

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-XX36

Date of Decision: 31/07/2021

Party Details

Customer: The Customer

Company: The Company

Complaint

The customer says that she has experienced substantial inconvenience and distress due to the company's operations.

Response

The company says that it has not been negligent, and so no compensation is owed.

No offer of settlement has been made.

Findings

The company has provided its services to the customer to the standard to be reasonably expected by the average person.

Outcome

The company does not need to take any further action.

The customer must reply by 31/08/2021 to accept or reject this decision.

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Case Outline

The customer's complaint is that:

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- Substantial traffic passes the Property from the nearby wastewater treatment works ("theSite").
- This occurs a minimum of 2-3 times a day, at all hours of the day and night, with tankers operating all night when it rains.
- She had been told in April 2019 that there would be two tankers a day, as opposed to the previous one tanker a week. However, there had actually been more than one tanker a week for a couple of years.
- Within a couple of days of being told this, there were four tankers lining up for the Site, and for one two week period there was one tanker per hour for 24 hours.
- When the initial planned work did not succeed in Autumn 2019, she received no official update until May 2020.
- New work commenced in Spring 2020, with a constant flow of tankers throughout the night commencing in Autumn 2020.
- Whenever it rained there were tankers parked on the road outside the Property with their engines running, waiting to enter the Site. She complained and the company moved them to a layby half a mile away.
- In January 2021, she was assured that the work would be completed by late February/early March 2021, with all work completed by May 2021.
- This did not happen, and the company now states that work will continue until late September 2021.
- This means that she and her family will have sleepless nights until then.
- The condition of the road outside the Property has deteriorated.
- She has complained to the company multiple times, but the problem has not been resolved and no compensation has been offered.
- An alternative route was used temporarily, but after complaints from other residents, encouraged by the company, it was restored to pass in front of the Property.
- She requests compensation of £10,000.00. The customer's comments on the company's response are that:
- There have been tankers at all hours of the day and night for a few years, not just since April 2020.
- She has been told unofficially by employees of the company that the nearby McDonalds is the cause of the problem, but that operation of tankers from the McDonalds was not being done because of McDonalds' lawyers, rather than because of health and safety.
- More often than not she makes contact with the company, rather than receiving contacts from the company.
- She reiterates the impact of this on her family.

The company's response is that:

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- In March 2020, a new condition from the Environment Agency relating to the Site came into effect, altering the effluent that

could be legally discharged during the wastewater treatment process. • To meet these new requirements, the company must undertake significant modifications to the treatment process. • The Site has been fully operational since the 1960s. • The company has no record of complaints from nearby residents until the commencement of the current works. • Phase 1 of the works commenced in November 2019, with installation of the new equipment completed in March 2020. • However, it became clear that the Site was still not meeting the new conditions of the permit. • As a result, the company could not discharge effluent from the Site to the environment. • To address this, in April 2020 the company commenced a process of removing effluent from the Site with tankers. • Particular challenges arose from fat, oil and grease entering the works from a local McDonalds restaurant. • Initially this material was collected at the McDonalds, but this was not feasible to continue long-term due to both logistical and health and safety issues. • Even if collection at the McDonalds had continued, the same number of tankers would have been needed at the Site. • Wastewater flows are run through the stages of the treatment process and then pumped back to the original tank for collection by tankers. This allows the company to monitor on a daily basis how the process is working and so identify when the permit requirements are being fulfilled.

