

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1479

Date of Decision: 17 September 2019

#### Complaint

In November 2015 the water main that runs adjacent to the customer's property burst and caused her property to flood. In 2018 the water main burst again, but no damage was caused on this occasion as the customer's property was protected by a barrier of mud bags. The customer is concerned that there is a risk of further flooding and damage to her property. In August and September 2018, the company offered to construct a slope on the boundary of the customer's property to help protect it against the risk of further flooding. However, the company has not constructed the slope and now denies that it ever offered to do so. The company states that it will not carry out the work as it is not obligated to improve private property, however, a slope would be a mitigation measure against the company's ageing infrastructure, not an improvement. The customer believes that the company has kept inaccurate records of the leak in 2018; she states there were two incidents of flooding caused by one leak that was not repaired adequately, however, the company asserts that there were two separate leaks and refuse to alter its records. The company has paid £150.00 in goodwill gestures but the customer believes this is inadequate; she wants the company to honour its agreement to construct the slope, or pay £540.00 as per the builder's estimate supplied, so she can get the work done independently. Furthermore, the customer wants the company to update its records to show that there was only one leak in 2018.

#### Defence

The water main outside the customer's property is not on the risk register and there are no plans to upgrade it. Under section 209(1) of the Water Industry Act 1991 the company is liable for any damage caused by a leak from its pipework and, in recognition of this, it paid the customer compensation when the leak in 2015 caused damage to her property. However, the legislation does not obligate water undertakers to improve private property to prevent potential damage caused by the escape of water. In view of this, the company denies liability to build a slope and states that it is the customer's responsibility, not the company's responsibility, to protect her property against water ingress. Furthermore, the company did not offer to create a concrete slope on the boundary of the customer's property; the customer asked if the company would do so but, in an email dated 15 November 2018, it set out the reasons why this

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was not possible. The company has paid the customer £150.00 in goodwill gestures to acknowledge the fact that it cannot produce evidence to rebut the customer's assertion that it offered to construct a slope, and also to recognise the confusion caused to the customer if she was told that the water main was old and needed to be replaced. The company's records regarding the number of leaks at the property in August 2018 are correct and, therefore, the company will not amend them.

The company has not made an offer of settlement.

### Findings

In accordance with WATRS's Scheme Rules, the customer's complaint regarding the company's alleged breach of its statutory duty to maintain the water main adjacent to her property 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 request for protective measures to be taken against the possibility of future flooding cannot be adjudicated upon through this Scheme. With regard to the customer's request that the company's records are amended, under the Water Redress Scheme Rules I have no jurisdiction to direct the company to change its internal record keeping practices. Therefore, I am unable to consider this matter and cannot make any direction to the company in this regard.

### Outcome

The company does not need to take any further action.

The customer must reply by 15 October 2019 to accept or reject this decision.



- The company states that it will not build the slope as it is not obligated by statute to improve private property, however, a slope would be a mitigation measure against the company's ageing infrastructure, not an improvement.
- The company states that it is her responsibility to protect her property against water ingress but she has already taken measures to protect her property; her garage is on a raised platform and, after the flood in 2015, she constructed a concrete barrier outside the property to deflect water. However, but for the mud bag barrier, her property would still have flooded in 2018.
- In light of the fact that the company has no immediate plans to upgrade the water main, she believes that constructing the slope would be beneficial to both herself and the company; she would gain the peace of mind that her property will not be damaged by further flooding, and the company would avoid paying her further compensation for future flood damage.
- The customer believes that the company falsified records of the leak that occurred in August 2018; she states there were two incidents of flooding caused by one leak because the company reinstated the leak site before completing the repair, but the company's records show that there were two separate leaks on the water main, one after the other. She states that it was immediately obvious the leak had not been repaired sufficiently because the hole started filling up with water straight after the engineers finished repairing it, but it was filled in regardless and further flooding occurred. Furthermore, if two leaks were repaired, she questions why the same site was dug up on both the 22 August 2018 and the 27 August 2018. She believes the records were falsified to cover up the fact that the leak was not repaired properly the first time it was attended to.
- The company has paid goodwill gestures amounting to £150.00 because it is unable to provide evidence to support its assertion that it did not agree to construct a slope and because she was given incorrect information about the operational condition of the water main by the engineer. She believes this is inadequate and wants the company to honour its agreement to construct the slope, or pay £540.00 as per the builder's estimate supplied, so she can get the work done independently. Furthermore, the customer wants the company to amend its records to show that there was only one leak that caused two incidents of flooding in 2018.

