

WATRS

Water Redress Scheme

ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /0815

Date of Decision: 11 September 2018

Complaint

The customer runs a theme park in []. On 5 September 2017, a water main burst. In order to carry out a repair, the affected supply to the park was switched off by [] ("the Wholesaler"). The customer lost a significant number of visitors to the park due to this incident. They are seeking reimbursement of financial losses in the sum of £6,716.61.

Defence

Following the opening of the Non-Household water market in April 2017, the company was established as an independent retailer, legally separated from the Wholesaler. In view of the complaint, the company requested that the Wholesaler undertake a full review of the 5 September 2017 events. The response provided by the Wholesaler, including the reason that they have declined to make any offer of compensation, was provided to the customer. The company has therefore fully discharged its obligation to raise the matter with the Wholesaler.

No offer of settlement has been made.

Findings

Having regard to the split in responsibilities between retailer and wholesaler, there was no failure on the part of the company in the provision of its services in this matter. The company had no responsibility for the repair works on 5 September 2017 or for any of the related decision-making or interactions with the customer's staff on that day. Rather, those activities fell wholly within the Wholesaler's realm of responsibility. At the customer's behest, the company raised the matter with the Wholesaler and has passed on the Wholesaler's response to the customer. I find that the company has discharged its duty to the customer in this respect and has no further liability.

Outcome

The company does not need to take any further action.

The customer must reply by 9 October 2018 to accept or reject this decision.

ADJUDICATOR'S DECISION

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Date of Decision: 11 September 2018

Party Details

Customer: []

Customer's representative: []

Company: [].

Case Outline

The customer's complaint is that:

- Their theme park ("Park") lost trade when [] ("the Wholesaler") decided to isolate a water main between 5 and 7 September 2017 to enable a repair to be undertaken ("the Repair").
- The burst main affected the supply to the toilets. Before the visitors paid entry, the customer had to alert them to the fact that the Park had no water supply to the cafes or toilets. This, in effect, led to a 65% fall in visitors on the day in question, 5 September 2017.
- The Park did have a limited supply from two other sources. When the inspector attended the property, therefore, he may well have been told that the Park had supply. However, the customer was not in a position easily to switch supply and had no knowledge of how that might be done. Park staff did not have a valve key. An employee of the Wholesaler brought this valve to the customer's attention and explained that it was an emergency bypass valve. He turned the valve but it appeared to make little difference to the flow to the toilets.
- During the day, the Wholesaler issued many warnings not to drink the water. Given these warnings, it was assumed that – even if the customer had managed to connect into another supply – it would have been irresponsible to use the other supply as drinking water anyway. In any event, by that point in time, the Park's normal arrivals for the day had finished (as most visitors arrive between 10 am – 12pm for a day visit).
- The customer was not advised that they could request an alternative supply. However, having seen their neighbour, []'s, with a water tanker, they did eventually request a temporary supply. This was provided and the Park managed to trade normally from the next day, 6

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September 2017.

- The company points to their historic trading results, on 5 September, over the three years prior to 2017. These results show that:
 - on 5 September 2014, their visitor numbers were 806, generating gross revenue of £9,985.32; and
 - on 5 September 2015, visitor numbers were 845, generating gross revenue of £10,710.43; and
 - on 5 September 2016, visitor numbers were 881, generating gross revenue of £10,974.32; and
 - over these three years, therefore, their average visitor numbers were 844 and the average gross revenue generated on 5 September was £10,556.33.
- On 5 September 2017, i.e. the day when the Repair work started, the Park's visitor numbers were only 273, which meant that the customer's gross revenue was reduced down to £3,327.91.
- The customer states that this puts their gross loss – due to the impact of the Repair – at £7,728.42 (including VAT).
- From that gross loss figure, the customer has deducted their retail cost of sales (£432.18) and catering cost of sales (£579.63) to produce a net 'total claim' figure of £6,716.61 (including VAT).
- In this adjudication, therefore, the customer seeks reimbursement of their financial losses in the amount of £6,716.61.

