

Policy Statement

The Burden of Proof and Standard of Proof at the Water Redress Scheme (WATRS)

30 July 2018

Centre for Effective Dispute Resolution

70 Fleet Street
London EC4Y 1EU

Tel: +44 (0)20 7536 6000

Fax: +44 (0)20 7536 6001

www.cedr.com

For general information:

info@cedr.com

For ADR enquiries:

adr@cedr.com

Following feedback WATRS has received from the ADR Panel, a review has been conducted into decisions made by adjudicators, with a particular focus on how adjudicators are applying the burden and standard of proof in determining outcomes to disputes referred to WATRS. As a result of the review, CEDR has formulated this policy statement.

WATRS mirrors the burden of proof and the standard of proof that apply to civil proceedings in the UK. The burden of proving a fact rests with the claimant, and the standard to which that fact must be proven is on the 'balance of probabilities' (where it is considered by the adjudicator to be more probable than not). Alignment with the norms of British civil justice is one of the fundamental principles of WATRS, ensuring that the scheme is robust and accords with accepted legal standards.

To this end, every decision made by a WATRS adjudicator states the following:

"In order to succeed in a claim against the company, the customer must prove 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 proved, the company will not be liable".

A number of previous WATRS adjudication decisions may have given the reader the impression that the burden and standard of proof place an obligation on a customer to "prove" everything that they have put forward, and that a failure to do so will render a customer's claim to be without merit. This has particularly been the case where customers have stated that they have not done something, such as not using the volume of water that they are being charged for, or not receiving a particular letter or notice from a company. Adjudicators should recognise that asking a customer to submit evidence so as to prove such a matter - in other words, to prove a negative - is to ask the impossible.

In this context, it is right for the adjudicators to recognise the imbalance of resources between the customer and the company. Adjudicators should acknowledge that a company is best placed to provide evidence that a particular volume of water has been used, or that a letter has been sent out. Furthermore, in situations where a company does not provide evidence on an issue that a customer has raised, the adjudicator should consider requesting such evidence from the company, and drawing appropriate conclusions where the company continues to not provide the requested evidence.

Both the burden and standard of proof should therefore be flexibly applied where it is appropriate for the adjudicator to do so, so that an appropriate and proportionate evaluation of all of the information and evidence is made.

Actions:

In view of the above points, WATRS will take the following actions to clarify the flexible nature of the burden and standard of proof:

1. An amendment to the wording used in adjudicator's decisions, in order to remove reference to an obligation on customers to prove the company's failings. Reference should be made to the 'evidence available to the adjudicator', which must 'show' that the company has failed. The following words will be adopted:

"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".
2. Adjudicators should not apply a strict burden or standard of proof on the customer, such as to require customers to prove each and every issue that they raise in a case. Customers will only be required to prove issues that they are reasonably able to prove, or where the issue in dispute is significant and clearly outside the knowledge of the company.
3. Adjudicators should emphasise in the wording of their decisions that cases are decided on the balance of the evidence as a whole, rather than solely the quality of the evidence submitted by the customer.
4. Adjudicators should always consider exercising their discretion to request further information or evidence from either party in order to clarify an issue relevant to the determination of the case. This is particularly so in disputes where a customer's claim is based on 'proving a negative'.
5. A statement of 'Principles of Decision-Making' will be made available on the WATRS website, setting out the principles that WATRS adjudicators are committed to when adjudicating disputes. The statement will make clear that adjudicators will adhere to the following principles:
 - a. Both the consumer and the company will be treated fairly and proportionately to ensure that neither party is unduly disadvantaged.
 - b. Adjudicators are independent and will at all times act objectively, promoting neither the position of the consumer nor that of the company.
 - c. Adjudicators will consider all the evidence presented by the parties, the specific circumstances of the case, and any other information directly relevant to the dispute.
 - d. Adjudicators shall consider whether it is fair and reasonable to request further information or evidence from either party to a dispute.
 - e. Equal consideration will be given to the word of the consumer and the word of the company.
 - f. Adjudicators will consider all relevant law, the company's terms and conditions and the Guaranteed Standards Scheme (GSS).
 - g. Full reasons for any decision will always be provided.