

June 2016

Trust in water

Final determination of a dispute under section 181 of the Water Industry Act 1991: Barrett v Yorkshire Water

www.ofwat.gov.uk

ofwat

Final Determination of a Dispute under Section 181 of the Water Industry Act 1991: Barrett v Yorkshire Water

Purpose of this document

This is a final determination of a dispute referred by Mr T & Mrs P Barrett to the Water Services Regulation Authority (“**Ofwat**”) for a determination under section 181 of the Water Industry Act 1991 (“**the Act**”). The dispute is between Mr & Mrs Barrett (represented by Mr [REDACTED]) (“**the Complainants**”) and Yorkshire Water (together “**the Parties**”) and is about Yorkshire Water’s exercise of statutory powers in carrying out maintenance works to a public sewer situated under the Complainants’ property (“**the Property**”). The Property comprises the Complainants’ house at [REDACTED] [REDACTED] (“**Daleside**”) and a separate plot of land adjacent to [REDACTED] Daleside (the “**Adjacent Land**”).

1. Introduction	4
2. Legal framework	5
3. Background	7
4. Particulars of complaint	11
5. Jurisdiction to determine the complaint	13
6. Requests for information	14
7. Draft determination	17
8. Comments on the draft determination	18
9. Final determination	23
10. Appendices	26

1. Introduction

- 1.1 This is a final determination of a dispute referred by [REDACTED], on behalf of the Complainants, to Ofwat for determination under section 181 of the Act.
- 1.2 The dispute is between the Complainants and Yorkshire Water and is about the exercise by Yorkshire Water of powers provided under section 159 of the Act, enabling it to conduct work on private land.

2. Legal framework

- 2.1 Section 159 of the Act empowers water and sewerage undertakers to lay and maintain pipes in private land. The undertaker is required to give reasonable notice to the owner and to the occupier of the land of its intention to exercise this power.
- 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 sections 159 and 161(2) of the Act (i.e. the power to lay pipes in private land, the power of entry for works purposes, and other related powers).
- 2.3 The duty referred to above is qualified in that we are not required to investigate a complaint if any of the following exceptions apply:
- a. The complaint appears to Ofwat to be vexatious or frivolous;
 - b. Ofwat is not satisfied that the complainant has given the undertaker a reasonable opportunity to investigate and deal with the complaint; or
 - c. The complaint was first made to Ofwat or the Consumer Council for Water (CCWater) more than 12 months after the matter to which the complaint relates first came to the attention of the complainant.
- 2.4 If, after considering the representations of the parties, Ofwat is satisfied that the undertaker:
- Has failed to adequately consult the complainant, before and in the course of exercising those powers, about the manner in which they are exercised; 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

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

- 2.5 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).
- 2.6 Section 182 of the Act obliges an undertaker to have an approved code of practice in place, dealing with work on private land. A contravention of the code of practice does not of itself require that a payment be directed under section 181 of the Act. However, Ofwat will take into account any contravention of an undertaker's code of practice in determining whether to direct any payment.

3. Background

- 3.1 Following a complaint about flooding from a property ([REDACTED]) neighbouring the Complainants' Property on 11 September 2014, Yorkshire Water carried out a CCTV survey which identified roots within one of Yorkshire Water's sewers. They removed the roots on 24 September 2014 and carried out another CCTV survey to ensure their work was successful. The results of that survey identified that about 20 metres of sewer needed to be re-laid, requiring a series of excavations. The camera survey also identified a major collapse on a surface water sewer and Yorkshire Water determined that to deal with that collapse it would be necessary to excavate on the Adjacent Land. The Adjacent Land was fenced off from [REDACTED] Daleside and access to the Adjacent Land appeared to be from High Street (the road behind, and running parallel to, [REDACTED] Daleside). Appendix 1 shows the map of the area surveyed. The Adjacent Land is shown on the map, situated between 39 Daleside and 48 Daleside.
- 3.2 To gain access to the Adjacent Land for excavation, Yorkshire Water contacted 'FSL estate agents' ("**FSL**"), whose contact details were posted on a fence outside the Adjacent Land, which at the time was for sale. Yorkshire Water state that at the time they did not know the Adjacent Land belonged to the Complainants. Yorkshire Water state that during the conversation an FSL agent granted them permission to enter the Adjacent Land to carry out the repairs, and they reasonably believed they were able to commence the works.
- 3.3 Whether or not consent was given by an FSL agent is disputed. FSL later wrote to the Complainants telling them that no one in its office had given Yorkshire Water permission to gain access to the land, as FSL had no authority to do so.
- 3.4 In compliance with section 182 of the Act, Yorkshire Water has published a document entitled "Code of Practice for the exercising of pipe-laying powers on private land" ("**the Code**"). As they did not know that the Complainants owned the Adjacent Land, they did not provide a copy of the Code to the Complainants prior to works commencing.
- 3.5 Paragraph 12 of the Code states the following:

"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 we will consult you about what we propose to do during the notice period".

3.6 Paragraph 13 of the Code states:

“We will take account of all matters mentioned above, as well as considering any suggestions that you (and/or adjacent landowners who are affected by the scheme) 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 engineering and operational needs and the long and short term costs of the works, as well as any comments or suggestions you or your agent have made. If at this stage we are unable to meet any suggestions or objections that you have, we will explain the final decision to you in writing if you ask us to do so”.

3.7 On 20 October 2014, Yorkshire Water entered the Adjacent Land to start work on the surface water pipe which was causing the issues experienced by the occupiers of [the neighbouring property]. Yorkshire Water state it “reasonably believed it had gained the absolute permission from the correct source” to carry out its works and was acting lawfully.

3.8 Yorkshire Water stated that when they entered the Adjacent Land on 20 October 2014, they cut the locks to the gate and that the gate then blew back in the wind and was damaged as a result (see Appendix 2). Yorkshire Water stated they repaired the gate using a specialist contractor but the Complainants were not satisfied with the repair. Subsequently, Yorkshire Water representatives met the Complainants on site on 18 November 2014 to review the quality of the repair.

3.9 According to Yorkshire Water, the Complainants advised them to concentrate on the sewer repair as the Adjacent Land was to be sold later that week, and the new owner would be removing the gate and fencing to enable access, so they could commence building on the land.