The company's response is that:

- Following the opening of the Non Household (NHH) water market in April 2017, the company was established as a completely independent retailer, legally separated from the Wholesaler. The company has a different Board structure and adheres to strict Level Playing Field conditions to ensure fairness in the market.
- As this complaint concerned the actions of the Wholesaler and the customer's associated loss of earnings, the company requested that the Wholesaler:
 - undertake a full review of the case; and
 - provide the company with further details of the Wholesaler's activities on the day in question.
- The sections below summarise the responses and arguments advanced by the Wholesaler (after the company, as retailer, sought to present the complaint to the Wholesaler on the customer's behalf).

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- A water main, which provided the customer with one of the three supplies entering the Park, burst on 5 September 2017. The other two supplies remained unaffected throughout. In order to allow the Wholesaler to start the Repair, the affected supply to the Park (and to other customers in the area) was switched off on the morning of 5 September 2017. The customer was asked not to attempt to use any water from this supply overnight following the Repair, as the pipe required chlorination and flushing as a precaution. A ‘*Do Not Drink*’ notice was issued. Water samples were collected and sent for analysis and this main could not be reinstated until there was confirmation that the tests had passed.
- The supply was fully restored on the afternoon of 7 September 2017.
- Alternative supplies were not requested by the customer at the time of the incident and the Wholesaler believed, therefore, that the remaining two supplies were sufficient. The Wholesaler holds no information regarding which particular aspects of the Park are served by which water supply, as this is private pipework.
- When an inspector attended the property to restore the water supply and to lift the ‘*Do Not Drink*’ notice, he was advised that the customer still had supply. Further investigation indicated that the meter bypass valve was already open and it was established with Park staff that they had a valve key. This information, in part, was the cause of delay in responding to the customer’s claim.
- The Wholesaler did not give any instruction to the customer to close or alter Park operations due to the burst water main. The customer’s claim for loss of business is based on a drop in visitor numbers and café/retail takings relative to the same date from previous years. However, in any event, the Wholesaler contends that this is not a fair measure of the customers expected takings on the day in question because:
 - 5 September 2017, the day of the incident, was a Tuesday following the end of the school summer holidays. The majority of the schools, both in the area and nationally, had returned to classes and the associated holidaymaker footfall would be expected to reduce as a result of families returning home;
 - the end of school holidays would have a negative impact on the footfall and takings of a business such as the Park;
 - when compared to other similar Tuesdays during the school term in the accounts provided, it was apparent that the takings were broadly similar and showed no obvious decrease in footfall or takings;
 - additionally, footfall increased during the following two days, when the affected water supply to the Park was still out of operation – supply was not restored until the afternoon

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- of Thursday, 7 September 2017. If the burst was the cause of the fall in visitor numbers, there was an expectation that this would have continued over the following two days;
- in comparison, 5 September 2014 was a Friday prior to the school term resuming. In 2015, this date was a Saturday and in 2016, it was the last Monday of the summer holidays (for many schools – it is aware that school timetables are not universal in this regard). The Wholesaler does not consider that it is reasonable to compare takings on these days with a term-time Tuesday, considering the nature of the customer's business;
 - furthermore, the accounts provided show a strong correlation between visitor numbers and takings from merchandise and refreshment sites within the Park (as would be expected). On 5 September 2017, takings from refreshment sites were actually slightly higher than would be expected given the number of customers, which indicates that these sites were not themselves adversely affected by the burst main.
- The Wholesaler does not consider that the drop in visitor numbers was attributable to the burst because:
 - the customer did not close their doors on the day (nor were they instructed to do so by the Wholesaler) and therefore, the general public would have been largely unaware of the burst prior to arrival at the Park; and
 - there was also no corresponding drop in refreshment sales relative to visitor numbers, as might be anticipated had the refreshment sites been unable to operate.
 - These are the key reasons that the Wholesaler has cited for declining to reimburse the customer's financial losses as claimed.
 - The Wholesaler has also disputed that 'loss of business' would be the appropriate measure of compensation (anyway) in a case such as this. On this issue, the Wholesaler points out that the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, at Regulation 17E, set statutory amounts for payments to household and non-household consumers in relation to service failures in connection with powers under section 60 Water Industry Act 1991. These amounts do not depend on the particular circumstances of the consumer, without prejudice to anything agreed as part of the supply agreement pursuant to section 55 (which the Wholesaler does not believe to be relevant in this instance).
 - It is argued that this is entirely appropriate because wholesalers must prioritise the reconnection of water supplies in line with the vital interests of the community as a whole, not the impacts on particular business consumers. For example, water companies must prioritise supplies of water to households, hospitals, schools, essential businesses like supermarkets and nationally significant infrastructure sites over supplies to non-essential retail outlets and leisure

