



Ofwat's final determination in respect to an appeal made by Dr Patrick Foulk against Yorkshire Water under section 105(1) of the Water Industry Act 1991

1. Introduction

- 1.1. Section 105 of the Water Industry Act 1991 (“**the Act**”) provides that the owner of a private sewer may appeal to Ofwat with respect to a company’s refusal to make a declaration to adopt a private sewer following an application duly made under Section 102 of the Act.
- 1.2. The appellant lodged an appeal under Section 105 (1) of the Act which allows an appeal on the grounds that the appellant is aggrieved by the refusal of a sewerage undertaker to make a declaration adopting the sewer in question.
- 1.3. On 27 October 2012, the Water Services Regulation Authority (“**Ofwat**”) received the said appeal from Dr. Patrick Foulk (“**the Appellant**”) of [REDACTED] (“**the Property**”) under section 105(1) of the Act against a refusal by Yorkshire Water (“**Yorkshire Water**”) to make a declaration of adoption in respect of the surface water sewer (“**the Sewer**”) which serves the Property and which runs from the curtilage of the Property and under Church Walk, and eventually draining into a pond.
- 1.4. This document sets out Ofwat's final determination having taken into account comments from both parties on our draft determination published on 14 June 2013. This document adopts the following structure:
 - i. The factual background (at part 2),
 - ii. Ofwat's procedure¹ (at part 3),
 - iii. The issue to be decided (at part 4),
 - iv. Ofwat's final decision (at part 5).

Annex A – The Plan

Annex B – Definitions

¹ This includes comments from both parties on the draft determination

Annex C – Section 102 Adoption of sewers and disposal works
Annex D – 105 Appeals with Respect to adoption

2. Factual Background

The parties

- 2.1. The Appellant owns the Property.
- 2.2. Yorkshire Water is a water and sewerage undertaker appointed under the Act. It operates and owns the public sewers in Yorkshire.

The site

- 2.3. The plan attached at Annex A (“**the Plan**”) shows the Property, the location of the Sewer coloured in dark blue, and the public sewer coloured in red. The plan shows that only the foul water main connects to the main public sewer.

Chronology of key events

- 2.4. On 31 July 2009, Yorkshire Water wrote to the Appellant, in response to his enquiry about the adoption of his surface water sewer, to inform him that they were unable to adopt the Sewer. In addition, Yorkshire Water explained that legislation about sewer adoption was likely to be changing and that the legislative² changes planned could potentially apply to his case. The Appellant therefore believed that there was a possibility that the Sewer would be adopted in the future.
- 2.5. In September 2011, the Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 came into force, which sets out the conditions for the transfer of private sewers. These conditions exclude from the scheme private sewers which do not communicate (connect) with the public sewer system, such as the Sewer in question.
- 2.6. In response to the Appellant’s further enquiry, in an email dated 11 January 2012, Yorkshire Water informed the Appellant that it is not their policy to adopt sewers, such as the one in question, which incorporate fuel interceptors. A fuel interceptor is a device used to filter out hydrocarbon pollutants from rainwater

² 2011 Regulations

runoff, typically used in road construction to prevent fuel contamination of streams carrying away the runoff. Yorkshire Water explained that whilst it is possible that they might have inherited assets with fuel interceptors in the past, they only became a sewerage undertaker in 1997³ and before this the role was the responsibility of different bodies. We clarified⁴ this with Yorkshire Water, who told us that they were undertakers prior to 1997, but had agreements at the time with local authorities to work on their behalf and have relied on historical information from these bodies. Yorkshire Water maintains that where they have been directly responsible for the adoption, fuel interceptors are not present in the systems⁵. They advised the Appellant to seek to have the pipework adopted by the local authority.

