



## Mayor and Cabinet

### Report title: Thames Water rebate

**Date:** 9 June 2021

**Key decision:** Yes.

**Class:** Part 1

**Ward(s) affected:** All

**Contributors:**

Executive Director for Housing, Regeneration and Public Realm, Director of Corporate Resources, Director of Law, Governance & Elections

### Outline and recommendations

- In the case of RBK v Moss, a Court of Appeal judgement in October 2020 found the Royal Borough of Kingston to be a water reseller under the terms of its Agreement with Thames Water. This judgement has significant implications for Lewisham and other local authorities. Lewisham had a similar agreement with Thames Water and consequently, it is now known the Council unknowingly overcharged tenants in respect of the water rates due.
- Mayor and Cabinet are requested to agree the outlined approach in this report regarding the proposed re-payments to current and former tenants to correct this.

## Timeline of engagement and decision-making

November 2020	Briefing note circulated to Members
9 June 2021	Report presented to Mayor and Cabinet

### 1. Summary

- 1.1. This report seeks to obtain approval to make refunds to those current and former tenants following the Court of Appeal's decision in the case of the Royal Borough of Kingston [RBK] v Moss where the Court held that RBK had acted as a water reseller and consequently Mr Moss was entitled to a refund of water charges that he had overpaid.
- 1.2. This report highlights the background to this case and the rulings made by the Judge.
- 1.3. It then outlines the rationale for the intended approach to processing the refunds to tenants.
- 1.4. This report considers the financial and legal implications of the proposals and makes a number of recommendations to Mayor and Cabinet.

### 2. Recommendations

- 2.1. Mayor and Cabinet are asked to:
  - 2.1.1. Approve proposals to make payments to current and former tenants as set out in sections 5, 6 and 7 below.

### 3. Policy Context

- 3.1. The contents of this report are consistent with the Council's policy framework. It supports the achievements of the Corporate Strategy objectives:
  - 3.1.1. Tackling the housing crisis:
    - 3.1.1.1. Everyone has a decent home that is secure and affordable.
    - 3.1.1.2. More social and genuinely affordable housing

### 4. Background

- 4.1. Like many other Local Authorities, the London Borough of Lewisham had a written Agreement with a water undertaker [in this case Thames Water Utilities Ltd] for the supply of water to its let properties. The timeline for the relevant Orders and Agreements is set out below:

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- April 2001 - Water Resale Order 2001 came into force
  - October 2003 – New agreement signed between London Borough of Lewisham and Thames Water, the previous agreement was likely on similar terms, covering the period prior to October 2003.
  - 2006 – Water Resale Order 2006 came into force
  - April 2017 – The agreement between London Borough of Lewisham and Thames Water was varied
  - November 2019 – The agreement between London Borough of Lewisham and Thames Water was terminated, at Thames Water’s direction
- 4.2. Under the agreement, Thames Water did not bill Lewisham’s council tenants directly for water and sewerage charges but instead billed the Council. Lewisham paid the charges made by Thames Water and collected the payments from tenants. The amount of the charges was reduced to reflect an agreed "voids allowance" and it was also agreed that the Council was entitled to "a commission" which was set against the amount of the charges otherwise payable. This resulted in a reduction of the sum paid by Lewisham to Thames Water and was to cover the cost of collecting the charges and for the risk of non-recovery.
  - 4.3. Two cases have recently come before the Courts in relation to these Agreements and the charges levied. In the initial case of Jones v Southwark [2016], the Judge held, amongst other things, that LB Southwark was a water re-seller for the purposes of the Resale Orders and had been charging Ms Jones more than the “maximum charge” permitted by the Resale Orders.
  - 4.4. The subsequent case, Royal Borough of Kingston [RBK] v Moss, sought to challenge and overturn the Jones v Southwark decision. Lewisham, along with 23 other local authorities, formed a collective through the Local Government Association [LGA] in support of the challenge. RBK sought to argue that in collecting water and sewerage charges from the tenant, the Council was not acting as a ‘water reseller’.
  - 4.5. The case went to the High Court in October 2019 and on appeal to the Court of Appeal in October 2020. The Court of Appeal found that RBK was a water reseller and Mr Moss was entitled to a refund of overpaid water charges.
  - 4.6. This judgement has significant implications for Lewisham and all the other local authorities. Lewisham had a similar agreement with Thames Water and it is clear in line with the judgement in RBK v Moss that the Council has been acting as a ‘water reseller’. Consequently, it is recognised that the Council unknowingly overcharged tenants in respect of the water rates due.
  - 4.7. The council has committed to refunding those tenants and former tenants who have mistakenly been overcharged for their water.
  - 4.8. It should be noted that the positions taken by other London Boroughs is variable. Some boroughs have committed to making refunds in the same manner as Lewisham is proposing. Others are still developing their proposals or are proposing only to cover the previous six years of refunds, applying the statute of limitations.

