

**The Scottish Public Services Ombudsman Act 2002**

# **Investigation Report**

UNDER SECTION 15(1)(a)

**SPSO**

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**Case 201304505: Business Stream**

**Summary of Investigation**

**Category**

Water billing and charging; incorrect billing

**Overview**

The complainant (Mrs C) was dissatisfied with Business Stream's decision to charge for water and waste water services for a commercial premises in the grounds of her home. She contended that the premises had no water supply of its own and that all water used was already paid for through the Council Tax bill for the domestic property.

**Specific complaints and conclusions**

The complaints which have been investigated are that Business Stream:

- (a) unreasonably charged non-domestic water and sewerage rates on Mr and Mrs C's business despite their having no water or sewerage facilities in the business (*upheld*); and
- (b) failed to provide a reasonable explanation for their actions (*upheld*).

**Redress and recommendations**

The Ombudsman recommends that Business Stream:

- |   | <i>Completion date</i> |
|---|------------------------|
| (i) apologise to Mr and Mrs C for inappropriately applying water charges at the Premises;   | 30 January 2015        |
| (ii) ensure that Mr and Mrs C's account is closed and all charges cleared in line with Scottish Water's offer; and  | 30 January 2015        |
| (iii) take steps to ensure that the accuracy of information provided by third parties is tested and challenged where necessary before forwarding it to their customers. | 27 March 2015          |

Business Stream have accepted the recommendations and will act on them accordingly.

## **Main Investigation Report**

### **Introduction**

1. The complainant (Mrs C) and her husband (Mr C) owned a business which operated from a small building (the Premises) in the garden of their home. The Premises was classed as a commercial property and, accordingly, was given a rateable value (RV) by the local Valuation Joint Board.

2. During a routine audit in 2010, the Premises was identified as a commercial property that was not being charged for water or waste water services (referred to as a Gap Site). In Scotland, commercial property owners are required to pay for their water usage through a licensed provider. Where no such provider has been selected, a licensed provider is appointed and, at that time, Business Stream were the only licensed provider accepting Gap Sites. Business Stream were appointed as the licensed provider for the Premises. On 22 November 2012, they created an account for the Premises, with an effective start date backdated to 28 October 2010 when the Premises was first identified as a Gap Site. An invoice was issued on 22 November 2012, covering the period 28 October 2010 to 31 March 2013 and totalling £1,695.74.

3. Mr and Mrs C challenged the invoice with Business Stream. They explained that the Premises had no water supply and that they did not require water to operate their business. Although they would go into their house to make a cup of tea or use the bathroom, any water used was already paid for through the domestic water portion of their Council Tax bill. Mr and Mrs C considered that they were being charged for a service that Business Stream had not provided. They raised their concerns in a formal complaint to Business Stream, however, did not find the responses that they received helpful and remained of the opinion that Business Stream had no justifiable grounds to charge their business for water.

4. The complaints from Mrs C which I have investigated are that Business Stream:

- (a) unreasonably charged non-domestic water and sewerage rates on Mr and Mrs C's business despite their having no water or sewerage facilities in the business; and
- (b) failed to provide a reasonable explanation for their actions.

5. As the investigation progressed, my complaints reviewer found that many of the issues raised related as much to Scottish Water as they did to Business Stream. As such, this report has been shared with Scottish Water and both organisations have been asked for their comments during the investigation.

### **Investigation**

6. In order to investigate this complaint my complaints reviewer reviewed Mr and Mrs C's correspondence with Business Stream. He also reviewed correspondence between Scottish Water and Business Stream and relevant water industry guidance and legislation. My complaints reviewer obtained additional comments and information from Scottish Water and Business Stream and discussed the circumstances of the complaint with a water industry adviser (the Adviser).

7. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr and Mrs C, Business Stream and Scottish Water were given an opportunity to comment on a draft of this report.

