



Ofwat's final decision in respect of an appeal made by Mr Hemults Francmanis against United Utilities under section 105B of the Water Industry Act 1991

1. Introduction

- 1.1. On 1 July 2011, the Water Industry (Schemes 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) situated within their respective areas. 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.
- 1.4. On 26 September 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal from [REDACTED] (which was subsequently acquired by [REDACTED] on 1 October 2012) (“**the Solicitors**”) on behalf of Mr. Helmut Francmanis (“**the Appellant**”) of [REDACTED] [REDACTED] under section 105B of the Act against a proposal by United Utilities Limited (“United Utilities”) to adopt a pumping station [REDACTED] [REDACTED] (“**the Pumping Station**”). [REDACTED] [REDACTED] This proposal was communicated by United Utilities in a general notice published on [REDACTED] (“**the Notice**”).

- 1.5. This appeal is on the ground that the adoption of the Pumping Station would result in serious detriment to the Appellant. This is for the Appellant to demonstrate.
- 1.6. This document sets out Ofwat's final decision. It takes into account comments from both parties on our draft decision issued on 11 April 2014. It is structured as follows:
 - i. The factual background (at part 2),
 - ii. Ofwat's procedure (at part 3),
 - iii. Representations on the draft decision (at part 4),
 - iv. The issues to be decided (at part 5); and,
 - v. Ofwat's final decision (at part 6).

2. Factual background

The parties

- 2.1. The [REDACTED] owns the Pumping Station. Throughout the appeal, the Solicitors have contacted and provided information to Ofwat on behalf of the Appellant.
- 2.2. United Utilities is a water and sewerage undertaker appointed under the Act. It owns the public sewers in the vicinity of the [REDACTED]

The location of the Pumping Station

- 2.3. The Pumping Station is on the Appellant's development site [REDACTED] (the "Site"). A plan attached at annex A (the "Plan") shows the approximate location of the Pumping Station, edged in red, on the Site.

Chronology of key events

- 2.4. The Appellant has planning permission to build 33 dwellings on the Site. At the time of the draft decision, 14 dwellings had been completed, with 13 of these occupied.
- 2.5. The Appellant installed the Pumping Station, at a cost of £250,000, as part of the sewerage infrastructure network serving the Site. It is understood that the Pumping

Station has the capacity to serve 33 dwellings only. The cost of the build was high because of the specification required by United Utilities and [REDACTED]

- 2.6. The Appellant and United Utilities signed a section 104 agreement on 22 August 2006 (“**the Agreement**”) which committed the latter to adopting, once completed, the foul sewer, the Pumping Station and rising main (but excluding the surface water sewer) on the Site, provided the conditions set out in the Agreement were met.
- 2.7. On 28 July 2011, United Utilities published the Notice setting out its proposal to exercise its power under the Regulations to adopt any pumping station - this includes the Pumping Station - within its area of operation on 1 October 2016. The Notice also included another proposal to adopt any private sewer or lateral drain within United Utilities’ area on 1 October 2011.
- 2.8. On 2 August 2011, the Solicitors wrote to Ofwat to register the Appellant’s objection to the proposed adoption of the Pumping Station by United Utilities.
- 2.9. On the 23 September 2011, the Solicitors submitted an appeal on the Appellant’s behalf under section 105B of the Act against the proposed adoption of the Pumping Station, the sewers and the lateral drains serving the Site by United Utilities. The Solicitors later confirmed that the appeal related solely to the transfer of the Pumping Station.

The Appellant’s submissions

- 2.10. The Appellant considers that the compulsory transfer of the Pumping Station would cause serious detriment because:
 - i. He had hoped to recover at least some of the cost of the installation of the Pumping Station from the sale of the dwellings which are being developed on the Site. Market forces have not allowed him to build the cost of the Pumping Station into the sale price of the dwellings. If the adoption went ahead he would not be able to recover the cost from the would-be purchasers of the dwellings on the Site. The Appellant also queries whether the transfer of the Pumping Station would be fair because the Agreement was in place prior to the Regulations coming into force (“**the Loss of Investment**”).
 - ii. The Pumping Station cost a lot of money to build and the Appellant considers that the Site should benefit rather than neighbouring third parties who have

not contributed to the cost. The capacity of the Pumping Station will be fully used by the dwellings on the Site once it is completed. If it transferred the Appellant would not be able to prevent neighbouring developments from using the Pumping Station; he is concerned that the capacity of the Pumping Station would be reached before the development of the Site was complete ("the Loss of Exclusive Use").

- 2.11. The Appellant stated on the appeal form that he did not believe that the serious detriment on the transfer of the Pumping Station could be mitigated. However, he does indicate that it is his intention that the Pumping Station should ultimately be adopted because its running costs, which he currently pays for (rather than charging the residents of the Site), will increase over time. The Appellant considers, however, that transfer should only occur after the development of the Site has been completed (in at least 10 years' time) and the capacity of the Pumping Station has been reached.

