



## Final determination of dispute under section 181 of the Water Industry Act 1991: Staverton Holdings Limited v South West Water Limited

### Purpose of this document

This is our final determination of a complaint referred by Staverton Holdings Limited (“**the Complainant**”) to the Water Services Regulation Authority (“**Ofwat**”) for determination under section 181 of the Water Industry Act 1991, as amended (“**the Act**”).

The complaint concerns the exercise of powers to lay pipes by South West Water Limited (“**South West Water**”) on land at Kenwyn Street Car Park, Truro (“**the Site**”).

Before reaching this final determination, we shared with the parties a draft determination (“**Draft Determination**”) on 1 October 2014 and we provided the parties with the opportunity to make representations to us on it. We have taken those representations into account before making this final determination.

### 1. Introduction

- 1.1 This is our final determination of a complaint referred by the Complainant to Ofwat for determination under section 181 of the Act.
- 1.2 The dispute is between the Complainant and South West Water and is about the exercise by South West Water of its powers provided under section 159 of the Act, enabling it to conduct work on private land.
- 1.3 We issued the Draft Determination to the parties on 1 October 2014, and have considered their responses in reaching this final determination.

## 2. Background

- 2.1 South West Water entered onto the Site which is owned by the Complainant, in order to conduct work, including laying sewer pipes, as part of a major scheme to upsize an existing sewer in Truro in order to relieve sewer flooding in the city.
- 2.2 South West Water has provided Ofwat with a copy of its Code of Practice for the exercise of pipelaying powers on private land (“**the Code**”). The Code sets out what a landowner is entitled to expect while an undertaker is exercising its powers. The Code sets out expectations on matters such as consultation, communications and the standard of any reinstatement.
- 2.3 On 13 June 2013, South West Water served the Complainant with a notice issued under section 168 of the Act to enter onto the Site in order to undertake initial surveys and dig trial holes in advance of planned works. A subsequent notice was served under section 159 of the Act on 19 July 2013, providing three months’ notice of the planned works, although this was withdrawn following objections from the Complainant. Following discussions, the notice was again served on 12 August 2013.
- 2.4 South West Water and/or its contractors Balfour Beatty (“**the Contractors**”) entered the Site between June 2013 and April 2014 at various points to undertake initial surveys, to lay pipes and to reinstate the land. Works commenced on 12 November 2013.
- 2.5 On 1 May 2014 the Complainant wrote to Ofwat, indicating that South West Water had failed to adequately consult them in connection with the works, including the reinstatement works, and had acted unreasonably, causing loss, damage and inconvenience to the Complainant. The Complainant requested that the complaint be investigated by Ofwat.
- 2.6 The complaint indicated that South West Water had failed to do the following.
- Provide a copy of the schedule of condition
  - Consult in relation to timings and the work carried out
  - Consult in relation to the reinstatement works
  - Reinstatement the Site to the appropriate standard
  - Provide information on the works or when the works would finish

- Undertake items of repair and damage caused whilst the works were ongoing

### 3. Details of complaint

- 3.1 South West Water provided the Complainant with its Code for the exercise of pipelaying powers on private land prior to commencing work.
- 3.2 The Code states, at paragraph 7, that “We will make a full schedule of condition of the working area. This may amount to (any or all of) written notes, photographs, or a video recording with verbal commentary. A copy will be sent to your agent prior to the scheme commencing. If at any stage we have missed anything, please tell us. The purpose of the record is to help both you and us check that we have restored the land to a condition as near as possible to that which existed before we started work (unless you have asked us to consider alternative proposals) and that any buildings remain in the same condition”.
- 3.3 The allegation made by the Complainant was that a schedule of condition was not provided prior to the works commencing. In a letter dated 23 April 2014, the Complainant alleged that, although a schedule of condition had been prepared on the instruction of South West Water by chartered surveyors Smiths Gore on 31 October 2013, a copy had not been provided in a timely manner to the Complainant or the Complainant’s agents.
- 3.4 The schedule of condition was provided by South West Water to the Complainant by e-mail on 8 May 2014. The reinstatement work at the Site had been completed by this time. The Complainant indicated that, as a consequence, there was no opportunity to comment or otherwise have an input on the schedule of condition.
- 3.5 South West Water indicated that the failure to provide a schedule of condition was an oversight and was not deliberate

#### **Complaint that South West Water failed to consult the Complainant in relation to timings and the work carried out.**

- 3.6 The Code covers what the Complainant can expect on consultation and notice of works in paragraph 3. It states, at paragraph 3(a) that “We are required to

give you a formal notice of our intention to carry out works on your land. The notice, which has to be in writing, will be accompanied by a plan. These documents will give you information about where we intend to lay the pipe, the extent of the working area, and when we intend to start the work.”

