

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X594

Date of Final Decision: 1 October 2023

Party Details

Customer: XX

Company: XX

Complaint

The customer says that there has been repeated sewer flooding at the Property.

He requests that the company fix or replace the pipework that is causing the flooding.

Response

The company says that it can only be liable for the customer's claim if it has been negligent, and it has not been negligent.

The company have made Guaranteed Standards Scheme (GSS) payments to the customer on two occasions, totalling £321.41.

Findings

The company can only be held liable through WATRS if it has been negligent, and the available evidence does not support a finding of negligence.

Outcome

The company does not need to take any further action.

The customer must reply by 27 October 2023 to accept or reject this decision.

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Case Outline

The customer's complaint is that:

- The shower in the Property, in which the customer's mother lives, has overflowed with sewage more than 12 times, most recently on 15 April 2023.
- The company has visited when flooding was reported, and has now put in place a maintenance plan involving flushing the network. This was initially scheduled for every 3 months, but has been increased to every 2 months.
- The customer says that he was advised by one of the company's agents that he was entitled to a £1,000.00 payment, but the company now denies this is owed.
- The company has now identified that the sewer at the back of the Property is too shallow and does not have a self-cleansing fall.
- The company has nonetheless refused to undertake work on the sewer to remedy the problem.
- The customer requests that the company fix or replace the pipework that is causing the flooding.

The company's response is that:

- The customer's mother has resided at the Property since 2016, and 10 occurrences have been reported of either internal flooding or restricted use of facilities.
- The company has attended the Property on each occasion.
- It has identified that the shared sewer at the rear of the Property does not have a self-cleansing fall, resulting in materials building up and causing blockages.
- This prevents waste escaping through the pipe, causing it to back up into the Property's shower.
- The company have made Guaranteed Standards Scheme (GSS) payments on two occasions, totalling £321.41.
- Other GSS payments have been declined because no evidence of internal flooding was present when the company arrived, or because there was excessive flushing of the toilet despite a known blockage being present.
- The company has examined replacing the sewer, but has determined that there is not enough depth on the sewer to create self-cleansing fall.

- The company has increased introduced regular flushes of the sewer, now performed every 2 months.
- The company will increase the frequency of the flushes if required.

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

- The company has acknowledged that the sewer at the rear of the Property is faulty.
- Blockages have not been caused by his mother, who does not use wet wipes.
- The company offered a payment of £75.00, which constitutes an admission of fault.
- The company has witnessed internal flooding on 11 occasions, cleaning it each time.
- He denies that the flooding was ever caused by excessive flushing.
- The flooding occurs overnight, while his mother is asleep.
- In April 2023, flooding occurred days after the company flushed the sewer.
- He reiterates that he was told by an employee of the company that he would be entitled to £1,000.00 per instance of flooding.

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. 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.
2. 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.”
3. 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.
4. 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.
5. 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.
6. In the present case, I accept the customer’s statement that his mother has been dealing with sewage flooding for a number of years, and I don’t question the high level of distress this will have caused. However, as explained above, under the Marcic principle the company can only be held liable if it has been negligent in some way that resulted in the flooding occurring or in response to a report of flooding.

7. The company has acknowledged that there is a flaw in the sewer, as it has an insufficient slope, so that it does not naturally wash away waste (“self-cleansing fall”). However, this is a problem with the way that the sewer has been constructed, rather than a fixable fault in the sewer (e.g. a broken section of pipe). As a result, the customer’s request that the sewer be rebuilt or replaced, while entirely understandable in terms of the impact of the sewer on his mother, is ultimately a request for a better sewer, rather than a request that a broken sewer be fixed.
8. The House of Lords in Marcic, however, expressly held that only Ofwat, as the company’s regulator, can require that the company construct a better sewer. This is because questions of whether sewers should be improved or new sewers constructed require a balancing of the interests of customers from across the company’s network, and given the finite resources at the company’s disposal an order from a court or a WATRS adjudicator that such work should be performed to the benefit of a particular customer necessarily means that work will not be performed that is required by other customers. This does not, of course, mean that there is no mechanism available for the company to be compelled to undertake sewer improvement, but that compulsion must come from Ofwat, which has been delegated this responsibility.
9. The customer has also questioned the efficacy of the monitoring and flushing scheme the company has introduced, particularly as the most recent incidence of flooding occurred only days after a monitoring and flushing visit was performed. However, while a monitoring and flushing scheme cannot guarantee that future flooding will not occur, even a properly functioning sewer may flood on occasion, and I find that if implemented properly, including increased monitoring frequency if future flooding occurs, as promised by the company, then the company’s proposed approach is an appropriate means of reducing the risk of flooding by the sewer to an acceptable level.
10. On 30 August 2023, the Adjudicator issued the following evidence request: “The company confirms that it is currently attending the sewer behind the Property every 2 months to manually flush the sewer and ensure that it is clear. The company is to confirm the dates on which all visits under this “monitoring and flushing” scheme have occurred, providing any notes from those visits.”
11. The company responded to this evidence request on 1 September 2023, and I find that the company has provided satisfactory evidence that it has adhered to the promised schedule, and that appropriate actions were taken when the sewer was attended.


12. I do not, therefore, find that the available evidence justifies a conclusion that the company has been negligent in its response to the flooding of the sewer, or to its management and implementation of the monitoring and flushing scheme. As a result, the Marcic principle requires that the customer's claim cannot succeed.
13. In his comments on the Preliminary Decision in this case, the customer argued that "the facts are indisputable and undeniable that Yorkshire Water are negligent. Yorkshire Water admit it's a faulty pipe but refuse point blank to fix it." However, as explained above, a WATRS Adjudicator may only address "standard" negligence, and I have found that the evidence does not support a conclusion that the company has been negligent in this respect. To the extent that the customer's argument relates to the company's decision to prioritise repair work on other sections of its network, at the expense of the pipework affecting the customer, the Marcic principle requires that this be a question resolved by Ofwat, the company's regulator, and not by a WATRS Adjudicator.
14. It should be emphasised, however, that the customer retains the right to question the effectiveness of the scheme again if further flooding occurs, and that he may at that time have a valid claim against the company if flooding has resulted from the negligent management or implementation of the monitoring and flushing scheme by the company.
15. For the reasons given above, the customer's claim does not succeed.

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 27 October 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.



Tony Cole

Tony Cole FCI Arb

Adjudicator