## 5. Lewisham’s liability period and amount

- 5.1. The liability to the council is for the commission element only, not the full water charges for the period.
- 5.2. It is proposed the amounts payable to residents will be calculated from 1<sup>st</sup> April 2001, when the 2001 Water Resale Order came into force, until 31<sup>st</sup> March 2017, when the

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agreements ended.

- 5.3. Work has been ongoing to understand the extent of the council's liability and the individual amounts due to residents. A group of officers across legal, financial, housing services and Lewisham Homes have been meeting frequently to fully understand the implications, establish the number of affected tenants and to propose an approach to refund tenants.
- 5.4. Officers have taken account of the available financial billing information dating back to 2001 to put together a model to understand the anticipated financial cost to the authority. The modelling has shown that the amount currently known to be payable is £7,881,837. All refunds will be wholly chargeable to the council's Housing Revenue Account (HRA). It is proposed that where a resident owes the council money either in current arrears or former arrears, any refund due will be used in the first instance to cover this debt.
- 5.5. The modelling has shown that the average amount due to a tenant who has lived continuously in their property since 2001 is as follows:

Bedroom size	Average amount due
0	£579.04
1	£613.77
2	£646.33
3	£666.78
4	£688.87
5	£704.48

## 6. Eligibility

- 6.1. Those eligible are intended to include:
  - 6.1.1. Residents currently living in properties managed by Lewisham Homes or RB3, where the tenancy commenced between 1<sup>st</sup> April 2001 and 31<sup>st</sup> March 2017.
  - 6.1.2. Eligible current leaseholders, i.e. those who purchased their home under the Right to Buy, after 1<sup>st</sup> April 2001 and before 31<sup>st</sup> March 2017. Their payment will apply from 1<sup>st</sup> April 2001 or the date in which they became a tenant of the property (whichever is the later) to the date in which they purchased the property, or 31<sup>st</sup> March 2017 (whichever is earlier).
  - 6.1.3. Current tenancies with the stock transfer organisations (L&Q, Hyde, Clarion and Phoenix) and where the resident was a Lewisham Council tenant between 1<sup>st</sup> April 2001 and the date in which the stock transfer took place.
  - 6.1.4. Former residents of properties managed by:
    - 6.1.4.1. Lewisham Council - where tenancies were in place after 1<sup>st</sup> April 2001
    - 6.1.4.2. Lewisham Homes - where tenancies occurred between 22<sup>nd</sup> January 2007 and 31<sup>st</sup> March 2017.
    - 6.1.4.3. Regenter B3 (RB3) in Brockley - where tenancies occurred between 3<sup>rd</sup> September 2007 and 31<sup>st</sup> March 2017
    - 6.1.4.4. The stock transfer organisations (L&Q, Hyde, Clarion and Phoenix) - where tenancies occurred between 1<sup>st</sup> April 2001 and the date of transfer to the stock transfer organisation.

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- 6.1.4.5. Former leaseholders who exercised their Right to Buy after 1<sup>st</sup> April 2001, and have since sold their property. Their refund will apply from 1<sup>st</sup> April 2001 or the date in which they became a tenant of the property (whichever is later) to the date in which they purchased the property, or 31<sup>st</sup> March 2017 (whichever is earlier).
- 6.1.5. Leaseholders are responsible for their own water charges following purchase of the property, therefore only first generation leaseholders who bought under the Right to Buy may be eligible.

## 7. Processing of payments

- 7.1. It is anticipated the processing of refunds will commence in accordance with the timeframes outlined below. The process will take place in a systematic way and the role out of subsequent phases will be impacted by the time taken to process earlier phases. If there is a significant demand from tenants in credit on their rent accounts to instead be paid directly, this will have an impact on the below timeframes.

