

November 2016

Trust in water

Final determination of a dispute under section 181 of the Water Industry Act 1991: [REDACTED] and Dŵr Cymru Cyfyngedig (Welsh Water)

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Final Determination of a Dispute under Section 181 of the Water Industry Act 1991: [REDACTED] and Dŵr Cymru Cyfyngedig (Welsh Water)

Purpose of this document

This is a final determination of a dispute referred by [REDACTED] 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 [REDACTED] (“**the Complainant**”) and Dŵr Cymru Cyfyngedig (“**Welsh Water**”) and is about Welsh Water’s exercise of statutory powers in carrying out works on the Complainant’s land (“**the Property**”). The Property comprises the Complainant’s farm and lands ([REDACTED]).

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1. Introduction

- 1.1 This is a final determination of a dispute referred by the Complainant to Ofwat for determination under section 181 of the Act.
- 1.2 The dispute is between the Complainant and Welsh Water (**“the Parties”**) and is about the exercise by Welsh Water of its power to carry out works on private land under section 159 of the Act.

2. Background

- 2.1 On 11 July 2014, the Complainant's neighbour made an application for a new water supply connection at [REDACTED] ("the Neighbouring Property").
- 2.2 Following receipt of Welsh Water's connection plan and quotation dated 6 August 2014, the Complainant's neighbour sent an amended plan back to Welsh Water on 20 August 2014, showing that the connection point would need to be on a track on the Complainant's land leading to the main residence at the Property. Welsh Water received the amended plan on 27 August 2014.
- 2.3 When reviewing the amended plan, Welsh Water failed to identify that it needed to access the Property to carry out this work – and therefore that it should have provided the Complainant with reasonable notice as required by section 159 of the Act. Subsequently, on 2 September 2014 Welsh Water sent a revised plan and quote for the new connection ("the Connection") to the Complainant's neighbour, and the latter paid for the Connection on 11 September 2014 in line with the quotation provided.
- 2.4 On 25 February 2015, Welsh Water received notification that the Neighbouring Property had installed the relevant service pipe and that a trench inspection was required.
- 2.5 On 3 March 2015, Welsh Water visited the Neighbouring Property to carry out a trench inspection and site survey in advance of making the Connection. From the outcome of the survey, Welsh Water identified that it would be carrying out works on private land and consequently that a notice under section 159 of the Act would need to be served on the Complainant.
- 2.6 Accordingly, on 12 March 2015 Welsh Water served notice on the Complainant, also providing a copy of its "Code of Practice for Pipelaying".
- 2.7 The notice expired on 9 April 2015. Welsh Water informed the Neighbouring Property that the works would take place on 17 April 2015, but the residents of the Neighbouring Property requested that Welsh Water postpone this. The Complainant was not informed of the date of 17 April 2015 and was not told that this date was to be postponed to 27 April 2015. The Works were completed at this rescheduled appointment.

- 2.8 On 29 April 2015, the Complainant complained to Welsh Water about the quality of the reinstatement works. Welsh Water and its contractor, AMEY, arranged an appointment on 5 May 2015 to discuss this with the Complainant. Following that meeting, Welsh Water agreed to carry out remedial works, and to reinstate a larger area of land as a gesture of goodwill. This further work took place on 6 June 2015.
- 2.9 The Complainant then raised a further complaint with Welsh Water on 24 September 2015, about numerous service failures which allegedly occurred when the works were carried out, particularly that Welsh Water's contractors, AMEY:
- arrived without notice;
 - failed to park and unload in the area agreed on the plan;
 - did not have the proper equipment to carry out a 'pipe jack', which the Complainant had been informed was part of the works;
 - were unsupervised and began excavating land before realising they did not have the appropriate connectors to complete the job;
 - parked in the wrong area on the far side of the excavation so that the contractors were blocked in by their own works, and were unable to leave the Complainant's property; and
 - that the supervisor of Welsh Water, who was contacted by the Complainant to resolve these works issues, refused to come on site.
- 2.10 Welsh Water responded to this further complaint on 6 October 2015 offering an apology, and outlining the work that had taken place since the Complainant raised the initial complaint, although it offered no further redress.
- 2.11 On 14 November 2015, the Complainant wrote back to Welsh Water expressing [REDACTED] dissatisfaction with its prior reply, in particular that it failed in its reply to reference previous work done on [REDACTED] land under nearly identical circumstances and in respect of the same neighbour, which had been carried out in 2009. In its response on 23 November 2015, Welsh Water stated that it only had "the water application and job details for [the] neighbour's connection, not records held against [the Complainant's] property." Welsh Water further apologised for its contractor's poor communication with the Complainant, and stated that the complaint had exhausted their complaints procedure.
- 2.12 On 6 February 2016, the Complainant wrote to us to complain that Welsh Water's "response [to [REDACTED] complaint] shows that the company has a blatant

