Neutral Citation Number: [2019] EWHC 3261 (Ch)

Case No: PT-2018-000194

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 29/11/2019

Before:

MR JUSTICE MORGAN

- -

Between:

ROYAL BOROUGH OF KINGSTON-UPON-THAMES	**Claimant**
- and -	
DEREK MOSS	**Defendant**

- -
- -

Ranjit Bhose QC and Ruchi Parekh (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Martin Westgate QC and Tom Cleaver (instructed by **Deighton Pierce Glynn**) for the **Defendant**

Hearing dates: 25, 28 and 29 October 2019

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Judgment Approved by the court for handing down

MR JUSTICE MORGAN:

Introduction

1. Since 1 April 1990, in accordance with the Water Act 1989 and, later, the Water Industry Act 1991, Thames Water Utilities Ltd ("TWU") has been the water and sewerage undertaker in relation to properties within the Royal Borough of Kingston-upon-Thames ("Kingston"). In that period, Kingston has been the owner of a large number of council houses and flats, most of which are let to its tenants on secure tenancies within the meaning of the Housing Act 1985. I will refer to these tenants as council tenants to distinguish them from long leaseholders of flats, who are not relevant in the present context. Under the Water Industry Act 1991, TWU is entitled to charge for the supply by it of water and sewerage services to premises which benefit from such services and including, therefore, the premises occupied by Kingston's council tenants. This case is concerned with those houses and flats where the supply of water is not metered.

2. From 14 January 2003 until 3 August 2017, arrangements between TWU and Kingston have been governed by a written agreement dated 14 January 2003 ("the 2003 agreement"). In summary, under the 2003 agreement and/or as a result of that agreement, TWU does not bill Kingston's council tenants for water and sewerage charges in relation to the water and sewerage services provided to their premises but instead bills Kingston for such charges. Under the 2003 agreement, Kingston pays the charges made by TWU for the relevant premises but the amount of the charges is reduced to reflect an agreed "voids allowance" (of 3.5% of the charges) and TWU and Kingston have also agreed that Kingston is entitled to "a commission" (of 9.3% of the charges less the voids allowance) which entitlement is set against the amount of the charges otherwise payable and this results in a reduction of the sum paid by Kingston to TWU.

3. The Defendant, Mr Moss, is a secure weekly tenant of a flat where Kingston is his landlord. He was granted a tenancy of the flat in October 1999 and the terms of that tenancy were varied with effect from 1 September 2003. In summary, both the terms of the original tenancy agreement and the terms as varied provide that Mr Moss is obliged to pay to Kingston "water charges" which are to be the sums payable for the water and sewerage services provided to the flat. The original terms referred to "the actual amount payable for the premises" and the varied terms referred to "the exact amount payable for the property to the water authority".

4. Against this background, Mr Moss contends that the amount of "water charges" which he is liable to pay to Kingston is in accordance with TWU's tariff for the water and sewerage services provided to his flat, less the voids allowance and less "the commission" referred to in the 2003 agreement. Kingston disputes this. It contends that it is entitled to recover a water charge from Mr Moss by reference to TWU's tariff for the water and sewerage services and without reducing that charge to reflect the fact that it has agreed a voids allowance and a "commission" with TWU.

5. Mr Moss puts his case in two ways. The first way is that he submits that the 2003 agreement involved TWU providing water and sewerage services to Kingston and his tenancy agreement involved Kingston in providing water and sewerage services to him. He then submitted that the arrangement between Kingston and himself is governed by

the Water Resale Orders 2001 and 2006 made under section 150 of the Water Industry Act 1991. It was then argued that the effect of those Orders was that the charge payable by Mr Moss to Kingston should be reduced to reflect the fact that the 2003 agreement provided for Kingston to have the benefit of a voids allowance and a "commission".

6. The second way in which Mr Moss puts his case is to rely on the terms of his tenancy agreement, both the original terms referring to "the actual amount payable" and the varied terms referring to "the exact amount payable". He submits that "the actual amount" and "the exact amount" are to be arrived at by deducting from the charge otherwise due the amount of the voids allowance and the "commission".

7. The issue in this case, which is raised by the first way in which Mr Moss puts his case, does not arise in this case for the first time. The same issue was raised in *Jones v Southwark LBC* [2016] PTSR 1011, which was decided by Newey J (as he then was) on 4 March 2016. In that case, the London Borough of Southwark had entered into an agreement with TWU which was in essentially the same terms as the 2003 agreement. In that case, the court had to consider whether that agreement provided for Southwark to collect water charges as agent for TWU or whether the effect of the agreement was that TWU was providing water and sewerage services to Southwark. Newey J held that Southwark was not acting as agent for TWU and, accordingly, that TWU was providing water and sewerage services to Southwark. Newey J then concluded that when Southwark charged its secure tenant, Ms Jones, for water and sewerage services, the case came within the Water Resale Order 2006 and that Southwark had overcharged Ms Jones because it had not given Ms Jones a reduction in the charges otherwise payable to reflect the fact that Southwark had received a voids allowance and a "commission" from TWU. This meant that Ms Jones had overpaid Southwark for some years and that she was entitled to recover the overpayments. I add that Newey J decided a further point in favour of Ms Jones arising out of the terms of the charges scheme made by TWU under section 143 of the Water Industry Act 1991. That further point also arises in the case before me.

8. I was told that Southwark did not appeal the decision of Newey J. Instead, in accordance with that decision, they calculated the amount of overpayments made by all their tenants and paid to their tenants a total of £28.6 million as repayment of previous overpayments by those tenants.

9. In the present case, I am asked to come to a different conclusion from Newey J. It is said on behalf of Kingston that when I come to construe the 2003 agreement, I will be assisted by certain background facts and matters which were not available in the *Southwark* case. Further, it seems that some of the arguments relied upon by Kingston were not relied upon by Southwark in that case.

10. Insofar as the background facts in evidence in this case are different from those in evidence in the *Southwark* case, I plainly must consider that evidence and the submissions made in relation to it. Further, if Kingston relies on arguments which were not put forward in the *Southwark* case, then I consider that I ought to decide what to make of those arguments and give effect to my view. However, quite apart from possibly different evidence and possible new arguments, I am invited by Kingston not to follow Newey J's decision on the ground that it is wrong. Kingston accepts that one High Court judge ought normally to follow an earlier decision of another High Court judge. Both counsel submitted to me that I ought to follow the earlier decision on a

point which was argued in the earlier case unless I was convinced that the decision was wrong. This formulation was taken from *R v Greater Manchester Coroner ex parte Tal* [1985] 1 QB 67. I drew attention to a slightly different formulation of the approach put forward by Lord Neuberger PSC in *Willers v Joyce (No 2)* [2018 AC 843 at [9] where it was said that I should follow an earlier High Court decision "unless there is a powerful reason for not doing so". I prefer this formulation to the earlier one as it permits the court to take into account factors, which may be material to what it should do, which are not confined to considering how convinced one is that the earlier decision is wrong. Both counsel then agreed that I should seek to apply the second of these formulations.

11. Mr Westgate QC (leading Mr Cleaver in this case) had appeared for the tenant in the *Southwark* case and his arguments had prevailed in that case. He did not invite me to curtail the argument in the present case and in particular he did not submit that I should cut through the argument, decide in favour of Mr Moss and, if I thought it appropriate, give Kingston permission to appeal to the Court of Appeal where Kingston could run its arguments that the earlier decision was wrong. This meant that the principle that I should normally follow an earlier High Court decision has not resulted in any saving of court time as all of the arguments which were run in the *Southwark* case have been run again before me and, indeed, further arguments have been added.

12. The parties relied on a number of witness statements and two of those witnesses gave oral evidence and were cross-examined. In the event, this evidence does not play any part in my reasoning in relation to the matters which I have to decide and I do not need to refer to it further.

13. Mr Bhose QC and Ms Parekh appeared on behalf of Kingston and, as I have indicated, Mr Westgate QC and Mr Cleaver appeared on behalf of Mr Moss. The case has been extremely well argued and I am grateful to all counsel for the considerable assistance which they gave me.

The 2003 agreement

14. For convenience, I have set out the full terms of the 2003 agreement in an Appendix to this judgment.

The tenancy agreements

15. On or about 18 October 1999, Kingston granted to the Defendant, Mr Moss, an introductory tenancy on the terms of Kingston's standard form described as "Introductory Tenancy and Secure Tenancy Agreement". The tenancy was a weekly tenancy of 18 Oakwood, 62 King Charles Road, Surbiton, Surrey, KT5 8QR commencing on 25 October 1999. Being an introductory tenancy, it was not a secure tenancy for a trial period of one year but on 25 October 2000, the tenancy was to become a secure tenancy.

16. The tenancy agreement said very little about water and sewerage or charges for the same. Clause 1 referred to "rent and other charges". This clause specified a figure for the "net rent". Clause 1 did not contain any figures for "service charge(s)" or "other charge(s)" and then specified £3.19 for "water charges" payable weekly. Clause 2 provided that the landlord was to provide "the following services" for which the tenant was to pay the service charge but as there was no service charge, no services were

specified. Clause 4 provided for changes in rent and other charges and clause 4(v) provided:

> "The water charge payable by the Tenant shall be the actual amount payable for the premises Any increase or decrease in the amount of the water charge payable by the Tenant is due immediately upon receipt of written notice served by the Landlord (NB Should the landlord in future cease to act as agent for the water authority, then water charges would be payable direct to the water authority who would also be responsible for advising of any change to the amount payable)"

17. Clause 9 provided that the Tenant was to pay the rent and other charges promptly as they became due.

18. Clause 39 was headed repairs and maintenance and obliged the Landlord to keep in repair various parts of the premises including pipes and drains and also to keep in repair and proper working order all installations for the supply of water and sanitation including pipes and soil pipes.