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businesses, however much money the latter might lose. Water companies would be heavily criticised if instead they prioritised restoring supplies to their most valuable customers or to those customers that would suffer the highest loss of business. It would be very unfair for wholesalers to be required to pay compensation to non-household customers on the basis of the value of the business interruption to the particular business.

- The Wholesaler asserts that the customer's complaint is clearly between it (the Wholesaler) and the consumer it does not relate to the retailer/company in any way and should be declined in accordance with WATRS Scheme Rules 3.4 and 3.5.
- Section 60(5) of the Water Industry Act 1991 and the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 provide the consumer with direct statutory recourse against the wholesaler. There is no role for the retailer/company in relation to disconnections for the carrying out of necessary works under section 60 of the Water Industry Act 1991 and the retailer/company has no statutory responsibility to the consumer in respect of such disconnections.
- In relation to the contractual relationship between the retailer/company and its customer, South West Water has not seen the contract but would expect disconnections under section 60 to be outside the contractual responsibilities of the retailer/company, in line with the statutory position. [] notes that the standard retail supply terms and conditions on the retailer's website ([https://www.\[\].co.uk/footer-links/t-cs](https://www.[].co.uk/footer-links/t-cs)) state that "*the physical supply of water and removal of sewerage to the Site is undertaken by the Wholesaler*" and that this is not part of the "Services" that the retailer provides (clause 1.14).

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

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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. I note the submissions that the company makes at the start of its defence under its ‘Overview’ heading. In this section, the company explains its responsibilities, as retailer, in relation to those of the Wholesaler (“the Split”). In terms of ‘setting the scene’, I find the company’s submissions about the Split, on page 1 of its defence, to be both relevant and correct – and I accept those submissions.
2. The remainder of the defence (pages 2, 3 and 4) consists only of a summary of the Wholesaler’s response to the customer’s claim. There is no defence of the company’s position – from its discrete standpoint as retailer – that I can pick up.
3. I have also had the benefit of reading the customer’s comments, emailed on 23 August 2018, in response to the company’s defence (“Comments”). On the subject of the Split, I note what the customer says in their Comments, i.e. that:

“... We do not concern ourselves with the distinction between wholesaler and retailer, we are simply the customer of the retailer ...”

4. However, I am conscious that appreciating the implications of the Split seems to be crucial in this case. When assessing whether the company has failed to provide its services to the standard to be reasonably expected, I find it is vital to have regard to the responsibilities and services the company had in the circumstances. I cannot see that the company had any responsibility for the Repair at the Park on 5 September 2017 or for any of the related decision-making or interactions with the customer’s staff on that day. Those activities, I find, fell wholly within the Wholesaler’s realm of responsibility.
5. The key role that the company has in this scenario, I find, is to take up the customer’s case against the Wholesaler. I have assessed whether the company can be said to have discharged its responsibilities to the customer in this specific regard. The conclusions and findings I have

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come to are that:

- a. the customer was already engaging directly with the Wholesaler (or attempting to) and therefore, the company became involved a little later down the line; and
 - b. taking into account the various letters to the customer from [], the company's Complaints Handler, I am satisfied that the company adequately:
 - i. conveyed the customer's concerns to the Wholesaler; and
 - ii. kept the customer updated as to the Wholesaler's responses and as to the timeframes for progress; and
 - c. I am satisfied that the company did enough (to discharge its obligations to the customer in this respect) by reporting back – in comprehensive detail – as to the responses that the Wholesaler was giving.
6. For the reasons above – and given the realities of the Split between retailer and wholesaler responsibilities generally – I cannot find any failure on the part of the company in the provision of its services in this matter.
7. The customer's complaint, therefore, is unable to 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 9 October 2018 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.

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Nik Carle, LLB (Hons), Solicitor, DipArb, FCIArb

Adjudicator

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