



Final determination of a dispute under section 181 of the Water Industry Act 1991: Mr Black v Sutton and East Surrey Water

October 2014

Purpose of this document

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

The dispute is between Mr Black (“**the Complainant**”) and Sutton and East Surrey Water (“**Sutton and East Surrey**”) and is about the way Sutton and East Surrey exercised its powers to work in Mr Black’s land.

1 Introduction

- 1.1 This is our final determination into a dispute referred by Mr Black (the Complainant) to Ofwat, on 16 May 2014, for determination under section 181 of the Act.
- 1.2 The dispute is between the Complainant and Sutton and East Surrey, and is about the way Sutton and East Surrey exercised its powers under section 159 of the Act to work in Mr Black’s land.
- 1.3 We issued a draft determination to the parties on 22 September 2014, and have considered responses received in reaching this final determination.

2 Legal framework

- 2.1 Section 159 of the Act empowers water undertakers to lay and maintain pipes in private land. The water undertaker is required to give reasonable notice of its intention to exercise this power to the owner and to the occupier of that land.

2.2 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.

2.3 If, after considering the submissions made by the parties, we are satisfied that an undertaker:

- has failed adequately to consult the complainant, before and in the course of exercising those powers, about the manner in which they are exercised (section 181(4)(a) of the Act); or
- by acting unreasonably in the manner of its exercise of those powers, has caused the complainant to sustain loss or damage, or to be subjected to inconvenience (section 181(4)(b) of the Act),

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

2.4 We are not required to investigate a complaint if any of the following three exceptions¹ apply:

- the complaint is vexatious or frivolous;
- the complainant has not given the undertaker a reasonable opportunity to investigate the complaint; or
- the complaint was brought to our attention over 12 months after the matter to which the complaint relates first came to the attention of the complainant.

2.5 In deciding whether to direct an undertaker to make a payment in respect of any failure, loss, damage or inconvenience, we may take into account any sums that have already been paid by the undertaker to a complainant. We must 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).

¹ These exceptions are detailed in section 181(2) of the WIA91.

- 2.6 It is also relevant to note that section 182 of the Act obliges an undertaker to have an approved code of practice (**CoP**) in respect of laying pipes in private land.
- 2.7 Action that is not in line with a CoP does not of itself entitle a person to a payment under section 181 of the Act. However, we will take this into account when determining whether to direct the undertaker to make any payment, and the amount of any payment.

3 Factual background

3.1 The parties

- 3.1.1 The Complainant owns land known as Charrington Farms, Flanchford Farm, Flanchford Road, Reigate, Surrey (**the Land**).
- 3.1.2 Sutton and East Surrey is a water undertaker appointed under the Act. It provides a water supply to customers in East Surrey, and parts of West Sussex, west Kent and south London.

3.2 The Complaint

- 3.2.1 The Complainant contends that Sutton and East Surrey failed to adequately consult him before and in the course of exercising its section 159 powers. The Complainant consequently believes that Ofwat should direct Sutton and East Surrey to make a payment pursuant to section 181(4)(a) of the Act.
- 3.2.2 The Complainant originally contended that Sutton and East Surrey acted unreasonably in the way in which it exercised its section 159 powers, and caused him to sustain loss and damage and to be subjected to inconvenience. However, the Complainant has subsequently withdrawn this part of his complaint.
- 3.2.3 On 17 October 2012, Sutton and East Surrey served a notice on the Complainant that it would lay a new water main across the Land. It carried out the work throughout July 2013.
- 3.2.4 On 10 July 2013, Sutton and East Surrey notified the Complainant that it would place an above ground 'air-valve' in the track at the edge of Barn Field (an arable field), located within the Land. However, on 29 July 2013, the

Complainant found that the air-valve had been placed within the working area of Barn Field. He contends that Sutton and East Surrey did not consult him about the change of location of this air-valve.

3.2.5 The Complainant considers that Sutton and East Surrey have breached the following three paragraphs of their Code of Practice for Pipe laying:

- i. Paragraph 13: **“By the time of making the final decision about the route, we will have taken into account both engineering and operational need and the long and short term costs of the works, as well as any comments or suggestions you or your agent have made”**.
- ii. Paragraph 15: **“Once we start work, we will keep as closely as possible to the notified route. If we find we are not able to do so, we will consult with you. If we find that we need to make significant changes, and you are unable to agree them with us, we will serve a fresh notice”**.
- iii. Paragraph 23: **“Generally, we put all of our pipes and accessories below ground level. However, where we need to install a manhole or other accessory that will be raised or at ground level, we will try to place it in a position to minimise interference with future agricultural operations. On water mains we may need to install air valves at high points, and washout valves at low points. Where we need to install an accessory at or above ground level we will always discuss this with you first”**.

3.2.6 The Complainant contends that he was given no opportunity to comment on the final location of the air-valve.

3.2.7 On 27 September 2013, Sutton and East Surrey told the Complainant that the final position of the air-valve in Barn Field would be retained, and any concerns would be addressed through compensation.

3.2.8 Sutton and East Surrey made the following compensation payments to the Complainant under Schedule 12 of the Act:

“Easement consideration”	£22,500.00
“Disturbance compensation”	£18,466.80
“Land agents’ fees”	£16,289.39
Total	£57,256.19

3.2.9 The Complainant sought a compensation payment of £15,840 for loss, damage and inconvenience in addition to the disturbance compensation mentioned above. He calculated this by assuming the value of the Land is £8,000 per acre, and he estimated that 1.98 acres of Barn Field had been lost as a consequence of the siting of the air-valve. £8,000 multiplied by 1.98 is £15,840. He also sought a further £5,000 directly from Sutton and East Surrey Water for failure to adequately consult.