3.10 Yorkshire Water state that sometime later the sale of the Adjacent Land fell through and the Complainants advised them that they required loose fence panels and a post to be repaired (damaged in the course of carrying out the works). Subsequently, Yorkshire Water met with the Complainants on 6 February 2015 to discuss this further and following the visit it was agreed that Yorkshire Water would pay the Complainants £300 for the damaged gate and would instruct a specialist contractor to re-bed the fence post and re-attach the loose fence panels. The amount of £300 was sent out on 13 February 2015 and the repairs to the fence post and the loose fence panels were carried out on 23 February 2015.

3.11 Yorkshire Water also carried out work on the Complainants' property at [REDACTED] Daleside. This included:

- digging out tree stumps;
- laying and connecting of 2 pipes (5 metres long), gravelling and back filling;
- removal of a broken pipe;
- levelling of the garden and getting rid of surplus soil;
- putting down top soil along the fence line (as requested by the Complainants);
- spreading 8 tonnes of washed gravel and washing down of both drives;
- cutting and digging out the tarmac area and an area of wet stone;
- compacting the drive and laying of tarmac; and
- planting new plants.

3.12 Yorkshire Water states that all of the above works were completed on 23 February 2015. However, in a letter to CCWater on 26 April 2015, the Complainants stated "as at 8 April 2015 the works to the sewers [were] still ongoing" and they understood this was works on a foul sewer which they said was leaking within their land. Further, they state that "YW continue to enter [their] land without permission even though they state the works are complete".

3.13 We note that Yorkshire Water to explain the nature of this work. Yorkshire Water stated that "all the work at the property was completed on 23 February 2015", but that on 9 April 2015 it carried out works to line the sewer. It stated that this work was carried out on its network and access to the property was not required. We note that this was also confirmed by the Complainants, although the latter stated that Yorkshire Water operatives "were still wandering onto the site [that is, the Property]".

3.14 Further, Yorkshire Water had previously told the Complainants on 11 December 2014 that it would "consider an appropriate compensation payment once all the work is completed" and that they would remain in contact to "discuss a compensation payment with [the Complainants]". Subsequently, on 17 March 2015, Yorkshire Water wrote to the Complainants to apologise that their repair works to the public sewer in the Complainants' land had caused them inconvenience and upset. They told the Complainants they were "aware [Yorkshire Water] had to remove a lock from [the Complainants'] gate without permission"...and that they wanted "to apologise for this and confirm a payment of £300 was made by way of compensation".

- 3.15 In that letter, Yorkshire Water also stated that during the works, they not only fulfilled their duty to leave the site in the same condition that it was found, but consider that they provided betterment over and above their statutory obligations. In addition to the £300 for the gate, Yorkshire Water offered a further goodwill payment of £50 to cover any use of water and electricity – an offer which the Complainants rejected.
- 3.16 As the Complainants were unhappy with that letter, on 26 April 2015 they contacted CCWater to express their dissatisfaction with Yorkshire Water and stated they accepted Yorkshire Water’s apology but not the goodwill gesture.
- 3.17 We understand that although the Complainants had asked CCWater to mediate with Yorkshire Water on their behalf, they were still in contact with Yorkshire Water. According to Yorkshire Water, the relationship between Yorkshire Water and the Complainants deteriorated in this period due to incidents where the Complainants allegedly verbally and physically abused Yorkshire Water representatives during onsite appointments, such that Yorkshire Water decided it was no longer appropriate for it to continue meeting the Complainants on site.
- 3.18 On 3 July 2015, CCWater wrote to the Complainants to inform them that it was unable to consider the complaint further and that the Complainants could take their case to the Water Redress Scheme (WATRS).
- 3.19 After taking on the case and contacting Yorkshire Water, on 7 January 2016 WATRS informed the Complainants that they could not adjudicate the dispute because Ofwat has powers to determine the issues raised.

4. Particulars of complaint

- 4.1 On 7 January 2016, the Complainants wrote to Ofwat, and complained about Yorkshire Water’s “misunderstanding of the stress and hardship caused” by Yorkshire Water’s actions, the lack of any compensation and that Yorkshire Water completely ignored requests and agreements made with the Complainants.
- 4.2 Further, on 1 February 2016, the Complainants asked Ofwat to consider the loss of income incurred by the Complainants because the Complainants alleged they were unable to leave their house unattended whilst Yorkshire Water representatives were there, as they had to monitor Yorkshire Water at all times due to the damage they allegedly continued to make.
- 4.3 The Complainants allege they never gave access to Yorkshire Water to work in the Adjacent Land, and that Yorkshire Water cut the lock to the gate to gain entry. The Complainants considered this to be “breaking and entering”, and that Yorkshire Water “gained access causing criminal damage”.
- 4.4 The Complainants also stated¹ that “due to the mismanagement of the works by Yorkshire Water, [the Complainants] were requested to attend numerous meetings on site” and felt they had to spend time monitoring Yorkshire Water on site. As a consequence the Complainants were unable to work full time and therefore suffered direct loss of income.
- 4.5 The Complainants are self-employed. They run a small business providing car transportation services to the motor industry and rely on contracts. They provided a list of days (29 days²) on which they say they were unable to work as a result of having to attend the site and stated that this equates to a loss of income of £13,050.

¹ In their response to our request for information on 16 February 2016

² October 2014: 15, 16, 20, 21, 26, 28. November 2014: 17, 18. December 2014: 5, 8, 15, 17, 18, 19, 20, 21, 22, 23. January 2015: 5, 6, 8, 12, 22, 29. February 2015: 22. March 2015: 5, 11, 18, 21.

4.6 The Complainants also referred to “numerous examples where the facts presented by Yorkshire Water... [were] inaccurate and incorrect”.

5. Jurisdiction to determine the complaint

5.1 Ofwat is satisfied that the dispute between the Complainants and Yorkshire Water is a dispute about the exercise by Yorkshire Water of powers conferred on it by section 159 of the Act, notwithstanding that no notice was served on the Complainants. The Complainants have alleged that Yorkshire Water has failed to compensate them for inconvenience and loss of income for the period in which the Complainants had to supervise Yorkshire Water operatives on the Property. None of the exceptions to our duty (section 181(2) of the Act) which we list at paragraph 2.4 are applicable.

