

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT X169

Date of Final Decision: 7 November 2022

Party Details

Customers:

Company:

Complaint

The customers complain that the company is refusing to repair a collapsed sewer pipe serving their home and that of three other customers of the company until the customers have removed a foundation pile that has penetrated the sewer. This was installed, probably in 2000 / 2001 by a former owner of their home and at a time when the company did not own the sewer. The customers had no involvement in and no knowledge of this and deny that they are liable to remove the foundation pile. They argue that the company should divert the sewer. Meanwhile, sewage is escaping routinely from the collapsed sewer into their garden. The customers ask for an apology, for the company to accept full responsibility for the sewer under the Private Sewer Transfer Regulations 2011, a full site investigation at the earliest opportunity and development of a method statement and risk assessment for the works required to repair the sewer, a full repair and compensation of £10,000.00 for distress and inconvenience.

Response

The company says that because of the legal complexity of this case, this issue should not be determined by WATRS. The company argues that the main cause of the problem is the pile supporting the bay window at the front of the customer's property which affects operation of the sewer and restricts the flow of sewage. This pile must be removed, and the damage caused repaired. It is accepted that this piling occurred prior to the customers' purchase of their property, but it was also not a problem caused by the company. The piling is causing an ongoing nuisance and interference to the sewerage network and the customers are responsible for this because they are owners of the property. Insofar as the customers are disputing the cause of the sewer blockage then it would be usual for expert evidence to be presented. If the customers are seeking an outcome where the company is required to repair the sewer there are complex engineering and health and safety matters for consideration and based on investigations so far, the company estimates that the costs to carry out the repair

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to its damaged asset are around £52,000.00. A direction to undertake this work cannot be achieved under the WATRS Scheme.

Findings

I find that the issue of whether it is necessary to remove the pile and any liability to undertake that process, is a complex matter of law which cannot be determined by me. I can consider the company's customer service, however, including the explanations given to the customers as to the reasons for the company's position. I note that although the company says that it wishes to find an amicable solution to this problem, it has also made clear that it will take no remedial action until the customers have removed the foundation pile which it states is a "continuing nuisance" and has threatened legal action. This is an imposed and not an amicable resolution, which will foreseeably cause distress and hardship to the customers. The correspondence indicates that the alleged nuisance has been inconsistently defined, the company has provided no reasons for its contention that it had acquired the sewer before 2011 even though this is the customers' argument, and it has provided no evidence also that it was not consulted at the time that permission for the foundation pile was given by the Cardiff County Council. Of note is that the company's sewer plan does not show the sewer to be situated under the customer's bay window and the presence of the sewer was not shown on the pre-purchase searches. If the plan was in the same format in 1999 to 2001, the plan is likely to have misled those making decisions at that time. The company's correspondence is consistent with no independent legal advice having been taken by the company. It would reasonably be expected by an average customer that before stating that it will take legal action against its customers in a complex case, a company would obtain independent legal advice and give a clear explanation of the position. In a case such as this where the customers are blameless, an average customer would reasonably expect the company to take a more collaborative approach. Moreover, the company has received advice that removal of the foundation pile from the sewer is the worst option and there is no indication as to how this could realistically be achieved by the customers. The company has not been willing to provide a method statement. Meanwhile, the customers' property is affected by serious and repeated flooding incidents from its sewers. I find that an average customer would not reasonably consider that the company had carried out its decision-making and communications processes in the manner that would reasonably be expected.

Outcome

The company needs to:

- a. Apologise to the customers for the customer service failures that I have found below.
- b. Explain to the customers why it says that the sewer under the customers' bay window was not transferred to the company under the Private Sewer Transfer Regulations 2011 (unless it now accepts that the company acquired the sewer in this way).

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c. If the company intends to continue to argue that the customers are liable for the removal of the pile before repair work can be undertaken, the company shall:

i. Take legal advice if it has not already done so.

ii. The company shall then explain the nature of its legal claim to the customers in writing in clear terms such that the customers are on notice of the precise legal points that the company intends to take. The company shall include the matters set out in paragraph 33 (c) ii above.

iii. Explain to the customers how the company expects removal of the pile to be achieved, including any arrangements that the company is prepared to make to facilitate practical achievement of this requirement.

d. Pay compensation to the customers in the sum of £1,000.00.

For the avoidance of doubt, the cost or value of the above actions shall not exceed £10,000.00.

ADJUDICATOR'S FINAL DECISION

Adjudication Reference: WAT X103

Date of Final Decision: 7 November 2022

Case Outline

The customers' complaint is that:

- The customers are concerned about sewer flooding taking place outside their home since 28 September 2021. They say that the flooding has been caused by damage to a public sewer transferred to the company in 2011 by the Private Sewer Transfer Regulations 2011.
- The damage was caused by authorised building works carried out by a previous owner of the property which were completed in 2001, eighteen years prior to their purchase of their home.
- Although the company denies that it acquired the sewer in this way and says that it had owned the sewer previously, its knowledge of the sewer network is proven to be inaccurate and incomplete, contributing to failure to identify the issue earlier, despite drainage and water searches being carried prior to the customers' purchase of the property.