8. During my investigation of this complaint, Scottish Water advised that they have since decided to cancel all charges for Mr and Mrs C's business. However, I decided to proceed with my decision as I considered there to be a wider public interest in the issues raised. When commenting on a draft version of this report, Business Stream confirmed that Mr and Mrs C's account has now been closed and that a final credit due to them will be issued shortly.

#### **(a) Business Stream unreasonably charged non-domestic water and sewerage rates on Mr and Mrs C's business despite their having no water or sewerage facilities in the business**

9. In her complaint to the Ombudsman, Mrs C explained that her business required no water to operate. The business operated from the Premises, which was a self-contained unit with no water or waste supply. There was no direct access between the Premises and Mr and Mrs C's home. Water used in their home was paid for through their Council Tax. Mrs C explained that, when working in the Premises, Mr C would go into the house to use the toilet or make a cup of tea. Members of the public had no access to their house when visiting the Premises.

10. Business Stream's system notes record that they contacted Mr C by telephone on 22 November 2012 when creating the account for the Premises. Mr C challenged the decision to set up water and waste water charges for his business. However, he was told that, although he reported that the premises had no water services, an account had to be created and the services verified. Business Stream subsequently asked Scottish Water to attend the Premises and check what services were in place.

11. In an email dated 19 July 2013, Scottish Water confirmed to Business Stream that their engineers had attended the Premises and reported that Mr and Mrs C should not be charged for property drainage. This was because water draining from the Premises did not discharge into the public sewer system. As a result of this, Business Stream removed all property drainage charges from Mr and Mrs C's account.

12. Following a formal complaint from Mr and Mrs C regarding the charges for the Premises, Business Stream wrote to them on 6 August 2013. They acknowledged Mr and Mrs C's position that all of the water they used was taken from their domestic supply, which was already paid for through their Council Tax. However, Business Stream explained that domestic water charges were based on the domestic property's Council Tax banding and did not include any charge for a business being run from the property. As such, Mr and Mrs C were liable for unmeasured (un-metered) charges for water and waste water based on the RV of the commercial element of the property as detailed on the Scottish Assessors Association (SAA) website. Business Stream confirmed that all drainage charges had been removed from Mr and Mrs C's account, reducing the balance owed by £238.68. They applied a further credit of £200.00 in recognition of the time it had taken to create their account after the Premises was identified as a Gap Site. As the Premises' bills were being calculated based on unmeasured water usage, Business Stream suggested that Mr and Mrs C apply for reassessment of their water usage. This would allow an assessment of the business's water usage based on the nature of the business and the available facilities, rather than charging an estimate based on the Premises' RV.

13. Dissatisfied with Business Stream's letter, Mr C telephoned them on 12 August 2013. Business Stream responded with a further letter dated 26 September 2013. In their letter, they set out their definitive position, which was based on comments they had obtained from Scottish Water. These

explained that, whilst the Premises may not have had any direct water supply, Mr and Mrs C did have access to water facilities via the domestic element of their property. Scottish Water advised that it is not possible for a commercially rated business to operate without access to water services for health and safety reasons and, as the charges for the domestic property did not include a charge for the commercial element of Mr and Mrs C's property, they were liable for non-domestic charges. Business Stream highlighted that Scottish Water had referred to section 7 of the Water (Scotland) Act 1980 (the 1980 Act) in reaching their position and had confirmed that the only situation where a customer would have no provision for water charges would be if a property was an unmanned storage unit with no water connection or the use of a private water source.

14. Mr and Mrs C submitted further complaints to Business Stream via their MSP and their local Citizen's Advice Bureau. In their reply to the Citizen's Advice Bureau dated 20 December 2013, Business Stream commented that, whilst they sympathised with Mr and Mrs C's circumstances, they were required to charge customers in line with water industry rules. In this respect, Scottish Water had investigated and confirmed that the charges were correct.

15. When investigating this complaint, my complaints reviewer asked Scottish Water to comment on the advice they had provided Business Stream regarding Mr and Mrs C's circumstances. As I mentioned in paragraph 13 of this report, Business Stream had passed on Scottish Water's comments to Mr and Mrs C in their letter of 26 September 2013. Scottish Water had advised that it was not possible for a business to operate without water facilities for health and safety reasons, and had referred to section 7 of the 1980 Act in support of their decision to apply charges for the Premises.

