

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X247

Date of Final Decision: 22 December 2022

#### Party Details

Customer:

Company:

#### Complaint

In July 2021, the customer's and her neighbours' gardens were flooded. The company was unable to find and repair the cause of the flooding for five months, and her garden was severely damaged as a result. The customer service provided by the company was very poor, and this added to the considerable distress and inconvenience the customer suffered. The company eventually found a collapsed sewer, but it accepts no responsibility for the damage caused to her property. The company offered her £170.00 for service failings, but the customer says that this is inadequate and she would like the company to pay £190.00 for damage to her shed and garden, and further compensation for the distress and inconvenience she has suffered. The customer would also like the company to accept responsibility for any future damage to her garden caused by the flood, and provide her with a formal apology for misleading her.

#### Response

A water company will only be liable for damage or inconvenience caused by sewerage flooding if it has been negligent. As the company was not negligent, and has found and repaired the cause of the flooding, the company cannot be held responsible for any inconvenience or damage caused. However, the company recognises that its service did not meet the expected standard at times and it has sent the customer a cheque for £170.00 under its Guaranteed Standards Scheme, and a further goodwill gesture of £190.00. The company denies liability to pay further compensation and apologises to the customer for its service failings.

#### Findings

I find that the customer's complaint concerns the company's alleged breach of its statutory duty to maintain effectual drains and, in accordance with the WATRS Scheme Rules, this falls outside of the scope of this Scheme and,

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

therefore, I have no jurisdiction to adjudicate on it. However, I am able to consider whether the company acted negligently or has failed 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 with regard to finding and repairing the collapsed sewer. However, the evidence demonstrates that the customer service provided by the company failed to meet the expected standard at times, but, as the payments made by the company adequately compensate the customer, and the company has already sufficiently apologised, I make no further direction to the customer in this regard.

Outcome

The company does not need to take any further action.

# ADJUDICATOR'S FINAL DECISION

Adjudication Reference: WAT-X247

Date of Final Decision: 22 December 2022

## Case Outline

### The customer's complaint is that:

- In April/May 2021, the company first became aware of the flooding in her neighbourhood. In July 2021, her garden and her neighbours' gardens were flooded, but the company was unable to find and repair the cause of the flood for five months.
- On 9 September 2021, she contacted CCW to complain that her garden was still flooded and despite assurances from the company that a tanker, an engineer and a customer services representative would attend, nobody arrived to help or investigate on that day.
- On 10 September 2021, she was told that the company would prioritise pumping out the gardens but a full team would attend on 13 September 2021 to investigate. A customer service representative attended and took photographs, and she was told that a tanker would come that evening to pump out the water before 11.00 pm. She sat up until 1.30 am but, despite the company having her telephone number, nobody visited and nobody called.
- On 12 September 2021, a network engineer came in a van but his hose was too short to reach the flood water and he had to wait a couple of hours for a longer hose. The engineer tried to pump the water out but this made little difference.
- On 13 September 2021, a tanker came and pumped the water out for a few hours but the engineers left saying they were fighting a losing battle.
- On 14 September 2021, it started to rain and her garden flooded again. The pressure of the water broke a manhole cover break in the alleyway. A tanker came at 11.30 am and she asked the engineers to report the broken manhole cover, but they said it was not their job and they had never been to the property before. She remarked that there was no continuity and the engineer then said that the problems were her own fault as she had not checked the house before purchasing it. However, she has lived in the property for 43 years. She reported the broken drain cover and the engineer's rudeness to the company on Facebook messenger.
- In the afternoon, another team came in a van and were polite and helpful. They logged the broken drain cover, and when they looked at the flooded gardens they said they would escalate the case as a small hose was not adequate to resolve the issue.