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- The customers complain of poor service by the company in handling of the issues, including initially claiming the sewer was a private drain, repeatedly jetting the blockage likely causing damage to their private drains, getting a jetting hose stuck in the sewer, damaging the sewer by attempting to removing the jetting hose by force, communicating only through use of mobile phones and in a manner that caused significant distress, and generally adopting an aggressive approach.
- The customers say that they have experienced an extreme level of inconvenience, including having to the use of household services or how such services are used for eleven months so as to prevent flooding. This has led to extreme emotional distress severely affecting their family's mental and physical well-being and causing symptoms including anxiety, stress, lack of sleep and even, they strongly believe, affecting the birth of their son.
- The customer asks for:
 - An apology
 - The company to accept full responsibility for the sewer as per the legal responsibility placed on the company by the Private Sewer Transfer Regulations 2011.
 - The company to conduct a full site investigation at the earliest opportunity and develop a method statement and risk assessment for the works required to repair the sewer.
 - The company to carry out a full repair of the public sewer as per the responsibility placed on the company by the Private Sewer Transfer Regulations 2011, including all associated works and accepting all associated costs.
 - Compensation of £10,000.00 in respect of severe sewage flooding on a frequent basis, extreme levels of inconvenience, failure of the company to transfer the sewer into its responsibility and distress and damage to the customer's wellbeing and anxiety

The company's response is that:

- Under rule 3.4.3, the company objects to the determination of this issue by WATRS because of the legal complexity of the case.
- The company's position is that the customers' complaint and the remedy sought is fundamentally concerned with the condition of the sewer serving the Property. The main cause of the sewer blockage is a pile supporting the bay window at the front of their property. This pile must be removed, and the damage caused repaired.
- It is accepted that this piling was installed prior to the customers' purchase of their property, but it was also not a problem caused by the company. The piling is causing an ongoing

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nuisance and interference to the sewerage network because it restricts the flow of sewage through the network and, whilst unfortunate, it is the company's position that the customers are responsible for the nuisance because of their purchase of the property.

- The company has been working with the customers to try and resolve matters amicably (and wish to continue to do so) but it has placed them on notice of a potential need to seek its own remedy through formal legal proceedings. Any legal proceedings are likely to be complex because tortious claims/claims for injunctive relief are subject to case law which would ordinarily be the subject of judicial scrutiny and interpretation. Insofar as the customers are disputing the cause of the sewer blockage then it would be usual for expert evidence to be presented. If the customers are seeking an outcome where the company is required to affect repair to the sewer, as is understood from the WATRS application, there are complex engineering and health and safety matters for consideration.
- Moreover, based on investigations so far, the company estimates that the costs to carry out to repair its damaged asset are around £52,000.00. The value of the works reflects that there are complex engineering challenges arising from the presence of the piling and as it forms part of the structural support of the property. A direction to undertake this work cannot be achieved under the WATRS Scheme.

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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Both the company and the customer have made submissions in response to my Preliminary Decision. I have taken their submissions into account and some of their comments are referred to below.

How was this decision reached?

1. I find that, as the company submits, the matter in issue is complex, both legally and practically.

Jurisdiction

2. I find that much of the customers' concern falls outside the scope of this Scheme. Although this issue is broadly to do with the provision of wastewater services, the real dispute between the parties concerns the apportionment of responsibility either to remove from or to take liability for a foundation pile that is currently causing an obstruction in the company's sewer. I am satisfied that the company is correct that I have no jurisdiction to determine this, which is an issue about legal rights and responsibilities and not merely the provision of wastewater services. I do not accept that the customer's submission that *"the notion that the foundation pile must be removed before the sewer can be repaired is, by the company's own admission, incorrect. Therefore, there is no complex matter of law here for [me] to determine"* means that I can decide what the parties are entitled to do. The consequences of the occupation by both parties of the same area of land is, I find, central to the outcome of this dispute. The determination of legal rights may inform the question whether the company has met the expected standard in requiring the customers to remove the pile from the sewer, but this is legally and factually complicated and requires significant investigation into the background. Although I commend in particular the customers' research, I find that this issue falls outside the scope of an adjudicator under the WATRS scheme based on Rule 3.4.3, which excludes disputes that raise "a complicated issue of law".
3. Moreover, although the customers ask for a direction that the company should divert the sewer, I note that the company's position is that it would be unfair to other customers if the company were to accept liability for the costs of diversion of the sewer in this case. I have taken into account all the arguments put forward by the customers as to why they should not be required to remove the foundation pile, but am mindful that, in the absence of negligence on the part of the company, the UK courts have no jurisdiction to direct the company to carry out capital works and the position is similar for adjudicators under the WATRS Scheme. The question of the allocation of resources and priorities is a matter overseen by Ofwat under processes set out in section 18 of the Water

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Industry Act 1991. This was determined by the UK's most senior court (see *Marcic v Thames Water* [2003] UKHL 66). Rule 3.5 of the Scheme Rules confirms that matters that are the responsibility of Ofwat are also outside my remit. For completeness, the customers have asked whether I can refer this matter to Ofwat but I make clear that I cannot.

