WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-XX86

Date of Decision: 26/01/2021

Complaint

The customer, through his representative, complains that he was given advice in 2019 that he would be permitted to build over the sewer when constructing a second building on his site. He had previously been allowed to build a garage over the sewer when his first house was built. In 2020, the company said that the customer would not be permitted to build over the sewer again. The customer disagrees with the company's reasoning and conclusion. He asks for a direction that the company shall enter into a Build-Over agreement in accordance with the 2019 advice.

Response

The company says that it mistakenly suggested in 2019 that it would be willing to enter into a Build-Over agreement. It says that it advised the customer's representative in 2020 that it would not permit building over the sewer. The company says that the grant of consent would be contrary to its published policy and there is no adequate reason why it should relax the policy in this case. It is willing to compensate the customer for costs caused by its mistake, but the customer has not so far accepted that.

Findings

Although the company did not supply its services to the required standard in 2019, it says that it is willing to compensate the customer for costs incurred on presentation of of a link between the incorrect suggestion that it made and the costs claimed. The company did supply its services to the standard that would reasonably be expected in 2020. The company has not acted unreasonably in applying its policy in 2020 and it has taken the customer's representations into account.

Outcom

The company is not required to take further action.

The customer must reply by 23/02/2021 to accept or reject this decision.

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-XX86

Date of Decision: 26/01/2021

Party Details

Customer's Representative: The Representative
Company: X Company

Case Outline

The customer's complaint is that:

1. The customer's complaint is that: • Misleading information was given by the company in relation to a proposed Build-Over Agreement intended to permit building over the sewer on land owned by the customer. • At the outset of a proposed development of the land in March 2019, the customer's representative contacted the company to request in-principle approval of a Build-Over agreement for a new dwelling. • The customer's existing property had required a Building-Close-To Agreement following consultation with the company in 2013 and the new proposal to build over the sewer was an alteration to that agreement, hence the need to seek approval. • The company advised by email that the proposal was acceptable and would require a Build-Over agreement. The standard agreement and Guidance Notes were attached. • On receipt of a response from the company in March 2019, the customer progressed the planning application, including the drawing up of plans and various supporting reports and surveys. • In March 2020, the representative made further contact with the company to enquire whether a raft foundation would be acceptable as an alternative to an augered pile foundation as agreed previously. • At this point, the company advised that it would not allow a Build-Over Agreement. • The representative corresponded with the company regarding the issue and has been through the company's complaints procedure. The customer is still dissatisfied with the response. • The company refuses to stand by its original advice that a Build-Over Agreement would be granted. The customer wants the company to enter into a Build-Over agreement so that the development can proceed.

The company's response is that:

1. The company's response is that: • It has made responses to the customer on 28 July 2020 and 1 September 2020 to explain why it cannot allow the proposed development over the existing sewer. • In summary, in 2013 the company gave

consent for new residential properties to be built close to the existing sewer on this site. It subsequently permitted a detached garage to be built over the sewer. This was a relaxation of the company's Build-Over policy, which states that the company does not provide consent to allow any new residential properties to be built over or built close to an existing public sewer. • The email from the representative dated 9 May 2013 made clear that the representative understood the situation because it summarised the company's position of only agreeing to provide consent allowing new residential properties to be built close to, but not over the top of, the existing sewer. This information would also have been known to the representative and the customer when drawing up an outline proposal for a new dwelling. • The company acknowledges that in March 2019, it suggested that its position had changed since 2013 and that it would accept a Build-Over Agreement for the new dwelling. However, this was done in error and the company has apologised for providing incorrect information. • The company says that no contract stems from the incorrect advice. The company's powers and obligations regarding the sewer are governed by statute, not contract law. • The land is owned by the developer subject to the company's pre-existing statutory rights of access provided by section 159 Water Industry Act 1991. The customer cannot proceed with his development in breach of the company's legal right to unrestricted access. • If the company were to agree to the request, it would face an increased risk that the proposed building work and increased loading would cause damage to the sewer (and potentially the property and environment). It would also make it harder for the company to access and maintain a sewer in the long term, resulting in increased costs to customers and significant disruption. • The Consumer Council for Water (CCWater) asked if the company would consider a payment in recognition of costs the developer may have incurred due to the advice given in 2019, although this was not an avenue the customer wished to explore. In considering such a request the company notes that the Planning Application, after initially being declined because of existing tree preservation orders, is now subject to appeal. It is possible that the development will proceed with a changed layout. This was the same situation the developer faced when the company refused permission to build over the sewer for the first dwelling the customer constructed. If costs are submitted for consideration the company would require evidence that these were incurred because of the incorrect advice in 2019. The company agrees, however, that it will consider these but it will not grant a Build-Over agreement.

