

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-XXXX

Date of Decision: 12/09/2021

Party Details

Customer: The Customer's

Company: The Company

Complaint

The customers say that they have been badly impacted by work undertaken by the company, and that this work has deviated substantially from the work originally agreed.

They request that the company confirm the finalised details of the project and pay compensation of £10,000.00.

Response

The company says that the work being undertaken is necessary for flood protection and that it has worked with the customers to address their concerns.

No offer of settlement has been made.

Findings

To the extent that can be adjudicated at WATRS, the company has not failed to provide 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 11/10/2021 to accept or reject this decision.

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Case Outline

The customer's complaint is that:

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- In 2020, the company arranged a consultation with local residents about potential work relating to ongoing flooding issues.
- Work was commenced in 2021.
- The Property has suffered significant damage from the impacts of this work.
- The customers have also themselves been impacted due to the noise of the work and through incursions into their privacy.
- The company says that a process will be undertaken after conclusion of the project to determine necessary remedial work on the Property, but has not been clear on the details of this process.
- Substantial elements of the project have been changed from what is originally proposed, and significant parts have still not been finalised.
- They request that the company confirm the finalised details of the project and pay compensation of £10,000.00.

The customers' comments on the company's response are that:

- They challenge the accuracy of some of the factual statements made in the company's response.
- No structural survey has been undertaken on the Property.
- The vibration monitor is set at a level that makes it pointless.
- They reiterate the impact of the work on their privacy.
- The company misled residents on the project.

The company's response is that:

- It acknowledges that the customers are unhappy with the work being performed, but that work is necessary to reduce the risk of flooding to the area.
- The company has worked with the customers to reduce the impact on them of the work.
- The company remains happy to continue to work with the customers in this respect.
- The Property has been surveyed and the need for remedial work will be determined once the work is completed.
- The work is scheduled to be completed in mid-2022.

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 *Marcic v Thames Water 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 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, 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 *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.
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, while I don’t question the customers’ description of the impact of the company’s operation of its business on them, no evidence has been

provided that would justify a conclusion that this impact resulted from standard negligence on the part of the company, as would be required for any remedy to be provided by a WATRS adjudicator. The company has not adhered to its original plan, but has provided an explanation for the changes. The company has also established that it has been responsive to the customers' complaints, including making adjustments to accommodate the customers' reasonable objections.

7. The customer has raised certain elements that may fall outside the Marcic principle, and so might give rise to a claim that can be adjudicated at WATRS, including an alleged poor use of a vibration monitor and an alleged failure by the company to undertake a full examination of the Property to determine whether immediate remedial work is required.

8. However, no evidence has been produced that could justify a conclusion that the company has actually been negligent in these respects, such as if the company had been presented with evidence that the setting of the vibration monitor was not achieving the monitor's purpose but did not appropriately respond, or that the customer had presented evidence of a need for immediate work on the Property to maintain its integrity but the company had failed to respond appropriately. Moreover, no evidence has been produced that any damage experienced by the customers is directly attributable to failures of this type, rather than arising from the company's regular operations, which are covered by the Marcic principle.

9. In short, under the Marcic principle the customers' objections to the company's operations, where no ordinary negligence has been identified, cannot be adjudicated upon by a WATRS adjudicator, and must instead be raised to Ofwat, the designated regulator in this sector.

10. In his comments on the Proposed Decision in this case, the customer has reiterated his concerns about how the company has operated the construction project. However, these concerns do not relate to considerations of standard negligence and so, as explained above, cannot result in an award from WATRS. If a remedy is available from Ofwat, that must be determined by Ofwat.

11. The customer also reiterated in his comments on the Proposed Decision his concern about whether the company's final offer of compensation will adequately remedy the damage that he argues the Property is experiencing. However, as this remedy has not been proposed, no decision can be reached as to whether it is appropriate. The present decision does not, however, preclude the customer bringing a subsequent claim to WATRS once the remedy has been proposed by the company, as long as all other admissibility requirements have also been met.

12. For the reasons given above, the customers' claims cannot 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