

WATRS

Water Redress Scheme

ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1276

Date of Decision: 25 March 2019

Complaint

The customer complains that, following an incident on 8 March 2018, the company failed to take adequate steps to prevent a further incident of flooding from the sewer into his cellar on 12 March 2018 and has failed to make a promised reimbursement of the costs that he incurred in dealing with the damage caused. The customer claims compensation in the sum of £1,451.94.

Defence

The company says that it investigated the cause of the flood on 8 March 2018 to the cellar and, although it suspected that this was not due to an escape from the sewer, it took appropriate and timely steps to investigate that were not completed by 12 March 2018 due to the fact that the relevant manhole was in the highway. The company found out only subsequently that there was a blockage caused by cement poured into the sewer by a third party. The company is not liable to the customer for this.

Findings

There is no evidence that the company failed to comply with its policies in relation to its response time and, by reason of the decision in *Marcic v Thames Water Utilities Ltd* and *Dobson v Thames Water Utilities Ltd* the customer is precluded from claiming on the basis merely that there has been an escape of sewage. I find that the company was taking ongoing steps to investigate when the second flood occurred and the company was supplying its services to the requisite standard. However, I find that the company indicated to the customer that it would reimburse his costs up to £500.00. The customer's evidence indicates that costs in excess of £500.00 were incurred. I find that an average customer would not conclude that the company would deny liability and make a goodwill payment of only half the maximum promised sum. As £250.00 has already been paid in relation to the customer's claim (excluding £75.00 in relation to a different aspect) the company should pay a further sum of £250.00.

Outcome

The company needs to take the following further action: pay compensation to the customer of £250.00 (in addition to the goodwill payment already made).

The customer must reply by 22 April 2019 to accept or reject this decision.

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ADJUDICATOR'S DECISION

Adjudication Reference: WAT/ /1276

Date of Decision: 25 March 2019

Party Details

Customer: []

Company: [].

Case Outline

The customer's complaint is that:

- The customer complains that, following an incident of significant flooding by foul water into his cellar at [] on 8 March 2018, the company took insufficient measures to prevent a further similar incident in the same week.
- The customer complains of poor investigation, conflation of the details of the incident at his home with that of his neighbour and delay. He contends that the company was negligent and challenges the company's description of its activities on site following the first incident.
- The customer seeks compensation in the sum of £1,451.94.

The company's response is that:

- Section 94 of the Water Industry Act 1991 requires the company "to provide, improve and extend the system of public sewers and to cleanse and maintain those sewers as to ensure that the area is and continues to be effectually drained." The Act also imposes a statutory scheme by which alleged failures to comply with the statutory requirements are enforceable under section 18 of the Act alone and not by individual proceedings. The courts have determined that a reactive system of maintenance is reasonable in all the circumstances, given the vast nature of the sewage system: see *Marcic v Thames Water Utilities Ltd* and *Dobson v Thames Water Utilities Ltd*.
- The customer contacted the company on 8 March 2018 to report that water was flooding into the cellar at his property. Under the company's service level response time in place at the time, a job was raised for it to attend by 10 pm the following day.

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- When the company visited on 9 March 2018, the flood water had already been pumped out by the customer. A camera survey of the public sewer at the rear of the property was found to be running clear. Further work was raised to carry a camera survey in the public sewer on the main road at the front of the property, which was not possible at the time due to traffic conditions.
- The company revisited on 12 March 2018 but it was still not possible to carry out the camera survey on the main road. Later that day the customer called to report further flooding into his cellar again. The company arranged to visit later that day.
- When the company attended, the customer was in the process of pumping out the flood water. Dye testing on a highway gully and water ponded around a BT and Virgin cable box was carried out, with the dye appearing in the sub floor at the customer's property. The company advised the customer that the flooding issue may be the responsibility of [] Highways and the cable companies to resolve. The company says, however, that it still intended to carry out a camera survey under the main road.
- On 13 March 2018 the company re-visited and found that dye had appeared in the cellar of the neighbouring property (139) and a highway gully outside 135 was still blocked. The company contacted the local council highways team about the highway gully.
- On 14 March 2018 the company's 'out of hours' team arrived at 10pm and was able to carry out a camera survey on the sewer in the main road. It was found that a third party had put concrete down the sewer causing a blockage. Further work was raised to carry out precision cutting to remove the concrete. This was completed on 21 March 2018.
- The company denies liability and states that the actions taken to investigate by camera were within a seven days' service level agreement with its contractor and it was completed outside normal working hours within this timeframe. The company's first response vehicles do not carry the specialist camera equipment required to survey mainline sewers, and work of this nature is carried out by contractors as quickly as possible depending on the SLA set, and staff/equipment resources available.
- The customer has been compensated with a goodwill payment of £325.00 and his tenant who is resident at the flooded address has received a guaranteed services scheme payment.