4. I additionally cannot make a direction that the company should carry out work to the sewer costing, the company says, more than £52,000.00 because this exceeds the financial limits to which this Scheme gives rise. See Scheme rule 6.4. I note the customer's suggestion that I should award £10,000.00 per household, but I cannot make a direction in favour of households that are not party to this adjudication.
5. It follows that I cannot provide the remedy that the customers want, namely, to direct that the company shall carry out a full repair of the public sewer, notwithstanding the level of distress that I recognise the customers are currently experiencing,
6. For completeness, I also agree with the company that I cannot make a determination that the customer is liable to undertake work to the company's sewer to remove the pile, which the company says that it will take legal action to achieve if necessary, because I have no power under this Scheme to direct the customers to take any action.
7. However, I do find that I can consider the company's customer services, which includes in this current difficult situation, the rationality of the company's current position and the manner in which the company has sought to explain it and the steps that the company has taken to resolve the problem.

Background to the complaint

8. A summary of the situation, as disclosed by the documentation submitted in this case is that:
 - a. The company's sewer passes under the customer's house at REDACTED. The sewer does not appear to be in the precise location shown on the company's sewer map which shows a sewer that runs down the side of number REDACTED and only crosses into number REDACTED at the rear of the property. This sewer is, however, located at the front of the customers' bay window. The sewer, which was originally stated by the company to be a private drain, is now known to serve four properties including the customers' home.

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- b. In 1999, an application was made to the Council for planning permission to do works to rebuild the front two-storey bay window at the property. A Full Plans Approval Notice was dated 18 November 1999 indicating that Cardiff County Council Building Control was satisfied with the proposals for this work, which included piling support. A certificate of completion was given in April 2001, certifying that completion occurred by 6 March 2001. It is not clear whether the company had any engagement in this process, but the documents indicate that the precise work was legally authorised by the Local Authority.
- c. It is not now disputed that a foundation pile has been driven through a sewer under the bay window. The evidence suggests that this occurred as part of the rebuild of the bay on new foundations in 2000 and 2001 but there is no evidence that anyone knew this had happened until 2021. The evidence suggests that this is a steel construction filled with concrete and it alone carries the load of the bay window.
- d. At some date, the company has acquired the sewerage network including this sewer. The company has said in its response to the application uploaded on 4 October 2022 that it had acquired the sewer before the transfer of responsibility for shared sewers on private land that occurred in 2011, but the basis for this statement is unclear from the documents that I have seen. The company does not say when it began to own this sewer. The customers say that the company acquired the sewers in 2011 under the Adoption of Private Sewers Regulations 2011 – or, if the company already owned the sewer, it became responsible for the repair of the sewer at an earlier stage and the arrival of the pile in the sewer does not affect this situation.
- e. The customers purchased their home in 2019. Neither their HomeBuyer report nor searches revealed a problem with foul water drainage or revealed the presence of a sewer under the bay window.
- f. An incident of flooding by foul water occurred in September 2021. The customers say that the company at first advised that the sewer was a private drain and therefore was the customers' responsibility. At the time the customers pointed out that the drainage searches indicated that there might be a shared sewer running along the boundary of their property, but they were advised by the company that these search plans were just "a best guess"

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and were “normally incorrect”. Further independent investigations provided evidence on 4 October 2021 that the sewer was shared, and the company then stated that it accepted that there was a public sewer.

- g. Repeated attempts were made to unblock the drain including jetting the sewer from the rear of the property which the customers believe caused additional damage to the sewer. As this was unsuccessful, the pipe was exposed at the front of the property and a section was cut from the top of the sewer. The company attempted to rod it, carried out a CCTV survey and identified a blockage initially thought to have been made of sand and gravel. The company then instructed a jetting tanker to be sent to the site to jet the blockage using a larger and more powerful jetting hose. This hose became stuck within the sewer and attempts were made to remove it. The customers say that this also caused further damage to the sewer and the hose remains lodged in the sewer, causing a further obstruction. The company denies that the hose causes any additional obstruction.
- h. Between 6 and 8 October 2021, the company attended with a structural engineer and took further CCTV images. The engineer identified the presence of the foundation pile in the sewer. The customers believe that if the company had chosen to extend its excavation by an extra metre or two, it would have been able to fully expose the area and there would have been a clearer picture of the problem.
- i. The customers say that following the identification of this foundation pile, the company’s approach to the problem changed. On 12 October 2021, the customers received a phone call from the company to say that it had concluded that in order to repair the sewer, the foundation pile needed to be removed. The company’s records show that the customers were advised to contact their insurers, which they then did.
- j. At this point, the customers were imminently expecting a baby. Following a difficult birth, which the customers say was aggravated by distress about the situation affecting the sewer, the customers returned to their property with their young son.
- k. Continuing works took place at the customer’s home to install an inspection chamber and to place a manhole over the sewer. The customers were upset that the company backfilled the excavation site. They argued that the company was merely burying the problem and any evidence that they could provide to their insurers. Moreover, the pipe was blocked

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with rubble, the foundation pile and the hose. They say that very little water and no solids were able to pass through it and the customers have continued to experience flooding incidents and backing up of sewage in their drains and on the ground outside their house. The customers have provided photographs and explanations of this.

