

WATRS

Water Redress Scheme

ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1134

Date of Decision: 02 January 2019

Complaint

The customer submits that a planning application has been made for development in a field behind his home. The planning application has been approved by the Planning Authority in outline, but an appeal on an identical application was dismissed by the Planning Inspector at appeal. The Inspector's decision notice was issued after the decision issued by the Planning Authority. It is unarguable that the proposed development is harmful to the public interest. He believes that the company may not be obliged to divert the main because the site will not be 'improved' by the development, and the request to divert the main is not reasonable, because the developer is not acting reasonably. The customer submits that he would like the company *"to resist diverting the water main. If it turns out that they cannot legally resist diverting the water main, then at least resist diverting it within areas of preserved ridge and furrow or within the root protection area of any trees (The spinney has a temporary TPO currently, which is expected to be made permanent)."*

Defence

The company submits that it is under a statutory duty to comply with Section 185 of the Water Industry Act 1991. This sets out that where its assets are located within privately owned land, the owner of that land may by notice require it to alter or remove its asset if it is necessary to enable them to carry out a proposed improvement of the land. Its duty to comply with Section 185 is not subject to planning consent being granted. The planning inspectorate has its own powers in relation to enforcing its planning decisions. On 30 August 2018, it confirmed to the customer that it did not have any live applications for the site at the time. Due to the constraints of the General Data Protection Regulation (GDPR), it is unable to comment or share details of applications that may or may not have been made, and is therefore unable to inform the customer when or if an application has been received. If and when an application is made, it will take into account any planning restrictions placed on the land before the route for a diversion is defined. No offer of settlement was made.

Findings

I accept the company's submissions about its obligations under Section 185 of the Water Industry Act 1991. Under Section 185, the company is under an obligation to comply with any notice except to the extent that that requirement is unreasonable. I acknowledge the appeal decision submitted by the customer as evidence to support his submission that an appeal on an identical

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application was dismissed by the Planning Inspector, and that the potential development is unreasonable. However, I am particularly mindful that the customer's own submissions show that the outline planning application still stands. It falls outside my remit to review the planning process and the merits of planning applications. Moreover, no evidence has been submitted to show that an application has in fact been made for a diversion of the main. I acknowledge that the customer is seeking to pre-emptively secure a guarantee from the company in the event that an application for a diversion is made. However, this is not a remedy available under WATRS. In addition, I am not satisfied that WATRS is the appropriate forum to determine a route for diversion, if an application is made and a diversion does take place. I acknowledge the customer's concerns and I appreciate that the customer will be disappointed. However, in the absence of evidence to show that the company has failed to provide its services to the standard to be reasonably expected and that the customer has suffered loss or detriment, this claim is unable to succeed.

Outcome

The company does not need to take any further action.

The customer must reply by 30 January 2019 to accept or reject this decision.

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ADJUDICATOR'S DECISION

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Party Details

Customer: []

Company: [].

Case Outline

The customer's complaint is that:

- A planning application has been made for development in a field behind his home. The planning application has been approved by the Planning Authority in outline, but an appeal on an identical application was dismissed by the Planning Inspector at appeal. The Inspector's decision notice was issued after the decision issued by the Planning Authority. It is common ground that the applications are identical. It is unarguable that the proposed development is harmful to the public interest.
- A 15" primary trunk water main that crosses the site will need to be diverted to build the development. If the main is diverted the development may not be viable to the extent that the outline planning permission could be economically revoked. Any new application would be considered de-novo and the Inspector's decision taken into account.
- He believes that the company may not be obliged to divert the main because the site will not be 'improved' by the development, and the request to divert the main is not reasonable, because the developer is not acting reasonably, having sought the decision of the Planning Inspector, in ignoring it. Recent case law (Thornton Hall Hotel Ltd, R (On the Application Of) v Wirral Metropolitan Borough Council) supports this view. The company's ethical policy advises it to act in the public interest; however, it is its clear intention to divert the main if asked.
- A reserved matters application is under consideration, so it is necessary to bottom this matter out before the company agrees to divert the main.