16. Section 7 of the 1980 Act, as referred to by Scottish Water, comments on the supply of water for domestic purposes. It states:

'7. Supply of water for domestic purposes

(1) In this Act a supply of water for domestic purposes means a sufficient supply for drinking, washing, cooking, central heating and sanitary purposes but not for any bath having a capacity in excess of 100 gallons, and includes-

(a) a supply for the purposes of any profession carried out in any premises the greater part of which is used as a house; and

(b) where the water is drawn from a tap inside a house and no hosepipe or similar apparatus is used, a supply for watering a garden, for horses kept for private use and for washing vehicles for private use ...'

17. My complaints reviewer highlighted to Scottish Water that this section of the 1980 Act appeared to allow water to be supplied for commercial purposes via the domestic supply (paid for through Council Tax) in cases where the greater part of the premises are used as a residential dwelling. He asked Scottish Water why this did not apply in Mr and Mrs C's case. He also asked Scottish Water for details of any legislation or regulations upon which they based their comment that it is not possible for a business to operate without access to water on health and safety grounds.

18. With regard to Health and Safety, Scottish Water provided my complaints reviewer with a copy of the Health and Safety Executive's publication: *Workplace health, safety and welfare. A short guide for managers* (the Health and Safety Guidance). This document states:

'Employers have a general duty under section 2 of the Health and Safety at Work etc Act 1974 to ensure, so far as is reasonably practicable, the health, safety and welfare of their employees at work. People in control of non-domestic premises have a duty (under section 4 of the Act) towards people who are not their employees but use their premises...'

19. With regard to welfare, the Health and Safety Guidance states that 'suitable and sufficient sanitary conveniences and washing facilities should be provided at readily accessible places'. It also states that 'an adequate supply of high-quality drinking water, with an upward drinking jet or suitable cups, should be provided...'

20. Under the heading 'Further Information', the Health and Safety Guidance includes a statement highlighted in bold: 'This leaflet contains notes on good practice which are not compulsory but which you may find helpful in considering what you need to do'.

21. Scottish Water told my complaints reviewer they accepted that section 7 of the 1980 Act had been quoted out of context. They explained that, section 7 covers premises that are deemed to be wholly dwellings. An example of a business that could operate out of a 'dwelling' without being separately non-domestically rated would be an accountant who has an office within the house,

but does not have the 'office' separately rated: the property would be deemed, as a whole, to be a dwelling. In Mr and Mrs C's case, as the Premises was commercially rated, with its own RV, it was not deemed to be part of the dwelling.

22. Scottish Water told my complaints reviewer that, Section 50 of the 1980 Act was relevant in Mr and Mrs C's case. This states:

'50 Power to supply by meter

(1) Scottish Water shall not be bound to supply with water otherwise than by meter-

(a) any premises whereof part is used as a dwelling house and part for any business, trade or manufacturing purpose for which water is required;

(b) any public institution, hospital, asylum, sanatorium, school, club, hostel, camp, assembly hall, place of public entertainment, hotel or restaurant or any licensed premises for which a license is required under the Licensing (Scotland) Act;

(c) any boarding-house capable of accommodating 12 or more persons, including the persons usually resident therein;

(d) any premises which are used solely for business, trade or manufacturing purposes and in which a supply of water for domestic purposes only is required; or

(e) any other premises specified, or of a description specified, in an order made by the Scottish Ministers.

...'

23. Scottish Water said that subsections 1(a) and 1(d) of section 50 highlight circumstances where premises are used either solely for business or partly for any business. They said, given that the Premises had been rated by the assessor, that part of Mr and Mrs C's property had been used as a business.

24. Again, my complaints reviewer asked Scottish Water whether these parts of the 1980 Act were applicable in Mr and Mrs C's case: subsection 1(a) related to a single property which had domestic and commercial parts, however, Scottish Water had advised that the Premises was not considered to be part of the domestic property due to its having been commercially rated by the assessor; and subsection 1(d) referred to properties that were used solely for commercial purposes, but had water supplies which were used for domestic purposes.