- l. On 28 October 2021, the customers were told in writing that it was their responsibility to remove the foundation pile from the sewer.
- m. In March 2022, the company attended to see if it would be possible to divert the sewer.
- n. Over the next six months, the customers were engaged in many telephone calls with the company and their insurer. The company says that it also engaged directly with the customers' insurer.
- o. By April 2022, the customers say that the sewage issue had deteriorated, presumably having backed up again. Sewage was escaping from the drains several times each day, flooding an area of their back garden and getting increasingly close to entering their home and they say that this issue is continuing. The customers say that they were having to scrape human faeces, toilet tissue and sanitary products away from the drains to allow the water to recede but even this had little effect. The company has provided a pump to assist them if sewage threatens to enter the home, but the customers say that this also requires lifting the manhole cover and, when the customers requested a technician to do this on a previous occasion, they were told that the technician would not attend for 48 hours.
- p. On 1 April 2022, the customers' insurers declined liability. The customers say that the insurers concluded that the damage that had been caused was to the company's sewer and there was no question of subsidence. The insurers said that the sewer was not covered under the customers' policy.
- q. On 5 May 2022, the company's internal legal team informed the customer that:
"The pile has caused damage to the sewer....To resolve this issue the pile must be removed and the sewer repaired...as the current owner of the property it is your obligation to resolve this issue."

The letter also stated that:

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REDACTED reserves the right to recover all associated costs relating to the sewer repair and all associated operational costs incurred from you.”

No detailed explanation was given as to why the company had reached the conclusion that the customers were liable, other than that the company had not caused the pile to be installed.

- r. On 22 June 2022, the customers emailed the company’s legal team asking for evidence that the damage to the sewer was caused by the pile and asking what engineering difficulties prevent the company from going around the pile. The customers also requested a risk assessment and method statement.
 - s. On 5 July 2022, the company’s legal team responded, providing photographs of the damage caused by the pile taken during camera surveys. The company explained that it had investigated whether it could tunnel past the pile, but it was unable to do so due to health and safety concerns. The company also said that until the pile is removed, it cannot provide a proposed work schedule. The company reiterated its view that it is the customer’s responsibility to remove the pile before any works can be undertaken to repair the sewer.
9. The customers say that the issue has now become so bad that they are afraid to use water in their house and do not always flush the lavatory. They set washing appliances to come on in the middle of night and try to limit their wastewater as much as possible. Every time it rains, they are worried that the sewage will flood their dining room and kitchen, and they get up in the middle of the night to check it. They cannot go into their garden because of the toxic fumes and smell, nor can they open any windows at the back of the house. They have sandbags and flood sacks (provided by the company) in place to stop sewage entering their home. In their response to my Preliminary Decision, they have emphasised how difficult this situation continues to be. When the weather is warm, they are troubled by flies around their home. Their position is that it is for the company to resolve this issue because, although neither party was responsible for the presence of the foundation pile in the sewer pipe, the foul waste is escaping from an unrepaired sewer pipe.
10. The company’s position remains, as explained to the customer in correspondence dated 28 October 2021, 5 May 2022 and 9 June and 9 July 2022 that the company will take no action because the customer first needs to remove the pile and then the company will repair the sewer.

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The company has indicated that it will take legal action to ensure that this occurs. In explanation to CCWater, the company has also stated:

Unfortunately, as REDACTED has purchased the property with the issue, he'd become liable and responsible for the removal of the pile as an owner of the property. The principle of "Caveat Emptor Buyer Beware" applies here and has been recognised by the Courts. To ensure that we remain fair to our other customers, any third-party damage to our network infrastructure is a relatively common occurrence, and legally and morally we'd expect those responsible for any damages to pay for any respective repairs. We cannot make any exceptions, nor can we take on the liability for what can be a considerable cost. Other contracting organisations or utility companies sometimes do cause damage to our infrastructure, and the repairs would need to be paid for by them. We also wouldn't be able to make any exceptions to this matter, as it is clearly unfair on those who do pay.

11. I now turn to the customer service aspects of this position.

Company description of the legal position

12. Both the company and the customer agree that that this situation needs to be brought to an end and I accept that the company in October 2021 and early March 2022 carried out investigations as to how this might be done. It found that there are significant practical complications, and it now invites the customers to resolve these by removing the pile, which the company's structural engineer advised in October 2021 is not easy and not the best option.

