

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1742 – Sewerage - Flooding

Date of Decision: 9 April 2020

#### Complaint

The customer has experienced regular external flooding at the rear of her property since 2014. The company claim that the flooding is not its responsibility and refuse to provide a long-term solution. The customer wants the company to take responsibility and prevent further flooding by upgrading the sewers and the pumping station.

#### Defence

Section 94 of the Water Industry Act 1991 places a duty on sewerage companies to maintain their sewers to ensure that their area is effectively drained. This statutory duty is enforceable by Ofwat, not the customer. In view of this, the customer's request for a long-term solution to the flooding is outside of the scope of WATRS. In any event, the company is not responsible for flooding unless it acted negligently. Investigations have shown that all its assets are working correctly and the company has not acted negligently; the flooding is caused by hydraulic overload due to surface water issues and river flooding. Therefore, the company cannot be liable under Section 94 of the Water Industry Act 1991. The company has not made an offer of settlement.

#### Findings

In accordance with WATRS's Scheme Rules, the customer's complaint regarding the company's alleged breach of its statutory duty to maintain effectual drains falls outside the scope of this Scheme for several reasons; the complaint concerns complex issues of law, the complaint would be better addressed to a more appropriate forum, and the complaint concerns matters over which Ofwat has powers to determine an outcome. Therefore, the customer's request for a long-term solution to the sewerage flooding cannot be adjudicated upon through this Scheme.

#### Outcome

The company does not need to take any further action.

The customer must reply by 7 May 2020 to accept or reject this decision.

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# ADJUDICATOR'S DECISION

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Date of Decision: 9 April 2020

## Party Details

**Customer:** The Customer

**Company:** XWater

## Case Outline

### **The customer's complaint is that:**

- She has experienced regular external flooding at the rear of her property since 2014. The flooding mainly affects the garden, although sewage sometimes backs up in her toilets, and occurs during adverse weather conditions. Her neighbours are also badly affected by this issue.
- The company claims that the control and prevention of localised flooding is the local authority's responsibility; however, she believes that the company is responsible as it owns the sewers that flood. The company has also confirmed that the sewer is on an annual inspection and maintenance plan, indicating that the sewer is problematic.
- The company decided against installing a non-return valve, but has advised her that she can arrange for one to be installed on her private pipework to mitigate the flooding.
- The company offered her £110.00 for service failings but she is dissatisfied with the company's response. She wants the company to take responsibility for the flooding and upgrade the sewer system and the pumping station.

### **The company's response is that:**

- The customer lives in an area of the country which experiences flooding from a river close by, and when there is heavy rainfall, due to the topography and geological conditions in the area, the water is unable to drain away.
- When this occurs, the surface and river water drains into the sewers; this sometimes overwhelms the foul sewer network and causes plumbing issues for the customer and other residents in the area. However, it has inspected all of its assets, including the sewer pumping

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- station, and has found them to be free flowing, free from defect and working correctly. In order to ensure its assets remain fully operational, it has agreed to check all relevant assets once a year.
- As all of its assets are fully operational and free from fault, it is not responsible for the flooding issues experienced by the customer. As such, X County Council and X District Council have been dealing with the surface water flooding, and the Environment Agency are dealing with the river flooding; together they are investigating whether this issue can be resolved by implementing a flood alleviation scheme in the area. It is attending regular flood forums for the area in a supportive capacity.
  - Under Section 94 of the Water Industry Act 1991, a water company is responsible for the repair and maintenance of its assets so that its area is effectively drained. As the customer believes that the flooding is caused by a fault with its sewerage system, and her complaint regards an alleged failure to ensure the area around her property is effectively drained, it follows that the customer believes it has breached its section 94 duty.
  - However, section 18 of the Water Industry Act 1991 gives Ofwat, the industry regulator, the jurisdiction to determine an outcome, and take enforcement action, following a breach of Section 94. Therefore, under rule 3.4.1 of the WATRS Scheme Rules, the customer's application falls outside of the scope of WATRS and, instead, the matter should be directed to Ofwat.
  - Furthermore, it is not responsible for flooding or flood damage when the cause is outside of its control, unless it acted negligently. As the flooding is caused by surface water and river flooding, and not by the negligence of the company, it cannot be liable under Section 94 of the Water Industry Act 1991.
  - In any event, the work requested by the customer would cost significantly more than the maximum remedy of £10,000.00 permissible under the WATRS Scheme Rules; it would in fact cost many millions of pounds. Therefore, this remedy cannot be awarded by the Adjudicator deciding this case.
  - In view of the above, it denies liability to provide a long term solution to the flooding experienced by the customer and disputes the jurisdiction of WATRS to adjudicate in this matter.

### **How is a WATRS decision reached?**

In reaching my decision, I have considered two key issues. These are:

1. Whether the company failed to provide its services to the customer to the standard to be reasonably expected by the average person.
2. Whether or not the customer has suffered any financial loss or other disadvantage as a result of a failing by the company.

