



Cabinet
06 April 2021

**Report from the Strategic Director
of Community Wellbeing**

Water Charges and Brent Council Tenants

Wards Affected:	All
Key or Non-Key Decision:	Key Decision
Open or Part/Fully Exempt: (If exempt, please highlight relevant paragraph of Part 1, Schedule 12A of 1972 Local Government Act)	Open
No. of Appendices:	None
Background Papers:	None
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1. Purpose of the Report

- 1.1. In the early 2000's, water companies offered Councils and social housing landlords opportunities to enter into a contractual arrangement to provide billing and collection services in return for a void allowance for empty properties and commission to reflect both the administrative costs attached and the transfer of risk and bad debt associated with these accounts. Brent Housing Partnership (BHP) on behalf of Brent Council entered into two of these arrangements, the first with Thames Water Utilities (TWU) in 2003 and later Affinity Water (AW) in 2005.
- 1.2. In 2016, it was ruled the London Borough of Southwark, were acting as 'water resellers' in accordance with the Water Resale Order 2001 and 2006 due to this type of arrangement. This position was later reinforced by a 27 October 2020 Court of Appeal decision (*Kingston v Moss*).
- 1.3. Following this ruling, the Council has reviewed the arrangements with TWU and AW and through this paper is seeking approval from Cabinet to issue refunds to current and former Brent Council tenants. The proposed approach is outlined

in the recommendations below but the overall report recommends that both current and former tenants are refunded to the start date of the contracts.

2. Recommendations

- 2.1. That Cabinet note the content of the report and approve the following approach regarding the payment of refunds in respect of water charges:
- (a) Refunds for both current and former tenants are calculated from the contractual start dates i.e. Thames Water Utilities 2003 and Affinity Water from 2005.
 - (b) Refunds for current tenants are to be issued to their rent accounts and those in credit can then apply for the amount to be debited to their bank accounts, and if in arrears, the refund will be used to offset the arrears owed
 - (c) Refunds for former tenants are to be; (i) issued to their rent accounts where former tenants have rent arrears to offset any arrears owed to the Council; (ii) paid into leaseholders accounts (who were tenants at the time) if they are currently in occupation; and (iii) establish a process for former tenants (with no current relationship with Brent Housing Management) to apply for a refund and ensure this is publicised with a cut-off date of two years from the point of launching the application process.

3. Background

- 3.1. In 2016, the landmark case of *Jones v LB Southwark* the judge ruled in its contract with TWU, Southwark had been purchasing water from TWU and reselling it to tenants at the full charge when in fact Southwark was receiving a discount and therefore was charging more commission than legally allowed. It should be noted that Southwark was able to charge a small fee for administration; this is a nominal amount of 1.5p per day per property, which equates to £5.47 per year per property. Southwark were ordered to refund the tenant any commission charged over and above £5.47 and backdate this charge to the time they either; entered into the contract or the start of the tenancy.
- 3.2. Following the ruling, the LB of Southwark took the decision to repay all tenants (both current and former) of its c.48,000 homes. Refunds were contained within the ring-fenced Housing Revenue Account, as required under the Local Government and Housing Act 1989. This pressure on Southwark's Housing Revenue Account ("HRA") was met through a combination of in year revenue surplus, lower debt repayment, lower bad debt provision and lower contribution to the capital programme than would otherwise have been the case.
- 3.3. The Royal Borough of Kingston-upon-Thames opted to challenge the Southwark ruling and pursued a claim in the High Court against one of its tenants, who was claiming a refund in respect of the water charges, seeking a declaration from the court that Kingston was not a "water reseller". The High Court dismissed this claim in November 2019 and Kingston took its case to the Court of Appeal; 'the collective' (i.e. the Local Government Association and a group of local authorities, which included Brent Council, which was known as the LGA water charges collective) supported Kingston in the High Court case

and this appeal. On 27 October 2020, the Court of Appeal ruled that the previous judgement of November 2019 stood and that the LB of Kingston was required to refund the defendant tenant in that case and effectively, its secure tenants.

- 3.4. Due to the similarities between those arrangements held by the High Court in the Southwark and Kingston cases, if the court was asked to make a determination on Brent's arrangements, it is highly likely the Council would be classed as a water re-seller if a case were taken through the Court process. Brent would therefore be required to provide refunds for covering the period the contract with TWU and AW was active.