3. Ofwat's Procedure

Ofwat has considered the information necessary to make a decision. In particular:

- 3.1. On 23 September 2011, Ofwat received a completed appeal form and supporting evidence from the Solicitor.
- 3.2. On 14 December 2011, Ofwat asked the Solicitors for full details of the timing of the current (and where appropriate subsequent) phase of development of the Site as well as any other additional relevant information about the development. The Solicitors responded on 16 December 2011.
- 3.3. On 13 September 2013, Ofwat sought clarification from the Solicitor as to how the Appellant had proposed to recover the cost of the Pumping Station prior to the Scheme and why the same method could not be used in the event the transfer took place. Ofwat also sought clarification about which proposed asset transfer was being appealed.
- 3.4. On 24 September 2013, Ofwat queried with United Utilities whether it had given any assurances to the Appellant that the Pumping Station would not transfer until all of the dwellings on the Site had been sold. If such assurances had been given, how these would affect its statutory duty to adopt.

- 3.5. On 8 October 2013, United Utilities confirmed that:
- i. the Agreement existed but it did not have records of any assurances outside of the Agreement;
 - ii. none of the transfer provisions in the Agreement had been in effect when the Regulations came into force in October 2011 because the Site was still under construction. However both the foul sewer and the surface water sewer on the Site transferred to United Utilities on 1 October 2011 under the Regulations and the Scheme.
- 3.6. On 30 October 2013, Ofwat asked for further information from the Appellant relating to the recuperation of the cost of the Pumping Station, and whether any agreements are in place with third parties for the use of the Pumping Station.
- 3.7. The Solicitors' answers prompted Ofwat to ask further questions. These were issued on 23 January 2014 and related to the progress of building on the Site, the cost of the Pumping Station and how this could be recouped, when the Appellant considered transfer could take place and what neighbouring developments are taking place which could impact on the Pumping Station. The Solicitors responded on 7 February 2014.
- 3.8. On 26 February 2014, United Utilities confirmed that the Pumping Station has capacity to serve 33 dwellings. The Site is still under development and the Appellant has not requested that United Utilities adopt the Pumping Station to date. If another developer requested permission to connect to the Pumping Station then an assessment of capacity would be undertaken and if any changes in capacity were required to accommodate a new development this would be at United Utilities' expense. It was also confirmed that the Agreement remains valid until the Pumping Station vests in United Utilities, either once the Appellant requests United Utilities to adopt it or on 1 October 2016, whichever is sooner.
- 3.9. On 7 March 2014, United Utilities confirmed that on transfer it will maintain capacity at the Pumping Station for the dwellings on the Site at all times, whether already built or yet to be built, up to and including the proposed 33 properties (with no discharge restrictions) as envisaged under the Agreement. Capacity will be maintained irrespective of any other developments in the vicinity, and if any upgrade to the Pumping Station was required to increase capacity to serve other developments, this would be funded by United Utilities.

4. Representations on the draft decision

4.1. On 11 April 2014, Ofwat issued its draft decision to the Appellant and United Utilities for their consideration. Ofwat received a response from United Utilities on 9 May 2014 confirming that it had no representations to make. However, on 18 July 2014, it clarified its position on how any upgrade to increase capacity at the Pumping Station after the Pumping Station had transferred would be funded. The Solicitor made representations on behalf of the Appellant via email on 3 June 2014 to which he added further clarity on 16 June 2014. The Appellant's representations and United Utilities clarification are detailed below.

4.2. The Appellant raised the following points which we address in section 6 below:

i. Safeguarding the capacity of the Pumping Station

In addition to the 33 houses being built on the Site, the Appellant is in the process of applying for planning permission to build (in two phases) approximately 45 more houses on adjacent land, which has been included in the Local Plan as land suitable for housing (“**the New Development**”). The New Development is not expected to start before the development of the Site is completed. The Appellant believes that the capacity of the Pumping Station should also be safeguarded for the New Development following adoption, whereupon it should be upgraded at the expense of United Utilities at such time as the New Development comes to fruition.

ii. Financial compensation – Loss of Investment

The Pumping Station was built out of necessity (the Appellant informed us that he was unable to connect to the existing sewer network) in order to provide a sewage system to serve the Site. The high cost of the Pumping Station was due to the exacting standards the approving authorities required it to be built to as well as the high cost of the pumping machinery.

Moreover, the land where the Pumping Station is located was potential development land for housing. That portion of land has now lost value because it is no longer available for housing which could have yielded profit.

