

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1375

Date of Decision: 1 May 2019

#### Complaint

The customers argue that the company created unreasonable levels of noise while addressing a problem with the sewers near the customers' property, and that it handled the customers' complaint poorly. They seek compensation of £1,400.00 for loss of amenity, distress and inconvenience; £750.00 for the failure of the company's customer service agents to respond properly to their complaint; and £1,000.00 for the company's poor handling of their request for compensation.

#### Defence

The company acknowledges that there were customer service failures in its handling of the customers' complaint, but argues that it did not act negligently in its handling of the noise created while it was addressing a problem with the sewers near the customers' property.

It has offered the customers total compensation of £370.00.

#### Findings

The customers have not established that the company acted negligently regarding the noise created by its operations. The company has acknowledged that there were customer service failures in its handling of the customers' complaint, but the compensation offered by the company is fair and appropriate for the failures experienced.

#### Outcome

The company needs to take the following further action: It must pay the customers compensation of £370.00.

The customers must reply by 31 May to accept or reject this decision.

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# ADJUDICATOR'S DECISION

Adjudication Reference: WAT/ /1375

Date of Decision: 1 May 2019

## Party Details

Customers: [ ]

Company: [ ]

## Case Outline

### **The customers' complaint is that:**

- For seven days and nights, from 26 April 2018 to 3 May 2018, the company operated three tanker pump trucks outside the customers' property, running 24 hours a day.
- During this period, no reasonable steps were taken by the company to mitigate the noise created by the tankers, despite requests being made by the customers.
- During a phone call on 1 June 2018, an agent of the company acknowledged that erection of an acoustic barrier would reduce noise levels by 50%.
- In an email of 6 June 2018, the same agent acknowledged that there had been a delay in sourcing acoustic barriers.
- Due to the noise, the customers were unable to sleep properly, one was unable to work from home effectively, and both were unable to benefit fully from their home and garden.
- The company responded inadequately to the customers' complaints.
- The company's customer service agents failed to ensure that proper steps were taken to mitigate the noise, promised callbacks were not made on at least four occasions, and the company failed to draw the customers' attention to the company's complaint procedure in a timely manner.
- The company failed to respond properly and in a timely manner to the customers' 3 May 2018 complaint.
- In an email to CCWater, the company acknowledged that it had not considered the customers' request for compensation made in their 3 May 2018 complaint.

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- The customers claim compensation of £1,400.00 for loss of amenity, distress and inconvenience caused by the company's failure to take reasonable steps to mitigate the noise of the tankers; £750.00 for the failure of the company's customer service agents to respond properly to their complaint about the noise; and £1,000.00 for the company's poor handling of their request for compensation.

**The company's response is that:**

- On 26 April 2018, a sewer collapsed near the customers' property.
- Emergency work was undertaken that initially required the use of tankers.
- Due to the location of the collapsed sewer, replacement of the tankers with an overland pump was not straightforward.
- The customers made contact on 30 April 2018 to complain about the noise.
- The customers submitted a written complaint on 3 May 2018.
- On 17 May 2018, the company called the customers to discuss their complaint.
- The company accepts that having the tankers onsite for seven days was inconvenient for the customers, but it was necessary.
- The customers were able to remain in their home and did not lose the use of any rooms or their garden, although the company accepts that due to the noise the customers may not have wished to spend time there.
- Alternative accommodation was not offered immediately, as the customers still had use of their home. In addition, because these were emergency works, it was unclear how long the tankers would need to be used.
- An overland pipe cannot be set up immediately and requires a site assessment and preparation of the site.
- Acoustic barriers are never used to mitigate the noise of tankers as they would have no effect.
- The company acknowledges that there were four failed callbacks, but states that the customer has been paid compensation of £120.00 for these failures.
- Information on the company's complaint process was included in an attachment to emails sent to the customers and is available on the company's website.
- To succeed in a claim for nuisance, the customers must establish that the company was negligent, but it was not.
- The customers have been offered a total of £370.00, consisting of £120.00 for failed callbacks and £250.00 for the number of times the customer was required to make contact with the company.

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### **The customers' comments on the company's response are that:**

- The company has acknowledged that the noise of its tankers was unacceptable.
- The company must demonstrate that it took all reasonable care and due diligence to mitigate the loss of amenity experienced by the customers, using the best available techniques.
- The company has not established that it considered its duty to mitigate at all, or that it took any steps at all to mitigate the noise of the tankers.
- Installation of acoustic barriers would have had some effect on the noise of the tankers, and a larger acoustic containment could have been constructed.
- The company cannot rely on a blanket approach of never erecting acoustic barriers around tankers, but must attend to the specific situation in question.
- That the customers could physically use the rooms of their house and their garden is not the relevant consideration.
- The amount being claimed is reasonable.
- The customers have received a cheque for £120.00 but this has not been cashed.
- The company's approach to this claim constitutes an abuse of process.