Current Position: Brent and Thames Water Utilities

- 3.5. Responsibility for managing Brent Council homes transferred back into the Council from BHP in 2017. During this period of transition, the Council introduced a variation to the contract with TWU to mitigate any further unintended overcharging of tenants. This variation of the contract removed the agreed terms for calculating and paying commission and the void discount, instead placing the onus on TWU to offer tenants the same type of relationship and service as if they were dealing with them directly. The variation also established the Council was no longer a water reseller.
- 3.6. The variation to this contract means that the Council's liability period for calculating refunds owed to tenants would be 2003 (when the contract started) – 2017 (when the variation was introduced).
- 3.7. TWU, recognising that many Councils were following suit and introducing these variations subsequently served notice on the Council to end the contract altogether in 2018. The contract officially ended in March 2019.

Current Position: Brent and Affinity Water

- 3.8. Despite advice that the ruling against TWU contracts was likely to apply to other water companies such as AW, the same approach was not taken for AW.
- 3.9. The process was started to apply a similar variation to the AW contract as seen with TWU but an internal delay in signing this deed meant that in 2019, the position for this contract was reviewed and it was agreed to serve notice to terminate the AW contract instead. Preparations to serve Notice were undertaken in late 2019 to ensure the contractual date for termination was met. The Notice was served prior to 31st March 2020 as required giving a termination date of 30th March 2021.
- 3.10. This delay in action means the liability period for issuing refunds is 2005 (when the contract started) – 2021 (termination of the contract). Based on indicative figures, the cost of the delay is an additional £400k in refunds.

Implications for tenants

- 3.11. The court rulings against both Southwark and Kingston stated that in receiving the discounts for voids and applying a higher commission, those councils should have passed this discount on to tenants in the form of lower bills. Instead, the money was incorporated into the Council's HRA and utilised for the

continued provision of landlord services. It is recognised that all tenants would have directly seen the benefit of a reduced bill from the discounts obtained by Brent, though this would have been a nominal annual amount when divided by all tenants. As commission was reinvested into providing landlord services such as repairs, BHP and subsequently BHM did not benefit from any 'profit' made other than using it to provide more for tenants.

- 3.12. However, both TWU and AW offer support for low income families or those experiencing hardship, and under the contracts between the Council and TWU and AW, these schemes were not available to Brent Council tenants. Examples of these schemes include;
- Low income tariffs: low income households can apply for a 50% discount on bills (*Both TWU and AW*)
 - Water Sure: households with a water meter and use a large amount of water because they have a big family or a water-dependent medical condition can have their bills capped (*Both TWU and AW*)
 - Customer Assistance Fund: for every £1 the tenant pays towards their water arrears TWU will match it and if these payments are maintained without a break for two years the TWU will clear any outstanding debt (*TWU only*)
 - Water Direct: a scheme working in partnership with the Department for Work and Pensions to agree a direct deduction from benefit payments to clear water arrears (*AW only*)
- 3.13. The 2017 variation with TWU required TWU to consider tenants for any support but due to the delay in action on the AW contract means tenants whose water is provided by AW would have continued to be not eligible for this support.
- 3.14. How water charges set up on the system also has a potential impact for tenants. Council tenants water charges are / were listed as a service charge and formed part of the overall monthly rent and service charge payment made to the service each month. Due to water charges being treated as a service charge and not being placed on a separate account, the Northgate system used by BHM cannot identify on mass how many tenants are in arrears and of those arrears how much is attributed to water charges. The Council has continued with enforcement action in line with its processes for any money owed including water charges. If an individual was in debt solely for water charges this would not constitute the level of arrears we carry out an eviction for. BHM would work with an individual to access financial support and set up an affordable payment plan.
- 3.15. The average refund to be issued per tenant (including former tenant) is £466; this amount will vary based on how long an individual was a tenant for during the period of the TWU and AW contract.

4. Considerations

- 4.1. To inform the approach the Council would take towards issuing refunds a number of considerations have been outlined in this section.