disregard for the rules and that this attitude stems from the fact that they have statutory powers".

- 2.13 Further, on 5 March 2016, the Complainant wrote to request that we investigate "the manner in which Welsh Water exercised its powers" under section 159 of the Act.

3. Legal framework

- 3.1 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.
- 3.2 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 section 159 and section 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).
- 3.3 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.
- 3.4 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 inconvenienceit may direct the undertaker to pay to the complainant an amount, not exceeding £5,000, in respect of that failure, loss damage or inconvenience.
- 3.5 In deciding whether to direct a payment in respect of any failure 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) (section 181(5) of the Act).

- 3.6 Section 182 of the Act obliges an undertaker to have an approved code of practice in place, dealing with work on private land. In compliance with section 182 of the Act, Welsh Water has published a document entitled "Code of Practice for Pipelaying" ("**the Code**"). As stated at paragraph 2.6 above, Welsh Water provided a copy of this to the Complainant on 12 March 2015.
- 3.7 A contravention of the Code 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.

4. Particulars of the complaint

4.1 The complaint is about:

- a. Welsh Water's failure to adequately consult with the Complainant; and
- b. the inconvenience caused to the Complainant by Welsh Water when working on the Property.

A. Failure to adequately consult the Complainant

4.2 The Complainant states that Welsh Water failed to adequately consult [REDACTED] in that it did not inform [REDACTED] of the amended timings of the works and it failed to adhere to the terms set out under the Code and section 159 of the Act, specifically, that:

- Welsh Water failed to advise [REDACTED] of the original and amended timing of the works; and
- it failed to give notice correctly.

B. Inconvenience caused by Welsh Water when working on the Property

4.3 The Complainant states [REDACTED] was inconvenienced because:

- there was a lack of adequate supervision of the works;
- there was a failure to adhere to the work plan; and
- the reinstatement was of poor quality.

4.4 And as a result of the above the Complainant had to:

- supervise some site visits and works; and
- contact Welsh Water, AMEY, CCWater and Ofwat to try to resolve the complaint about both the notice and the manner of the works.

5. Jurisdiction to determine the complaint

- 5.1 Ofwat is satisfied that the dispute between the Complainant and Welsh Water is a dispute about the exercise by Welsh Water of powers conferred on it by section 159 of the Act. The Complainant has alleged that Welsh Water has failed to consult the Complainant adequately before exercising these powers, and has further alleged that [REDACTED] was inconvenienced in the manner of Welsh Water's exercise of these powers.
- 5.2 We consider that we have a duty to investigate this complaint in that:
 - we do not consider the complaint to be vexatious or frivolous;
 - we are satisfied that the Complainant has exhausted Welsh Water's complaints procedure; and
 - the Complainant contacted Ofwat on 6 February 2016 to complain about Welsh Water's use of its statutory powers, which is within the time that allows us to consider the complaint.

6. Requests for information

- 6.1 We sent requests for information (“**RFI**”) to Welsh Water and to the Complainant on 21 June 2016. We asked the Complainant to provide:
- a chronology of events in this matter;
 - in addition to the information which [REDACTED] had already provided, copies of any other correspondence which the Complainant had with Welsh Water in relation to the works, including any complaints made; and
 - information on the remedial works that took place on the Property.
- 6.2 We asked Welsh Water to provide:
- Welsh Water’s code of practice with respect to works on private land;
 - a chronology of events of this matter;
 - copies of any correspondence exchanged with the Complainant in relation to the works;
 - the current position relating to the reinstatement of the Property, and whether Welsh Water had caused any loss, damage or inconvenience to the Complainant; and
 - where Welsh Water had already carried out reinstatement works, the costs Welsh Water incurred for these works, including any supporting information where relevant.
- 6.3 Both parties responded to our RFIs by 19 July 2016. We summarise their responses below.