5.2 This is because:

- We do not consider the complaint to be vexatious or frivolous;
- The Complainants have exhausted Yorkshire Water's complaint procedure; and
- The Complainants contacted CCWater on 2 December 2014 to complain about the length of time Yorkshire Water had been carrying out works at the Property and further on 9 January 2015 to complain about the reinstatement associated with the works done as a result of the flooding, which is within the time period which allows us to consider the complaint.

Therefore, we have a duty to investigate.

6. Requests for information

6.1 Ofwat sent requests for information (RFI) to Yorkshire Water and to the Complainants on 2 February 2016. We asked the Complainants:

- to provide, in addition to the information which they had already provided us, copies of any other correspondence with Yorkshire Water in relation to the work, including any complaints made;
- to provide details around the loss of income incurred;
- to clarify their allegations over “inaccurate and incorrect” comments made by Yorkshire Water; and
- to provide supporting evidence (such as costs incurred and the receipts) for any work which had to be carried out by the Complainants, specifically, their statement that “the garden wall in the end had to be made good by Mr Barrett”.

6.2 We asked Yorkshire Water to:

- set out how they ensured compliance with the Code during work on the Property, albeit they had not served a section 159 notice to work in the Property;
- indicate the current position relating to the reinstatement of the Property, and confirm whether they have caused loss, damage or inconvenience to the Complainants;
- provide a chronology of events in this matter;
- provide copies of any correspondence exchanged with the Complainants and/or their representatives in relation to the work and indicate how they responded to any letters or e-mails of Complaints; and
- set out, where they have already carried out reinstatement works, the costs Yorkshire Water has incurred for these, including any supporting information where relevant.

6.3 Both parties responded to our RFIs on the 16th February 2016. We summarise the responses, which we consider are relevant to the dispute, below.

Response from the Complainants

6.4 The Complainants provided us with the correspondence which they consider to be relevant to their complaint, which included correspondence between:

- the Complainants and CCWater;
- Yorkshire Water and CCWater;
- Yorkshire Water and the Complainants; and
- WATRS and the Complainants.

6.5 The Complainants also provided us with details of the alleged loss of income which they incurred, which amounted to £13,050, covering 29 days when they did not work. The Complainants state that there was no guarantee they would have secured contracts on the 29 days which they listed, but they provided supporting emails from two individuals, dated 11 February 2016 and 14 February 2016 which they consider demonstrates the contracts would have been secured.

6.6 Further, the Complainants provided clarification into why they said Yorkshire Water had made “inaccurate and incorrect” comments in their letters. We sought clarifications from Yorkshire Water on the points raised by the Complainants, and have included them at Appendix 5.

6.7 The Complainants did not provide supporting evidence (e.g. receipts) to corroborate that they had to carry out extra work, but rather stated it was the inconvenience and the time taken to carry out the works. They stated because the re-bedding of the coping stones was carried out in freezing conditions the mortar failed, and therefore had to be redone. They also stated that there was an instance where Yorkshire Water came to reset a post which was pushed over but the latter had no spirit level – something which the Complainants had to provide.

Response from Yorkshire Water

6.8 Yorkshire Water told us they ensured compliance with the Code during the works on the land by:

- Consulting with FSL to gain access to the land;
- Continuing to contact the customers during the works. A single point of contact was appointed to the customers to provide clear updates of Yorkshire Water’s actions;
- Ensuring there was constant access for the customers to leave and enter their land;
- Using precaution boards to lessen the damage on the driveway from heavy plant machinery;

- Cleaning mud/soil following the works; and
- Restoring/improving the condition of the land once all the works were completed.

6.9 In terms of Yorkshire Water's current position on the reinstatement, they consider that all of the necessary remedial work has been completed, but accept that, due to the complexity of the repair work on the collapsed sewer, there was some unavoidable damage to the Complainants' land. They stated that they repaired and made good the existing driveway, walls and fences and replaced any shrubs and bushes. Yorkshire Water also added they wanted to make sure the reinstatement works were completed to the Complainants' satisfaction, which meant that some of the remedial work took more than one attempt. Yorkshire Water considers that the resulting works amount to betterment, which is over and above its statutory obligation. Yorkshire Water also provided a chronology of events, copies of all correspondence relevant to the complaint and a breakdown of all the costs they have incurred in doing the works at the Property. This included the total cost for the sewer replacement works which amounted to £23,393.17, and reinstatement works on the garden which amounted to £5,972.15.

7. Draft determination

7.1 We issued a draft determination on 17 March 2016. Our draft determination considered that

- Yorkshire Water breached its obligations to provide reasonable notice under section 159 of the Act to the owner and occupier of the land in that it did not consult the Complainants prior to accessing the Adjacent Land. Once it became aware that the Adjacent Land belonged to the Complainants, it contacted the Complainants to discuss access to the Property and it kept in contact with the Complainants throughout the works and in this respect we considered that Yorkshire Water met its statutory obligations and its obligations set out in the Code;
- Yorkshire Water's conduct did result in inconvenience to the Complainants in that they needed to supervise some of the works, attend various site meetings and engage with Yorkshire Water on remedial works. However, we did not consider that the Complainants had established that they suffered the loss or damage claimed as a result of the works;
- the extent of the remedial work carried out by Yorkshire Water amounted to betterment of the Property and consequently that there was no net damage or loss suffered by the Complainants; and
- in view of the total cost of the works (£23,393.17) carried out at the Property, in addition to the goodwill gesture of £5,972.15 spent on the Complainants' garden, that no further payment was due to the Complainants

7.2 In considering whether Yorkshire Water should pay the Complainants an amount for the inconvenience caused, we had regard to the extent of remedial work already carried out by Yorkshire Water, including:

- £300 in compensation for cutting the lock on the gate;
- Replacing the lock on the gate;
- Re-bedding the fence post and re-attaching the loose fence panels;
- Tarmacking an area of the drive, including pulling up a piece of block paving and relaying tarmac;
- Repointing some sections of the garden wall where it cracked; and
- Replacing the uprooted conifer trees in the garden with laurel trees.

8. Comments on the draft determination

Yorkshire Water's response

8.1 On 12 April 2016, Yorkshire Water told us that they accepted the determination and did not intend to make a representation.

