

February 2020

## **McComb Property vs United Utilities and Water Plus Limited**

Final decision of a dispute determined under section 17E of the Water Industry Act 1991

Complaint against United Utilities and Water Plus Limited regarding the eligibility of a property

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## **Summary of our draft decision**

This is a final determination of a dispute between McComb Property Company and United Utilities and Water Plus Limited, about whether premises are eligible to switch their suppliers as part of the new market arrangements. It was referred for a determination under section 17E(1) of the Water Industry Act 1991.

In light of the legal framework of the Water Industry Act 1991, and the evidence we have gathered from the parties to the dispute, we determine that the premises have been incorrectly classified as non-household and should, therefore, no longer remain in the non-household retail market.

We determine that from 12 September 2018, the date that McComb Property Company (via Water Plus Limited) first contacted United Utilities regarding eligibility, the Premises should be considered as household and, as such, should be deregistered from the non-household market.

## 1. Introduction

### A. The complaint

- 1.1 This determination concerns a dispute referred to the Water Services Regulation Authority (**Ofwat**) on 11 July 2019 for determination under section 17E(1) of the Water Industry Act 1991 (**the Act**). The parties to the dispute are McComb Property (**the Customer**), United Utilities and Water Plus Limited (**Water Plus**).
- 1.2 The dispute is about the decision taken by United Utilities and Water Plus to classify the Customer's property at [REDACTED] (**the Premises**) as non-household. The Customer disputes this decision and considers the Premises should be classed as household.
- 1.3 This determination considers the eligibility of the Premises by considering whether the Premises are 'household premises' as defined by the Act. It will assess the principal use of the Premises, and if found to be primarily used as a home, it will not be eligible to be supplied by Water Plus. If the principal use is not as a home, it will be eligible to be supplied by Water Plus. Our assessment has been done with reference to Ofwat's [Eligibility Guidance](#) and [Eligibility Supplementary Guidance](#).
- 1.4 This determination is based on the information we have gathered since opening this case. Should the status of the Premises change going forward, the eligibility of the Premises could also change.

### B. Jurisdiction to determine this complaint

- 1.5 Ofwat has jurisdiction to determine disputes about the eligibility of premises where a licensee or a potential customer of a licensee cannot agree on whether the eligibility requirements are satisfied in respect of a proposed supply arrangement.
- 1.6 When disputes about eligibility are referred to us, we expect the parties to have considered our [Eligibility Guidance](#) and [Eligibility Supplementary Guidance](#) and taken reasonable steps to try and resolve the issue first. In this case, the Customer has exhausted United Utilities', Water Plus's and the Consumer Council for Water's (**CCWater**) complaints procedures and processes, respectively.

- 1.7 We are satisfied that the Parties have considered our eligibility guidance documents and have taken reasonable steps to try and resolve the issue. As such, we consider it is appropriate for Ofwat to proceed with making a determination in this matter.

## 2. Background

### A. The Parties

#### Customer

- 2.1 The Customer is McComb Property Company Limited who operate in multiple property sectors including office and retail, residential and student accommodation. McComb Property Company is one of the largest independent commercial landlords in Merseyside and West Lancashire.

#### Companies

- 2.2 United Utilities is the incumbent company and served the Premises prior to market opening. It is appointed under the Act to provide water and sewerage services to customers in the area where the Premises is located.
- 2.3 Water Plus is a retail licensee. In April 2017, the Premises were transferred to Water Plus for water retail and sewerage retail services.

### B. The Premises

- 2.4 The Premises is located at [REDACTED] and is private student accommodation for students at Edge Hill University. The accommodation is split over two floors with 8 ensuite rooms on each floor and shared communal kitchen, dining and lounge areas.
- 2.5 Students stay at the premises throughout their time at University and this can vary from 1, 2 or 3 years. Students have the option of staying in their accommodation all year round including holidays, Christmas and Easter.
- 2.6 The Premises is only used as student accommodation and is not used for any other purposes such as group or commercial bookings.
- 2.7 The Premises is classed as a home of multiple occupancy (**HMO**) and it pays West Lancashire County Council HMO licence fees. The Premises does not pay Council Tax as students are exempt from paying Council Tax. All students provide council tax exemption certificates which are then forwarded to the council.

- 2.8 The initial minimum term of tenancy for students is 50 weeks, however, students can opt for a full year (52 week) tenancy. The percentage of students who opt for a 52 week tenancy is 40%.