Through the unavoidable need for the construction of the Pumping Station, the Appellant has suffered indirect financial loss. He believes it is appropriate for him to receive an appropriate level of financial compensation

for this loss.

iii. The timing of the Adoption

In order to protect the significant investment in the Pumping Station, the adoption should not take place at any time prior to October 2016, whether under the Notice or the Agreement. Ofwat should amend its draft decision conclusion¹ to state that: '... United Utilities shall not adopt the Pumping Station until the date specified in the Notice, irrespective of the terms of the Agreement.'

- 4.3. United Utilities clarified that after the transfer of the Pumping Station (either through the Agreement or the Scheme) it would take responsibility for maintaining the Pumping Station to make it fit for purpose. However, if it received a request from a developer to connect a development (including the New Development) other than the Site to the Pumping Station and this would require United Utilities to upgrade the Pumping Station, it would seek to recover the costs of the upgrade from that developer.
- 4.4. Ofwat has not sought to respond to every point made by the Appellant in his submissions and representations in advance of making this final decision. Ofwat is satisfied that it has sufficient information to issue a final decision.

5. The issues to be decided

- 5.1. Section 105(B)(3)(a) of the Act, allows a person to appeal against a company's compulsory adoption of pumping stations on two grounds:
- i. that the sewerage company is not under a duty to adopt it; or
 - ii. that the adoption would result in serious detriment to the Appellant.
- 5.2. Ofwat is satisfied that the Pumping Station is not exempt from the Scheme and therefore United Utilities has a duty to adopt it.

¹ Subject to any representations received in response to this draft decision, Ofwat concludes that United Utilities should adopt the Pumping Station under the terms of the Agreement or with effect from the date specified in the Notice, whichever is earlier.

- 5.3. The issue to be decided, therefore, is whether the proposed transfer of the Pumping Station would result in serious detriment to the Appellant.

6. Ofwat's final decision

- 6.1. As set out at paragraph 1 above, the Regulations and the Scheme apply to private sewers, lateral drains and pumping stations. Section 3(8)(b) of the Regulations provides that in the case of a pumping station, the date of vesting must be no later than 1 October 2016, except where a relevant appeal is outstanding.
- 6.2. A pumping station pumps sewage under pressure from one point to another through a rising main. A rising main is a type of drain or sewer through which foul sewage and/or surface water runoff is pumped from a pumping station to join with the main sewerage system. The Regulations define 'pumping station' as "that part of a sewer or lateral drain which is a pumping station used or intended to be used in connection with that sewer or lateral drain, and includes the rising main."

Serious detriment

- 6.3. The Appellant considers that the transfer of the Pumping Station would be seriously detrimental to him. He provided his reasons in his submissions and his representations (see paragraph 2.10 and 4.2). Each of these is considered below.

Loss of Investment

- 6.4. The Appellant has informed Ofwat that "the development has progressed slowly and until all of the units are built and sold [he] will not have recovered the cost [of the Pumping Station]". This suggests to Ofwat that the Appellant's ability to recover the cost of his investment does not primarily depend on the transfer or otherwise of the Pumping Station but on the sale of all the dwellings on the Site.
- 6.5. Ofwat has not been provided with any evidence which suggest that the transfer of the Pumping Station to United Utilities will hinder the construction of any of the remaining dwellings on the Site. Further, it is not clear to Ofwat that, at some point in the future, once all the dwellings have been built and sold, the cost associated with the construction of the Pumping Station could not have been recovered.
- 6.6. The Appellant states that market forces have not allowed him to build the cost of the Pumping Station into the selling price of the dwellings on the Site. However the

condition of the housing market is not relevant to the adoption of sewerage infrastructure.

- 6.7. The Appellant also queries whether the transfer of the Pumping Station is fair given that the Agreement was in place prior to the commencement of the Regulations. The Regulations take account of the fact that section 104 agreements may be in place when they came into force. Vesting under the Regulations should take place on the date specified in the agreement or pursuant to the Scheme (1 October 2016), whichever is earlier. Ofwat believes that because the Regulations take into account the fact that section 104 agreements could have been in place, we do not consider that it would be 'unfair' for the Pumping Station to transfer because the Agreement was in place.
- 6.8. Based on the analyses in paragraphs 6.4 to 6.7, Ofwat does not accept that the adoption of the Pumping Station would hinder the recovery of costs associated with the construction of the Pumping Station. It therefore does not consider that the 'Loss of Investment' amounts to serious detriment.

