

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X467

Date of Decision: 25/08/2021

Party Details

Customer:

Company:

Complaint

The customer stated that her house was flooded on 14 separate occasions due to an unmaintained Victorian culvert. She first complained in February 2020, but the company failed to identify the cause of the flood, which led to the customer's house being flooded again on many occasions. The customer complained again in August 2020, which eventually led the company to investigate again and discovered that the old culvert had collapsed and blocked the water flow. After it was fixed, the flooding did not reoccur. The customer seeks an explanation for the flooding, £2,500.00 in compensation for the service failings and for the inconvenience caused and £7,500.00 to pay towards the expenses caused by the flooding in her house.

Response

The company stated that it attended the customer's property when the flood was reported in February 2020. After checking that the sewers were free flowing, they thought that the flooding was caused by heavy rain brought by storm Dennis. The next flooding report took place in August 2020 and further investigation led to the discovery of a blocked old culvert, which they fixed. However, the water in the culvert was different from the water in the customer's property. The company denies negligence and states that it is not liable to pay for the damages claimed by the customer.

Findings

The flooding was caused by a collapsed culvert, which the company discovered when notified of a new flooding in August 2020. I find that most of the flooding experienced by the customer was not the result of the company's negligence as the customer had only reported a previous flooding in February 2020. However, I find that the company's delay in

adopting the culvert and fix it, as well as poor customer services (not returning promised calls during flooding and a delay in the repairs) was beyond what would be reasonably expected. In view of that, I direct the company to compensate the customer with £1,500.00 for the inconvenience caused.

Outcome

I direct the company to compensate the customer with £1,500.00 for the inconvenience caused.

The customer must reply by 23/09/2021 to accept or reject this decision.

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Case Outline

The customer's complaint is that:

- She first complained about the flooding in February 2020, but a previous complaint was raised earlier by another neighbour.
- Her property was flooded on 14 separate occasions, which only stopped when the company fixed an old Victorian culvert that was blocked.
- The inaction from the company caused the customer £22,000.00 in damages.
- She requested an explanation about the likely cause of the floods, £7,500.00 in compensation as a contribution to the cost of fixing her property, and £2,500.00 for the service failures and for the inconvenience caused.

The company's response is that:

- The customer reported a flooding incident during February 2020, which was believed to be caused by heavy rainfall. A new flooding incident was reported in August 2020 and further investigation discovered a blocked old Victorian culvert, which was repaired by the company in November 2020.
- The water in the old culvert was different from the water found in the customer's house.
- It recognised missed appointments and service failings, for which it has apologised and offered a £100.00 goodwill payment.
- The House of Lords decision of Peter Marcic v Thames Water (2003) ruled that water companies are not required to compensate for damages occurring because of capacity issues.
- It is not required to pay for the damage caused to the customer's house, which ought to be covered by the customer's house insurance.

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. The customer experienced flooding in her house on 14 separate occasions. The first time she reported it to the company was on 16 February 2020, but she stated that the landlord of a next door pub reported another flood in October 2019. The company attended the customer's property on 16 February 2020 and found that the sewer was not blocked and concluded that the likely cause of the flooding was heavy rainfall from storm Dennis. In the comments made to the preliminary decision the customer noted that the water coming into her property in February and in August was the same type of water. The next time the customer reported a flood to the company was on 19 August 2020. The company stated that the water found in the customer's house was mostly clean, but at times it was warm and soapy, which suggests that it came from a sewer. As the floods continued, the customer became very distress and upset. She contacted the company again on various occasions, but some of her emails were unanswered (e.g. the email sent to REDACTED on 31 October 2020) and a promised call was not returned by a company's representative in time (e.g. returning a call on 13 instead of on 6 November 2020).
2. In her response to the company's defence the customer estimates the damages experienced in her house to be currently in the region of £30,000.00, and that would be excluding a claim for stress and structural damage to the property. The company states that, under the common law, they are not required to pay compensation unless it is proven that they have been negligent, which they deny.
3. When the company was first informed of the flooding in the customer's property, on 16 February 2020, they checked that the sewer was working properly and believed that the flood was caused by unprecedented rainwater. The company stated that two nearby road gullies may have also contributed to the flooding in the customer's property. The company did not receive a report of another flooding until the 19 August 2020, though this time there was clear evidence of foul water coming out. I am mindful that the customer has stated that she had further flooding incidents in June 2020, but these were not reported to the company. Since the company did not receive a new flooding report for six months, I find that it was reasonable for them to believe that the public sewers were working correctly. When the next flood was reported in August 2020, the company initiated an investigation that led to the discovery of a blocked Victorian culvert. I am mindful that the company initially stated that the flooding was not caused by their assets, and it was the insistence of the customer who contacted her local councillor that led the company to attend the site the next day. The company started unblocking the

culvert at the start of September 2020 and the first stage of the work was completed in early October. However, the customer stated that the works were not completed until November 2020. After that, the customer stopped experiencing floods in her property.

4. The company states that the water found in the customer's house was clean water, which resulted from the rainfall. The customer however has provided photographic evidence that at times the water was warm and soapy, which suggests that the foul water came from a sewer. In view of that I find on the balance of probabilities that the blocked culvert caused the customer's house flooding.