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

- On 15 September 2021, a large tanker and a van attended and pumped for hours. The water went down, and the manhole cover was repaired. The day after, the tanker came back and pumped until the water was very low, and said that they were going to put a camera down the pipe after it had been cleared.
- On 17 September 2021, the tanker came again and the water was cleared. However, despite there being no further rain, on 18 September 2022, the water started to rise again. She sent a Facebook message asking for information about what was happening, but she was then blocked from receiving information as the case had been logged under a different address so data protection laws prevented her accessing it.
- On 19 September 2021, a neighbour reported the issue and the company said that the notes suggested that a blockage had been cleared and the sewer line was going to be cleaned, but there was no suggestion of any damage to the pipe.
- On 20 September 2021, she telephoned the company and explained that her and all her neighbours wanted to know what had been done, what was planned, whether the pipes had been cleared, whether a camera had been used, and, if so, what was found. She was told that it would be investigated and social media would be used for updates, and a follow-up call was logged for 28 September 2022.
- By 23 September 2021, her garden had dried out but, again, the water started to rise so she telephoned the company and was given an update. The smelly grey water steadily rose until 27 September 2021, despite sunny weather, but then it began to rain and the water started to flow into her garden like a waterfall. She was then told that a tanker would come to pump the gardens but, when it arrived, it only pumped out one garden in her neighbourhood. She was told it would come back, but it did not return.
- On 29 September 2021, there was further heavy rain at night and the company made lots of excuses to explain why the issue had not been resolved.
- On 1 October 2021, further rain caused the water level to rise again. A camera survey showed that the pipe was clear but there was a massive freshwater leak due to the pressure, and she was told that a big tanker would arrive at 6 a.m. the next day to pump all the gardens and the freshwater team would then take over.
- On 2 October 2021, the promised tanker arrived at 7.30 a.m. and the engineer was rude to her neighbour and left after pumping out only one garden.
- She was on the telephone for over one and a half hours that day, explaining the problems. She was given the telephone number for the Solutions Team and was told they would call her. She heard nothing so, two hours later, she phoned the number she had been given. However, she was unable to speak to the correct team and got cut off. It then started to rain so hard that the flood water spread further than it had previously and it was very fast flowing.

***This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.***

- On 3 October 2021, the pump-out team arrived and worked for six hours. Most of the water had been pumped away by the time they left, but the day after the water rose again.
- On 5 October 2021, very heavy rain caused further flooding and people had to wade through ankle deep water. A freshwater network engineer attended to inspect the issue and said that the problem seemed to be coming from up the road. In the afternoon, both the foul and fresh water teams attended and said a burst main had been found but it was not near the leak. The foul water team said the flood water was fresh water, and the fresh water team said it was foul water. Everybody was told something different, and the engineers were all saying different things.
- On 6 October 2021, she was told that a tanker would attend but it did not arrive. She telephoned the company and was told that they were investigating the pipe at the back of her house.
- On 8 October 2021, a network engineer arrived and said that the company was considering whether the flooding had anything to do with a large structure that had been erected nearby a couple of years previously and some pipes were going to be jetted.
- On 11 October 2021, no jetting was carried out and the rising water started to trickle down the alley under her shed.
- The company eventually diverted a sewer to prevent the flooding and, on 14 October 2021, the company said that it would not consider any claim unless they were proven negligent, and that everybody should make claims under their home insurance. She submitted a GSS claim in December 2021.
- The customer is no longer experiencing flooding, but her garden is a mess and her shed is sinking.
- In May 2022, the company's insurers stated that the company was not negligent and cannot be held liable for damage caused by sewer flooding. The company then offered £170.00 for service failings.
- She wants the company to apologise for misrepresenting the truth and she would like it to admit liability in case of further problems.
- She would also like compensation, in an amount decided by the adjudicator, as the £170.00 offered by the company for service failings is insulting. She would also like £190.00 for damage, comprising of £30.00 to repair her shed floor, £60.00 to remove damaged trees and shrubs, £50.00 for new plants and pots, and £50.00 for labour costs.

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

- In July 2021, the customer first reported flooding at her property. It has fully resolved the issue and has carried out significant and complex work on its assets to help avoid any further flooding incidents.
- It is obligated to comply with the Water Industry Act 1991. Section 94 of the Act places a general duty on sewerage undertakers to provide, improve and extend a system of public sewers to ensure their area is and continues to be, effectually drained and to make provision for emptying

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

and dealing with the contents of the sewers. This duty is only enforceable by Ofwat, the Water Industry Regulator, using Section 18 of the Act. As such, this duty is not something that individuals can try to enforce or make a claim under.

