

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X802

Date of Final Decision: 9 March 2022

Party Details

Customer: The Customer

Company: The Company

Complaint

The customer complains that following a previous application to WATRS and mitigation measures taken by the company, there has been an escape of sewage into his home. He has now discovered that other customers in his area are affected by this and he says that the company should have disclosed this. He asks for a review of the previous decision made by WATRS and a direction for a legal indemnity and mitigation against reduction in his house value and compensation in an unspecified amount as well as interest.

Response

The company says that it has taken mitigation measures to protect the customer's home and in the previous application to WATRS the company succeeded in showing that it did not have to pay for the mitigation measures taken by the customer. It says that it had been considering long term interventions and these would have taken into account their impact on other customers. The company was not permitted by law to give the customer data about its other customers. The company says that it has taken sufficient measures to mitigate the problem for the customer and should not be required to give an indemnity, contribute to insurance or pay other compensation.

Findings

I find that rule 3.5 of the WATRS Scheme rules prevents a review of a previous adjudication decision and an adjudicator cannot give any remedy that is dependent on the value of the property. The application for review of the outcome of the previous WATRS application and for an indemnity and mitigation of loss of the value of his house is thus outside the scope of this Scheme. The customer's complaint that he should have been told about other customers can be considered, as can his complaint that there has been a further escape of sewage in February 2021 after the previous application to WATRS had been decided. The lawfulness of disclosure of data is for the Information Commissioner's Office to decide but it is unlikely that it would have been lawful to give information about other customers and, in any event, knowledge of other customers would not have affected an adjudicator's decision in the customer's

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case. The adjudicator has no jurisdiction to direct the prioritisation of company resources to prevent sewage escapes, and this would also have prevented an adjudicator for giving further directions in relation to the flood in February 2021.

Outcome

The company does not need to take further action.

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Case Outline

The customer's complaint is that:

- The customer says that he made a complaint about flooding of sewage into his basement in 2020 that was escalated to WATRS under ref WAT-XXXX and was initially "settled".
- Subsequently, it was discovered that the company did not inform WATRS that it was aware of several other incidents from multiple customers on the same street. This information was not disclosed and "mised the decision outcome" of the customer's complaint. The complaint requires the issues to be re-visited in full.
- The customer says that the company is responsible for (1) providing a scaled infrastructure to handle the customer requirements for which they charge and (2) making sure that systemic issues are identified, responses coordinated, and all customers are kept informed in synchronous. The company failed at both of these. The customer asks why the company would refund sewage costs following these incidents if they are not liable to prevent them.
- Additionally, the ongoing complaint handled by the Consumer Council for Water (CCWater) is in deadlock because the company will not offer legal indemnity of any kind if the customer decides to sell his property and his sale were to be prevented or the house down valued; despite the company admitting full liability and taking ownership of mitigation measures.
- Contrary to the company's assertion (below) it has never discussed with him the possibility of installing a pumping station for which he would take responsibility. He would not wish to

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assume responsibility for this. CCWater ruled that the company had to do something about the mitigation, and they did, so the customer asks why the company is investing so much money in mitigation if the risk is his.

- The original WATRS decision was not made with the full information to hand, so needs to be re-assessed. The customer points out that if he wants to sell his house or insure his house in the future it is only reasonable to ask that there are no negative consequences. It is clear that this situation must be declared to a future buyer and that means a potential impact on his ability to sell and on the value of his house. There is also the on-going question of the increased cost of insurance.
- The customer asks for a review of the previous outcome, a legal indemnity and mitigation against house value reduction and compensation in an unspecified amount and interest.

