

WATRS

Water Redress Scheme

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DECISION

by Claire Andrews, Barrister, FCI Arb

An adjudicator appointed by WATRS

under the Water Redress Scheme

Decision date: 5 October 2016

Adjudication Reference: WAT/ /0381

Between ■■■¹ and ■■■■²

- The claim is made by the customer, ■■■■■, trading as ■■■ represented by ■■■ of ■■■■■, against a water and sewerage company, ■■■■■.
 - The claim dated 9 September 2016 is for the refund of all charges improperly raised for the drainage of surface water and for compensation between 1 April 2009 and 31 March 2014.
 - The position of the company is explained in its defence dated 21 September 2016 which is disputed by the customer in a reply dated 27 September 2016.
 - The customer's claim is that the company has incorrectly charged for surface water drainage since 2009 and has failed to pay attention to the terms of the customer's lease in deciding the common areas that should be taken into account.
 - The company's position is that it is not liable for this claim.
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Decision

1. The claim succeeds in part.
2. I direct that the company shall:
 - take action to refund to the customer that part of the customer's bill which relates to surface water drainage from the cross-connected area of ■■■■■, backdated to 1 April 2014; and

¹Customer's address for correspondence ■■■■■

²Company's address for correspondence ■■■■■

- take action to consider whether, on a fair and reasonable application of its discretionary policy, the customer is eligible to backdating of the claim to refund of surface water charges to the date of the customer's first occupation of [REDACTED]. For the avoidance of doubt, compensation under the discretionary policy is only payable if, after the consideration described above, the customer is eligible under that policy.

Main issues

3. I consider that the main issues in this adjudication are:
 - a. Whether the company has failed to provide its services to the standard to be reasonably expected.
 - b. Whether the reasons given by the customer are sufficient to justify the remedies sought.

Background information

4. 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.
5. The customer and the company are aware of the facts of this case. I do not propose to recount all the facts in the same manner and order as the parties have done in their documents except where it is necessary for the purposes of this decision. I have carefully considered all of the documents submitted by the parties in support of their submissions and presented to me. The parties should also be reassured that if I have not referred to a particular document or matter specifically, this should not be taken to mean that I have not considered it in reaching my decision.

Customer's and company's positions

6. The customer explains that an application for full removal of surface water drainage charges was submitted to the company on 4 September 2014 in respect of its premises at [REDACTED]. The company's contractor, [REDACTED], visited the site in October 2014 and confirmed that the customer's unit was not connected to the company's system. The report reads:

'The West side of the site has a private drainage system leading to an outfall in [REDACTED] to the North of the site'

It was also found during the site survey undertaken by [REDACTED] that this site is within a shared boundary and part of the site is cross connected into a combined system to the east of the site. The report reads:

'Impermeable areas on the East side of the site connect to the [REDACTED] surface water sewer'

The company responded by amending the drainage charges as a partially connected site. The reason for not accepting that the full removal of the charge was appropriate was due to the cross connected area described above. The customer contends that as its premises do not benefit from any drainage connections to the company's system, it is entitled to the removal of the charge in full. ██████ provided the company with the lease agreement which stipulates that the customer only has use of the relevant common parts, in this case it would have been the access road serving the units, and the units only have use of the conduits (drains) which are in the estate and serve the premises. The company's complaints team has said that they 'do not have a policy excluding leases as evidence', however their 'guidelines outline that we do not charge based on any agreement that they are not party to, including private lease agreements'. The company has further stated:

Although you have supplied the details of the private lease agreements, the details are not something that we can consider in this case. As previously advised by ██████ we will base our assessment of charges on the information we have at the time, in this case the information includes the current configuration of the site.

The company has confirmed that if there were to be a reconfiguration of the site, the company would review the matter again, but will not review its guidelines and will not backdate the adjusted charge any further.