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In order for the customer's claim against the company to succeed, the evidence available to the adjudicator must show on a balance of probabilities that the company has failed to provide its services to the standard one would reasonably expect and that as a result of this failure the customer has suffered some loss or detriment. If no such failure or loss is shown, the company will not be liable.

I have carefully considered all of the evidence provided. If I have not referred to a particular document or matter specifically, this does not mean that I have not considered it in reaching my decision.

### How was this decision reached?

1. Having considered the facts of the case and the evidence presented by the parties, I find that the customer's complaint regards an alleged breach of the company's statutory duty to maintain its sewers to ensure that the customer's property is effectually drained.
2. Section 94 of the Water Industry Act 1991 outlines the company's duty to maintain its sewers and states:

“(1) It shall be the duty of every sewerage undertaker—

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and

(b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.

(2) It shall be the duty of a sewerage undertaker in performing its duty under subsection (1) above to have regard—

(a) to its existing and likely future obligations to allow for the discharge of trade effluent into its public sewers; and

(b) to the need to provide for the disposal of trade effluent which is so discharged.

(3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above—

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(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Director.”

3. Since the customer’s complaint raises issues relating to the company’s obligations under section 94 of the Water Industry Act 1991, I consulted the WATRS Scheme Rules to establish whether the complaint was within the scope of this Scheme.

4. Rule 3.4 of the Scheme Rules states:

“WATRS may reject all or part of an application to the Scheme where it considers that:-

3.4.1 a customer should be referred to a more appropriate forum for the resolution of the dispute; or

3.4.2 the application should have been made against an alternative water and/or sewerage company; or

3.4.3 in exceptional circumstances, the dispute raises a complicated issue of law.”

5. Rule 3.5 of the Scheme Rules states:

“The Scheme cannot be used to adjudicate disputes which fall into one or more of the following categories:

- disputes concerning the Competition Acts 1998 and 2002 as amended;
- regulatory enforcement cases;
- bulk supply determinations;
- disputes between undertakers, between licensees and between undertakers and licensees;
- water supply licensing disputes;
- whistle blowing;
- any matters over which Ofwat has powers to determine an outcome;
- disputes relating to eligibility to transfer to a statutory licensee;
- water quality legal standards;
- enforcement cases under the Environmental Protection Act 1990 and the Environmental Act 1995 as amended;
- disputes that are subject to existing court action or on which a court has ruled unless the

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court's decision has been set aside;

- disputes that are the subject of an existing or previous valid application under the scheme;
- the handling of CCW and Ofwat complaints;
- complaints which are being or have been investigated by a statutory or regulatory agency or agencies including the Drinking Water Inspectorate and/or the Environmental Agency in respect of the breach of a statutory or regulatory requirement unless a WATRS Notification or Option Letter has been issued in respect of the complaint;
- resale and third party complaints;
- disputes relating to the fairness of contract terms and/or commercial practices;
- disputes concerning allegations of fraudulent or criminal activity; and
- any dispute or disputes that are considered by WATRS to be frivolous and/or vexatious.”

6. I find that the complaint raised by the customer concerning the sewerage flooding falls outside the scope of this scheme for several reasons, which I shall now outline.
7. Having considered the facts of the case, I find that the complaint regarding sewerage flooding raised by the customer concerns complex legal issues, specifically the company's compliance to section 94 of the Water Industry Act 1991 above. In view of this, I find that Rule 3.4.3 of the Scheme Rules prevents me from adjudicating on these issues.
8. Furthermore, in accordance with section 18 of the Water Industry Act 1991, Ofwat has the jurisdiction to take enforcement action against water companies that breach their section 94 statutory duties. Therefore, I find that the complaint would be better addressed to Ofwat, which I consider to be “a more appropriate forum”, as per Rule 3.4.1.
9. In addition to this, Rule 3.5 specifically renders any matters over which Ofwat has powers to determine an outcome outside the scope of this scheme. As above, section 94 (3)(b) of the Water Industry Act 1991 delegates enforcement powers to Ofwat and, therefore, as an adjudicator operating under the rules of this Scheme, I have no jurisdiction to consider an alleged breach of section 94.
10. For the reasons I have outlined, and in accordance with the Scheme Rules, the customer's claim for a long term solution to the flooding cannot succeed. I appreciate the frustration the customer will likely feel at this, but I do not have the jurisdiction to consider or direct upon this matter.

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### Outcome

The company does not need to take any further action.

### What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- The customer must reply by 7 May 2020 to accept or reject this decision.
- When you tell WATRS that you accept or reject the decision, the company will be notified of this. The case will then be closed.
- If you do not tell WATRS that you accept or reject the decision, this will be taken to be a rejection of the decision.

*KS Wilks*

Katharine Wilks

**Adjudicator**

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