19. Apart from the express terms of the tenancy which I have mentioned, there was no other express term which referred to the provision of water and sewerage services.

20. With effect from 1 September 2003, the terms of Mr Moss' tenancy were varied so that his tenancy continued thereafter on the terms of Kingston's new standard form of secure tenancy. This standard form of tenancy contemplated that the agreement would specify the amount of the basic rent payable weekly and the amount of the water charges, also payable weekly. Clause 3(2) of the tenancy agreement provided that it was a condition of the tenancy that the tenant paid "any other charges" for the property and these charges were part of the rent; the reference to these charges included the water charges. Clause 5 provided for changes to the rent and other charges. Clause 5(2) provided:

> "The amount of water charges to be paid by you shall be the exact amount payable for the property to the water authority. Any changes will be notified in writing addressed to you at the property giving details of the changes. The changes will take effect immediately."

21. Clause 10(1) of the tenancy agreement provided that the landlord was obliged to keep in repair and proper working order the systems that supply water and for sanitation. As with the earlier form of the tenancy agreement, there were no other express terms which were relevant to the supply of water and sewerage services.

The issues

22. The parties have agreed a List of Issues which I am asked to decide. The agreed issues are:

> "(1) Was Kingston a "reseller" for the purposes of the Water Resale Orders 2001 and 2006 from 1 April 2002? In particular:

(a) Was Kingston a "reseller" as a result of the 2003 Agreement and the requirement under the Defendant's tenancy agreement to pay water and sewerage charges to Kingston?

(i) Was the effect of the 2003 agreement that Kingston acted as agent for TWU?

(ii) Was the effect of the 2003 Agreement that Kingston acted "on behalf of" TWU pursuant to its powers under s. 1 of the Local Authorities Goods and Services Act 1970 read with paragraph 20 to schedule 1 of the Water Consolidation (Consequential Provisions) Act 1991 and if so did that preclude it from being a "reseller"?

(b) Was the effect of the TWU charges schemes in force between 1 April 2002 and 31 March 2010 such as to make Kingston liable to pay charges in respect of the supply of water and sewerage services to the premises?

(i) To the extent that the schemes did purport to make Kingston liable where premises were let on a weekly secure tenancy were they of legal effect?

(ii) If they were of legal effect, did the term in the said charges scheme: "a tenancy of less than 12 months" include a weekly secure tenancy?

(2) If Kingston was a reseller as a result of the 2003 agreement then did it cease to be a re-seller as a result of Deed of Clarification and Agreement dated 3rd August 2017 from 1 April 2016 or from some other date and if so what date?

(3) If Kingston is or has at any time been a reseller then has Kingston breached the maximum charges provisions in the 2001 and 2006 Orders?

(4) If so then does any right to recover the overpayment arise solely because of the section 150(5) and/or paragraph 10(1) of the Water Resale Order 2006?

(5) Has Kingston acted in breach of clause 9 of the Water Re-Sale Order 2006?"

23. In the course of argument, further matters were addressed and, to the extent necessary, I will consider those further matters in this judgment. Initially, Mr Bhose was minded to submit that Mr Moss's ability to claim repayment of overcharges was subject to a six year limitation period but he later told me that Kingston did not seek to rely on a defence of limitation in that way. Further, Issue (5) was not pursued.

Water and sewerage undertakers

24. Water undertakers and sewerage undertakers were created by the Water Act 1989 and the relevant statutory provisions were consolidated by the Water Industry Act 1991 (hereafter "the 1991 Act"). There is a brief summary of the position prior to the Water Act 1973, to the position between 1973 and 1989 and to the current position pursuant to the 1991 Act in *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] 1 WLR 2576 at [4] per Lord Sumption. In relation to the Kingston area, the relevant provider of water and sewerage services pursuant to the Water Act 1973 was a public body, Thames Water Authority ("TWA"), and when these services were privatised by the Water Act 1989, the relevant provider was a private company, TWU. That remains the position.

Water and sewerage services under the Water Industry Act 1991

25. The 1991 Act contains definitions which apply generally throughout the 1991 Act. Section 219 defines "customer or potential customer" in relation to a water or sewerage undertaker as:

> "(a) any person for or to whom that company provides any services in the course of carrying out the functions of a water undertaker or sewerage undertaker … ; or
>
> (b) any person who might become such a person on making an application for the purpose to the company;"

Section 219 also defines "owner" as:

> "the person who—
>
> (a) is for the time being receiving the rack-rent of the premises, whether on his own account or as agent or trustee for another person; or
>
> (b) would receive the rack-rent if the premises were let at a rack-rent,
>
> and cognate expressions shall be construed accordingly;"

26. Chapter I of Part II of the 1991 Act provides for the appointment of water undertakers and sewerage undertakers. Part III of the 1991 Act deals with the supply of water. Chapter I of Part III of the 1991 Act imposes general duties on water undertakers. Chapter II of Part III of the 1991 Act deals with the supply duties of a water undertaker. This Chapter includes sections 45 and 52. Under section 45(1), either an owner or an occupier of any premises may give notice to a water undertaker requiring it to make a connection of the premises to the water main for the purpose of providing a domestic water supply. Where such a notice is given, the water undertaker owes a duty, to the person who gave the notice, to make the connection. Section 52 defines the domestic supply duty on a water undertaker. A demand for a domestic water supply under section 52 may be made by the occupier of the relevant premises or by an owner of the premises who agrees to pay all of the undertaker's charges in respect of the supply demanded. By section 54, the domestic supply duty is owed to "the consumer" and for the purposes of this section, a "consumer" is defined as:

> "… a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of that supply of water would fall".

27. Chapter III of Part III of the 1991 Act deals with the quality and sufficiency of supplies by a water undertaker.

28. Part IV of the 1991 Act deals with the provision of sewerage services. Chapter I of Part IV describes the general functions of a sewerage undertaker. Chapter II of Part IV deals with the provision of sewerage services. Chapter II includes sections 98 and 106. Under section 98, either an owner or an occupier of any premises in a locality may require the provision of a public sewer for that locality. Where such a requirement is made, the sewerage undertaker owes a duty, to the person who made the requirement, to provide a public sewer. Under section 106, the owner or occupier of any premises is entitled to have his drains communicate with the public sewer and thereby to discharge foul water or surface water from his premises.

Water and sewerage charges

29. Chapter I of Part V of the 1991 Act deals with water and sewerage charges. Chapter I contains sections 142, 143, 144 and 150 to which it is necessary to refer in detail. At this point, I will set out sections 142, 143 and 144 by reference to the statutory provisions in force when the 2003 agreement was entered into.

30. Section 142 provided:

> "142.— **Powers of undertakers to charge.**
>
> (1) Subject to the following provisions of this Chapter, the powers of every relevant undertaker shall include power—
>
> (a) to fix charges for any services provided in the course of carrying out its functions and, in the case of a sewerage undertaker, charges to be paid in connection with the carrying out of its trade effluent functions; and
>
> (b) to demand and recover charges fixed under this section from any persons to whom the undertaker provides services or in relation to whom it carries out trade effluent functions.
>
> (2) Subject to subsections (2A), (3) and (3A) below, the powers conferred by subsection (1) above shall be exercisable—
>
> (a) by or in accordance with a charges scheme under section 143 below; or
>
> (b) by or in accordance with agreements with the persons to be charged.
>
> (2A) Paragraph (b) of subsection (2) above shall not have effect in relation to—

(a) charges for the supply of water to a dwelling, or

(b) charges for the provision of sewerage services in respect of a dwelling,

but this subsection does not affect any agreement made before the commencement of section 3 of the Water Industry Act 1999.

(2B) In subsection (2A) above, *"dwelling"* has the meaning given by paragraph 1(2) of Schedule 4A to this Act.

(3) Paragraph (b) of subsection (2) above shall have effect in relation to the exercise of powers with respect to charges in connection with the carrying out of a sewerage undertaker's trade effluent functions only in so far as provision for the fixing, demanding or recovery of such charges may be contained in an agreement entered into in accordance with section 129 above.

(3A) The power of a sewerage undertaker to charge, by virtue of subsection (1) above, for any services provided in the course of carrying out its duty under section 101A(1) above shall be exercisable only by or in accordance with a charges scheme under section 143 below.

(4) Except in so far as this Chapter otherwise provides, a relevant undertaker may fix charges under this section by reference to such matters, and may adopt such methods and principles for the calculation and imposition of the charges, as appear to the undertaker to be appropriate.

(5) The powers in relation to which this section has effect shall not be exercised so as to contravene any local statutory provision which expressly provides that no charge shall be made for a particular service.

(6) Nothing in subsections (1) to (5) above or in any charges scheme under section 143 below shall affect any power of a relevant undertaker to fix charges under any power conferred otherwise than by virtue of this Chapter.

(7) References in this section to a sewerage undertaker's trade effluent functions are references to its functions under Chapter III of Part IV of this Act."

