

WATRS

Water Redress Scheme

ADJUDICATOR'S FINAL DECISION SUMMARY

Adjudication Reference: WAT-X712

Date of Final Decision: 12 January 2022

Party Details

Customer: The Customer

Company: The Company

Complaint

The customer complains that the company is in breach of its duty as a riparian owner and in breach also of the Land Drainage Act 1991 in that it has allowed the collapse of a culvert with the consequence that water has flooded onto her land and caused £10,000.00 damage. She asks for compensation of £11,255.45 in respect of financial loss and for inconvenience and distress.

Response

The company has said in correspondence that it is not liable for the escape of water from its assets. The company has not submitted a response but it has previously offered compensation of £250.00 plus payment of the first year's increased premium.

Findings

I find that although the decision as to whether the company has liability for the escape of water from the culvert as a riparian owner falls outside the scope of the Scheme, the company has not provided its customer service to the standard that would reasonably be expected. This includes failure to make visits and calls back as the company has accepted, but also includes the company's failure for a long time to acknowledge its ownership of the land and its failure to investigate the customer's claim by taking legal advice. Instead, the company has, without taking legal advice, asserted to the customer that its liability is the same as would be the case for an escape from a sewer. I find, overall that in comparison with other comparable situations, the company would reasonably be expected to pay a sum equivalent to the customer's insurance excess of £250.00 and any increase in the premium for the first year, but I also find that the proposed goodwill payment does not take into account the severity of the inconvenience and distress in this case. I find that an award of £300.00 is fair and reasonable. Additionally, I find that the company shall be required to take practical action to review its decision, including taking legal advice and shall explain its decision to the customer.

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Outcome

The company shall:

- Pay compensation as follows:

(1) £300.00 in respect of the company's failure to provide satisfactory customer service;

(2) If within 10 working days of the date when the customer accepts this Final Decision the customer provides evidence to the company that (i) she has made an insurance claim and that an excess was payable and (ii) that her insurance premium for the following year has increased in consequence of the claim; the company shall pay:

(i) the customer's insurance excess of up to £250.00 and

(ii) the amount of any increased insurance premium for the following year, namely that covering February 2021.

For the avoidance of doubt, if the customer can only provide evidence of one of those matters, the company shall make payment in respect of that matter and if the customer has not made a claim on her insurer, the company is only required to pay £300.00 as stated in (1) above.

- Within 20 working days of the date when the customer indicates her acceptance of this decision, review the outcome communicated to the customer on 4 June 2020, including taking legal advice as to the legal issue raised by the customer.

- The company shall then, within 10 working days of receiving legal advice, provide a full explanation to the customer by reference to relevant legal principles as to whether it will or will not accept liability for the customer's claim.

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Case Outline

The customer's complaint is that:

- The company's culvert, which ran under the railway line that served the construction of the (REDACTED) reservoir, collapsed on 15 February 2020, 5 days after the customer notified the company that an inspection chamber constructed by the company in 2012, appeared to have moved and was leaking water.
- Both before and after the collapse of the culvert, the customer was involved in trying to get the company to accept responsibility and take action, and to deal with the effects, for instance on the nearby road. The company repeatedly denied responsibility and said that others were liable.
- Although eventually the company repaired the leak, it has refused to pay compensation to the customer, whose house and garden was affected by flooding and has said that the customer should claim from her household insurance.
- The customer has been offered £250.00 towards the insurance excess and a £100.00 goodwill payment.
- The customer asks for compensation of £11,255.45 to compensate her for financial loss and for inconvenience and distress.

The company did not submit a response to the customer's application but has submitted comments on my Preliminary Decision dated 18 December.

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- In its response to my Preliminary Decision, the company agrees that it will pay the compensation directed in my Preliminary Decision to a maximum of £250.00 for insurance costs and £300.00 for poor customer service. In relation to that part of the decision which is concerned with recovery of increased insurance costs, the company indicates that it is prepared to make payments on the provision of proof that these costs have been incurred.
- The company agrees that its previous references to the decision in *Marcic v Thames Water* were misplaced and has offered an apology to the customer.
- The company states that a claim against the company as a riparian owner is outside the scope of the WATRS scheme and argues that there is no statutory duty on the company to maintain a culvert and therefore argues that it is not in breach of its duty of care.
- The company argues that it should not be required to take legal advice as to this issue because the company has not failed in its duty to the customer.