25. Scottish Water told my complaints reviewer that, in circumstances where an individual has chosen to have part of their property, within the curtilage of the overall premises, rated for business purposes, water service provision is then based on a mixture of domestic use (as covered by Council Tax charging) and business use (as covered by charges within the retail water market). Scottish Water explained that a typical example of this scenario would be where a customer has a workshop within the overall premises shared with a house, with or without direct water facilities, and the workshop is rated as non-domestic by the Assessor. The workshop could be a room within the house; a room added onto the house; or a detached building within the grounds (curtilage) of the premises which include the house. As the workshop is assessed as a non-domestic premises, it should be registered with the Central Market Agency and served via a Licensed Provider. Where the workshop has its own water and waste water facilities:

- The 'shared supply' serving both the workshop and the household dwelling should be metered as dual use, and measured water and waste water charges will be applied via the Licensed Provider. The household would not then be billed via Council Tax, and would be billed directly by Scottish Water for any roads and property drainage.
- If the 'shared supply' cannot be metered, unmeasured charges would be applied to the workshop by the Licensed Provider, and the household would continue to be billed via their Council Tax.
- If the water supply to the workshop only, is a separate metered connection, then there is no 'shared supply'. Measured water and waste water charges will be applied via the Licensed Provider for the workshop, and the household dwelling would be charged via their Council Tax for their household water and waste water services.

26. Scottish Water said that, where the workshop has no water or waste water facilities (ie no tap, toilet or sink), it will still have access to water from the dwelling house and may be using some of this for non-domestic purposes. In this case:

- The workshop will be subject to non-domestic charges because of the availability of supply.
- Assessed charges would be levied on the non-domestic workshop for the availability of the services.

- The workshop would be registered with the Central Market Agency and billed via their Licensed Provider for the non-domestic assessed charges associated with the workshop.
- The household would be billed separately via their Council Tax for the household usage.
- Alternatively, the supply serving the dwelling could be metered and measured water and waste water charges applied via the Licensed Provider serving the workshop. In this case, Scottish Water would bill the household directly for roads and property drainage, and the household customer would not then be billed via their Council Tax. (Depending on usage and Council Tax banding of the dwelling, this option may be more beneficial to the customer).

27. Section 27 of the Water Services etc (Scotland) Act 2005 (the 2005 Act) sets out which types of property are eligible for commercial water charges. It states:

'27 Meaning of 'eligible premises'

(1) In this part, 'eligible premises' means -

(a) in relation to the supply of water, premises which are (or are to be) connected to the public water supply system; and

(b) in relation to the provision of sewerage or the disposal of sewage, premises which are (or are to be) connected to the public sewerage system, but not any dwelling

(2) In subsection (1), 'dwelling' means any dwelling within the meaning of Part II (Council tax: Scotland) of the Local Government Finance Act 1992 (c.14) except the residential part of part residential subjects within the meaning of that Part of that Act.

(3) The Scottish Ministers may by order modify subsection (2) so as to vary the meaning of 'dwelling'.'

28. For the purposes of applying water charges, Business Stream and Scottish Water take the view that, where a commercially rated property 'has access to' a water supply, they are eligible for water charges. My complaints reviewer asked Business Stream and Scottish Water whether they had obtained any legal advice regarding their interpretation of section 27 of the 2005 Act. Neither organisation provided us with evidence of such legal advice.

29. My complaints reviewer discussed Mr and Mrs C's case with the Adviser. The Adviser considered that the Premises is a separate property from the

dwelling house and should be treated as such. It is self-contained and has its own RV. The only connection is that it is in the same ownership. He noted that the Premises has no water supply and no direct access to water. He acknowledged that Scottish Water had cited health and safety guidance, but noted that it was just that, guidance. The Adviser was not aware of a legal requirement for the Premises to have a water supply, but if there were such a requirement, it is clear that no such supply exists and this would be a separate legal matter.

