



Final Determination of dispute under section 181 of the Water Industry Act 1991: Mr R Southall v Welsh Water Limited

Purpose of this document

This is a determination of a complaint referred by Mr R Southall (the **Complainant**) to the Water Services Regulation Authority (**Ofwat**) for determination under section 181 of the Water Industry Act 1991 (**WIA 1991**) on 20 October 2006.

The complaint concerns the exercise of powers to lay pipes on land (the Powers) by Welsh Water Limited (**Welsh Water**) at the Old Docks, Penclawdd, Gower, Wales (the **Site**).

Before reaching this final determination, we shared with the parties a draft determination (**Draft Determination**) on 26 July 2012 which provided the parties with the opportunity to make representations to us.

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1 Introduction and background

- 1.1 This is the final determination of a complaint referred to Ofwat by the Complainant under section 181 of the WIA 1991. In this complaint, the Complainant alleges that Welsh Water failed to undertake adequate consultation with him in respect of its exercise of its powers to lay pipes for the supply of water across the Site.
- 1.2 On 1 October 2002 land agents, acting on behalf of Welsh Water, Rees Richards & Partners (**Rees Richards**) contacted Mrs How, the Complainant's grandmother and the then owner of the Site (the **Original Owner**) referring to her as a Trustee of the Benson Trust which was mistakenly understood to own the Site. The Original Owner/Benson Trust was informed that Welsh Water would be exercising the Powers in respect of the Site as part of an improvement programme to the sewer infrastructure in the area.
- 1.3 Welsh Water has since clarified that the Benson Trust did not actually exist in 2002 and that the Original Owner owned the Site absolutely during this period. However, for ease of reference, we will refer to the Trustees where appropriate in this determination, as Welsh Water (through Rees Richards) has done so in relevant previous correspondence.
- 1.4 On 10 December 2002 Rees Richards contacted the Trustees to inform them that Welsh Water had arranged an open evening to be held in a local community hall on 16 December 2002 which would give those with an interest in the improvement programme the opportunity to gain further information. On 11 December 2002 Welsh Water served formal notice (the **Notice**) on the Trustees stating that it would be exercising the Powers after three months from the date of the Notice. The works began in March 2003. Ofwat understands that the work was completed by May 2004.¹ Ofwat also understands that it is unlikely the land agent could obtain instructions from his client at this point because around the time she was gravely ill and subsequently passed away on 25 June 2004. The Complainant at the time was only the executor of the Original Owner's estate and

¹ An email from the Complainant dated 12 September 2012 states: "In its statement of case to the Lands Tribunal in this matter, Welsh Water states that "The Compensating Authority entered upon the relevant land on or around 11th March 2003 and completed the pipe laying works in or around May 2004".

was not yet a trustee of the property. He only became a trustee on 25 August 2005.

- 1.5 On 15 April 2005, Rees Richards wrote to the Complainant (who had previously requested that all correspondence should be sent to him) stating that further entry onto the land would be required by Welsh Water to carry out further works. On 23 November 2005 the Complainant (through his surveyor) raised some concerns with Rees Richards about concrete structures on the land. The Complainant also requested “as built” plans showing these structures. On 24 November 2005 Rees Richards sent a copy of the original plans for the works. This was the plan that had been attached to the Notice and the Complainant told Rees Richards that it was not the plan requested which was an “as built” final construction plan.
- 1.6 On 8 February 2006 the Complainant raised further concerns about an above ground structure which did not appear to be on the plans which had been provided with the Notice. The Complainant also questioned whether planning consent had been obtained for the above ground structures. On 2 March 2006 Rees Richards emailed the Complainant suggesting that planning consent was not necessary for the above ground structure and that the “as built” plans were still being produced. In his response on the same date the Complainant asked for confirmation that planning consent definitely was not needed, and also stated that he had been given no indication, prior to the commencement of the works (in 2002-03), that there would be an above ground structure. The Complainant also stated that no such information had been provided during the local consultation.
- 1.7 On 24 March 2006 a local resident (Andrew Spowart) who had been present at the meeting on 16 December 2002 (see paragraph 1.4 above) emailed the Complainant saying that the only indication of any above ground structures which had been given at that December 2002 meeting was a small fence and certainly not anything as large as the structure now on the site. On 21 August 2006 Foresters LLP (solicitors instructed by the Complainant) wrote to Welsh Water stating that:
 - (a) prior to the commencement of the works the only information which had been given to the Complainant were the notes accompanying the Notice which indicated that the relevant pipe would be a sewer;
 - (b) the Complainant had understood that the sewer would be beneath ground and on that basis did not object;
 - (c) it had subsequently transpired that the sewage pumping facility now on the site occupied an area of approximately 17 metres by 14 metres, was