The company's response is that:

- The company agrees that the customer has previously raised a case against the company on 3 November 2020 (REDACTED). The company provided a response on 17 November 2020 and a decision was reached by an adjudicator in November 2020.
- The case followed internal flooding at the customer's home in February 2020. The company had previously been aware of a similar incident in 2012. On 24 February 2020, the company checked the public sewer and found no defects or blockages. The company then completed an in-depth investigation to understand the options for resolution. It concluded that sewage flooding occurs when there is exceptional rainfall, resulting in the sewer system becoming overloaded, which in turn results in a sewage escape in the customer's cellar. To prevent the sewer from becoming overloaded in times of exceptional rainfall, the company would need to implement a long-term solution. A solution proposed by the company in this instance could be to install a sewage pumping station. With the customer's signed agreement, the sewage pumping station could then become the customer's responsibility. This option has been suggested and the company was at the time the response was made, currently awaiting a review to understand if the work and funding can be approved. The company has not installed a pumping station.
- The company has provided property level flood protection against the overloaded sewer that will be maintained by the company. The company also fitted a Non-Return Valve (NRV) to a private manhole on the Customer's property on 17 September 2020. The company says that with the NRV in place. the capacity and storage space for water increased, therefore protecting the property from water backing up and entering the cellar. The company did not

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receive any contact from the customer to report flooding after the NRV was fitted for 5 months, despite these months being over the winter wetter periods.

- On 6 February 2021, the company received a report of internal flooding. The customer confirmed that the water cleared after approximately 8 minutes, The customer did not require immediate attendance from the company, and he confirmed that there was no damage, unlike the previous incident in February 2020.
- The company visited the property on 10 February 2021 and checked the network with a camera. No issues were found. The company deems the cause to be the same as the previous incident, namely an overloaded sewer causing an escape at times of heavy rainfall.
- The company arranged for a supervisor to visit the property to understand if there was anything further that it could do to help. The company proposed installation of three non-return gullies at the property which would create additional capacity and reduce the risk of flooding. The customer was happy with this proposal and over the next few months the company instructed contractors to carry out health and safety checks, surveys and obtained a civil engineers report.
- The pre-work was all completed by 30 June 2021 and the non-return gullies were fitted by mid-September 2021. The company also agreed to fit sensors at the property. These were fitted as another form of mitigation to trigger an alert should water levels rise within the network. The sensors were fitted on 11 November 2021, and they will alert both the customer and the company, giving time for the company to attend and take action to prevent further incidents. The customer is aware that both of these mitigation methods do not 100% guarantee that flooding will not occur again as factors out of the company's control could arise, but the risk has been significantly reduced.
- Since the above work has been completed the company has not received any further reports of flooding from the customer, nor have the sensors been triggered.
- In the WATRS case the customer did not request any information relating to other incidents or reports or seek clarity about any other work the company was completing. Even if he had, the company would have been limited to the information that could have been provided due to data protection restrictions. The company also strongly believes that if details about other reports could have been shared, this would not have changed the outcome for his claim.
- On 27 July 2021 the customer did seek information about works the company was completing in his area. The company arranged for a supervisor to discuss this with him. The company told the customer that they were aware of other reports, that they were completing investigations and would communicate any next steps with individuals. The company told the

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customer that the investigations and next steps for his property would take into account the area as a whole, although the cause and responsibility for any issues remained the same.

- The company does not believe that the outcome of his WATRS case was misled, if the information was requested at this time then it would have provided as much information as possible, information has not been withheld. Other customers had made reports which the company was unable to discuss with the customer, but the outcome for the customer would have remained the same. The company would like to provide assurances that any other reports have been handled and steps have been put in place to support other customers appropriately.
- The company will not offer legal indemnity of any kind if the customer decided to sell his property and has not admitted liability and taken ownership of mitigation measures. All incidents at the property have been due to an overloaded sewer at times of heavy rainfall, which the company is not legally liable for.
- The long-term solution is in the planning stages and the customer will be updated as soon as there is any further information
- In this particular WATRS case the customer is not claiming compensation although he does ask for the outcome to be reviewed. The company says that it is unsure what new outcome the customer is seeking. The company has explained to the customer that its decision to not pay any additional compensation stands and the customer has confirmed that he is happy with the mitigation work that the company has put in place.

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.

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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.

I have also considered the comments made by the customer on my Preliminary Decision. The outcome of the Final Decision is, however, the same as the Preliminary Decision.

How was this decision reached?