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?

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1. In reaching my decision below I have taken into account the comments made both by the customer and by the company in response to my Preliminary Decision. I have summarized those of the company above and I refer to both sets of comments below.
2. Although the company states that the issue of riparian responsibilities arises between the customer and the company because of the company's standing as a landowner rather than a statutory undertaker (a point with which I agree), I note that in the correspondence between CCWater, the company and the customer it has not been suggested that the applicant was not a customer of the company within the meaning of the Scheme rules, and as the applicant is a resident within the area served by the company, I find that it is probable that she is a customer, even though her claim in this case is not a contractual one.
3. I also note that the Scheme rules make clear that a claim may be considered by an adjudicator if it includes matters that have been considered within the company's complaints handling process. The Scheme rules also indicate, however, that matters that fall within rules 3.4 and 3.5 are precluded.
4. Rule 3.4 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

...

3.4.3 in exceptional circumstances, the dispute raises a complicated issue of law.

I find that the effect of the rules is that I have jurisdiction to consider the customer's claim against the company because it has been considered within the company's complaints handling process, but it does not follow that I have jurisdiction to reach a decision on every matter that has been raised. I refer to the significance of these rules again below.

5. I also remind the parties that, even though the company did not respond to the customer's application, I was required in my Preliminary Decision to be satisfied that the evidence and circumstances supported the customer's claim and that the remedies claimed were fair and reasonable. That remains the position, although I now also take into account the submissions made by the company as well as the customer in response to my Preliminary Decision.

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6. I also remind the parties that the only question that I may decide under this Scheme is whether the company has provided its services to the expected standard as set out above.
7. As to the facts on which the customer's claim is based, I find that the customer has established that the company has now repaired a small culvert which crosses beneath a disused railway line which is now used as an access track. She complains that the company has failed to maintain this, with the consequence that it collapsed and caused flooding to her land and home. She says that the company is liable because it is a riparian owner of the culvert.
8. The customer has described the facts and circumstances in detail in the statement that she has prepared for the Consumer Council for Water (CCWater) and in her submissions to WATRS. In essence, I find that the events which gave rise to the dispute are that:
 - a. On 10 February 2020 an inspection chamber for the culvert which had been installed in 2012 by the company, appeared to have moved and to be falling in. Water was coming out of the ground around it. The customer rang the company and was told that she should ring (REDACTED) Borough Council because the company did not own the culvert. The customer did this.
 - b. On 15 February 2020 the culvert collapsed at the inspection chamber. The customer says that she rang the company who again told her to ring (REDACTED). The company does not appear to have a record of this call because the company says that the first contact from the customer was on 18 February 2020. In any event, the customer rang (REDACTED), but was told that the Council was not responsible.
 - c. The customer says she contacted the company again and was told that the company would ring the Highways Agency. The company has again not indicated that has a record of this call. Nothing then happened. The customer argues that the company did not make the promised call but the company suggests that the customer had not made contact at this point.
 - d. The customer says that water and debris were flowing onto the road. This was dangerous so she rang the police who attended and shut the road. The Highways

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Agency then closed the road overnight and most of the next day and tried to remove some of the debris that had come from the culvert.

- e. The culvert collapse also caused damage to the customer's property including flooding of one room in the house, flooding of the shed, flooding of the Balmoral sewage system including the box with the motor in it and damage to the driveway. The customer has submitted photographs of the damage caused.
- f. The customer reported this to (REDACTED) again and a representative attended on 17 February 2020. The representative said the culvert did not belong to the (REDACTED) but he would find out if it was the company and if so would issue them with a notice under the Land Drainage Act 1991.
- g. At the same time the Highways Agency inspector arrived to check the road and drain and also thought that the culvert was the responsibility of the company.
- h. On 18 February 2020 a conversation occurred between the company and the customer. The customer says that she was told that the culvert was the responsibility of her local council or the Environment Agency and the company also agrees that it denied ownership of the culvert, for which it apologises.
- i. The Environment Agency, when contacted by the customer, said that this was not their responsibility.
- j. The customer then contacted the company again on that date. The company says that it raised work on 19 February 2020 when the customer called back, although the customer says that she was told on 20 February 2020 that the company was sending out a technician.
- k. Between 21 and 24 February 2020, the customer says that persistent rainfall caused further flooding. The company promised to send somebody out with sandbags, but this did not occur.
- l. Attempts were then made to resolve the damage to the culvert in early March 2020 but there were various difficulties which meant that the job did not get started.