- 3.7 The Code continues to state, at paragraph 3(c) that “If the works involve laying a new pipe we will always try to contact you before we issue the notice. Unless it is an emergency or in response to a requisition we will give you at least three months’ notice”. At paragraph 3(e) it states that “We will always use our best endeavours to consult you before the notice is served, but if for any reason we have not been able to do so, we will consult you about what we propose to do during the notice period”. At paragraph 3(f) the Code states that it will consider “any suggestions that you have about the route of the pipe, the timing of the works, and the reinstatement of land and land drains and discuss them with you. By the time of making the final decision about the route, we will have taken into account both operational and engineering needs and the costs of the works, as well as any comments or suggestions you or your agent have made”
- 3.8 The Complainant alleged that South West Water conducted one meeting prior to the commencement of work on Site. The Complainant alleges that proposals and specifications were discussed and agreed subject to the circulation of agreed minutes. The Complainant alleges that no minutes were received and that no plans or documents for proposed works or pre-commencement reports were provided.
- 3.9 It is agreed by South West Water that a meeting took place at the Site on 5 August 2013. South West Water contends that the proposed work and timetables were explained at length at the meeting, together with proposed reinstatement. Subsequent correspondence that refers to the meeting includes a letter dated 8 August 2013 from South West Water which provided plans for the works, and invited comments. A response, dated 12 August 2013, indicates the objections that the Complainant had to the plans.
- 3.10 The Complainant wrote to South West Water on 12 September 2013 indicating that South West Water’s contractor had entered the car park and sprayed the surface with different coloured paint to indicate the location of services below the surface. The Complainant had not been consulted on the works undertaken, and requested that the letter be treated as a complaint. In a letter of response dated 1 October 2013 from solicitors representing South

West Water, apologies were provided for the work that was undertaken without consultation or agreement.

### **Complaint that South West Water failed to consult the Complainant in relation to the reinstatement works**

- 3.11 In a letter dated 23 April 2014 from the Complainant to South West Water, it is alleged that the Contractors had informed the Complainant that it was up to the Complainant to comment on the reinstatement works before they were undertaken, and that no comments had been received. The Complainant alleged that no information was provided on the progress of the work and they were not told that reinstatement works had commenced. No opportunity was therefore provided to comment on the proposed reinstatement works.
- 3.12 In its response to the Complainant dated 15 May 2014, South West Water indicated that, at a site meeting dated 16 April 2014, the Contractor had invited comments on the reinstatement works conducted to date. South West Water indicated that the first intimation it had received that the Complainant wished to comment on reinstatement works was a letter dated 28 March 2014. The reinstatement had been completed on 26 March 2014.
- 3.13 South West Water indicate that there was no requirement for it to consult with the Complainant prior to reinstatement works being carried out, and that it would seek to reinstate and restore the Site to the same condition, as far as reasonably practicable, that it was in before the works commenced. South West Water further indicated that the Complainant could have raised issues related to reinstatement on occasions when the Complainant was onsite.

### **Complaint that South West Water failed to reinstate the Site to the appropriate standard.**

- 3.14 The Code, at paragraph 27(a) states “At the completion of the works we will restore the area where we have worked to the same condition that it was in before we started. On the occasions that this is not reasonably possible we will pay compensation to reflect the depreciation in the value of the land.”
- 3.15 The Complainant provided photographs of the Site, purporting to illustrate how South West Water had failed to reinstate it to the same condition that it was in before the works started. It alleges that damage to the surface of the tarmac remains, and describes the area of the Site that has been reinstated

as a large discoloured uneven patch in the middle of it. It alleges that survey pins and markings on the Site remain.

