

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X947

Date of Final Decision: 27 June 2022

Party Details

Customer: The customer
Company: The company

Complaint

The customer's property has been flooded with sewage on many occasions over the last twenty years. The company accepts there is a problem with the sewerage system and has tried various unsuccessful short term fixes, but says it does not have the budget to complete a long term repair. The customer wants the company to permanently resolve the issue, apologise for the length of time this problem has been on-going, and pay £10,000.00 in compensation for the distress suffered and the poor service received from the company.

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 and the company denies that it has been negligent in this case. The company does not have the budget to carry out a permanent repair at the moment but will do so when it has the funds, and it has undertaken flood prevention work to reduce the risk of flooding until a permanent repair is possible. The company offered the customer a goodwill payment for the one reported incident of flooding in the last five years, but this was rejected. The company has apologised to the customer for any inconvenience suffered, but denies further responsibility.

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

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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 flooding incidents amounts to negligence or a failure to provide its service to the expected standard. Having reviewed the evidence, I do not find 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.

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Case Outline

The customer's complaint is that:

- Over the last twenty years, his garden has been repeatedly flooded by sewage flowing out of the manholes located in his garden. For the first five years he contacted the company on many occasions and, about fifteen years ago, his local MP contacted the company to discuss the issue. The story has featured on the front page of his local newspaper, and the fire brigade attended on several occasions as the flooding was so serious.
- The company said that a long term repair would be carried out but it was unable to afford it immediately. However, the flooding has occurred on many occasions since, his garden has been ruined, several of his lodgers have moved out due to the odour and threat to their health, and it has caused him a great deal of distress and inconvenience, but the company have still done nothing to remedy the problem in the long term.
- The company accepts that there is a problem with the sewer system and that the short term fixes it has completed over the years have not performed as expected, but still says it does not have the budget to complete a long term fix.
- The company's response states that he has only complained of flooding once in the last five years. After his initial series of complaints, he complained less as he had been advised that a long term solution was planned. In addition, he works in **XX** and the telephone costs and time difference prohibit him from telephoning the company, and his tenant works long hours and does not always have the time needed to report the issue when the flooding occurs.
- He asked the company to purchase his property as the problem means that he will find it difficult to sell, but it declined and advised that it would keep him updated. This is not sufficient and he wants the company to find a long term solution to stop the sewage overflowing into his garden.
- In view of the length of time this issue has been going on for, and the level of inconvenience and distress he has suffered, he would also like the company to apologise and pay £10,000.00 in compensation.

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The company's response is that:

- Section 94 of the Water Industry Act 1991 states that it 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 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, the industry regulator, 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.
- Ofwat, the industry 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.
- Its ability to carry out major sewer improvement/replacement schemes is a complicated financial matter as investment programmes must be agreed every five years, in advance, with Ofwat. This causes issues where there is recurrent sewer flooding as funding to undertake major improvements is not always available.
- Its investigations have shown that surface water and groundwater are the cause of most of the flooding events in the customer's lane and the surrounding area. On occasion, blockages have also caused flooding and it has attended to clear them with rods and jetted the sewer line, but it accepts that the sewers need to be improved.
- It has carried out extensive research and a hydraulic model of the sewerage system has been built to identify the hydraulic restrictions causing the flooding. However, implementing a permanent solution requires significant investment and in the letter sent to the customer's MP in 2010, it advised that the required improvements would remain on the priority list until funding was available, but no timescale was provided. It also explained the importance of reporting all flooding incidents so that it could understand the frequency and impact of the flooding.
- It denies the customer's claim that no action has been taken to resolve the issues he has been experiencing. As above, long term improvements are planned and will be undertaken when the funds are available but to reduce the risk of flooding until then, it has undertaken considerable flood mitigation work. This includes clearing blockages when it has been contacted by the customer's neighbours, installing a non-return valve at a neighbouring property, installing sensors in the sewerage system surrounding the customer's property which will alarm when the

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levels are high, and it has arranged for scheduled maintenance tasks to be carried out every six months to ensure the line is flowing freely.

- It only received one report of flooding from the customer between 2015 and 2020; therefore, it did not know the frequency or impact of the flooding. In addition, it was not given the opportunity to attend to clear any blockages or clean and disinfect the areas where foul flooding had occurred.
- Following the recent report of flooding, a clean-up was completed by its contractors in September 2021. Had the customer's tenant reported any other flooding at the property, it would have attended and carried out any necessary works to clear blockages and clean-up if required.
- In September 2021, it sent a GSS claim form to the customer to complete and return, but the customer did not return it and the three month reporting period has now expired. However, to acknowledge the one reported incident of flooding in the last five years, it offered a one-off payment of £200.00 as a gesture of goodwill, but the customer declined this offer.
- In view of the above, it denies liability to compensate the customer in the amount of £10,000. It is disappointed that it is currently unable to carry out the extensive works required to provide the permanent solution requested by the customer, and it apologises for any inconvenience. However, it has carried out works to reduce the risk of flooding at the property until a permanent solution can be implemented and denies further responsibility.

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.

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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 capacity issues in the sewer network system caused by adverse weather or sewer misuse, 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 *Marcic v Thames Water* [2003] and *Dobson v Thames Water Utilities* [2009] it was decided that claims based on a water company's performance of its statutory obligations must be considered by Ofwat, the industry regulator, 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

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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.
8. However, I am able to adjudicate on the customer's suggestion that even though the company accepts that there is a problem with the sewers and improvements are required, it has failed to take any effective action to prevent flooding over the last twenty years, and this has caused sewage to spill into his garden, as this amounts to an allegation of standard negligence.
9. However, having reviewed the evidence provided by the parties, while I accept that the company is aware that the problematic sewers have caused repeated incidents of flooding over the last twenty years and need substantial improvements, I accept that the company has undertaken work to prevent further flooding, including installing a non-return valve and an alarm system, and has put the problematic sewer on a periodic maintenance plan until funding for a permanent solution has been secured. Therefore, I do not find that the company has failed to take any action to prevent the flooding. Following the customer's latest report of flooding, the evidence shows that the company attended and cleaned-up, and I find that this was a reasonable response in the circumstances, and I note that the company has committed to doing this in the future if the customer reports further flooding.
10. In view of the above, while I appreciate how inconvenient and distressing the repeated incidents of flooding have been for the customer, I accept that the company's refusal to carry out a permanent repair until it has the funds for the investment is reasonable and does not amount to standard negligence. I also find that the company has taken appropriate action to reduce the risk of further flooding until a permanent repair can be carried out, and the evidence does not show that the company has failed to provide its service to the expected standard in any other way. In view of this, I do not find the company has been negligent or has failed to provide its service to the standard reasonably expected by the average person.

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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 and frustrated by my decision, the customer's claim for a long-term solution to the flooding, compensation and an apology, cannot succeed.
12. In response to the preliminary decision, the customer has submitted comments. I acknowledge these comments and understand that the outcome of my decision does not provide the long term solution to the flooding the customer hoped for, or the compensation the customer feels he is entitled to after the stress and inconvenience he has suffered over the last twenty years as a result of the flooding. However, as explained, under the Scheme Rules, I am unable to consider whether the company has failed to carry out its statutory duties by failing to provide a long term solution to the flooding to date, and there is no evidence to show that the company has been negligent. Therefore, my decision remains unchanged.

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 11 July 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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