

22 January 2020

[REDACTED] and Southern Water:

**Final direction of a dispute determined
under section 181 of the Water Industry
Act 1991**

**Complaint against Southern Water about
work carried out on private land**

Contents

Summary of our decision	3
1. Introduction	4
2. Background	5
3. Legal Framework	8
4. Jurisdiction to make a direction	10
5. Draft direction	11
6. Final direction	13

Summary of our decision

This is our final direction of a dispute between Southern Water Services Limited (**Southern Water**) and [REDACTED] (**the Complainants**) over works carried out on land owned by the Complainants at [REDACTED] (**the Site**) in September 2018. This direction also opines on whether, in carrying out those works, Southern Water failed to consult the Complainants or caused loss, damage or inconvenience to the Complainants.

In summary, we determine that by failing, in their management of the works on private land, to communicate effectively and punctually with the Complainants, Southern Water caused inconvenience to the Complainants.

We have considered whether Southern Water should pay the Complainants compensation in recognition of the above failure. We have concluded that no further compensation should be paid, in light of the amounts already paid to the Complainants by Southern Water.

1. Introduction

A. The complaint

- 1.1 This is the final direction of a dispute referred by [REDACTED] [REDACTED] (**the Complainants**) to the Water Services Regulation Authority (**Ofwat**), on 28 March 2019, for direction under section 181 of the Water Industry Act 1991 (**the Act**).
- 1.2 The dispute is between the Complainants and Southern Water Services Limited (**Southern Water**) and is about Southern Water's exercise of its power to carry out works on private land under section 159 of the Act. In particular, we have considered whether:
- a. Southern Water failed to adequately consult with the Complainants; and
 - b. the Complainants experienced any loss, damage or inconvenience when Southern Water carried out works at a property in Southern Water's sewerage supply area.

B. Overview of our direction

- 1.3 Our direction, and our reasoning for it, is set out in full in [chapter 7](#) of this document, but an overview of our direction is set out below.
- 1.4 In light of the legal framework of the Act, and the evidence we have gathered from the parties to the dispute, we determine that Southern Water served appropriate notice of the works on the Complainants but, through poor communication, caused the Complainants inconvenience.
- 1.5 In recognition for failing to substantively reply within a reasonable time to an email Southern Water paid the Complainants £25. Southern Water also paid the Complainants £200 as a goodwill gesture for the inconvenience and disturbance caused by the works. We consider these payments to be adequate compensation for the inconvenience caused and, as such, we do not consider any further payments to the Complainants are required.

2. Background

A. The parties

Complainants

2.1 The Complainants are the owners of the Site.

Company

2.2 Southern Water is appointed under the Act to provide sewerage services to customers in Southampton, where the Site is located.

B. The Site

2.3 The Site is located at [REDACTED]. The Complainants own the Site.

C. The work on private land

2.4 On 24 May 2018, Southern Water contacted the Complainants asking for access to their land to repair a foul sewer. Southern Water needed access to the Complainants' land as a large chestnut tree, which was not on the Complainants' land, was impeding access to the sewer from the street and was preventing the open excavation and repair of the sewer. The roots of this tree had caused the damage to and displacement of the foul sewer.

2.5 The Complainants refused Southern Water's request and instead suggested removing the tree and then making the repairs to the sewer. The Complainants did not accept that there was a significant issue with the sewer that required emergency work. As such, they did not consider Southern Water needed to access the Site.

2.6 On 8 June 2018, having internally checked the urgency of repairing the damaged sewer, Southern Water decided to issue a "Pre-notice of warrant of entry application". This included a notice under section 159 of the Act giving the Complainants seven days to confirm that access would not be hindered.

2.7 On 11 June 2018, the Complainants responded advising that they remained of the view that removal of the tree was the most appropriate approach and

suggested that both parties contribute equally to the removal of the tree. On 14 June 2018, Southern Water decided to explore the possibility of removing the tree. After further emails with the Complainant, Southern Water arranged to visit the Site, and this took place on 17 July 2018.

- 2.8 On 18 July 2018, Southern Water wrote to the local authority requesting permission to remove the tree. On 19 July 2018, the local authority replied refusing permission for the tree to be felled as it considered it unlikely the tree was the cause of the damage to the sewer. Southern Water responded to the local authority reasserting its view that the root bowl of the tree had caused the displacement of the sewer.
- 2.9 On 20 July 2018, the local authority contacted Southern Water to advise that the tree had an amenity value of £73,000 but they would allow the felling of the tree provided that Southern Water planted two semi mature sweet chestnut trees in the area as a replacement.
- 2.10 No agreement was reached between the parties. On 5 August 2018, the Complainants emailed Southern Water restating their objection to Southern Water accessing their property. Southern Water subsequently applied to the Magistrates Court for a warrant of access; on 16 August 2018 the warrant was granted.
- 2.11 On 23 August 2018, the Complainants raised a complaint with Southern Water about the process, reiterating their view that the work could be carried out without access to the Site and with the removal of the chestnut tree. On 29 August 2018, the Complainants sent a further email, to Southern Water's Chief Executive, to complain about the exercise of the warrant, and a further email, on 6 September 2018, asking for a date when the works would begin.
- 2.12 The Complainants allege that they were informed that works would take place on 29 September 2018. On 21 September 2018, Southern Water began works, without informing the Complainants the commencement date for works had changed. On 10 October 2018, the work was completed. Southern Water did not inform the Complainants when the works were completed.
- 2.13 On 12 October 2018, in accordance with the Guaranteed Standards Scheme (**GSS**), Southern Water paid the Complainants £25 for its failure to substantively respond to their email of 6 September 2018 in a timely manner.
- 2.14 On 16 October 2018, the Complainants referred their case to the Consumer Council for Water (**CCWater**) seeking compensation for Southern Water's