31. Section 143 provided:

"143.— **Charges schemes.**

(1) A relevant undertaker may make a scheme ("a charges scheme") which has effect in relation to a specified period of twelve months and does any one or more of the following, that is to say—

(a) fixes the charges to be paid for any services provided by the undertaker in the course of carrying out its functions;

(b) in the case of a sewerage undertaker, requires such charges as may be fixed by the scheme to be paid to the undertaker where, in the circumstances set out in the scheme—

(i) a notice containing an application for a consent is served on the undertaker under section 119 above;

(ii) such a consent as is necessary for the purposes of Chapter III of Part IV of this Act is given by the undertaker; or

(iii) a discharge is made in pursuance of such a consent;

and

(c) makes provision with respect to the times and methods of payment of the charges fixed by the scheme.

(2) The persons who may be required by a charges scheme to pay any charge fixed by virtue of subsection (1)(b) above shall be the person who serves the notice, the person to whom the consent is given or, as the case may be, any person who makes a discharge in pursuance of the consent at any time during the period to which, in accordance with the scheme, the charge relates.

(3) A charges scheme which requires the payment of charges where a discharge has been made in pursuance of such a consent as is mentioned in subsection (1)(b) above may impose—

(a) a single charge in respect of the whole period for which the consent is in force;

(b) separate charges in respect of different parts of that period; or

(c) both such a single charge and such separate charges.

(3A) A sewerage undertaker is under a duty to ensure that any charges scheme made by the undertaker, so far as having effect to recover the undertaker's costs of providing a sewer by virtue of its duty under section 101A(1) above, causes those costs to be borne by the undertaker's customers generally; and a sewerage undertaker's duty under this subsection shall be enforceable under section 18 above—

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Director.

(4) A charges scheme may—

(a) make different provision for different cases, including different provision in relation to different circumstances or localities; and

(b) contain supplemental, consequential and transitional provision for the purposes of the scheme;

and such a scheme may revoke or amend a previous charges scheme.

(5) Nothing in any charges scheme shall affect—

(a) any power of a relevant undertaker in a case not falling within section 142(2A) above to enter into such an agreement with any person in any particular case as determines the charges to be made for the services provided to that person by the undertaker; or

(b) the power of a sewerage undertaker to enter into any agreement under section 129 above on terms that provide for the making of payments to the undertaker.

(6) A charges scheme shall not take effect unless it has been approved by the Director.

(7) The Secretary of State may give guidance to the Director on the exercise of his power under subsection (6) above; and the Director shall have regard to that guidance in the exercise of that power.

(8) The Secretary of State shall arrange for any guidance given by him under subsection (7) above to be published in such manner as he considers appropriate.

(9) The Director may not exercise his power under subsection (6) above for the purpose of limiting the total revenues of relevant undertakers from charges fixed by or in accordance with charges schemes."

32. Section 144 provided:

"144**.— Liability of occupiers etc. for charges.**

(1) Subject to the following provisions of this section and except in so far as provision to the contrary is made by any agreement to which the undertaker is a party—

(a) supplies of water provided by a water undertaker shall be treated for the purposes of this Chapter as services provided to the occupiers for the time being of any premises supplied; and

(b) sewerage services provided by a sewerage undertaker shall be treated for the purposes of this Chapter as provided to the occupiers for the time being of any premises which—

(i) are drained by a sewer or drain connecting, either directly or through an intermediate sewer or drain, with such a public sewer of the undertaker as is provided for foul water or surface water or both; or

(ii) are premises the occupiers of which have, in respect of the premises, the benefit of facilities which drain to a sewer or drain so connecting.

(2) Subject to subsection (3) below, charges which, under the preceding provisions of this Chapter, are fixed in relation to any premises by reference to volume may be imposed so that a person is made liable in relation to those premises to pay charges for services provided by a relevant undertaker after that person has ceased to be the occupier of the premises.

(3) A person shall not be made liable by virtue of subsection (2) above for any charges fixed in relation to any premises by any relevant undertaker, except where—

(a) he fails to inform the undertaker of the ending of his occupation of the premises at least two working days before he ceases to occupy them; and

(b) the charges are in respect of a period ending no later than with the first relevant day.

(4) For the purposes of subsection (3) above, *"the first relevant day"* , in relation to a case in which a person has ceased to be the occupier of any premises in relation to which charges are fixed by a relevant undertaker, means whichever of the following first occurs after he ceases to occupy the premises, that is to say—

(a) where that person informs the undertaker of the ending of his occupation of the premises less than two working days before, or at any time after, he ceases to occupy them, the twenty-eighth day after he so informs the undertaker;

(b) any day on which any meter would normally have been read in order for the amount of the charges to be determined;

(c) any day on which any other person informs the undertaker that he has become the new occupier of the premises.

(5) Where—

(a) any person who is the occupier of any premises to which a supply of water is provided by a water undertaker has served

notice on the undertaker for the purposes of section 62 above; and

(b) that notice is given otherwise than in connection with that person's ceasing to be the occupier of the premises in a case in which provision is made by virtue of subsection (2) above for a person who has ceased to be the occupier of the premises to be made liable for any charges,

then, notwithstanding that that person continues to be the occupier of those premises, he shall not be liable to the undertaker (otherwise than in pursuance of a demand for a supply made since the service of the notice) for any charges in respect of any supply of water to those premises after the appropriate time.

(6) In subsection (5) above *"the appropriate time"*, in relation to a case in which a notice has been served for the purposes of section 62 above, means whichever is the later of—

(a) the expiry of the notice; and

(b) the end of the period of two working days beginning with the service of the notice.

(7) In this section any reference to two working days is a reference to a period of forty-eight hours calculated after disregarding any time falling on—

(a) a Saturday or Sunday; or

(b) Christmas Day, Good Friday or any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971.

(8) Where, in the case of any premises—

(a) the person who was liable, immediately before 1st September 1989, to pay charges in respect of a supply of water to those premises was the owner of those premises, rather than the occupier;

(b) that person was so liable (under section 54 of Schedule 3 to the Water Act 1945 or any other local statutory provision) otherwise than by virtue of an agreement; and

(c) the person who was in fact the occupier of the premises on that date has not ceased to be the occupier before the coming into force of this Act,

then the person who is the owner from time to time of those premises shall continue, until the person mentioned in paragraph

(c) above does cease to be the occupier of the premises, to be the person liable and, accordingly, shall be treated for the purposes of this section as if he were the occupier of the premises."

33. Section 150 provides for the fixing of maximum charges in certain cases. I will set out section 150 later in this judgment when dealing with the subject of maximum charges.

34. Section 150B of the 1991 Act defined "consumer" for the purposes of Chapter I of Part V of the 1991 Act as follows:

> "**150B. Meaning of "consumer" in Chapter I.**
>
> In this Chapter *"consumer"* —
>
> (a) in relation to the supply of water by a water undertaker to any premises, means a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of that supply of water would fall, and
>
> (b) in relation to the provision of sewerage services in respect of any premises, means a person who is for the time being the person on whom liability to pay charges to the undertaker in respect of those services would fall."

The power of a local authority to collect and recover charges

35. At the date of entry into the 2003 agreement, a local authority such as Kingston had power to agree to collect and recover charges on behalf of a water undertaker and a sewerage undertaker. The relevant power for a local authority to agree to collect charges fixed by a water or sewerage undertaker on behalf of that undertaker was conferred by section 1 of the Local Authorities (Goods and Services) Act 1970 as applied by paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991.

36. At the date of the 2003 agreement, section 1 of the Local Authorities (Goods and Services) Act 1970 ("the 1970 Act") provided:

> "**1.— Supply of goods and services by local authorities.**
>
> (1) Subject to the provisions of this section, a local authority and any public body within the meaning of this section may enter into an agreement for all or any of the following purposes, that is to say—
>
> (a) …
>
> (b) the provision by the authority for the body of any administrative, professional or technical services;
>
> (c) …
>
> (d) …

> …
>
> (2) …
>
> (3) Any agreement made in pursuance of subsection (1) of this section may contain such terms as to payment or otherwise as the parties consider appropriate.
>
> … "

37. Paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991 provided:

> "The powers conferred by section 1 of the Local Authorities (Goods and Services) Act 1970 (supply of goods and services by local authorities to public bodies) shall be exercisable by a local authority, within the meaning of that section, as if the NRA was a public body within the meaning of that section; and 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."

38. Accordingly, at the time of the 2003 agreement, Kingston was able to enter into an agreement with TWU to provide administrative services to TWU and, in particular, to collect charges on behalf of TWU, on such terms as to payment by TWU to Kingston as those parties considered appropriate.