### **C. Complaint**

- 2.9 On 12 May 2017, the Customer contacted Water Plus reporting high consumption at the Premises. Following a self-leak test, the Customer contacted Water Plus again, on 14 June 2017, confirming a leak was located on the 'stop tap' and that it had been repaired.
- 2.10 On 14 July 2017, Water Plus received a leak allowance request and sent this to United Utilities. On 25 July 17, United Utilities confirmed a leak allowance had been granted corresponding to 595m<sup>3</sup>, in accordance with United Utilities' policy. On 27 June 2018, the Customer contacted Water Plus complaining about the amount of the leak allowance. Water Plus subsequently raised this complaint with United Utilities who outlined its student accommodation policy.
- 2.11 On 10 September 2018, Water Plus contacted the Customer to discuss United Utilities' response regarding the leak allowance and, in doing so, the Customer also questioned the eligibility of the Premises. On 12 September 2018, Water Plus contacted United Utilities regarding the eligibility of the Premises and, on 24 September 2018, United Utilities responded setting out that it considered the Premises should remain in the non-household market.
- 2.12 On 29 October 2018, the Customer made a further complaint with Water Plus on eligibility, which, on 19 November 2018, was rejected by United Utilities, who restated that it considered the Premises should remain in the non-household market.
- 2.13 On 22 November 2018, the Customer escalated its concerns to the Consumer Council for Water (**CCWater**) which confirmed the initial assessment provided by United Utilities. In the complaint, the Customer raised a separate issue regarding an additional leak (United Utilities carried out two inspections and this second leak was eventually repaired).
- 2.14 On 25 April 2019, the Customer escalated its concerns to the Water Redress Scheme (**WATRS**), which confirmed the initial assessment provided by United Utilities. WATRS awarded compensation to the Customer for £200 for service failing for 'time, material distress, resource and inconvenience'.

## **D. Request for a determination**

- 2.15 On 11 July 2019, the dispute on the eligibility of the Premises was referred to us for determination. We carried out a preliminary assessment to establish whether to take the matter forward. This included requesting further information from the parties.
- 2.16 On 7 August 2019, we asked United Utilities and Water Plus to review the complaint and to provide their final positions. Both responded confirming their positions. On 19 September 2019, the Customer confirmed that it wanted Ofwat to formally determine the dispute.
- 2.17 On 23 September 2019, having conducted a preliminary assessment, we decided to open a case and informed the parties accordingly.
- 2.18 On 11 November 2019, we issued our draft determination to the parties. We did not receive any representations from the Customer but both United Utilities and Water Plus provided representations.
- 2.19 On 13 December 2019, we sought representations from the parties on the implementation date of this decision. We did not receive any representation from United Utilities (as it had raised this issue in its previous representation), but Water Plus and the Customer provided representations.



### 3. Legal framework

3.1 Section 17E(1) of the Act allows us to determine, in a case referred to us by:

- a water supply licensee or a potential customer of a water supply licensee (**WSL**); or
- a sewerage licensee or a potential customer of a sewerage licensee,

whether a proposed supply of water to, or proposed sewerage services for, the customer would be in accordance with what is authorised by the licensee's licence.

3.2 Section 17E(2) of the Act provides that the matters we may determine include:

- the extent of the premises to be supplied or served;
- whether the premises to be supplied or served are household premises;
- in the case of supply by a water supply and / or sewerage licence (WSSL licensee) with a restricted retail authorisation, whether the threshold requirement is satisfied in relation to premises to be supplied; and
- any other matter, the determination of which is relevant to those matters.

3.3 Under schedules 2A and 2B of the Act, a licensee with a retail authorisation may not supply or serve household premises. The Act does not define 'premises' for the purpose of assessing eligibility. Premises can include buildings or land. Licensees can only supply customers at individual eligible premises. Each of the premises supplied must be eligible.

3.4 The issue in this case is, therefore, whether or not the premises to be supplied or served are household premises. The meaning of 'household premises' is set out in section 17C of the Act. The primary considerations are:

- whether the person has his home in all or any part of the premises; and
- whether the principal use of the premises is as a home.

3.5 We consider complaints on a case-by-case basis when asked to make a determination under section 17E of the Act.

## 4. Our draft determination

4.1 On 11 November 2019, we issued our draft determination to the parties. United Utilities and Water Plus provided representations. We also discussed the outcome of the draft determination with the Customer.

### A. United Utilities' response

4.2 On 28 November 2019, United Utilities provided its representation.

4.3 United Utilities sought clarity regarding the scenarios in the eligibility supplementary guidance.

4.4 United Utilities considers the fact that students have the option to remain all year is the key criteria not whether any given percentage of them do or do not in fact do so. It asked whether the 40% figure was intended as a threshold requirement which could be factored in for future properties. United Utilities also questioned whether the remaining 60% of the rooms are sublet or available for subletting. It considers that if they were available for subletting purposes then the premises would be deemed to be eligible.

