

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT X938

Date of Final Decision: 22 June 2022

Party Details

Customer:

Company:

Complaint

The customer complains that the company has directed flood water into the roadway, affecting his properties at numbers REDACTED, REDACTED. He says that he has been affected by flooding on very many occasions and has suffered inconvenience. Following damage to his wall at number REDACTED, there has been a conspiracy between the company and its contractor such that the company is refusing to build a higher retaining wall to keep out the flood water from his property. The customer would like an apology and a direction that the company should take action to reimburse the customer for the time wasted, stress, damage and the cost to defend his properties properties.as well as the taking of further action to prevent flooding.

Response

The company says that it is not under an obligation to undertake any works and there is a major flood relief project underway. It has agreed in the short term to reconstruct a retaining wall damaged in a previous flood but, although the customer's property is at a low point in the roadway, the effect of building a higher wall will move the flood water to other properties. This is against its policy. The company has no control over a wall that the customer might build, however, and it has offered the customer up to the amount that it would pay to a contractor for the reconstruction of the wall.

Findings

I find that the company has not failed to provide its services to an expected standard. I have no jurisdiction to direct the company to make strategic expenditure contrary to its own policy and there is no evidence of a conspiracy between the company and its contractor in this regard. Although I accept that the customer and his mother have suffered repeated inconvenience and upset as a consequence of flooding at his properties, a company is not generally liable. The customer does not succeed in his claim for compensation or for an apology.

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Outcome

The company does not need to take further action.

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Case Outline

The customer's complaint is that:

- The customer complains that the company has failed adequately to address a flooding problem affecting two properties that he owns at numbers REDACTED, (the latter property being occupied by his 90-year-old mother).
- The customer complains that flooding to his property started after large pipes were installed on REDACTED around 20 years ago. He says that the sewerage runs down REDACTED onto REDACTED.
- He says further that flood mitigation has been raised on properties that are higher than his two properties and the company has acknowledged that he had not been consulted whereas he should have been. He believes that the flood defences from the other properties are diverting the foul water onto his own two properties and suggests that the company has taken this action to reduce the number of complaints but has focussed all the difficulties on him.
- He has asked the company to rebuild a retaining wall and provide a flood door at number REDACTED in excess of 600mm, which is the maximum that the company says that it can install. He says that there is a conspiracy between the company and its contractor, , because it denies that the remedial action that it has taken would direct flood water to number REDACTED. He alleges historic poor workmanship by and suggests that he is being victimised and that the company is covering up for .
- He would like an apology and a direction that the company should take action to reimburse the customer for the time wasted, stress, damage and the cost to defend his properties properties.as well as the taking of further action to prevent flooding.

The company's response is that:

- The company agrees that flooding is occurring at the properties and says that this is caused by prolonged or heavy periods of rain which the REDACTED public sewer network is not able to

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cope with. It refers to a one in 50-year rainfall event. It says that this has become worse due to increased rainfall, urban creep and reduction of natural drainage.

- The company has installed property level mitigation at both of the customer's addresses. Although the customer believes that the company is not addressing his request to raise the wall at number REDACTED to prevent his mother's property from flooding, the company has explained that it is unable to raise the height of the wall, as doing so would make flooding worse at nearby properties. The company cannot wilfully pass on a known issue to another property.
- The company has fulfilled what would reasonably be expected, being to review and provide mitigation for a known flooding issue. It has paid for the wall at number REDACTED to be rebuilt after it became damaged following a flooding event and has installed property level flood mitigation at both properties to reduce flooding. It says that it has spent £6,165.98 on flood protection which falls in line with its design standard and incorporates its sewer modelling investigations.
- There is no quick fix to resolve the flooding issue which impacts the customer's properties.
- The company is in the early stages of a £40m capital scheme, which when completed will improve the drainage in the whole of the REDACTED area and will ultimately resolve the flooding issues at both of the customer's properties. Due to the size, scale and complexity of the problem, the company expects this scheme to be fully completed in approximately 4 years, however the company is currently exploring all available options to accelerate any work which will directly resolve flooding issues to the worst impacted properties.
- The company adds that it has previously apologised to the customer for the way in which his complaint and concerns at the properties have been addressed. The company repeats its sincere apologies if the customer feels that the company has not acted in the way that he would like. It says, nonetheless that the company has done all that can reasonably be expected of it.

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.

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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.

I have also carefully considered the customer's comments on my Preliminary Decision although I have found that the outcome of the Final Decision must remain the same as the Preliminary Decision.

How was this decision reached?

