

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X908

Date of Final Decision: 26 May 2022

#### Party Details

Customer:.

Company:

#### Complaint

In periods of heavy rainfall, the sewer that serves the customer's property becomes overwhelmed and sewage backs up into the customer's toilet. This has happened several times in the last six years and twice in the last year, but the company has refused to put the sewer on a preventative maintenance plan. The customer believes that the sewer is unfit for purpose and wants the company to take action to prevent future incidents of flooding.

#### Response

Claims that the company has breached its statutory duty to maintain its sewers are outside of the scope of WATRS and, therefore, cannot be adjudicated upon. In any event, a water company will only be liable for damage caused by flooding if it has been negligent. The customer's property was not flooded and the issue with the sewer was caused by hydraulic overload, not negligence. Therefore, the company is not liable to take action to prevent flooding in the future.

The company has not made an offer of settlement.

#### Findings

In accordance with the WATRS Scheme Rules, the customer's complaint regarding the company's alleged breach of its statutory duty to maintain effectual drains falls outside the scope of this Scheme and, therefore, I have no jurisdiction to adjudicate on it. However, I am able to consider whether the company's response to the incident reported by the customer on 21 October 2021, and its refusal to put the problematic sewer on a maintenance plan or take other mitigating action, amounts to negligence or a failure to provide its service to the expected standard. Having reviewed the evidence, I do not find

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on the balance of probabilities that the company has acted negligently or failed to provide its service to the standard reasonably expected by the average person. In view of this, the customer's claim cannot succeed.

**Outcome**

The company does not need to take any further action.

# ADJUDICATOR'S FINAL DECISION

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## Case Outline

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

- The sewer that serves his property becomes overwhelmed in periods of heavy rainfall and causes sewage to back-up into his property. This has happened on several occasions over the last six years, and twice in the last twelve months. The last incident occurred on 20 and 21 October 2021, when sewage backed up into his property's waste pipes and ended up filling his toilet bowl. Each time this happens, it takes three to four hours to clean and fumigate the bathroom.
- The company says that he has only reported one previous incident of flooding and it has received no complaints from his neighbours, but this is not correct.
- The company denies that the sewer is defective or inadequate, and says that it is unable to stop the rainwater from entering the sewer. However, as the sewer becomes overwhelmed in adverse weather, he believes that it is defective, inadequate or obstructed.
- He is retired and is normally at home, yet in the eight years he has lived at his property, and despite reporting the problems to the company, he has never seen the company routinely inspect the drains to ensure they are working as they should be and are free from blockages.
- CCW asked the company to put the problematic sewer on a maintenance plan so that it could be periodically checked for problems that might cause further flooding. However, the company refused on the basis that it had received insufficient reports of flooding to justify placing the sewer on such a plan.
- He does not believe that the company is providing a service that is fit for purpose and he wants the company to take action to prevent further flooding.

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

- Section 94 of the Water Industry Act 1991 states that is the duty of every sewerage undertaker: to provide, improve and extend such a system of public sewers and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that

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that area is and continues to be effectually drained. This duty is only enforceable under Section 18 of the Act by the Secretary of State or Ofwat.

- In the House of Lords' decision in *Marcic v Thames Water Utilities Limited* [2003] All ER(D) 89, it was held that Ofwat is the appropriate body to address such complaints and a water company can only be held liable for flooding where it has been negligent.
- Rule 3.5 of the WATRS Scheme Rules states that it cannot be used to adjudicate disputes over which Ofwat has the power to determine an outcome.
- In any event, it denies that it has failed to exercise its statutory duty under Section 94 of the Act or that it has been negligent.
- It has a level of service that should be provided to all household customers which is set out in its 'Core Customer Information' document.
- Ofwat, the industry's regulator, has a Guaranteed Standards Scheme (GSS) which is a summary of standards and conditions that water companies are expected to meet.
- If a water company does not meet the expected standards, a customer is entitled to a payment as set out under the GSS.
- In accordance with the Guidance Note for Weather-Related Exemptions in the GSS Regulations as issued by Ofwat, if a customer suffers internal/external sewage flooding because of exceptional weather, it does not have to make a GSS payment.
- On 9 September 2021, the customer reported that the manhole in his rear garden was full. On 10 September 2021, it attended the property and rodded the manhole to clear any blockages. There was no evidence to suggest that the customer suffered internal or external flooding at this time, and the cause of the issue with the manhole was noted to be the result of extensive wet weather conditions.
- On 21 October 2021, the customer reported an issue with his toilet. Again, this appeared to be a result of severe wet weather conditions. There is no evidence to suggest that the customer suffered internal or external flooding at this time either.
- On 5 November 2021, it attended the property and undertook a CCTV survey of the sewer and no defects were identified. However, a small blockage was identified in the customer's lateral pipework which was cleared.
- The customer wants it to take action to mitigate the future risk of flooding, to include the fitting of a non-return valve.
- Under its capital governance scheme, it is allocated funds and the use of those funds is dependent on certain priorities. Due to the limitations with funding, it must prioritise customers who are impacted most severely. In view of this, its policy is to introduce flooding mitigation to customers who suffer internal or external flooding on two or more occasions within five years.