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.

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2. Whether or not the customer has suffered any financial loss or other disadvantage as a result of a failing by the company.

If the evidence provided by the parties does not prove both of these issues, the company will not be directed to do anything.

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 contends that the company has not provided its services to an adequate standard because, had it acted more promptly, the second incident of flooding that occurred four days after the first, could have been avoided. In particular it is apparent from the documentation that he complains:
 - a. That the company was slow to attend: it did not acknowledge the customer's complaint that the flooding was by foul water;
 - b. That when a crew first attended on 9 March 2018, the customer was not still in the process of pumping out the water. The company insisted that the water was fresh water and therefore nothing to do with the company, apart from an engineer who left a voicemail message saying that if it occurred again then the company would pump the water out.
 - c. When the second incident occurred on 12 March 2018, the company said that it did not have a crew available and as it was fresh water the customer would need to take responsibility.
 - d. On 15 March 2018, it was the local authority that confirmed that a blockage had been found in the sewer and not the company.
 - e. That he was initially told that the company would cover the costs but when the invoices were sent, it had to be transferred to "legal" who refused to make payment other than by way of goodwill.

The customer contends that the company's repeated assertion that the issue was to do with ingress of surface or clean water led to delay in taking action and this, he contends, was negligent.

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2. A further complaint made by the customer that the company had referred to the situation at the neighbouring property in its correspondence I find to have been resolved by a goodwill payment of £75.00 (which forms part of the total goodwill payment of £325.00 referred to in the summary of the company's submissions).

The factual background

3. The documentation submitted in the case indicates that the company's initial suspicions were that the water entering the customer's cellar was not waste water but clear water. The first entry reads:

Advisor stated there is a common supply pipe that is possibly leaking and when supply turned off by plumber this will also turn off water to 137 – 143. Contact updated as private issue.

When the customer contacted the company later that day, the company was still of the view that the water in question was clear water or water from the street. The company's records state:

Customer calling as they have got WW Flooding inside of the cellar and neighbour at [] is also affected, they have got the maintenance on site and they think this is coming from the surface water, advised we will attend next day 10pm to inspect.

Although the customer says that the company continued to maintain that the water in question was a leak from a clear water supply or from the pavement, it is notable that the job sheet records for 9 March 2018 state:

Job not resolved, FW raised for mainline CCTV to check the mains and establish cause of flooding.

The detailed entry made clear that this related to raising a job request for camera survey at manhole 8001 to 9901, which was in the middle of the road and too dangerous to inspect at that time. While I accept, therefore, that the company may have continued to express their view at this time that the ingress of water was likely to have come from an external cause, such as the street drains, I find that the company did not hold that view with such certainty that it closed its mind to taking investigations in relation to the sewers.

4. The customer complained to the company again on 12 March 2018 because the cellar was, again, filling up. I find that in that telephone call, the customer asked about help with drawing off the waste water. The customer says that he explained that on the previous occasion an engineer had confirmed that there was foul water in the cellar and that the company would assist if another incident occurred. There is nothing inconsistent in the company's documentation about this and I find that it is probable that it was said. The customer says that

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he was told that no help would be provided and that the water in his cellar was not waste water. The company's records indicate that the company said that it would not be able to assist with this on that day but it would do so in the next couple of days. This is also consistent with the company's assertion that, as the customer was pumping out the cellar, it would be quicker to continue with pumping as the company had no means to protect flooring in property. The company's records indicate that the customer's wife said that she was not prepared to wait for the company to provide pumping equipment that could be supplied free of charge.