### **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 customers to the standard to be reasonably expected by the average person.
2. Whether or not the customers have suffered any financial loss or other disadvantage as a result of a failing by the company.

In order for the customers' 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.

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## How was this decision reached?

1. The customers claim compensation of £1,400.00 for loss of amenity, distress and inconvenience caused by the company's failure to take reasonable steps to mitigate the noise of the tankers.
2. In Marcic v Thames Water plc [2003] UKHL 66, the House of Lords held that the statutory nature of the work undertaken by water companies entails that a different liability regime is applicable to water companies than to entirely private actors.
3. In the words of the court, "The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the Director [i.e. Ofwat] was intended to discharge when questions of sewer flooding arise."
4. The customers, of course, are not complaining about flooding, and so the factual basis of the customers' claim is different to that considered by the Supreme Court in Marcic v Thames Water plc. However, as emphasised by the Court of Appeal in Dobson v Thames Water Utilities [2009] EWCA Civ 28, the "Marcic principle" applies broadly to exclude claims for nuisance based on a water company's performance of its statutory obligations, except where the claim relates to certain responsibilities, including cleaning and maintaining sewers, and relies on a contention that the company performed its statutory obligations negligently.
5. The consequence of the House of Lords' ruling in Marcic v Thames Water plc, then, as interpreted by the Court of Appeals in Dobson v Thames Water Utilities, is that the company can only be required to pay the requested compensation if it has acted negligently or otherwise wrongfully. The simple fact that the customers have suffered damage as a result of the company's operation of its business does not entitle the customers to compensation.
6. In the present case, the customers have based their arguments upon a contention that the company did not use "the best available techniques". However, as just explained, that is not the applicable standard. Rather, the question is whether the approach taken by the company to the situation it was addressing was so inadequate that it constituted negligence. In essence, this means that the company must have failed to exercise ordinary care in a situation in which there was a clear risk of harm.

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7. The customers have satisfactorily established that there was a clear risk of harm resulting from the company's activities. As the customers have argued, while a loud tanker might be merely an additional noise in a busy city street, it will be far more disruptive in a smaller and quieter location.
8. The remaining question, then, is whether the company failed to exercise ordinary care. It must be emphasised, however, that "ordinary care" is a lower standard than "good customer service" or any similar standard. The company, that is, is not required to have acted in a praiseworthy manner, but only to have met the minimum that could reasonably be expected of it given the situation it was addressing. Moreover, the evaluation of the company's actions must be made with recognition of the context in which the company was acting: actions that would be negligent in one context might not be in another.
9. Based on the evidence presented in this case, I find that while the company could certainly have been more proactive in its efforts to protect local residents from the noise its tankers were creating, there is insufficient justification for finding that the company acted negligently.
10. The customers have acknowledged that work commenced at approximately 20:00 on Thursday 26 April. However, while the customers state that they experienced broken sleep the first evening, they do not report any neighbours discussing the work with the company or its workers until Saturday 28 April, and it was not until Sunday 29 April that the customers report the first complaint being made about the noise. While this delay may simply reflect a praiseworthy tolerance on the part of the customers and their neighbours, it nonetheless also provided a justification to the company in reaching a conclusion that while there was clearly noise being produced, it was not so loud as to be a substantial burden to the customers and their neighbours.
11. The company has also provided the reasonable explanation that while it was aware of the noise being created by its tankers, it could not immediately install a quieter overland pump because a site assessment and site preparation were first required. This pipe was then installed by Thursday May 3. There is no evidence on the basis of which I could conclude that the delay in completing installation of this overland pipe resulted from negligence on the part of the company.

