

WATRS

Water Redress Scheme

ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1212

Date of Decision: 6 June 2019

Complaint

The customer's garage and external areas of his property were flooded with sewerage in both 2015 and 2016. The customer claims that the flooding and associated work caused disruption and damage, but the company has not accepted liability and has blamed extreme weather conditions. The customer also claims that poor customer service was provided by the company subsequent to the flooding and during the complaints process. The customer believes that the company was negligent in the way it dealt with the flood in 2015 and that it only took action to prevent further flooding after he contacted the company's Chief Executive Officer. He wants the company to compensate him in the amount of £4,050.00 for the losses he suffered as a consequence of the flooding. He requests a full refund of his sewerage charges from the date of the flood in 2015 to the date on which this dispute is resolved. He wants the company to provide him with an explanation as to why no representative of the company took ownership of the complaint in order to resolve it and claims £2,500.00 for the anxiety and stress suffered as a result of the company's customer service failings.

Defence

The customer's complaint regards the company's statutory duty to maintain effectual drains and this falls out of the scope of the Water Redress Scheme (WATRS). In any event, the flooding in 2015 and 2016 was caused by extreme weather conditions for which the company is not liable. The customer is not entitled to a refund of sewerage charges as he has received a sewerage service and is legally obliged to pay for it. The company has not failed to provide its customer service to the standard the customer is reasonably entitled to expect; it made a GSS payment in May 2016 for a customer service delay and offered a GSS payment following the 2015 flood, but the customer refused to accept it. It has dealt with the customer's complaint in accordance with its guaranteed standards at all other times.

The company has not made an offer of settlement.

Findings

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In accordance with WATRS's Scheme Rules, the customer's complaint regarding the company's alleged breach of its statutory duty to maintain effectual drains falls outside the scope of this Scheme for several reasons; the complaint concerns complex issues of law, the complaint would be better addressed to a more appropriate forum, and the complaint concerns matters over which Ofwat has powers to determine an outcome. Therefore, the customer's claim for losses suffered as a consequence of sewerage flooding cannot be adjudicated upon through this Scheme. With regard to the customer's complaint about poor customer service, the majority of issues raised concern the way the company dealt with the alleged breach of its statutory duty to provide effectual sewers. I find that, as the Scheme Rules do not allow me to consider the company's liability under section 94 of the Water Industry Act 1991, I am also unable to consider whether the customer service the company provided when dealing with these matters fell below the reasonably expected standard. With regard to the remaining customer service issues raised by the customer, the customer has not demonstrated that the company failed to supply its services to the standard that would reasonably be expected. The customer claims a refund of sewerage charges from the date of the flood in 2015 to the date this complaint is resolved. However, in accordance with the Water Industry Act 1991, the company has provided a sewerage service and is entitled to charge for it, and the customer has received a sewerage service and is obliged to pay for it. Therefore, the claim for a reimbursement of sewerage charges cannot succeed. The customer also requests an explanation of the way his complaint was handled, but I find that the information provided in evidence by the company satisfies this request and, therefore, I make no direction to the company in this regard.

Outcome

The company does not need to take any further action.

The customer must reply by 4th July 2019 to accept or reject this decision.

- The company were aware of localised flooding before 2015 but, even after the Property flooded in 2015, it took no action to prevent further flooding until he contacted the company's Chief Executive Officer after the second flood in June 2016. The company then fitted a non-return valve in to the sewer chamber under its drain in the front garden of the Property to prevent further flooding and extensive works were carried out in the surrounding areas. His neighbour informed him that the company had re-directed the sewers and pipes away from the Property and he questions why the company would take expensive remedial action if the floods were not caused by a fault with the sewer and pipes.
- He feels that the company was negligent in the way it dealt with his complaint in 2015 and could have prevented the 2016 flood if it had taken preventative measures earlier. The company offered him £500.00 as a goodwill gesture and a rebate of 50% of the sewerage charges paid in 2015. He rejected these offers on the basis that they were not proportionate to the failings of the company.
- He wants the company to compensate him in the amount of £4,050.00 for the losses he suffered as a consequence of the flooding; £250.00 for the insurance excess he had to pay, £700.00 for replacement turf and slabs damaged during the clean-up process, £100.00 for the cost of numerous telephone calls to the company and to his insurer, £1,500.00 for loss of earnings on days the customer had to wait at the Property for the company's representatives, and £1,500.00 for loss of uninsured possessions.
- He also wants the company to provide a full refund of his sewerage charges from the date of the flood in 2015 to the date on which this dispute is resolved.
- He wants the company to provide him with an explanation as to why no representative of the company took ownership of the complaint and why the company did not resolve it earlier.
- He claims £2,500.00 for the anxiety and stress suffered as a result of the company's poor customer service. He explains that he has had to fight every step of the way to get the company to take action, he continually had to chase the company for information and updates, the company failed to explain why and how the flooding occurred, the company missed appointments and he was continually worried that the Property would flood again, which caused distress and anxiety.