- 2.7. From his response⁶ to Yorkshire Water on 22 April 2012, we understand that the Appellant managed to persuade the East Riding of Yorkshire Council (ERYC) to agree to maintain the fuel interceptor. The aim of this was to deal with Yorkshire Water's reservations, in the hope that Yorkshire Water would then agree to adopt the Sewers.
- 2.8. On 7 October 2012, following Ofwat's advice to appeal formally to Yorkshire Water, the Appellant wrote to Yorkshire Water again, making an application under Section 102 of the Water Industry Act 1991 for its adoption of the Sewer.
- 2.9. On 19 October 2012, Yorkshire Water wrote to the Appellant to refuse the adoption of the Sewer due to the presence of the fuel interceptor.
- 2.10. On 27 October 2012, the Appellant submitted an appeal under section 105(1) of the WIA91 against Yorkshire Water's refusal to adopt the Sewer.

3. Ofwat's procedure

The Appellant's submissions

- 3.1. The Appellant is appealing against Yorkshire Water's refusal to adopt the Sewer.

³ Email from Yorkshire Water to Dr. Foulk on 11/01/2012.

⁴ Email from Yorkshire Water to Ofwat on 12/06/2013.

⁵ We address this further in paragraph 5.10 below

⁶ To Yorkshire Water's email of 11/01/2012

3.2. On 14 June 2013, Ofwat issued a draft determination to the Appellant and Yorkshire Water for their consideration, setting out the reasons Ofwat consider Yorkshire Water is correct to refuse to make a declaration to adopt the Sewer. These were as follows:

- a. The Sewer in question does not communicate with the public sewer and discharges all contents to the local pond, as shown in Annex A of the Plan. We concluded that this is also a relevant consideration in this case.
- b. There is a risk of pollution, which could make other customers of Yorkshire Water liable for clean-up costs in the future.

3.3. We summarise the Appellant's response to the draft determination in the following paragraphs below:

- a. The Appellant states that although the "Criteria relevant to this appeal (Section 102 (5) of the WIA91) states correctly that the Sewer in question does not connect to the public sewer system and is not required as part of Yorkshire Water's public sewer system, Yorkshire Water have stated that they are prepared to adopt the Sewer if it met their standards of construction. He states that Yorkshire Water had told him that they are prepared to adopt the Sewer if the interceptor is removed.
- b. The Appellant states that the presence of the fuel interceptor itself does not pose a risk of pollution, and that the presence of the fuel interceptor in the Sewer reduces the likelihood of pollution and its subsequent risk of clean-up costs.
- c. The Appellant states that his representation shows Yorkshire Water are prepared to adopt the Sewer should the fuel interceptor be removed, which would increase any risk of pollution over that with the fuel interceptor in place and put other customers of Yorkshire Water at greater risk of the burden of any clean-up costs. The Appellant considers that the draft determination was in effect saying that the residents of Church Walk should remove the fuel interceptor so that Yorkshire Water will adopt the Sewer.
- d. The Appellant considers that surface water sewers flow into ponds and watercourses in many parts of Britain and all such sewers have an inherent risk of pollution to the environment. He considers that the draft determination means that sewers must have their fuel interceptors removed to allow them to be adopted by Water companies, which would result in an increased risk of pollution to the environment, which means that no surface water sewer should

be allowed to drain into a pond or watercourse.

- e. The Appellant states that Section 5.6 of the draft determination “admits that the industry publication ‘Sewers for Adoption’ is not directly relevant to this case, and therefore does not need to be taken into consideration in this case.”

3.4. Yorkshire Water replied in an email dated 2 July 2013 and stated that it does not wish to make a representation on this matter. However, in light of some of the issues raised by the Appellant above, we asked Yorkshire Water to clarify:

- i. Why they suggested that should the Appellant “negotiate permission to remove the fuel interceptor, and then undertake the works to remove the interceptor from the surface water sewer network”, this would “allow Yorkshire Water to adopt the system”. We also asked them to clarify how this reconciles with their previous statement in a letter to Ofwat⁷ in which Yorkshire Water state the reason they are refusing to adopt the Sewer is due to the risk of pollution.
- ii. Why they suggested that negotiation could take place with the Highways Authority under s.115 of the WIA91, as that provision relates to public sewers or those vested in the Highways Authority rather than private sewers such as those that are the subject of this case.

