

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-XXXX

Date of Decision: 15/09/2021

Party Details

Customer: The Customer

Company: The Company

Customer's Representative: The Representative

Complaint

The customer reported a leak in his cellar in July 2019 and work was carried out in June 2020. The customer is not happy with the reinstatement as cobblestones were taken away and replaced with tarmac and the area of replacement is incomplete. Damage caused due to a leak in the cellar has not been fixed and agreed redress has not been paid. There has been a further leak since the repair in 2020. The customer asks for compensation of £10,000.00 and for the company to reinstate the road with cobblestones.

Response

The company says that it has investigated the alleged leak which has generally comprised a damp patch on the cellar wall consistent with the presence of groundwater although ammonia salts were found in a large damp patch on the customer's cellar wall in December 2019 and damage and obstructions were found in the sewer. Even if the damp was caused by a leak from the sewer, the company is not liable for this. The company has made goodwill payments totalling £450.00 as well as a payment of £25.00 for a late response to the customer's complaint. No further payment is due or was agreed. The company carried out works in July 2020 and replaced all but three rows of cobblestones. The repairs to the road took place at a point where the road was not cobbled but tarmac, so the replacement has been like for like. The customer has refused to permit the company to restore the remaining three rows. The company has not agreed to make any further payment and it is investigating the further leak.

Findings

The evidence shows, on balance, that the company restored the road to

its previous condition save for the three rows of stones that the customer asked the company not to reinstate. Adjudicators have no jurisdiction under the WATRS Scheme to determine liability for alleged failures to maintain the sewers in the absence of negligence, which has not been shown by the customer and therefore the customer does not succeed in his claim for compensation. The customer has not proved that the company failed to make an agreed payment and the company has submitted evidence that the customer's complaint of a further leak is being investigated. The customer has not shown that the company failed to supply its services to the expected standard.

Please note, this Preliminary Decision is subject to comments from both parties and the Findings may subsequently change. This will be recorded in a Final Decision. Please refer to the 'What happens next?' section for more information.

Outcome

The company does not need to take any further action.

The customer must reply by 13/10/2021 to accept or reject this decision.

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Case Outline

The customer's complaint is that:

- He reported a leak in July 2019 and work was carried out in June 2020. The customer is not happy with the reinstatement as cobblestones were removed and only an area 10 metres long and 2 metres wide has been reinstated. This has been done with tarmac. Once the tarmac has worn there will be a problem again with the sewerage line. The customer accuses the company of "stealing stone" and not reinstating the road properly, which will create a problem for the customer's property.
- Damage caused due to the leak in the customer's cellar has not been fixed nor was the customer given any help to repair damage due to that leak. The customer's insurer has refused to pay for the damage because they say that it was the company's responsibility.
- Agreed redress has not been paid by the company. There were three separate issues, therefore the £25.00 redress given was insufficient by £50.00. The customer had to pay £50.00 to reinstate the property and eliminate a leak in his small back garden.
- Since the main sewerage line was fixed it now appears to be broken again and water has again started coming to his cellar.
- The customer does not believe that he has been listened to by the company.
- The customer would like:
 - o The area to be reinstated with stones; and
 - o £10,000.00 compensation for damage to the customer's cellar.

The company's response is that:

- Following the customer's complaint that cobbles had been removed and not replaced following repairs to the sewerage under the street, the company attended on 26 May 2021 to dig two small trial holes to look for cobbles under the tarmac. This showed that some cobbles were seen at the side of the excavation, but the rest was filled with tarmac. The company also reviewed photographs from the original dig in 2020, which show the edging of the dig was tarmac, with no visible cobbles underneath.
- The company also reviewed a number of pictures including those submitted by the customer and looked at the condition of the road. The company concluded that the re-instatement was like for like save those 3 rows of cobbles were missing. The company offered to return on 25 June 2021 to reinstate these. This was declined by the customer.
- The company denies that there will be a problem again with the sewerage line due to use of tarmac. The company states that it follows SROH (specification of reinstatement of openings in highways) requirements for backfill and reinstatement of excavations. For the re-instatement on the customer's street, the company used type 1