The Complainants' response

8.2 The Complainants provided their representation on 19 April 2016. They state that Yorkshire Water provided incorrect and misleading information, particularly, that:

- a. the damage to the gate could not have been caused by it blowing back in the wind because there is nothing³ for it to blow into, and considered that the damage was done by the bucket of an excavator hitting it;
- b. the refund which Yorkshire Water paid them was to cover the cost of repairing the damaged gate and does not constitute a 'compensation'. They provided an advice note from Yorkshire Water as evidence to their statement;
- c. it is untrue that they verbally and physically abused Yorkshire Water operatives, stating to the contrary, that it was Yorkshire Water operatives who laughed and verbally abused them on two occasions (on 21 October 2014 and on 23 October 2014). The Complainants added that two Yorkshire Water operatives were removed from the site as a result although they returned on 26 October 2014 to make an apology to the Complainants;
- d. they do not accept the remedial works carried out by Yorkshire Water are above and beyond Yorkshire Water's statutory obligation nor do they accept that there is any betterment. The Complainants consider that if necessary precautions had been taken much of the damage would have been avoided;

³ The Complainants provided a photo showing the position of the gate (see Appendix 2)

- e. the photographs provided by Yorkshire Water (and which are in Appendix 3a and 4 of this document showing the garden before and after the reinstatement) are “incorrect and totally misleading”. They state the land shown in Appendix 3a is the land which was up for sale (i.e. the Adjacent Land) and that Appendix 4 is the Complainants’ garden, a separate piece of land. The Complainants provided photographs “AA”, “CC” and “DD” (see Appendix 6) which they state correctly show the Adjacent Land and the garden before Yorkshire Water commenced the works, respectively. The Complainants consider photographs ‘CC’ and ‘DD’ show that Yorkshire Water did not provide any betterment;
- f. the conifer trees in Appendix 3 were removed originally by the Complainants to assist Yorkshire Water and were set aside to be replanted once the works were completed. The Complainants state because Yorkshire Water took far longer than planned, these trees died before they could be replanted;
- g. the remedial works took more than one attempt to satisfy them. They state this is because resurfacing works to the driveway had to be re-laid due to a four hour gap between deliveries which meant that the first layer of tarmac had already “gone off”, making it impossible to lay the second delivery. The Complainants provided photographs ‘EE’ and ‘FF’ (see Appendix 7) which show the poor quality of tarmac that had to be redone. The Complainants state it is unsurprising that the reinstatement works cost £5,972.15 due to the extent of the remedial works required to their garden and the several attempts made by Yorkshire Water to carry out the works to the correct standard. They consider that this could have been avoided if the correct precautions had been implemented, for example when heavy vehicles entered the land; and
- h. the lock that was broken by Yorkshire Water was never replaced.

Additionally, the Complainants consider that

- i. whilst it is difficult to establish that work would have been secured without a written contract, contracts of this type do not exist and they rely on previous experience and contacts within the industry to secure commissions. In an attempt to demonstrate the level of work which they regularly secure, the Complainants point out that they managed to secure work for 1, 5, 8, 9, 10, 11, 12, 15, 16, 22, 23, 24, 25 and 29th September 2014 – and they consider it is not unreasonable to conclude that the same level of commissions would have been forthcoming over the period of October 2014 and March 2015.

The Complainants consider it was not in their best interest to leave their home unattended, as instances such as the four hour delay between deliveries of tarmac would not have otherwise come to light;

- j. £50 was insufficient to cover the cost of water and electricity for nearly 3 months which is the time Yorkshire Water operatives were at the site – the Complainants considered that the offer was derisory;
- k. the total cost of the works is not relevant and the £5,972.15 is not extra cost, nor can it be considered as a ‘goodwill gesture’ because it was for the reinstatement of the garden, driveway, trees, walls which were damaged by Yorkshire Water and which they were duty bound to reinstate;
- l. Yorkshire Water did not meet its statutory obligations because on two occasions when Yorkshire Water was carrying out works to the neighbouring property (at [REDACTED]) the Complainants allegedly asked them if access was required onto their land and on both occasions Yorkshire Water said no; and
- m. they did suffer loss and damage and there was no betterment. They add that Yorkshire Water confirmed they would visit the site once the works were completed but that no one has visited to date, and that the garden has now sunk. The Complainants hope Ofwat reconsiders its decision and “award (them) the compensation they are entitled to”.

Ofwat’s comments

8.3 We set out below our response to some of the factual disputes that arise as a result of the representations received.

- a. Based on the photograph at Appendix 2, we agree with the Complainants that it is likely there was nothing for the gate to have blown back into and that therefore the damage may not have been caused solely by the wind.
- b. Based on the advice note which the Complainants provided, we agree that the £300 was not a compensation, but was to cover the Complainants’ costs for repairing the gate.

- c. Through their RFI, Yorkshire Water provided us with an excel spreadsheet containing call log information. Further, on 6 May 2016 Yorkshire Water provided copies of telephone records between itself and the Complainants which contained an instance in which the Complainants had verbally abused and threatened a Yorkshire Water operative. We are satisfied that Yorkshire Water did make calls to the Complainants and that it may have been justified in deciding to instruct its operatives not to continue visiting the site. For the purposes of this dispute, we have not considered these issues further as we are of the view that they are customer service issues that are best dealt with by Yorkshire Water rather than as part of a dispute being determined under section 181 of the Act.
- d. We agree with the Complainants that had Yorkshire Water got it right first time, there may have been no need to repeat some of the works which they did.
- e. We note that in the draft determination we did not include two photographs which Yorkshire Water provided and which showed the garden before the works started, as it was not clear to us that these were of the garden. This meant that we misrepresented the pictures of “before” and “after” the works. For clarity, all of the pictures showing the garden and the Adjacent Land are now included at Appendix 3.
- f. Through the correspondence we have reviewed, it does not appear that Yorkshire Water had asked the Complainants to remove the mature trees, and therefore there cannot be an expectation that it had to reinstate these trees.
- g. We asked Yorkshire Water to explain why there was a four hour gap in delivery of the tarmac. Yorkshire Water stated that their “team mis-timed the curing time and when they started to roll it the tarmac was partially cured. This is why when [they] returned to rectify the issue [they] did an oversized area as good will gesture at [their] cost. This was not due to any delays with materials”. We consider that this amounted to poor planning by Yorkshire Water and that it would have increased the cost of reinstating the garden
- h. We also asked Yorkshire Water whether they replaced the lock, given that the Complainants said they had not done so. Yorkshire Water stated they “accept the lock was broken when [they] gained access to the site and [they] did not replace the lock or contribute towards this.”