A. Response from the Complainant

- 6.4 The Complainant provided us with the correspondence which [REDACTED] considers to be relevant to [REDACTED] complaint, which included correspondence between:
- Welsh Water and CCWater,
 - Welsh Water and [REDACTED] and
 - Welsh Water and the residents of the Neighbouring Property.
- 6.5 The Complainant provided us with a statement from the residents of the Neighbouring Property dated 11 April 2016, disputing Welsh Water’s assertion that they [the residents] had not informed Welsh Water of the specific details

of the Connection. The statement also contained connection maps (see Appendix 1) indicating that the connection would need to be made in private land. The Neighbouring Property had sent these maps to Welsh Water as part of the revised connection plan.

- 6.6 The Complainant also provided us with a previous notice issued to [REDACTED] under section 159 of the Act on 7 August 2009 by Welsh Water for a near identical connection to the Neighbouring Property. [REDACTED] argued that this supported [REDACTED] opinion that Welsh Water should have been aware of the need to carry out works on [REDACTED] land, and should have kept [REDACTED] better informed.
- 6.7 Further to this, the Complainant provided a photograph of the reinstatement to [REDACTED] driveway following Welsh Water's initial work. The Complainant considered this to be of poor quality, and following [REDACTED] complaint of 29 April 2015, Welsh Water repaired this on 6 June 2015.
- 6.8 The Complainant stated that the time taken to get Welsh Water to address this issue cost [REDACTED] hours of [REDACTED] time and that this is therefore an inconvenience.

B. Response from Welsh Water

- 6.9 Welsh Water provided us with documents it considers to be relevant to the complaint, which were as follows:

Photographs of the original and further reinstatement

- 6.10 Welsh Water provided a photograph from its meeting with the Complainant of 29 April 2015, showing the quality of the original reinstatement, and another photo of 23 March 2016, showing the extended remedial works.

Timeline of the works and complaints received

- 6.11 Welsh Water provided a timeline of events surrounding the complaint, and states that the initial reinstatement covered an area of approximately one metre by five metres, but that it carried out extended works, which covered an area of approximately six metres by one metre at a cost of £832.42 as a

gesture of goodwill. Welsh Water consider this extended reinstatement to be a betterment of the Property.

6.12 The timeline also states that it failed to inform the Complainant of the original or amended timing for carrying out the works.

6.13 Welsh Water provided us with a copy of its Code which showed the following three standards which Welsh Water has potentially failed to meet:

- “If, for any reason, the works do not start at or shortly after the proposed date, we will advise you of the amended timing. Once the proposed starting date is determined we should be able to give you a reasonable idea of how long the works will take, and also how long we anticipate any reinstatement will take” (paragraph 14);
- “Before the works commence we will give you the name, workplace address and telephone number of the person responsible for supervising the works. Normally, he/she will be available during working hours” (paragraph 19); and
- “We will make sure that anyone working for us on your land is properly supervised and that they have been told not to stray outside the working area. If you have told the named contact about anything that requires special attention he/she will ensure that it is brought to the attention of those of our workers who might need to take it into account” (paragraph 22).

Correspondence between itself, the Complainant and CCWater

6.14 Welsh Water provided its inspector’s note of 3 March 2015, which states, “Unfortunately connection point is on [the Property], I have spoken to the owner and [REDACTED] has not granted permission and wants a land entry notice served.”

6.15 Further, Welsh Water requested that in making its determination, Ofwat takes into account:

- The speed with which Welsh Water resolved the matter following the Complainant’s complaint of 29 April 2015;

- That the Complainant, while expressing dissatisfaction, has not requested further compensation;
- Welsh Water's acknowledgement of service failures in their handling of this matter; and
- The betterment of the Property, which Welsh Water completed as redress for their errors.

