

Item No. 13.	Classification Open	Date: 1 November 2016	Meeting Name: Cabinet
Report title:		Thames Water – Historic Water Resale Case Update and Next Steps	
Ward(s) or groups affected:		All	
Cabinet Member:		Councillor Stephanie Cryan, Deputy Leader and Cabinet Member for Housing	

FOREWORD - COUNCILLOR STEPHANIE CRYAN, DEPUTY LEADER AND CABINET MEMBER FOR HOUSING

In June cabinet considered a report following the recent High Court ruling in respect of the council's contractual relationship with Thames Water for the collection of its tenants' water rates. Cabinet agreed that the council should start consultation with tenants on its preferred option to terminate that contract and for tenants to enter a direct billing arrangement for their water rates. Since starting the consultation Thames Water has given notice to terminate the contract on 1 April 2017. This means that all tenants will have to have a direct billing arrangement in place with Thames Water by 31 March 2017.

This now necessitates the need for a smooth transition plan to help and support our most vulnerable residents through this change and I am pleased that Thames Water has recognised this and has made a commitment to working with the council through the establishment of a Project Board.

This report also provides an update on the progress made on the refunds to eligible tenants following the High Court Ruling.

RECOMMENDATIONS

1. That cabinet notes the outcome of the consultation with tenants regarding the preferred option to terminate the agreement with Thames Water.
2. That cabinet notes that on 22 September 2016 Thames Water served notice of termination of the contractual arrangement with the council. The notice will expire on 31 March 2017.
3. That cabinet notes that as Thames Water has given notice to terminate the agreement council tenants will switch to a direct billing arrangement with Thames Water with effect from 1 April 2017.
4. That cabinet agrees that given the termination of the agreement the strategic director of housing & modernisation be instructed to work with Thames Water to ensure as smooth a transition as possible for council tenants including support for vulnerable tenants on the process of switching to a direct billing arrangement with the water company.
5. That cabinet notes the progress with the process of refunds to eligible tenants.

BACKGROUND INFORMATION

Contractual arrangement with Thames Water

6. The council has, in common with a large number of other local authorities and social housing providers, a contractual arrangement with the local water supplier (in the council's case Thames Water). This arrangement was understood to be one by which the council was to provide billing and collection services, in return for a void allowance for empty properties and a commission to reflect both the administrative costs attached and the transfer of risk and bad debt associated with these accounts.
7. Thames Water has around seventy broadly similar contracts with other London boroughs, district councils and housing associations within its footprint. Such agreements also appear to be common across the country.
8. The contract has run for a number of years, and is mostly likely a direct "descendant" of the precepting arrangements in place until regional water authorities began to bill customers directly. In the 2016/17 HRA budget the gross charge for Thames Water which the council passes on to tenants was £13.6 million net of void allowance, whilst the commission income is £2.4 million. Leaseholders have a direct billing relationship with Thames Water, and the council plays no part in this. Similarly, some tenants have also chosen to opt out of the council's arrangements and also have a direct billing relationship with Thames Water; however they are comparatively few in number.
9. Throughout this process, the council regarded itself as acting as an agent for Thames Water, and has had no input into, nor ever sought to vary the billing amount for each individual tenancy as calculated by Thames Water itself.

Litigation background

10. In 2011 the council sought to evict a tenant for non-payment of rent and associated charges, including water charges. The tenant resisted the claim, and the tactic of his solicitors was to question the legality of every charge made by the council to the tenant since the commencement of his tenancy in 1999. After a protracted period of correspondence, the council took advice from counsel and brought a possession claim in the Lambeth County Court.
11. At trial the court found for the council in almost every particular regarding the legality of the charges that made up the tenant's total rent liability; however the Judge was not minded to make a possession order because of reservations regarding the housing benefit position that the tenant found himself in. The tenant appealed, one of the stated grounds being that the court had erred in not finding the council to be a water reseller. This was listed at the Court of Appeal, but the case was settled with the tenant before the hearing commenced.
12. Following the conclusion of this legal action, the council felt it prudent to review the contractual arrangement with Thames Water in order to remove any possible ambiguity as to the legal relationship between the two parties, and with further advice from counsel, a Deed of Variation was drawn up, agreed with Thames Water and signed on 23 July 2013. The Deed explicitly states that the council is not acting as a water reseller under the relevant regulations.