stone and hardcore and then tarmac on top, which is to the required standard for reinstatements. • The company does not accept the allegation that stone has been stolen and cannot foresee any issue the reinstatement would cause for the customer or his property in future. • The company is also not liable to pay for damage caused by sewerage escapes in the absence of negligence. This was confirmed to the customer in writing on 24 July 2020. On many occasions, the flooding was caused by materials being placed into the sewer which subsequently caused a blockage. The company cannot control what materials third parties place in the sewer. • It does not accept that it has been negligent in failing to undertake the works to the sewer until June 2020. Due to financial and logistical requirements, there have been some jobs that have taken time between being raised and being completed by the company, however this has not caused further damage in the customer's cellar, with regular visits made confirming mostly damp patches. • The company says that when the customer reported flooding into his property, the company attended in a timely manner and investigated the reports, carried out testing and raised follow-up work as necessary. • The company has advised the customer on several occasions to contact his insurance company for assistance with the damage to the cellar and it understands the customer has been in touch with the ombudsman for his insurance company about the company's refusal to accept his claim. The customer confirmed this during a call to the company on 4 December 2020. • Agreed redress has been paid by the company. The company offered goodwill to cover part of the customer's insurance excess. £250.00 was paid to the customer in October 2020 for this. There have not been any further amounts offered or agreed since this payment. • The company also paid the customer £200.00 for inconvenience in March 2020. • The sum of £25.00 was payable for late responses to written complaints, which was paid on 15 June 2021. Only one instance of a late response occurred. • The company has no information about the sum of £50.00 paid to fix the back garden. • As for the customer's complaint of a further incident, the company attended on 24 July 2021 to investigate the customer's new report and found a minimal damp patch in the cellar. Dye testing of all assets around the property was undertaken and the company is seeking to confirm if any dye has since entered the cellar. • The customer has not provided any evidence or breakdown of the £10,000.00 requested.

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.

Neither party has submitted further comments in response to my Preliminary Decision. The Final Decision does not therefore differ from the Preliminary Decision.

How was this decision reached?

1. The company has explained that the following events occurred and has submitted a case log which I find supports this summary:
 - On 25 July 2019, the customer reported water ingress into his cellar. The company attended on 26 July 2019 and found displaced joints in the sewer. Work to line the sewer was raised. This work was completed on 7 August 2019.
 - On 10 August 2019 the customer said that he was still experiencing a leak into the cellar. The company attended that day and carried out further testing and arranged for a follow-up call to check whether any dye entered the property. By 15 August 2019, no dye had entered the cellar.
 - On 11 September 2019 the company carried out further dye testing and ammonia testing. The ammonia tests were consistent with ground water entering the building. No dye was seen when the company was onsite and therefore the company concluded the issue could be groundwater.
 - The customer called the company on 26 September 2019 for an update. As there were no positive dye tests, the company arranged work for clean water assets to be checked. The company attended on 1 October 2019 and confirmed there were no leak noises on **XX** Road or at the rear of properties where the water is supplied. The company concluded that the cause of the problem was a blocked highway gully/drain and advised the customer to contact the Council to report this.
 - The customer called the company again on 3 November 2019 to report the cellar flooding again and when the company attended the customer indicated that this was the same issue and not a new occurrence. The company gave advice about ground water and again advised to report a blocked highway gully/drain to the council.

- On 15 November 2019, the company received another report of further flooding into the customer's cellar. Because no dye testing had been carried out on the visit on 3 November 2019, the company agreed to carry out the testing. At the same time, the company cleared a blocked gully as a gesture of goodwill, removed some wipes from the sewer and carried out further dye testing. Despite jetting the sewer, there was no change in the damp patches in the cellar or signs of any dye. The company arranged to return to carry out a further specialist camera survey.
- On 5 December 2019, the company attended the same day and found a 2 square meter patch of damp with some water. This had a high ammonia reading suggesting it may have been wastewater. The company again carried out dye testing and returned on 11 December 2019 to undertake the specialist camera survey. The company found a blockage in the sewer and multiple fractures through the sewer, plus a section of pipe that was deformed.
- The follow up was completed on 30 January 2020, when the company removed a mass of rags and wipes from the sewer. A number of visits then took place while the company decided on the best course of action. This included visits in February 2020 to clear the sewer to allow for further camera surveys.
- On 9 April 2020, the company sent a robotic cutter team to try to cut an obstruction from the sewer but found a collapse requiring a dig.
- The customer made several further reports to the company between then and the repairs being completed, to which the company attended.
- On 22 July 2020, the work was undertaken with relaying 15 metres of sewer being replaced. On 11 September 2020, the company also relined part of the sewer.
- In February 2021, a further section of sewer was replaced.