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- m. On 1 June 2020 contractors for the company came to mend the culvert and works were completed on about 8 June 2020.
 - n. The company has now refused to pay for the damage that has been caused and has said that the customer should claim from her house insurance.
 - o. The customer has been offered £250.00 towards her insurance excess plus a sum equal to the increase in premium for the following year and a £100.00 goodwill payment.
9. The customer has framed her claim against the company on the basis that she is entitled to a financial remedy against the company because it is the riparian owner of the culvert. Although in its email to the customer dated 20 June 2020, the company has acknowledged that the strip of land that is now an access track and the dismantled railway does belong to the company, and that this is above the culvert, the customer has put forward no evidence that shows that the company would be liable merely because there has been an escape of water from the culvert at the point where it opens on to neighbouring land by the inspection chamber but she says that her solicitor suggests that she might have a right of action in negligence against the riparian owner and a barrister friend has told her that she has a good case. In her comments in response to my proposed decision, the customer has provided some further submissions and photographs in support of her claim for a claim for damages due to alleged negligence.
10. Negligence is not a matter that can be determined under this Scheme, however. As indicated above, I can only consider what an average customer would reasonably expect the company to do.
11. Although I take into account the customer's further submissions about the culvert, I also note that the company refers to a lack of statutory obligation to inspect and states that it is not in a position to carry out pro-active inspection, which I take to be a statement about its stance where it is a landowner as well as where it is a water/sewerage undertaker. I find that the scope of the company's duty of care has a direct bearing on what an average customer may reasonably expect a company to do in similar circumstances. I accept the company's submission, however, (as I indicate above) that the scope of the company's duty of care is not a matter which falls within the scope of this Scheme. As I have no jurisdiction to make a determination as to matters of negligence which underpin the customer's claim and WATRS is therefore an inappropriate

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forum for such a dispute, I therefore cannot determine whether or not the company has fallen short of reasonable expectations. Questions of negligence or nuisance are matters that are for the court to decide and this is a complicated matter. I therefore find on the basis of rules 3.4.1 and 3.4.3 that I have no jurisdiction to consider the company's liability for escape of water onto the customer's property and I express no further views on the evidence submitted.

12. However, in respect of its customer service more generally, I do find that the company has not provided its services to the standard that would reasonably be expected.
13. The evidence of the customer suggests that conversations with the company have shown "denial and incompetence over the acceptance of owning and legally having to maintain the culvert on the land that they own". The customer has made approximately 17 recordings of conversations with the company and supplied them to CCWater, I accept that until 3 June 2020, these calls contained denials of liability. I accept also that these caused the customer considerable frustration and distress in consequence, as well as inconvenience. Although the company has no records of the customer's calls prior to 18 February 2020, I find that it is likely, bearing in mind the detail of her recollection and subsequent actions, that she is correct in this recollection. The customer was therefore sent to discuss the flooding issue with other authorities when it was, in fact, the company's responsibility to bring an end to the flooding.
14. Moreover, I also note that the company has consistently asserted that it is not liable for the escape of water from its assets but it has not put forward a reliable and informed legal reason for this. It is not clear what was initially the basis for its denial of responsibility although, notably, in a manager's call in June 2020, the company made specific reference to *Marcic v Thames Water* (inaccurately described as a decision of the Supreme Court) which relates to an escape of water from a sewer. Despite that the customer made the valid point that her complaint did not concern a sewer, the evidence shows that the company was not able to address that issue save by repeated references to the position relating to sewers. The company has now acknowledged that the reference to *Marcic v Thames Water* was incorrect. Although the manager who made that call said that he had referred to the land and planning department, he had not asked for legal advice.
15. In its response to my Preliminary Decision, the company has put forward an argument that because it has no statutory obligation to inspect its network proactively, it is not in breach of its duty of care. As, however, the company now acknowledges that the ownership of the culvert

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falls outside its statutory responsibilities as a water and sewerage undertaker, the absence of a statutory obligation is unlikely, I find, to be conclusive as to the scope of the company's duties as a landowner and, in particular, as to the scope of its duty of care. As indicated, this is a complicated matter of law, on which I find that an average customer would reasonably expect a company to take legal advice before asserting a position of law. There remains, I find, no evidence that the company has taken legal advice.

