



Ofwat final decision on an appeal made by Mr Higginbotham against United Utilities 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 28 August 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal by Mr. John Higginbotham (“**the Appellant**”) of [REDACTED] (“**the Property**”) under section 105B of the Act against a proposal by Severn Trent Water Ltd (“**Severn Trent**”) to adopt the drainage system which connects [REDACTED] to the public sewer under [REDACTED]. Correspondence with

the Appellant has confirmed that the section of pipework eligible for adoption is shown on the plan at Annex A (“**the Plan**”) between point [REDACTED] and [REDACTED] (“**the Sewer**”), as explained further at paragraphs 6.4-6.6.

- 1.5. On 30 October 2012, United Utilities PLC (“**United Utilities**”) confirmed by email that the case had been wrongly allocated to Severn Trent. Severn Trent provides water services to the property, but United Utilities is the sewerage undertaker that serves the Property. From this date onwards, the case was transferred to United Utilities.
- 1.6. This appeal is on the two grounds set out at paragraph 1.3 above. These are for the Appellant to demonstrate.
- 1.7. 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 Appellants’ representation 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 Appellant owns the Property.
- 2.2. United Utilities is a sewerage undertaker appointed under the Act. It owns the public sewers (“**the Public Network**”) in the area of the Sewer.

Chronology of key events

- 2.3. The Appellant purchased the Property in 1989. One of the conditions to the granting of the planning permission to rebuild the house on the Property was that the Property’s drainage be connected to the Public Network. This work was done at the Appellant’s cost.
- 2.4. The drain from Bank House, a property neighbouring the Property, is connected to the Sewer. The date of this connection is unknown. The location

of this connection is shown at [REDACTED] on the Plan. It is from this point that the Appellant's drain becomes the Sewer.

- 2.5. On 26 August 2011 the Appellant submitted an appeal under section 105B of the Act against Severn Trent's proposal to adopt the Sewer compulsorily. As detailed at paragraph 1.5, it subsequently transpired that the Property was served by United Utilities and not Severn Trent. The appeal is therefore against the transfer of the Sewer to United Utilities.

The Appellant's submissions

- 2.6. The Appellant does not accept that there is a duty on United Utilities under the Regulations and the Scheme to adopt the Sewer, because it was his understanding that the Sewer served a single dwelling.
- 2.7. The Appellant considers that the compulsory transfer of the Sewer would cause serious detriment because:
- i. The Sewer was constructed at his expense and he believes that he should be compensated for its loss.
 - ii. The Appellant would no longer be able to derive a benefit from it. This, therefore, conflicts with his right of protection of property under the Human Rights Act.

3. Ofwat's procedure

- 3.1. Since receiving the appeal, Ofwat has considered the information submitted and has obtained from the Appellant the additional information necessary to make a final decision. In particular:
- letters dated 28 January 2013 and 3 August 2014 from the Appellant describing the curtilage of the Property; and
 - an email dated 13 June 2013 from United Utilities which provides the results of an investigation into the sewers and drains serving [REDACTED] and the Property.
- 3.2 On 9 December 2013, Ofwat issued a draft decision to the Appellant and United Utilities for their consideration. We received a response from the Appellant, in

an email dated 2 January 2013 which is outlined in section 4. United Utilities replied by email sent 23 December 2013 which stated that it had no further written representations to make.

3.3 Ofwat has not sought to respond to every point made by the Appellant and United Utilities in their submissions and correspondence. However, Ofwat is satisfied that it has sufficient information to issue this final decision.

4. The Appellant's representation on the draft decision

- 4.1. The Appellant submitted a representation in response to the draft decision which sets out a number of concerns and clarifications.
- 4.2. The Appellant clarified that the £26,000 compensation that he requested reflects the cost of installing the drainage system (of which the Sewer is a part) were it to be installed today. The Appellant has since confirmed, in a letter dated 10 January 2014 (which we received on 13 February 2014), that the cost of connection of the Sewer would be between £690 and £900. It is noted from the Appellant's representations that this figure does not take into account professional fees and the hire or transportation of specialist equipment required for the installation of the drainage system.
- 4.3. The Appellant also re-iterated his concerns that the transfer will result in him losing a valuable asset, which he paid for, without receiving any compensation.

5. The issue to be decided

- 5.1. The issues to be decided are whether:
 - United Utilities has a duty to adopt the Sewer under the Scheme ("**the Duty to Adopt**"); and
 - the proposed transfer would result in serious detriment to the Appellant ("**the Serious Detriment**").
 - Whether any compensation should be ordered ("**the Compensation**")