39. For some time prior to the 2003 agreement, there had been similar powers, as follows:

i) The Water Act 1973 reorganised the various public water boards and local authority water undertakings in England and Wales. It brought into existence ten water authorities, including TWA. Section 7 of the Water Act 1973 provided that the powers conferred by section 1 of the 1970 Act were exercisable by a local authority as if a water authority were a public body within the meaning of section 1; this section did not expressly state that the power to agree to provide administrative services included a power to agree to collect and recover charges. However, the Water Act 1973 provided for transitional arrangements pursuant to an order or orders made by the Secretary of State under section 254 of the Local Government Act 1972; by paragraph 5(2)(c) of schedule 6 to the Water Act 1973, provision could be made during a transitional period for the calculation, collection and recovery on behalf of a water authority by a local authority of amounts payable in respect of services provided by the water authority. Pursuant to this power, a series of annual orders were made, the last one being the Water Authorities (Collection of Charges) Order 1980.

ii) Section 38 of the Local Government Act 1974 introduced section 32A into the Water Act 1973. Section 32A provided that a local authority and a water authority could enter into an agreement for the collection and recovery by the local authority on behalf of the water authority of charges for services provided

by the water authority. An agreement under section 32A took precedence over any order made by the Secretary of State under the transitional provisions: see paragraph 5(2)(c) of schedule 6 to the Water Act 1973 as amended by paragraph 14 of schedule 7 to the Local Government Act 1974.

iii) The water industry was privatised pursuant to the Water Act 1989; paragraph 40 of schedule 25 to the Water Act 1989 was in essentially the same terms as were later enacted in paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991.

40. These powers on the part of a local authority to enter into an agreement for the collection and recovery of water charges were considered on two occasions by the Court of Appeal. The cases are *Lambeth LBC v Thomas* (1998) 30 HLR 89 and *Rochdale MBC v Dixon* [2012] HLR 6, [2012] PTSR 1336. I will need to consider those cases in more detail later in this judgment but, at this stage, I will consider what assistance they provide as to the meaning of paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991.

41. In *Lambeth LBC v Thomas*, the county court judge made findings as to the terms of the agreement which had been made between the water undertaker (TWU) and the local authority. I will need to refer to those findings later in this judgment when I consider the submissions as to the 2003 agreement in the present case. The Court of Appeal (Kennedy LJ and Mance J) held that the agreement in that case came within the statutory power to enter into an agreement for the collection and recovery of charges but did not discuss the precise meaning of the statutory power.

42. In *Rochdale MBC v Dixon*, it was argued that the agreement which had been made between the local authority and the water undertaker was ultra vires and, in particular, it was outwith the power conferred by paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991. This required the Court of Appeal to consider the width of that power and whether it applied to the agreement which had been made in that case. The leading judgment was given by Rix LJ, with whom Rimer and Elias LJJ agreed. Rix LJ considered the meaning of the words "on behalf of" in paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991. He held that these words plainly applied where the relationship between the water undertaker and the local authority was one of agency but the words applied more widely than that. He said at [49]-[50]:

> "49. If, however, I am wrong about this, and the concept of agency is inappropriately invoked in the analysis of these arrangements, there is also authority that the expression "on behalf of" does not necessarily require the concept of agency, but may have the more general meaning of "for the benefit of" or other such phrases. Indeed, [counsel for Mr Dixon] accepts that this is so and there is authority to that effect. Thus in *R (S) v Social Security Comr [2010] PTSR 1785* Sir Thayne Forbes held that "on behalf of" in paragraph 4(10) of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 (SI 2006/217) was to be given the meaning of "in its place" or "instead of" rather than "for the benefit of" or "in the interests of" or as expressive of agency. At

> para 27, he referred to a wealth of authority in this country and in Australia as to the possible meanings of the phrase, and, at para 28, wrote in seeming approval of the parties' common ground conclusions, based on those authorities, to the effect that:
>
> > "the key principles to be derived from the various cases in which the words 'on behalf of' have been considered are as follows: (i) the phrase 'on behalf of' does not have a fixed meaning, it is not a term of art; (ii) the phrase is capable of bearing a wide range of meanings; and (iii) it will take its meaning in any particular case from its statutory context."
>
> 50. Those conclusions seem correct to me. Indeed, I would include the simple preposition "for" as one of the possible meanings. In the circumstances, many of those meanings could apply here, so as to undermine [counsel's] ultra vires argument. Thus, even if perchance the ultimately correct analysis of the agreement were to be found not in agency, but, for instance, in the concept of assignment (if, indeed, the statutory claims of water undertakers on their customers can be assigned), it would seem to me that the arrangements still amounted to a collection and recovery of water charges "on behalf of" the water undertaker. [Counsel] submitted that the collection of the water charges was not for the benefit of UU [*they were the water undertaker*] at all, but for the benefit of Rochdale. However that submission was an essential repeat of his overall case (albeit in one formulation expressly abandoned) that the agreement was somehow concerned with Rochdale's water charges rather than UU's as though Rochdale had somehow earned the charges concerned by the supply of water, rather than negotiated it as part of the collection method by which UU's water charges were collected and recovered for it."

The factual background

43. Mr Bhose relied heavily on what he said were the arrangements which had existed between Kingston and, first, TWA and, then, TWU as regards the collection and recovery of charges, prior to the 2003 agreement. He submitted that these arrangements were an important part of the background material which could be relied upon as an aid to the interpretation of the 2003 agreement. Mr Westgate contended that the arrangements, whatever they were, were not admissible, alternatively were of no assistance in construing the 2003 agreement. Before dealing with those submissions, I need to make my findings as to what the previous arrangements had been.

44. Following the coming into force of the Water Act 1973 on 1 April 1974, the Secretary of State made a series of Orders under section 254 of the Local Government Act 1972 and paragraph 5(2)(c) of schedule 6 to the Water Act 1973; these Orders required Kingston to collect and recover on behalf of TWA a general services charge. Parts of the first such Order, the Water Authorities (Collection of Charges) Order 1974, are set out in the report of *Daymond v Plymouth Council* [1976] AC 609.

45. On 25 June 1975, Kingston resolved that it was not prepared to enter into any voluntary agency arrangements (for the collection and recovery of charges) after its obligation (under the various Orders) came to an end.

46. On 27 October 1977, TWA wrote to Kingston with proposals as to the collection of water charges. The letter was a very detailed one but the points in it which are now relevant are:

    i) TWA stated that it would be pleased to enter into an "appropriate agency arrangement" if Kingston to wished to continue to collect water charges from tenants of council properties let on an inclusive basis;

    ii) TWA stated that from 1 April 1978 the new combined water charges bill would consist of four elements:

        a) A standing charge for water;

        b) A standing charge for sewerage;

        c) A rate poundage charge for water; and

        d) A rate poundage charge for sewerage;

    iii) TWA set out its proposal as to a "commission payable" for acting as collection agents";

    iv) The proposal was that, in return for Kingston collecting TWA's water charges from tenants of all premises let on an inclusive basis, Kingston would be paid a collection commission at the rate of 2% of the total water charge raised; this commission would be deemed to cover the administrative costs of collection and any losses through non-recovery;

    v) TWA also proposed to make a void allowance in addition to the collection commission; the proposal was to increase a previously agreed void allowance by ¼%; the letter set out further detail as to the treatment of empty properties.

47. On 1 March 1978, Kingston resolved to accept an arrangement with TWA under which TWA would pay Kingston 2% commission for the "collection of water rate and sewerage and environmental services charge" and a void allowance of 1.75% in respect of "water rates".

48. On 19 September 1978, Kingston expressed opposition to proposed changes in charging for water services and referred to increased costs.

49. On 1 April 1990, TWU became the relevant water and sewerage undertaker in place of TWA. On 14 June 1990, TWU wrote to Kingston referring to Kingston's water services charges account for council housing.

50. On 13 February 1991, Kingston's note of the income received by it referred to "Increased commission on collection of water rates on behalf of TWA". The reference to TWA ought to have been a reference to TWU but nothing turns on that.

51. On 30 April 1991, TWU proposed to Kingston changes to "the commission arrangements" with effect from 1 April 1991. The commission (including bad debts) was to be 9% and the allowance for voids was to be 3.5%. The proposal referred to there being an "agreement" between the parties which could be terminated on 6 months' notice. This proposal was accepted by Kingston on 24 May 1991.

52. On 13 January 1992, Kingston's housing revenue account service plan for 1992/1993 referred to an increase in its income as a result of the re-negotiation of the "contract"; this was a reference to the terms agreed on 24 May 1991.

53. In 1993 and 1994, there was a discussion between TWU and Kingston as to whether the commission of 9% should be calculated after deduction of the voids allowance of 3.5%. Kingston contended that the 9% commission should be calculated before the deduction of the 3.5% allowance and the two matters were to be combined. Kingston referred to the arrangements which had been made with effect from 1 April 1978. There then ensued further negotiations as to a revised commission rate. In the course of those negotiations, Kingston referred to "the 1977 agreement". On 12 May 1994, Kingston sent to TWU a copy of the letter of 27 October 1977.

54. In Kingston's housing revenue account for 1995/96, there is a note to the effect that Kingston collected water rates from its tenants on behalf of the water undertaker. In the housing revenue account service plan for 1997/1998, Kingston referred to an income from "water rates commission".

55. Based on the above material, I find the following as to the relevant arrangements as to water and sewerage charges prior to the 2003 agreement:

    i) Kingston paid to TWA and, later, TWU the charges levied by TWA and, later, TWU for the relevant premises less a voids allowance and a sum which was called commission;

    ii) The sum which was called commission was to compensate Kingston for the cost of collecting the charges and for the risk of non-recovery;

    iii) There was no formal agreement which recorded these arrangements;

    iv) The arrangement was described by TWA in its letter of 27 October 1977 as being an "agency arrangement";

    v) TWA and, later, TWU did not bill the council tenants in Kingston for water and sewerage;

    vi) Kingston charged its council tenants for water and sewerage by reference to TWA's and, later, TWU's charges for the relevant premises.

