

WATRS

Water Redress Scheme

ADJUDICATOR'S DECISION SUMMARY

Adjudication Reference: WAT/ /1629

Date of Decision: 18 October 2019

Complaint

The customer's complaint relates to a public sewer located on land adjacent to the customer's property. The customer wishes to carry out works to reinforce the foundations of an outbuilding that is situated approximately 1.4 meters away from the sewer, but he is concerned that the works may damage the sewer given its fragile condition. The customer requests an order that the company either (1) upgrade its sewer so that it is strong enough to withstand the work, or (2) accept responsibility for any damage that the customer's works could cause to the sewer. The customer also claims compensation in the amount of £2,500 for distress and inconvenience.

Defence

The company rejects the customer's claim. It states that it has investigated the sewer and concluded that it is in serviceable condition. It has therefore refused to carry out repairs to the sewer as requested by the customer, and it argues that it was entitled to do this in the exercise of its discretion. However, it granted the customer "build over" permission, which allows him to carry out the reinforced works he plans. The company argues, however, that it is entitled to insist that any damage that may be caused by the works should be the responsibility of the customer.

Findings

Although the company has a duty, under the Water Industry Act 1991, to repair the sewer network, this duty is not enforceable by the customer, and the company has discretion as to how to allocate its limited resources when carrying out its obligations. The company was therefore within its rights to refuse to repair the sewer. It granted the customer permission to carry out his soil reinforcement works, and I am not able to determine in advance that the customer should be exonerated for any damage that the works may cause to the sewer. I therefore do not consider that the customer is entitled to the remedies he seeks. Finally, although the customer may have found this process stressful, I do not consider that this stress is as a result of any service failing by the company, so I do not award the compensation requested by the customer.

Outcome

The company does not need to take any further action.

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

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

ADJUDICATOR'S DECISION

Adjudication Reference: WAT/ /1629

Date of Decision: 18 October 2019

Party Details

Customer: [] (the "customer").

Company: [] (the "company").

Case Outline

The customer's complaint is as follows:

- The customer complains about a public sewer belonging to the company that runs just outside his property, through the garden of a neighbouring property. On his land, the customer has an approximately 200-year old outhouse which is suffering from the effects of subsidence and requires repair. The customer therefore wishes to carry out works to reinforce the foundations of the building. However, the outhouse is located some 1.4 meters from the public sewer pipe.
- In accordance with the company's policy, the customer therefore requested permission (referred to as "build over" permission) to carry out the works. The company eventually concluded that the customer could carry out the works but only if he accepted responsibility for any damages to the sewer that is caused by the works.
- The customer has commissioned a CCTV survey of the sewer and concludes that it is not in good condition. It is made of pitch fibre, which he considers to be a substandard material. In addition, it is more than 50 years old and is degrading and suffering from root ingress. He notes that the design life of pitch fibre piping is around 50 years, so he considers that the sewer in question is outside its design life.

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

- The customer points out that the CCTV survey shows that the piping is oval in several places, and concludes that it has therefore been deformed by land movement. He considers that the sewer requires repair, for example by relining it.
- The customer also notes that his outbuilding predated the sewer. He notes that the person who laid the sewer chose to do so within 1.4 meters of his building, which is less than 3m which he considers the company now adopts as standard practice.
- The customer requested the company to carry out repairs to the sewer. However, following investigation, the company concluded that the sewer was functioning correctly and that it was therefore not a priority. It therefore refused to repair it.
- As a result of the above factors, the customer feels that he should not be held responsible if his foundation works result in any damage to the sewer. The customer points out that the repair works to his building are urgent as the building has cracks which are worsening with time. The cost of the repair works is escalating as time goes on and he fears that the whole building may collapse. However, he does not want to carry out the works if this would lead to an unquantifiable financial risk on his part.
- In his comments on the company's defence, the customer further submits that the company has failed to meet its obligation to "improve" the sewer in question under section 94 of the Water Industry Act 1991. He also draws attention to section 3 of the Criminal Damage Act 1971, arguing that the company's conduct shows an intent to damage his property, and to sections 49, 10 and 54.7 of the Consumer Rights Act 2015 which he argues requires the company to provide him with a certain level of service. Finally, the customer draws attention to a guidance document (which I note is labelled "Consultation Draft") concerning the layout of sewers for adoption, and various other guidance documents and articles concerning root ingress into sewers, the degradation of sewers, the tendency of pitch fibre sewers to collapse and the need to reline them, the recent weather conditions which could have led to his problem with subsidence, and the lack of availability of insurance coverage for the sewer.
- The customer requests an order that the company either (1) upgrade its sewer so that it is strong enough to withstand work being done in its vicinity, or (2) accept responsibility for any damage his works could cause to the sewer. The customer also claims compensation in the

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

amount of £2,500 for the distress he has been caused by the fact that his building could suffer collapse and the inconvenience caused the delay to the repairs.