- 3.16 South West Water have responded by indicating that the tarmac used in the course of the reinstatement was, from a visual inspection, the same grade and specification as already laid on the Site, and that the material laid complies with the New Roads and Streetworks Act 1999 Specification for Reinstatement.
- 3.17 South West Water also indicated that snagging in relation to the works continued and that, as such, the complaint was premature.

### **Complaint that South West Water failed to reinstate the boundary wall appropriately.**

- 3.18 The Code, at Paragraph 27(c) states “If we have damaged or removed any fence, bank or wall we will repair or replace it as necessary”
- 3.19 The Complainant provided photographs of a boundary wall that was in place before the works commenced, and photographs of the replacement wall that had been erected by South West Water. The replacement wall is of a different height to the original wall allegedly having been reduced in height by 565mm, which, it is claimed, compromises the safety of the Site and the neighbouring property.
- 3.20 The Complainant further alleges that the boundary wall was rebuilt in the wrong location. It is alleged that the new location of the wall has increased the size of a car parking space that has been leased to South West Water and has reduced the Complainant’s planting area.
- 3.21 South West Water responded by indicating that it had rebuilt the wall along the line which best fitted the two walls it had removed. South West Water also indicated to the Complainant, in a letter dated 15 May 2014, that if the Complainant wanted the wall provided to be removed and rebuilt in accordance with the original wall, the Contractor would do this. South West Water indicated that the matter would be included within the snagging items to be discussed with the Complainant.

## **Complaint that South West Water failed to inform the Complainant of the progress of the works or when the works were to finish.**

- 3.22 The Complainant alleges that at the site meeting on 16 April 2014, it was confirmed that stage 3 of the proposed works, as indicated in the notice, would not be undertaken. It was understood by the Complainant that stage 3 was necessary to upsize a discrete length of sewer. The Complainant alleges that it was understood that the Site would be unavailable for use until stage 3 had been completed, and only therefore discovered at the meeting that reinstatement had been undertaken without notice or consultation.
- 3.23 South West Water responded on 15 May 2014 by indicating that if these works had been required, this would have been discussed with the Complainant. It was anticipated by South West Water that the Complainant would be pleased that originally planned works were not proceeding.

## **Complaint that South West Water failed to undertake items of repair relating to damage caused whilst the work was ongoing.**

- 3.24 The Complainant alleged that damage to the Site included damage to gully channels and displaced kerbing caused by heavy transport mounting the kerb to access the works. It was also alleged that concrete had been spilt onto the Site and it had been dispersed into the fuel interceptor.
- 3.25 In its response, South West Water indicated that the damage to kerbs would be incorporated within the snagging items to be discussed at a site meeting to be arranged. South West Water challenged the allegation relating to responsibility for concrete entering the fuel interceptor, relying on photographic information contained in the schedule of condition to support its position.

## **4. Legal framework**

- 4.1 Section 159 of the Act allows undertakers to lay and maintain pipes in private land. The undertaker is required to give reasonable notice of its intention to exercise this power to the owner and/or to the occupier of that land.
- 4.2 Ofwat has a qualified duty under section 181 of the Act to investigate any complaint made or referred to it with respect to the exercise by an undertaker

of any powers conferred on it by or by virtue of section 159 of the Act (i.e. the power to lay pipes in private land, the power of entry for works purposes, and other related powers)

- 4.3 If, after considering the representations of the parties, Ofwat is satisfied that an undertaker:
- has failed adequately to consult the complainant, both before and in the course of exercising those powers, about the manner in which they are exercised; or
  - by acting in the manner of exercising those powers, has caused the complainant to sustain loss or damage, or to be subjected to inconvenience

we may direct the undertaker to pay to the complainant an amount not exceeding £5,000 in respect of that failure, loss, damage or inconvenience.

- 4.4 Section 181(2) of the Act provides that Ofwat is not required to investigate a complaint if any of the three following exceptions apply.

- (a) The complaint is vexatious or frivolous
- (b) The complainant has not given the water and/or sewerage undertaker a reasonable opportunity to investigate the complaint
- (c) The complaint was brought to Ofwat's attention over 12 months after the matter to which the complaint relates first came to the attention of the complainant.