13. Although the company has said in its response to this application that it wishes to find "an amicable solution" to the problem, it has also made clear that it will take no remedial action to the sewer until the customers have removed the foundation pile which it states is a "continuing nuisance". The company now threatens legal action and also says that it will seek to recover from the customers any costs of works that it takes (estimated now at £52,000.00). I find that this is an imposed and not an amicable resolution and I am mindful also that this approach would be likely to cause distress and hardship to the customers. I would also observe that at no point has the company explained to the customer in a clear way what the legal justification might be for its claim that the customers must remove the pile before any action can be taken by the company and nor has it explained how this is to be done in either a practical or legal way. For the reasons given

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below, I am not satisfied that in approaching the matter in this way, the company has provided its customer services to the expected standard.

14. Had the customers themselves damaged the company's sewer by putting a foundation pile through it, the company's right to require removal of this would be unchallengeable. It is, however, agreed that the customers themselves have taken no steps to cause damage to the company's asset and it is also not clear that the company owned the sewer at the time that the pile was driven through. I find on the basis of the evidence submitted to me that it is at least possible that the sewer was privately owned at that time, including by the owners of number 69. If the previous owners of the company's property had put a pile through their own sewer pipe and then the company acquired the pipe, the company's right to assert that the customers were legally obliged to remove the pile is not immediately obvious. This point has been made by the customers to the company, but no clear answer has been given by the company to the customers or in the company's response to the customers' application to WATRS.
15. Moreover, even if the company owned the sewer pipe, there is no evidence that the company had no opportunity to comment on the proposed works at that time. It may be material in this context that the company's sewer map does not show a sewer under the customer's bay window. If the plan was in the same format in 1999 to 2001, the plan is likely to have misled those making decisions at that time, notwithstanding the warning on the plan that the precise positioning of assets needed to be identified locally.
16. Moreover, following the introduction of the pile, there is no evidence that the sewer was not working satisfactorily for the following 20-plus years until the recent blockage. It is, moreover, not clear to what extent this problem has been made worse by jetting and removal of the top of the sewer such that it now is in a more fractured condition (including containing a lodged jetting pipe) than it would have been merely because the sewer also contained a foundation pile.
17. The question that the customers therefore ask is why they and not the company should be liable for resolving this historic situation. It is plain from the correspondence that the customers do not believe that they should be responsible, and I find that, although the company says that the customers bear a burden that has passed to them by their purchase of the land, it has not explained in clear terms why this makes them liable. I find that the company has stated the position without explaining it. The letter of 5 May 2022 said merely:

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It has been confirmed that a pile supporting the bay window at the front of your property has been driven through the REDACTED sewer, thereby affecting its operation. The pile has caused damage to the sewer and is restricting flow. To resolve this issue the pile must be removed and the sewer repaired. Whilst we appreciate the pile may have been in situ prior to you purchasing the property, as the current owner of the property it is your obligation to resolve this issue. REDACTED Will arrange any necessary repairs required to its sewer following removal of the pile. REDACTED Has explored the option of diverting the sewer, however due to engineering difficulties this is not a feasible option.

18. The company's subsequent correspondence asserts that the customers' liability arises as a consequence of the law of nuisance. It is unclear whether the company refers to a legal or to a statutory nuisance, but no reference has been made in any of the company's correspondence to legislation that supports the company's position.

19. I make a number of observations about the explanations provided by the company, and I note that the company's position gives rise to a number of puzzles that I find an average customer might reasonably expect to be made clear before being told that they must bear the cost of works.

a. First, I note that the company has provided an inconsistent explanation as to what comprises the nuisance, bearing in mind that the sewer operated adequately for 20 years.

i. To REDACTED, the company on 9 June 2022 stated, "*We consider the piling to be an interference with our asset and that it is causing a legal nuisance*". This indicates that the company considers the overflow of sewage from the sewer to be the nuisance, caused by the presence of the pile. The company also said: "*the frequency of flooding incidents have increased causing an ongoing nuisance to the customer*". The company therefore appears to suggest that the legal nuisance is the escape of sewage, but this does not explain why the customer is liable to remove the pile. I bear in mind that the law of nuisance involves unreasonable and substantial interference with the use and enjoyment of another person's property. Based on the explanation to REDACTED, it would seem that if the nuisance was the escape of sewage from the company's asset, this would be consistent with the company and not the customers committing the legal wrong, because sewage was escaping from the company's asset on to the customer's land. While I do not

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comment on whether it can ever be a legal nuisance for the customers to cause sewage to escape from another's asset on to their own land, this situation would be unusual. In any event, although the company accepts that both parties need this situation to come to an end, I find that the explanation given to REDACTED does not make clear why the customers are liable to take practical action to resolve this problem.