The company's response is that:

- The company contests the customer's claim.
- The company accepts that it received a "build over" application from the customer on 20 May 2019 in respect of the foundation works that he describes, and that the customer requested that the company reline the sewer.
- On 18 June 2019, the company's contractor inspected the sewer and concluded that there were no operational issues with it and that it was free flowing. The company therefore wrote to the customer on 24 June 2019 stating that (1) the sewer was operational with no major defects, and (2) the company would be prepared to accept the customer's build over application subject to the provision of a pre-works CCTV survey (which it accepted the customer had already provided) and a post-works CCTV survey.
- Following this, there were discussions between the customer's contractor and the company in which the contractor explained its proposed methodology for the works, that in summary involved the injection of expanding resin into the soil at regular intervals, in order to reinforce it. The contractor confirmed that it would take various steps to monitor the path of the resin once it had been injected, although it noted that the resin does tend to take the path of least resistance.
- The customer then raised the issue with CCWater. Following this, the company conducted another CCTV survey of the sewer on 3 September 2019. The company wrote to the customer on 11 September 2019 to confirm that the sewer was serviceable, and that the only problem was a root intrusion which the company would arrange to fix. The company therefore confirmed that it would not carry out any further works to the sewer (such as relining or upgrading the pipework). The company went on to state that if there was any damage caused to the sewer by third party works, it would back-charge in respect of the repair of that damage.
- However, the company also wrote to the customer's contractor on 13 September 2019 to state that it had no further comments to make on the contractor's installation methods, and to request

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

that the contractor provide a CCTV survey of the sewer when the works are complete. On 16 September 2019, the company removed the root ingress that it had discovered in the sewer.

- The company therefore submits that it has carried out the necessary inspections to ensure that it is happy with the condition of the sewer, and has confirmed that the customer may go ahead with the works that he proposes.
- The company notes that although it has a general duty under section 94 of the Water Industry Act 1991 to provide, improve and extend a system of public sewers to ensure the area is effectually drained, this duty is only enforceable by Ofwat, the Water Industry Regulator. The company therefore argues that the customer cannot seek to enforce this provision or bring a claim under it.
- The company explains that because of the size of the sewerage network, it fulfils this duty by adopting a "reactive" system of maintenance which entails repairing known issues as needed in order to avoid or reduce the risk of flooding. It therefore considers that it was reasonable, and in accordance with its duty under s.94, for it to refuse to the repair the sewer complained about by the customer. Even if the sewer is old, there are many sewers in the company's network which are even older, so the test applied by the company when deciding whether to repair is whether or not the sewer is in fact operational.
- The company points out that it has obligations to meet the budgets that it establishes and submits to Ofwat, so it needs to spend money prudently. It therefore submits that it has been reasonable to conclude that the sewer in question is not a priority merely because of the fact that the customer has an outbuilding that is collapsing. It needs to prioritise sewer upgrades in areas where customers suffer from flooding.
- The company denies that it should be held liable on the basis that the sewer was laid too close to the customer's building. Firstly, the company notes that the sewer was laid by a private developer and only transferred to the company in 2011. Secondly, the company notes that there is no legislation, code or practice which requires that sewers be laid at a minimum distance from any building.

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

- The company concludes that it cannot meet the customer's request to upgrade the sewer, and that it is entitled to insist that any damage caused to the sewer by the customer's works will be back charged to the customer, as this is what it does in all cases where gives "build over" permission for works near a sewer. It considers that there have been no failings in the customer service it has provided, and therefore denies that the customer is entitled to compensation for inconvenience or distress.