1. The customer complains that he has experienced many episodes of flooding since 2013 comprising three floods in 2013, three floods in 2014 two floods in 2019, at least 2 floods in 2020 and flooding again in 2021. The customer's residential road is on a slope so that when, due to hydraulic overload, surface water floods into the sewer, discharges from the drains run down his road toward his house and into two properties owned by him – numbers REDACTED and REDACTED.
2. He has been told by the company that there is strategic resolution work in sight. The company has said that a flood alleviation strategy is in place and main capital works are currently planned to commence in 20REDACTED and the work to take around 18 months to complete. The strategy spans the REDACTED catchment, which, the company says, requires a holistic solution to solve the flooding problem. This cannot be solved by addressing catchments in isolation.
3. I summarise the evidence submitted by the customer as follows. He says that:
 - i. Before 2013, although there was flood water from time to time, it affected the property at number REDACTED and not his properties. He says that the problem on his properties has been caused by the construction of parts of the company's network and its failure to take steps to protect properties downstream when new developments were

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introduced. This increased use of the sewers and reduced permeable area and the company was aware that this was so.

- ii. Certain flood protection works were carried out in 2019 by the company's contractor, REDACTED. The customer complains of a conspiracy between the company and its contractor, REDACTED, which was responsible in the past for previously having caused him: *"19 months of hell and destruction, 77 days tied up with REDACTED making a complete mess of my basement, this was only put right when REDACTED took over the work"*.

He says that the problem started with REDACTED in June 2019 when he was told in respect of flood repairs and alleviation needed at number REDACTED covers for his flood barriers were no longer available. The customer says that this was untrue. He explains that REDACTED fitted a new aluminium flood barrier which went through the tanking in his workshop. The centre post hole filled with ground water and REDACTED also fitted the barrier the wrong way round so it would keep water in not stop water from entering. The customer says that it took over a year of digging his workshop floor before the customer complained. The customer has submitted some correspondence that indicates that the company also agreed that the work that had been done was unsatisfactory. He says that the old type of barrier was put back with the neoprene covers that REDACTED said were no longer available.

- iii. The protections at number REDACTED were effective but in a subsequent flood, water has flowed over the wall at number REDACTED and washed away the foundations and caused it to lean.
- iv. The company agreed on 28 June 2021 to carry out flood mitigation proposals at his property to reduce the flooding severity affecting the main building and garden of his house. The mitigation details were to supply a side flood door, a double flood airbrick, low level pointing, cable entry points, water sealant to lower level and to replace the front wall and flood fence to be agreed after design. A firm of engineering consultants was appointed to design the wall.
- v. Discussions occurred about the design of the wall and gates and the customer complains that the flood gates installed at his property would be higher than his garden wall which means that his wall would be retaining the flood.

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- vi. As a gesture of goodwill, the company offered the customer one of two options on 6 December 2021. The company would either (1) pay up to £15,000 for the customer to address the flood damage to the wall at number REDACTED or (2) rebuild the wall at number REDACTED to its existing height on behalf. This would be designed by the company's internal structural design team and constructed by REDACTED (the flood mitigation contractor). In respect of option 2, the customer wanted the company to design and build the wall and to offer certain assurances as to its efficacy. The company was not prepared to offer any assurances, other than agreeing to provide information about the construction of the wall in advance.
- vii. The customer complains that the flood defences at two properties up the hill from his also have higher flood mitigation measures. He complains that it is this which increases the burdens on his property: by having put floodgates on number REDACTED the company has diverted further floodwater to his property and that by deliberate actions of , the contractor and the company have made sure that numbers REDACTED and REDACTED get the full force of the flood waters. The company says that gates at another property were replaced due to them being rotten. At that point, the occupants of that address would have been offered a choice of design. The company says that:

Flood water is still retained within the highway, only breaching the height of number REDACTED's wall in exceedance events which are above and beyond levels that REDACTED offer temporary mitigation against.

The documentation submitted shows that he has asked questions about the flood defences supplied at other properties, but the company has been unwilling to discuss the detail with him of what has occurred in respect of the other customers.

- viii. The problem has, he says, therefore been passed on to him and he complains that the company is now using its policy that it should not pass flood waters on to others as an excuse for not building the flood protection he asks for, whereas he did not have the benefit of this. He further complains that the effect of installing floodgates at the height that the company intends is that the flooding will affect the property where his 90-year-old mother lives (number REDACTED) instead of other properties.

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4. The customer is claiming compensation for stress which he says has interrupted his retirement and he wants the company to apologise and to agree to provide taller protections for the restored retaining wall, claiming that the impact of lower protection will channel floodwater into his mother's home.
5. I turn to these issues.
6. In relation to the customer's claim for the construction of taller flood defences, this is, I find, a challenge to a strategic decision by the company because it has decided that the flood waters cannot deliberately be passed on to other customers. I remind the parties, however, that my powers under this Scheme do not permit me to direct that the company should expend its resources or make strategic decisions as to its network or to its flood defences. My reasons for this statement are that:
 - i. 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 its 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.
 - ii. 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 or for flood protection. 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 function that a company has information that enables it to carry out and Ofwat as a regulator can also oversee this. An adjudicator concerned with one specific case is, like a court, not in a position to carry out this exercise.
 - iii. A company is not therefore liable for escapes or damage caused by escapes of sewage from its network in the absence of negligence. It is not negligent to have a policy that does not permit a particular action or may have a consequence that some

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customers are better protected than others: it is for the company (overseen by Ofwat) to decide on priorities and allocation of resources.