The interpretation of the 2003 agreement

56. The principal arguments in this case related to the interpretation of the 2003 agreement. By the end of the argument, there were four possible constructions which had been identified. These were:

i) The agreement provided for TWU to provide water and sewerage services to certain properties owned by Kingston and Kingston agreed to pay TWU for those services;

ii) The agreement provided for Kingston to collect and recover from its tenants of certain properties, as agent for TWU, charges for the provision of water and sewerage services;

iii) The agreement provided for Kingston to collect and recover from its tenants of certain properties, on behalf of TWU but not strictly as agent for TWU, charges for the provision of water and sewerage services;

iv) The agreement provided for the assignment to Kingston of TWU's rights to recover from the tenants of certain properties charges for the provision of water and sewerage services.

57. Before addressing the terms in which the 2003 agreement was expressed, Mr Bhose emphasised the statutory power conferred on Kingston by section 1 of the Local Authorities (Goods and Services) Act 1970 as applied by paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991. This conferred on Kingston a power to collect and recover the relevant charges on behalf of TWU. He submitted that the 2003 agreement was entered into pursuant to this power and it followed that it was "an agreement for the collection and recovery by [Kingston], on behalf of [TWU] of [the relevant charges]" within the words of that statutory power. He then submitted that such an agreement was sui generis and should be considered as such. This meant that the court did not need to analyse the agreement and to identify a character for it such as an agreement for the provision of services, or an agency agreement or an assignment of future debts. On his submission, it was not necessary to determine the effect of the agreement save to conclude that it was something different from an agreement for the provision of services.

58. Mr Bhose's approach involves the court in asking the wrong question. His question is: was the 2003 agreement within Kingston's powers as conferred by paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991? I consider that the correct question is: what is the effect of the 2003 agreement? The reason why the court is examining the 2003 agreement is in order to determine whether this case comes within the Water Resale Orders 2001 and 2006. The terms in which those Orders are expressed make it necessary to determine the effect of the 2003 agreement.

59. Further, I do not consider that a conclusion that the 2003 agreement is sui generis would answer the question whether the 2003 agreement comes within the Water Resale Orders 2001 and 2006. I consider that the real question is whether the 2003 agreement amounted to an agreement to provide services to Kingston or whether the agreement provided for Kingston to act as agent for TWU or whether TWU had assigned to Kingston the right to recover charges from occupiers.

60. Further, although the statutory power for Kingston to collect and recover charges on behalf of TWU is part of the background to the construction of the 2003 agreement, it is not the only statutory background which is relevant. Also relevant are the charging provisions in the 1991 Act and, in particular, section 144(1) of that Act which provides that supplies of services are treated as services provided to the occupiers of premises

"except in so far as provision to the contrary is made by an agreement to which the undertaker is a party".

61. In order to determine the effect of the 2003 agreement, I will construe the agreement and for that purpose I will start with its express terms. The principal subject matter of the agreement is the obligation on the part of Kingston to pay TWU's charges in accordance with the detailed terms of the agreement. It is less clear as to what Kingston is to receive in return for its payment of the charges. If the parties had intended that TWU would contract with Kingston to provide water and sewerage services to certain properties, they could have made such an obligation much more explicit. Nonetheless, the language of the agreement does clearly enough suggest that the payment of charges is in return for the provision of services. The agreement refers to the provision of services by referring to the properties which will have the benefit of the services. These properties are defined as some of the properties managed by Kingston in its capacity as local housing authority. The agreement does not clearly state that the services are to be provided to Kingston, as distinct from being provided to properties. The agreement does not state that the services are provided to the occupiers of properties and, indeed, the agreement contemplates that a charge will be made for properties even when some of them are not occupied but that matter will be dealt with by a voids allowance which applies to the total charges for all of the properties.

62. However, the agreement does use language which suggests that TWU is to provide a service to Kingston. TWU is defined as the Provider and Kingston is defined as the Customer. The fact that Kingston is to pay TWU for the provision of services to properties owned by Kingston makes it relatively easy to say that TWU is agreeing to provide services to Kingston.

63. There are two terms which are, or may be, out of line with a conclusion that the agreement provides for TWU to provide services to Kingston. I refer to clause 3.2 which provides that the charges are to be reduced by 9.3% "by way of the Customer's commission" and to clause 4.6 which refers to the possibility that VAT may be payable by TWU in relation to the Customer's commission. As to clause 3.2, if the agreement taken as a whole provides for TWU to provide services to Kingston, then it would be said that the "commission" is not like a commission paid to an agent in return for providing a service to a principal but is instead simply a discount on the price for the service provided by TWU to Kingston. It is not particularly unusual for a court to hold that a label used in a contract is not apposite when the true character of the contract is under consideration. As to clause 4.6, if the agreement provides for TWU to provide a service to Kingston at a discounted price, then it should be obvious that Kingston is not entitled to add VAT to the amount of the discount in the price payable by it. It can be said that clause 4.6 refers to "any" VAT so that it contemplated that none might be payable but if the parties clearly intended an agreement for the provision of services by TWU to Kingston, it is still surprising that they included clause 4.6. I add that it ought to have been clear that TWU would not charge Kingston VAT on the charges payable by Kingston as water and sewerage charges are zero rated for the purposes of VAT.

64. If the agreement provides for TWU to provide services to Kingston, it was not suggested that TWU did not have power to enter into such an agreement. In particular, it was not suggested that TWU did not have power to agree with Kingston that it would pay for all the properties which came within the terms of the agreement and then receive a voids allowance. Nor was it suggested that TWU did not have power to agree to give

Kingston a discount, called a "commission" in the way provided in the agreement. Nonetheless, I have considered how the terms of the agreement, construed as an agreement to provide services to Kingston, fit in with the statutory provisions. Such an agreement would come within the type of agreement referred to in section 144(1). The charges imposed by the agreement, providing for a voids allowance and a commission would come within section 142(2)(b) although that paragraph would only apply if section 142(A) did not apply. Section 142(2A) only applies where the charge in question is for a supply to "a dwelling" and I can see that it might be right to hold that the singular does not include the plural so that section 142(2A) would not apply to an agreement to provide supplies to many dwellings. In any case, it may be that an agreement which provides for a voids allowance and a "commission" is permitted under TWU's general power to contract; and see section 142(6). In any case, it was not argued that the agreement, construed as an agreement to provide services to Kingston, was outwith TWU's powers so I do not need to consider that matter any further.

65. Accordingly, I proceed on the basis that it was open to TWU and Kingston, consistently with the provisions of the 1991 Act, to make an agreement that TWU would provide services to Kingston in relation to properties owned by Kingston, and occupied by its council tenants, on the terms of the 2003 agreement.

66. Before I turn to consider any alternative interpretations of the agreement, I ought to consider whether a finding that the agreement provided for the supply of services by TWU to Kingston would be contrary to any relevant authority, in particular, *Lambeth LBC v Thomas* and *Rochdale MBC v Dixon*.

67. *Thomas* does not help very much with the true construction of the 2003 agreement in the present case. The terms of the agreement in *Thomas* are not set out in the report and, instead, the judgment of Mance J describes the effect of the agreement in that case. The county court judge had held that the local authority "undertook to collect that money from each tenant". Mance J held that it was open to an agent to contract with his principal that the agent would retain a part, even a large part, of the sums recovered for himself. That is plainly relevant when I come to consider whether the 2003 agreement created an agency relationship but does not directly bear on the effect of the words used in the 2003 agreement.

68. In *Dixon*, the terms of the agreement are set out in the report. Those terms are very different from the terms of the 2003 agreement and do not provide any real assistance as to the effect to the words used in the 2003 agreement. I note that in *Dixon*, Mr Westgate who appeared for Mr Dixon eschewed a submission that the local authority had taken over from the undertaker as the provider of water services to the tenants. Rix LJ at [37] commented that such a submission would have been "impossible". That comment is understandable in the light of the terms of the agreement in that case but does not directly bear on the effect of the 2003 agreement.

69. I will next consider whether the 2003 agreement provided for Kingston to collect and recover sums due to TWU as agent for TWU. The problem with that suggested interpretation is that there is so little in the agreement to suggest that Kingston was agreeing with TWU to collect and recover the charges and specifically to act as agent for TWU. No doubt, the parties to the agreement would have expected Kingston to want to collect and recover the charges but there is no term in the agreement which either authorises them to do so or requires them to do so. The topic of collection and recovery

from occupiers is simply not mentioned. It might be suggested that the reference to "commission" and the possibility of charging VAT on the "commission" meant that Kingston was to provide a service to TWU and it is therefore necessary to try to identify what that service was to be. Even so, the agreement does not contain anything to indicate that the suggested service was the collection and recovery of charges from occupiers on behalf of TWU. It is clear that if Kingston did recover charges from occupiers, Kingston would keep the monies for itself and would not be required to pay them over to TWU. I conclude that there is really no support in the words of the 2003 agreement for holding that it was an agreement under which Kingston was to collect and recover charges as agent for TWU.

70. In *Thomas* and in *Dixon*, the Court of Appeal considered that the agreements in those cases created an agency relationship. I have commented earlier on the terms of the agreements in those cases and I do not consider that the finding of agency in those cases is of direct assistance when considering the different terms of the 2003 agreement.

