

WATRS

Water Redress Scheme

ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT X388

Date of Decision: 25 March 2023

Party Details

Customer: XX
Company: XX

Complaint

The customer has a dispute with the company regarding the length of time it took to rectify the causes of sewage flooding events at his property. The customer claims that he has been complaining to the company since 2014 but it did not rectify the problem until November 2022, and he believes many of the remedial works undertaken were not appropriate. The customer claims that despite ongoing discussions with the company and the involvement of CCWater the dispute is unresolved and therefore he has brought the claim to the WATRS Scheme and asks that the company be directed to pay compensation in an unspecified amount and issue an apology.

Response

The company says its records show that it addressed the customer's complaint in 2014 and did not receive any further contact until January 2021. Following the second complaint it undertook full investigations and carried out testing and surveys, and completed the necessary remedial works in November 2022. The company states that it has fully complied with its statutory obligations to maintain its sewerage assets. The company has made an offer of settlement to the customer that he rejected and thus declines to pay compensation.

Findings

The claim does not succeed. I find that the evidence does not support on a balance of probabilities that the company has been negligent in its maintenance of its sewerage assets. I find that the company is reasonably aware of its statutory obligations and has responded to a reasonable level to the customer's complaints of effluent discharge onto his land and has advised him how to seek compensation under the GSS scheme. I find that the evidence shows that the company has provided its services to a reasonable level and has managed the customer's account to the level to be reasonably expected by the average person.

Outcome

The company does not need to take further action.

The customer must reply by 21 April 2023 to accept or reject this decision.

ADJUDICATOR'S DECISION
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Case Outline

The customer's complaint is that:

- He has experienced an ongoing dispute with the company concerning issues with wastewater and sewerage services. Despite the customer's recent communications with the company, and the involvement of CCWater, the dispute has not been settled.
- The company has a pumping station, fourteen manholes, and more than 1,000 metres of pipework located on his land.
- Since July 2014 he has experienced numerous incidents of raw sewage flooding his land that is adjacent to sewer pipe assets of the company.
- One incident occurred in December 2020 and sewage discharged onto his land for thirteen consecutive days, and because of this the customer submitted an invoice for reparations to the company.
- A further flooding event took place in May 2022 emanating from the pumping station, and again he submitted an invoice to the company.
- The company eventually undertook a detailed survey of the pumpstation and appurtenant pipework in June 2022.
- An ongoing exchange of correspondence ensued throughout the following months in which the company stated it had taken reasonable measures to mitigate flooding events and that it rejected his invoices for compensatory payments.
- Believing the company had not properly addressed his concerns he, on 03 October 2022, escalated his complaint to CCWater who took up the dispute with the company on his behalf.
- The records show that CCWater contacted the company on 05 October 2022 with a pre-investigation letter to request its version of events.
- On 12 January 2023 CCWater advised him that the company had responded to its request for additional information, and confirmed that it refuses to pay his invoices but had offered £100.00 as a gesture of goodwill that he declined.

- On 18 January 2023 CCWater concluded that this was the final position of the company, and it could not take any further measures to have the company change its position and was thus closing his case.
- Continuing to be dissatisfied with the response of the company he has, on 01 February 2023, referred the matter to the WATRS Scheme where he requests that the company be directed to pay compensation in an unspecified amount and issue an apology.

The company's response is that:

- It provided its response to the claim in its package of documents submitted on 13 February 2023.
- It confirms its statutory obligations in respect of providing water and sewerage services.
- It confirms that it has a duty to provide, improve and extend the system of public sewers and to cleanse and maintain those sewers. It also confirms that this duty is only enforceable under section 18 of the Water Industry Act 1991 by the Secretary of State or, with his specific or general consent, by Ofwat.
- The customer's application is not eligible for adjudication by WATRS. Rule 3.5 of the Water Redress Scheme Rules (2016 edition) states the Scheme cannot be used to adjudicate disputes on "*Any matters over which Ofwat has powers to determine an outcome*".
- Issues relating to effectual drainage can only be enforced by the Secretary of State or Ofwat.
- It relies on the House of Lords decision in *Marcic v Thames Water Utilities Limited* [2003] All ER(D) 89 where it was held that common law actions against a statutory appointed sewerage undertaker are not compatible with the Statutory Scheme under the Water Industry Act 1991.
- It advised the customer that he should seek compensation for the effluent flooding events through the application procedures of the Guaranteed Services Scheme [GSS].
- It details the activities and the budget it allocates for undertaking an ongoing programme of sewerage network maintenance.
- It confirms the customer first contacted it about sewage flooding to his field in July 2014, and that it took appropriate action. The company states that it had no further contact from the customer until January 2021.
- Numerous actions were undertaken at the pumping station and manholes and a full survey was undertaken in June 2022 of all its assets on the customer's land. The subsequent remedial works were completed in November 2022.