6.16 We consider that the information submitted by both parties is sufficient to inform our determination.

7. Draft determination

- 7.1 We issued a draft determination on 8 September 2016.
- 7.2 Our draft determination considered that Welsh Water provided adequate redress for the inconvenience caused in carrying out the works at the Property, specifically by a letter of apology to the Complainant and tarmacating an area of the drive at a cost to Welsh Water, of £832.42. We therefore determined that no further compensation should be paid to the Complainant for this element of [REDACTED] complaint.
- 7.3 We also considered that Welsh Water breached its obligations to provide reasonable notice under section 159 of the Act, as it provided the incorrect length of notice. We therefore determined that Welsh Water failed to adequately consult the Complainant and it should make a payment of £200 to the Complainant.

8. Comments on the draft determination

A. Welsh Water's Response

- 8.1 On 30 September 2016, Welsh Water told us that it accepted the determination and did not intend to make a representation.

B. Complainant's Response

- 8.2 The Complainant provided [REDACTED] representation on 29 September 2016. [REDACTED] stated that the draft determination had several inaccuracies and errors that [REDACTED] would like rectified in our final determination. These were that:
- a. there were two dates in the draft determination the Complainant disputes. The first of these was for the date of the quotation received by the Neighbouring Property of 6 August 2014, due to their sending amendments on 20 August 2016;
 - b. the second disputed date was in respect of the photo which paragraph 6.10 of the draft determination says was taken on 5 May 2015, as the photo itself has a time stamp of 29 April 2015;
 - c. Welsh Water had not contacted the Complainant with the dates of the appointments, and it was the residents of the Neighbouring Property that posted the initial appointment with Welsh Water and not the Complainant; and
 - d. the Complainant had no contact with AMEY through this process.

- 8.3 Additionally, the Complainant considers that:

- a. Welsh Water did not only have the application details but also held records from the Neighbouring Property relating to a prior connection;
- b. Welsh Water's assertion that the Complainant did not request further compensation is misleading, as the Complainant feels Welsh Water did not offer the opportunity to do so, having told [REDACTED] that that the complaint procedure had been exhausted;

- c. the tarmacaking of the affected area does not constitute a betterment, and points out that while there are pictures of the damage both after the works and after the tarmacaking, there are no pictures of the land prior to the works, making betterment difficult to prove;
- d. enforcement could be achieved under section 79 of the New Roads and Street Act, which places a requirement on undertakers of works to keep records of works and apparatus, and make these available on request.

C. Ofwat's comments

- 8.4 We set out below our response to some of the clarifications and disputes raised in the representations received. Where the Complainant has previously raised points that we consider have already been addressed in our draft determination, we have not reconsidered these points here.
- a. We accept the corrections with regard to dates provided in the Complainant's representations. The quotation date of 6th August 2014 was correct, but required further context in regard to the amendment and revised quotation to make this clear (see paragraph 2.2 above).
 - b. The date for the disputed date for the photo was clearly an error as shown by the time stamp. This final determination reflects these amended dates (see paragraph 6.10 above).
 - c. We agree that we incorrectly identified the postponement of the appointment as having been made by the Complainant, rather than by the residents of the Neighbouring Property. We have corrected this in this final determination (see paragraph 2.7 above).
 - d. While the Complainant did not intend to contact AMEY, in [REDACTED] dealings with the contractors to contact their supervisor [REDACTED] had been dealing with representatives of AMEY, though this may not have been clear at the time.
- 8.5 Further, we consider below some of the other points that the Complainant raised in [REDACTED] representations:
- a. In Welsh Water's letter of 23 November 2015, it states;

"When we [Welsh Water] stated 'our records' this was in relation to the water application and job details for your neighbours' connection not records held against your property.

Unfortunately we would not have cross referenced any of your previous interactions with Welsh Water over the years during this process."

We accept Welsh Water's version that it did not cross reference its previous interactions with the Complainant when it dealt with this matter. We consider that good asset management involves companies constantly using information gathered to update their records, to better inform them in managing their networks. We have some concerns as to whether Welsh Water is doing this adequately if it failed to note that the connection would involve accessing private land. Nonetheless this is not an issue we intend to pursue for the purposes of this determination.

- b. Welsh Water fulfilled its obligations under its own complaints procedure having addressed the complaint at both stages of its written complaint procedure. As neither letter from the Complainant specifically requested further compensation, Welsh Water's assertion that the Complainant did not seek further compensation is correct.

