

# WATRS

## Water Redress Scheme

### ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1575

Date of Decision: 5 September 2019

#### Complaint

The customer states that over many years there have been repeated occasions when the mains sewer that passes under his land has become blocked causing effluent to flood his field; the most recent occasion being 27th March 2019. The flooding caused damage to his field and prevented his cattle from grazing. The customer believes that the flooding occurs because the drains are not designed and/or maintained correctly and he has referred this matter to Ofwat, the industry regulator. The company claims to have introduced an improved maintenance regime and asserts that the sewer was cleaned on 13 February 2019. However, the fact that flooding occurred on 27 March 2019 demonstrates that the maintenance regime is insufficient. The company states that it is not liable under section 94 of the Water Industry Act 1991 and has suggested that he claims on his insurance. However, the customer questions why his insurer should assume responsibility for the company's failings. The customer believes that the company has failed to take his complaint seriously and has not fully investigated the cause of the flooding. Furthermore, the company has never given a consistent or clear explanation as to why or how the flooding occurred, at times stating it was due to the misuse of the sewer and at other times stating that it was caused by hydraulic overload due to adverse weather. The company has provided no evidence to support its assertion that the blockage was not caused by negligence. The customer wants the company to apologise for not taking the complaint seriously and find a long term solution to the flooding. He also wants the company to compensate him in the amount of £420.00 for the losses he suffered as a consequence of the flooding.

#### Defence

The company accepts that foul flooding incidents occurred at the customer's property in June, July and August 2013, December 2015 and March 2019. Following the incident in December 2015, the problem sewer was placed on a Maintenance Scheduled Task (MST) to carry out yearly jetting in order to minimise the possibility of other blockages occurring. Section 94 of the Water Industry Act 1991 places a duty on water 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

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Director of Water Services. As such, Ofwat is the relevant authority for enforcing Section 94. In view of this, the customer's request for a long term solution to the repeated flooding incidents, 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, a water company will only be liable if it has been negligent. As the cause of the flooding incident on 27 March 2019 was an unforeseen blockage, the flooding was not caused by negligence or a failure on the part of the company to provide its services to the standard to be reasonably expected. Furthermore, the MST in place is working sufficiently as there were no reported incidents of flooding during the three years between January 2016 and February 2019. The customer states that his complaint has not been taken seriously and requests an apology. However, the company has responded to the complaint with appropriate information and advice, although on one occasion the customer was inadvertently misled regarding his eligibility for a GSS payment and on another occasion the cause of the flooding was wrongly stated as hydraulic overload. The company apologises for these errors.

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 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 request for a long term solution to the sewerage flooding and his claim for losses suffered as a consequence of it cannot be adjudicated upon through this Scheme. With regard to the customer's request for an apology on the basis that his complaint has not been taken seriously, the main issue raised concerns the way the company dealt with the alleged breach of its statutory duty to provide effectual sewers and the effectiveness of the MST. 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 customer's complaint that he was given inconsistent reasons for the flooding, whilst the evidence supports the customer's assertion, the company has now clarified the reason the sewer flooded on 27 March 2019 and apologised to the customer for providing incorrect information and, therefore, I make no direction to the company in this regard.

### Outcome

The company does not need to take any further action.

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The customer must reply by 3 October 2019 to accept or reject this decision.

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# ADJUDICATOR'S DECISION

Adjudication Reference: WAT/ /1575

Date of Decision: 5 September 2019

## Party Details

Customer: [ ].

Company: [ ].

## Case Outline

### **The customer's complaint is that:**

- Over many years there have been repeated occasions when effluent has flooded his field because the mains sewer that passes under his land has been blocked. The most recent incident of flooding occurred on 27th March 2019, causing damage to his field and preventing his cattle from grazing.
- He believes that flooding occurs because the drains are not designed and/or maintained correctly and he has referred this matter to OFWAT.
- The company claims to have introduced an improved maintenance regime and asserts that the sewer was cleaned on 13 February 2019. However, the fact that flooding occurred on 27 March 2019 demonstrates that the maintenance regime is insufficient. He states that the company accesses the sewer for maintenance purposes approximately 800 metres away from the 90 degree bend at which the flooding occurs and, therefore, the problem area is not adequately cleaned or maintained.
- The company states that it is not liable for external flooding under section 94 of the Water Industry Act 1991 and has suggested that he claims under the terms of his insurance policy. However, he questions why his insurer should assume responsibility for the company's actions or inactions; the company's negligence has caused the flooding and it should compensate him accordingly.
- Furthermore, the company is misrepresenting the legal approach to hydrological overload, which is meant to absolve water companies from responsibility for freak acts of nature that cause blocked sewers, but not absolve them from responsibility for blockages caused by the routine

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use of sewers. The company also misrepresents the court's decision in the case of *Marcic v Thames Water Utilities Ltd [2003] UKHL 66* regarding a water company's duty to replace a sewer. He differentiates the cited case from his own on the basis that, unlike him, the claimant had not followed the correct procedure and therefore lost his case.