13. On 15 October 2014, the council was served with a High Court claim commenced by a tenant residing in SE15 (N.B. not the tenant cited in paragraphs 10-11 above, though represented by the same firm of solicitors), seeking a declaration that the council was a water reseller as defined by the Water Resale Order 2006, and that, as a consequence, water charges made since the date that the regulations came into force should be recalculated under the provisions of that Order.
14. This case was heard at the High Court (Chancery Division) in February 2016, and on 4 March 2016 Newey J. found in favour of the tenant. However, there was an important proviso – the court had not felt equipped to judge on the effectiveness of the Deed of Variation since Thames Water was not a party to the tenant's claim. As part of settlement of the case, the tenant agreed that the Deed of Variation established that the council was no longer a water reseller after 22 July 2013.
15. Given the agreed position regarding the council's relationship with Thames Water post-July 2013, and bearing in mind the cost of further litigation, the chances of success, and the relative benefits to unmetered tenants as a whole, the council decided that the settlement was preferable to bringing an appeal on the "resale" issue.

KEY ISSUES FOR CONSIDERATION

16. On 7 June 2016 the cabinet received a report that set out the issues arising from the outcome of the High Court Claim that was heard in February 2016. As a result cabinet agreed that:
 - The council proceeds with immediate refunds to current tenants, with interest calculated under the provisions of the Water Resale Order 2006, the refunds themselves covering the period 1 April 2001 to 28 July 2013, and with interest covering the period 1 April 2001 to 30 June 2016.
 - Cabinet instructs the Strategic Director of Housing and Modernisation to make necessary arrangements for refunds to former tenants covering the periods outlined in paragraph 1 to take place during the course of 2016 and beyond if required.
 - The preferred option is to terminate the council's contractual agreement with Thames Water.
 - Cabinet instructs the strategic director of housing and modernisation to consult with tenants on the proposal to terminate the contractual agreement with Thames Water, and to provide information regarding likely timescales, their personal responsibilities regarding water charges, and the options available to them once termination has been implemented.

Progress with the refund process

17. Anyone who was a tenant of Southwark Council between 1 April 2001 and 28 July 2013, and was charged for water and sewerage by the council was potentially eligible to receive a refund. Given the large scale of the exercise this proceeded in several phases and included:

- 27,922 current tenants were eligible and were contacted by letter with a calculation of their refund.
 - Of these so far the council has issued about 23,500 cheques to those who are current tenants with the council.
 - The council has also refunded the 2,296 households whose properties are managed by Tenant Management Organisations (TMOs). The individual tenants are being paid through their TMO.
 - The council is currently refunding about 6,000 households who are current tenants but have had more than one tenancy with the council (because for example they moved from one Southwark council property to another).
 - This is to be followed by about 2,000 leaseholders (people who exercised their right to buy in the refund period) who remain in occupation of the property.
 - The remainder includes about 35,000 former tenants of the council for whom the council does not have current contact details will be able to apply to the council towards the end of October. The process for applications will be published on the council's website and in an advertisement in Southwark News.
18. In total, the council estimates that around 74,000 households will have been contacted or contacted the council regarding refunds when the process is complete. More detail on this is set out below.
19. Where possible, the council has offset refunds against arrears, in order to assist tenants in the management of their rent accounts. Not all the aggregate arrears of £15.1 million can be utilised in this way – there was a matching exercise to allow individual cases to be offset where this is possible. An early estimate of the proportion available to be utilised in this way is £4.6 million, as the table below sets out.

	Cases	In credit	Nil balance	In arrears	Total Arrears £m
Current tenants	31,070	17,103	308	13,659	10.2
Former tenants	43,358	9,837	29,891	3,630	4.9
Total cases	74,428	26,940	30,199	17,289	15.1

20. Analysis of the individual cases gives the following likely application of refunds as an offset against arrears:

	Arrears	Likely offset	Arrears remaining	Net refunds
	£m	£m	£m	£m
Current tenants	10.2	3.5	6.7	13.6
Former tenants	4.9	1.1	3.8	10.4
Total cases	15.1	4.6	10.5	24.0