4.5 United Utilities questioned the relevance of or extent of reliance upon the premises being classified as a HMO that pays licence fees. It asked us to expand on this.

4.6 United Utilities questioned the wider implications of the determination and noted that it is unlikely to be possible to establish ex ante all properties which, as a result of this decision, might now be categorised as not eligible that are currently treated as eligible. It set out that it would respond to any retailer request where customers provide evidence that a property is not eligible.

4.7 United Utilities suggested that we consult more widely on this determination prior to finalising it given the broader ramifications.

4.8 United Utilities asked us to clarify the date from which deregistration should take effect. Its working assumption is that deregistration should take effect from the date of the original contact from the customer.

### B. Water Plus response

4.9 On 29 November 2019, Water Plus provided its representation.

- 4.10 Water Plus requested that Ofwat re-issue the eligibility guidance and eligibility supplementary guidance to more clearly articulate this particular scenario. Water Plus also wanted to understand if Ofwat intends to encourage wholesalers to review eligibility decisions regarding similar properties.
- 4.11 In addition to the above, Water Plus asked us to clarify the date from which deregistration should take effect noting the impacts of this on both Water Plus and United Utilities.

## 5. Our final determination

### A. The Customer's view

5.1 The Customer considers that the Premises should not be eligible for the non-household market. As such, they dispute the decision made by United Utilities and Water Plus Limited.

5.2 The Customer considers the definition of a household property is:

'A domestic property is defined as a dwelling that has no more than one family unit. This could be a house, individual flats and maisonettes [...]. A residential property is classed as a care home, nursing homes, blocks of flats, HMO<sup>1</sup>.'

5.3 Building on the above, the Customer considers the Premises is similar to a block of flats in that both are used for residential purposes. The Customer also considers that as it pays a HMO licence to the local authority it means that the Premises is classed as a residential dwelling.

5.4 The Customer has set out that the Premises is purely student accommodation with the students using it as their permanent place of residence. The Customer has also set out that the minimum term of tenancy is 50 weeks but that students can opt to stay for a further two weeks should they wish to do so.

5.5 Based on the above, the Customer considers that the principal use of the Premises is as a home.

### B. United Utilities' view

5.6 United Utilities considers the Premises to be non-household and, to this end, it considers it correctly placed the Premises in the non-household market. It states that it used the Eligibility Guidance and Eligibility Supplementary Guidance to support its reasoning.

5.7 United Utilities set out that it made a thorough assessment of the appropriate interpretation of the eligibility guidance for different types of properties and as part of this assessment concluded that businesses or individuals who let flats to university students, on a term of less than one year, should be eligible to

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<sup>1</sup> <http://www.ultrasafe.org.uk/faq/what-is-a-domestic-property-and-a-residential-property/>.

take advantage of the benefits of the non-household retail market. As a result, United Utilities registered the Premises, and other similar sites, within the market.

- 5.8 Following the publication of our Eligibility Supplementary Guidance, United Utilities subsequently reviewed this interpretation and concluded that it would not systematically revise the status of these properties based upon the additional principles and examples that were provided.
- 5.9 As the Premises is available for rent on a 50 week contract basis, and the Customer's website states that students cannot remain in their rooms and must remove all of their belongings between periods of tenancy (see link [here](#)), United Utilities concluded that the principal use is not as a home and so it should be included in the non-household retail market.
- 5.10 United Utilities was subsequently made aware that the Customer had provided an out of term contract for an additional two weeks for one of its tenants. However, United Utilities concluded that this had not changed the principal use of the Premises.
- 5.11 Taking the above into account, United Utilities considers the Premises is eligible for the non-household market.

### **C. Water Plus's view**

- 5.12 Water Plus considers the Premises to be non-household and, to this end, it considers it was correct to supply the Premises. It used both the Eligibility Guidance and Eligibility Supplementary Guidance to support its reasoning.
- 5.13 Water Plus noted that the Customer has been in the non-household market since the opening of that market, and raised no concerns about being in the market, until the leak was identified.
- 5.14 Water Plus considers our Eligibility Supplementary Guidance supports its reasoning for the Premises being in the market. It quotes parts of the guidance which state that 'if students cannot remain in the accommodation during university holidays, and so are required to return to their permanent home then the principal use of the accommodation is not as a home, and so the premises should be eligible for the non-household market'.
- 5.15 Taking the above into account, Water Plus considers the Premises is eligible for the non-household market.

## **D. Our final decision**

5.16 We consider that the Premises is a household and determine under section 17E of the Act that the Premises are not eligible to be supplied by Water Plus. We set out our reasoning for this below. In assessing the eligibility of the Premises, we have taken account of our guidance including the process set out in our Eligibility Supplementary Guidance.