failure to follow its Code of Practice in relation to giving notice and for the inconvenience caused by the extended process of Southern Water gaining access to their garden and the works themselves preventing access to their garden.

- 2.15 On 26 October 2018, CCWater contacted Southern Water asking it to make a goodwill gesture to the Complainants due to the failures noted above. On 9 November 2018, Southern Water responded to CCWater, agreeing a £200 gesture of goodwill in acknowledgement of the inconvenience and disturbance caused by the works.
- 2.16 On 3 December 2018, CCWater contacted Southern Water, advising that the Complainants had not received the £200 and that the garden had been left in a worse position than before the works.
- 2.17 On 13 December 2018, Southern Water confirmed that it had applied the £200 to the Complainants billing account but it that it had corrected this and sent a cheque to the Complainants instead. Southern Water also provided photographic evidence of the improvement works it had undertaken in the Complainants garden. This included fitting a new patio and fencing to return the garden to its original state.
- 2.18 On 17 December 2018, CCWater recommended that the Complainants refer their case to the Water Redress Scheme (**WATRS**) as they had exhausted Southern Water and CCWater's complaints processes.

D. Request for a direction

- 2.19 On 22 January 2019, following further emails, the Complainants decided that the appropriate channel for their dispute would be to refer the matter to Ofwat, as WATRS do not intervene where Ofwat has a role.
- 2.20 On 9 April 2019, we received the request to investigate the Complainant's issues, and a preliminary assessment was carried out.
- 2.21 On 7 June 2019, it was agreed in the preliminary assessment that this should be considered for a direction under s181 of the Act and a case was opened accordingly.

3. Legal Framework

- 3.1 This section outlines the key legislative provisions relevant to this case.
- 3.2 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.
- 3.3 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).
- 3.4 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 CCWater more than 12 months after the matter to which the complaint relates first came to the attention of the complainant.
- 3.5 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.

- 3.6 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).

4. Jurisdiction to make a direction

4.1 Ofwat is satisfied that the complaint is about the exercise by Southern Water of powers conferred on it by section 159 of the Act. The Complainants have alleged that Southern Water has failed to consult adequately before exercising these powers, and has further alleged that they were inconvenienced by the manner in which Southern Water exercised these powers.

4.2 We consider that we have a duty to investigate this complaint and that none of the statutory exceptions are engaged in that:

- we do not consider the complaint to be vexatious or frivolous;
- we are satisfied that the Complainants have exhausted Southern Water's complaints procedure; and
- the Complainants contacted Ofwat on 28 March 2019 to complain about Southern Water's use of its statutory powers, which is within the 12 month time period set out in section 181 of the Act.

5. Draft direction

5.1 On 1 August 2019, we issued a draft direction to which both parties responded.

A. Response from the Complainant

5.2 On 21 August 2019, the Complainants responded to the draft direction and raised the following challenges:

- The Complainants disputed that notice had been served correctly.
- The Complainants felt that the emergency was dealt with when a blockage was removed on 16 April 2018.
- The Complainants highlighted that the local authority agreed to allow Southern Water to remove the tree.

5.3 In addition to the above, the Complainants disputed Southern Water's assertion that it restored their property to its original state, prior to the works taking place. The Complainants allege that the area which was excavated for the works has started to sink, causing the patio repair sink, and the new fence panelling was blown down within months of its fitting.

5.4 Neither party has submitted to Ofwat any photographic evidence of the alleged inadequate restoration works. Ofwat has only received photographs taken immediately after Southern Water carried out restoration works. As such, we could not make a decision on whether the Complainants suffered loss or damage as a result of the works.

5.5 We requested that the Complainants and Southern Water arrange to meet at the Site in order to provide evidence of any further detriment which was not taken into account in our draft direction. The Complainants did not make these arrangements when Southern Water contacted them. As a result, as there is insufficient evidence on this matter, we have not been able to amend our conclusions in this Final Direction and there is no basis for Ofwat to make a further award in this respect.

5.6 Several further clarifications were made to the text, as requested by the Complainants, in particular, where the information lacked clarity or was open to potential misinterpretation.

B. Response from Southern Water

- 5.7 On 22 August 2019, Southern Water responded to the draft direction accepting its findings and advising it had no intention to make any further representations.
- 5.8 Southern Water's reply came after the deadline imposed for responses to the draft direction. Had Southern Water's response had contained substantive challenges, Ofwat would have considered whether or not to consider its late submissions.