However, while the Complainant was not specific in [REDACTED] letters about what would resolve [REDACTED] complaint, we consider that Welsh Water could have done more to guide the Complainant through the complaints process effectively, and could have proactively attempted to discover what would have resolved this matter for the Complainant without further escalation.

- c. Based on the photographs the Complainant and Welsh Water have provided (at Appendix 2) to show the damage and repair, we are unable to draw any conclusion that this is a betterment without an appreciation of what the land looked like prior to the reinstatement. However, we accept that Welsh Water tarmacked a larger area than was necessary for the purposes of reinstatement.
- d. The New Roads and Street Works Act 1991 is enforceable by the Health and Safety Executive ("the HSE"), and any attempt to resolve the complaint through this act would need to go through the HSE, not Ofwat. It is also our understanding that this act applies to works on public roads, rather than private land.

9. Final determination

- 9.1 We have considered, under section 181 of the Act, the manner in which Welsh Water exercised its powers:

A. Failure to adequately consult the Complainant

Failure to provide notice

- 9.2 Undertakers are obliged to provide reasonable notice under section 159 of the Act in order to carry out works on private property. The Act gives a definition of reasonable notice as follows:
- a. where the power is exercised for the purpose of laying a relevant pipe otherwise than in substitution for an existing pipe of the same description, to be three months; and
 - b. where the power is exercised for the purpose of altering an existing pipe, to be forty-two days.

- 9.3 From the information we have reviewed, Welsh Water provided 28 days' notice prior to the works taking place. We consider that by doing this, Welsh Water breached its obligations to provide reasonable notice under section 159 of the Act, as it provided the incorrect length of notice.

Failure to make an appointment

- 9.4 We also considered whether Welsh Water failed to inform the Complainant of the date of the Connection.
- 9.5 This is an expectation set out in paragraph 14 of the Code, which Welsh Water is obliged to publish and adhere to under section 182 of the Act.
- 9.6 We note that Welsh Water did not inform the Complainant when it was starting connection works on site, both in regard to the initial appointment, and following the Neighbouring Property's request that Welsh Water postpones the work.

- 9.7 We consider that by doing this, Welsh Water breached its obligations to provide the Complainant with the date of the works on [REDACTED] land under paragraph 14 of the Code.