• Incoming flow rates vary depending on the weather, increasing during rainfall, often significantly. • The flow was mostly managed by 2-3 tankers per day between April and October 2020, due to dry weather. • Larger numbers of tankers have been required since October 2020, due to wetter weather. • The company tries to only run tankers during sociable hours, but when a larger number of tankers is required, this may not be possible. • The company has made efforts to respond to the impact of the current works on nearby residents, including the customer. • The completion date of the works has been brought forward through the use of temporary hire equipment, rather than waiting for permanent parts. • The route used by tankers into the Site was altered to pass fewer properties, and if more than one tanker is required, additional tankers wait in a layby outside the village. • The company reviewed alternative locations for the tankers to discharge, but none were effective and feasible. • The company is aware of damage to road verges and is committed to repairing this damage when the works are completed. • Completion of Phase 2 of the works, scheduled for March 2021, was delayed due to the extremely cold and wet winter. • Work on Phase 3 has now commenced, with an anticipated completion date of September/October 2021, after which tankers will no longer be required other than a single tanker per week for routine operational and maintenance purposes. • On August 2020, the customer contacted the company's CEO to complain about the impact on her family of the ongoing works and to request compensation. • The company explained the need for the works and arranged for tankers to be restricted to between 9:00 and 17:00. However, it emphasised that it might not be possible to adhere to this schedule if conditions required, such as during prolonged rain. • The company declined to provide compensation, as it did not believe that it had been negligent. • Further complaints were received from the customer, and the company reiterated its position. • The

company denies that the compensation claimed by the customer is owed.

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. 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. In **XX v XX plc** [2003] UKHL 66, the House of Lords held that the statutory nature of the work undertaken by water companies entails that a different liability regime is applicable to water companies than to entirely private actors.
2. In the words of the court, "The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the Director [i.e. Ofwat] was intended to discharge when questions of sewer flooding arise."
3. The customer, of course, is not complaining about sewer flooding, and so the factual basis of the customer's claim is different to that considered by the Supreme Court in **XX v XX plc**. However, as emphasised by the Court of Appeal in **XX v XX** [2009] EWCA Civ 28, the "**XX** principle" applies broadly to exclude claims based on a water company's performance of its statutory obligations, except where the claim relates to certain responsibilities and relies on a contention that the company performed its statutory obligations negligently.
4. The consequence of the House of Lords' ruling in **XX v XX plc**, then, as interpreted by the Court of Appeals in **XX v XX**, is

that the company can only be required by a WATRS adjudicator to pay the requested compensation if it has acted negligently or otherwise wrongfully. The simple fact that the customer has suffered damage as a result of the company's operation of its business would not entitle the customer to compensation. In such a case, if a remedy is appropriate, it can only be provided by Ofwat.

5. Moreover, any negligence displayed by the company must not raise regulatory issues, but must instead reflect what might be called standard negligence. To illustrate, if the argument was that the company was negligent in not inspecting its sewers more regularly, this raises regulatory considerations and so in accordance with the **XX** principle such claims must be addressed to Ofwat and cannot be resolved through WATRS. On the other hand, if the claim was that the company undertook an inspection, but did so negligently and missed a problem that should have been noted, this raises a question of standard negligence, and so can be resolved through WATRS.

6. In the present case, while I don't question the customer's description of the impact of the company's operation of its business on her and her family, no evidence has been provided that would justify a conclusion that this impact resulted from negligence on the part of the company. The company has not met its original targets for the works to be completed, but has provided an explanation for the difficulties it has experienced. The company has also established that it has been responsive to complaints raised, both by the customer and by other nearby residents, arranging for its tankers to wait outside the village, re-routing their path to minimise the number of residents affected, and reducing overnight tankering when it is not required by weather conditions.

7. I find, therefore, on the basis of the evidence provided, that the company has provided its services to the customer to the standard to be reasonably expected by the average person.

8. To reiterate, this does not mean that I do not accept the honesty of the customer's description of the impact on her family of the company's operations. However, as explained above, as the evidence does not support a finding that the company has acted negligently, a WATRS adjudicator simply lacks the legal power to award to the customer a remedy for the inconvenience and distress that it is clear that she has experienced. If a remedy is available to the customer in this respect, it can only be provided by Ofwat, not WATRS.

9. For the reasons given above, the customer's claim does not succeed.

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.

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Tony Cole
Adjudicator