

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X518

Date of Decision: 16/08/2021

Party Details

Customer:

Company:

Complaint

The customer says that he has experienced repeated external sewer flooding. He requests that the company put preventative measures in place, compensate him for the damage he has suffered, and reimburse him for the costs of putting additional flood protection in place.

Response

The company says that it is not liable for the customer's claim as it was not negligent.

The company has made a payment to the customer of £647.33.

Findings

The company failed to provide its services to the customer to the standard to be reasonably expected by the average person with respect to clean-up of the Property after sewer flooding.

Outcome

The company needs to take the following further action: It must pay the customer compensation of £350.00.

The customer must reply by 14/09/2021 to accept or reject this decision.

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Case Outline

The customer's complaint is that:

• He experienced flooding from the company's sewers the last several times the nearby river flooded. • When he experienced flooding on 23 and 24 December 2020, he contacted the company. • The initial response he received was that all relevant managers were on their Christmas holidays. • After further chasing he received a visit from one of the company's engineers, who stated that there was nothing he could do. • The company's Operations Manager visited the Property on 6 January 2021, and assured him that the issue would be addressed and that the company would assist with the clean-up. • However, no action was then taken. • The Property experienced further sewage flooding and the company's Operations Manager visited again on 1 February 2020. • He was told that he would need to address the matter himself and attempt to recover costs through the company's insurer. • He has monitored the level of sewage in the inspection chambers, and the rise and fall of sewage levels is not directly linked to flooding of the river. • He requests that the company put preventative measures in place, compensate him for the damage he has suffered, and reimburse him for the costs of putting additional flood protection in place.

The company's response is that:

• The Property is situated next to the REDACTED. • The sewers at the Property are private and the customer's responsibility. • The customer made contact on 23 December 2020 to report flooding at the Property. • The company attended the Property on 24 December 2020 and confirmed that the flooding was a result of the river bursting its banks. • The company confirmed that at that time its pumping station was operating at full capacity, but was only pumping river water due to the extreme weather conditions. • Flooding at the Property was entirely caused by significant rainfall over an extended period of time. • The company attended the Property again on 14 January 2021, as the customer had requested an in-person meeting. • The company provided advice to the customer, but confirmed that this was a private matter. • The customer subsequently made a claim with the company's insurer, which denied liability. • The company does not believe that it was obligated to make a Guaranteed Service Standard (GSS) payment, as the flooding was a result of exceptional weather.

• Nonetheless, the customer was refunded an amount equal to 1 year of sewage charges, or £647.33.

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 REDACTED, 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 Court of Appeal subsequently reiterated in REDACTED, that the "Marcic 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 REDACTED, then, as interpreted by the Court of Appeal in REDACTED, 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.
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 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.

6. In the present case, I do not find that there is evidence that would justify a conclusion that the company acted negligently and that this resulted in the harm that the customer has identified. The customer has argued that the evidence indicates that the company's present systems are not fit for purpose, but that is a question of the company's performance of its statutory obligations, which, as explained above, must be addressed to Ofwat, and cannot serve as the basis of a claim at WATRS.

7. As a result, the customer's claims for the company to take action to resolve the flooding at the Property and to pay compensation for the damages he incurred cannot succeed.

8. In his comments on the Proposed Decision in this case, the customer has asked about the division of responsibility between WATRS and Ofwat regarding future proactive measures. As explained above, to the extent that the customer is at risk of experiencing future flooding arising from the company's regular operation of its business, that is a matter that must be addressed by Ofwat. Where flooding has occurred because of standard negligence, reflecting not the manner in which the company operates its business but that it has done so negligently, that is a matter than can be addressed to WATRS.

9. The customer has also claimed compensation for expenses he incurred reducing the risk of the Property being flooded.

10. However, while I accept that the actions taken by the customer may have been a reasonable response to the risk of ongoing flooding, the justification for taking these actions ultimately relies on the company's alleged inadequate performance of its statutory obligations, and so raises regulatory concerns that must again be raised to Ofwat and cannot be addressed by a WATRS adjudicator.

11. As a result, this element of the customer's claim also cannot succeed.

12. However, the customer has also argued that the company failed to act appropriately in response to his reports of flooding, leaving him to clean up the sewage himself. The company has not challenged the accuracy of the customer's account, which is supported by the available evidence.

13. I find, therefore, that the company failed to provide its services to the customer to the standard to be reasonably expected by the average person with respect to its responses to reports of sewer flooding at the Property. Even if it is accepted that the flooding at the Property was ultimately caused by excessive rainfall, as argued by the company, it remains true that the company's sewers overflowed into the Property and I find that the average person would reasonably expect the company to have assisted the customer in cleaning up overflow from its sewers, whatever the cause.

14. I accept that having to undertake this clean-up, both internally and externally, will have caused the customer inconvenience and distress, and in consultation with the WATRS Guide to Compensation for Inconvenience and Distress, I find that appropriate compensation for the company's failings in this respect would consist of £350.00.

15. The company has already paid the customer compensation of £647.33. However, while the company has argued that it was not obligated to make any GSS payments to the customer because the flooding was a result of exceptional weather, and such an exception is recognised by Ofwat in its "Guidancenote for weather-related exemptions in the GSS Regulations", the company has provided no evidence that the customer's situation meets the standards laid out in this document. I do not, therefore, regard it as appropriate to treat the payment of £647.33 as a goodwill gesture, rather than a GSS payment. It does not, as a result, cover the matters for which compensation has been ordered here.

16. Therefore, for the reasons given above, the company must pay the customer compensation of £350.00.

Outcome

1. The company needs to take the following further action: It must pay the customer compensation of £350.00.

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.
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Tony Cole
Adjudicator