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's complaint stems from a pitch fibre sewer that is owned by the company and is located close to an outbuilding on the customer's property. The customer wishes to carry out works to deal with a problem of subsidence that is affecting his outbuilding. Because the works will involve injecting expanding resin into the soil, the customer cannot be sure that the resin will not spread over the boundary and affect the sewer that is located some 1.4 meters away, even though the customer's contractor has confirmed that it will be vigilant to prevent any such problems.

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

2. It is not in dispute that the company has granted the customer's "build over" application, and has therefore agreed that the customer can carry out the foundation reinforcement works as planned. However, the customer's complaint is that the company has refused to carry out repair works on the sewer, which the customer considers is fragile and substandard. This customer is worried that as a result of this fragility, his works may cause damage to the sewer, and if they do, the company has indicated that they will hold the customer liable for the cost of repairing the damage.
3. I am therefore required to decide, firstly, whether the company should be compelled to carry out repair works on the sewer.
4. As both parties have pointed out, the company has a duty under s. 94 of the Water Industry Act 1991 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"*. Nevertheless, the company has discretion as to how to accomplish this duty with the resources available. As a result, s. 94(3) provides that the duty is only to be enforced by the Secretary of State or by Ofwat. This means that private individuals such as the customer can therefore not directly enforce the company's obligations under this section.
5. I conclude that the customer does not have a right to bring a claim against the company as a result of the way in which it has exercised its discretion as to how to prioritise the repair and improvement works that it carries out to the sewerage network. The company's decision not to repair the sewer in question is not directly causing any damage to the customer. The customer is free to carry out the works to his outbuilding, as confirmed by the company's grant of "build over" permission. Although the state of the sewer might mean that the customer's contractor may have to take extra care while carrying out the works, in order to ensure that there is no resin incursion into the sewer, this is not a direct damage that is caused by the company to the customer.
6. In any event, the decision whether or not to pursue the company regarding its s.94 duties is a matter for Ofwat. Under section 3.5 of the WATRS Rules, I am prevented from adjudicating any matters in respect of which Ofwat has the power to determine an outcome. I therefore cannot in any event grant the order that the customer seeks.

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

7. Secondly, I am required to decide whether I should order the company to take responsibility for any damage that the customer's works cause to the company's sewer, given its poor condition. In this regard, I note that the aim of the company's contractor is to ensure that the resin it injects does not encroach on the sewer, and therefore to avoid any damage to the sewer (regardless of its state). However, it cannot be excluded that damage may inadvertently be caused to the sewer.
8. If damage in fact occurs, it will be necessary to consider the circumstances in detail, in order to determine whether or not the customer should be held liable. In principle, if the customer's actions have caused damage to the company's property, it is at least possible that the customer may be liable to the company, for example under the torts of nuisance or negligence, regardless of whether or not the sewer is in poor condition.
9. I am therefore not in a position to decide, in advance of the works, that the company must accept liability for any damage that occurs to the sewer. I thus cannot grant the customer the remedy that he seeks.
10. For completeness, I deal also with the customer's arguments on the basis of the various legislation, guidance documents and articles cited in his comments on the company's defence. I note that I am not entitled, under the WATRS Rules, to decide criminal matters, so I cannot decide a complaint that arises from the Criminal Damage Act 1971. I also do not consider that the allegations raised by the customer on the basis of the Consumer Rights Act 2015 are relevant, given that the company has duties towards the customer under the Water Industry Act 1991 and associated regulations. I do not consider that the guidance and articles cited by the customer change the position set out above, that the company has discretion as to how to exercise its duty to keep the sewerage network in repair.
11. However, I am entitled, under section 3.3 of the WATRS Rules, to decide a dispute regarding the level of service provided by the company. I can therefore consider whether the terms of the "build over" permission that was granted by the company are unreasonable, and whether there have been service failures on the part of the company which entitle the customer to claim for distress and inconvenience, for which he claims the sum of £2,500.

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.

12. I have considered the papers carefully and I conclude that the company has responded reasonably to the customer's request for build over permission. It carried out sufficient investigations, and, as set out above, it was entitled, in its discretion, to decide not to carry out the repair works to the sewer requested by the customer. While I appreciate that the process has been stressful for the customer, I do not consider that there have been any service failures on the part of the company, so I am unable to award the customer the compensation he seeks.

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 15 November 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.

Natasha Peter (Barrister, FCI Arb)

Adjudicator

This document is private and confidential. It must not be disclosed to any person or organisation not directly involved in the adjudication unless this is necessary in order to enforce the decision.