30. The Adviser also noted that Mr and Mrs C's customers do not have access to water facilities from their dwelling house. He, therefore, felt that the only point to consider was whether the owner, having access to his own house for water facilities justifies having separate water charges for the Premises. The Adviser did not consider there to be any justification for commercial water charges at the Premises. He noted that its presence did not place additional demands on the water supply system and Mr and Mrs C's use of water did not increase as a result of owning the Premises.

31. As I mentioned in paragraph 8 of this report, Scottish Water ultimately acknowledged that it had been inappropriate to apply commercial water charges to the Premises and withdrew all charges. When commenting on a draft version of this report, Scottish Water explained that they have commenced a review of their charging policies to ensure that these are aligned with the Scottish Government's Principles of Charging. They also aim to ensure that charges are fairly applied to premises where services are provided or available for use.

*(a) Conclusion*

32. As Business Stream explained in their letter to the Citizens Advice Bureau, they are required to charge customers in line with water industry rules. This would include relevant guidance and legislation. In considering this case, I am also mindful that Business Stream's charges will have been based on decisions made by Scottish Water. It is not for this office to interpret legislation, or to arrange for an independent legal view. I can only assess whether the decisions made by Scottish Water and Business Stream are demonstrably supported by relevant guidance and legislation.

33. Generally, I find it entirely reasonable that Scottish Water should seek to apply charges for water used for commercial purposes. However, it would not be reasonable for them to apply charges (through a licensed provider such as

Business Stream) for a service that they have not provided. This is evidently recognised by Scottish Water given their decision not to charge for drainage after it was established that no water drained from the Premises into the public sewer system.

34. I was concerned to find that when water charges were applied at the Premises, two conflicting interpretations of Mr and Mrs C's situation combined to work against them: on the one hand, the Premises was viewed as a separate property in its own right due to its RV. This allowed the Premises to be treated as a commercial property, liable to commercial charges; on the other hand, the Premises was considered to be part of (within the curtilage of) the dwelling house. This allowed Scottish Water to apply their position that the business had access to the domestic property's water supply. I agree with the Adviser's view that, as the Premises has its own RV, it must be treated as an entirely separate property in its own right.

35. I was unconvinced by the evidence provided by Scottish Water in support of their decision to apply charges at the Premises. I could find no legislation or guidance supporting their position that businesses cannot operate without water for health and safety reasons. The Health and Safety Guidance that they provided in support of this position clearly stated that the recommended actions were not compulsory and should be followed 'so far as is reasonably practicable'. Furthermore, when explaining the basis for charges at the Premises, Scottish Water referred to sections of the 1980 Act which could not reasonably be interpreted as being applicable to Mr and Mrs C's situation. I am also concerned as to how section 27 of the 2005 Act has been interpreted, as this appears clear that properties should be 'connected to' the water system, rather than 'have access to' in terms of being eligible for charges. This is a point of legal interpretation which I consider should be clarified.

36. In Mr and Mrs C's case, the Premises has no water supply, no sinks or toilets, and no water meter. It is a separate property from the dwelling house with its own RV. I do not consider it appropriate for Scottish Water to link the Premises to the dwelling house, just because it is located in the garden. It has not been established that Mr and Mrs C's business requires water to operate. As the Adviser noted, their business does not place additional demands on the water supply system and Mr and Mrs C's use of water did not increase as a result of owning the Premises. Scottish Water have taken the view that, as Mr and Mrs C use the bathroom and make tea in their home when conducting

business from the Premises, that water is being used for commercial purposes. I consider this point to be debatable. However, regardless, I found nothing in the applicable water industry rules that supports a policy decision to apply charges to a commercial property just because the owners have access to a domestic water supply already paid for through Council Tax.

37. With all of the above in mind, I do not consider Business Stream's charges to have been made in line with water industry rules. I, therefore, uphold this complaint.

38. In making the recommendations below, I acknowledge that Scottish Water have already commenced a review of their charging policies. I would ask that they inform me of any changes to their policies resulting from this review.