8.4 Further, we consider below some of the other points that the Complainants raised in their representation:

- a. The Complainants state that the nature of their work does not involve a contract to be in place. Nonetheless, we do not consider that the Complainants have made out an adequate case that they needed to be at home on the relevant 29 days or that they would have secured all of the work they say they may have secured.
- b. On 4 May 2016, we asked the Complainants to provide evidence to support their assertion that they asked Yorkshire Water whether the latter needed to carry out works on their land. In responding, on 9 May 2016, the Complainants noted that the discussions they refer to happened on 15 and 16 October 2014 before the works commenced. They state that whilst they have no evidence to confirm that these discussions took place, Yorkshire Water should be able to confirm they were on site at [the neighbouring property] on those dates.

We also asked Yorkshire Water to comment on this point. Yorkshire Water stated that this was “down to the fact that at that point [they] didn’t know [they] required access as [they] were investigating issues at [the neighbouring property]. Access to land behind [the Property] was made from High Street so [they] assumed this was not the [Complainants’] land”.

- c. We note that Yorkshire Water did not go ahead with the site visit after the reinstatement, and we consider this may be because the relationship between itself and the Complainants had broken down at that point. Particularly, that the Complainants nominated a relative to handle their communication with Yorkshire Water and requested that Yorkshire Water no longer contact them.
- d. Based on the photographs which the Complainants have provided at Appendix 8 to show the sunken land, we are unable to draw any conclusion that this is the case without an appreciation of what the land looked like prior to the reinstatement.

9. Final determination

- 9.1 We have considered, under section 181 of the Act, the manner in which Yorkshire Water exercised its powers.
- 9.2 The scope of the complaint is about:
- Yorkshire Water's failure to adequately consult with the Complainants; and
 - the loss, damage or inconvenience suffered by the Complainants by Yorkshire Water when working on the Property.
- 9.3 Undertakers are obliged to provide reasonable notice under section 159 of the Act in order to carry out works on private property. Yorkshire Water says that it provided notice to FSL as it had been represented to them that FSL could provide consent, on behalf of the Complainants, to access the Adjacent Land. FSL confirm that they acted as agent for the Complainants in respect of the sale of the land, but deny that they had authorisation to provide consent on behalf of the Complainants and deny further that consent was in fact provided. As no written notice was provided, Yorkshire Water cannot provide proof that notice was given to FSL and there is no proof that FSL consented on behalf of the Complainants to Yorkshire Water entering the Adjacent Land.
- 9.4 As a result, we consider that Yorkshire Water breached its obligations to provide reasonable notice under section 159 of the Act to the owner and occupier of the land in that it did not consult the Complainants prior to accessing the Adjacent Land.
- 9.5 We also considered, once Yorkshire Water had entered the Property, whether it adequately consulted the Complainants in the course of carrying out the works. It is our assessment that in this respect Yorkshire Water met its statutory obligations and its obligations set out in the Code. Once Yorkshire Water became aware that the Adjacent Land belonged to the Complainants, it contacted the Complainants to discuss access to the Property and it kept in contact with the Complainants throughout the works.
- 9.6 Further, we also considered whether Yorkshire Water caused inconvenience, loss or damage to the Complainants.

- 9.7 We consider that the Complainants were able to establish that they suffered loss or damage as a result of the works and that although they were compensated for the gate, they were not compensated for the lock.
- 9.8 We also consider that Yorkshire Water's conduct did result in inconvenience to the Complainants in that they needed to supervise some of the works, attend various site meetings, and engage with Yorkshire Water on remedial works. However, we do not consider that the Complainants were able to establish the alleged loss of earnings to the extent claimed.
- 9.9 In considering whether Yorkshire Water should pay the Complainants an amount for the inconvenience caused, we had regard to the extent of remedial work already carried out by Yorkshire Water.
- 9.10 We note that we arrived at our provisional conclusion (at draft determination) that the works constituted a betterment based on the photographs of the reinstated garden (see appendix 4), which showed a clear betterment when compared to the Adjacent Land (see appendix 3a), rather than compared to the front garden (appendix 3b).
- 9.11 We also note that we based our provisional conclusion on the information we had received from Yorkshire Water which stated that "as a goodwill gesture, an extra £5,972.15 was spent on reinstating the Customers' garden". This sum was spent on:
- Re-bedding the fence post and re-attaching loose fence panels;
 - Tarmacking an area of the drive, including pulling up a piece of block paving and relaying tarmac;
 - New fence panels to bridge the gap in the fence originally hidden by trees;
 - Repointing some sections of the garden wall where it cracked;
 - Land near high street levelled; and
 - Replacing the uprooted conifer trees in the garden with laurel trees.
- 9.12 During the process of collecting information, Ofwat requested a breakdown of this cost, in order to determine to what extent this amount was necessary reinstatement or betterment. Yorkshire Water provided the following breakdown on 9 March 2016:
- £300 Reset of wooden fence post

- £3,000 Additional tarmac (10m x 4m) on the driveway including excavating labour and materials, removal of block paving.
- £550 Setting of coping stones at the side of the driveway
- £1200 Gravel and underlay (previously just soil)
- £150 Fence panels installation
- £200 Cost of taller trees

9.13 On the evidence, it is difficult for us to determine with certainty that the above amounts constituted a betterment rather than necessary reinstatement works, and if it did constitute betterment, the extent of that betterment. On balance, we conclude that there was some betterment but that Yorkshire Water overstated the extent of the betterment in that some of the £5,972.15 they said amounted to a goodwill payment was more likely to have been payment for reinstating the garden to its former state, given the damage caused by the works.

Specifically, we consider that:

- £300 to reset the wooden fence post did not amount to betterment;
- We do not have enough evidence to determine how much, if any, of the £3,000 of additional tarmac (10m x 4m) on the driveway amounted to betterment. While Yorkshire Water may have put tarmac on a larger area than it might otherwise have done, the need for tarmac was because of damage caused to the driveway by parking heavy vehicles on the driveway and the cost of putting tarmac on the driveway increased because of Yorkshire Water mistiming the tarmac curing time; and
- the £550 for setting of coping stones at the side of the driveway may have been betterment but the need for this was due to heavy vehicles used on the driveway.