- ii. In the company's response to the application the company says:

The Piling is causing an ongoing legal nuisance and interference to the sewerage network and, whilst unfortunate, it is the Company's position that the Customers are responsible for the same because of their purchase of the Property.

and

The Company has actionable legal remedies against the Customers. Whilst the Pile was installed by a third party, the Customers have purchased the Property and have inherited responsibility for it. The Company is considering seeking a court order requiring the Customers to remove the Pile or to recover the direct and associated costs of repair. The Pile has been driven through the Company's Sewer, thereby affecting its operation, and restricting the flow of sewage, it is therefore vital that it is removed so that the damaged caused [sic] can be repaired....,

This puts the legal position differently. In these passages, the company appears to suggest that the nuisance is the interference caused to the company's network by the presence of the pile in the sewer, which the customer had "come to" by the purchase of the property. The customer did not "come to" a nuisance by way an escape of sewage, because this did not occur until 2021 so the argument therefore must be that the presence of the pile itself and not the sewage was the nuisance affecting the use of the company's asset. If this is the company's argument, however, it is unclear what the company says about the apparently effective operation of the sewer until 2021.

- b. Secondly, I turn to the question of time.

- i. If the placement of the pile in the sewer was the act of nuisance, this cause of action would have arisen primarily in 2001. I find that the company has not explained clearly why this cause of action persists although in its response to the

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application, the company refers to “ongoing nuisance” which I take to be a reference to the concept of continuing nuisance in environmental claims. A claim for continuing nuisance would not come to an end six years after the installation of the pile, but if the damage to the pipe caused an interference with use and enjoyment of the sewerage network, the company would need to be able to explain to the customers how this could be a continuing nuisance when the company was unaware of it. If the nuisance is the release of the sewer contents into the customers’ garden, the period between the interference and the harm would exceed 20 years and the company would need to be able to explain to the customers how this could support a claim in nuisance.

- ii. Moreover, even if the nuisance has been “continuing”, I am mindful that the Supreme Court is due to consider whether a continuing right of action can be based on ongoing harm or damage resulting from a single act of nuisance. I make no further comment on this save to say that the company has not made its position clear to the customers who have argued that they are not legally liable.
- iii. If the customer is right that the company acquired the sewer in 2011, it is also a factor that the company may have “come to” an asset that contained the foundation pile for 69 Bangor Street. If the company had a legal right to require removal of the pile in 2011, it has taken no action to enforce its legal right for 11 years – because – I accept, at this point, the company would probably have had no knowledge of the situation and the pile was not then causing a problem. It may, however, have had no legal right to require removal of the foundation pipe in 2011. This is a point that the customers have made to the company repeatedly, but the company has given no clear answer as to why their arguments on this are incorrect.
- iv. Finally, in no correspondence that I have seen has it been considered whether a right called a “prescriptive easement” could be relevant on the basis of the historic facts.

20. I make clear that I do not express an opinion on the above matters, which are not for me to decide, but I am mindful that the company has made a demand on the customers in circumstances that are unusual and have not sought to distinguish this from a situation where a third party may recently have damaged the sewer, despite the customers asking repeatedly why they are liable.

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As indicated, this is a situation that an average customer would foreseeably find distressing and intimidating. The customers also have stated that they consider that they are facing “ruin” and I find that the company has not explained clearly why it considers that its position is correct.

21. I find that an average customer would reasonably expect the company to have explained in detail why it considers that the customers are responsible in the circumstances that have arisen in this case. The company has not done so, and I find that it has fallen short of its responsibilities in this respect.
22. In making the above finding, I accept that the law of nuisance on which the company relies is complicated and a specialist area of law. However, just as the company says that it is too complex to be considered by a WATRS adjudicator, I find that, when customers are faced with a serious legal situation that is not of their making, an average customer would reasonably expect a company to have obtained independent legal advice before stating its position. I infer from the timing of the requests to the customers to remove the pile which began in October 2021, coupled with the absence of clear explanation of the reason why the customers are responsible, that the company may not have taken independent legal advice. I find that the failure to respond fully to the customers’ question as to why they are liable has added to the distress and inconvenience caused to the customers as they have had to try to uncover the underlying factual position and raise questions.
23. In summary, therefore, I find that an average customer would reasonably expect that where a complex legal question arises, a company would, before seeking to compel the customer to pay for actions (that if the company is wrong in law might be a liability of the company):
 - a. Satisfy itself as to the legal position and
 - b. Clearly explain this to a customer, answering any challenges and concerns that the customer may raise.
24. I find that the lack of clear explanation has increased the distress and inconvenience that arises out of the escape of sewage into the customers’ garden, especially in circumstances where, I find, no collaborative proposals for resolution (such as joint instruction of legal or engineering experts to find a solution, reduce the potential costs to the consumers or other agreed resolution) have been put forward to the customers.

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25. I add that I have taken into account also the customers' complaint that they were initially given incorrect advice about the ownership of the sewer and that jetting and the presence of the lodged jetting pipe have added to the inconvenience. While I note that the company may initially have been wrong in its beliefs about ownership of the sewer, I find that the company investigated and quickly explained that it owned the sewer pipe. I find that this was consistent with the standard of service that a customer might reasonably expect. I am also mindful that a company would normally expect to clear a blockage by jetting and I do not find that any steps taken by the company either to clear the blockage or discover the problem fall outside the range of actions that an average customer would reasonably expect when a complaint of overflow of sewage has been received. As for the customers' complaint that the company would only communicate by mobile phone, I find that this is an expected method of communication. As to the content of the communications, I have addressed this above.