6. Final direction

6.1 We set out our draft direction in this chapter. It has been informed by the legal framework, as set out in [Chapter 3](#), and the evidence provided to us by both parties.

6.2 Our draft direction assesses whether Southern Water:

- a. failed to adequately consult the Complainants; and
- b. caused any loss, damage or inconvenience to the Complainant in carrying out the works at the Site.

A. Failure to adequately consult the Complainant

6.3 Under section 159 of the Act, Southern Water is obliged to provide reasonable notice in order to carry out works on private property. Section 159(5) of the Act defines 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, reasonable notice is three months, unless the work is required for an emergency; and
- b. Where the power is exercised for the purpose of altering an existing pipe, reasonable notice is 42 days, unless the work is required for an emergency.

6.4 On 8 June 2018, Southern Water issued a notice under section 159 of the Act. As the work was to alter an existing pipe, 42 days' notice was required, unless the notice was for emergency works. The 42 days would have expired on 20 July 2018.

6.5 In their response to the draft direction, the Complainants disputed that notice had been served correctly. However, we are satisfied that the "Pre-notice of warrant of entry application" referenced at paragraph 2.6, and elsewhere in this document, fulfilled the purpose of sufficient notice for these works.

6.6 The Complainant's response also stated that the emergency was dealt with when a blockage was removed on 16 April 2018. They considered that the further works were unnecessary. However, Ofwat considers that due to the damage and displacement of the sewer, it is likely that this problem would recur if a repair was not carried out. The Environment Agency sets strict

pollution reduction targets, to which Southern Water must adhere. Therefore, it would not have been acceptable for Southern Water to allow the damage to the sewer to persist

- 6.7 Southern Water sought to accommodate the Complainants by seeking permission from the local authority for the removal of the chestnut tree. When permission was not given, and the Complainants continued to refuse access, Southern Water applied for, and was granted, a warrant of entry. As a result, the works did not commence until 21 September 2019, some two months after the expiry of the notice issued on 8 June 2018.
- 6.8 In any event, Southern Water obtained a warrant of entry and argued that the works were required in an emergency situation. We are, therefore, satisfied that there is no merit to the Complainant's view that Southern Water failed to consult them.

B. Loss, inconvenience and damage caused to the Complainant by the works

- 6.9 As set out above, we consider Southern Water adequately consulted the Complainants. There were, however, points in the process where Southern Water failed to communicate effectively, and in a timely manner, with the Complainants.
- 6.10 We consider that by failing to respond in a timely manner to the Complainants' emails, and in communicating an incorrect date for the start of the works, the Complainants were inconvenienced by Southern Water's handling of the matter.
- 6.11 In this instance, and in line with prior directions we have made under section 181 of the Act, we would consider making an award of £200 to the Complainants. However, on 12 October 2018, Southern Water issued a £25 GSS payment to the Complainants for not replying within 10 days to a complaint email from the Complainants. Further, on 9 November 2018, it paid £200 to the Complainants as a goodwill gesture for inconvenience and disturbance caused by the works.
- 6.12 Taking this into account, we consider that Southern Water has already offered appropriate compensation to the Complainants and no further payment for inconvenience is required.

- 6.13 In their response to the draft direction, the Complainants provided more detail about the quality of the restoration works carried out by Southern Water. They also expressed their dissatisfaction with the restoration works. In particular, they alleged that the restorative work carried out by Southern Water deteriorated shortly after the work was completed. However, neither party has provided sufficient evidence to allow us to make a decision in this matter. As we are unable to fully particularize or quantify the alleged damage, we are unable to make a direction that further remunerative remedy should be paid to the Complainants.
- 6.14 In the response to the draft direction, the Complainants also raised that the local authority had agreed to allow Southern Water to remove the tree and that this would have removed the need to inconvenience them with the further works. As at paragraph 2.13 this was a conditional offer, which would have been significantly more expensive than carrying out the works from the Complainant's land. Water companies have a responsibility not to generate unnecessary expenses, as these are ultimately passed back on to all consumers, and Southern Water would therefore have difficulty justifying this alternative course of action, when a cheaper effective option remained open to it.

C. Conclusion

- 6.15 In light of the legal framework, and the evidence we have gathered from the parties, we consider that Southern Water adequately consulted the Complainants. We also consider that whilst some inconvenience has been caused to the Complainants, Southern Water has made appropriate redress to the Complainants. As such, no further compensation is required to be paid to the Complainants by Southern Water.

Ofwat (The Water Services Regulation Authority)
is a non-ministerial government department.
We regulate the water sector in England and Wales.

Ofwat
Centre City Tower
7 Hill Street
Birmingham B5 4UA

Phone: 0121 644 7500
Fax: 0121 644 7533
Website: www.ofwat.gov.uk
Email: mailbox@ofwat.gov.uk

January 2020

© Crown copyright 2019

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3.

Where we have identified any third party copyright information, you will need to obtain permission from the copyright holders concerned.

This document is also available from our website at www.ofwat.gov.uk.

Any enquiries regarding this publication should be sent to us at mailbox@ofwat.gov.uk.