- In summary, it is satisfied that has made significant and extensive efforts to attempt to resolve the customer's issues, has advised him of his ability to seek compensation through the GSS, and has fulfilled its statutory duty to provide an efficient drainage system.

The customer's comments on the company's response are that:

- On 15 February 2023, the customer submitted comments on the company's response paper. I shall not repeat word for word the customer's comments and in accordance with Rule 5.4.3 of the Rules of the WATRS Scheme I shall disregard any new matters or evidence introduced.
- The customer reiterates his previously submitted complaint that the company has been responsible for the flooding events at his property. The customer believes the remedial actions previously undertaken were ineffective and that it did not respond to incidents in reasonable time. The customer states that he believes if it was not for his constant complaining over numerous years the flooding events would have continued.

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 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 dispute relates to the customer's dissatisfaction that the company has taken an unreasonably long period of time to complete remedial works to its assets that regularly overflowed and deposited effluent on his property.
2. I note that the WATRS adjudication scheme is an evidence-based process, and that for the customer's claim to be successful, the evidence should show that the company has not provided its services to the standard that would reasonably be expected of it.
3. I accept that the company has established its statutory duty under the Water Industry Act 1991 to provide and maintain effectual drainage services to every property in its area.
4. I note that the company has stated in its response that its responsibilities for the sewer network in its area are regulated by Section 94 of The Water Industry Act 1991.
5. I have read Section 94 of the Act, and I am satisfied that the company has correctly understood its responsibilities.
6. The company in its Response submission has referred to the case of *Marcic v Thames Water plc*.
7. In *Marcic v Thames Water plc* [2003] UKHL 66, the House of Lords held that the statutory nature of the work undertaken by water companies entails that a different liability regime is applicable to water companies than to entirely private actors.
8. In the words of the court, "The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the Director [i.e. Ofwat] was intended to discharge when questions of sewer flooding arise."
9. The Court of Appeal subsequently reiterated in *Dobson v Thames Water Utilities* [2009] EWCA Civ 28, that the "Marcic principle" applies broadly to exclude claims based on a water company's performance of its statutory obligations, except where the claim relates to certain responsibilities and relies on a contention that the company performed its statutory obligations negligently.
10. The consequence of the House of Lords' ruling in *Marcic v Thames Water plc*, then, as interpreted by the Court of Appeal in *Dobson v Thames Water Utilities*, is that the customer's claim can only succeed if the company has acted negligently or otherwise wrongfully. The simple fact that the customer has suffered damage as a result of the company's operation of its business would not suffice.

11. Moreover, any negligence displayed by the company must not raise regulatory issues, but must instead reflect what might be called standard negligence. To illustrate, if the argument was that the company was negligent in not inspecting its sewers more regularly, this raises regulatory considerations and so in accordance with the Marcic principle such claims must be addressed to Ofwat and cannot be resolved through WATRS. On the other hand, if the claim was that the company undertook an inspection, but did so negligently and missed a problem that should have been noted, this raises a question of standard negligence, and so can be resolved through WATRS.
12. In the present case, I do not find that there is evidence that would justify a conclusion that the company acted negligently and that this resulted in the harm that the customer has identified. The customer has argued that the evidence indicates that the company's remedial works prior to 2022 were ineffective and could not succeed, but that is 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.
13. The company, in its written response to CCWater, states that hydraulic overload is the cause of the sewer flooding events at the customer's property.
14. Hydraulic overload is when the capacity of a sewer is insufficient for the volume of wastewater flowing through it¹. The company detailed to CCWater the investigations it undertook to identify hydraulic overload, it stated :-
- A levels survey was completed which showed that the overflow into the storm tank was higher than manhole 4501. As a result, the head required to push against the weight of the sewage had to be significant, so significant in fact that the seal on manhole 4501 was broken first.*
- We are confident that we have found the root cause of the problem and have already taken steps to mitigate against the flooding in the future.*
15. The company has stated that it, along with all other water utility companies, are not liable for damage caused by hydraulic overload unless it can be proved that the company was negligent in its maintenance of its assets.
16. The company has explained in detail the actions it has taken, and the responses made to each of the customer's flooding complaints since 2014.
17. I am satisfied from my reading of the company's submission that it has taken the customer's complaints seriously and has made reasonable efforts to investigate the causes and to ensure