Practical resolution

26. The customers also complain that the company is requiring them to carry out an activity which is not reasonably feasible. They have reiterated in response to my Preliminary Decision why they believe that the company's approach is incorrect and inconsistent with the advice that the company has itself received. I find that an average customer would not reasonably expect a sewerage company to state to customers that they should carry out works that the company has no reason to believe can be done.

27. I find that it is very unclear how the customers could reasonably be expected to carry out removal of a foundation pile, which would require alterations in, and access to and closure of the company's assets. The company has provided the customer with no method statement as to what it requires or what it would permit the customers to do. When asked, the company indicated that it could not provide information about what should happen to the sewer pipe until the pile was no longer present. Even in its response to the customers' application, the company has given no clue as to how this could be achieved, and, while the company says on the one hand that it will hold the customers liable for the cost of repairs, the proposal that the company has put forward seems (with no explanation) to be that which was not recommended by the company's own expert. The customers have forcefully repeated their submissions on this in response to my Preliminary Decision

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28. Notably, the structural engineer's report of 6 October 2021 prepared for the company, states (emphasis added) that a scheme to relay the sewer pipe is necessary to enable the pile to be removed. The suggestion now made by the company that the customers can simply remove the foundation pile was not recommended.

4.5 It would be our recommendation that localised investigation works/trial pits be undertaken in the vicinity of the bay window to verify the nature of the foundations.

4.6 Should it be proven that the bay structure is supported by a piled foundation then no remedial measures to 'break-out' the pile and repair the sewer pile should be undertaken.

4.7 It would be our recommendation that:

i) A scheme be implemented to re-lay the sewer pipe to avoid the pile – however given the depth and location of the damage this may require specialist tunneling works that may need to extend significantly beneath the dwelling to achieve a suitable alignment for the new sewer

ii) Suitable alternative support be introduced around the bay window (possibly in the form of additional piles) to make the problematic pile redundant. Once finalised, attempts could then be made to 'cut-out' the pile from within the sewer utilising specialist remotely operated equipment allowing the pipe to then be re-lined if possible.

4.8 Should the existing pipe be beyond-repair following the removal of the pile (if option ii above is the preference) then open excavations may be required to complete the works. Given this is a possibility discussion with the designer of the replacement piles should be undertaken before installation to verify that the new piles could be temporarily exposed for a period of time should open excavations in the vicinity be required. Further to this, it is also likely that should such excavations be needed the stone boundary wall to the front of the property may also need to be locally removed to facilitate the works given its proximity.

4.9 Upon completion of the repairs any excavations should be back-filled with suitable self compacting or 'foamed' concrete to avoid any long-term settlement of the surrounding ground which may adversely affect the garden, footpath & any services in the vicinity. This will also provide a suitable bearing strata upon which to re-build the boundary wall to match the existing arrangement.

4.10 It would also be our recommendation that the proposed backfill material and reinstatement works to the footpath area that has already been disturbed be discussed and agreed with the Local Authority Highways Department prior to undertaking any works.

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29. While I take into account that this report was prepared for the company and the structural engineer was minded to advise the company in a way that would not result in liability for damage to the customers' home (which if the customers undertook this work, they would have to take responsibility for), it is clear that the structural engineer thought that simply removing the pile should not be undertaken.

30. Moreover, if the customers were to be responsible for removing the pile from the existing sewer, it is questionable how this could be done. The e-mail dated 23 September 2022 from the REDACTED discussed the feasibility of removing the pile from the pipe. The Consultancy had discussed the position with piling specialists. The email commented:

The depth of the REDACTED pipe is approximately 3 m passing beneath the building with the closest manhole present to the blockage being on the footpath outside the front of the property. We do not see a feasible way for a drill bit to be threaded into the 3m deep pipe without a new input and output formed. How could a drill member be passed down a manhole to a depth of three metres and then threaded through the pipe to cut out a steel pile in- filled with concrete? Therefore, the only option is for the pipe to be diverted.

31. I find in this situation that the company has on the basis of the evidence submitted, demanded that the customers should undertake a solution that is not recommended, and the company has not engaged with the customers as to how, reasonably, this can be achieved. I find that this has also fallen short of the level of customer service that an average customer would reasonably expect in these difficult circumstances.

Redress

32. Based on my findings above, therefore, I find that the customers are entitled to a remedy, but consistently with my jurisdiction, the remedy must be limited. The customers ask for an apology, the company to accept full responsibility for the sewer as per the legal responsibility placed on the company by the Private Sewer Transfer Regulations 2011, a full site investigation at the earliest opportunity and method statement and risk assessment for the works required to repair the sewer, a full repair of the public sewer, including all associated works and accepting all associated costs and compensation of £10,000.00 in respect of severe sewage flooding on a frequent basis, extreme levels of inconvenience, failure of the company to transfer the sewer into its responsibility and distress and damage to the customer's wellbeing and anxiety.