concreted, with a building and a 7 metre high gantry surrounded by a 3 metre high fence;

- (d) the Complainant, being unaware of the size the completed structure, had been given no opportunity to object; and
- (e) the constructed size of the final structure was far larger than anything indicated in the Notice.

- 1.8 On 4 September 2006 Welsh Water responded to the letter from Foresters LLP. In its response Welsh Water stated that the plan accompanying the Notice had clearly indicated that the pumping station was marked as the “approximate position” and that discussions had taken place with the Complainant’s representatives and with the local population.
- 1.9 On 20 October 2006 the Complainant referred the matter to Ofwat stating that he wished to initiate a formal complaint against Welsh Water on the basis of the grounds set out in the letter from his solicitors (see paragraph 1.7 above) which he attached to his complaint. On 27 October 2006 Ofwat wrote to the Complainant setting out the statutory basis on which it can investigate matters such as this. Ofwat also pointed out that it believed that the pumping station was likely to have needed planning permission before it was constructed but that this was a matter for the local authority.
- 1.10 On 15 January 2007 Foresters LLP wrote to Ofwat requesting that the complaint be held in abeyance until certain issues had been clarified or settled in the courts. On 5 April 2007 Ofwat responded confirming that it would stay its investigation pending the outcome of any court proceedings.
- 1.11 On 6 February 2008 the Planning Inspectorate issued an enforcement notice on Welsh Water requiring the removal of the above ground gantry and all associated supporting structures. Welsh Water appealed against the enforcement notice but subsequently withdrew its appeal.
- 1.12 On 24 June 2011 the Complainant wrote to inform Ofwat that he had obtained an Order from the Lands Tribunal following a negotiated settlement with Welsh Water. The Complainant also stated that the issue as to whether the works had correctly been authorised was now settled but that he wished Ofwat to proceed with its investigation into his complaint.
- 1.13 The Draft Determination was sent out to both parties on 26 July 2012. Welsh Water responded to the Draft Determination on 9 August 2012 and the Complainant responded on 14 August 2012. As Welsh Water raised some

fundamental objections, it was thought appropriate to share these comments with the Complainant. This was done on 6 September 2012 and the Complainant responded to Welsh Water's objections on 12 September 2012.