How is a WATRS decision reached?

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

- Whether the company failed to provide its services to the customer to the standard to be reasonably expected by the average person.
- Whether or not the customer has suffered any financial loss or other disadvantage

as a result of a failing by the company.

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 and arguments put forward, including the comments made by the representative in response to my Preliminary Decision. 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.

Customer: The Customer

How was this decision reached?

1. 1. The customer's main concern is to obtain a change of decision in relation to the company's refusal of a Build-Over agreement. I remind the parties of the scope of my powers, however. Although the customer's representative makes clear that the customer wants the company to enter into a Build-Over agreement and to honour the advice given by the company in March 2019, this is not something that I can direct. I find that it is for the company and not for me to decide whether a Build-Over agreement should be made in the circumstances of this case. I can, however, consider the company's decision-making and can decide whether the company has arrived at its conclusion in a way that would be consistent with the expectation of an average customer. If I find that the company has not acted reasonably, I could direct that the company should re-consider its decision.

   2. I do not, however, find that the company has acted unreasonably in deciding in 2020 that it will not enter into a Build-Over agreement in respect of this development. I have come to this conclusion because of the following findings and reasons.

   3. The starting point is the application that was made by the customer in 2013. The documentation submitted to me by the parties shows that what happened was this:
   a. In 2013, the customer proposed the construction of three properties on a site in X Location. He approached the company and was told that he could not build within 3 metres of the public sewer which ran under the land.
   b. The representative then followed this up, and consent to building within 3 metres of the sewer was again refused.
   c. The representative had a meeting with the company on 8 May 2013. The company at that meeting reversed its previous decision and said that the properties

could be built up to, but not over the sewer. It was stated during that meeting that if the sewer had to be replaced, it would be located in the highway and not through the private gardens along that road.
d. Later it was decided to build a single dwelling (X Property). The “Build-Close-To” the sewer agreement, enabled the customer to build the main part of the home to end within 3 metres of the sewer.
e. On a subsequent application in 2015, the company entered into a Build-Over agreement in relation to a detached garage.

4. In March 2019, the customer put forward proposals to build one additional home at the end of his garden (X Property 2). On 12 March 2019, the representative sent a letter stating that a Build-Over agreement had been granted in 2013 and enclosing outline documents for the new development. The representative said that the new building would have augured pile foundations. The representative hoped that the company would feel able to follow the 2013 precedent.

5. On 26 March 2019, the company confirmed that it required an application fee and Build-Over sewer agreement. The company also said that it would require an augured pile foundation in order to keep risks to its assets to a minimum. The company was requested to send over the proposal for approval. The customer then applied for planning permission.

6. In March 2020, the customer’s representative explained to the company that it wished to build the new home with a smaller footprint and with raft foundations. At that point the company said that it would not grant consent to building over the sewer.

7. The company says that it made a mistake in March 2019 and should not have said that it would consent. The representative says that it did not make a mistake but that the company has changed its stance.

8. A complaint was made on 17 July 2020 and responded to on 28 July 2020 (wrongly referring to the sewer as a brick egg sewer). The representative indicated that he was not satisfied with this response and asked for a review. In the review it was confirmed on 1 September 2020 that this is a concrete egg sewer.

9. The company makes the following six points:
a. The suggestion made in 2019 had been a mistake.
b. Entry into a Build-Over agreement would be contrary to its policy.
c. The company does not permit new building over the sewer in other places.
d. There would be an increased risk that the proposed building work and increased loading would cause damage the sewer (and potentially the property and

environment);
e. It would be harder for the company to access and maintain a sewer in the long term, resulting in increased costs to our customers and causing significant disruption.
f. The company has no plan to replace the sewer so as to change its route.