71. Mr Bhose argued that the 2003 agreement provided for Kingston to collect water and sewerage charges "on behalf of" TWU and that was such an agreement was sui generis. Before, I consider that submission further, I will address the other suggested possibility that the 2003 agreement amounted to an assignment by TWU of the right to recover the relevant charges as and when they became due from the occupiers of the premises to which the services were provided.

72. Mr Westgate made the preliminary point that because the 2003 agreement provided for Kingston to pay the relevant charges (albeit discounted) to TWU, that had the consequence that the occupiers would not owe any debt to TWU and so TWU had nothing to assign in this respect to TWU. That argument assumes that I hold that the 2003 agreement makes provision to the contrary of section 144(1) of the 1991 Act. I agree with Mr Westgate that if that assumption were justified, then the occupiers would not be liable to TWU which therefore did not have the benefit for debts owed by occupiers to assign to Kingston. However, if the 2003 agreement is construed as an agreement which leaves the occupiers liable to pay the relevant charges under section 144(1) and then sells the benefit of those charges to Kingston in return for the price paid by Kingston (being discounted by reference to the charges) then it would be open to TWU to say that the occupiers owe it the charges and it can sell the benefit of the charges to Kingston.

73. The real problem with the suggestion that the 2003 agreement amounted to an assignment by TWU to Kingston of the benefit of charges which would be payable by occupiers is that there is really no wording in the agreement to support that suggestion. It is true that Kingston must have been intended to get something in return from TWU for its payments and it might be right to consider whether that something was the assignment of the benefit of the charges rather than the benefit of the services being provided to Kingston. However, once those two possibilities are considered, it is clear that the wording of the agreement is far more suggestive of the latter and is in no way suggestive of the former.

74. In addition, if one were to hold that the 2003 agreement amounted to an assignment of future choses in action, the assignment would be equitable only. If Kingston, as assignee of the chose in action, were to sue an occupier, there would be a procedural requirement for Kingston to join TWU as the assignor of the chose in action. However,

I do not place too much weight on this consideration as it might be possible to argue that, in view of the practice of local authorities to include a term in their tenancy agreements requiring the tenant to pay water charges, the parties to the 2003 agreement would know that the local authority would have a claim in contract against the tenant without having to establish a cause of action as the assignee of a debt owed by the tenant to the assignor.

75. I will now consider Mr Bhose's primary case which was that the 2003 agreement was an agreement by Kingston to collect water and sewerage charges "on behalf of" TWU within paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991 and that such an agreement was sui generis.

76. If the 2003 agreement provided for Kingston to collect water and sewerage charges as agent for TWU, then it would be an agreement to collect charges "on behalf of" TWU. If the 2003 agreement amounted to an assignment of future choses in action, then the question might arise whether such an agreement resulted in Kingston collecting charges "on behalf of" TWU. It will be remembered that Rix LJ in *Dixon*, at [50], considered that if the agreement in that case provided for the assignment of the benefit of the charges by the undertaker to the local authority then collection by the local authority could still be "on behalf of" the undertaker, possibly in the sense of the collection being by the local authority in place of, or instead of, the undertaker.

77. If, however, the 2003 agreement did not provide for Kingston to collect the charges as agent for TWU and if the 2003 agreement did not amount to an assignment of future choses in action, then I do not see how it could be said that there was anything in the 2003 agreement which had the effect that Kingston was collecting charges "on behalf of" TWU.

78. In *Dixon*, Rix LJ explained that the words "on behalf of" in the relevant statutory provision could extend to a case where the local authority was to collect and recover charges "in place of" TWU or "instead of" TWU or simply "for" TWU. These possible meanings of "on behalf of" were taken from the earlier decision in *R (on the application of S) v Social Security Commissioner* [2010] PTSR 1785 where the decision was that these formulations were narrower than "for the benefit of". Taking the widest of the possible meanings, not actually supported by the decision in *Dixon*, "for the benefit of", I do not see how it could be said that any collection and recovery by Kingston from occupiers of premises was "for the benefit of" TWU; TWU would derive no benefit from such collection and recovery by Kingston as Kingston would retain for itself everything it collected and recovered; the benefit to TWU was derived not from the collection and recovery by Kingston but instead from Kingston's contractual obligation to pay the charges to TWU, albeit at a discounted rate. Equally, I do not see how it could be said that any collection and recovery by Kingston was "for" TWU. If the formulations "in place of" or "instead of" involve a narrower concept than "for the benefit of" then, again, they would not be satisfied by the 2003 agreement.

79. Accordingly, I consider that applying the various possible meanings of "on behalf of" as used in paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991, as interpreted in *Dixon*, the 2003 agreement did not provide for Kingston to collect water charges on behalf of TWU (unless the agreement provided for Kingston to be the agent of TWU or, possibly, as assignee of the future choses in action).

80. Up to this point, I have considered the wording of the 2003 agreement with a view to assessing the nature of the rights and obligations created by it. I now need to consider whether there are any background matters, of law or of fact, which ought to be taken into account before reaching a conclusion as to the effect of that agreement.

81. As I have explained, Mr Bhose relied heavily on section 1 of the Local Authorities (Goods and Services) Act 1970 as applied by paragraph 20 of schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991. He submitted that those statutory provisions were the obvious source of the power to enter into the 2003 agreement and it followed that the 2003 agreement should be construed as an agreement for the collection and recovery of charges on behalf of TWU. However, this statutory power is not referred to in the 2003 agreement and none of the language in which the statutory power is expressed is used in the agreement. TWU and Kingston also had power under section 144(1) to make an agreement which provided for TWU to provide the services to Kingston. Accordingly, I do not find that the statutory power relied on by Mr Bhose points me in the direction he contends for. Indeed, the difference in the language between that statutory power and the agreement might tend to point me away from the result he contends for.

82. Then, Mr Bhose contended that I should be significantly influenced by the arrangements which were made by Kingston with TWA in 1977/1978 and which were continued with TWU until the 2003 agreement was entered into. Mr Westgate objected that I could not give effect to that submission because to do so would be contrary to clause 9 of the agreement. That clause provided that the agreement represented the entire agreement between the parties and superseded all prior arrangements between them. As to that submission, I doubt if an entire agreement clause prevents the court construing the entire agreement in the ordinary way against the background of relevant matters which are normally admissible for that purpose.

83. Mr Westgate cited Henderson J in *Matchbet Ltd v Openbet Retail Ltd* [2013] EWHC 3067 (Ch) at [132] where the judge said that a contractual provision which stated that the new agreement superseded prior arrangements would not be complied with if it remained permissible to have recourse to the earlier arrangements as a guide to the construction of the new agreement.

84. On the other hand, there is authority which allows the court to consider an earlier agreement as a possible aid to the interpretation of a later agreement which supersedes the earlier agreement. The question as to the usefulness of considering a prior agreement when construing a later agreement was addressed by Rix LJ in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] CLC 1480 at [83], in these terms:

> "83. In principle, it would seem to me that it is always admissible to look at a prior *contract* as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to *supersede* the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be

> impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law."

85. With the assistance of that explanation, I have considered whether the arrangements in place from 1978 to 2003, which were superseded in express terms by the 2003 agreement, offer anything useful as an aid to the interpretation of the 2003 agreement. The 2003 agreement was plainly not identical to the earlier arrangements, whatever precisely they were. As explained by Rix LJ in *HIH*, where the terms of the contracts differ, prima facie the second contract involved a deliberate decision to depart from the wording of the earlier arrangements, whatever precisely they were, so that the earlier arrangements are unlikely to be of assistance. It should also be noted in this case that the earlier arrangements were first entered into in 1977/1978 and then continued in force until 2003. In 1977/1978 the statutory provisions as to water charges were different from the provisions which applied following privatisation in 1989 and which were in force when the 2003 agreement was entered into.

86. In the result, if I am able to have regard to the prior arrangements, notwithstanding clause 9 of the 2003 agreement, I do not derive any assistance from them when construing the 2003 agreement. This means that it is unnecessary for me to discuss whether the prior arrangements are inadmissible or whether they are admissible but of no assistance; the distinction does not matter in this case.

87. Mr Bhose then submitted that if I construed the 2003 agreement as providing for the supply of services by TWU to Kingston, the result would be extremely uncommercial so that the parties to the 2003 agreement could not have intended it. It was submitted that I should therefore prefer an alternative available construction which avoided that commercial result.

88. It was not said that there was anything inherently uncommercial in TWU agreeing to provide services to Kingston and Kingston agreeing to pay for them at a discounted rate. However, on the assumption that such an arrangement would mean that Kingston was limited in what it could recover from its tenants by reason of the Water Resale Orders 2001 and 2006, it was submitted that the overall result would be an uncommercial one. Mr Bhose pointed out that the 2003 agreement had been entered into after the 2001 Order was made and he added that that was not the case in relation to the agreement (made in 2000) considered in the Southwark case (although the agreement in that case was after the coming into force of section 150 of the 1991 Act). In a case to which the Water Resale Orders applied, it was submitted that if Kingston had to pass on to its tenants the benefit of the 9.3% commission then it was giving itself the trouble of collecting water charges, and running the risk of non-recovery in some cases, when it was not receiving any benefit from doing so. It was submitted that the

position would be even worse if it had to pass on to its tenants the benefit of the voids allowance of 3.5%. As against that, Mr Westgate submitted that where the Water Resale Orders of 2001 and 2006 applied, someone in the position of Kingston could charge a daily administration charge for the costs of billing involved.