The company's response is that:

- Rule 3.5 of the Scheme Rules states that it cannot be used to adjudicate disputes over which Ofwat has the power to determine an outcome. Ofwat has the power to determine disputes under certain sections of the Water Industry Act 1991 including section 94, the "General Duty to Provide Sewerage System."

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- Section 94 of the Water Industry Act 1991 places a duty on sewerage companies to maintain their sewers to ensure that their area is effectively drained. This statutory duty is enforceable under Section 18 of the Act by either the Secretary of State or the Director of Water Services. As such, Ofwat is the relevant authority for enforcing Section 94. This was confirmed by the House of Lords in *Marcic v Thames Water Utilities Limited [2003] All ER(D) 89*. Therefore, the customer's complaint regarding the sewage flooding at the Property in July 2015 and June 2016, and the claim for losses consequential to that flooding, are outside of the scope of WATRS and should be addressed to Ofwat instead.
- In any event, it denies liability for both incidents of flooding at the Property.
- It states that the flooding on 17 July 2015 was due to extreme weather conditions. A significant storm passed over the [] City area during the early hours of the morning. The weather radar for the period reported 26.1mm of rain fall over a 2 ½ hour period, giving a return of 1 in 6 years.
- Furthermore, the storm was electrical and resulted in a significant number of lightning strikes. The lightning caused a fluctuation or small loss of the power supply to the pumping station and resulted in the electrical tripping of the pumps at approximately 4 a.m. The alarm at the pumping station was a non-priority alarm as there is another emergency overflow sewer. A non-priority alarm will usually be attended to within an 8 to 12 hour period depending on circumstances; in this case both pumps were manually re-set within the usual time period for a non-priority alarm.
- However, the property suffered a sewerage flood. The company attended the Property to carry out a clean-up, which consisted of washing down and disinfecting the garden, the concrete garage floor, the paved areas at the front and washing down the grass. It denies that it caused damage to the grass or slabs during the clean-up process and states that the customer has failed to substantiate the claim that damage was caused.
- Following the incident, it undertook an inspection which did not identify any problems with the pumps, pipework or electrical systems. However, even though it had no legal obligation to do so, the company took action to prevent further flooding; the alarm response codes were increased to high priority, a new electrical relay was installed to prevent the pumps tripping, and a CCTV survey of the local sewers was undertaken which confirmed that there were no issues of concern.
- The flooding was not caused by any failure on the part of the company to provide its services to the standard to be reasonably expected. Furthermore, its refusal to accept liability for the flooding caused by extreme weather does not amount to a failure on its part.
- The flooding at the Property on 12 June 2016 was also due to extreme weather conditions. During the evening an extreme storm passed over the [] City area. The weather radar for the period reported 51mm of rain fall over a 2 ½ hour period, giving a return of 1 in 67 years.