Consideration 1 – Timescales for calculating refunds

- 4.2. The first consideration is the window the Council would consider for offering refunds.
- 4.3. The expectation for current tenants is the approach taken by Southwark after the Court ruling in their respective case. This is that all current tenants should receive a refund covering the time from the contract start date (2003 for TWU and 2005 for AW) or the tenancy start date if after to the point of the contract variation (2017 for TWU) or contract termination (2021 for AW).
- 4.4. There are options for consideration when specifying the period the Council would use for calculating refunds owed to former tenants for the excess charge including interest, in line with Water Resale Order 2006. The options are presented as follows:
- *Option A* - Refund all current and former tenants going back to 2003(TWU)/2005(AW), this is the recommended option.
 - *Option B* - Refund current tenants going back to 2003(TWU)/2005(AW) and former tenants going back to 2010, relying on the “change of position” legal defence. This option is taking the view that the Council refunds back a statutory six-year from the Southwark ruling in 2016.
 - *Option C* - Refund current tenants going back to 2003(TWU)/2005(AW) and former tenants going back to 2014, relying on the “change of position” legal defence. This option is taking the view that the Council refunds back a statutory six years from Kingston ruling in 2020.

Table 1: Estimated cost associated with each scenario

Scenario	Description	Water Supplier		Tenant		Total
		Gross Refund Thames (£M)	Gross Refund Affinity (£M)	Current (£M)	Former (£M)	Gross Refund (£M)
A	Refund all current and former tenants going back to contract start date (2003/2005)	5.5	1.7	4.8	2.4	7.2
B	Refund current tenants going back to contract start date (2003/2005) and former tenants going back to 2010	4.1	1.4	4.8	0.7	5.5
C	Refund current tenants going back to contract start date (2003/2005) and former tenants going back to 2014	3.7	1.3	4.8	0.2	5

- 4.5. Southwark’s approach (i.e. Scenario A as set out in Table 1 above) and the recommendation of this report is to adopt Option A and refund all current and former tenants to the contract start dates.

Consideration 2 – Issuing refunds to current tenants

- 4.6. The Council already has an established relationship with current tenants and therefore issuing refunds will be a straightforward process. The recommendation of this report is that all current tenants are issued refunds to their rent account. Those who are in credit can then request the refund to be debited to their bank account, and for those in rent arrears the refund will be used to offset any monies owed to the Council.
- 4.7. The alternative option is to establish a process, which requires tenants to apply for a refund directly. This would be an administrative burden for the service and risk tenants who are digitally or social excluded from not receiving money owed to them. Additionally, unless a cut off point for issuing refunds was agreed, the process could be on going for a number of years.

Consideration 3 – Issuing refunds to former tenants

- 4.8. Issuing refunds for former tenants is more difficult as the Council may no longer hold contact details and in some cases, tenants may now be deceased.
- 4.9. This report recommends the Council take reasonable steps to issue refunds. These are:
- Issue a refund direct to the rent accounts where former tenants still owe arrears to the Council
 - Identify any leaseholders currently in occupation who were previously tenants during this time period
 - Establish a process for former tenants (with no current relationship with Brent Housing Management) to apply for a refund and ensure this is publicised with a cut-off date of two years from the point of launching the application process.
- 4.10. The amounts due for refund for former tenants, as shown in Table 1 above, are based on all former tenants applying for a refund. It is unlikely in practice this will happen however, the service would still actively promote the application. Any tenants who are recently deceased and whose estates are still in the process of being administered would also be entitled to a refund.
- 4.11. The alternative is for the service to either resource or commission an external agency to track down any former tenants and proactively issue a refund. This would add to the costs incurred by the Council and therefore the pressure on the HRA through this process.

5. Next steps

- 5.1. The table below sets out key milestones for Cabinet to note. A project group of representatives from each department will be established to ensure this project is successfully completed within the next financial year.

Table 2: Key milestones and proposed timelines for implementation

Milestone	Proposed Timescale	Department required
Finalise refund calculations	March 2021 - June 2021	BHM and Finance
Develop agreed process for issuing refunds	March 2021 – June 2021	Performance Insight and Improvement and BHM
Members briefing	June 2021	BHM
Resident Association briefings	June 2021	BHM
Publish and provide information to tenants.	Update website with general information Individuals to receive confirmation of refund amount June 2021 – September 2021	Communications and BHM
Issue refunds to all current tenants	June 2021 – TBC	BHM and Finance
Issue refunds to all former tenants with arrears	September 2021 - ongoing	BHM and Finance