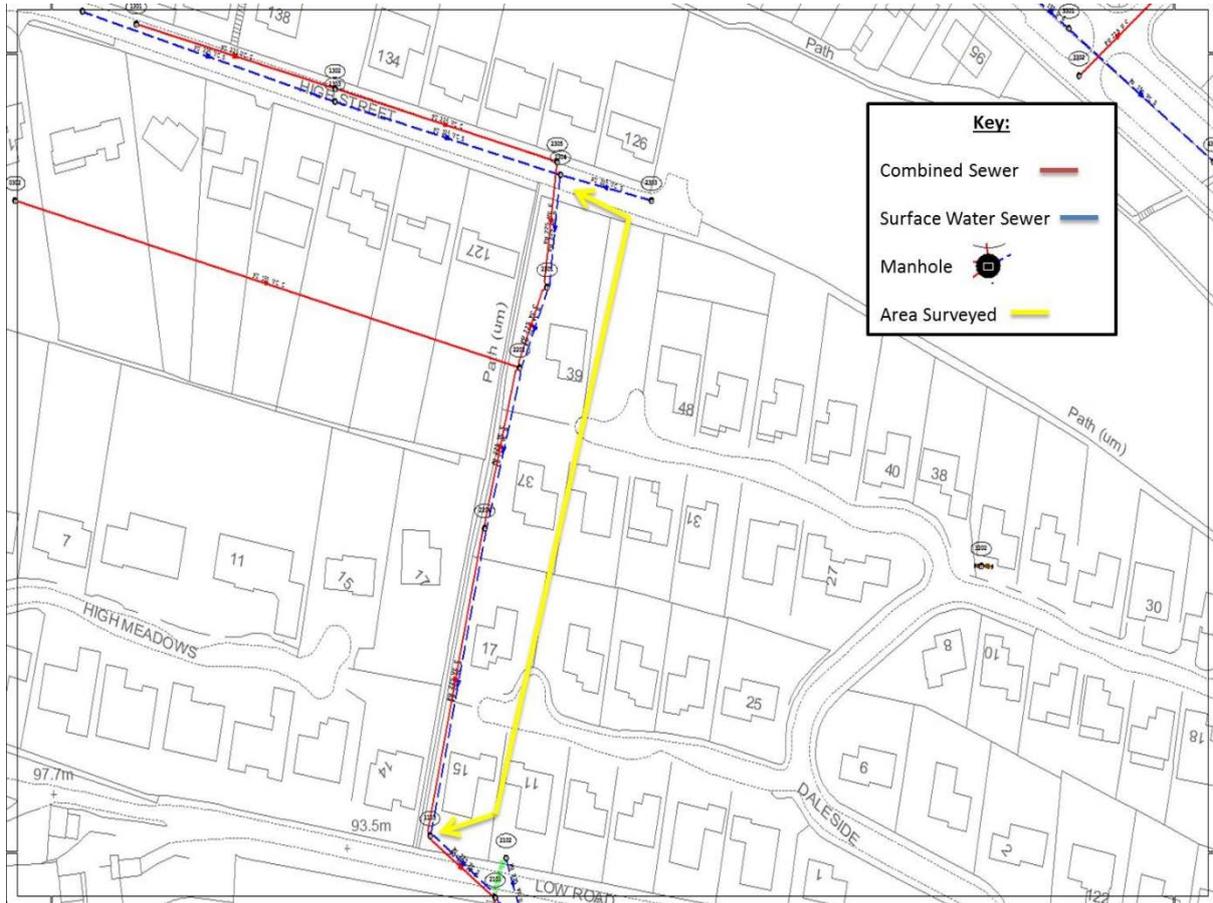
9.14 As Ofwat considers that some, but not all of the £5,972.15 was likely to be betterment, Ofwat directs Yorkshire Water to make a payment of £1,500 to the Complainants, this amount being for

- Yorkshire Water breaking the lock and unlawfully entering the Property;
- the damage caused to the Property; and
- inconvenience caused to the Complainants.

9.15 This amount includes any contribution we consider Yorkshire Water should have paid towards the utility costs of the Complainants.

10. Appendices

Appendix 1: Map of the Area Surveyed



Appendix 2: Picture of the Broken Gate

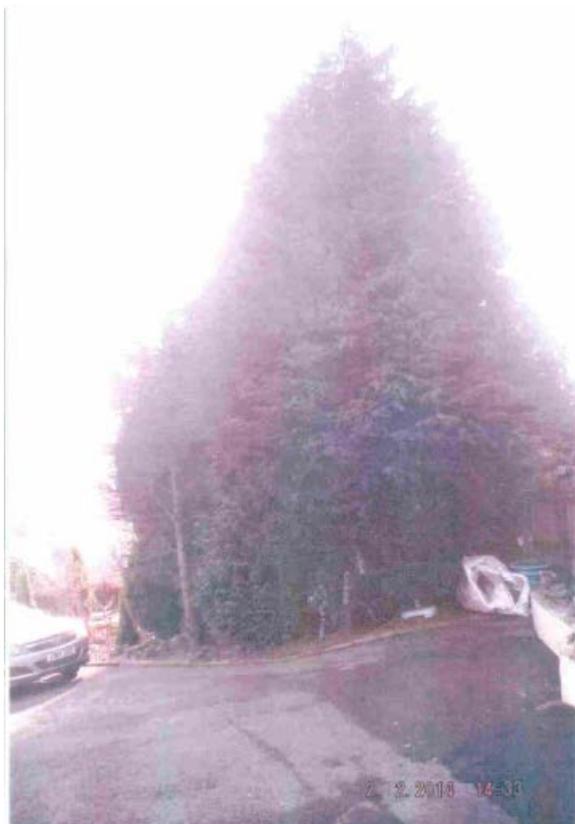


Appendix 3: Before the reinstatement (Adjacent Land & garden)