7. The company explains that in line with its charges scheme, it has raised surface water and highway drainage charges for the customer's premises since 28 October 2010. As outlined in Section 4 of its charges scheme, surface water and highway drainage charges for metered customers are based upon the chargeable area of premises and the tariff band this value falls within. A reduction can be claimed for the surface water by deduction of any areas that constitute 10% or more of the total chargeable area and from which no surface water enters the public sewer network. Following site visits during November 2014 and February 2015, the company accepted that ██████ (along with most of the Western part of the site) was not connected to the public drainage system for surface water purposes. These visits also confirmed that the multiple occupancy site was partially connected for surface water drainage on the eastern part of the estate. The company recalculated the chargeable area for Unit 18 which placed it within a lower band tariff for this service. The chargeable area consisted of a proportion of the common area of the enclosed estate which had been proven to be draining to the public sewer and was an assessment made in accordance with the charges scheme. The company further argues that its 2014/15 charges scheme, as approved by OFWAT, clearly stated that any a surface water allowance shall be applied from 1 April 2014. This has statutory authority and is binding on customers. The company has accepted that the customer has met the criteria of this allowance scheme and the billing adjustment has been made accordingly. On a discretionary and non-binding basis, the company may back-date a surface water allowance over a maximum 6 year period if the premises were built after 1 April 1998, but only if the single or multi-occupied site is fully unconnected for surface water. It reserves the right to exclude

multi-occupied sites which are still partially connected for surface water because it is not reasonable to expect the company to be aware of any partial arrangements without being notified by the owner or developer at the time.

8. In the comments in reply to the company's defence, the customer reiterates the points made above and refers to the definitions of "site", "chargeable area", "common area" and "premises" in the company's scheme of charges for 2014/2015. The customer asserts that these definitions are inconsistent with each other. The customer also points out that the company would have been aware of the arrangements for surface water drainage at the customer's premises since 2000.

Adjudicator's findings and reasons

9. I find that:

- a. The two issues which arise in this case are (1) as to the extent of the chargeable area for the purposes of the company's charging scheme and (2) whether the company is required to back-date any rebate to 2009. I deal with each in turn.

Chargeable area

- b. It is common ground in this case that there is no run-off from ■■■■ (which is located towards the west of the relevant industrial estate) into the public sewerage such that the customer would be liable for surface water drainage charges from its building. The company argues, however, that its scheme of charges made under section 143 of the Water Industry Act 1991 justifies inclusion of a cross-connected area located to the east of the estate within the customer's chargeable area for the purpose of assessing the surface water drainage charge. The company says that it can decide whether the customer is benefitted by this cross-connected area by an inspection of the environment and it is not bound to, although it may, consider the provisions of the customer's lease. In this case, the company argues that having regard to the lease is not of assistance because it is not a party to the lease and it is therefore not bound by its terms.
- c. Neither party has put the complete scheme of charges for 2014/2015 before me, but the company justifies its position by reference to a glossary included in its submission and the customer also refers to the definitions. The glossary appears to be an extract from parts of a charges scheme and I have looked at these. In order to ensure that my understanding of the significance of the definitions taken alone is not at odds with the scheme of charges when read in its totality, I have also referred to the company's complete scheme of charges for 2013/2014, 2014/2015 and 2015/2016 which are openly accessible to both parties on the company's website. The scheme of charges which the company asserts to be relevant can be found at:

occupation, the chargeable area for each of the premises will include a proportionate part of the common area. This is calculated by dividing the common area pro rata to the individual site measurement of each separate premise.