16. Having regard to its location, appearance and function of the waterway, I am satisfied that the waterway in question is not a sewer. It follows that in its dealings with CCWater and the customer and with WATRS, the company is dealing with a different and more complicated situation but there is no evidence that the company has taken legal advice as to its position, whether from its in-house function (if any) or externally, yet it has maintained opposition to the customer on the basis that it is not legally liable.
17. I find further that it is reasonably possible that the company has not correctly analysed and considered the customer's claim and, in particular, has not correctly explained its position to the customer, which I find would reasonably be expected. I find that the company has not met expected standards in this regard.
18. The company has also acknowledged that there have been a number of instances where the company has failed to make promised visits and failed to call back the customer where it has promised to do so. The company has agreed to make a payment of £250.00 towards the customer's insurance excess and the increase of the first year's insurance premium as well as a further £100.00 goodwill payment.
19. The file maintained by CCWater and the call recording for 4 June 2020 indicates that the customer has not accepted this offer because she asks for compensation resulting from the collapse of the culvert and she was offended by the offer of compensation of £100.00.
20. In the light of my findings above, however, the company cannot be required by WATRS to make payment for the damage caused, but I also do not find that the level of compensation offered by the company for inconvenience and distress meets the gravity of the case.
21. As to the offer of the payment of £250.00 plus the first year's increase in insurance premium as a consequence of the customer's claim on her insurance, I find that this is consistent with an

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offer that a company would ordinarily be expected to make in the case of damage caused by an escape of water for which the company does not accept liability but which does not, on its facts, fall within the company's guaranteed payment scheme.

22. As to the offer of a goodwill payment of £100.00, while I note that the customer explains that her husband also suffered a cardiac emergency during this time which she ascribes to the stress of the flood, I find that there is no supporting evidence for this, which, in any case, would not be capable of compensation under this Scheme. I find, however, that taking into account the number of occasions on which the company denied ownership of the strip of land, the period of time that this went on, the fact that it happened against a background where the customer had already been caused significant loss and inconvenience and that the company has not given a full or complete explanation to the customer as to why it will not accept liability with reference to relevant legal principles, I find that a fair and reasonable sum by way of compensation for inconvenience and distress is £300.00.
23. It therefore follows that I direct that, provided that the customer has in fact incurred insurance losses, the company shall pay compensation of £550.00 to the customer as well as the amount of her increased insurance premium for the following year, namely that covering February 2021. If the customer has not made a claim on her insurer, however, the company shall pay £300.00 and the question of an increased premium does not arise.
24. As I have found also that the company has not given a full and complete explanation to the customer by reference to legal advice and principles which suggests that it has not taken legal advice as to its refusal to make further payment, I also direct that the company shall take practical action to review the outcome of the customer's complaint, including taking legal advice as to the specific issue that has been raised by the customer. This shall be done within the timetable provided for by the Scheme rules. The company shall then provide a full explanation by reference to relevant legal principles as to whether it will or will not accept liability for the customer's claim.

OUTCOME

The company shall:

- **Pay compensation as follows:**

(1) £300.00 in respect of the company's failure to provide satisfactory customer service;

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(2) If within 10 working days of the date when the customer accepts this Final Decision the customer provides evidence to the company that (i) she has made an insurance claim and that an excess was payable and (ii) that her insurance premium for the following year has increased in consequence of the claim; the company shall pay:

(i) the customer's insurance excess of up to £250.00 and

(ii) the amount of any increased insurance premium for the following year, namely that covering February 2021.

For the avoidance of doubt, if the customer can only provide evidence of one of those matters, the company shall make payment in respect of that matter and if the customer has not made a claim on her insurer, the company is only required to pay £300.00 as stated in (1) above.

- Within 20 working days of the date when the customer indicates her acceptance of this decision, review the outcome communicated to the customer on 4 June 2020, including taking legal advice as to the legal issue raised by the customer.

- The company shall then, within 10 working days of receiving legal advice, provide a full explanation to the customer by reference to relevant legal principles as to whether it will or will not accept liability for the customer's claim.

What happens next?

- This adjudication decision is final and cannot be appealed or amended.
- 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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Claire Andrews

Claire Andrews, Barrister, FCI Arb.

Adjudicator

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