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- The pumping station received a severe increase in flow at 6.00 p.m. The pump well was at maximum capacity by 6.15 p.m. but both pumps continued to operate until capacity reduced. However, the sewer backed up and sewage escaped from a manhole and flooded the Property. It denies that there were any failures of the pumping systems.
- It attended the Property to carry out a clean-up. However, when its contractors attended the Property, there were too many items in the garage and it could not carry out the work. It denies that it damaged the customer's garden and slabs and states that the customer has failed to provide any evidence to substantiate his claim.
- Even though it was not legally obliged to, it took further measures to prevent future flooding by installing a non-return valve on the lateral sewer serving the Property. It also installed a new overflow sewer downstream of the Property, set at a level below that of the manhole that has previously flooded.
- It denies that that the flooding event experienced by the customer was caused by any failure to provide its services to the standard to be reasonably expected. Both occasions of flooding were due to extreme weather conditions, but with different causes. In accordance with the Guidance Note for Weather-Related Exemptions in the Guaranteed Service Standard (GSS) Regulations issued by Ofwat, part 2.1 and 2.2 states that, if a customer suffers internal/external sewage flooding because of exceptional weather, the company does not have to make a GSS payment.
- Sewer flooding is most likely to occur during severe and exceptional weather and most modern public sewers are designed to cope with storms likely to occur on average once or more in 30 years. Customers might legitimately expect a GSS payment if flooding occurred in such weather. However, there are instances where a payment exemption may apply, including sewer flooding that has affected properties in a wider area, or where flooding is caused by storms with a return period of more than 30 years.
- The storm in 2015 had a return period of less than 30 years. During a review of the flooding incidents at the Property, it discovered that it had erroneously failed to pay the customer a GSS payment in respect of the first external flooding incident in 2015. In accordance with the GSS guidelines, it should have paid the customer 50% of the annual sewerage charges for that year. Therefore, it issued a cheque in the sum of £155.86 in accordance with its obligations. However, the customer rejected the compensation payment and the cheque was cancelled.
- As the storm that caused the flooding in June 2016 was a 1 in 67 year event, the customer was not entitled to a GSS payment in respect of that event.
- Its insurance company considered the customer's claim for consequential losses in the amount of £4,050.00 and found there to be no negligence on the part of the company. Therefore, it rejects

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the customer's claim. In any event, the customer has not provided any evidence to substantiate his losses.

- With regard to the claim of £2,500.00 for stress and anxiety caused by customer service failings, it denies that the customer service received by the customer fell below the standard which the customer could reasonably expect to receive. The customer's complaint has at all times been taken seriously and the only delay in responding to the customer was in November 2016, which is admitted. Due to this delay, the customer was awarded £20.00 in accordance with GSS standards. Therefore, it has already compensated the customer in accordance with its legal obligations.
- It offered the customer a goodwill gesture payment of £500.00 for the inconvenience and stress caused by both flooding incidents. However, this was not an admission or acceptance that the company has failed to provide its services to the standard reasonably expected, or that the company has been negligent. It was simply a goodwill gesture that the company thought was fair in the circumstances. However, the customer rejected the offer.
- It denies that it has failed to provide the customer with a full explanation of the incidents or kept the customer informed at all times as alleged. It has been to the Property and met with the customer, although further site meetings were cancelled by the customer due to family matters. It has always responded to correspondence in a timely manner and in accordance with its guaranteed standards, except for the delayed response in November 2016, outlined above, for which it has already made a GSS payment.
- With regard to the customer's request for a full sewerage refund from 2015 to the date on which this complaint is resolved, it denies that the customer is entitled to any further refunds. As previously stated, the company issued a cheque to the customer in respect of a 50% refund for sewerage charges in accordance with its legal obligations, however, the customer failed to cash the cheque.
- In any event, in accordance with Section 142 of the Water Industry Act 1991, it has the power to charge for services provided to the customer. It has provided the customer with a sewerage service and the customer is liable for the company's charges as the occupier of the Property in accordance with Section 144 of the Water Industry Act 1991. Therefore, the customer is not entitled to have his sewerage charges refunded from 2015.

How is a WATRS decision reached?

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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. The customer claims for losses consequential to sewerage flooding at his property in 2015 and 2016; an insurance excess, loss of earnings, damaged property, phone call charges and damage to his garden turf and slabs. Having considered the facts of the case, I find that the customer's complaint regards an alleged breach of the company's statutory duty to maintain its sewers to ensure that the customer's property was effectually drained.
2. Section 94 of the Water Industry Act 1991 outlines the company's duty to maintain its sewers and states:

“(1) It shall be the duty of every sewerage undertaker—

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and

(b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.

(2) It shall be the duty of a sewerage undertaker in performing its duty under subsection (1) above to have regard—

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(a) to its existing and likely future obligations to allow for the discharge of trade effluent into its public sewers; and

(b) to the need to provide for the disposal of trade effluent which is so discharged.

(3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above—

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Director.”

3. Having carefully reviewed the evidence and in view of the fact that the customer’s complaint raises issues relating to the company’s obligations under section 94 of the Water Industry Act 1991, I consulted the WATRS Scheme Rules to establish whether the complaint was within scope of this Scheme.