10. The customer challenges these points.
a. Mistake: the representative argues that the company did not suggest that consent would be granted: it made clear that it would be granted and the customer has placed reliance on this.
b. Policies: the company has referred to its published advice on its approach to building over sewers. The company says that the relevant leaflet explains that the company is strongly opposed to building over sewers and if this is to happen, the sewer must be strongly constructed and the builder must have entered into a Build-Over agreement with the company. The representative says that this indicates that the policy permits a departure from its usual rule and there are other examples, including in respect of the garage at X Location and at X Location 3, where the company has permitted building over.
c. Application of the policy: The representative argues that company accepts that it can be possible to obtain an agreement to build over the public sewer when an extension to a property is built. The representative asks what the difference is in terms of restriction of access and risk to NWL between this and a new dwelling?
d. Risk of damage: The representative argues that there would be no additional risk if the company permitted building over the sewer. The Build-Over agreement requires the developer to provide detailed foundation proposals to prove that no additional loading is transferred to the sewer. The public sewer is CCTV surveyed prior to the foundation works commencing and post-works to ensure that no damage has been caused, therefore, the risk referred to is removed. Repair of any damage caused to the sewer by the proposed works would be the liability of the owner (and their contractors).
e. Access: access to the sewer is and would be possible from manholes 0101 upstream and 0204 downstream of the proposed dwelling. Furthermore, a Build-Over sewer agreement includes various clauses requiring the owner to give undertakings and indemnities relating to construction, liability for damage and loading and access and maintenance.
f. Route: In 2013 the company had said that if the sewer were to be replaced, the replacement sewer would run under the highway.

Mistake
11. The customer says that the company gave a firm commitment in 2019: the representative argues that in 2020, this was not a mistake but a change of policy. The company, on the other hand, acknowledges that its email suggested that

consent would be given but was not in itself a binding promise.

12. I do not find that the statement by the company in 2019 was intended to be a binding promise. The email sent by the company's Technical Administration Assistant (a junior role) stated:
"I can confirm we require an application fee and Building over sewer agreement. We would require an augured pile to keep risks to our assets to a minimum and I would be grateful if you could please forward details of the foundation design/method statement for the proposed development for approval.
Please find attached a copy of the application forms."

13. I find that it is quite clear from the language used that further steps were necessary before a grant of permission could be given. These were: (1) completion of the application form; (2) submission of the design/method statement; (3) payment of a fee and (4) entry into the Build-Over agreement. Additionally, as the representative concedes in comments on my proposed decision, the Build-Over agreement would not have been made before the grant of planning permission. While I accept that the representative had submitted some details of the proposed development, the fact that further or repeated information was requested "for approval" indicates that approval had not been granted. I note that the email indicates that an application might be regarded favourably but this is very far from the sort of consent that I find would reasonably be expected to bind the company.

Policy
14. The company has referred to its published advice on its policies. The company says that the relevant leaflet explains that the company is strongly opposed to building over sewers and if this is to happen, the sewer must be strongly constructed and the builder must have entered into a Build-Over agreement with the company. The company publishes its Guidance and this is available for all customers to read. Among the matters stated in the Guidance, it says:
"We will accept single story extensions, domestic garages, conservatories and two story extensions to residential properties to be constructed over or close to a sewer, subject to certain conditions described below:...
Under no circumstances will building over be allowed where;
• An existing or proposed manhole would be located inside the building...
• The development is a new detached development or redevelopment"

15. The Guidance also states:
"We will say no if…Your development involves the construction of a new residential property, the extension of industrial and commercial property or any detached ancillary buildings or structure…
Your building will use another form of foundation design e.g. pad, piling, raft, cantilever, etc."

16. I find that the extracts above explain that the proposed construction is contrary to the company's published policy. I find that an average customer would expect the company to follow its own policies and would therefore reasonably expect that a Build-Over agreement would not be permitted for a new development. It would also not be expected where a raft foundation was proposed.

Application of the policy

17. The representative says that the company has not been consistent in the application of the policy. In its email of 1 September 2020, the company said: X Company own and maintain over 30 thousand kilometres of public sewerage network within our operating area; there will undoubtedly be instances where properties have been built over sewers. I have asked our current building regulation personal if they are aware of any such instances and they have informed me that there has been a couple of recent scenarios where they have allowed residential apartments to be built over our main interceptor sewer in X City centre, but they can't recall ever having given permission for a single dwelling similar to this proposal.