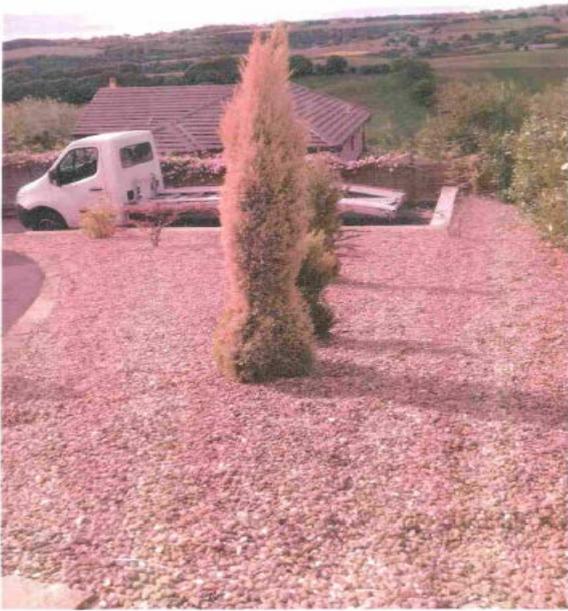
Appendix 3a: The first two pictures show the Adjacent Land



Appendix 3b: The two pictures below show the Complainants' (front) garden



Appendix 4: After the reinstatement



Appendix 5: Clarifications from Yorkshire Water on points raised by Complainants

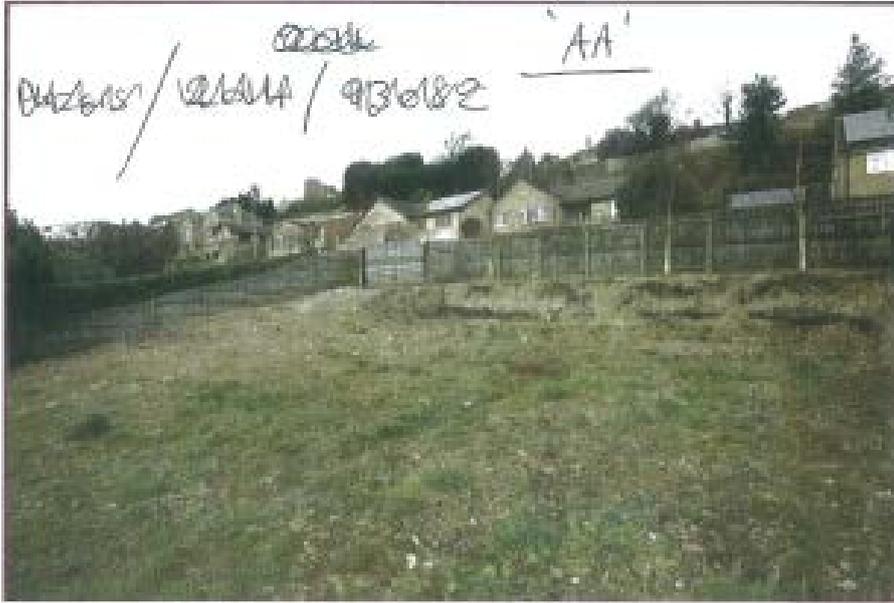
The points as set out below were raised by the Complainants following letters which they received from Yorkshire Water, and we therefore asked Yorkshire Water to clarify. Yorkshire Water provided their response on 24 February 2016 and we set these out below:

	Points raised by Complaints	Yorkshire Water's response
1	<p>There are numerous examples of where the facts presented by YW in response to questions raised by CC Water on behalf of the Complainants are inaccurate and incorrect. I refer to letters from YW addressed to the Complainants dated 18/12/14 and 18/05/15. Copies attached.</p> <p>Letter dated 18/12/14. YW state that they attended the land on 22/10/14 and 23/10/14 to flush the sewer and camera survey the sewer. They go on to say that to carry out the works they would have to gain access and proceeded to gain permission from the Agents representing the Complainants.</p> <p>This statement is incorrect as YW had already entered onto the land without permission on the 20/10/14. See Point 2 of YW letter dated 18/05/15.</p>	<p>Point 1: I can confirm that YWS entered Mr and Mrs Barrett's land on 20 October 2014, although permission was originally sought on 10 October 2014 (Appendix 2). This date was confirmed within a piece of correspondence sent to the Consumer Council for Water and Mr and Mrs Barrett on 18 May 2015. I would like to apologise for the confusion surrounding the first date provided within the initial Stage 1 complaint. This confusion was then rectified within the Stage 2 response, YWS' initial response to you.</p>
2	<p>Letter dated 18/05/15, Point 1. YW state that the camera survey and subsequent works were carried out via manhole access at the neighbouring property. This statement is incorrect. YW had entered upon the land without prior notification and hammered yellow painted stakes into the ground and painted part of the gate yellow. [See attached photo AA].</p>	<p>Point 2: The roots referred to were removed on 24 September 2014 through a manhole which is present within the garden of [the neighbouring property]. Access was not obtained through [redacted] Daleside until 20 October 2014. The maps sent previously specifically (Appendix 1), show the manholes location within the land of [the neighbouring property]. To add, I can clarify that due to the concerns raised by Mrs Barrett on 20 October 2014 at 19:16 YWS' teams were removed from site when the concern about yellow paint was initially raised. (Appendix 6 Line 3). No previous contact had been received from either customer at [redacted] Daleside until YWS' first visit on 20 October 2014. This would therefore reconfirm that the paint marks were left only after this visit.</p>
3	<p>Letter dated 18/05/15 Point 2. YW state that they were granted permission to enter the land from the Agents, FSL representing the Complainants. This is completely incorrect. At no time did FSL grant permission to YW to</p>	<p>Point 3: I can confirm that YWS contacted the Estate Agents, FSL, who were acting on Mr and Mrs Barrett's behalf, on 10 October 2014 at 11:02am. Whilst I acknowledge the content of the letter provided by FSL, this letter does not dictate</p>