4. Rule 3.4 of the Scheme Rules states:

“WATRS may reject all or part of an application to the Scheme where it considers that:-

3.4.1 a customer should be referred to a more appropriate forum for the resolution of the dispute; or

3.4.2 the application should have been made against an alternative water and/or sewerage company; or

3.4.3 in exceptional circumstances, the dispute raises a complicated issue of law.”

5. Rule 3.5 of the Scheme Rules states:

“The Scheme cannot be used to adjudicate disputes which fall into one or more of the following categories:

- disputes concerning the Competition Acts 1998 and 2002 as amended;
- regulatory enforcement cases;
- bulk supply determinations;
- disputes between undertakers, between licensees and between undertakers and licensees;
- water supply licensing disputes;
- whistle blowing;

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- any matters over which Ofwat has powers to determine an outcome;
 - disputes relating to eligibility to transfer to a statutory licensee;
 - water quality legal standards;
 - enforcement cases under the Environmental Protection Act 1990 and the Environmental Act 1995 as amended;
 - disputes that are subject to existing court action or on which a court has ruled unless the court's decision has been set aside;
 - disputes that are the subject of an existing or previous valid application under the scheme;
 - the handling of CCWater and Ofwat complaints;
 - complaints which are being or have been investigated by a statutory or regulatory agency or agencies including the Drinking Water Inspectorate and/or the Environmental Agency in respect of the breach of a statutory or regulatory requirement unless a WATRS Notification or Option Letter has been issued in respect of the complaint;
 - resale and third party complaints;
 - disputes relating to the fairness of contract terms and/or commercial practices;
 - disputes concerning allegations of fraudulent or criminal activity; and
 - any dispute or disputes that are considered by WATRS to be frivolous and/or vexatious.”
6. I find that the complaints raised by the customer concerning the sewerage flooding fall outside the scope of this scheme for several reasons, which I shall now outline.
7. Having considered the facts of the case, I find that the complaints regarding sewerage flooding raised by the customer concern complex legal issues, specifically the company's compliance to section 94 of the Water Industry Act 1991 above. In view of this, I find that Rule 3.4.3 of the Scheme Rules prevents me from adjudicating on these issues.
8. Furthermore, in accordance with section 18 of the Water Industry Act 1991, Ofwat has the jurisdiction to take enforcement action against water companies that breach their section 94 statutory duty to maintain sewers. Therefore, I find that the complaint would be better addressed to Ofwat, which I consider to be “a more appropriate forum”, as per Rule 3.4.1.
9. In addition to this, Rule 3.5 specifically renders any matters over which Ofwat has powers to determine an outcome outside the scope of this scheme. As above, section 94 (3)(b) of the Water Industry Act 1991 delegates enforcement powers to Ofwat and, therefore, as an adjudicator

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operating under the rules of this Scheme, I have no jurisdiction to consider an alleged breach of section 94.

10. For the reasons I have outlined, and in accordance with the Scheme Rules, I find that the customer's claim for losses consequential to the company's alleged breach of section 94 of the Water Industry Act 1991 falls outside the scope of this Scheme and, therefore, I shall not adjudicate on these matters. I appreciate the frustration the customer will likely feel at this, but I do not have the jurisdiction to consider or direct upon these matters.
11. However, the customer also claims a refund of sewerage charges, asks for an explanation as to why the complaint was not dealt with more efficiently, and claims compensation for anxiety and stress caused by the company's poor customer service. Having considered the evidence, I find that the elements of these claims that are distinct from the alleged breach of the company's statutory duty are within the scope of this Scheme. Therefore, I am able to consider them.
12. With regard to the customer's claim for a full refund of charges from July 2015 to the time this claim is resolved, I have considered the evidence and the obligations of both the company and the customer under the Water Industry Act 1991. I accept that, in accordance with Section 142 of the Water Industry Act 1991, the company has the power to charge for sewerage services provided to the customer. The evidence demonstrates that the company has provided the customer with a sewerage service since he moved to the Property and the customer does not allege otherwise. Therefore, the customer is liable for the company's charges as the occupier of the Property in accordance with Section 144 of the Water Industry Act 1991. In view of this, the customer's claim for a refund of sewerage charges does not succeed.
13. The customer requests an explanation as to why no single company representative was able to take control of his complaint. The job note evidence supplied by the company demonstrates that on several occasions during the initial complaint process the customer requested to be referred to a more senior member of staff. I understand that this was due to the customer's frustrations regarding how the complaint was being dealt with, but I find that it would not have facilitated the consistency desired by the customer. In any event, I find that the evidence supplied by the company will sufficiently explain what action the company was taking in order to resolve the dispute and I find it unnecessary for me to make a further direction to the company in this regard.