- 4.5 In deciding whether to direct a payment in respect of any failure, loss, damage or inconvenience, we will take into account any sums that have already been paid by the undertaker. We will not direct an undertaker to pay any amount to a complainant in respect of any loss, damage or inconvenience for which compensation is recoverable under any other enactment (except in so far as it appears appropriate to do so by reason of any failure of the amount of any such compensation to reflect the fact that it was not reasonable for the undertaker to cause the complainant to sustain the loss or damage or to be subjected to the inconvenience).

- 4.6 Section 182 of the Act obliges an undertaker to have an approved Code . A contravention of the Code does not of itself require that a payment be directed under section 181 of the Act. However, Ofwat may take into account any contravention of the Code in determining whether to direct any payment.

## 5. Draft determination

- 5.1 In making our draft determination we considered whether, under section 181 of the Act:
- South West Water failed adequately to consult the Complainant, before and in the course of exercising its powers, about the manner in which they were exercised; and
  - by acting unreasonably in the manner of exercising those powers, South West Water caused the Complainant to sustain loss or damage, or to be subjected to inconvenience.
- 5.2 We also considered whether any of the exceptions to our duty to investigate under section 181 of the Act applied to any parts of the complaint.

### Consultation

- 5.3 In considering whether South West Water had failed adequately to consult the Complainant before exercising its powers, it was our draft determination that South West Water did provide adequate notice of the dates upon which work was expected to proceed.
- 5.4 In considering whether South West Water had failed adequately to consult the Complainant during the exercise of its powers, it was our draft determination that there were instances where South West Water fell short of the expectations it had set out. The first instance occurred during early September 2013 when, without notice, the Contractors entered the Complainant's property and marked it with spray paint. Although South West Water subsequently indicated to the Complainant that the area to be worked on would need to be marked prior to works commencing, our determination was that there is a reasonable expectation of consultation in the form of prior notice that South West Water failed to provide.
- 5.5 South West Water also failed to provide a schedule of condition at an appropriate time, or in accordance with the Code. The expectation that a schedule of condition will be provided prior to the commencement of works is prominently set out within the Code, and there is an expectation that the procedure would be followed. Failure by South West Water to provide a schedule of condition led to protracted correspondence which could have been avoided.

5.6 Further, it was our draft determination that South West Water failed adequately to consult the Complainant during the exercise of its powers at the time of reinstatement. Ofwat has seen no evidence that South West Water advised the Complainant that it had changed its plans regarding the final stage of the work and that it had commenced reinstatement. Ofwat did not regard the response provided to the Complainant indicating that, in South West Water's view, it did not have a duty to consult on reinstatement as being consistent with the requirements of section 181 of the Act. We also did not regard the response indicating that the Complainant could have raised issues whilst onsite when reinstatement works were progressing as being sufficient to discharge South West Water's responsibility for the process of consultation. Nor did the response meet the standards expected of water companies working on private land.

### **Loss, Damage or Inconvenience**

5.7 In considering whether South West Water has acted unreasonably causing loss, damage or inconvenience, it was Ofwat's draft determination that South West Water did not restore the land to its original condition, an expectation which is set out in the Code. Specifically, the replacement of the removed boundary wall at a lower height and in a different location to the original wall. However, it was recognized that South West Water has offered to remove the replacement wall and restore the wall to its original height and position.

5.8 Ofwat considered the photographic evidence provided to support the allegation that loss, damage or inconvenience has resulted from the reinstatement of the tarmac surface of the car park. Correspondence has been provided by South West Water indicating that communications relating to snagging was ongoing.

### **Compensation amount**

5.9 It was Ofwat's draft determination that, in respect of consultation on the exercise of powers, South West Water failed to adequately consult the Complainant in the course of exercising its powers. Our draft determination was to direct South West Water to make a payment of £500 to the Complainant. This amount reflected the additional communications inevitably generated by the failure of South West Water to conduct effective consultation.

- 5.10 Ofwat also considered whether South West Water had acted unreasonably in the manner in which it has exercised its powers under section 159 of the Act. Ofwat had seen evidence of ongoing communications between South West Water and the Complainant related to snagging and offers to deal with outstanding issues. It was Ofwat's draft determination that the Complainant had not yet allowed South West Water the opportunity to conclude outstanding issues regarding the standard of the works and, in these circumstances, no payment was directed at the time.