1. I have considered carefully whether I have jurisdiction to deal with this dispute. Rule 3.5 of the WATRS Scheme rules state that the Scheme cannot be used to adjudicate claims that are:
 - disputes that are the subject of an existing or previous valid application under the Scheme; and
 - for loss of property value.
2. The customer, in his application dated 14 January 2022 asks for a review of the previous application and outcome on the basis that he has since learned that other customers in his immediate vicinity are also affected by the flooding that was the subject of his dispute in November 2020.
3. The documentation variously refers to determination of the previous application by “settlement”, by the decision of CCWater, by an Ombudsman and by an adjudication under this Scheme. It is not disputed that there was a valid application in November 2020 and therefore I am satisfied that the customer has made a previous application to WATRS about flooding. The documentation, on balance, reflects that this was concluded by an adjudication decision in November 2020. Although I have not seen the application form and I have not asked to see this, I have seen the response that was filed by the company, and I have read the documentation in the file submitted by CCWater relating to that dispute. It is clear that the dispute related to the previous escapes of sewage in February 2020, in April 2020 when the customer told the company that he was experiencing repeated incidents of flooding dating back to 2012, and the customer’s private mitigation measures that the company found when it inspected in April 2020. In a letter dated 5 June 2020, the company informed the customer that an option would be the installation of a pumping station or a tank to store a surcharge of rainwater. The company told the customer that either of these would need investment. The company offered a contribution to the customer’s insurance costs, which was refused, because he wanted to claim for the costs that he had incurred in installing mitigation measures.

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4. The customer has confirmed in correspondence with CCWater and the company that the previous application included his claim for compensation for the mitigation measures that he had taken. That this formed part of his claim for compensation is also acknowledged in the company's response to the previous application. The customer has stated in correspondence concerning this application that the question whether the company should pay for the flood measures the customer had installed should be reopened because the customer now knows that other customers were also experiencing escapes of sewage from the sewers. I do not find that this issue can be reopened, however. I find that the effect of rule 3.5 of the Scheme rules is that the question whether the company should pay the costs of the customer's mitigation measures and cannot be considered again because it has previously been part of a valid application. It follows, therefore, that I cannot review the previous decision in this respect as the customer asks.
5. The customer also says that the previous outcome also involved a direction that the company should take some mitigation measures. This is not borne out by the company's submissions, but I am mindful that, as there has been a further escape of sewage in February 2021, any decision made in November 2020 would in any case have been subject to a change of circumstances. A previous claim for mitigation measures to be taken would not therefore have prevented a further application to WATRS relating to a later flooding incident, and the fact that a previous escape had been mitigated is a matter that the adjudicator would be entitled to consider in looking at the overall situation. I can therefore deal with the question whether further measures now need to be directed and I return to that below.
6. However, I make clear that an application for a legal indemnity and mitigation against house value reduction is also not a matter that I can consider. Because this is a claim that is fully dependent on a loss of property value or potential loss of property value, I find that it is precluded by rule 3.5 of the Scheme rules.
7. It follows from the above in summary, that the matters that are within the scope of the Scheme are (1) the customer's complaint that the company should have disclosed to the customer and to the adjudicator that there were other customers who were also affected by flooding of sewage in 2020 and (2) whether the customer's experience of flooding in February 2021 should result in a further remedy. I now turn to these.

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8. In respect of the customer's contention that he should have been told about the other customers affected by flooding and that this was a material non-disclosure that could have affected an adjudicator's decision, I do not accept this. I take into account that the fact that the company knew of other affected customers may have come as a surprise to the customer and that lack of awareness of others in a similar position may have prevented them from marshalling resources and putting forward of a combined case to the company. I am also mindful, however, that while it may be open to the company to reveal information about the situation generally in its sewers, I find that the company's decision that revealing information to the customer about others in a similar position was within a range of reasonable responses to the existence of data protection rules. Although conclusive decision-making in respect of data protection issues is within the jurisdiction of the Information Commissioner's Office and not WATRS, I find that it is likely that the company's data protection responsibilities, by which the company is legally bound, would have prevented disclosures of events affecting specific customers.

