

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT X397

Date of Final Decision: 29 March 2023

#### Party Details

Customer: XX

Company: XX

#### Complaint

The customer complains that a leak from the company's asset led to water penetration in his home and it has caused damage that he initially estimated at £5,000.00 but has now found to be closer to £10,000.00. He complains that the company took a long time to resolve the problem, did not communicate with him well, told him that it would clean up when this was not its policy and refused to take responsibility. He asks for compensation and for the company to acknowledge its responsibility.

#### Response

The company denies that it is liable for leakage of sewage from its assets without negligence. The company says that it was not negligent as the leak was from a lateral drain that it had acquired in 2011 but of which it was unaware because this showed on no maps. The drain deteriorated through wear and tear but the company could not have known this. It entered the customer's property due to inadequate damp proof or drainage protections. As a matter of goodwill, the company has offered a gesture of goodwill to the customer in the sum of £350.00 for poor customer service; and £450.00 to cover the Customer's insurance excess, which is consistent with its published policy on uninsured losses. The company says that the offer of £800.00 is still open for acceptance.

#### Findings

I find that the company is not liable to compensate the customer for damage caused by an escape of sewage in the absence of negligence. This is a consequence of the decision in the case of *Marcic v Thames Water* (see below) and rule 3.5 of the Scheme Rules. I find that the company has provided a standard of customer service that did not meet expectations in respect of its communications, speed of rectification of the problem and because it told the customer that it would clean up, whereas that is not the company's policy. Although the award of compensation of £350.00 is a higher sum than I might have awarded for this part of the customer's claim, I find that the company, having made this offer, would not reasonably be expected to reduce it and that therefore I should not direct this. The company is willing to continue to make the total offer of £800.00. Because I find that the company's customer service did not meet reasonable expectations, I find that it is fair and reasonable to direct

that the company should pay the customer the sum that it has offered of £800.00.  
No further remedy is directed.

**Outcome**

The company needs to pay £800.00 to the customer.

# ADJUDICATOR'S FINAL DECISION

Adjudication Reference: WAT X397

Date of Final Decision: 29 March 2023

## Case Outline

### **The customer's complaint is that:**

- The customer claims £5,000.00 in respect of internal and external damage caused to his property at **XX**
- He says that damage has been caused by leaking foul water from the company's sewerage.
- The customer would also like the company to take responsibility for the failure of its asset.

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

- The company says that any damage to the customer's property has been caused by inadequate damp proofing and/or drainage at the customer's property, for which the company is not liable.
- The company reports that on 7 August 2022, the customer reported an internal flood at the property because wastewater was seeping under a retaining wall and collecting in the cavity between the retaining wall and internal bedroom wall. Later that day, the company instructed its technicians to attend the property to undertake emergency works. On 8 August 2022, the company continued its investigation into the cause of the flooding. On 9 August 2022, the customer told the company that he had drilled a hole in the external retaining wall at the property so that the wastewater could drain from the cavity.
- The company undertook an in-depth investigation into the cause of flooding at the property over the course of several weeks. Due to the unique and difficult location of the leak it took longer than usual to identify and repair. The company also had to rule out other possible causes that it had identified during its investigations (e.g. by undertaking numerous dye tests and CCTV surveys on sewerage assets in the area, as well as inspecting water mains and associated pipework for possible defects). The company took all reasonable steps to locate and repair the leak without delay and kept the customer updated whilst investigations were ongoing.
- On or around 9 August 2022, the company's contractors identified a leak on a 150mm lateral drain laid under a road within the vicinity of the property that was not on the company's mapping system. Responsibility for the defective lateral drain transferred to the company under The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011. This therefore had led to delay in repairing the leak.