6. Financial Implications

- 6.1. The water charges were paid directly into each authority's Housing Revenue Account (HRA), similar to the service charges, and therefore the reimbursements will also need to be paid from the local authorities' HRA. Since the water charges are not covered by housing benefits, they are a cost pressure on revenue budgets.
- 6.2. For Brent, based on current knowledge and a number of assumptions, the financial exposure is estimated to fall between £5m and £7.2m, as shown in the scenario model in Table 1 above. However, these estimates may be subject to change, depending on the calculation methodology applied. To be prudent, the figures provided in this report are estimated using the calculation methodology that results in the highest cost to the Council.
- 6.3. In 2019/20, Brent took action, consistent with other providers of social housing, to set aside earmarked reserves of £2.7m within the HRA for the water case to cover the cost of making payments to tenants. Early analysis at the time estimated the exposure to be circa £5.5m, based on the assumption that the six-year limitation period would apply to all tenants. Due to the ongoing uncertainties regarding the extent of the liability at the time, 50% of the estimated exposure was set aside in a dedicated HRA reserve.
- 6.4. The magnitude of the estimated financial exposure represents a significant pressure on the HRA, as the £2.7m provision will need to be increased up to the value of the agreed option in 2020/21. The increase will be funded through a reduction in the HRA revenue contribution to capital. The HRA's Capital requirements (Major Works and New Builds) are funded via Capital Receipts (Sale of RTB homes), Borrowing and an annual allowance from the Revenue

budget. The one off reduction in this revenue contribution will have an impact on the financing of the major works in 21/22. Assuming 2% interest rates, Option A, that is estimated to cost £7.2m, would result in additional £0.1m per annum in debt financing costs. The long-term budget pressures will be incorporated into the 30 year HRA Business Plan and mitigating actions, such as re-profiling the planned major works programme or revenue savings, will be considered as part of the wider Asset Management Strategy.

7. Legal Implications

- 7.1. In the case of *RB Kingston-Upon-Thames v Moss [2020] EWCA Civ 1381*, the Court of Appeal dismissed the appeal by the Royal Borough of Kingston-Upon-Thames (“Kingston”) from the High Court’s 2019 conclusion that, when collecting water charges from its secure tenants alongside the weekly rent, it was acting as a water ‘re-seller’ for the purposes of the Water Resale Orders 2001 and 2006 and had, as a consequence, been charging Mr Moss more than the statutory maximum set by those Orders.
- 7.2. The net result was, as in *Jones v Southwark LBC [2016] EWHC 457 (Ch)*, that Mr Moss was entitled to repayments against Kingston. This was notwithstanding the fact that at all times he had been charged the exact same sums that he would have been charged had TWU been charging him direct. This resulted from the maximum price formulae in the Water Resale Orders. Brent’s written agreements with TWU and Affinity contain similar terms to the ones considered in the Jones (Southwark) and Moss (Kingston) cases. It is understood that Kingston has not applied to the Supreme Court to appeal against this decision of the Court of Appeal.
- 7.3. Arguably, the judgment only applies to Kingston, given that they were the only party to the case, and as the vast majority of the background documentation put forward in support of the case related to their historic arrangements with Thames Water Utilities (TWU) and predecessor bodies. However, from examining the paperwork provided back in 2016 (when the LGA water charges collective was founded) by those authorities who were collecting water rates for/on behalf of TWU, it appears that all of those authorities were collecting water rates on behalf of TWU on near identical terms. As such, it is likely that if the matter were to be determined by the court, all of those authorities, including Brent, would be deemed to have been acting as water resellers in the same way as RB Kingston were.
- 7.4. In relation to Brent’s collection arrangements with Affinity Water (AW), there are many similarities between the AW agreement and the TWU agreement, and Southwark’s agreement with TWU considered in the *Southwark v Jones* case. It is likely that if the Court was asked to make a determination, it would construe the AW Agreement to be similar to the TWU Agreement and rule that the Council was acting as a water reseller with AW.
- 7.5. Until the Water Resale Order 2001 came into effect, there was no right to claim for any overcharge of water by a ‘water reseller’. The contract between Brent and TWU is dated 18 February 2003. This contract was varied in March 2019 with an effective date of 1 April 2017 to reflect the fact that Brent was an agent and not a water reseller. The contract between Brent and AW is dated 09 August 2005. This contract has not been varied and has been terminated at the Council’s instigation, taking effect on 31 March 2021.

