



Ofwat's final decision in respect of an appeal made by Mr O'Connor 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(s).
- 1.4. On 28 September 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal by Mr K O’Connor (“**the Appellant**”) in relation to [REDACTED] (“**the Property**”) under section 105B of the Act against a proposal by Thames Water Limited (“**Thames Water**”) to adopt the private sewer which serves the Property (“**the Sewer**”) and which runs from the point of connection from [REDACTED], and down the drive to [REDACTED] before connecting with the public sewer under [REDACTED]

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- 1.5 This appeal is on both of the two 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 decision (at part 5).

2. Factual Background

The parties

- 2.1 The Appellant owns the Property and the Sewer.
- 2.2 Thames Water is a water and sewerage undertaker appointed under the Act. It owns the public sewers in the area of the Sewer.

The site

- 2.3 The plan attached at Annex A (“**the Plan**”) shows the approximate locations of the Property, neighbouring properties at ██████████ ██████████, and the Sewer.

Chronology of key events

- 2.5 The Sewer serves the Property and ██████████
- 2.6 On 28 September 2011, the Appellant submitted an appeal under section 105B of the Act against Thames Water’s proposal to adopt the Sewer compulsorily.

The Appellant’s submissions

- 2.7 The Appellant does not accept that there is a duty on Thames Water under the Regulations and the Scheme to adopt the Sewer.

- 2.8 And the Appellant considers that the compulsory transfer of the Sewer would cause serious detriment because the transfer would allow unrestricted access to the Property which would result in an impact on the security of the property.

3. Ofwat's procedure

- 3.1 Since receiving the appeal, we have gathered and considered the information necessary to make a final decision.
- 3.2 On 21 March 2013, Ofwat issued a draft decision to the Appellant and to Thames Water in which we set out our view that the proposed transfer of the Sewer would not cause serious detriment to the Appellant and therefore the proposed transfer should go ahead. We received no comments from the Appellant. Thames Water replied in an email dated 10 April 2013 and accepted our draft decision.
- 3.3 Ofwat has not sought to respond on every point made by the Appellant in his initial 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 Scheme; 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. In terms of those definitions, the Pipework currently comprises the Sewer which runs from the point of connection with [REDACTED], and down the drive to [REDACTED] before connecting with the public sewer under [REDACTED]

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

- 5.2 As set out at paragraph 1 above, the Regulations and the Scheme apply to private sewers and lateral drains.
- 5.3 With regard to the Sewer, 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).
- 5.4 Ofwat is satisfied that neither paragraph 5.3 i. nor paragraph 5.3 ii. above applies in relation to the Sewer and that therefore:
- i. the Sewer is not exempt from the Scheme; and
 - ii. Thames Water has a duty under the Regulations and the Scheme to adopt the Sewer.

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

- 5.5 The Appellant considers that the transfer of the Sewer would be seriously detrimental as it would allow unrestricted access to the Property which may cause future issues with the sale of the Property and be a security risk to the Appellant.
- 5.6 We consider that in order for there to be serious detriment there has to be actual effect. Section 159 of the Act gives water and sewerage companies powers to enter private land to lay a pipe; to inspect, maintain, adjust, repair or alter any pipe; and to carry out incidental works. There is no evidence that Thames Water will have to exercise its powers to carry out works at the Property. And on the occasions where Thames Water might have to exercise these powers, the company must give the owner or occupier of the private land reasonable notice and may be required to pay compensation if the exercise of those powers results in loss or damage to the owner or occupier, or results in a depreciation of the value of the land. As the company must give adequate notice we do not consider that this equates to “unrestricted access”. The Appellant also has the added protection that he can complain to Ofwat if he is

unhappy with the way that Thames Water exercises its section 159 powers to investigate that complaint.

- 5.7 The Appellant has not provided any evidence that the occasional access that may be required for maintenance purposes would impact on the future sale of the Property or the Property's security. We therefore consider any potential case of detriment to be entirely speculative at this stage.

European Convention on Human Rights

- 5.7 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 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 them on a transfer of the Sewer to Thames Water.
- 5.8 Therefore, we consider that the Appellant would not suffer serious detriment as a result of the adoption of the Sewer.

Conclusion

- 5.9 Ofwat's final decision is that Thames Water's proposal to adopt the Sewer should be allowed and that the Sewer should transfer to Thames Water with effect from 23 May 2013.
- 5.10 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.