*(a) Recommendations*

39. I recommend that Business Stream:	<i>Completion date</i>
(i) apologise to Mr and Mrs C for inappropriately applying water charges at the Premises; and	30 January 2015
(ii) ensure that Mr and Mrs C's account is closed and all charges cleared in line with Scottish Water's offer.	30 January 2015

**(b) Business Stream failed to provide a reasonable explanation for their actions**

40. Mrs C complained that Business Stream failed to provide a reasonable explanation for the charges applied to the Premises.

41. As I explained under Complaint (a) of this report, following telephone discussions with Mr C, Business Stream wrote to him explaining their position. In their letter of 6 August 2013, Business Stream explained the Gap Site process which had led to a water account being created for the Premises. They also explained that Mr and Mrs C's Council Tax did not allow for water used for business purposes and confirmed that a credit had been applied to their account in respect of the cancelled drainage charges.

42. In their letter to Mr C of 26 September 2013, Business Stream passed on the comments they had received from Scottish Water. These stated that it was not possible for a business to operate without water on health and safety

grounds and referred to section 7 of the 1980 Act by way of an explanation for the charges.

43. On 22 November 2013, Business Stream responded to a complaint from Mr and Mrs C's MSP. This response combined the explanations that had been provided in the two previous letters.

44. My complaints reviewer was provided with copies of telephone notes recorded by Business Stream staff after speaking with Mr and Mrs C about their complaint. These reflected the explanations that were issued in writing.

*(b) Conclusion*

45. I found that Business Stream's responses to Mr and Mrs C were sufficiently detailed and sought to address the concerns they had raised. Whilst there was some jargon used, it was evident that the matter had already been discussed over the telephone and that the letters' recipients would have some understanding of the circumstances leading to the charges. As such, I am not critical of the style, tone or level of detail in the letters that were sent to Mr and Mrs C.

46. Under Complaint (a) of this report, I found that the decision to charge for water at the Premises was not supported by water industry guidance and legislation. However, Business Stream's correspondence generally reflected the situation as they understood it at that time. With regard to the reasons for the charges, their comments were largely based on the information that had been provided by Scottish Water. It is appropriate for Business Stream to seek Scottish Water's comments when responding to a complaint, as the charges originated from Scottish Water. However, as has been accepted by Scottish Water, the reference to section 7 of the 1980 Act was made in error and did not apply to Mr and Mrs C's situation. I was concerned to find that Business Stream passed on this explanation without checking its accuracy, or without challenging the clearly misleading information that had been provided to them.

47. Overall, whilst Business Stream provided detailed responses to Mr and Mrs C's complaints in good time, their responses contained inaccuracies and, therefore, did not provide a clear explanation as to why the Premises was liable for water charges. Accordingly, I uphold this complaint.

*(b) Recommendation*

48. I recommend that Business Stream:

*Completion date*

- (i) take steps to ensure that the accuracy of information provided by third parties is tested and challenged where necessary before forwarding it to their customers.

27 March 2015

49. Business Stream have accepted the recommendations and will act upon them accordingly. The Ombudsman asks that Business Stream notify him when the recommendations have been implemented.

**Explanation of abbreviations used**

Mrs C	the complainant
Mr C	the complainant's husband
the Premises	commercial premises owned by Mr and Mrs C
RV	rateable value
the Adviser	a water industry adviser to the Ombudsman
SAA	the Scottish Assessors Association
the 1980 Act	the Water (Scotland) Act 1980
the Health and Safety Guidance	Workplace Health, Safety and Welfare: a Short Guide for Managers
the 2005 Act	the Water Services etc (Scotland) Act 2005



**Glossary of terms**

Gap Site	a commercial property that is not being charged for water or waste water services
Curtilage	the overall grounds of a property

**List of legislation and policies considered**

The Water (Scotland) Act 1980

The Water Services etc (Scotland) Act 2005

Workplace Health, Safety and Welfare: a Short Guide for Managers