- The customer is effectively alleging that it caused the flooding, and the flooding caused damage to her garden and shed, and inconvenience and distress to her, and, as such, it has not complied with its duty under Section 94 of the Act.
- WATRS rule 3.5 states that the Scheme cannot deal with “any matters over which Ofwat has powers to determine an outcome” and WATRS rules 3.4.1 and 3.4.3 state that WATRS may reject all or part of an application to the Scheme where it considers that a customer should be referred to a more appropriate forum or the dispute raises a complicated issue of law.
- It is not responsible for damage or inconvenience caused by sewerage flooding when the cause is outside of its control, unless it has acted negligently. This means, if issues are caused by a blockage in the sewer and the blockage has been caused by inappropriate items having been placed in the sewer, or hydraulic overload, which it has no ability to control, it is not liable. This was confirmed in the case of *Marcic v Thames Water [2003]*. This also means that it cannot always be held for sewage floods from public sewers in its network.
- In fact, the company can only be held liable if it has been negligent in the way it provided maintenance or operational services once a flood has happened. Therefore, although a water company is liable to make payments to a customer that has suffered sewage flooding under its Guaranteed Standards Scheme, it is not otherwise liable to pay for the damage caused or the inconvenience suffered as a result of the flooding.
- In view of this, and because it took a proactive approach to investigate and locate the collapsed sewer, diverted it and upgrade two sewers running underneath the railway, that it cannot legally be held responsible for any damage to the customer’s garden.
- Part of the customer’s water services charges contribute to the cost of maintaining its network of clean and wastewater pipes. However, it is widely recognised that due to the vast size and nature of the sewage network, a reactive system of maintenance is a reasonable approach for wastewater undertakers to adopt, and this is what happened in this case.
- This is a very important factor in this case. The flooding was outside of its control because at the time of the continued flooding it initially believed it was due to hydraulic overload. However, as time went on it found that flooding was occurring in dry weather, a process of elimination was used to try and find the cause, and the collapsed sewer was eventually found.
- While it cannot be held liable for any damage caused by the flooding, it has sent a cheque for £190.00 to the customer as a goodwill gesture and to apologise for any service failings, and it

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

encourages her to cash the cheque for £170.00 already sent her as she is entitled to this for service failings. It has also sent flowers to the customer as an apology.

- The £190.00 goodwill gesture matches the amount requested by the customer to reimburse her for items she alleges were damaged; however, it does not accept liability for the damage caused by sewer flooding.
- The customer wants it to accept liability for future issues. However, it cannot accept liability for any future flooding from its assets unless it is aware of an issue and does nothing at all about it, as set out above.
- The customer wants it to apologise as she believes it has “lied” in its response to CCW. When it replies to CCW, it provides a short and condensed outline of the situation and a short overview to explain how it has resolved the situation. It apologises that its Complaint Case Manager provided an incorrect date of the first report of the flood. It also appreciates that the customer feels that there was more than a “slight delay” but finding and repairing the collapsed sewer was a very complex matter which needed significant investigations over time and a process of elimination to find.
- It also accepts that some comments were made by its network engineer which she found offensive; however, it assures the customer that this was not his intention and it genuinely and sincerely apologises if the customer’s feelings have been hurt by these comments.
- It also accepts that it may not have met the customer’s expectations in respect of the scheduling of pumping-out her garden at times. Unfortunately, internal flooding incidents must take priority.
- Given the facts of the case and the legal position on sewer flooding, it does not believe that any additional payments are due to the customer in compensation.

### 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

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

customer has suffered some loss or detriment. If no such failure or loss is shown, the company will not be liable.

I have carefully considered all of the evidence provided. If I have not referred to a particular document or matter specifically, this does not mean that I have not considered it in reaching my decision.

### How was this decision reached?

1. The company states that sewerage undertakers cannot be held liable for damage caused by flooding unless they have been negligent, and that this means that it cannot be held responsible for capacity issues in the sewer network system caused by adverse weather or sewer misuse, or flooding caused by an unexpected sewer collapse, 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

***This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.***



regularly enough, this raises regulatory considerations (as it is a regulatory requirement to inspect sewers regularly). This would mean that, in accordance with the decisions in the cases cited above, such claims must be addressed to Ofwat and cannot be resolved through WATRS.