B. Inconvenience caused to the Complainant by the works

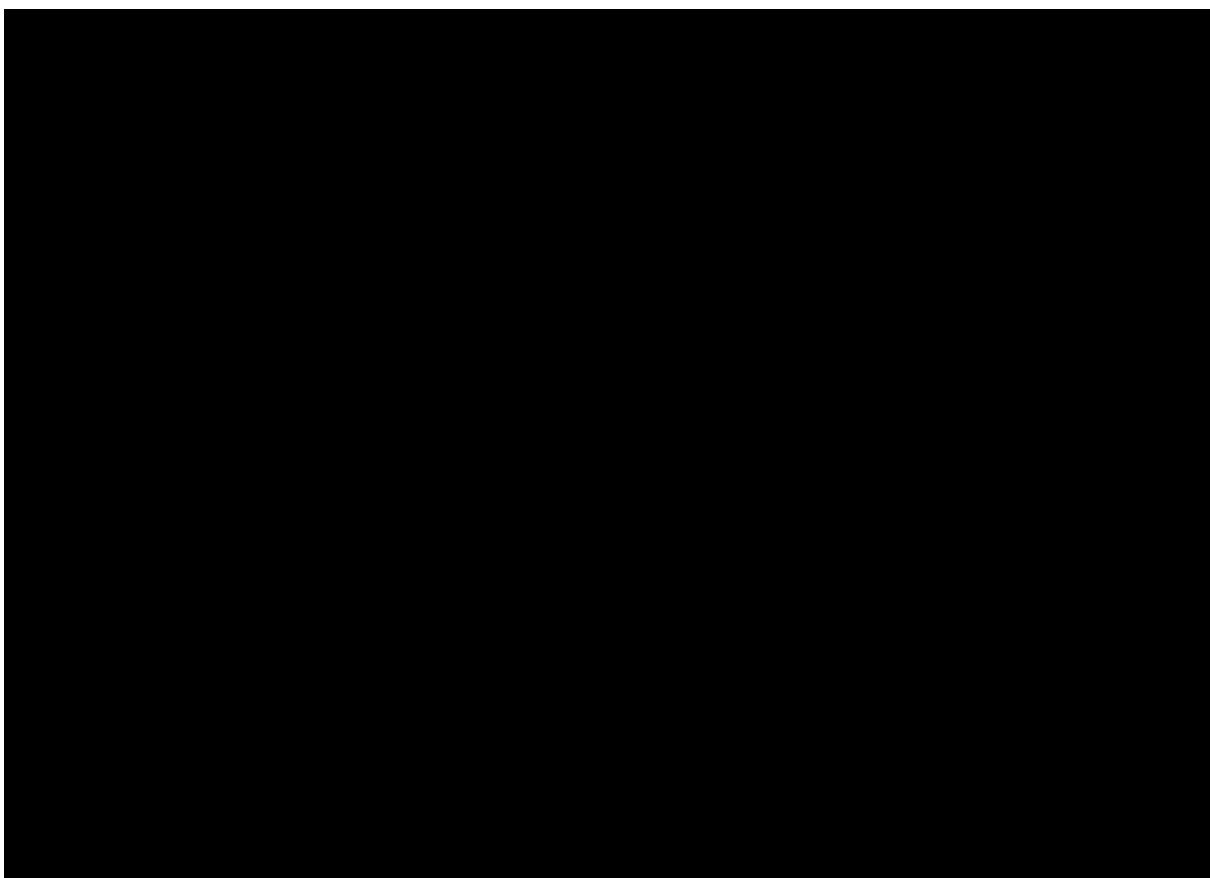
- 9.8 We also considered whether Welsh Water caused inconvenience to the Complainant.
- 9.9 We note that Welsh Water apologised to the Complainant for the amended timing of the works. However, it did not address the lack of adequate supervision of the works and the failure to adhere to the work plan (made prior to the start of the works) despite the Complainant raising this in [REDACTED] letter of 24 September 2015. We consider that by doing this, Welsh Water failed its obligations under paragraphs 19 and 22 of the Code.
- 9.10 We note that because of this, the Complainant had to supervise the works, and contact Welsh Water, AMEY, CCWater and Ofwat to try to reach a satisfactory conclusion to [REDACTED] complaints both regarding the serving of notice for the works, the manner in which these were carried out, and because of the poor quality of the reinstatement. We therefore conclude that there was some inconvenience caused to the Complainant as a result of the way Welsh Water carried out the works.
- 9.11 Welsh Water accepted that it failed to carry out the reinstatement correctly, and offered redress in reinstating and improving a significantly larger area of land. Particularly, it tarmacked an area of the drive at a cost of £832.42.
- 9.12 Welsh Water's view is that the extent of the remedial work, tarmacaking an area six times that of the original reinstatement, amounted to betterment of the Property and consequently that there was no net damage or loss suffered by the Complainant.
- 9.13 The Complainant stated in [REDACTED] reply to our draft determination that [REDACTED] considered this part of [REDACTED] complaint resolved by the remedial works. As there is no photograph of the land prior to the Connection, we are unable to prove that this was a betterment. However, Welsh Water and the Complainant both agree that this resolved the issues with the works and reinstatement.

C. Conclusion

- 9.14 We have considered whether Welsh Water should pay the Complainant an amount for not adequately consulting [REDACTED] in carrying out works in [REDACTED] Property and for causing [REDACTED] inconvenience as a result of the way in which it carried out the works.
- 9.15 In doing so, we have had regard to the extent of remedial work already carried out by Welsh Water.
- 9.16 We consider that Welsh Water has provided adequate redress for the inconvenience caused in carrying out the works at the Property, specifically by a letter of apology to the Complainant and by tarmacating an area of the drive at a cost to Welsh Water, of £832.42. We, therefore, determine that no further compensation should be paid to the Complainant for this element of the complaint.
- 9.17 However, we consider that Welsh Water failed to adequately consult the Complainant by:
- failing to provide the correct notice under section 159 of the Act; and
 - failing to inform the Complainant of an appointment for the works on [REDACTED] land under its Code.
- 9.18 In our draft determination, we only took into account the first element of this failure in proposing an award of £200. This was partly because we incorrectly concluded that the Complainant had postponed the first appointment. We now consider that this was an error and that we should have taken into account both these elements of the failure to consult.
- 9.19 Therefore, we determine that Welsh Water should make a payment of £375 to the Complainant.
- 9.20 The level of this payment reflects that no loss or damage was caused by Welsh Water exercising its powers in an unreasonable manner, but, that Welsh Water inconvenienced the Complainant both by its failure to consult adequately, and by the manner in which it exercised its powers.