Phase	Refunds to	Method	Approximate timeframe
Phase 1	Current residents in properties managed by Lewisham Homes and RB3	To rent accounts, and credits where applicable	Commencing July 2021
Phase 2	Eligible leaseholders	To service charge accounts and credits where applicable	Commencing Autumn 2021
Phase 3	Current residents of stock transfer organisations (Phoenix, Hyde, L&Q and Clarion)	Processes to be agreed with RPs	Commencing Winter 2021
Phase 4	Former tenants and eligible former leaseholders	To eligible bank accounts	Commencing beginning 2022

- 7.2. Work to identify Lewisham Homes and RB3 current residents due a refund has been completed. It is proposed that letters be issued to tenants, advising their individual refund amount and that a payment will be made to their rent account.
- 7.3. Current Lewisham Homes and RB3 residents with a credit on their rent account may be able to request a direct payment. Depending on demand, providing direct payments could take a considerable time to process, and may have a knock on impact to the proposed timeline for subsequent phases.
- 7.4. Discussions have commenced with the stock transfer organisations to make arrangements for eligible tenants to be identified and refunded in due course.
- 7.5. The process of identifying former tenants and eligible former leaseholders is anticipated to be challenging. Communications messaging will be set up as part of phase 4 to invite them to apply for a refund. Detailed information, setting out the processes involved in claiming a refund will be available on a webpage. It is proposed that they will be invited to apply for a refund using a web based form, and will be required to submit evidence to support their claim, which will be verified. This whole process is likely to take time to complete, and they will be made aware of the anticipated timeframes.
- 7.6. It is anticipated that applications for former tenants and eligible former leaseholders to apply for refunds will need to remain open for a significant period of time in order that

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they have every opportunity to apply. Those who make contact to enquire about their refund prior to the application process going live will be contacted outlining the expected timeframes. A dedicated email address has been set up to facilitate this process.

## 8. Financial implications

- 8.1. This report asks Mayor and Cabinet to approve proposals to make payments to current and former tenants as set out in sections 5, 6 and 7 of this report, to a current estimated total of £7,881,837. This will be funded via the HRA.
- 8.2. Following the Court of Appeal ruling in October 2020, it was decided to reassess the implications and potential liability for the London Borough of Lewisham. This was calculated with the data currently available at that time as £8.673m.
- 8.3. The £8.673m was set-aside in a Water Charges Provision and will be used to fund the payments as outlined in this report.
- 8.4. Work continues to assess the full liability to the Council as a result of the legal judgement and if the total value exceeds the current set-aside provision, a further charge to the HRA will be required.
- 8.5. It should be noted that where a tenant owes the council money either in current arrears or former arrears, any refund due will be used in the first instance to cover this debt. Any remaining balance which results in a credit on the tenants account would then be available to be paid over to the tenant upon request.

## 9. Legal implications

- 9.1. The supply of water and sewerage services is governed by the Water Industry Act 1991. Under section 6 of that Act the Secretary of State has the power to appoint a company to be a water undertaker for an area within England and Wales. A water undertaker has a statutory duty to supply water to domestic premises (“the domestic supply duty”). Section 142 (1) gives a water or sewerage undertaker the power to fix charges for services provided in the carrying out of its functions and to demand and recover those charges from any person to whom the undertaker provides services. In the case of a dwelling the charges must be fixed by a charging scheme made under section 143. The charging scheme must be approved by the regulator: section 143(6). Under section 144, therefore, liability to pay water charges is that of the occupier “except in so far as provision to the contrary is made by any agreement to which the undertaker is a party”. Section 150 gives the regulator power to fix maximum charges for services provided with the help of undertakers’ services.
- 9.2. In 1999, the regulator published a consultation paper on the use of its power to make a Water Resale Order. The consultation paper said (among other things): “... water resale occurs when water ... provided to a customer by a licensed undertaker (a supplier) is sold by that customer to a third party. Such arrangements are most commonly found on mobile home parks, in flats and apartments and other rented or leasehold accommodation... In the absence of a maximum resale order, the price which can be charged is governed only by any contractual arrangements existing between the parties.
- 9.3. Following the consultation exercise the regulator made the Water Resale Order 2001 and, subsequently, the Water Resale Order 2006. The 2001 Order contains a series of definitions which include: “Purchaser” means a person who occupies any dwelling and who buys from a Re-seller any water or sewerage services; “Relevant Undertaker” means a Water Undertaker or a Sewerage Undertaker; “Re-seller” means any person who is not a Relevant Undertaker but who (a) provides to any Purchaser a supply of piped water which a Water Undertaker has supplied, directly or

