

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT-X726

Date of Decision: 6 February 2022

#### Complaint

The customer says that the Property has experienced repeated sewer flooding, resulting in damage to her boiler, which needed to be replaced.

She requests that the company apologise, take action to prevent future flooding, and compensate her for the cost of the new boiler.

#### Response

The company says that the flooding did not result from its negligence and it responded appropriately when contacted.

The customer has received the appropriate GSS payments and a goodwill gesture of £250.00 towards replacement of the boiler.

#### Findings

The company 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 7 March 2022 to accept or reject this decision.

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# ADJUDICATOR'S DECISION

Adjudication Reference: WAT-X726

Date of Decision: 6 February 2022

## Party Details

**Customer: The Customer**

**Company: The Company**

## Case Outline

### **The customer's complaint is that:**

- There has been repeated sewer flooding at the Property, dating back a number of years.
- This has resulted in her outhouse being flooded, which houses her boiler.
- The boiler was damaged by the flooding and needed to be replaced.
- She requests that the company apologise, take action to prevent future flooding, and compensate her for the cost of the new boiler.

### **The company's response is that:**

- The Property has experienced four incidents of flooding since 2013.
- Two were private matters and two arose from blockages in the sewer.
- The company cannot control what is placed into the sewer network.
- The company denies that it has been negligent, and emphasises that it cannot put regular checks in place after every flooding incident on its network.
- It has attended the customer's reports of flooding within a reasonable time.
- The customer has received a goodwill gesture of £250.00 towards replacement of the boiler.
- The customer has received the appropriate Guaranteed Standards Scheme (GSS) payments for the flooding she has experienced.

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## How is a WATRS decision reached?

In reaching my decision, I have considered two key issues. These are:

1. Whether the company failed to provide its services to the customer to the standard to be reasonably expected by the average person.
2. 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.

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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 unpleasantness of the sewer flooding the customer has experienced, or the hardship resulting from the need to replace the boiler, no evidence has been provided that would justify a conclusion that these impacts on the customer 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 incidents of sewer flooding experienced at the Property have been rare and no evidence indicates that they resulted from negligence by the company, the company has responded appropriately when contacted, and the company has both paid the required GSS payment for the flooding and provided a voluntary goodwill gesture to the customer to assist with the cost of replacing the damaged boiler.
7. In her comments on the Proposed Decision in this case, the customer stated that "I have repeatedly stated that the blockage occurs down the road at a junction to **XX** way. I have been present on no less than 2 occasions when this has happened. The company are lying I have seen it they have had to bring in large clearance wagons to sort it." However, as explained above, it is an essential requirement for any remedy to be awarded by a WATRS Adjudicator in a case such as this one that the company be found to have been negligent. The mere fact that a blockage has occurred twice on a public sewer would not establish negligence, even if significant work was required to remove the blockage on each occasion. To be clear, this does not mean that I find that no negligence has occurred, but any decision must be made on the basis of the evidence presented, rather than on the basis of speculation, and no evidence has

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been presented that would justify a finding that the sewer flooding experienced at the Property resulted from negligence on the part of the company.

8. Ultimately, for the reasons explained above, under the Marcic principle the customer's objections relate to the impact on her of the company's operation of its business, and as no ordinary negligence has been identified, the customer cannot be awarded a remedy by a WATRS adjudicator. Her claim must instead be raised to Ofwat, the designated regulator in this sector.
9. For the reasons given above, the customers' claim does not succeed.

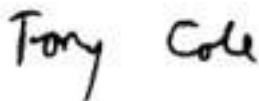
#### Outcome

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 by 7 March 2022 to accept or reject this 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, FCI Arb**

**Adjudicator**

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