2 Legal framework

- 2.1 Ofwat has a duty under section 181 of the WIA 1991 to investigate any complaint made or referred to it in respect of the exercise by a water undertaker of any powers conferred on it by virtue of section 159 of the WIA 1991 (i.e. the power to lay pipes in private land, the power of entry for works purposes, and other related powers).
- 2.2 Where the water undertaker is to exercise its powers under section 159 of the WIA 1991 it is required to give reasonable notice to the owner or occupier of the land. Where the water undertaker is to carry out work which is not on an existing pipe the notice period must not be less than three months. Where the work is to an existing pipe the notice period must not be less than 42 days. In this case, which was work on an existing pipe, Welsh Water was therefore required to give the Complainant 42 days' notice.
- 2.3 If, after considering the representations of the parties, Ofwat is satisfied that the water undertaker:
 - (a) has failed adequately to consult the Complainant, before and in the course of exercising those powers, about the manner in which they are exercised; or
 - (b) by acting unreasonably in the manner of its exercise of those powers, has caused the Complainant to sustain loss or damage or to be subject to inconvenience
- 2.4 Ofwat may direct the water undertaker to pay to the Complainant an amount not exceeding £5,000 in respect of the failure, loss, damage or inconvenience.
- 2.5 In general, Ofwat may not order compensation in respect of any failure, loss, damage or inconvenience if compensation is recoverable under any other legislative provision.
- 2.6 A water undertaker is required under section 182 of the WIA 1991 to have an approved code of practice in respect of work on private land. A contravention of its code of practice does not itself require a payment from the water undertaker. However, Ofwat will take into account any such contravention in determining the complaint.

3 Request for further information

- 3.1 Ofwat investigated this matter in accordance with its powers under section 181 of the WIA 1991, and on 5 January 2012 Ofwat sent a request for further information to the parties. From Welsh Water, Ofwat requested a copy of Welsh Water's code of practice. From the Complainant, Ofwat requested a copy of the court documents and correspondence relating to the Lands Tribunal hearing. Ofwat also requested details on what compensation he had recovered from Welsh Water.

Welsh Water's response to the request for further information

- 3.2 Welsh Water replied to the request for further information on 4 January 2012. In its response Welsh Water sent a copy of its code of practice. Welsh Water also stated that under section 181(2)(c) of the WIA 1991 Ofwat is not required to investigate any complaint where it has been made more than 12 months after the matter to which the complaint relates first came to the notice of the Complainant. Welsh Water believes that the present complaint should be time barred. It also states that in view of the settlement ordered by the Lands Tribunal, there is no basis for Mr Southall's claim to be determined by Ofwat.

Complainant's response to the request for further information

- 3.3 The Complainant replied on 8 February 2012. In his response the Complainant asked Ofwat to request the court documents from Welsh Water, given the large amount of court documents and correspondence. Ofwat requested specified court documents from Welsh Water and the Land Tribunal's Order was provided to Ofwat by Welsh Water on 30 May 2012 and other relevant documents relating to the court proceedings were received on 14 June 2012. The Complainant also said that he had received a total of £56,250 in compensation from Welsh Water.

4 The Draft Determination

Welsh Water's Response to the Draft Determination

- 4.1 In its response to the Draft Determination dated 9 August 2012, Welsh Water asserts that its Code of Practice had been complied with and makes the following objections, namely that:
- 4.2 There was no duty to consult the Complainant as, at the relevant times, the Complainant was not the owner of the Site and a subsequent owner should not be permitted to make a complaint about a failure to consult the original owner;

- 4.3 The complaint is out of time and there are no special reasons to extend the time limit;
- 4.4 Adequate consultation took place with the original owner of the Site and Mr Spowart's evidence should not be relied upon.

Complainant's Response to the Draft Determination

- 4.5 In the Complainant's response to the Draft Determination, he stated that he had no further representations to make. However, further to Ofwat sharing Welsh Water's response to the Draft Determination (see paragraph 4.1) with the Complainant on 6 September 2012, he made the following comments:
- 4.6 Four generations of the Complainant's family had an interest in the land and Welsh Water addressed its consultation and Notices to the Trustees of the Benson Trust, including in the Lands Tribunal proceedings. Further, the Complainant considers that the coincidence of his grandmother dying and the period of the Notice and works were factors special enough to allow an extension of the time available for a complaint to be made.
- 4.7 The consultation was not adequate because there was no mention or reference in any correspondence to the above ground works including the crane gantry. The Complainant argues that it was not possible to detail a complaint until the re-surveyed, as-built drawings were received in August 2006; the complaint was referred to Ofwat two months later.
- 4.8 The Complainant refers to the plan attached to the Notice of Entry dated 11th December 2002 and points out that the area of the pumping station was almost twice that shown on the map. The Complainant also points out that the area of protected land that was eventually required for easements stretched 5 metres either side of the large reservoirs and the pumping station versus the 3 metres described in the Notice.
- 4.9 The Complainant asserts that there was no opportunity for the public, or anyone else, to object to the scheme because the scheme consulted on was less extensive than the scheme undertaken.
- 4.10 The Complainant's primary concern is that the substance and the process of the consultation were inadequate. He states that no objection was made at the time because it was not possible to realize from the information provided at the time that any objection was needed.