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- He also has concerns that the main may be diverted through the root protection areas of trees subject to Tree Preservation Order.
- The customer submits that he would like the company *“to resist diverting the water main. If it turns out that they cannot legally resist diverting the water main, then at least resist diverting it within areas of preserved ridge and furrow or within the root protection area of any trees (The spinney has a temporary TPO currently, which is expected to be made permanent).”*

The company’s response is that:

- Whilst it understands that new developments can sometimes be contentious, it has a duty to the communities it serves as well as the commercial entities that use its services. As a statutory water and sewerage undertaker, it is under a statutory duty to comply with Section 185 of the Water Industry Act 1991. This section sets out that where its assets are located within privately owned land, the owner of that land may by notice require it to alter or remove its asset if it is necessary to enable them to carry out a proposed improvement of the land.
- It has a duty to comply with such a request. The work is carried out at the expense of the person giving the notice, as opposed to bill-paying customers.
- It appreciates that there may be planning complications; however, this is not something it can get involved in as it has its own duties to comply with, which are enforceable by its regulator, Ofwat. Its duty to comply with Section 185 is not subject to planning consent being granted and therefore it still needs to comply with the request as part of its duties as a statutory water and sewerage undertaker. The planning inspectorate has its own powers in relation to enforcing its planning decisions.
- On 30 August 2018, it confirmed to the customer that it did not have any live applications for the site at the time. Due to the constraints of the General Data Protection Regulation (GDPR), it is unable to comment or share details of applications that may or may not have been made, and is therefore unable to inform the customer when or if an application has been received. If and when an application is made, it will take into account any planning restrictions placed on the land before the route for a diversion is defined.

How is a WATRS decision reached?

In reaching my decision, I have considered two key issues. These are:

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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. This claim concerns a potential development on land behind the customer's home. In the absence of any evidence showing that the claim *"fall[s] to be determined by Ofwat"*, this case falls within the scope of the scheme under Rule 3.3 *"development and new supplies"*.
2. I remind the parties that WATRS is an evidence-based process. 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.
3. I accept the company's submissions that under Section 185 of the Water Industry Act 1991, where its assets are located within privately owned land, the owner of that land may by notice require it to alter or remove its pipe or apparatus if it is necessary to enable them to carry out a proposed improvement of the land.
4. Subject to the asset not being in, under or over a street, and any security reasonably required being provided; the company is under an obligation to comply with the notice except to the extent that that requirement is unreasonable.

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5. I acknowledge the appeal decision dated 20 November 2017 submitted by the customer as evidence to support his submission that an appeal on an identical application was dismissed by the Planning Inspector, and that the potential development is unreasonable. However, I am particularly mindful that the customer's own submissions show that the outline planning application still stands. It falls outside my remit to review the planning process and the merits of planning applications. It is also not within my remit to determine whether the site will be improved by the development, whether the development is in the public interest, or whether the developer has acted unreasonably. I am only able to assess the actions/conduct of the company.
6. Moreover, no evidence has been submitted to show that an application has in fact been made for a diversion of the main. As discussed above, under the WATRS Scheme it must be shown that the company has failed to provide its services to the standard to be reasonably expected and that as a result of this failure the customer has suffered some loss or detriment. The evidence submitted to this adjudication does not show a failing on the company's part, nor is there evidence to show that customer has suffered a loss or detriment. I acknowledge that the customer is seeking to pre-emptively secure a guarantee from the company in the event that an application for a diversion is made. However, this is not a remedy available under WATRS. In addition, I am not satisfied that WATRS is the appropriate forum to determine a route for diversion, if an application is made and a diversion does take place.
7. For the avoidance of doubt, I also note the company's submissions about its obligations under the GDPR. GDPR issues do not fall within the scope of WATRS. I am unable to direct that the company share any details of any applications made.
8. Consequently, in view of all of the above, I acknowledge the customer's concerns and I appreciate that the customer will be disappointed. However, in the absence of evidence to show that the company has failed to provide its services to the standard to be reasonably expected and that the customer has suffered loss or detriment, this claim is unable to succeed.
9. Please note that this decision does not preclude the customer from seeking alternative means of redress for his complaint. The applicant may wish to seek independent legal advice.

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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 30 January 2019 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.



U Obi LLB (Hons) MCIArb
Adjudicator

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