¹ As defined by UK Government Select Committee on Public Accounts, 30th Report, Responsibilities for preventing sewer flooding.

by means of various actions that its sewers were undamaged and functioning to a reasonable level. These actions included,

- Lowering the back-up float for the inlet pumps to initiate a second pump quicker, thus preventing the possibility of site overload.
- Lowering the alarm float to raise alarm and initiate earlier attendance technicians.
- Revising alarm priority.
- Replacing a non-return valve on the inlet pump to ensure no back flow if the pump fails.
- Cleaned and emptied the inlet wet well to fully utilise capacity and reduce risk of rag and grit build up.
- Liaising and meeting with the customer.
- Undertaking surveys.
- Undertaking remedial works as necessary.

18. The customer has stated that the remedial works performed by the company *“in the past never had a hope of solving the problem”*. The customer has not provided any evidence to substantiate his statement.

19. I take note that the customer has not, at any time, retained independent professional experts to inspect the problems on his behalf and supply reports of their findings. The evidence laid before me does not establish that the investigations, findings, and remedial actions of the company were ineffective or wrong.

20. The evidence does show that the company informed the customer that he could apply for a GSS payment by following the applicable application procedures. The company also identified the level of GSS payment the customer could expect to receive.

21. Overall, I am satisfied that the company has not been negligent in the maintenance of its assets nor in its response to the customer’s complaints of flooding.

22. In his application to the WATRS Scheme the customer seeks to have the company directed to pay an unspecified amount of compensation, and he has not detailed what the compensation is for. However, from my reading of the CCWater submissions it seems to me that the customer seeks compensation for the length of time the company had taken to rectify the causes of the flooding events.

23. I have stated above that I do not find the evidence supports the customer’s position that the company was in any way negligent in its maintenance of its sewerage assets. Thus, I find that the customer’s claim does not succeed, and I shall not direct the company makes any compensatory payment to the customer.

24. Similarly, I do not find that the company’s actions establish the applicability of an apology. Thus, I shall not direct the company to issue an apology.

25. My conclusion on the main issues is that the company has not failed to provide its services to the standard to be reasonably expected by the average person, and the evidence does not confirm that the customer experienced any financial loss.

The Preliminary Decision

- The Preliminary Decision was issued to the parties on 13 March 2023.
- The company has, on 14 March 2023, responded to the Preliminary Decision.
- The company states it has noted the Preliminary Decision and has no additional comments.
- The customer has, on 20 March 2023, responded to the Preliminary Decision.
- The customer explains, in reference to paragraph 18 above, his understanding of the technical aspects.
- In respect of paragraph 19, the customer states that as a Chartered Civil Engineer he understands both concrete and water. The customer says it was his advice that resulted in the company understanding the correct source of the problem.
- I am satisfied that the facts upon which the Preliminary Decision was based remain unchanged.
- Having read the response of the parties I am satisfied that no amendments are required to the Preliminary Decision.

Outcome

The company does not need to take further action.

What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- The customer must reply by 21 April 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.

A handwritten signature in black ink, appearing to read 'P R Sansom', with a long horizontal flourish extending to the right.

Peter R Sansom
MSc (Law); FCI Arb; FA Arb;
Member, London Court of International Arbitration.
Member, CI Arb Business Arbitration Panel.
Member, CI Arb Pandemic Business Dispute Resolution Arbitration Panel.
Member, CEDR Arbitration Panel.
Member, CEDR Adjudication Panel.

Independent Adjudicator