21. For the 31,000 current tenants, the average refund for eligible tenants was around £550. It is important to note that an individually calculated refund figure will be dependent on a number of variables, since the water charge itself as supplied to the council by Thames Water is based on rateable values, which gives rise to a greater variety of original debits. The water charge was also updated annually by Thames Water, so the timing of occupancy affected the final amount arrived at.
22. In summary to date the council has refunded approximately 31,000 current tenants and just over 2,500 TMO tenants a total of around £17m to date. Water refunds that were credited to rent accounts have now been debited for eligible current tenants and 23,977 cheques have been dispatched totalling £12.7m, with customers in rent arrears having those reduced by the credit applied to the rent account.
23. The table below sets out the total water charge and each of the stages above, separated into current and former tenants.

1 April 2001 – 28 July 2013	Cases	Water Charge	Gross Refund	Admin. Fee	Interest 2001-2013	Interest 2013-2016	Total Credits
		£m	£m	£m	£m	£m	£m
Current tenants	31,070	70.2	15.5	(1.5)	2.7	0.4	17.1
Former tenants	43,358	46.8	10.3	(1.1)	2.1	0.2	11.5
Total cases	74,428	117.0	25.8	(2.6)	4.8	0.6	28.6

Returned cheques

24. A total of 23,977 cheques were raised in the first phase of refunds with a value of £12,732,894.22 in the lead tenant's name. At the time of writing 1,505 cheques have yet to be presented and these outstanding total £630,235.01.
25. 637 cheques have been returned to Southwark to either be re-issued to tenants or credited back to the rent account: this represents 2.7% of all cheques issued

and only 1.5% for re-issue. Below is a breakdown of the reasons cheques were returned.

Reason for Return	No of Cheques
No Bank Account	29
Tenant Deceased/Succession Issues	52
Tenant no Longer Living at the Property	48
Cheque issued in the Wrong Name (e.g. tenant since married and changed surname or Incorrect Spelling)	284
Credited back to the Rent Account	159
Unknown / Other (Destroyed/Paid to a 3 rd Party)	65

26. Under the Water Resale Orders 2001 and 2006, the amount that a reseller can charge a third party must be calculated as a proportion of the sums paid by the reseller to the water supplier. The High Court judge found that the commission and void allowances, which until July 2013 were both deducted from the total sums paid by the council to Thames Water, should have been passed on to unmetered tenants in the form of lower bills. Taken together, the void allowance (5%) and commission (18%) is equivalent to 22.1% of the total charged to individual tenants for water. Under the terms of the Water Resale Orders, the council is allowed to charge an administration fee of 1.5p per day, which is being deducted from the total to be refunded.
27. The 2006 Order stipulates that overpayments by a reseller must be refunded including an element for interest equivalent to double the average Bank of England base rate for that period, calculated on a "simple" basis (i.e. the interest itself does not generate further interest).
28. Whilst the judgment was made in the context of the 2006 Water Resale Order, the council wished to avoid any further legal challenge and draw a line under the matter. After taking further legal advice regarding both the applicability of a limitation period and the relative effect of the two Water Resale Orders, the council formed the view that it would be both prudent and reasonable to extend the period of liability to the commencement of the first Water Resale Order (April 2001), and make refunds from that date up to 28 July 2013.
29. As noted above a Deed of Variation was signed on 23 July 2013, and the council was therefore not required to make any refunds in respect of water charges after this date. However, as rents and associated charges are accounted for on a weekly basis (Monday – Sunday), the refund period was extended to 28 July 2013, to the benefit of tenants.

Consultation on the future relationship with Thames Water

30. Following agreement of the 07 June 2016 cabinet report the council commenced consultation on the preferred option of terminating the agreement with Thames

Water with the intention of reporting the results back to cabinet to inform the decision on the future relationship with Thames Water.