9. As for the situation generally, the company disclosed that the internal flooding at the customer's home was caused by excessive rainfall and there is no evidence to the contrary. I find that adjudicators under the WATRS Scheme would have been mindful that when this occurs and the sewers become surcharged because they are filled with rainwater, the unwelcome consequence often is that there is an overflow of sewage. This may well affect a number of customers, especially in the downstream areas of a network. It would, I find, have been fully understood by the adjudicator in the customer's case that other customers could similarly be affected as a consequence of environmental events. Adjudicators, however, have jurisdiction to consider only the matter before them, namely the individual customer's own application.

10. Moreover, as matters stand, the powers that adjudicators have to make directions or awards in relation to flooding from sewers are limited. Under the Water Industry Act 1991, sewerage companies have a statutory obligation to repair and maintain and develop their networks, but it is also a recognised economic reality that they can only undertake such actions within their budgets. This means that water companies have to prioritise certain issues over others. Those decisions as to the priorities to be applied by the water companies are not reviewable under the WATRS scheme. 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 their networks. The reason for this decision was that overview of the company's decision-making in this area is, on a proper interpretation of the Water Industry Act 1991, the responsibility of Ofwat and not the courts.

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Although WATRS is a specialist adjudication scheme, its position is similar to that of a court. Adjudicators cannot weigh up the relative merits and needs of all of a company's customers and set priorities. This is a matter that Ofwat may be well placed to undertake, but an adjudicator is not. Additionally, rule 3.5 of the WATRS Scheme rules also prevents an adjudicator from considering questions of strategic investment because adjudicators must not consider "any matters over which Ofwat has powers to determinate an outcome". Moreover, Ofwat itself also notes that "sewers may overflow from time to time during periods of exceptional weather".

11. Instead, when escapes of sewage occur, companies are required to make guaranteed payments under the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 and the customer has received compensation under this Scheme.
12. It follows, therefore, that even if an adjudicator had known that there were other customers who were affected by flooding, this is very unlikely to have made a difference to the outcome in the customer's case. Put in context therefore, I find that an average customer would not reasonably expect the company to have disclosed information about other customers, and even if the company had done so, I find that it is improbable that this would have made any difference to the outcome in the customer's own case. It follows that I do not find that the company has failed to supply its services to the expected standard.
13. The company says that the incident of flooding in 2021 is not significant because "the customer is satisfied with the measures that the company has already put in place", I find that, having regard to the submissions made by the customer in this application to WATRS, that it is improbable that the customer is satisfied with the arrangements that are in place. He would like the company to ensure that his home is not affected by an overflow of sewage that he will have to declare on any sale of the property and will affect his insurance premiums. However, it is apparent that the company has responded to the further incident that occurred in February 2021 by putting in three additional gullies and an alarm system. While the company cannot promise that there will never be an overflow of sewage in the future, (and, indeed, the customer says in response to my Preliminary Decision that this has already happened) I find that it is likely that these measures will have reduced the frequency and severity of the problem. Neither the company nor the customer has put forward a short-term measure and the company says that all payments made under the Customer Service Standard regulations have been paid. I therefore find that the company has taken the measures that would be reasonably expected in all the circumstances.

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14. I note that the customer has also not had an opportunity to consider his response to the company's decision that it will not put long-term measures in place. This position was not stated in the company's response to the claim, but in an additional document filed in answer to the customer's reply. I am satisfied that as between the company and the customer, there remains a measure of disagreement. However, for the reasons set out above, I do not have power to direct that the company shall take long-term measures and it is notable that the customer himself is also opposed to the principal measure that the company was considering, not least because this would appear to transfer to him an obligation to maintain a pumping station. The installation of long-term measures is a strategic matter of the type that the decision in *Marcic* and the Scheme rules prevent me from considering.

15. It follows from the above that there is no further outcome that I, as an adjudicator under the WATRS Scheme, can direct, even though I recognise that the customer may continue to feel aggrieved about this situation. It follows, nonetheless, that the evidence does not show that the company has fallen short of expected standards. In consequence, the customer is not able to succeed in his claim for the remedies that he wants.

Outcome

The company does not need to take further action.

What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- 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

Claire Andrews, Barrister, FCI Arb.

Adjudicator

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