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33. For the reasons stated above, I cannot direct that the company should repair the sewer or provide a by-pass arrangement as the customer would wish. I find, however that it is fair and reasonable to direct that the company should take the following actions, the value of which I make clear for the avoidance of doubt, should not exceed £10,000.00:

- a. Apologise to the customers for the customer service failures that I have found above.
- b. If it continues to be the company's case that the sewer was not transferred to the company under the Private Sewer Transfer Regulations 2011, explain to the customer why this is the situation.
- c. I indicated in my Preliminary Decision my finding was that If the company intends to continue to argue that the customers are liable for the removal of the pile, the company should take independent legal advice and share a summary of this with the customers. If the company has already taken independent legal advice, then I decided on a preliminary basis that the company should share a summary of this advice with the customers. The company has, however, despite its stated wish to reach a conclusion in an amicable way, stated that it is not prepared to take advice that it will share with the customers, but it wishes to proceed in an adversarial way. It does not waive privilege in the legal advice that it will have paid for. While I note that this stance is not consistent with its stated goal of resolving the situation amicably, the company is correct that I cannot compel it to waive legal privilege if this is the route that it wishes to follow. I can, however, direct the company to state, having taken legal advice, the position that it proposes to adopt. I therefore direct that the company shall:
 - i. Take legal advice if it has not already done so.
 - ii. The company shall then explain to the customers in writing clear terms such that the customers are on notice of the precise legal points that the company intends to take, the nature of its legal claim. I make clear that this should include (1) the cause of action including why the pile is now said to be a nuisance caused by the customers rather than the company (when this has not been stated between 2001 and 2021); (2) the reason why the customer and not the company is liable for the presence of the pile which is an object in the company's sewer that is causing a

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problem to the customers and (3) the reason why any claim for damage to the sewer is (if it runs with the customers' land) not statute barred.

- iii. Explain to the customers how the company expects removal of the pile to be achieved, including any arrangements that the company is prepared to make to facilitate practical achievement of this requirement.
- d. Pay compensation for the increased level of inconvenience and distress caused by lack of clarity over the period of this dispute. Having regard to the WATRS Guide to Compensation for Inconvenience and Distress and taking into account the period over which this problem has existed and its nature as well as the steps that the company has taken practically to assist the customers by investigations, attempts to clear a blockage and the provision of pumping equipment sandbags, I found that that a fair and reasonable sum was £1,000.00. I have taken into account following my Preliminary Decision the customer's increased expression of unhappiness about the current situation and their assertion that £1,000.00 is insufficient to compensate for inconvenience and distress relating to the pollution of his environment by sewage, especially in the light of the alleged insufficiency of the pumping system and associated arrangements with which the customers have been supplied as well as the ongoing level of distress. I have read their submissions on this point and I empathise with their concerns, but I am also mindful that the issues concerning the escape of sewage are linked strongly to those concerning liability for the problems in the sewer which I have no jurisdiction to resolve. I do not increase the award for this reason, therefore. I have also considered carefully whether, in light of the company's stated intention to proceed on an adversarial basis, I should increase the level of compensation payable to the customers because this may increase the level of distress experienced by the customers. I find, however, that the company is entitled to proceed in this way and I further find that I should not therefore increase the compensation that I have found to be payable in accordance with the WATRS Guide to Compensation for Inconvenience and Distress.
- e. It follows that I continue to direct that the company shall pay £1,000.00 in compensation to the customers.

34. For the avoidance of doubt, the WATRS Scheme rules state at 5.7.2 that unless another time period is stated, the company must comply with the decision within 20 working days from the date

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on which WATRS notifies the company of the customer's acceptance of the decision. I have not stated another timescale and therefore this is the period that applies.

Outcome

The company needs to:

- a. Apologise to the customers for the customer service failures that I have found above.
- b. Explain to the customers why it says that the sewer under the customers' bay window was not transferred to the company under the Private Sewer Transfer Regulations 2011 (unless it now accepts that the company acquired the sewer in this way).
- c. If the company intends to continue to argue that the customers are liable for the removal of the pile before repair work can be undertaken, the company shall:
 - i. Take legal advice if it has not already done so.
 - ii. The company shall then explain the nature of its legal claim to the customers in writing in clear terms such that the customers are on notice of the precise legal points that the company intends to take. The company shall include the matters set out in paragraph 33 (c) ii above.
 - iii. Explain to the customers how the company expects removal of the pile to be achieved, including any arrangements that the company is prepared to make to facilitate practical achievement of this requirement.
- d. Pay compensation to the customers in the sum of £1,000.00.

For the avoidance of doubt, the cost or value of the above actions shall not exceed £10,000.00.

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Claire Andrews

Claire Andrews, Barrister, FCI Arb.

Adjudicator

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