2. The complaints that I find the customer has raised consequently upon this are that:

- a. The cobbled highway has not been replaced as it was.
- b. The leak went on for a long time but the company has not adequately compensated the customer for penetration of water into his cellar.
- c. The company has not paid agreed compensation.
- d. A further leak has occurred.

3. I deal with each of these events in turn.

The cobbles

4. The customer says that following the start of the dig in June or July 2020., he could see piles of cobbles behind the digger which were then removed and a cobbled street (with, in areas, overlying tarmac) has now been fully tarmacked and the cobbles removed by the company's contractors. He would like this to be reinstated and says that the company is incorrect in stating that there were no cobbles under the excavated area save three rows which have been replaced. The customer does not accept that this has been re-laid as it was. The company, on the other hand, says that save for the three rows referred to (which the customer has refused to have reinstated) the highway has been reinstated as it was and to a correct standard.

5. I am mindful that in considering this dispute, I have to consider whether the company has supplied its services to the standard that would reasonably be expected. I am also mindful that the scope of the Scheme rules is very wide and includes jurisdiction to resolve disputes which have been the subject of an internal company complaint procedure and which are not excluded under Rules 3.4 or 3.5 of the Scheme. I find that this dispute falls into this category, but I am also mindful that the documentation submitted to me does not contain any information about the ownership of the highway in question, nor as to whether any permissions would be necessary to re-dig the road to carry out the replacement works that the customer asks for. I am mindful, therefore, that unless the road is owned by the customer, I would have no power to direct that the road should be altered or reinstated, because this would involve an interference with an asset of a third party who is not and could not be a party to this adjudication. Although, therefore, I consider below whether the company has provided its services to the customer to the correct standard, in the absence of evidence that the customer owns the road, I am precluded from directing that the company should replace the tarmacked road with cobbles.

6. However, I also find that the customer has not proved that the company failed to supply its services to the correct standard. In reaching this conclusion, I bear in mind that adjudication is an evidence-based process in which the customer is required to prove his claim by reference to supporting evidence.

7. I also note that the company does not challenge that it would reasonably be expected to restore the roadway in its previous condition and I find that the fact that the company accepts that three rows of cobbles have not been replaced indicates that some cobbles have been removed and the roadway has not been restored to its previous condition. However, in respect of this limited aspect of the dispute, the company has offered to replace the three rows of cobbles. Accordingly, I find that

the company, in offering to rectify its error, has supplied its services to the standard that would reasonably be expected.

8. As for the customer's assertion that there were further cobbles, photographs submitted by the company suggest that in the area of the sewerage works, the top layer of roadway was tarmac. In correspondence contained in the file submitted by the Consumer Council for Water (CCWater) which the customer says had cobbles beneath. In reply to the company's response, the customer says:

"**XX The company XX** are showing photo which is deliberate attempt to conceal information. This photograph was taken after cobbles were removed. Stones were then put behind the truck shown in photo. I remember there were hundreds of stones behind the truck. I trusted **XX The company XX** that they will reinstate street with these stones. I should have taken photos. So I am still adamant that stones were stone as I saw them behind truck with own eyes. Further more the reinstatement is not like to like. Once tarmac has removed in 100 meters long street only 15 meters which is right in front of home will be without stones and there will several small and big dips and puddles. **XX The company XX** should reinstate street with cobbles and make it as it was before work was carried out."

9. The customer has also supported his claim with two photographs that do show the presence of some cobble stones under the tarmac. There is no evidence, however, as to where these holes were located and especially not whether these may show the stones from the three rows that the company says it has not replaced. These photographs do not show, I find, that the entire area covered by tarmac would have been underlain by older cobbles and nor are there any photographs of cobbles stacked in the street prior to removal. There can thus be no evidence that these were not other items or were not the cobbles from the three rows which it is agreed have been removed.