5. Under section 94 (1) of the Water Industry Act water companies have a statutory duty to maintain and clean their sewers to ensure that they are functioning effectively. However, this is not an absolute duty. The company refers to the House of Lords decision in *Marcic v Thames Water plc* [2003] UKHL 66, where it was held that under the Water Industry Act 1991 water companies cannot be held liable to pay compensation when the damage caused was not due to negligence on the part of the company. 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. 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."

6. The Court of Appeal subsequently reiterated in *Dobson v Thames Water Utilities* [2009] EWCA Civ 28, that the "Marcic principle" applies broadly to exclude claims based on a water company's performance of its statutory obligations (including the maintaining and unblocking sewers), except where the claim relates to certain responsibilities and relies on a contention that the company performed its statutory obligations negligently. The consequence of the House of Lords' ruling in *Marcic v Thames Water plc*, then, as interpreted by the Court of Appeal in *Dobson v Thames Water Utilities*, is that the customer's claim can only succeed if the company 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 suffice.

7. 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 Marcic 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.

8. In the present case, the company attended the customer's house when she reported the flooding in February 2020. I am mindful that the customer stated that the company was alerted to the old culvert containing the sewerage in October 2019 and in February 2020, but the company failed to check it. However, when the company attended the customer's property in February 2020 it found at the time that the water was clean, so it was reasonable to believe that it was caused by rainwater. The company checked that the sewers were in working order and did not hear of a new report of flooding until six months later in August 2020, when it was clear that there was foul water (which is likely to have been the same type of water as that found in February). Considering that, I find that there is no evidence to sustain that the company was then negligent for not finding the old Victorian blocked culvert in February 2020, because it was reasonable for them to believe that the flooding was not re-occurring. Thus, given that there were no more reported cases (save from the pub landlord in October 2019, which was in a different property, albeit next door to the customer's property), I find that the company was not negligent in its visit to the customer's property in February 2020. In view of that, I find that the Marcic principle applies and so the company is not required to compensate the customer for the damage caused by the flooding in her property until a new flooding was reported in August 2020.

9. However, after the company was notified of the flooding on 19 August 2020, the customer experienced flooding again on the 21 and 25 of August 2020, and it was not until the 26 of August 2020 that the company agreed to carry out a detailed investigation, which was culminated in November 2020 with the repair of the culvert and the manhole. Furthermore, I am mindful that the customer has also complained about poor customer service and that the company has acknowledged that there have been failures in the quality of its customer service. The company stated that it has offered the customer a goodwill payment of £100.00, which the customer states that she never received, probably because her complaint was still unresolved. I note that the customer has requested £2,500.00 in compensation for the service failures, and for the inconvenience caused. These failings relate to not replying to emails to the customer and not returning promised phone calls in time while the customer was in a very stressful situation. I also note that the company asked the customer to estimate her losses, giving her the impression that her substantial losses would be recovered from the company.

10. With regards to the amount in compensation for stress and inconvenience caused by the company's service failings noted above, I take into consideration the non-binding guidelines used in the WATRS scheme. The guidelines have four tiers, which reflect the different levels of inconvenience and distress. The guidelines, which are available online on the WATRS website, note that although such an award is capped at £2,500.00, most awards are modest amounts, between £100.00 and £200.00. The scale recommends for cases falling within Tier 1 compensation up to the value of £100.00; for Tier 2 between £100.00 and £500.00; for Tier 3 between £500.00 and £1,500.00; and for Tier 4 between £1,500.00 and £2,500.00. In view of the service failures, and in particular the serious inconvenience caused to the customer as a result of the delay in repairing the culvert since the new flooding was reported on 19 August 2020, I find that the customer ought to be compensated in accordance with the top of Tier 3.

11. I am mindful that the Preliminary Decision had only awarded £500.00. The increase from the top of Tier 2 to the top Tier 3 is justified because the significant stress the customer was under as a result of the flooding, and the limited assistance provided by the company, which should have repaired the culvert earlier on. In particular I took into consideration that when the customer reported the flooding on 19 August 2020, the company initially denied responsibility (as it had done in February 2020) until a local councillor requested the company to investigate further, which led the company to find the blocked culvert. Moreover, the company has not explained why it could not fix the culvert until November 2020. Accordingly, based on my review of the matter, I now direct the company to compensate the customer with £1,500.00.

12. The customer requested a letter explaining the cause of the flooding. I am mindful that the company has explained this to the customer in the defence response, page 43. Thus, I find that there is no need for the company to provide again a written explanation to the customer who is already aware that the flooding was caused by collapsed culvert.

13. In the response to the claim the customer queries if she accepts this decision, whether it would stop her from pursuing further compensation in court. The customer must be made aware that if she accepts this decision, she may be barred from pursuing the same claim in court based on the Court of Appeal case of *Clark v In Focus Asset Management & Tax Solutions Limited* [2014] EWCA Civ 118.

Outcome

1. I direct the company to compensate the customer with £1,500.00 for the

inconvenience caused.

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.

- If you choose to accept this decision, the company will have to do what I have directed within 20 working days of the date in which WATRS notifies the company that you have accepted my decision. If the company does not do what I have directed within this time limit, you should let WATRS know.
- If you choose to reject this decision, WATRS will close the case and the company will not have to do what I have directed.
- If you do not tell WATRS that you accept or reject the decision, this will be taken to be a rejection of the decision. WATRS will therefore close the case and the company will not have to do what I have directed.

Pablo Cortes
Adjudicator