5. The company's records indicate that the company did attend on that day, however. The company notes that it dye tested the highway gully and water ponded around BT and Virgin cable box, and dye appeared in the cellar. The company acknowledges that it indicated to the customer that the issue may be the responsibility of [] Highways and the cable companies and not the responsibility of the company.
6. A further attendance on 12 March 2018 shows that it had intended to start arrangements to put a camera survey in place through the manhole in the highway. The log for this entry said, among other matters:

Arrived on site to carry out cctv form mh 8001 d/s to 9900 approx 80m we first filled up with water located mh 8001/9900 found due to location of the mh being in middle of the road, with HGV/BUSES/CAR'S passing constantly unsafe to set up.
7. The company's log indicates that the company then attended again to carry out a camera survey on 13 March 2018 and discovered that the sewer was blocked with cement.
8. The company additionally attended the property on 15, 17 and 19 March to try to clean the cellar, although this work was inhibited by gases that required a four-man team and breathing apparatus.
9. On 21 March 2018 the cement in the sewer that was causing the blockage was removed.

Findings

10. As indicated in paragraph 1 above, the issue in this case is as to the adequacy of the company's response to the customer's complaint of flooding on 8 March 2018. The customer does not say that the company should have known before 8 March 2018 that there was a risk of foul water flooding in his cellar and there is no evidence that would support this contention. The customer

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argues rather that the company was negligent in that it did not take appropriate action following first notification of the flood.

11. By way of general observation I bear in mind that “negligence” is not a matter that can be determined under the WATRS scheme. My jurisdiction is limited only to the question whether the company has supplied its services to the standard that would reasonably be expected of it by the average person. I take into account that an average person would not expect a company to act in a negligent way, but my findings are not to be treated as a finding as to whether or not the company has committed a civil wrong that would be subject to trial in the courts.
12. I additionally accept the submissions of the company in respect of the application of the Water Industry Act 1991. In the absence of negligence, the courts do not have powers to reach findings in respect of the company’s performance of its obligations under section 94 of the Water Industry Act 1991, because a complaint of this type is reserved to OFWAT by section 18 of that Act. This was confirmed by the two legal cases referred to in the submissions of the company. The reasoning in those cases underlines that it is not for the courts to examine the company’s policies in relation to the company’s obligations to maintain, etc. the sewers. In the context of the WATRS scheme, therefore, I find that I have no jurisdiction to reach a conclusion that the company has failed to meet its obligations under section 94 of the Act and cannot consider whether the company has put in place suitable policies, but I can consider whether the company has operated its policies in a manner that would reasonably be expected of it by an average person.
13. In this context, I have considered the background facts set out above. I note that on 8 March 2018, the company agreed to attend the customer’s property, but did not agree to do so until the next day. The company says that this was within the service level required by its policies and there is no evidence to the contrary. I find that it is likely that the attendance of a customer service crew may not always be possible immediately upon a call to the company, even where an escape of foul water from the sewer is concerned. While I note that the internal records corroborate that the customer was told there was a clean water source nearby that could be a probable cause of the flooding, I find that there is no evidence to support the contention that this observation resulted in the company offering a slower response time.
14. Moreover, I further find that although the company may have continued to express the view that the source of the flooding was from the highway or other fresh water source, there is no

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evidence to suggest that the company had therefore stopped investigating whether its theory was correct. The documentation submitted by the company indicates that arrangements were underway to carry out a camera investigation but this could not be done immediately, largely because of the need to arrange for an out of hours inspection in the highway.