	<p>enter the land. They were not authorised to grant anyone permission. The dates when YW state that they had gained permission do not tally. See letter from FSL, copy attached.</p>	<p>a date nor time of YWS' call and therefore I am unable to find any information which does not tally. [Isn't the letter dated months after the event?]</p>
4	<p>Letter dated 18/05/15, Point 2. YW state that they were told the new owners of the land would be removing the gate and fencing to enable access for construction. This is incorrect. No such discussion took place. YW also state that the gate had blown open and was damaged as a result. This again is incorrect. Had the gate blown open, there is nothing for it to blow into to cause the damage. The fact is that the gate was damaged by an excavator which also damaged the gate post. [See attached photo 3].</p>	<p>Point 4: My colleagues, Suzanne Gill and Wayne Chappell, met with Mr Barrett on 18 November 2014. During this site visit clarification was sought surrounding the matter of the damaged gate and the feedback from this visit was then emailed to Mr Barrett. (Appendix 7, File Appendix 1). Suzanne Gill confirms that Mr Barrett was happy to leave the matter with the gate and the lock due to this being sold later this week. He confirmed that the new owner was considering removing the gate and fencing for access to commence with building on the land. YWS also confirmed that the gate was damaged during high winds and that it was more than happy to reimburse him for the replacement lock. Sometime later Mr Barrett advised YWS that the land sale behind his property had fallen through and that he now required the gate, loose fence panels and post repairing. YWS then met with him on 6 February 2015 to discuss this further. Following this visit YWS agreed that it would reimburse him £300.00 for the gate but would instruct a specialist contractor to re-bed the fence post and re-attach the loose fence panels. The refund for the gate was sent out to Mr Barrett on 13 February 2015. The fence post was re-bedded and the loose fence panels reattached on 23 February 2015.</p>
5	<p>Letter dated 18/05/15, Point 3. YW were specifically instructed not to park or use the driveway with heavy plant and machinery. This was completely ignored on several occasions. They have tried to justify their actions by stating that the Complainants parked their car transporter on the driveway. This is true however the transporter weighs 1800kgs and whilst machinery and plant used by YW was circa 18 tonne. YW also state that the complainants also parked their motor home on the driveway. The motor home has a specific parking area and is never parked on the driveway. Boards were provided to protect the driveway but these were totally inadequate. [photographs 4 & 5].</p>	<p>Point 5: Prior to any machinery being introduced to the land, YWS advised Mrs Barrett, during a conversation with my colleague on 21 October 2014 at 11:20, (Appendix 6, Line 5) that the land was water logged and although she had asked us to leave [the] site, YWS' view was that it would be dangerous to do so. Mrs Barrett also advised YWS of the water damage which was more apparent to a section of the long flat, left hand-side, of their drive. Despite YWS' view that any damage from the waste water asset had not resulted from its negligence, as its vehicles were allowed to park on this section, YWS agreed to relay this area of driveway as a gesture of goodwill. Whilst YWS also accepts that the use of boards may not have completely eradicated any further damage to their land, it is likely that further</p>

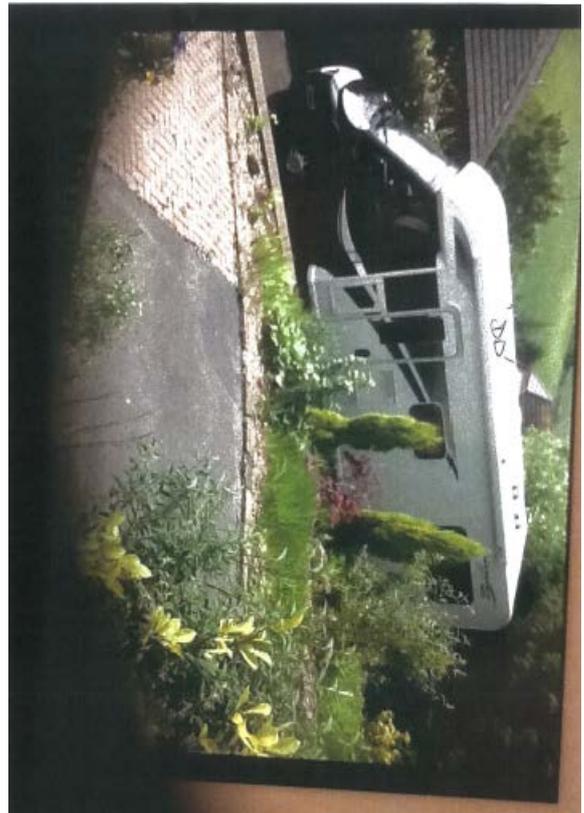
		damage would have occurred had they not been used.
6	Letter dated 18/05/15, Point 3, Paragraph 6. YW state that they agreed to tarmac an area of uneven block paving as a gesture of goodwill. This is misleading as the paved area was actually damaged by YW vehicles crossing the area without the necessary protective boarding. [See Photo 6 which shows YW vehicle and no boarding].	Point 6: During Suzanne Gill's conversation with Mr Barrett on 8 January 2015 at 13:18 (Appendix 6, Line 60) Mr Barrett asked if YWS would consider any additional works to their land. Whilst Suzanne Gill was unable to clarify if this was possible, she agreed to discuss this further when onsite. She then arrived with my colleague, Jonny Eyre, on 12 January 2015 to discuss all reinstatement arrangements. It was during this conversation that the additional works were agreed as a gesture of goodwill and the consent forms signed. (Appendix 4) Confirms the additional hand written section added on by Suzanne Gill which reconfirms that those works were only agreed during this site visit.
7	Letter dated 18/05/15, Point 7. YW state that they have provided betterment to the Complainants over and above their statutory obligation. We strongly dispute this statement as all the repairs and reinstatement works were carried to areas which had been damaged by YW.	Point 7: YWS would like to reiterate that the betterment provided to [REDACTED] Daleside was agreed to be carried out to recognise and adequately compensate any poor service. The cost of the repair was increased by approximately £5000.00. The details of YWS' additional works were supplied to Mr Barrett in a letter sent on 17 March 2015. (Appendix 7, File Appendix 14) These include:- <ul style="list-style-type: none"> a. Removal of conifers trees replaced with laurel trees at a specified height b. Re-bed fence post and attached fence c. Deliver gravel and place in garden d. Repair tarmac drive including an area previously block-paved e. New fence panel to bridge gap in the fence originally hidden by tree f. Land near High Street levelled

Appendix 6: Photographs provided in Complainants' representation



'AA' – Adjacent Land

Complainants' mature garden before the works, 'CC' and 'DD' below:



Appendix 7: Quality of tarmac that had to be redone



Appendix 8: Photographs of sunken area