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

- The main drain outside the customer's property is operationally sound. Therefore, it is not on the risk register and there are no plans to upgrade it.
- Section 209 (1) of the Water Industry Act 1991 covers damage caused by the escape of water and states "Where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage, the undertaker shall be liable, except as otherwise provided

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in this section, for the loss or damage.” Therefore, it is liable for any damage caused by a leak from its pipework and, in recognition of this, it paid compensation to the customer following the leak in 2015 that caused damage to her property. However, the legislation does not obligate water undertakers to improve private property, such as the customer’s home, to prevent potential damage caused by the escape of water.

- In view of this, it denies liability to take measures to prevent the customer’s property from flooding and states that it is the customer’s responsibility, not the company’s responsibility, to protect her property against water ingress. The customer has taken no steps to protect her property since the flooding incident in 2015 and, because the customer has converted her garage into living space, it is important that she does so. It explains that the properties on the customer’s street have raised front door entrances to prevent water ingress, but the garage entrances are not raised. The customer did not raise the entrance area when she converted her garage space and therefore wants the slope constructed in front of this part of her home. However, it is not the company’s responsibility to ensure that the converted area of the customer’s home is watertight.
- The customer claims that the Planning and Dispatch Team Manager offered to create a concrete slope outside her home to protect it from future incidents of flooding, but this is not accurate. During telephone calls with the Planning and Dispatch Team, the customer asked if the company would be able to construct a concrete slope and, in order to provide good customer service, the team manager told her that he would enquire whether this was possible. However, in an email dated 15 November 2018, the customer was given a clear explanation of why this was not possible.
- When it increases expenditure on network upgrades and maintenance, the cost of customers bills rise. Consequently, it has a statutory duty to submit five yearly budgeting plans for approval by the industry regulator, Ofwat. The budget for network upgrades needs to be spent in a way that ensures maximum benefit for the maximum numbers of customers. This cost/benefit approach means that it does not reserve budgetary funds to improve private property, so it cannot construct the slope requested by the customer and would not have offered to do so.
- The calls in which the customer alleges it offered to construct a slope were not recorded and, therefore, it cannot provide audio copies or transcripts to the customer. In view of this, and the fact that the customer alleges an engineer incorrectly told her that the water main was operationally inadequate, it made a £100.00 gesture of goodwill to the customer and later sent a further payment of £50.00. It also apologises to the customer for any confusion caused.

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- The customer alleges that its records regarding the number of leaks in August 2018 are incorrect or have been falsified. However, the records correctly show that there were two different leaks on its water main in the customer's road in August 2018.
- It explains that, when a leak is repaired, it is not unusual for another leak to occur on a different section of the same pipework. This is because the process of excavating ground around pipework causes movement where there would ordinarily be none, and this can cause pipes that are already leaking to fracture further. It asserts that the work reports show that there were two separate leaks on the same section of pipework outside the customer's home in August 2018 and, for this reason, it will not amend its records to show that there was only one leak.

### 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 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 advised that her property and the supporting infrastructure were constructed in 1875 and, consequently, the water main leaks because it is old and requires replacement. The customer wants the company to pay for the construction of a concrete slope on the boundary of her property in order to provide long term protection against further flooding. Having considered

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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 water mains.

2. Section 37 of the Water Industry Act 1991 outlines the company's duty to maintain its water mains and states:

“(1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—

(a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

(b) for maintaining, improving and extending the water undertaker's water mains and other pipes, as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part.

(2) The duty of a water undertaker under this section 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. Since the customer's complaint raises issues relating to the company's obligations under section 37 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:

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“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;
- 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 complaint raised by the customer concerning the repeated leaks on the water main outside her property falls 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 complaint regarding flooding raised by the customer concerns complex legal issues, specifically the company’s compliance to section 37 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.

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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 the section 37 statutory duty to maintain water mains. 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 37 (2) of the Water Industry Act 1991 delegates enforcement powers to Ofwat and, therefore, as an adjudicator operating under the rules of this Scheme, I have no jurisdiction to consider an alleged breach of section 37.
10. For the reasons I have outlined, and in accordance with the Scheme Rules, I find that the customer’s request for measures to prevent future flooding of her property falls outside the scope of this Scheme and, therefore, I cannot adjudicate on this matter. I appreciate the frustration the customer will likely feel at this, but I do not have the jurisdiction to consider or direct upon this matter.
11. The customer also complains that the company’s records incorrectly state that there were two leaks on the water main in August 2018 when, in fact, there was only one leak that was incorrectly repaired and caused two incidents of flooding. The customer believes that the incident was falsely recorded to hide the fact that the leak was not properly repaired.
12. Having considered the evidence presented by the parties, although I find this matter distinct from the issue above, on the basis that the company’s internal record keeping is a matter related to its commercial practices as per Rule 3.5, I find that it also falls outside the scope of this Scheme. Again, I appreciate that this is not the outcome the customer hoped for, but I am unable to consider the customer’s claim in this regard.

#### **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 15 October 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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