10. Appendices

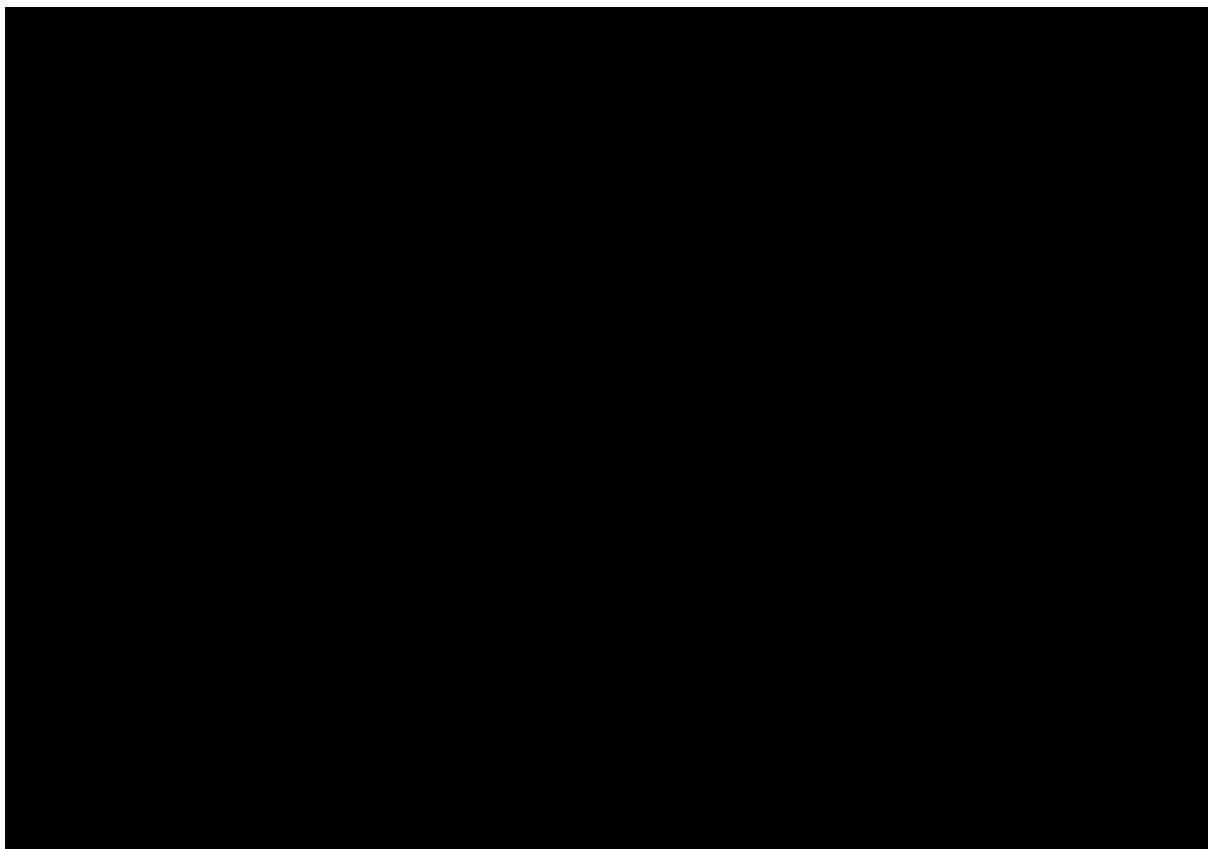
Appendix 1: Connection Maps submitted by the Neighbouring Property



Final determination of a dispute under section 181 of the Water Industry Act 1991: [REDACTED] and

Welsh Water

OFFICIAL



Appendix 2: Before the reinstatement



Appendix 3: After the reinstatement