18. I find in this case that, although the representative complains that the company has not provided details of approval for other building-over arrangements and complains about the quality of answer given by the company, the representative has not been able to point to any potentially similar cases where permission to build over has been given. Permission to build a garage or extension over the sewer is not a relaxation of the policy because the policy makes clear that the company may permit this. In making its response of 1 September 2020, I find that the company has considered whether the frequency of exceptions and relaxations has been such that a relaxation should be granted in this case. The company refers to two factors, one is that the policy has generally been followed by the company and the second is that the exceptions to the policy are in quite different circumstances, for example, in X City Centre, where the considerations are quite different. These are, I find relevant considerations and the company was reasonable to refer to these in answer to the representative's objection that there are instances where the sewer has been built over.

19. The representative argues that the company's policy is inappropriate because there is no reasonable distinction between an extension and a new development. I do not accept that argument, however. In the case of an extension, the principal building is already in place and the scope for making changes, which may be needed for many reasons, is restricted. In the case of a new development, especially one such as this development where there is a large area of garden, a developer is likely to have a choice where on the plot the new home should be located. The need to build over the sewer is therefore less. I am mindful that it is for

the company to decide what policies it will apply, but I find that the drawing of the distinction between a new-build and an extension or garage would be likely to be understood by customers. Despite the further submissions of the representative in response to my Preliminary Decision, I find that it is reasonable for the company to have adhered to this policy.

20. Accordingly, I find that the company's decision that the customer's application should not succeed, against this background, is within a reasonable range of responses and is not unreasonable.

Risk of damage

21. The gist of the representative's argument is that the owner and the contractor make themselves responsible in a Build-Over agreement so as not to expose the company to increased risks. However, the company says that it is not satisfied as to this. I find that there is nothing unreasonable about this approach.

22. If the company does not grant the Build-Over consent, there will be no increased loading on the sewer and therefore the development will not cause risk of collapse or damage. The potential problem is avoided. If the permission is granted, then a risk may arise, whatever the extent of that risk. The company will only be able to call upon the customer and others once something has gone wrong. The company's preferred approach is to avoid something going wrong and I find that this approach is reasonable.

23. Moreover, if the company were to make a relaxation in the customer's case, it would also need to consider the relaxation when other applicants might also wish to build over the sewer. The company's reasons for departing from its policy in other cases would be more difficult to uphold. The grant of cumulative build-over consents would increase the cumulative risk to the network. I find that the company would be expected to take this matter into account and its conclusion is one that the company could reasonably come to.

Access

24. The representative refers to the fact that access can be made available via two manholes in the proposed development at X Property 2 and, as with the point above, he refers to the various responsibilities that are imposed on the customer by reason of the Build-Over agreement. The company points out, however, that access via the two manholes does not equate to an ability to monitor the sewer along its entire length. I find that the company would reasonably be expected to take this consideration into account.

Route

25. Although the representative refers to a conversation in 2013 in which the

company acknowledged that if it had to replace the sewer, the replacement would be constructed in the highway, it does not follow that the company would wish to take measures that increase the risk that the sewer will need to be replaced. The company says that it has no present intent to replace the sewer and there is no evidence to the contrary. I find that the company would not reasonably be expected to take into account its contingent plan for the sewer at a point when the sewer is functioning adequately in its existing location.

Conclusion

26. It follows from the above that I find that in 2020, the company, although it has not followed the advice given in 2019, has considered the position and taken into account the objections raised by the customer's representative. It has not acted unreasonably in the way it carried out its decision-making process and therefore did not fail to supply its services to the requisite standard

27. The company does not deny that it made a mistake in 2019 and I find that at this point it had failed to supply its services to the expected standard. The company has offered to provide compensation if the customer can prove to the company that he has suffered a loss in consequence of this mistake. It has stated that this offer remains open, which I find to be a fair and reasonable response to its own error. The customer has made clear that he asks for a different remedy. He would only wish to claim compensation if the request for a Build-Over agreement remains refused.

28. For the reasons given above, I do not direct that the company shall comply with its 2019 advice and I have insufficient evidence to make a direction in respect of the error in 2019. It will be for the customer to make a claim when and if he feels that it is appropriate.

29. Accordingly, on the basis of the claim made in this application, I do not direct the company to take any further action.

Outcome

1. 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 within 20 working days to accept or reject this final 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.

Claire Andrews

Adjudicator