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indirectly, to the Reseller or (b) provides to any Purchaser a sewerage service which a Sewerage Undertaker has supplied, directly or indirectly, to the Re-seller .....If a person is a re-seller, the charges he may pass on are capped by a formula which differs from the formula to be found in a charges scheme.

- 9.4. Section 1 of the Local Authorities (Goods and Services) Act 1970 gives local authorities power to enter into agreements with public bodies to provide the public body with administrative, professional or technical services. Paragraph 20 of Schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991 provides: "... the powers of a local authority under that Act shall be deemed to include power to enter into an agreement for the collection and recovery by the authority, on behalf of any water undertaker or sewerage undertaker, of any charges fixed by the undertaker under Chapter I of Part V of the Water Industry Act 1991."
- 9.5. 2 cases have recently come before the Courts regarding the relationship between Thames Water / a Local Authority and the Tenant and the charges levied. In the case of Jones v Southwark [2016], the Judge had to interpret a written agreement entered into by Thames Water [TWU] and LB Southwark dated 6 March 2000 ("the Southwark Agreement"). He held, materially, that: (1) The Southwark Agreement did not create a relationship of principal and agent (as LB Southwark had contended) but was an agreement of sale and purchase. This had the result that LB Southwark was a re-seller for the purposes of the Resale Orders and (2) LB Southwark was, accordingly, a re-seller, and had been charging Ms Jones more than the "maximum charge" permitted by the Resale Orders.
- 9.6. The subsequent case, Royal Borough of Kingston [RBK] v Moss, sought to challenge and overturn the Jones v Southwark decision. The declarations which the Council were seeking were, ostensibly, that in collecting water and sewerage charges from the tenant the Council was not acting as a 'water reseller', and that it was the tenant and not the Council who remained liable to the water provider at all material times. Lewisham along with 23 other local authorities formed a collective through the Local Government Association [LGA] in support of the challenge.
- 9.7. The case came before a single Judge in the High Court over 4 days at the end of October 2019 and Judgement was handed down on 29th November 2019. The Judge found in this first instance that RBK was a water reseller and that Mr Moss was entitled to a refund of water charges that he had overpaid over the years [2003 – 2017] ... the precise figures were not calculated. The matter came before the Court of Appeal on 20th October 2020. The Court of Appeal found that RBK was a water reseller and Mr Moss was entitled to a refund of overpaid water charges.

## **10. Equalities Implications**

- 10.1. The process for inviting former tenants and eligible leaseholders to apply for a refund will need to be robust, to ensure all former tenants and eligible leaseholders have the opportunity to apply for a refund.

## **11. Climate change and environmental implications**

- 11.1. There are no anticipated climate change and environmental implications.

## **12. Crime and disorder implications**

- 12.1. There are no anticipated crime and disorder implications.

## **13. Health and wellbeing implications**

- 13.1. There are no anticipated health and wellbeing implications.

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## 14. Background papers

- 14.1. Member Briefing - Lewisham Council's Thames Water contract – 11<sup>th</sup> November 2020

## 15. Glossary

Term	Definition

## 16. Report author and contact

- 16.1. Fenella Beckman, Director of Housing Services [Fenella.Beckman@lewisham.gov.uk](mailto:Fenella.Beckman@lewisham.gov.uk)

## 17. Comments for and on behalf of the Executive Director for Corporate Resources

- 17.1. Tony Riordan, Principal Accountant, Financial Services  
[Tony.Riordan@lewisham.gov.uk](mailto:Tony.Riordan@lewisham.gov.uk)

## 18. Comments for and on behalf of the Director of Law, Governance and HR

- 18.1. Leonard Tribe, Senior Lawyer, Legal Services [Leonard.Tribe@lewisham.gov.uk](mailto:Leonard.Tribe@lewisham.gov.uk)

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