6. On the other hand, if the claim is that flooding was reported and the company negligently failed to notice or remedy a problem, this raises a question of standard negligence, and so can be resolved through WATRS. To explain this further, if the argument is that the company was aware of a problem in its sewer network that had caused flooding but did nothing to resolve it, and the problem 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 was aware that there was a problem with the sewer and the problem was causing flooding in the customer's garden, it failed to find and resolve the problem within a reasonable timeframe, and this has caused further damage to her garden and shed, and caused her to suffer distress and inconvenience, 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 became aware of the flooding in July 2021 and it was not resolved for several months, I accept that the company actively investigated the cause of the flooding, found the collapsed sewer, and has undertaken considerable work to divert the sewer and prevent future incidents of flooding as much as possible. I accept that the process took longer than the customer would have liked, and understand the frustration this must have caused the customer, especially as she was unable to use her garden for five months. However, the evidence demonstrates that finding the cause of the flood was a complex issue and involved a process of elimination and, on balance, I accept that the method taken by the company, and the amount of time taken, was reasonable.
10. In view of the above, while I appreciate how inconvenient and distressing the flooding must have been for the customer, and that it caused damage to her garden and shed, I do not find that the

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

actions of the company amount to standard negligence. It therefore follows that the customer's claim for compensation for damage to her garden and shed, and inconvenience and distress caused by the flood, cannot succeed. Further, I cannot direct the company to take responsibility for any future issues that may arise in the customer's garden as a result of the flood damage.

11. The customer claims that the customer service provided by the company was poor, and the comments on her application form demonstrate that this made the stress and inconvenience she suffered worse.
12. Having reviewed the evidence, I am pleased to note that the company has reviewed the service it provided to the customer and I accept that the correct amount of GSS payments have been sent to the customer for the failings demonstrated by the evidence. However, I find that the company should compensate the customer for the distress and inconvenience she suffered as a result of these service failings as the circumstances surrounding them undoubtedly caused additional upset. That said, having consulted the WATRS Guide to Compensation for Distress and Inconvenience, I find that the additional £190.00 sent to the customer is equivalent to an award under 'Tier 2', and I find that this fairly compensates the customer in this regard. Therefore, I do not find that the company is liable to pay further compensation.
13. The customer wants the company to apologise to her for purposely misrepresenting the facts; however, the evidence does not persuade me on the balance of probabilities that the company intentionally misled the customer; therefore, this element of the customer's claim cannot succeed.
14. In view of the above, while I understand that the customer will be extremely disappointed and frustrated by some elements of my decision, I make no further directions to the company.
15. Following the preliminary decision, the customer made some comments. Some of these comments refer to issues the customer believes were not considered in the preliminary decision, but I reassure the customer that, as per the paragraph above the adjudication decision, all the evidence and issues raised have been considered thoroughly, even if they have not been specifically addressed.
16. The customer also comments on some issues that I have already addressed, for example, the time the company took to remedy the flooding and whether this amounts to standard negligence.

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*

As I have already considered this issue and all the relevant evidence, my view remains unchanged and I find no need to consider it again.

17. However, the customer raises some other points and queries that need to be addressed.
18. The customer questions why the manhole cover issue was mentioned in the summary of her claim; it was mentioned because the issue was raised on the customer's application form.
19. The customer also says that the company misrepresented the truth to her and says that a comparison of the response provided to CCW and the response provided to WATRS demonstrates this. I agree that some of the information and explanations provided by the company have changed, but, as stated above, I do not find that this demonstrates an intention to mislead the customer as it is not uncommon for a company's response to change over time. This is because further and deeper investigations are often carried out when a case is referred to WATRS.
20. The customer has also asked whether there is another legal forum to which she can refer her claim. I am unable to give legal advice, but if the customer rejects my decision and wishes to pursue her claim further, she would be best advised to seek independent legal advice.

#### **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 5 January 2023 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*

***This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.***



Katharine Wilks

**Adjudicator**

*This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.*