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14. The customer also claims £2,500.00 for the distress and anxiety caused by the flooding and the poor customer service he received. As above, I am unable to consider the elements of this claim that pertain to the actual flooding incident as these fall outside of my jurisdiction and I find some of the customer service issues raised are intrinsically linked to a determination of liability under the Water Industry Act 1991 on the company's part. However, I can consider the distress and anxiety allegedly suffered by the customer as a result of other customer service failings on the part of the company.
15. The company accepts that it was liable to provide the customer with a GSS payment equating to 50% of the sewerage charges for 2015 following the first incident of flooding. The evidence demonstrates that the company attempted to make payment of £155.86 but the customer did not accept it. Having considered the GSS standards and conditions document provided in evidence by the company, I find that any GSS payments for external sewerage flooding must be claimed within three months of the incident. As the customer rejected the payment offered by the company and the three month time limit has now expired, I find that the company is no longer liable to make this payment and I make no direction to the company in this regard.
16. The company admits to a further breach of its guaranteed standards in May 2016 and, having considered the evidence, I accept that the company has applied a Guaranteed Standards Scheme (GSS) payment of £20.00 to the customer's account to satisfy its obligations under the GSS guidelines set out by the industry regulator, Ofwat. Therefore, I make no further direction to the company in this regard.
17. The customer complains that he was not provided with a full and accurate explanation as to why and how the flood occurred. I note that the customer was provided with an explanation on 14 July 2016 and, after referring the complaint to CCWater, the customer received a full report on the flooding incidents at the Property from the company on 28 February 2018. I am therefore satisfied that the customer now has the information he requires and find that I do not need to make a further direction to the company concerning this matter.
18. The customer states that the company made appointments to attend the Property but the company's representative did not arrive at all or was late in attending. The job note evidence presented by the company is somewhat confusing as it refers to the customer and another customer, presumably the customer's neighbour who was also affected by the flooding. I note that a site meeting was cancelled in December 2016, although the circumstances are not fully

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explained, and the company's representative was late for a meeting on 14 June 2016 but did eventually attend. However, I find that the evidence relating to these issues is insufficiently detailed to allow me to find that the company failed to provide its service to the standard the customer was reasonably entitled to expect.

19. The job notes support the customer's assertion that he made numerous telephone calls in the aftermath of the flooding in order to obtain information and updates on the clean-up job, the cause of the flooding and the measures that were being taken to prevent further flooding. However, I also note that the company had difficulty in contacting the customer on several occasions and find that this would have exacerbated the lack of communication between the parties.
20. The customer states that the lack of information exacerbated the stress suffered as he expected further flooding every time it rained heavily. The evidence shows that the first explanation of the cause of the flooding was provided shortly after the second incident on 14 July 2016. Having considered the evidence provided, I accept that the company's delay in explaining why and how the flooding occurred would have increased the customer's anxiety slightly, but I do not find that the company was obligated to supply this information. Furthermore, I find it likely that the main cause of the customer's anxiety was his belief that the company had done nothing to fulfil its statutory duty and prevent further flooding, the lack of communication about remedial works and the delays in cleaning up the property after the floods.
21. I reiterate that I am unable to determine whether the company is liable for a breach of section 94 of the Water Industry Act 1991 and, therefore, I am also unable to determine whether the company has failed to provide its customer service to the standard the customer was reasonably entitled to expect when dealing with the clean-up following the alleged breach of section 94 and measures to prevent further flooding.
22. In view of the above, whilst I appreciate that the customer will be disappointed by my decision, I do not find that the company's customer service fell below the standard the customer was reasonably entitled to expect with regard to the customer issues I am able to adjudicate upon.

Outcome

The company does not need to take any further action.

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What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- The customer must reply by 4th July 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.

KS Wilks

Katharine Wilks

Adjudicator

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