6. Ofwat's Final Decision

The Duty to Adopt

- 6.1. 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. We set out those definitions in Annex B.
- 6.2. If a pipe falls within the definition of a 'drain', then it is not eligible for adoption. A drain must:
- i. serve a single property; and
 - ii. fall within the curtilage of that property.
- 6.3. United Utilities undertook dye tests in 2013 which show that [REDACTED] is connected to the Sewer at [REDACTED] on the Plan.
- 6.4. The pipe between [REDACTED] and point [REDACTED] on the Plan falls within the curtilage of [REDACTED] and only serves that house. This is, therefore, the private drain belonging to Bank House and is not eligible for transfer under the Scheme.
- 6.5. The pipes between the Property and [REDACTED] on the Plan fall within the curtilage of Property and only serve [REDACTED]. These are, therefore, private drains and are not eligible for transfer under the Scheme.
- 6.6. The Sewer is shown between [REDACTED] and the public sewer at [REDACTED] on the Plan. It serves both the Property and [REDACTED] and is therefore eligible for adoption under the Scheme.
- 6.7. 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 the Regulations), and the relevant notice has been given.
- 6.8. Ofwat is satisfied that neither of the exemptions apply to the Sewer and therefore:

- i. the Sewer is not exempt from the Scheme; and
- ii. United Utilities has a duty under the Regulations and the Scheme to adopt the Sewer.

The Serious Detriment (section 105B(3)(a) of the Act)

- 6.9. The Appellant contends that the transfer of the Sewer would be seriously detrimental for the reasons set out at 6.10-6.11 below.
- 6.10. If the Sewer was transferred to United Utilities, the Appellant claims that he would lose an asset which he had paid for. As detailed at paragraph 4.2 above, the Appellant has clarified that the cost of building the Sewer was between £690-£900.
- 6.11. The Appellant was required to install the Sewer, at his own cost, as a condition of the planning permission granted to develop the Property. The Sewer was installed to provide an important drainage service to the Property, without which the Appellant could not have connected the Property to the Public Network.
- 6.12. The Appellant believes that he would not be able to derive a benefit from the Sewer following transfer and that this conflicts with his right for the protection of property under the Human Rights Act. In his response to our draft decision, the Appellant comments “**I believe you will find recorded cases where the terms ‘public interest’ and ‘general interest’ are taken to mean the general public or at least the majority. As the only interest in this system lies with ourselves and [REDACTED] and consideration being given to the location of the properties it is very unlikely that any further domestic development would be permitted in the foreseeable future.**”
- 6.13. The Government decided that the situation before the introduction of the Regulations was unfair, with a large number of customers of sewerage undertakers (like the Appellant) disadvantaged because they “**are not only paying their water and sewerage companies for sewerage services, but are also responsible for the upkeep of the private sewers serving**

their properties”¹

- 6.14. With regard to the Appellant’s comments on the draft decision as detailed at paragraph 6.12 above, the aim of the transfer was to provide more integrated and better managed sewerage systems throughout the country, enabling works to be planned and carried out. It was not intended that only those areas with development potential should be included within the remit of the Regulations, as it is considered that a more integrated sewerage system is in the public interest.
- 6.15. Whilst we acknowledge that the Appellant has incurred costs of between £690-£900 in installing the Sewer, this was necessary to comply with the planning permission to build the Property and does not mean that the Sewer itself has a realisable value. If the Sewer transfers to United Utilities, the Appellant would retain full use of the Sewer but his liability for the cost of repairing and maintaining it would cease.
- 6.16. We acknowledge that there is a direct link between the infrastructure that United Utilities owns and the amount of money it receives, this relates to its associated costs and does not prevent the Property or ██████████ from benefiting from the use of the Sewer. Because the Sewer is currently attached to the Public Network, both the Appellant and the owner of ██████████ ██████████ should already be paying sewerage bills to United Utilities, and this should not increase as a direct result of the adoption of the Sewer although customers in receipt of sewerage services may see a small general rise in bills as a result of the costs associated with the adoption of private sewers. .
- 6.17. Ofwat has carefully considered the information submitted but does not believe, for the reasons given above, that any serious detriment would result from the transfer of the Sewer.

Compensation

- 6.18. Under section 105B(9)(a) of the Act, Ofwat has considered whether transfer of the sewer should be made conditional upon payment of compensation by United Utilities to the Appellant.

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69356/private-sewers-transfer-guidance110928.pdf

- 6.19. We have taken into account all of the points raised in paragraphs 6.9 to 6.17 above, for example the cost incurred by the Appellant to install the Sewer, the fact that the expenditure was necessary to comply with planning permission to build the Property, that the Sewer itself does not have an independent realisable value, and that the Appellant would retain full use of the Sewer on its transfer.
- 6.20. Having considered all of the points above, Ofwat has concluded that transfer of the Sewer should not be conditional on payment of compensation.

European Convention on Human Rights

- 6.21. Ofwat has considered separately the Appellant's appeal by reference to Article 1 of the First Protocol of the European Convention on Human Rights 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.**

We have concluded that a payment of compensation to the Appellant would not be needed on the transfer of the Sewer to United Utilities 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 Sewer to United Utilities.

Conclusion

- 6.22. Ofwat concludes that United Utilities should adopt the Sewer with effect from **26 September 2014**. The remaining pipes as described in sections 6.4 and 6.5 will remain the property of the owner of [REDACTED] and of the Appellant respectively.
- 6.23. In making its decision under section 105B(9)(a) of the Act, Ofwat is able to

specify conditions including payment of compensation by United Utilities. Ofwat has concluded that in this case it would not be appropriate to specify any conditions, including any condition directing the payment of compensation.

Annex B – Definitions set out in 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;