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- As the customer has not suffered any flooding incidents, whether internal or external, the customer is not eligible for flooding mitigation (which includes a non-return valve).
- As it has undertaken CCTV surveys of the sewer and it was found that the sewer was free from defects and performing as it should be, and there is no evidence that it has acted negligently, all liability is denied.

### 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. The company states that sewerage undertakers cannot be held liable for damage caused by flooding unless they have been negligent, and that this means that it cannot be held responsible for flooding caused by exceptionally high rainfall and capacity issues in the sewer network system, as this does not indicate that it has been negligent in the carrying out of statutory duties.
2. I accept that this is correct because in the cases of *REDACTED* it was decided that claims based on a water company's performance of its statutory obligations must be considered by Ofwat, the industry regulator,

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except where it is claimed that the company has, when undertaking these statutory obligations, done this negligently.

3. This means that a customer's claim to WATRS in relation to flooding can only succeed if the customer is able to show, on the balance of probabilities, that the company acted negligently when carrying out these duties, and a claim based solely on the argument that the customer has suffered damage as a result of the company's performance of or breach of its statutory duties cannot succeed.
4. This also means that as an adjudicator operating under the WATRS, I do not have the authority to consider whether the company has breached its statutory duty to maintain its sewers to ensure that an area is effectually drained, as such matters must be addressed to Ofwat, the industry regulator, and I can only adjudicate on matters where the customer alleges that the company has acted negligently.
5. Further, any negligence displayed by the company must not raise regulatory issues, but must instead reflect what might be called 'standard negligence'. To explain this further, if the argument is that the company has been negligent because it has not been inspecting its sewers regularly enough, this raises regulatory considerations (as it is a regulatory requirement to inspect sewers regularly). This would mean that, in accordance with the decisions in the cases cited above, such claims must be addressed to Ofwat and cannot be resolved through WATRS.
6. On the other hand, if the claim is that flooding was reported and the company negligently failed to notice or remedy a problem, this raises a question of standard negligence, and so can be resolved through WATRS. To explain this further, if the argument is that the company was aware of a blockage in its sewer that had caused flooding but did nothing to clear it, and the blockage then caused flooding at the customer's property, this raises issues of standard negligence that can be considered by a WATRS adjudicator.
7. The evidence provided shows that the customer believes that the company has failed to maintain its sewers to prevent floods. However, I am unable to consider whether the company has failed to maintain its sewers as this raises 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.

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8. However, I am able to adjudicate on the customer's suggestion that the company failed to inspect the sewer and ensure it was free from blockages despite reports of flooding over the last six years, and this has caused sewage to back up into his pipework and toilet, as this amounts to an allegation of standard negligence. I am also able to consider whether the company's refusal to put the sewer on a maintenance programme following reports of flooding amounts to standard negligence.
9. However, having reviewed the evidence provided by the parties, I find that the back-up of sewage in the customer's pipework and toilet was most likely caused by the extreme weather conditions on 20 October 2021, and I do not find any evidence to justify a conclusion that any flooding was caused by the presence of a blockage that the company should have known about or did know about, or that the company acted negligently in any other way, and that this resulted in damage to the customer's property. I also find that following the customer's report of flooding in his toilet, the company attended and inspected the sewer and this was a reasonable response in the circumstances.
10. Further, having considered the company's response, I accept that the sewer does not meet the company's criteria for placing it on a periodic maintenance plan, and the circumstances do not justify any other form of mitigating action, like fitting a non-return valve. Therefore I do not find that the company's refusal to take such action amounts to negligence or a failure to provide its service to the standard reasonably expected by the average person.
11. As I do not find that the company has failed to provide its service to the expected standard, while I appreciate that the customer will be disappointed by my decision, the customer's claim for the company to take action to prevent further incidents of flooding cannot 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 9 June 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.

*K S Wilks*

Katharine Wilks

**Adjudicator**

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