water to adopt the Drains and that any 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, following a draft decision issued on 23 January 2015. 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 Site.
- 2.2. Anglian Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in the area of the Drains.

The Site

- 2.3. The plan attached at Annex A shows the curtilage of the Site, in blue. This includes a road with a small roundabout, and further land on the opposite side of the road adjacent to a [REDACTED] site. We understand that the Appellant owns the road, and that Anglian Water's sewers are situated beneath the land.
- 2.4. The plan attached at Annex B ("**the Plan**") shows the approximate location of the Drains.
- 2.5. The Plan shows that the Drains are located within the curtilage of the Site (outlined in green), and consist of private drains which are not lateral drains but which are the subject of this appeal (see paragraphs 5.1 and 5.2 below). These consist of:
 - 2.5.1. surface water drains, shown in blue on the Plan, which we understand connect to the public sewer at two points:
 - At point X, situated in a road called [REDACTED] behind the Site and outside the curtilage; and
 - At point Y within the curtilage of the Site.
 - 2.5.2. and foul water drains, shown in orange on the Plan, which also connect to the public sewer at points X and Y above, thereby following a similar route to the surface sewer.
- 2.6. In addition, the Plan also shows, as a hatched red line, the approximate location of Anglian Water's public foul and surface water sewers located within the curtilage of the Site.

The Appellant's Submission

2.7. The Appellant is the owner of freehold or long leasehold rights on several sites at which sewerage services are provided by statutory sewerage undertakers, including Anglian Water. In this capacity, it has received a notice or has been alerted to the notices of Anglian Water's proposals to adopt private sewers and lateral drains.

2.8. The Appellant considers that the drainage infrastructure on the Site consists of drains and not sewers or lateral drains (as defined in Section 219 of the Act). On this basis, the Appellant considers that the Drains are not transferable to Anglian Water under the Regulations and the Scheme. The Appellant states that its position is consistent with [Defra's published guidance](#) and reflects the fact that although the Site may have properties or buildings in separate occupation located on it, it consists of a single curtilage by virtue of being under the common ownership of the Appellant.

2.9. The Appellant owns the road and the land adjacent to [REDACTED] site, and considers that if there was a connection by [REDACTED] within its curtilage, there would need to be an agreement in place between the Appellant and [REDACTED]. The Appellant confirmed that no such agreement is currently in place.

2.10. On 29 September 2011, the Appellant submitted an appeal under section 105B of the Act against Anglian Water's proposal to adopt the Drains compulsorily.

2.11. The Appellant considers that Anglian Water is under no obligation to adopt the Drains, and that if they were transferred, this would result in serious detriment to them.

3. Ofwat's Procedure

3.1. Since receiving the appeal, Ofwat has considered the information necessary to make a decision. In particular, on 29 September 2011, Ofwat received a completed Ofwat appeal form and supporting evidence from the Appellant.

3.2. Ofwat contacted Anglian Water on 1 August 2012 to ask them to comment on the Appellant's view that the Site consists of a single curtilage and therefore there is no duty on Anglian Water to adopt the Drains.

- 3.3. We received a response from Anglian Water on 16 August 2012, in which they stated that the Appellant has provided them with information about the maintenance grounds, buildings, car parks and roads within the boundary of its ownership which supports the single curtilage argument – but that “*they [Anglian Water] are concerned that the land registry plan provided by the Appellant [on 1 March 2012] showing the extent of the Property appears to include a roundabout and a road in which an Anglian Water [owned] foul sewer is located*”. Anglian Water considers that “*this influences the single curtilage factual position, for example concerning single access to the site*” Anglian Water considers it is possible that a [REDACTED] supermarket located on the other side of the road also drains into Anglian Water’s foul sewer, which could then affect the position regarding the applicability of the Regulations and Scheme, as this would result in shared drainage of the Site and the [REDACTED] supermarket, meaning that the Drains would be eligible for adoption.
- 3.4. Anglian Water has informed Ofwat that it does not have drainage plans for the [REDACTED] site to confirm their opinion of “shared drainage”. Anglian Water suggested that they can conduct a CCTV survey of the relevant sections of the network to confirm the position but have stated that “*someone will need to cover the cost of the survey*” and asked Ofwat’s views on this. It also commented that it is possible that a declaration of private ownership/single curtilage could be made, up to any connection point in the road, but this would be dependent on whether any connections are identified in the survey.
- 3.5. Ofwat relayed this information to the Appellant for their comments and on 31 August 2012, the Appellant confirmed that they are not agreeable to paying Anglian Water’s cost of undertaking a CCTV survey because they see no reason why they should pay for Anglian Water to undertake a survey to confirm its (Anglian Water’s) understanding of either Anglian Water’s or a third party’s [REDACTED] infrastructure. The Appellant added that it has carried out a site survey and is of the opinion that none of [REDACTED] infrastructure is located on the Site or connected to the Drains.
- 3.6. Given this, on 27 November 2012 we asked the Appellant to share their site survey results with Anglian Water. We also asked the Appellant to indicate the precise boundary of the Site and the location of the Drains that are the subject of this appeal.
- 3.7. On 7 December 2012, the Appellant told us that they had shared the site survey with Anglian Water on 1 March 2012, and also sent us a plan showing the boundary of the Site and the location of the Drains which we then provided to Anglian Water; the latter had no further comments over and above what

they had already stated.