## **6. Parties' comments on the draft determination**

### **South West Water**

- 6.1 In its response dated 20 October 2014, South West Water indicated that, having given consideration to the comments made in the draft determination and in an attempt to bring the matter to a close as quickly as possible, it would accept the draft determination.
- 6.2 South West Water recognised that it did fail to adequately consult with the Complainant as required by the Code. However, since this had been pointed out, South West Water indicated that it had taken steps to address any of the Complainant's concerns and indicated that it was in discussion with the Complainant regarding an offer in full and final settlement of all outstanding issues.

### **The Complainant**

- 6.3 Solicitors responding on behalf of the Complainant commented that the level of compensation proposed was too low, given the amount of losses and costs incurred in relation to this matter.
- 6.4 The Complainant submits that he has incurred legal costs of £15,510.30, and that the solicitors have work in progress to the value of £12,598. These costs have been incurred as a result of difficulties with the notices served by South West Water and in relation to the reinstatement works. In addition to the legal costs incurred, the Complainant indicated that he has expended significant time and cost in addressing issues, and has valued the personal time he has spent on the matter at £65 per hour plus travelling and VAT at a total of £23,977.20. The Complainant submits that serious concerns about the

works carried out has resulted in ongoing correspondence with South West Water relating to snagging items and reinstatement works, including items not referred to in the draft determination as they had occurred since the draft had been received.

- 6.5 The Complainant provided a copy of correspondence from the solicitors to South West Water dated 5 September 2014, in which discussions relating to the outstanding issues and appropriate levels of compensation were in the course of being conducted, and which post-dated the issue of the draft determination.

## Further Correspondence

- 6.6 On 29 January 2015, we requested further information from both the Complainant and South West Water in order to establish whether all outstanding matters had been brought to a conclusion, either by completion of the work or by an agreed settlement. It was considered that sufficient time had elapsed since the issue of the draft determination to have provided South West Water with a reasonable opportunity to conclude outstanding issues,
- 6.7 On 30 January 2015, the Complainant responded, indicating that discussions with South West Water were ongoing and that although he hoped that matters would be resolved shortly, it could not be confirmed that outstanding matters had been finally resolved. The Complainant was of the opinion that the land had not been reinstated to the state and condition it was in before South West Water exercised its statutory powers.
- 6.8 On 9 February 2015, South West Water responded to our request for information indicating that a sum had been agreed in lieu of reinstatement and that the dates for completing works relating to the gates and wall had been agreed with the Complainant.

## 7. Final determination

- 7.1 Having considered both our draft determination and the parties' responses to that draft, our final determination is that in respect of the consultation on the exercise of its powers, we direct South West Water to make a payment of £500 to the Complainant. This amount reflects the additional communications

inevitably generated by the failure of South West Water to conduct effective consultation.

- 7.2 After considering the comments made by both parties on, and subsequent to, the draft determination, it is clear that there continues to be discussions relating to outstanding reinstatement works. South West Water has referred to offers they have made in full and final settlement of outstanding issues. The Complainant has provided copies of correspondence indicating that discussions were continuing to take place subsequent to the issue of the draft determination.
- 7.3 The jurisdiction of Ofwat to consider the complaint was considered in section 4 above. Particular reference was made to section 181(2) of the Act, where it is stated that Ofwat is not required to investigate a complaint if the Complainant has not given the water and/or sewerage undertaker a reasonable opportunity to investigate the complaint. In this instance ongoing discussions intended to resolve outstanding issues related to the reinstatement works and any compensation due had not been concluded five months after the publication of the draft determination. It is considered that South West Water has been provided with a reasonable opportunity to investigate the complaint and complete reinstatement works.
- 7.4 When considering whether South West Water has acted unreasonably in the manner in which it had exercised its powers under section 159 of the Act, although there is evidence of ongoing communication between the parties related to snagging, including offers to deal with outstanding issues and compensation, it is our finding that South West Water has not fully resolved outstanding issues, and has caused inconvenience to the Complainant.
- 7.5 Having considered both our draft determination and the parties' responses to that draft, our final determination is that, in respect of whether South West Water has acted unreasonably causing inconvenience, we direct South West Water to make a further payment of £1,000 to the Complainant. We therefore direct South West Water to pay the Complainant a total of £1,500 in respect of both the failure to consult the Complainant and the loss, damage or inconvenience suffered by the Complainant.