- It was confirmed that wear and tear of the lateral drain had resulted in an escape of wastewater which seeped through the ground before entering the property. The company's investigations have confirmed that the wastewater was only able to enter the Property and collect in the cavity between the retaining wall and internal bedroom wall due to a lack of damp proofing at the property and/or inadequate drainage from the cavity wall. Indeed, the Customer confirmed that he had to drill a hole in the external cavity wall to allow the wastewater to drain away.
- Upon locating the leak, the company instructed its contractors to install a new manhole to gain access to the lateral drain – this work was undertaken between 19 and 22 August 2022. The company could not dig out the compromised lateral drain as a gas main encased in concrete ran directly over the top of it. This made it unsafe to excavate. A “protruding patch” liner was installed to alleviate the issue until the company's contractors could source a specialist kit from Germany in order to fit a “top hat patch” (a liner that seals the pipe without digging) – the company's contractors do not keep the top hat patch in stock,
- On 1 September 2022, the company's contractors confirmed that the top hat patch would not arrive until 23 September 2022. It actually arrived on 30 September 2022. On 30 September 2022, the company completed a final repair to the compromised lateral drain by installing the top hat patch and three 225mm patch liners. This resolved the flooding issue at the property.
- Following email and telephone correspondence between the parties, the customer indicated that
- he wished to make a claim against the company for damages arising out of the flooding at the Property. The company advised the Customer that it did not admit liability for any damage caused by the flooding at the property. The company does not have liability in law for damage caused by escapes of sewage unless it has been negligent. Whilst wastewater did escape from the lateral drain (due to an unforeseeable and previously undetected leak), the flooding at the property was a direct result of inadequate damp proofing and/or drainage.
- The company therefore recommended that the customer should make a claim on his own insurance, which the customer refused to do.
- As a matter of goodwill, the company has made the following offer to the customer:
  - £350.00 for poor customer service; and
  - £450.00 to cover the Customer's insurance excess.Total: £800.00
- On 23 December 2022, the company received an email from **XX** to confirm that the customer had made a claim on his home insurance policy.
- The customer has nonetheless remained dissatisfied with the company's position and, on 1 February 2023, he submitted the application to WATRS.
- The company repeats its offer of £800.00 as a gesture of goodwill, without any admission of liability and without prejudice to any and all of the company's rights.

## 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.

The company has indicated that it accepts the Preliminary Decision, and the customer has not commented. The outcome of the Final Decision is the same as the Proposed Decision.

## How was this decision reached?

1. The documentation submitted to me shows that between 7 August 2022 and 30 September 2022, foul water was leaking from the company's assets and entering the customer's property. The fact that this occurred was confirmed by dye testing and the company says that the leak was proven to come from a lateral drain for which it is legally responsible but, due to the historical nature of acquisition of drainage arrangements, it was unaware of the presence of this until the incident in question.
2. The customer says that there was a mechanical failure of the company's pipes that created a leak underground and foul water entered into his property for 9 weeks. He says that this caused damage to the property, including entering a bedroom area and damaging carpets, wardrobes, walls and skirting boards. The customer has submitted supporting photographs and videos. The customer was bailing it out for a period, however that was not sustainable. He was able to create an outlet so the water would drain outside, however the wooden decked patio area is now damaged (including underneath). Sewage also ran into their small pool. The customer initially estimated the damage to be at least £5,000.00. The customer also says that the company offered

on more than one occasion to clean up, but this was never done. He was then later told that the company does not offer this service.

1. The customer has argued with a number of points made by the company, namely as to the location of the leak, the number of occasions on which a cleanup service was offered, whether water had previously been trapped inside a retaining wall and whether the case of *Marcic* (below) is relevant, as it relates to the company's systems becoming overwhelmed by rainwater, whereas this was a mechanical failure of the company's asset.
  
3. The company, however, denies that the fact that there has been a leak from pipework gives rise to liability to compensate the customer in circumstances where it was unaware of the condition or location of the pipe, The company says that the character of the leak was that it entered into the groundwater and then found its way into the customer's home because he does not have adequate damp-proof arrangements to keep groundwater out of his walls. It nonetheless agrees that its leaflet "Uninsured losses" states that:

*We'll consider making a payment of uninsured losses on an individual basis*

and it has offered to refund the customer's excess charge of £450.00.

4. I bear in mind the following:
  - a. That it is common ground that the leak caused damage to the customer's home. In respect of the company's point that this was not effluent entering the customer's property from the company's asset, but a contamination of the ground as a consequence of a leak, such that foul water has entered the building from the groundwater, I find, having regard to the description supplied by both parties, that this was the case.
  
  - b. Although, as indicated above, the customer initially estimated the damage at £5,000.00, in reply to the company's response he has now obtained an estimate from PMS for building and repair work in the sum of £8,558.04, and a further £1,262,36 for new carpeting excluding the fitting charge.
  
  - c. The issue with which I am concerned does not relate to the adequacy of the customer's damp-proofing or other protections against the ingress of water, it is concerned with whether the company has supplied its services to the expected standard. I therefore make no findings about the condition of the customer's damp defences or other proofing.