3.5. We summarise Yorkshire Water’s response⁸ below:

- i. Yorkshire Water acknowledged that their comments are at odds with their concerns relating to the risk of pollution, and stated that they had not considered the consequences in their response. They also added that if the interceptor was removed, this would not automatically result in adoption of the drainage network; consideration to the possibility of pollution would have to be taken into account and they would look for agreement/guidance from all stakeholders, for example the local Land Drainage Authority, Highways Authority, and the owner of the pond.
- ii. The suggested scenario was that the Highways Authority would take over the majority ownership of the drain. However, as the Highways Authority generally do not agree to private drains discharging to highway drains,

⁷ 1 February 2013

⁸ Emails from Yorkshire Water to Ofwat on 12 July 2013 and 5 August 2013.

Yorkshire Water could adopt the small lengths of lateral drain, upstream of the petrol interceptor which would be controlled under Section 115.

3.6. We have reviewed Yorkshire Water's response and consider that their current position with regards to the interceptor and the associated pollution risk is appropriate. We do not consider that the facts suggest a simple solution and we are not in a position to predict what outcome there may be from any negotiations the Appellant may have with the relevant stakeholders. We provide our response to the Appellant's representation to the Draft Determination below:

Ofwat's response to the Appellant's Representation

3.7. We respond to the Appellant's representations below in the same order as they are set out at 3.3 above:

- a. Yorkshire Water acknowledges that its communication with the Appellant has been unclear prior to the Regulations coming into place but it was not intended to mislead the Appellant. Particularly, we do not consider that it was within Yorkshire Water's remit to suggest that the Appellant removes the fuel interceptor in the system, as a precondition for adoption.
- b. The existence of an interceptor in the system suggests a perceived risk of pollution which the interceptor is there to manage. It is not a pollution risk in itself, but is there to prevent pollution from occurring in the first place. However, we also recognise that there is an inherent risk of failure associated with the interceptor, and that such potential failure could cause pollution further downstream.
- c. We do not consider that sewers must have their fuel interceptors removed to allow them to be adopted by sewerage companies. On the contrary, we consider that interceptors are necessary where there is a risk of pollution. However, the presence of a fuel interceptor on the Sewer is evidence of a risk of pollution which the interceptor is there to mitigate. We consider that while the 'Sewers for Adoption' manual is not directly relevant to this case, it acts as a useful illustration and guide for how sewers should be constructed across the industry, to facilitate adoption in the future.

3.8. Ofwat has not sought to respond on every point made by the Appellant in its submissions and correspondence in advance of making this final decision. Ofwat is satisfied that it now has sufficient information to issue a final decision.

4. The issue to be decided

- 4.1. The issue to be decided is whether Yorkshire Water is correct to refuse to make a declaration to adopt the Sewer in this case.

5. Ofwat's final decision

The Sewer

- 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. We set out those definitions in Annex B. In terms of those definitions, the Sewer currently comprises, from the curtilage of the Property, a surface water sewer which runs beneath Church Walk and drains into a pond.

Appeals with respect to Adoption (Section 105 (1) of the WIA91)

- 5.2. As set out at paragraph 1.1 above, the Appellant may appeal against the undertaker's refusal to adopt the Sewer in question. The Appellant has confirmed that he is the owner of the property and therefore we consider that he is eligible to make this appeal.