15. Even if the customer was told by an engineer that if the problem arose again the company would arrange for the draw down of the flood, it would appear that when the second incident occurred on 12 March 2018, the company did not have a crew available at the moment of contact and the customer was told that a crew would arrive within the next couple of days. In fact, the evidence shows that the company did attend on that day, albeit that no draw down of the flooding was commenced by the company until 15 March 2018. At the time of attendance, the documents show that the company was actively investigating the cause of the flooding, including considering the surface drainage but, in the light of the attempts that day to look at the manhole in the highway, I find that there is no evidence that the company's suspicion that there may a surface water issue prevented it also from investigating its own sewerage.
16. Overall, therefore, as the second flood occurred only four days after the previous one and I find that the company had not ceased or held up its investigation, I am satisfied that the second flood occurred in consequence of the blockage in the sewer but that the company had taken reasonable steps to investigate whether there was such a cause but had not been able to do so before 12 March 2018. It follows that I find that the company had provided its services in a way and to a timescale that would reasonably be expected of it.
17. The customer complains that on 15 March 2018, it was the local authority that confirmed that a blockage had been found in the sewer and not the company and I find that the documentation submitted by the company confirms that, although the customer was told that a CCTV inspection was to take place on 13 March 2018, there is no evidence that the customer was told the outcome. I find in the circumstances that this fell short of the expectations that an average customer would reasonably have of the company: the customer had a legitimate concern to know what was happening to his cellar and the company had previously suggested that a different cause was likely. It is not, however, apparent that any financial consequences would have flowed from the fact that the company did not communicate their findings until after the local authority had done so.

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18. As to the information given to the customer that the company would cover the costs of removing the waste water, the customer says that he was told this on 15 March 2018, although when the invoices were sent, it had to be transferred to “legal” because the claim was more than £500.00. I find that this is partially accepted by the company, which states in its letter to the customer dated 10 August 2018:

We advised you, we were only able to consider claims up to £500.00 and therefore the claim would need to be referred to legal services. I have investigated your claim on a legal liability basis, and unfortunately on this occasion the claim was denied.

I find that an average customer would have understood the promise made to have meant that up to £500.00 would be authorised but if more was sought then would have to be considered by “legal”. I find that an average customer would not expect that “legal” would find that no payment at all would be made on the basis that the company had no legal liability to pay.

19. The customer has submitted a calculation of his claim, which, although not supported by documentation, is likely to be a realistic reflection of the costs incurred in paying [] to pump out the cellar, the costs of hiring a pump, and payments to [] pumping services. This excludes other more contentious claims such as the payment to a tenant for electricity, the hours spent by the customer and his wife and payments in respect of the carpet. The expenditure relating to pumping out the property totals £648.02 and therefore exceeds the stated figure of £500.00. I find that an average customer would reasonably have expected that a sum of £500.00 would then be paid. Instead of making this payment, however, the company has paid only £250.00 by way of goodwill contribution. I find that in this way, the company has fallen short of the standards that would reasonably be expected of it.

20. I find, therefore, that the company should be required to make a further payment of £250.00 to bring the level of reimbursement to the promised maximum figure. As the sum of £75.00 referred to above relates to incorrect explanations given to the customer regarding the investigation, this does not fall to be deducted.

21. It follows from the above that I find that it is fair and reasonable that the company shall be required to pay to the customer a further sum of £250.00.

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Outcome

The company needs to take the following further action: pay compensation to the customer of £250.00 (in addition to the goodwill payment already made).

What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- The customer must reply by 22 April 2019 to accept or reject this decision.
- If you choose to accept this decision, the company will have to do what I have directed within 20 working days of the date on which WATRS notifies the company that you have accepted my decision. If the company does not do what I have directed within this time limit, you should let WATRS know.
- If you choose to reject this decision, WATRS will close the case and the company will not have to do what I have directed.
- If you do not tell WATRS that you accept or reject the decision, this will be taken to be a rejection of the decision. WATRS will therefore close the case and the company will not have to do what I have directed.



Claire Andrews, Barrister, FCI Arb

Adjudicator

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