- The company states that he must have agreed to the installation of the sewer when it was installed and that he would have been paid compensation at that time. However, the company has failed to provide any evidence to support this assertion.
- He believes that the company has failed to take his complaint seriously and has not fully investigated the cause of the flooding. Furthermore, the company has never given a consistent or clear explanation as to why or how the flooding occurred, at times stating it was due to third party misuse of the sewer, and at other times stating the cause as hydraulic overload due to adverse weather, even though it did not rain during March 2019. The company has provided no evidence to support its assertion that the blockage was not caused by negligence.
- The customer wants the company to apologise for not taking the complaint seriously and find a long term solution to the flooding. He also wants the company to compensate him in the amount of £420.00 for the losses he suffered as a consequence of the flooding; £240.00 for his wife's loss of earnings, £100.00 for seed and fertiliser, £40.00 for emergency hay and £40.00 for labour and re-seeding.

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

- Foul flooding incidents occurred at the customer's property in June, July and August 2013, December 2015 and March 2019. The attending crews for the 2013 incidents were unable to find the cause, the incident in December 2015 was caused by a build-up of rags in the sewer, and the flooding incident in March 2019 was also caused by a blockage.
- Following the incident in December 2015, the sewer that runs beneath the customer's field was placed on a Maintenance Scheduled Task (MST). MST's are planned jobs undertaken for a variety of reasons and are put in place to carry out maintenance tasks. The sewer at the centre of this dispute was placed on a MST to carry out annual jetting of the public sewerage system to ensure that it is kept clear.
- 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. In any event, a water company will only be liable if it has been negligent and there is no evidence of negligence in this case.

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- In view of the above, the customer's request for a long term solution to the repeated flooding incidents, 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, major sewer improvements and replacements involve complex financial issues as investment programmes are agreed with Ofwat on a five yearly basis. A cost/benefit approach is taken and factors considered during this process include the severity of the flooding and the cost of the solution to resolve the problem. This methodology was approved by *Marcic v Thames Water Utilities Limited [2003] UKHL 66*.
- In this case, the MST in place is working sufficiently. The problem sewer was jetted in April 2017, February 2018 and February 2019. There were no reported incidents of flooding for the three years between January 2016 and February 2019; which indicates that the MST is sufficient and a further expensive long term solution is not needed.
- In recognition of the lack of redress for foul flooding in the absence of negligence, all water companies operate a Guaranteed Standards Scheme (GSS) pursuant to the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008. Section 12 of the Regulations refers to external sewer flooding and provides that, if the customer's property is externally flooded, the water undertaker shall pay the customer 50% of the sewerage charges payable for the property by the affected customer for that financial year, or £500.00, whichever is the lesser. However, as the customer does not pay wastewater charges for the field, a payment under the GSS is not applicable.
- The customer complains that his complaint has not been taken seriously and requests an apology, however, the company has responded to the complaint with appropriate information and advice. Regrettably, on one occasion the customer was inadvertently misled regarding eligibility for a GSS payment, but an apology was given in a letter dated 20 May 2019. The customer has been advised on more than one occasion that the flooding in his field on 27 March 2019 was caused by an unforeseen blockage in the sewer. However, in a letter dated 9 July 2019 the cause was wrongly stated as hydraulic overload and the company apologises for this error.
- As the cause of the flooding incident on 27 March 2019 was an unforeseen blockage, the flooding was not caused by negligence or any failure on the part of the company to provide its services to the standard to be reasonably expected. Therefore, liability is denied.

### 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 sewer flooding at his property in March 2019; £240.00 for loss of earnings, £100.00 for seed and fertilizer, £40.00 for emergency hay, and £40.00 for labour and re-seeding. The customer also requests the company to provide a long term solution to the flooding. 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.

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

(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;

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- 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 sewerage flooding 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 sewerage flooding raised by the customer concerns 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.

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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 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, and his request for a long term solution to the flooding, fall 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. The customer also asks for an apology from the company on the basis that it did not take his complaint seriously and gave him inconsistent reasons for the flooding. Having considered the evidence, I find the allegation that the company did not take the customer's complaint seriously intrinsically linked to the company's alleged breach of section 94; in order to adjudicate on it I would have to consider the adequacy of the company's response to the flooding, and in particular the sufficiency of the MST. Therefore, I also find this element of the customer's complaint out of scope.
12. However, the customer complains that the company has provided inconsistent information with regard to the cause of the flood on 27 March 2019. I find this element of the customer's claim distinct from the alleged breach of the company's statutory duty and is within the scope of this Scheme. Therefore, I am able to consider it.
13. Having reviewed the evidence presented by the company, I accept that the information provided to the customer was inconsistent. However, the company's defence statement clarifies the reason the flooding occurred and the company has apologised for providing inconsistent information. I am therefore satisfied that the customer now has the information he requires and has received an apology. In view of this, I find that I do not need to make a further direction to the company concerning this matter.
14. In any event, the company was not obligated by statute or policy to supply this information to the customer and, whilst I appreciate that the customer will be disappointed by my decision, I

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do not find that the company's customer service fell below the standard the customer was reasonably entitled to expect in this regard.

#### **Outcome**

The company does not need to take any further action.

#### **What happens next?**

- This adjudication decision is final and cannot be appealed or amended.
- The customer must reply by 3 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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