Loss of Exclusive Use

- 6.9. The Appellant has built and paid for the Pumping Station and has informed us that it only has the capacity to serve 33 dwellings. This has been confirmed by United Utilities. As detailed above, the Appellant wants it to serve the Site exclusively due to the limitation on capacity. The Appellant considers that it could take up to 10 years to complete the development of the Site, and therefore for the Pumping Station to reach full capacity.
- 6.10. In this instance the Appellant has built the Pumping Station to serve the Site, at considerable expense. It is understood that a development is taking place nearby and although Ofwat is not privy to the details surrounding that build, it believes that the Appellant has raised legitimate commercial concerns regarding the future capacity of the Pumping Station and the impact that this could have on the development of the Site. Ofwat believes that a loss of capacity of the Pumping Station could be detrimental to the Appellant in as much as it would impact on the development of the Site.
- 6.11. However, Ofwat notes United Utilities' confirmation that it will maintain capacity at the Pumping Station for the planned 33 dwellings on the Site whether built, under construction or not yet built, (see paragraphs 3.8 and 3.9). Ofwat therefore considers that the Appellant should be able to complete the development of the Site, at his own pace, without concern about the capacity of the Pumping Station. Provided that the condition detailed at paragraph 6.20-6.21 is complied with, Ofwat

does not consider that the 'Loss of Exclusive Use' amounts to serious detriment.

Safeguarding the capacity of the Pumping Station

- 6.12. The Appellant is in the process of applying for permission for the New Development and believes that any upgrades to the Pumping Station that are required for it should be funded by United Utilities. As at the date when the Appellant made his representations to our draft decision, he had not submitted a planning application and consequently did not have permission to carry out work on the New Development. It is clear from United Utilities' clarifications that they would expect to recoup costs from developers if the Pumping Station required upgrading before a connection to it could be made. Ofwat considers that, in order for there to be serious detriment, there has to be an actual effect. Given that the New Development has not received planning permission, and therefore any conditions regarding the drainage of it are not known, Ofwat considers that this issue amounts to speculation, and therefore there can be no serious detriment to the Appellant with regard to it on the transfer of the Pumping Station. Further, Ofwat considers United Utilities' approach to the funding of an upgrade of the Pumping Station, should it be required by those developments that are not the Site, to be reasonable.
- 6.13. For the reasons stated above, Ofwat will not therefore direct United Utilities in the manner requested by the Appellant.

Financial compensation – Loss of Investment

- 6.14. The provision of the Pumping Station (and the associated issues which are detailed at paragraph 4.2(ii)) resulted from the planning permission granted by the [REDACTED]. The granting of planning permission preceded the Agreement which confirms the Appellant's "intention that the Pumping Station should ultimately be adopted."
- 6.15. In Ofwat's view, whether the Pumping Station transfers under the Agreement or under the Scheme the result, in terms of any 'indirect financial loss', will be the same because the building of the Pumping Station pre-dates either of these events. Any issues about this indirect financial loss should have been raised by the Appellant at the planning stage or at the time the Agreement was being negotiated. Ofwat does not consider, therefore, that any indirect financial loss would have an impact on the transfer of the Pumping Station under the Scheme and therefore would amount to serious detriment.

Timing of the adoption

- 6.16. United Utilities cannot adopt the Pumping Station under the Agreement until the trigger point stated in the Agreement has been reached. Given that the Agreement remains valid (until 1 October 2016), Ofwat neither has the power to overturn it or amend its terms.

European Convention on Human Rights

- 6.17. Ofwat also notes that it has considered separately the Appellants' 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. Ofwat's view is that the payment of compensation to the Appellant on the transfer of the Pumping Station would not be necessary to ensure a fair balance between his and the public interests in a more integrated sewerage system. Furthermore, we do not consider that the Appellant would suffer serious detriment if compensation were not paid to him on a transfer of the Pumping Station to United Utilities.

Conclusion

- 6.18. Ofwat concludes that United Utilities should adopt the Pumping Station under the terms of the Agreement or with effect from the date specified in the Notice, whichever is earlier.
- 6.19. In making its decision under section 105B(9)(a) of the Act, Ofwat is able to specify conditions to the transfer of the Pumping Station. As detailed above, Ofwat considers that the Appellant would suffer serious detriment on the transfer of the Pumping Station if its capacity is taken up by a different development before the Appellant's development of the Site is complete. The assurances provided by United Utilities and the condition detailed below should remove this concern.

Conditional Transfer

- 6.20. Ofwat therefore imposes the following condition on United Utilities which must be agreed by United Utilities in writing to Ofwat before transfer will take place:
- 6.21. United Utilities
- will not permit the Pumping Station to be used by another development whilst the Site is still being developed unless and until the capacity of the Pumping Station has been increased at no cost to the Appellant;

- will ensure that the Pumping Station will always have enough capacity to serve the 33 dwellings planned for the Site which it was built to serve, regardless of whether the Site has been completed or not; and
- will upgrade the Pumping Station, at the developer's expense, should an increase in the capacity of the Pumping Station be required for another development, including the New Development.

6.22. In these circumstances the Appellant should not be prejudiced in its use of the Pumping Station for the needs of the Site.