

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X276

Date of Final Decision: 5 January 2023

Party Details

Customer: The Customer

Company: The Company

Complaint

The customer's patio and ponds have been flooded with sewage on many occasions over the last three years and he is unable to discharge waste water from his property when it rains heavily. The company accepts there is a problem with the sewerage system and has carried out work to prevent the patio and pond flooding, but says it does not have the budget to complete the long term repair needed to allow the customer to discharge sewage in heavy rainfall. The customer wants the company to permanently resolve the issue, and pay compensation for the distress and inconvenience he has suffered over the last three years.

Response

The company has carried out several investigations and completed work to prevent the flooding, and has commissioned a modelling survey of the area to ensure that when the long term solution is undertaken, it fully resolves the issues faced by the customer. The company says that although funding is not immediately available, it has prepared a submission for the budget covering 2023 schemes. In view of this, the company cannot complete works until the required funding is available and denies responsibility to compensate the customer.

The company has not made an offer of settlement.

Findings

In accordance with the WATRS Scheme Rules, the customer's complaint regarding the company's alleged breach of its statutory duty to maintain effectual drains falls outside the scope of this Scheme and, therefore, I have no jurisdiction to adjudicate on it. However, I am able to consider whether the

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company's response to the issues faced by the customer 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:

- Since November 2019, a damaged sewer has caused raw sewage to flood over his patio into his mill ponds, and he cannot discharge any waste water or sewage from his property during periods of heavy rainfall.
- In September 2021, the company lined the problematic sewer and this stopped the sewage leaking over his patio into his mill ponds; however, he is still unable to discharge sewage when it rains. This means he cannot use the shower, sink or toilet, or any appliances that use and discharge water.
- He asked the company to resolve the problem by carrying out a long-term repair, but the company says that funds are unlikely to be available to consider a long term solution until April 2023.
- The company's response, timeline and internal messages show that the company has been aware of the funding issue for over twelve months and acknowledged that it could not undertake a long term solution for some time. Despite this, the company did not tell him that it had no plan to resolve the issue.
- On 11 July 2022, the company sent him a letter that said, "We've fully reviewed your complaint and as we've answered all your concerns, you've reached the end of our complaints process. If you contact us again about the scheme and when it's going to start, we won't reply as there's nothing further, we could add." However, at that time the company had not addressed all of his concerns, but had taken the internal decision that the long term solution needed was going to be too expensive and the issues raised in his complaint were not going to be addressed. The company has still not committed to a timescale or said what the solution will be.
- In view of this, he has concluded that the company are not acting in good faith, and that it has no plan or timeline to address the issue even though his property is unusable when it rains, and its decision to do nothing essentially means that his property has been cut off from the sewer.

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- He has not been able to discharge sewage into the sewer when it rains for three years, and this has caused a considerable amount of distress, a frequent need to clean up, and his house is now suffering from damp.
- He wants the company to carry out a long-term solution and pay him compensation for the distress and inconvenience it has caused.

The company's response is that:

- The problems experienced by the customer were first raised in October 2019. A full investigation was carried out and it found a large build-up of silt and root growth. The line was de-silted, a root cut was carried out, and the combined sewer outfall (CSO) was lined. All the work was completed by April 2020.
- The customer made contact again in September 2020. Further investigations showed the line was running freely but that there was some slight damage around a connection, so lining works were raised to patch over this section.
- Following a further in depth investigation it was decided that the patch would not be sufficient, so work was raised to line a 60 metre stretch of the network.
- This came with challenges; it had to over-pump, which means it had to use an overland pipe and pumping system to move the effluent through the section of sewer it was lining due to the size of the sewer and the length of the liner, and manholes had to be uncovered and raised to ground level to provide access. This happened during the Covid-19 restrictions so safety measures had to be put in place to allow the different teams to work closely together, and this caused some delays in the works being carried out. It also needed permits from the local council in order to close the road to carry out the works. The work was completed 15 October 2021.
- The flooding has been resolved by removing the silt, cutting the roots and carrying out lining works, but it has not resolved the issue experienced by the customer during heavy rainfall events.
- A scheme has been proposed to resolve the wider issue. However, the budget for this period has already been allocated, so the work cannot be proposed until 2023.
- As explained to the customer, when it needs to carry out a scheme of this size it has to take several factors into consideration, including the number of properties and the size of the area affected, the effect the flooding is having on those properties, and whether the flooding occurs inside or outside the properties. It cannot carry out a resolution that just moves the issue to another area rather than resolving it entirely.
- The issue affects five properties and is caused by under capacity in the 300 and 250 mm sewer running through the fields off **XXX** Road behind the property. This sewer runs past **XXX**