7. As the company has determined here that it will not instal higher flood protection because the consequence of this will be to divert the problem experienced by the customer to other third parties, this is a strategic decision. Although the customer says that the reason that his properties are affected is due to historic changes to the network and the flood protections made by the company and that the floodwaters have been passed on to his property because this is the lowest point, this does not, I find, change the position. Even if the customer is correct and the company has made errors of judgment in respect of other properties and especially at number REDACTED, the company says that it has a policy that it will not deliberately take steps that move an existing problem from one property to another. I find that there is no evidence that the company does not have this policy.
8. Although the customer says that the company's conclusion that the problem would be transferred to others is an inaccurate conclusion reached on the basis of inaccurate information provided by REDACTED, there is no evidence that the company's belief that flooding would be passed on to others is based on incorrect facts and nor is there evidence of a conspiracy between the company and its contractor, REDACTED. Accordingly, I do not find that there is evidence that the company has acted based on improper motives and there is no evidence on which I could base a conclusion that the company's belief about the probable consequences of building the wall higher is wrong.
9. For the avoidance of doubt, I add that I also find that an average customer would not reasonably expect the company to transfer a known problem affecting one customer to another customer. I further find that an average customer would expect the company to apply its own policy in regard to what it is prepared to do.
10. Moreover, I note that, despite its policy, the company has gone a considerable way to try to assist the customer to resolve this dispute.
 - i. In the short term, even though its own policy prevents it from undertaking the construction he asks for, the company has, I find, gone a considerable way towards helping the customer to have what he wants. The company has recognised that it has no power to stop the customer from building a higher wall and it has offered the

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customer up to £15,000.00 to contribute to his aims. The maximum sum of £15,000.00 has been arrived at by reference to the sum that it would have paid its contractor to build a wall of the company's decided height and design.

ii. In the longer term, there is a strategic plan in place for significant expenditure by the company of £40 million, which will bring the customer's problem to an end. While I accept that the documentation shows that there is some uncertainty about when this will be complete, the company is, I note, optimistic that it can be achieved by, at the latest, 2026.

11. Accordingly, I do not find that the company has failed to supply its services to the expected standard and I do not direct that the company shall be required to take further action in relation to the wall.

12. In relation to the customer's claim for compensation, I have indicated above that a company is not generally liable for compensation in the absence of negligence for flooding by sewage even if this is a repeated occurrence.

13. While I note the customer's argument that the company has channelled the floodwaters in its own assets and he claims that the absence of investment to expand the network has been causative, I find that even if he is right about this, it is not a matter in respect of which I have jurisdiction to grant compensation as explained above. The company has indicated that it has made payments under its Guaranteed Service Standards scheme (which reflects the statutory obligations under the Water Supply and Sewerage Service (Customer Service Standards) Regulations 2008 to make payments for flooding in certain circumstances) but the customer has not given an explanation that would enable me to conclude that he is eligible for further payments that have not been made.

14. The customer says in answer to the company's response to the application that it has

missed out all the trouble I had with REDACTED the contractor that damaged my garage doors floor and DPC and the Time and stress it has cost me to sort this out.

Having read the file submitted by the Consumer Council for Water (CCWater), I note that the focus of the customer's complaint centred on the retaining wall. It is not clear that the

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customer has asked for compensation in relation to the work undertaken by REDACTED at number REDACTED prior to resolution of the construction problems by a further contractor. The customer's application form relates to wastewater services, but while I accept that the customer's submission did include photographs and some explanation regarding the work done in 2019, it was not apparent that a compensation claim was also being made. It is understandable, I find, that the company did not comment on this. Having reviewed the documentation, I am not satisfied that the customer included this claim in his application, and I find that rule 5.4.3 of the Scheme rules prevents me from considering this.

15. Even if I were to consider this, however, I am not satisfied that the claim has been made clear. If the claim also relates to 2019 and is that the customer has experienced flooding for which the company undertook flood protection work which was inconvenient, then I find that the company is not liable to give compensation, for the reasons set out above. If the claim is that the customer agreed that REDACTED could carry out flood protection work affecting his garage, but that REDACTED did not do this work adequately, I find that although the customer has explained his dissatisfaction and has submitted some evidence that an individual within the company agreed that the works had not been done well, the company was not under an obligation to do these works and it is not clear that the company should be liable for any greater sum than the cost of flood protection works undertaken and the Guaranteed Service Standard payment that it made for the events in that year. This is especially the case where, I find, the company has not been given a fair opportunity to answer a claim for compensation in this respect. I have insufficient information about the events in 2019 to be able to reach any finding. Accordingly, I do not direct that the company is liable to compensate the customer.

16. While I accept therefore that both the customer and his mother have suffered considerable inconvenience and distress as a consequence of repeated flooding, for the reasons given above, I am not able to find that the customer can succeed in respect of his claim for a remedy.

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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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