5.17 In our draft determination we considered the extent of the Premises and we provisionally determined the Premises to be a single boundary premises. On reflection, we consider that it is not necessary for us to make a determination on the extent of the Premises for the purposes of determining if the Premises are household premises. We also have not been asked to determine the extent of the premises. As such, we are not making a determination on the extent of the Premises.

### **i. Principal use of the Premises**

5.18 In determining the principal use of the Premises we have reflected on the information provided to us by the parties and we have also reflected on the Eligibility Guidance and Eligibility Supplementary Guidance.

5.19 As set out above, students can opt for either a 50 or 52 week contract at the Premises. In addition, the Customer has set out that the Premises is not used for any commercial or group bookings. We consider this to be sufficient evidence that the principal use of the premises is as a home.

5.20 We recognise that the Customer has provided additional evidence beyond this and the representations asked for clarity as to the weight given to these additional elements – in particular, the classification of the Premises as a HMO and the fact that 40% of students opt for a 52 week contract. We will always consider all facts in the round. However, we do not consider these two elements to be particularly relevant.

5.21 In particular, we do not consider 40% to represent a threshold. We consider that even for the 60% of students who have contracts for 50 weeks, the Premises constitute their principal place of residence. In coming to this conclusion, we have taken into account that the reason given for having 50 week contracts is to provide the landlord with time to prepare the Premises for new and/or existing students. It is not to give the landlord an opportunity to use the Premises for short-term lets.

- 5.22 In addition to the above, we have also reflected on the Eligibility Supplementary Guidance which sets out that the principal use of ‘university halls of residence and accommodation’ may not always be apparent as some premises could be considered as a home for students whereas others could more accurately resemble hotels. In this case we consider that the accommodation does not resemble a hotel.
- 5.23 We further set out in the Eligibility Supplementary Guidance a number of scenarios to test whether university halls of residence and accommodation are eligible for the market. We do not consider these scenarios to be overly helpful in this case. We do, however, consider there are a couple of principles set out in those scenarios that it is useful to highlight:
- a. The scenarios test whether student accommodation is available all year or whether students return to their permanent home during holidays. Where accommodation is not available all year and students are required to return to their permanent homes these should be considered eligible for the non-household market. In this case, students can opt to contract to remain in the Premises all year. Although some students only contract for a 50 week period, we consider this is distinguishable from a scenario where students are obliged to leave their student accommodation for one or more of the longer holidays.
  - b. The scenarios test whether premises are available for non-domestic purposes such as conferences or subletting. If they are, it is indicative of those premises being potentially eligible for the non-household market. In this case, as set out above, the Premises are not used for conferences or short term lets.

**ii. Date implementation will take effect**

- 5.24 Both United Utilities and Water Plus have asked us to clarify the date from which deregistration should take effect and United Utilities has suggested this could be the date from which it was first contacted by the Customer.
- 5.25 Section 17E (2) of the Act allows us to determine “any other matter the determination of which is relevant to those matters” (and ‘those matters’ includes ‘whether the premises to be supplied [or served] are household premises’). We consider that a determination of when deregistration should take place is relevant to a determination of eligibility.

- 5.26 In the normal course of events, we consider that an eligibility determination will take effect from the date of the determination. However, in this case, all the parties have made representations on the issue and all agree that the determination should take effect on an earlier date.
- 5.27 Both United Utilities and Water Plus consider the date on which the determination should come into effect should be the date United Utilities first received the complaint regarding eligibility. As set out in paragraph 2.11, this date is 12 September 2018. The Customer considers the date the determination should come into effect should be when it first raised its complaint with Water Plus which it considers to be in 2017. This, initial communication however, was in relation to the leak allowance issue not the eligibility of the premises.
- 5.28 Reflecting on the above representations we consider that the premises should be regarded as household premises from 12 September 2018.

## **E. Conclusion**

- 5.29 Based on the evidence and representations received, and having considered our Guidance, we consider the principal use of the Premises is as a home. Accordingly, we determine that the Premises are not eligible premises. We also determine the date implementation will take effect as 12 September 2018.

## **F. Wider implications of this determination**

- 5.30 As set out above, United Utilities suggested that we consult the industry prior to finalising this determination. Having reflected on this, we did not consider this to be necessary based on the facts of this case which we consider establish a clear case that the principal use of the premises is as a home.
- 5.31 We do, however, accept that our Eligibility Guidance and Eligibility Supplementary Guidance need updating and we will do so in due course.



Ofwat (The Water Services Regulation Authority)  
is a non-ministerial government department.  
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February 2020

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