Criteria relevant to this appeal (Section 102 (5) of the WIA91)

- 5.3. This section of the Act (see Annex D) requires that a sewerage undertaker, in deciding whether a declaration should be made under Section 102, shall have regard to all the circumstances of the case and to certain listed criteria in particular. The listed criteria include, at Section 102 (5)(a), **'whether the sewer or works in question is or are adapted to, or required for any general system of sewerage or sewer disposal which the undertaker has provided, or proposes to provide, for the whole or part of its area'**.
- 5.4. This means the fact that a sewer that is the subject of an adoption proposal is not an integral part of the sewerage undertakers network is a relevant consideration in any decision regarding its adoption. The Sewer does not communicate with the public sewer and discharges all contents to the local pond, as shown in Annex A of the Plan. On this basis, the Sewer cannot be considered an integral part of Yorkshire Water's drainage network and provides Yorkshire Water with a discretion to refuse to adopt the Sewer.

Furthermore, in coming to a decision on this case, we have also considered the presence of the fuel interceptor.

The Presence of the Fuel Interceptor in the System

5.5. Yorkshire Water has a policy not to adopt sewers with fuel interceptors. The company's policy on these matters is for it to determine within the framework of the relevant legislation. Yorkshire Water gave the Appellant unhelpful information when it advised him to have the interceptor removed to allow the Sewer to be adopted. The presence of the interceptor is evidence of an inherent risk of pollution and Ofwat would not make an exception and order its removal because of the risk of pollution to enable adoption. Furthermore if the fuel interceptor had never been installed, Yorkshire Water could still have refused to adopt the Sewer because it does not connect to one of its public sewers, as stated at 5.3 above.

Sewers for Adoption

5.6. Whilst not of direct relevance to applications for adoption under s.102 of the Act, the water and sewerage industry publication⁹ 'Sewers For Adoption' contains guidance for the design and construction of sewers that will be adopted by Sewerage undertakers in England and Wales in accordance with Section 104 of the Water Industry Act 1991. It states that "petrol and oil interceptors should not be considered for inclusion in the Works to be covered by Section 104 agreements¹⁰". We consider that, for the reasons stated in paragraph 5.4 above, it is prudent for water and sewerage companies to consider this principle, particularly where if the interceptor failed, the outfall could potentially cause a pollution incident, as in this case.

Ofwat's decision

5.7. Ofwat considers that

(a) the fact that the Sewer in this case does not connect to the public sewer provides Yorkshire Water with a discretion to refuse to adopt the Sewer, and

(b) the presence of a fuel interceptor indicates an inherent risk of pollution, which could make other customers of Yorkshire Water liable for clean-up costs in the future if the sewer were to be adopted, which is a valid basis for the

exercise of that discretion. Ofwat therefore determines that Yorkshire Water's decision should be upheld.

Conclusion

5.8. Ofwat concludes that Yorkshire Water's refusal to adopt the Sewer should be upheld on the basis that it is not connected to the public sewerage system and carries an inherent risk of pollution.

Annex B – 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.

Annex C – Section 102 Adoption of sewers and disposal works.

(1) Subject to the following provisions of this section and to sections 103, 105 and 146(3) below, a sewerage undertaker may at any time declare that—

(a) any sewer which is situated within its area or which serves the whole or any part of that area;

(aa) any lateral drain which communicates or is to communicate with a public sewer which—

(i) is so situated or serves the whole or any part of that area; and

(ii) is vested in that undertaker; or

(b) any sewage disposal works which are so situated or which serve the whole or any part of that area, shall, as from such date as may be specified in the declaration, become vested in the undertaker.

(2) The owner, or any of the owners, of any sewer, lateral drain or sewage disposal works with respect to which a sewerage undertaker might make a declaration under this section may make an application to that undertaker requesting it to make a declaration under this section with respect to the sewer, lateral drain or works.

(3) A declaration or application under this section may be made with respect to a part only of a sewer.

(4) A sewerage undertaker which proposes to make a declaration under this section—

(a) shall give notice of its proposal to the owner or owners of the sewer [lateral drain] or works in question; and

(b) shall take no further action in the matter until two months have elapsed without an appeal against the proposal being lodged under section 105 below or, as the case may be, until any appeal so lodged has been determined.