3.2.10 On 3 March 2014, Sutton and East Surrey wrote to the Complainant admitting that it failed to consult adequately, and had caused loss, damage and inconvenience. It referred the Complainant to its land agent to agree compensation.

3.2.11 On 28 March 2014, Sutton and East Surrey’s land agent said that compensation for exposed air-valves in fields of a similar nature was in the region of £300-400. However, it agreed to offer a compensation payment based on the Complainant’s land valuation and take account of a failure to consult. It offered the Complainant a payment of £5,040, which it considered was to compensate for both the failure to adequately consult and for the loss, damage and inconvenience caused. It calculated this as it assumed the value of the Land is £8,000 per acre, and it estimated that 0.63 acres of Barn Field had been lost as a consequence of the siting of the air-valve. £8,000 multiplied by 0.63 is £5,040.

3.2.12 However, the Complainant understood that this offer of compensation was only to compensate for loss, damage and inconvenience, not to compensate for failure to consult.

3.2.13 We understand that the Complainant accepted Sutton and East Surrey’s compensation offer of £5,040 on 10 June 2014 on the basis that this was for loss, damage and inconvenience. He considers that he has been adequately

compensated for the loss, damage and inconvenience caused, although we understand that he is yet to receive the compensation payment from Sutton and East Surrey. The Complainant stressed that he would like Ofwat to investigate Sutton and East Surrey's alleged failure to adequately consult him.

3.2.14 Sutton and East Surrey is aware that the Complainant considers he hasn't been compensated for failure to consult. It is disappointed at his decision to refer this dispute to Ofwat, as it considers the offer of £5,040 provides sufficient compensation for both loss, damage and inconvenience, as well as its failure to adequately consult.

4 Views of the parties

4.1 We issued a draft determination to the parties on 22 September 2014 and invited comments. The key findings from our draft can be summarised as follows:

- Sutton and East Surrey's offer of £5,040 to the Complainant adequately compensated him for loss, damage and inconvenience, but not for a failure to adequately consult.
- Sutton and East Surrey failed to adequately consult the complainant, before and in the exercise of its section 159 powers, about the manner in which they were exercised.
- This failure to adequately consult resulted in the Complainant's business being adversely affected in perpetuity.
- Therefore, we are minded to direct Sutton and East Surrey to make a payment of £2,500 to the Complainant.

4.2 The Complainant's land agent, CLM, responded to our draft determination on 13 October 2014, and made the following points:

- The Complainant has not yet received the compensation of £5,040 from Sutton and East Surrey.
- He would like our final determination to make it clear that Sutton and East Surrey should pay £2,500 in addition to the £5,040 offered that has not yet been paid.

4.3 Sutton and East Surrey responded to our draft determination on 14 October 2014, and made the following points:

- It is disappointed that in our draft determination we say we are minded to direct it to make a payment of £2,500 to the Complainant. Sutton and East Surrey considers that the compensation offered (£5,040) to the Complainant takes into account its failure to adequately consult. However, the Complainant agreed to the offer of £5,040 compensation on the basis that it compensated him for loss, damage and inconvenience but not for a failure to adequately consult.
- Sutton and East Surrey also considers that there is adequate space between the boundary of the field and the exposed air-valve for the land to be farmed in a normal way. However, as set out above our decision to direct Sutton and East Surrey to make a £2,500 payment was in respect of its failure to adequately consult the Complainant only. In any event the Complainant disputes this point and considers that the corner of the field is no longer workable as there is a likelihood that the air-valve would be hit by farm machinery.
- Finally, Sutton and East Surrey pointed out that our draft determination quoted an incorrect price range for their usual compensation payments for exposed air-valves. We have amended this in paragraph 3.2.11 above.

5 Our final decision

- 5.1 Sutton and East Surrey has admitted that it failed adequately to consult the Complainant, before and in the course of exercising its powers, about the manner in which they were exercised. Accordingly we have concluded that Sutton and East Surrey failed to adequately consult the Complainant.
- 5.2 Although Sutton and East Surrey considers it took account of its failure to consult in its offer of £5,040 to the Complainant, we consider this was insufficient compensation. We consider that the failure to adequately consult led to serious consequences as the Complainant can no longer farm an area of Barn Field in perpetuity. As noted above, the Complainant considers that the corner of Barn Field is no longer workable as there is a likelihood that the air-valve would be hit by farm machinery. If he had been consulted about the proposed change of location of the air-valve from the edge of Barn Field to its centre, the Complainant believes he may have been able to negotiate a mutually acceptable position for the air-valve which would have avoided the subsequent loss, damage and inconvenience.
- 5.3 For this reason, we direct Sutton and East Surrey to make a payment of £2,500 to the Complainant. This is in addition to the £5,040 in compensation

already offered by Sutton and East Surrey to the Complainant on 10 June 2014, and which the Complainant accepted on the basis that this was for the loss, damage and inconvenience suffered. We note that this compensation is yet to be paid.

- 5.4 We have a qualified duty to investigate complaints made under section 181 of the Act. We do not consider that the Complaint falls into any of the exceptions to our duty to investigate.
- 5.5 We conclude that Sutton and East Surrey failed to adequately consult the Complainant before and in the course of exercising the powers conferred on it by or by virtue of section 159 of the Act, about the manner in which those powers were to be exercised. This failure to adequately consult resulted in the Complainant's business being adversely affected in perpetuity. Therefore we direct Sutton and East Surrey to make a payment of £2,500 to the Complainant. This is in addition to the £5,040 in compensation already offered by Sutton and East Surrey to the Complainant on 10 June 2014.