31. The consultation included giving tenants information on the implications of termination, the rights and responsibilities of tenants as individual customers of Thames Water; the opportunities that this enables regarding alternative tariffs; and the likely timescales involved.
32. The consultation followed the councils agreed consultation framework that promised all our consultation would be:
 - Universal
 - Impartial
 - Comprehensive
 - Timely and
 - Cost effective.
33. The stakeholders for this consultation were all current tenants subject to the current arrangement for paying water charges. The chosen consultation method was by survey made available on the council consultation portal and in hard copy on request for those unable to complete them online. This was promoted to residents in the letters to them confirming the refunds and to all Chairs of Tenants and residents Associations, Tenant and Homeowners Council and Area Housing Forums.
34. The consultation provided information on the background, and set out the reasons for the council's current suggested way forward inviting feedback on this option.
35. The consultation was also monitored and analysed with the aim of ensuring that we receive responses from a representative sample of residents to give greater confidence in the results.
36. The response to the consultation was poor. A total of 15 responses were received and the consultation was therefore inconclusive as to tenants preferred way forward.
37. Given the termination of the agreement by Thames Water the council has no option regarding the ending of the agreement and the consultation will now end.

Termination of the agreement

38. The agreement between the council and Thames Water is a commercial agreement which can be terminated by either party. Clause 7.2 of the agreement allows either party to terminate by giving at least six months' written notice to the other party.
39. On 22 September 2016 Thames Water Utilities Limited served formal notice in writing that the agreement would terminate and Thames Water would take over the billing relationship from 1 April 2017.

The transition plan

40. Given the decision to terminate the agreement it is now important that the council and Thames Water ensure that there is as smooth a transition as possible for tenants switching to the direct billing arrangement on 1 April 2017.
41. Officers have met with officers of Thames Water to begin discussion as to how this process could work and are establishing a Project Board of Thames Water and council staff that will develop and ensure implementation of a Project Plan for the 6 months leading up to 1 April 2017.
42. As noted in the termination letter Thames Water has experience of previous transitions of tenants to direct billing. The transition plan will be based on this experience and Thames has made a commitment to working with the council to ensure this is as seamless as possible.
43. The transition plan will be complete by 14 November 2011 and include the following key elements:
 - Communication between the council and all affected tenants at the start of the process advising them of the change and the next steps
 - A communication plan agreed between the council and Thames Water for communication with affected tenants throughout the transition phase.
 - Engagement with tenants through attendance at tenants meetings such as Tenants & Residents Associations, Area Housing Forums and Tenants Council.
 - Engagement with key partners such as the advice agencies who may be approached by tenants for advice.
 - Engagement with frontline staff for example those in Resident Services and Communities so that they can respond to tenants queries in the transition period.
 - Engagement with other key staff in the council and elsewhere who deal with vulnerable tenants
 - Consistent and clear messaging using website, existing newsletters, noticeboards and other bulletins for tenants
 - Communication with tenants using the council rent letters in February 2017.
44. The cabinet member has already written to Tenants & Residents Associations and Tenant Council advising them that Thames Water has given notice to terminate the agreement. The aim was to give tenants as much notice as possible regarding the change to their billing arrangement.
45. A high level roadmap of the engagement approach is set out at Appendix B.

Community impact statement

46. Under the Public Sector Equality Duty General Duty public authorities must have 'due regard' to the need to eliminate unlawful discrimination, harassment and victimisation as well as to advance equality of opportunity and foster good relations between people who share a protected characteristic and those who do not.
47. The protected groups covered by the equality duty are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The duty also covers marriage and civil partnerships, but only in respect of eliminating unlawful discrimination.
48. The council's "Approach to Equality", which was agreed by cabinet in December 2011, outlines the council's legal duties under the PSED General Duty and its obligations under the Human Rights Act 1998. It also sets out the council's commitment to embedding equality and human rights within the day-to-day responsibilities of all members, officers and contractors, as a part of day to day business.
49. It is essential that when decisions are made they take into account the public sector equality duty's general duty (PSED General Duty) as set out in section 149 of the Equality Act 2010. As Thames Water has given notice to terminate the agreement and the response rate to the consultation was very low an exhaustive analysis of the options from an equalities perspective is not appropriate. However the council must consider how best to support residents who are vulnerable by reason of a protected characteristic such as age or disability; this is considered further below.