89. I have not yet considered whether and how the Water Resale Orders apply in this case but at this stage I will assume that they do apply. I will in particular assume that the effect of the Orders is that Kingston will have to pass on to its tenants the benefit of the 9.3% reduction in the water charges although it can charge a daily administration charge as permitted by the Orders. On that assumption, I agree with Mr Bhose that the result would be an uncommercial one for Kingston largely for the reasons he gave.

90. Before reaching my conclusion as to the true construction of the 2003 agreement, taking into account all relevant background matters, I will mention a further matter which I will put on one side. The evidence showed that the properties which were treated by TWU and Kingston as coming within the 2003 agreement included a number of properties where Kingston was itself the occupier. Kingston is the occupier of a laundry room, an estate office and a former surgery used as a residents' association office. In the case of these properties, the 1991 Act provides for Kingston as the occupier to pay for the water and sewerage services provided to those premises in accordance with TWU's charges scheme. However, TWU and Kingston have treated these properties as being subject to the 2003 agreement and Kingston has had a voids allowance of 3.5% and a "commission" of 9.3 % in relation to the charges for these premises in the same way as it had that allowance and "commission" for properties occupied by its council tenants. Mr Westgate submits that those facts show that the 2003 agreement provided for TWU to provide services to Kingston because it was pursuant to that agreement that TWU provided services to the laundry room, the estate office and the former surgery.

91. I am not wholly satisfied that I can take into account the facts which have occurred in relation to the laundry room, the estate office and the former surgery for the purpose of construing the 2003 agreement. If the facts at the time the 2003 agreement were made showed that it was intended that the 2003 agreement would apply to these premises where Kingston was the occupier, then I would have to evaluate Mr Westgate's submission. However, I am not clear that those are the facts of this case. Instead, the evidence dealt with what happened after the agreement was entered into and how these properties were treated. I will therefore, for reasons of caution, leave out of account these matters when arriving at my decision as to the construction of the 2003 agreement. I add that I was given similar evidence about other properties, such as garages and stores, being dealt with under the 2003 agreement. However, in so far as there was evidence on the point, I understood that the garages and stores were occupied by tenants rather than by Kingston. I was also told that a sports ground was treated as being within the 2003 agreement but there is reason to think that that was the result of a mistake. In any event, leaving out of account these matters does not in the event affect my conclusion.

92. At the hearing, the parties made submissions to me as to Mr Moss's rights if the effect of the 2003 agreement was that TWU supplied the relevant services to Kingston and then (under the tenancy agreement) Kingston provided the same services to Mr Moss. In that event, TWU would not owe Mr Moss the duties under sections 54, 60 and 62 of the 1991 Act. I heard submissions as to Mr Moss's position in relation to the Water Industry (Charges) (Vulnerable Groups) (Consolidation) Regulations 2015 made under

section 143A of the 1991 Act. Those regulations refer to "a qualifying person" and it is arguable that Mr Moss could be a qualifying person even if he were not a consumer. It was also submitted that Mr Moss would be a "customer" for the purposes of the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, made pursuant to sections 38, 39, 95 and 96 of the 1991 Act. I also heard submissions as to the operation of section 144A. Although I am grateful to counsel for their detailed submissions on these matters, I am not in the end persuaded that any of these consequences, or suggested consequences, throw any real light on the interpretation of the 2003 agreement between TWU and Kingston, where Mr Moss was not a party.

Conclusion as to the 2003 agreement

93. I can now reach my conclusion as to the interpretation of the 2003 agreement. As a matter of language, the strongest of the candidates for the meaning of the agreement is that it was an agreement by Kingston to pay TWU for services provided to Kingston. Indeed, I consider that this is what the agreement clearly states. I recognise that if, as I currently assume, the Water Resale Orders 2001 and 2006 apply to the charges made by Kingston to its tenants with the result that Kingston loses much of the benefit of the 9.3% commission which it must pass on to the tenants, then the result is an uncommercial result for Kingston.

94. In the light of my observations as to the apparent meaning of the language of the agreement and the commercial consequences of adopting the apparent meaning, Mr Bhose presses me to reject the apparent meaning and to identify some other meaning which avoids those commercial consequences. However, I am guided at this point by what was said by Lord Neuberger PSC in *Arnold v Britton* [2015] AC 1619 at [20], as follows:

> " … while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

95. I conclude that to construe the 2003 agreement as providing for Kingston to collect and recover charges as agent for, or otherwise on behalf of TWU, or to be the equitable assignee of charges due from occupiers goes beyond any recognised process of construction and is therefore not a course which is open to me. My conclusion is that the 2003 agreement provided for TWU to provide water and sewerage services to Kingston for which Kingston was to pay TWU in accordance with the terms of the agreement.

96. I heard evidence as to events which took place after the 2003 agreement was entered into but it was not said that those events amounted to a variation of the agreement (prior to the deed dated 3 August 2017 to which I will refer) nor did they give rise to any kind of estoppel binding TWU or Kingston to which I was asked to give effect. In particular, I was given evidence as to the VAT treatment of the "commission" referred to in the treatment but the subsequent events in relation to VAT are not material as to the construction of the agreement. The presence of clause 4.6 in the agreement, which refers to VAT, is of course relevant to construction but I have already dealt with that point.

The Deed of Clarification and Amendment

97. On 3 August 2017, TWU and Kingston entered into a deed described as a Deed of Clarification and Amendment. This deed changed the arrangements which were to govern between TWU and Kingston as to payment or collection of the relevant charges. I understand that it is agreed that the effect of the deed is that the claim by Mr Moss to recover overpaid charges does not relate to the period from 3 August 2017. The deed provided that it took effect from 1 April 2016 but Mr Bhose accepted that Kingston could not assert as against a non-party to the deed, such as Mr Moss, that the pre-existing arrangements were altered from 1 April 2016 as distinct from the date of execution of the deed, 3 August 2017

Maximum charges

98. Section 150 of the 1991 Act provided:

> "**150.— Fixing maximum charges for services provided with the help of undertakers' services.**
>
> (1) The Director may from time to time by order fix maximum charges which a person who is not a relevant undertaker may recover from another such person in respect of water supplies or sewerage services provided to that other person with the help of services provided by a relevant undertaker.
>
> (2) For the purposes of this section water supplies or sewerage services are provided to a person with the help of services provided by a relevant undertaker if—
>
> (a) a facility for that person to have access to a supply of water provided by a water undertaker in pipes, or to make use of sewerage services provided by a sewerage undertaker, is made available to that person otherwise than by the undertaker;
>
> (b) that person is provided with a supply of water in pipes by a person to whom the water is supplied, directly or indirectly, by a water undertaker; or
>
> (c) that person is provided with sewerage services by a person who, for the purpose of providing those services, makes use of sewerage services provided, directly or indirectly, by a sewerage undertaker.

> (3) It shall be the duty of the Director to publish any order under this section in such manner as he considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.
>
> (4) An order under this section may make different provision for different cases, including different provision in relation to different persons, circumstances or localities, and may fix a maximum charge either by specifying the maximum amount of the charge or by specifying a method of calculating that amount.

98. (5) Where a person pays a charge in respect of anything to which an order under this section relates and the amount paid exceeds the maximum charge fixed by the order, the amount of the excess shall be recoverable by that person from the person to whom he paid the charge."

The Water Resale Order 2001

99. The Water Resale Order 2001 was made pursuant to section 150 of the 1991 Act and came into operation on 1 April 2001. Paragraph 4 of the Order contained a number of definitions.

100. "Dwelling" was defined so as to refer to a private dwelling house, a house in multiple occupation and also a caravan and a boat or similar structure designed or adapted for use as a place of permanent habitation. It is not disputed that the flat let to Mr Moss is a dwelling within this definition.

101. Paragraph 4 of the Order defined "Re-Seller" as follows:

> "'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 indirectly, to the Re-seller; or
>
> (b) provides to any Purchaser a sewerage service which a Sewerage Undertaker has supplied, directly or indirectly, to the Re-seller,
>
> but does not include any person who uses any Relevant Pipe belonging to any Water Undertaker to transport water already belonging to that first person from a point of connection on any Water Undertaker's system."

102. Paragraph 4 of the Order defined "Purchaser" as "a person who occupies any dwelling and who buys from a Re-seller any water or sewerage services".

103. Paragraph 5 of the 2001 Order imposed maximum charges on Re-sellers. As regards unmetered premises, paragraph 5(2) provided:

> "(a) If the Purchaser's water supply is not metered, the charge for that supply shall not exceed the average bill for an unmeasured water supply (and, if appropriate, sewerage service) payable by the Relevant Undertaker's own customers, as from time to time published by the Director, unless the Re-seller can show that a higher charge is justified in accordance with part (b) of this sub-paragraph, sub-paragraph (3) of this paragraph or with paragraph 7 below, as the case may be.
>
> (b) Without prejudice to part (a) of this sub-paragraph if a Purchaser's water supply is unmeasured, the maximum charge must be calculated as follows:
>
> first, any amounts recoverable either under sub-paragraph (1) above or from any other person supplied must be deducted from the amount payable by the Re-seller to the Relevant Undertaker; after which - the amount still to be recovered may then be either shared
>
> i) equally between the Purchasers to whom this sub-paragraph applies or
>
> ii) in proportion to the respective rateable values, square footages, occupancy or number of bedrooms in each of the affected purchasers' dwellings;"

104. Paragraph 7 of the 2001 Order allowed the addition of administration charges for the cost of billing, not to exceed 1.5 pence per day for each Purchaser to whom sub-paragraph 5(2) applied. 1.5 pence per day is £5.48 per annum.