5 Conclusion

Jurisdiction to determine the dispute

- 5.1 On the facts, Ofwat considers that the Complainant, as the subsequent owner of the Site, was entitled to refer a complaint to Ofwat under section 181 of the WIA 1991 as a Trustee of the Benson Trust with an interest in the Site.
- 5.2 Ofwat is satisfied that the dispute between the Complainant and Welsh Water is a complaint about whether Welsh Water failed to adequately consult the Original Owner of the Site prior to the exercise of the Powers and about whether Welsh Water acted unreasonably in exercising the Powers, and therefore that Ofwat has jurisdiction to determine this dispute under section 181 of the WIA 1991.
- 5.3 Ofwat notes Welsh Water's objection (in its response to the Draft Determination) with reference to the complaint being outside the relevant time limit (see paragraph 4.1 (b) above) but does not agree with its argument that the Complaint should be time barred. Under section 181(2) (c) of the WIA 1991, the 12-month period can be extended by Ofwat where there are any special reasons for doing so and given the circumstances of this case, Ofwat considers that there are (see paragraph 5.12 below).

Determination and reasons

- 5.4 Following Ofwat's investigation of this matter, we determine that Welsh Water failed to adequately consult the Original Owner before and during its exercise of the Powers. This is because Welsh Water failed to inform the Original Owner of the Site about the nature and size of the above ground structures which were to be installed.
- 5.5 Welsh Water gave Notice to the Original Owner on 11 December 2002 and held an open public meeting on 16 December 2002, which neither the Complainant nor the land agent for the previous owner attended. We accept Welsh Water's argument that no weight can be given to Mr Spowart's email, especially since the meeting as described by Welsh Water was conducted in an informal manner, with all available documents being displayed on tables.
- 5.6 In light of the above, Ofwat considers that for the purposes of determining if there was adequate compliance with section 181(4) WIA91 only the Notice given to the Original Owner should be taken into account and any subsequent communications between the Original Owner, her agent and Welsh Water.

- 5.7 Ofwat has reviewed the Notice that was given to the owner in December 2002. In the note attached to the Notice it says that the “relevant pipe(s) to be laid in your land will be a SEWER and in the Notice itself there is a statement that says: “In this Notice ‘relevant pipe(s)’ includes any accessories used in connection with the pipe(s)”. On the attached map there is also reference to accessories. Although ‘accessories’ is broadly defined in WIA 1991, there is no reference to this definition in the Notice and nothing to aid the recipient of the Notice as to the nature of the particular accessories.
- 5.8 In a letter to Ofwat dated 18 January 2012, Welsh Water says that “the works shown on the plan sent with the statutory notice were a rising main, a pumping station, storage tanks and a discharge pipe”. We do not agree that the plan attached to the statutory notice indicates any of these structures. Rather it shows a red line indicating ‘approximate position of relevant pipes and associated accessories’. None of the structures mentioned in the above letter are identified. It is Ofwat’s view that the Notice should have explicitly drawn attention to above ground structures and as it did not do so, it did not constitute adequate notice. At the time when Notice was given to the Original Owner, she was represented by a land agent and in the above letter, Welsh Water say that “the agents were informed of the proposed works which they must have communicated to Mrs How (the Original Owner). The agents were aware of the construction of the pumping station which was surrounded by a secure fence.” While there is no documentary evidence to suggest that the agent of the Original Owner was aware of the above ground assets, we accept that the agent was aware that there were above ground assets at the latest by 31 March 2004, when he visited the site.
- 5.9 We accept Welsh Water’s argument that it had no duty to give notice to the Complainant as the Complainant was not the owner or occupier at the time that Notice was given. In our view the issue is more a factual than a legal issue and the factual questions we have considered are the following.
- Who was the owner or occupier at the time that notice was given as the company will only have a duty to give notice to the owner or occupier (section 159(4) WIA 1991)?
 - Was the owner or occupier at the time properly consulted? In this instance the relevant question is whether the notice given to the Original Owner provided accurate and sufficient information to enable her to object had she chosen to do so.
 - If she was given proper notice and she failed to or chose not to object, then a subsequent owner will have no right to object.
 - If she was not given proper notice and this fact only became evident subsequent to a change in ownership, the new owner will have a right to