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12. The customers also object that the company took no measures to limit the noise created by the tankers. However, as I have noted, the delay in a complaint being made provided the company with some level of assurance that the noise of the tankers was not unreasonably loud. The company was clearly aware that significant noise was being made, but as emphasised above, the consideration is whether the company acted negligently, and until Sunday 29 April the company had been provided with no information regarding the impact of the noise on local residents.
13. The company argues that it did not use acoustic barriers at this point as they would have made no difference, while the customers state that they were told by a company employee that barriers were not used because there was a problem sourcing barriers. However, even if the latter explanation is correct, there is no evidence from which I could conclude that the company's failure to source acoustic barriers resulted from the company's negligence rather than, for example, because its available barriers were currently in use or because there were no barriers available from its suppliers. In either case, the company's failure to use acoustic barriers would not have resulted from the company's negligence.
14. Ultimately, the burden is on the customers to produce evidence from which it could be concluded that the company acted negligently, and for the reasons given above, while I accept the customers' statements regarding the impact on their enjoyment of their property of the company's work, no evidence has been presented that would justify a finding that the company acted negligently with respect to the noise that it was making, and without a finding of negligence the law does not allow the compensation claimed by the customers to be awarded.
15. Consequently, this element of the customers' claim does not succeed.
16. The customers also claim compensation of £750.00 for the failure of the company's customer service agents to respond properly to their complaint about the noise being produced by its tankers.
17. The company has acknowledged that there were customer service failures in its responses to the customers' complaints and has offered the customers total compensation of £370.00 for these failures. In consultation with the WATRS Guide to Compensation for Inconvenience and Distress, I find that this amount is fair and reasonable for the specific problems encountered by the customer, once the customers' broader claim, as discussed above, has been detached. The

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customers experienced failures in customer service in a stressful situation, but the company did nonetheless respond to the customers in a substantive manner, including a personal visit by a company representative.

18. Consequently, the company must pay the customers compensation of £370.00 for failures in its customer service during the time in which its tankers were operating.
19. The customers also claim compensation of £1,000.00 for the company's poor handling of their request for compensation.
20. However, while the customers argue that the company failed to consider their request for compensation made on 3 May 2018, the evidence produced by the customers to support this contention makes clear that the company did consider the request but decided that the customers had not sufficiently justified the amounts they were claiming. It may have constituted good customer service for the company to then engage directly with the customers to address their concerns and see if there was a means by which a more specifically justified claim could have been presented. However, the law does not require that the company provide good customer service, and I find that it did not constitute a failure by the company to provide its services to the customers to the standard to be reasonably expected by the average person for the company to refuse to assist the customers in making a financial claim against it.
21. Consequently, this element of the customers' claim does not succeed.
22. In their comments on the company's Defence, the customers also argue that the company's approach to the WATRS process constitutes an abuse of process.
23. Under Article 5.4.3 of the Water Redress Scheme Rules, the customers were not permitted to "introduce new matters or evidence in their comments on the company's response". As a result, under the Rules this additional claim must be "disregarded".
24. Nonetheless, I will note that even if Rule 5.4.3 did not require that the customers' claim of abuse of process be disregarded, I would not find that it succeeded.
25. The customers object to only being given two days in which to comment on the company's Defence. I acknowledge that this is a short period for review of a company's Defence and

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submission of comments, however this is the period expressly stated in Rule 5.4.3 of the Water Redress Scheme Rules. As a result, this is not a time limit that as an adjudicator I have the power to adjust. Whether allowing customers more time to submit their comments on the company's Defence would result in more considered submissions, and thereby enhance the WATRS adjudication process, is a decision that must be undertaken when the Water Redress Scheme Rules are next revised.

26. In addition, this rule is applicable scheme-wide, rather than only to the company, and so its impact cannot constitute an abuse of process by the company.
27. The customers also argue that the company has raised "significant extra arguments" in its Defence, despite knowing that "We, as lay people, will have no access to either law reports or precedent services that are available to legal professionals without paying a significant amount of money to subscribe to these services". It is, however, in the nature of a dispute that defendants will raise all arguments available to them when they make their defence, and the company cannot be prevented from raising legal defences merely because it has not raised them previously to the customers.
28. There is no question that, as argued by the customers, the interaction of the two day limitation with a company's superior legal expertise can place customers at a disadvantage in responding to a company's Defence. However, the WATRS adjudication process also incorporates decision-making by independent adjudicators that are not bound by the company's description of the applicable law. While this cannot entirely alleviate the difficulties unquestionably created by the short time period allowed to customers for commenting on a company's Defence, it does ensure that customers will receive a legally-informed independent decision, rather than one that relies only upon the law as described by the company.
29. For the reasons given above, the company must pay the customers compensation of £370.00 for failures in its customer service during the time in which its tankers were operating.

#### **Outcome**

The company needs to take the following further action: It must pay the customers compensation of £370.00.

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## What happens next?

- This adjudication decision is final and cannot be appealed or amended.
  - The customers must reply by 31 May 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.
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Tony Cole

**Tony Cole, FCI Arb**

**Adjudicator**

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