3.8. Ofwat has provided Anglian Water with multiple opportunities¹ to explain, and to provide evidence, as to why it considers that there could be a connection by a third party. However, Anglian Water maintains that they do not consider that they should be paying for the cost of the CCTV survey to support their view, and no other evidence has been forthcoming.

3.9. Ofwat requested further information from the Appellant in December 2014, which included the land registry plan and a plan showing the location of the Drains, which the Appellant provided on 10 and 23 December 2014, respectively. Further, on 20 January 2015 Ofwat met with the Appellant to gain a better understanding of the location of the Drains. In that meeting, the Appellant provided us with the plan, used at Annex A.

3.10. On 23 January 2015, Ofwat issued a draft decision to the Appellant and Anglian Water for their consideration, setting out the reasons why Ofwat do not consider that there is a duty for Anglian Water to adopt the Drains. Ofwat received a response from the Appellant in a letter dated 9 February 2015. In its response, the Appellant suggested some amendments to paragraphs 2.5.2, 2.9, 3.5 and 3.7 to reflect the facts of the case. The Appellant also provided a copy of an agreement made under section 104 of the Act that applies in respect of Anglian Water's sewers on the Site. The Appellant states that the agreement confirms that there is no connection between [REDACTED] site and Anglian Water's public sewers in the road marked A on the plan at Annex A.

3.11. Anglian Water emailed Ofwat on 12 February 2015 to say that they do not have any representations to our draft decision.

3.12. Ofwat has not sought to respond to every point made by the parties in their submissions and correspondence in advance of making this final decision. However, Ofwat is satisfied that it has sufficient information to issue a final decision.

4. The issues to be decided

4.1. The issues to be decided are whether:

- (a) Anglian Water has a duty under the Regulations and the Scheme to adopt the Drains; and

¹ Emails of 08/01/13, 21/05/13 and 15/10/14.

(b) The proposed transfer would result in serious detriment to the Appellant.

4.2. These issues are addressed in section 5 below.

5. Ofwat's Final Decision

The Drains

- 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. Based on the information provided by the Appellant, Ofwat considers that the Drains comprise of private drains, falling within the definition of 'drain' in section 219 of the Act, as they are located within the curtilage of the Site (see paragraph 2.4 above).
- 5.2. Anglian Water considers that the extent of the Site appears to include a roundabout and a road in which an Anglian Water's foul sewer is located. Anglian Water considers that this influences the single curtilage factual position. They also add that it is possible that the [REDACTED] site also drains into this foul sewer which would then affect the position in terms of shared drainage. However, Anglian Water have provided no evidence to support their view that the Site consists of multiple curtilages or that there is a shared connection with the [REDACTED] site.
- 5.3. We note that any dispute regarding the curtilage of a property does not fall within Ofwat's jurisdiction and should be dealt with by the Upper Tribunal (Lands Chamber). In this instance we are not aware that any such referral has been made.
- 5.4. We consider that for the purpose of the Act, drains serving a single site, and located within its curtilage, remain the responsibility of the site's owner. In accordance with Defra guidance, a single curtilage may contain a number of individual properties under common ownership or with separate lease or other agreements but which have common drainage arrangements. Therefore, we consider that because the Drains under appeal fall within the curtilage of the Site, they are not eligible for adoption under the Regulations and the Scheme.
- 5.5. Therefore, we do not consider that Anglian Water has a duty to adopt the Drains.

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

5.6. The Appellant considers that the transfer of the Drains would constitute serious detriment.

5.7. As we do not consider that there is a duty on Anglian Water to adopt the Drains (see paragraph 5.5), the claim of any potential serious detriment that may occur on such transfer does not arise for Ofwat's determination. We received no evidence from the representations which led us to conclude that there is a duty to adopt, and therefore, there was no need for us to consider the issue of serious detriment.

Conclusion

5.8. Ofwat concludes that:

- (a) the Appellant's appeal be upheld;
- (b) Anglian Water's proposal to adopt the Drains shall be disallowed; and
- (c) the Drains shall not transfer to Anglian Water.

Annex D – Some of the definitions set out in section 219(1) of the Water Industry Act 1991 (“the Act”), and subsection (2) of section 219 of the Act

“drain” means (subject to subsection (2) below) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage;

“lateral drain” means—

- (a) that part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate; or
- (b) (if different and the context so requires) the part of a drain identified in a declaration of vesting made under section 102 above or in an agreement made under section 104 above;

“sewer” includes (without prejudice to subsection (2) below) all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings;

Subsection (2) of section 219 of the Act:

(2) In this Act—

- (a) references to a pipe, including references to a main, a drain or a sewer, shall include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and
- (b) references to any sewage disposal works shall include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes;

and, accordingly, references to the laying of a pipe shall include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another.