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and to The **XXX XXX** house. This issue is exacerbated by the acute angle of the spill pipe exiting **XXX** Lane CSO which decreases the capacity of the spill pipe. This causes higher surface water levels in the upstream sewer causing flooding. A modelling process has been put forward to determine the exact capacity needed within the network, and this will help to determine the best solution.

- In the meantime, it has offered to attend and clean up when the customer reports flooding, but this has been declined by the customer who just wants the incidents logged. It has explained that it is important to visit after each incident to help build a picture of the scale of the problem for funding purposes.
- In view of the above, it cannot provide a permanent resolution to the problem until it has the budget to do so, and denies responsibility to compensate the customer.

How is a WATRS decision reached?

In reaching my decision, I have considered two key issues. These are:

1. Whether the company failed to provide its services to the customer to the standard to be reasonably expected by the average person.
2. Whether or not the customer has suffered any financial loss or other disadvantage as a result of a failing by the company.

In order for the customer's claim against the company to succeed, the evidence available to the adjudicator must show on a balance of probabilities that the company has failed to provide its services to the standard one would reasonably expect and that as a result of this failure the customer has suffered some loss or detriment. If no such failure or loss is shown, the company will not be liable.

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

How was this decision reached?

1. A sewerage undertaker cannot be held liable for damage caused by flooding unless it has been negligent, and 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.

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2. In the cases of *Marcic v XXX [XXX]* and *Dobson v XXX [XXX]* this position was confirmed when 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 or inconvenience 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 it can be resolved through WATRS. To explain this further, if the argument is that the company was aware of a problem in its sewer that had caused flooding but did nothing to resolve it, and the problematic sewer 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 ensure that his property is effectually drained. However, I am unable to

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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 some of the problems he has experienced over the last three years, and this has meant that he is still unable to discharge sewage into the sewer network during periods of heavy rainfall, 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 three years and still prevents the customer from discharging waste water into the sewers during heavy rainfall, and that the company accepts that the sewers need substantial improvements, I also accept that the company has undertaken considerable work to prevent further flooding and intends to apply for funding for a permanent solution from the 2023 budget. Therefore, I do not find that the company has failed to take any action to prevent the flooding or remedy the problem still faced by the customer.
10. In view of the above, while I appreciate how distressing the repeated incidents of flooding have been for the customer, and how inconvenient it is for the customer to be unable to discharge waste water into the company's network during heavy rainfall, 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.
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 and compensation cannot succeed.

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12. Following the preliminary decision, the customer has asked why the company has not provided any temporary measures to alleviate the problems he is experiencing while it undertakes modelling and applies for funding, such as installing a below ground tank that is pumped out by the company after each period of rainfall, or disconnecting his property from the sewer above the house and connecting it to the sewer that the mill building and business below is connected to. However, these questions were not asked in the customer's initial complaint to WATRS, so the company did not have a chance to respond to them, and the WATRS Scheme Rules do not allow the customer to introduce new issues at this stage of the process. In view of this, I am unable to consider these matters and 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 12 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.

KS Wilks

Katharine Wilks

Adjudicator

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