2. Although the customer says that the case of *Marcic v Thames Water*, ([2003] UKHL 66) is not of relevance because the case concerns incidents of surcharge rather than deterioration of an asset, I do not accept that argument. I find that the case is authority for the wider proposition that under the Water Industry Act 1991, courts cannot find that sewerage companies are liable for the escape of the contents of public sewers in the absence of negligence. This is because strategic decisions relating to the provision and maintenance of a sewerage network are matters that are overseen by Ofwat. Instead, provision is made for statutory credits to be given to customers under the Guaranteed Service Standards scheme where appropriate. As “maintenance” involves the application of policy as to steps to be taken by companies (including whether these should be reactive or proactive), this is for Ofwat to oversee and not for courts (or customers).
5. WATRS is a specialist adjudication scheme but its position is similar to that of a court. This is because its function is to resolve individual disputes between customers and companies, not to undertake a strategic review, such as would be necessary when considering competing interests for investment or the priorities that should apply to its maintenance programme. I am mindful that in making changes to the company’s assets, the company is required to weigh up the relative merits and needs of all its customers. This is a matter that Ofwat may be well placed to undertake, but an adjudicator is not. I therefore find that adjudicators under this Scheme have no power to direct that companies should provide compensation for situations that arise out of its strategic activities. Any doubt about that is removed by rule 3.5 of the Scheme Rules, which states that an adjudicator has no power to make a decision that is the responsibility of Ofwat.
6. In the context of this dispute, the company has explained that the leak was found to have occurred in pipework that the company acquired in 2011 without its knowledge because it was not marked on relevant maps. There is no evidence to the contrary and I find that the company could not reasonably have been expected to take proactive steps to look for the pipework until it was alerted to a problem.
7. I find, therefore, that without more, the fact that a leak has occurred and caused damage to the customer’s premises does not mean that the company is liable to compensate the customer for the damage caused. The usual protection against loss due to damage from flooding or leaks is household insurance and I note that the customer was advised as to this and, as indicated above, the company has agreed to pay the excess on the customer’s insurance policy.
8. Although, therefore, I cannot find that the company is liable for damage to the customer’s property by flooding, I do, however, have jurisdiction to consider the question of customer service.

9. It is notable that the company has acknowledged deficiencies in its customer service, particularly in respect of advice given to the customer that the company would arrange to carry out a cleanup in the customer's home whereas that was not its policy, and it did not provide that service. Moreover, the company agrees that it has not on a number of occasions returned calls and kept the customer updated over the investigation and remediation process. I also note that in its complaints process, the company told the customer that the reason for part of the delay in stopping the leak was that the leaking pipe lay under a building. Whereas, although it was affected by the presence of a gas main, it was not under another premises. I am satisfied that this (later acknowledged) error would also have been a source of frustration. Furthermore, the customer has complained that the investigatory process went on for an unduly long time. I also agree that the process took longer than would reasonably have been expected. While I accept that there were a number of unusual features of this investigation, I am not satisfied that the period of more than two weeks before the source of the leak was detected was consistent with good customer service.
10. It follows that I find that the customer would be entitled to receive redress in respect of the standard of customer service that fell below reasonable expectations. The company, with detailed knowledge of all the circumstances, has put a figure on this of £350.00. Whilst this is a higher figure than I might otherwise have been prepared to award, I am mindful that the company was in a better position than am I to assess the hardship caused to the customer as a consequence of the company's omission to meet expected standards.
11. The company has moreover made clear that its overall offer to the customer of £800.00 taking into account also its willingness to pay the customer's insurance excess, is still open for acceptance. In all the circumstances, therefore, I find that the company's gesture of goodwill is in a fair and reasonable amount and I do not find that it is either necessary or consistent with the customer expectations to reduce this.
12. It follows that I find that, due to the company's omission to provide its customer services to the expected standard, I direct that the company shall pay to the customer the sum of £800.00. I do not make any further directions.

#### **Outcome**

The company needs to pay £800.00 to the customer.



### What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- If you choose to accept this decision, the company will have to do what I have directed within 20 working days of the date on which WATRS notifies the company that you have accepted my decision. If the company does not do what I have directed within this time limit, you should let WATRS know.
- If you choose to reject this decision, WATRS will close the case and the company will not have to do what I have directed.
- If you do not tell WATRS that you accept or reject the decision, this will be taken to be a rejection of the decision. WATRS will therefore close the case and the company will not have to do what I have directed.

Claire Andrews

**Claire Andrews, Barrister, FCI Arb,**

**Adjudicator**