- 7.6. The council is only bound to concede it was a water 're-seller' from the date of the written agreement with the water company, which agreement is indistinguishable (in legal terms) from those agreements considered in the cases of *Moss (Kingston)* and *Jones (Southwark)*. The council does not concede it was a water re-seller before the date of the respective contracts. If any tenant wanted to challenge that, they would have to prove that the characteristics of any previous contract with the water providers was similar to the agreements.

Limitation

- 7.7. There are effectively three routes for people to claim a repayment of water charges:
- A statutory claim in the small claims court, in which case limitation is 6 years from the date of claim. Former tenants would be limited to a statutory claim of 6 years.
 - An equitable set off, in which case there is no limitation period. This would only apply to current tenants who have a continuing obligation to pay rent to the Council, and would need the tenant to inform the council that they are claiming a set off.
 - A claim for restitution, in which case there is no limitation period, (section 32(1)(c) Limitation Act 1980). However, there may be a defence to any such claim on the basis of 'change of position'.
- 7.8. The approaches in paragraph 3.4 above amount to the same thing; the council would be adopting a formal position that there is no legal entitlement to recover any overcharges made more than six years before. However, once tenants receive reimbursement of the six years' overcharges there is a risk that many may question why the council, having accepted it has acted unlawfully in overcharging them for many years, is not repaying all the money. Whilst the council would be able to argue that the entitlement to an overcharge is statutory and s9 Limitation act 1980 applies to that statutory claim, the risk in adopting this approach is that the tenant may counter with legal proceedings in a claim for restitution or right to set-off. This would have two legal consequences. First the authority would have to defend these proceedings with the consequent costs and may lose. Secondly this leaves open the possibility of claims being brought against the authority some time into the future.
- 7.9. If the council adopts Option A as the approach set out at paragraph 3.5 the only risk is that it may end up paying out more than it would need to if it adopted the other approaches. However, it would be a principled approach for an authority to take if it chose to do so. Whatever approach is taken, former tenants have entitlement to repayment as well.

Interest

- 7.10. In addition, interest is payable on the overpayment. The council is only liable to repay interest on excess water charges from 1 April 2006 onwards when the Water Resale Order 2006 came into force as the Water Resale Order 2001 did not provide for interest to be recoverable on overcharged sums.
- 7.11. Interest does not need to be applied to overpayments from 1 April in each financial year, only from the date on which the total amount charged turned into

excess. Logically, in a case where weekly payments have been made, the starting date will be the date in the year when the total aggregate payments made by the tenant exceed the maximum amount set by the Orders. Anything paid after that date will be an overcharge (or, to use the terminology of the Orders, “the excess”). The authority would want to argue that the tenant only started to be “overcharged” at the tail end of each year, which would affect the date from when interest was first payable.

- 7.12. The rate of interest to be applied to overpayments is the twice the average Bank of England base rate from across the period during which the overpayment is calculated. The start date for the calculation of the average is the first date on which tenants were overcharged, and the end date is the date on which the authority ceased to collect water rates as a water reseller. However, interest will still be chargeable until the date on which payments are actually made.
- 7.13. There is no lawful basis for recovering more than the 1.5p per day administration charge, regardless of an authority’s actual historic administrative costs in collecting charges and their current administrative costs in now arranging for repayments.
- 7.14. If a tenant claims in the County Court, a tenant may be entitle to recover interest at 8% per annum as per s.69 of the County Courts Act 1984.
- 7.15. There are no obstacles to crediting the overpayment into a tenant’s rent account or former tenant rent arrears but the amount should be clearly identifiable as such.
- 7.16. Any recently deceased tenants whose estates are still in the process of being administered may be entitled to make a claim. However, it is less clear whether longer deceased tenants would retain the right to make a claim. Successor tenants would only have an entitlement to claim from the date that their tenancy commenced following the succession.

8. Equality Implications

- 8.1. The refund of water charges affects all tenants living in Brent Council homes. The recommendation of adopting a proactive approach to refunding current tenants would mean an automatic refund to individuals rent accounts mitigating the risk of barriers that may affect individuals with protected characteristics from claiming. Any content produced by BHM will be accessible via multiple channels and officers will be briefed with FAQ’s so they are confident in explaining it to tenants should they have questions.

9. Proposed Consultation with Ward Members and Stakeholders

- 9.1. See table 2 above

10. Human Resources/Property Implications (if appropriate)

- 10.1. N/A

Report sign off:

Phil Porter

Strategic Director of Community Wellbeing