(5) A sewerage undertaker, in deciding whether a declaration should be made under this section, shall have regard to all the circumstances of the case and, in particular, to the following considerations, that is to say—

(a) whether the sewer or works in question is or are adapted to, or required for, any general system of sewerage or sewage disposal which the undertaker has provided, or proposes to provide, for the whole or any part of its area;

(b) whether the sewer or lateral drain is constructed under a highway or under land reserved by a planning scheme for a street;

(c) the number of buildings which the sewer [or lateral drain] is intended to serve, and whether, regard being had to the proximity of other buildings or the prospect of future development, it is likely to be required to serve additional buildings;

(d) the method of construction and state of repair of the sewer [lateral drain] or works; and

(e) in a case where an owner objects, whether the making of the proposed declaration would be seriously detrimental to him.

(6) Any person who immediately before the making of a declaration under this section was entitled to use the sewer [or lateral drain] in question shall be entitled to use it, or any sewer [or lateral drain] substituted for it, to the same extent as if the declaration had not been made.

(7) No declaration may be made under this section in respect of any sewer or works the construction of which was completed before 1st October 1937.

Annex D – 105 Appeals with Respect to adoption

(1) An owner of any sewer, lateral drain or sewage disposal works may appeal to the Authority if—

(a) he is aggrieved by the proposal of a sewerage undertaker to make a declaration under section 102 above; or

(b) he is aggrieved by the refusal of a sewerage undertaker to make such a declaration.

(2) Subject to section 104(4) above, a person constructing or proposing to construct a drain or sewer or any sewage disposal works may appeal to the Authority where a sewerage undertaker—

(a) has refused an application under section 104 above;

(b) has offered to grant such an application on terms to which that person objects; or

(c) has failed, before the end of two months from the making of such an application, either to refuse the application or to give notice to the applicant of the terms on which it is prepared to grant the application.

(3) The time for the making of an appeal under subsection (1) above by the owner of any sewer, lateral drain or sewage disposal works shall be—

(a) in the case of an appeal by virtue of paragraph (a) of that subsection, any time within two months after notice of the proposal is served on that owner; and

(b) in the case of an appeal by virtue of paragraph (b) of that subsection, any time after receipt of notice of the undertaker's refusal or, if no such notice is given, at any time after the end of two months from the making of the application for the declaration.

(4) On the hearing of an appeal under this section, the Authority may—

(a) in the case of an appeal under subsection (1) above, allow or disallow the proposal of the sewerage undertaker or, as the case may be, make any declaration which the sewerage undertaker might have made; or

(b) in the case of an appeal under subsection (2) above—

(i) uphold the refusal of the undertaker to grant the application or to modify the terms offered; or

(ii) on behalf of the undertaker, refuse the application or enter into any agreement into which the undertaker might have entered on the application;

and any declaration made under paragraph (a) above shall have the same effect as if it had been made by the undertaker in question.

(5) Where the Authority makes a declaration under subsection (4)(a) above, he may, if he thinks fit—

(a) specify conditions, including conditions as to the payment of compensation by the sewerage undertaker; and

(b) direct that his declaration shall not take effect unless any conditions so specified are accepted.

(6) Where the Authority makes an agreement under subsection (4)(b) above on behalf of a sewerage undertaker, he may do so on such terms as he considers reasonable or, as the case may be, on the terms offered by the undertaker subject to such modifications as he considers appropriate for ensuring that the terms of the agreement are reasonable.

(7) The Authority, in deciding, on an appeal under this section, whether any declaration or agreement should be made, shall have regard to all the circumstances of the case and, in particular, to the considerations specified in section 102(5) above; and for the purposes of this subsection, in its application in relation to an appeal under subsection (2) above, paragraphs (a) to (e) of section 102(5) above shall have effect with the necessary modifications.