- g. The crucial words here, however, are “belonging to”. If the common area does not “belong to” a particular premise, it is not within the chargeable area. The customer argues that the area to the east of the estate does not “belong to” its premises, because the occupants of Unit 18 have no rights to use the area which is cross-connected. In order to determine a question of “belonging”, the primary resource is the customer’s lease because it is this document which determines what the customer owns, or put another way, what “belongs” to him. Ownership under a lease includes the buildings which are demised and all the associated easements. Although the full lease has not been put before me, Parts 1 and 2 of the second schedule of the lease have been supplied. These show that the customer has a right to use the “relevant common parts” in the estate but only for the purposes of going to and from the premises (which I take to be Unit ■■■) as well as the conduits which serve the customer’s unit and certain rights intended to protect that unit as well as 15 drive-up units in the Yard. This means that the right to use the common parts is restricted to the purposes of access. Common parts which have nothing to do with access to the customer’s premises are not included. It has not been suggested that access can be obtained to the premises over the eastern part of the estate and therefore I find that the lease does not suggest that the customer has any ownership of rights over the eastern part of the estate. I find that the fact that a client of the customer (or indeed the customer’s staff) may park on a part of the estate which does not belong to the customer does not result in that area belonging to the customer: reasoning based merely on usage and not ownership is not within the scheme.
- h. It follows, therefore, that I accept the customer’s contention that the company applied its scheme of charges incorrectly by not looking at the terms of the lease and by making an assessment solely by looking at the layout of the estate. For this reason I find that the company has not provided its services to the standard to be reasonably expected of a sewerage company and the customer is entitled to redress.
- i. I find that the customer has submitted evidence that shows on the balance of probabilities that it has no share in the common area and that therefore the land to the east is outside the customer’s chargeable area. I therefore conclude that it is fair and reasonable to direct by way of redress that the company shall take action to refund to the customer that part of the bill which relates to the cross-connected area, backdated to 1 April 2014.

Refund backdated to September 2009

- j. I find, however, that the customer is not entitled as of right to have his refund for surface water charges backdated to 2009. The company has indicated that its charging scheme does not require the company to backdate any overpayments for surface water drainage for any period before 1 April 2014 and that this is a position which is disclosed to and authorised by OFWAT. The customer has put forward no evidence to demonstrate that the company is incorrect in this approach. Furthermore, the company asserts that the customer has only been in occupation and subject to the charge since October 2010. The customer is not entitled to any repayment which precedes the date for which water surface drainage charges were first levied.

- k. Nonetheless, the company has explained that outside the statutory scheme, it has operated a non-binding discretion to backdate repayments of surface water charges for up to 6 years in circumstances where premises were built after 1 April 1998 and the single or multi-occupied site is fully unconnected for surface water. The customer has submitted that his premises were built in about 2000 and the customer would therefore be eligible for the exercise of this discretion. Because the company did not consider whether to exercise this discretion in the customer's favour due to a finding that I have concluded to be in error, namely that the customer benefitted from partial surface water drainage due to the common area, I find that it has also failed to provide its services to a standard which would be reasonably expected of a water and sewerage company in not considering whether the discretion could be applied in the customer's case.

- l. I find that the customer is entitled to redress in this respect also, therefore. Because the company is not bound to exercise its discretion in the customer's favour, however, I do not direct that the customer is entitled to compensation as claimed. If the company's discretionary policy would entitle the customer to receive back-dated compensation, compensation would be payable in accordance with that policy. As the customer's entitlement under the policy is unclear, however, my finding is limited to directing the company to take action to consider whether, on a fair and reasonable application of its discretionary policy, the customer is eligible for backdating of his claim to refund of surface water charges from the date of the customer's first occupation of Unit [REDACTED]

Conclusion

- 10. My conclusion on the main issues is that:
 - a. The company has failed to provide its services to the standard to be reasonably expected.
 - b. The reasons given by the customer are sufficient to justify the claim.

- 11. Therefore, I conclude that the claim succeeds in part.

12. I direct that the company shall:

- take action to refund to the customer that part of the customer's bill which relates to the cross-connected area, backdated to 1 April 2014; and
- take action to consider whether, on a fair and reasonable application of its discretionary policy, the customer is eligible for backdating of his claim to refund of surface water charges to the date of the customer's first occupation of [REDACTED]. Take action to consider whether, on a fair and reasonable application of its discretionary policy, the customer is eligible to backdating of the claim to refund of surface water charges to 1 April 2009. For the avoidance of doubt, compensation under the discretionary policy is only payable if, after the consideration described above, the customer is eligible under that policy.



Claire Andrews
Adjudicator