10. In contrast, the company has submitted photographs which are said to have been taken before and during the dig and which show no cobbles. The photographs of the trial holes also do not show that cobbles are present except in the three rows agreed by the company. I find that there is no evidence that the company has deliberately concealed information by removing cobbles from the trial holes before the photographs were taken.

11. Accordingly, and taking into account the burden on the customer to put forward evidence in support of his case, I find that the customer has not shown that the company failed to reinstate the road correctly. It follows that I find that the customer has not shown that the company failed to supply its services to the standard that an average customer would reasonably expect.

12. I also find that there is no evidence that the provision of a tarmac surface is unsatisfactory or inferior to a cobbled road surface and there is no evidence that the customer's property will suffer in consequence.

13. The customer does not succeed in relation to this part of his claim.

Liability for the leak

14. The customer asks for compensation for the damage to his cellar.

15. The company says that by virtue of the Water Industry Act 1991, it is not liable for the escape of foul water from its sewers in the absence of negligence and it does not accept that delay in carrying out works to the sewer would constitute negligence because it has to weigh up the urgency of competing interests. This may mean taking no action, particularly as for some period the dye testing suggested that damp in the customer's cellar was due to groundwater, rather than leakage from the sewer.

16. Although the log of the customer's account shows that before the works were undertaken, the events were treated as urgent, there is no evidence that the company had acted negligently. I am satisfied on the basis of the evidence put forward by the company that it attended the customer's property and investigated his complaints without any clear evidence that the problems in the sewer were causing or contributing to the damp in the customer's cellar.

17. I find that the situation, therefore, is as follows:

a. Under the Water Industry Act 1991, decisions relating to the provision and maintenance of a sewerage network are matters that are overseen by Ofwat. In a case that concerned repeated escapes of sewage called *Marcic v Thames Water*, ([2003] UKHL 66) the UK's most senior court ruled that the courts have no power to review the strategic decisions of companies in relation to improving the network. The reason for this decision was that overview of the company's decision-making in this area was found to be, under the Water Industry Act 1991, the responsibility of Ofwat and not the courts.

b. Although WATRS is a specialist adjudication scheme, its position is similar to that of a court. This is because its function is to resolve individual disputes between customers and companies, not to undertake a strategic review, such as would be necessary when considering competing interests for investment. I am mindful that in making changes to the company's assets, the company is required to weigh up the relative merits and needs of all its customers. This is a matter that Ofwat may be well placed to undertake, but an adjudicator is not. I therefore find that adjudicators under this Scheme have no power to direct that companies should

provide capital funding for strategic works and the customer cannot succeed in relation to this aspect of her claim.

c. Additionally, I draw attention to rule 3.5 of the Water Redress Scheme Rules (2020 edition) which states that WATRS cannot be used to adjudicate disputes which fall into one or more categories, including “any matters over which OFWAT has powers to determinate an outcome”.

18. Moreover, the customer has not put forward evidence, other than by reference to damp in the cellar, of any damage caused, still less damage of £10,000.00. I note that the company has made a contribution towards the cost of the excess on the customer’s insurance policy as well as a payment for inconvenience in March 2020.

19. I also note that there is no evidence that effluent, as opposed to merely damp on the cellar wall, has entered the customer’s cellar, and therefore the customer is not eligible, I find, for compensation under the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008.

20. It follows from the above that I find that the customer has not shown that he is entitled to the compensatory payment that he seeks and therefore I also find that an average customer would not reasonably expect such a payment to be made to the customer.

Failure to pay the agreed amount

21. The customer refers to a payment made of £25.00 and says, in effect that he was entitled to £75.00. The company says that the customer has misunderstood the purpose for which the payment of £25.00 was made.

22. I find that the amount of £25.00 is consistent with the company making a payment in respect of a failure to meet its guaranteed service standards. The company states that this payment was made on 15 June 2021 in relation to a late response to the customer’s complaint, and I find that there is no evidence that the company agreed to make a payment of this amount for any other reason. It follows that I find that the customer has not shown that the company would reasonably be expected to make any further payment.

A further leak has occurred

23. As for the further leak, the company says that it is actively investigating this. I find that there is no sufficient evidence, however, that would indicate that the company has failed to supply its services to the correct standard in this respect.

Conclusion

24. I find that it follows from the above that the evidence does not prove that the company has failed to supply its services to the correct standard.

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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Claire Andrews
Adjudicator