Support for vulnerable residents

50. Thames Water already has a range of support in place for vulnerable residents who may be less able to manage the payment of their own water bills. Thames Water has a dedicated Extra Care Team that provide a range of support for example providing large print, braille, audio format and coloured background paper for customers with visual impairments, textphone, sign language interpreters and a dedicated mobile phone number for texting during emergencies for people with hearing difficulties; additional help in the event of a water supply interruption or sewage flooding for the less mobile, and a doorstep password scheme to visit a customer's home.
51. The council will also be proactive in ensuring that those in need of support regarding the switching process are helped through the transition. The council has records of vulnerable tenants but does not intend to share these records with Thames Water for data protection reasons. Council officers will work with Thames Water to develop a strategy for ensuring that the appropriate co-ordinated support is available to those who need it.
52. Advice and support is also available from agencies like the Citizens Advice Bureau and other independent advice organisations including Step Change Debt Charity and National Debtline. The council will ensure that all of our VCS partners are aware of the new arrangement including our local Citizens Advice Bureau and other advice agencies.

53. Section 44 of the Flood and Water Management Act 2010 enabled water companies to decide whether or not to bring forward a company social tariff as part of a package of targeted support to enable customers to pay their bills, including help with metering, payment methods, debt advice and water efficiency.
54. The intention of social tariffs is to deliver a wide range of benefits to water companies and their customers, including:
- assisting low income households who would otherwise struggle to pay their bills in full;
 - helping to prevent new cases of bad debt arising as a consequence of non-payment of water bills that may be unaffordable, and helping to resolve the existing problem of bad debt;
 - enabling water companies to design support schemes that are explicitly tailored to address local affordability problems and local affordability risks;
 - protecting unmetered low income households from unaffordable bills that may arise in areas with high levels of people who have the choice of metering;
 - protecting low income households from unaffordable bills in areas that have been designated an area of serious water stress where the water company has chosen to bring forward universal metering to help ensure a supply-demand balance; and
 - providing reputational and financial benefits to the water company through improved customer service and by placing a greater focus on the needs and views of customers.
55. In 2014/15 Thames Water introduced a social tariff for the most vulnerable customers to provide a 50% discount on bills for qualifying customers. More than 7,000 customers have also benefited from their metered bill being capped through the WaterSure scheme.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Democracy

56. The legal issues arising are correctly set out in the body of the report.

Strategic Director of Finance and Governance (FC016/023/SR)

57. As part of the final accounts process for 2015/16, the council accrued an amount equivalent to the then estimated total water refunds applicable to current tenants. This was in accordance with accounting principles regarding matching expenditure with income, given that the judgement of the high court case establishing this liability was in March 2016. With regard to refunds to former tenants, the council accepts that this could take an extended period of time to resolve, and therefore has made separate provision within its accounts to recognise this. This provision is likely to be revisited during 2016/17 and future years as the refund process nears completion. In all instances, liabilities are

contained within the ring-fenced housing revenue account, as required under the Local Government and Housing Act 1989.

58. The annual commission generated as part of the billing contract with Thames Water will no longer be available to the housing revenue account as an income stream. This forms the bulk (but not the entirety) of the income area identified as "Commission Receivable" within the annual HRA budget reports presented to cabinet in December and January each year. The council will remain liable for water charges on non-domestic assets such as council offices, garages, and tenant and resident halls; however these charges were not commission-generating in the first instance.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Thames Water refund of overpayments and future arrangements – Cabinet report 7 June 2016	160 Tooley Street London SE1 2QH	Paula Thornton Constitutional Team 020 7525 4395
Link: http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=302&MId=5147&Ver=4		
Deed of Variation agreed between LB Southwark and Thames Water – 23 July 2013	160 Tooley Street London SE1 2QH	Emily Springford Law and Democracy 020 7525 5778
Link: http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=302&MId=5375&Ver=4		

APPENDICES

No.	Title
Appendix A	Letter giving notice of termination of the agreement between Thames Water Utilities Limited and London Borough of Southwark dated 6 th day of March 2000
Appendix B	Water Billing Transition Plan Roadmap

AUDIT TRAIL

Cabinet Member	Councillor Stephanie Cryan, Deputy Leader and Cabinet Member for Housing	
Lead Officer	Gerri Scott, Strategic Director of Housing and Modernisation	
Report Authors	Stephen Douglass, Director of Communities Ian Young, Departmental Finance Manager, Housing and Modernisation	
Version	Final	
Dated	20 October 2016	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS/DIRECTORATES/CABINET MEMBER		
Officer Title	Comments sought	Comments included
Director of Law and Democracy	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Date final report sent to Constitutional Team		20 October 2016