complain. Ofwat's understanding is that the twelve month period set out in section 181 will only start to run from the date that it became evident that the notice had not been sufficient.

5.10 With reference to whether there are special reasons for Ofwat to consider the claim, we note that the complaint was formally brought in October 2006. This is about 31 months after the extent of the above ground structures became apparent to the previous owner's agent. The Complainant first raised concerns with Welsh Water in 2005 and, being unable to resolve the dispute to his satisfaction, the Complainant referred the matter to Ofwat the following year. Ofwat's investigation was stayed whilst the Lands Tribunal proceedings took place. Now that those proceedings have been completed Ofwat considers that there remains the matter of whether Welsh Water adequately consulted with the Complainant. We do not accept that section 181(2)(c) imposes a time bar on claims. All that this provision does is say that Ofwat is not obliged to consider complaints that are brought outside of that period. Ofwat also rejects Welsh Water's argument that there is no legal basis for Ofwat to investigate this complaint as Section 181 (1) of the WIA 1991 does not preclude it from carrying out such an investigation. In Ofwat's view, there are special reasons for allowing this complaint to be brought, in that:

- it is unlikely the land agent could obtain instructions from his client because around the time she was gravely ill and subsequently passed away on 25 June 2004;
- although we are told by Welsh Water that the land agent advised the Complainant until February 2005, the Complainant at the time was only the executor of the previous owner's estate and was not yet a trustee of the property. He only became a trustee on 25 August 2005;
- from about April 2005 until the complaint was formally lodged with Ofwat in October 2006, the Complainant took steps to pursue his complaint directly with Welsh Water.

5.11 Ofwat has examined both parties' representations and, in the circumstances, concludes that the consultation to exercise Powers has been inadequate. This is because there was no indication in the Notice that the "sewer" referred to was intended to include a substantial above ground construction.

5.12 Finally, Welsh Water has argued that the settlement, by way of an Order of the Lands Tribunal, was a full and final settlement of all disputes between the parties in relation to these works and that no further order for compensation should be made. Ofwat agrees with Welsh Water in this regard. In particular, the relevant paragraph of the Order of the Lands Tribunal provides that:

“The Compensating Authority shallpay the Claimants the further sum of £42,400 in full and final settlement of (a) the Claimants’ claims for compensation in this Reference, and (b) all and any other claims arising out of or in connection with the works described in or referred to in the Statement of Case and Reply herein, and (c) the Claimants’ costs of this Reference.”

It is Ofwat’s view that (b) above is broad enough to include claims for a failure to consult about the works referred to in the Lands Tribunal matter, notwithstanding that this may not have been part of the reference to the Lands Tribunal. The intention of the parties appears to be to settle all claims arising out of this matter and in Ofwat’s view this includes a claim for compensation for failure to consult. Accordingly, Ofwat determines that no further compensation should be paid to the Complainant, notwithstanding Welsh Water’s failure to consult the Original Owner.