The Water Resale Order 2006

105. The Water Resale Order 2006 was made pursuant to section 150 of the 1991 Act and came into operation on 31 March 2006, replacing the 2001 Order. The 2006 Order defined Dwelling, Re-seller and Purchaser in essentially the same terms as in the 2001 Order.

106. Paragraph 6 of the 2006 Order imposed maximum charges on Re-sellers. As regards unmetered premises, paragraph 6(2) provided:

> "(a) If the Purchaser's water supply is not metered, the charge for that supply shall not exceed the average bill for a water supply (and, if appropriate, sewerage service) payable by the Relevant Undertaker's own domestic customers, as from time to time published by the Director, unless the Re-seller can show that a higher charge is justified in accordance with part (b) of this sub-paragraph, sub-paragraph (c) of this paragraph or with paragraph 8 below, as the case may be.
>
> (b) Without prejudice to part (a) of this sub-paragraph if a Purchaser's water supply is not metered, the maximum charge must be calculated as follows: (i) first, any amounts recoverable either under sub-paragraph (1) above or from any other person

> supplied must be deducted from the amount payable by the Re-seller to the Relevant Undertaker or licensed water supplier; (ii) secondly, the amount still to be recovered after performing the deduction required by sub-paragraph (b)(i) above shall be apportioned— (aa) equally among the Purchasers to whom this sub-paragraph applies; or (bb) in proportion to the respective— (1) rateable values of each of the affected Purchasers' dwellings; (2) square footages of each of the affected Purchasers' dwellings; (3) the number of occupants in each of the affected Purchasers' dwellings; (4) the number of bedrooms in each of the affected Purchasers' dwellings; or (cc) by calculating one half of the charge in accordance with the method stated in sub-paragraph (b)(ii)(aa) above and the other half in accordance with any one (but only one) of the methods set out in sub-paragraph (b)(ii)(bb)(1) to (4) above."

107. Paragraph 8 of the 2006 Order allowed for the addition of administration charges in the same terms as in paragraph 7 of the 2001 Order.

The application of the Water Resale Orders

108. The first issue which arises in relation to the Water Resale Orders is whether Kingston was a Re-seller, as defined in those Orders. The second issue is whether Mr Moss was a Purchaser, as there defined. The submissions on this point really only related to the period after the entry into the 2003 agreement (on 14 January 2003).

109. As to whether Kingston was a Re-seller, there is no dispute that it was not a Relevant Undertaker. The question therefore is whether it provided to any Purchaser a supply of piped water and a sewerage service which a water or sewerage undertaker had supplied to it. In view of my earlier finding, that TWU supplied water and sewerage services to Kingston and that the same services were ultimately provided to Mr Moss, it would seem to follow that there was a supply of water and sewerage services to Mr Moss and that they were supplied to him by Kingston.

110. As to whether Mr Moss was a Purchaser, the issue is whether he bought from Kingston any water or sewerage services. At all relevant times, Mr Moss paid Kingston for the water and sewerage services and it seems to follow that he bought those services from Kingston.

111. The definitions of Re-seller and Purchaser do not involve an inquiry into whether the Re-seller was under an obligation to provide water and sewerage services to the Purchaser. Instead, they refer to the fact of such services being provided and the further fact that the Purchaser paid the provider of the services for those services. On that basis, I conclude that at all material times since 14 January 2003, Kingston has been a Re-seller and Mr Moss has been a Purchaser within the meaning of the Water Resale Orders 2001 and 2006. Accordingly, I need not consider whether Kingston was under an obligation to provide water and sewerage services to Mr Moss.

The maximum charge

112. I have set out above the terms of paragraph 5(2) of the Water Resale Order 2001 and of paragraph 6(2) of the Water Resale Order 2006. It is agreed that the relevant part of paragraph 5(2) of the 2001 Order is the part which refers to "the amount payable by the Re-seller to the Relevant Undertaker" and which describes how that amount is to be apportioned. Similarly, the relevant part of paragraph 6(2) of the 2006 Order is the part which again refers to "the amount payable by the Re-seller to the Relevant Undertaker" and the provision as to apportionment.

113. The questions which arise in relation to the calculation of "the amount payable" concern the void allowance of 3.5% and the "commission" of 9.3% which apply to the payment to be made by Kingston to TWU. Mr Westgate submitted that both of these percentages are to be deducted to arrive at a lower figure which will be "the amount payable" by Kingston to TWU for the purposes of the Water Resale Orders.

114. In relation to the void allowance, the Water Resale Orders provide for the total of the amount payable by the Re-seller to the Relevant Undertaker to be apportioned between "the Purchasers to whom this sub-paragraph applies". This involves identifying the total amount payable to the Relevant Undertaker and also identifying the Purchasers between whom that total amount is to be apportioned.

115. Assuming that there is not a mismatch between the voids assumed for the purpose of the voids allowance (3.5% of the total) and the actual number of voids, then the calculation would work as follows, assuming that Kingston pays water charges for 1000 houses or flats. On that assumption, Kingston pays 96.5% of the water charges for the 1000 houses or flats and is able to recover the 96.5% figure from 965 houses or flats. On that example, it is clear that Kingston should apportion the 96.5% figure between the 965 houses or flats and not the 100% figure for 1000 houses because the 100% figure was not "the amount payable" by Kingston to TWU.

116. If, as is likely, there is a mismatch between the 3.5% voids assumed by TWU and Kingston and the actual number of voids, then the calculations will be different. If the actual voids are 5%, then Kingston will apportion the figure of 96.5% of the charges for 1000 houses or flats between 950 purchasers. If the actual voids are 2%, then Kingston will apportion the figure of 96.5% of the charges for 1000 houses or flats between 980 purchasers.

117. As regards the "commission" of 9.3%, prima facie, "the amount payable" by Kingston to TWU is the figure arrived at after deduction of the 9.3%. On my analysis of the 2003 agreement, Kingston agreed to pay the reduced figure for the supply of water and sewerage services. The commercial rationale for TWU and Kingston agreeing on that deduction was no doubt that if TWU were to be responsible for billing and collecting water charges from consumers, then that would involve extra cost for TWU which could properly be reflected in the amount of the water charges. However, when TWU agreed to provide the services to Kingston in return for simplified billing and collection arrangements (and no risk of bad debt), Kingston would be expected to pay less for the services. On this basis, "the amount payable" by Kingston to TWU can naturally be taken to be the discounted figure.

118. The problem for Kingston arises from the Water Resale Orders. No doubt, at the time of the 2003 agreement, Kingston expected that it would be able to recover from its tenants the 100% figure for water charges with the intent that the 9.3% deduction would compensate Kingston for the work involved in billing and collection and the risk of bad debts. However, Kingston appears not to have considered the terms of the Water Resale Orders and thus overlooked the fact that it would be restricted to recovering from its tenants "the amount payable" by Kingston to TWU so that it was not able to add on to the amount payable to TWU a sum to reflect the cost of billing and collection and to cover the risk of bad debts.

119. The parties referred me to *Williams v Southwark LBC* (2001) 33 HLR 22. Under the lease in that case, the lessor was entitled to recover from the lessee the cost of insuring the demised premises. Over the years, the lessor had negotiated with insurers different terms as to the charges for insurance. At one time, the lessor was given a discount in the premium of 33% and then 36.5%. The discount was called a "commission". The lessor accepted in the subsequent court proceedings brought by the lessee, that the "commission" was a straight discount and the "cost" of the insurance was the net cost after deducting the discount. Later, the lessor agreed a "commission" of 25% which was split as to 5% as a discount on the cost and as to 20% for handling and administration carried out by the lessor on behalf of the insurer. It was agreed, that the cost of the insurance should be reduced to reflect the discount of 5%. However, the court held that the cost of the insurance should not be further reduced to reflect the agreed figure of 20%. It was held that the 20% figure was in return for the lessor agreeing to carry out the work and administration involved in handling claims on behalf of the insurer. The claim would be by the insured lessee against the insurer and the lessor would handle the claim with any payment on the insurance policy being made by the insurer to the insured lessee. On that analysis, the 20% was not a discount in the cost of the insurance but was a separate charge made by the lessor to the insurer for the services provided by the lessor to the insurer.

120. I consider that the reasoning in *Williams v Southwark LBC* (as to the 20% figure) does not apply to the 9.3% figure in the present case. If the water charges were payable by the consumer to TWU and TWU had appointed Kingston to collect the water charges on behalf of TWU and if it had been agreed that Kingston could keep 9.3% of the water charges as payment for the services rendered by it to TWU, then the position would have been different and the water charges payable by the consumers would not be reduced by the 9.3%. However, on my analysis of the 2003 agreement, that was not the nature of the arrangement between TWU and Kingston.

121. It was agreed that, for the purpose of calculating the maximum charges permitted by the Water Resale Orders, Kingston is entitled to add the administration charges permitted by paragraph 7 of the 2001 Order and by paragraph 8 of the 2006 Order. The permitted charge is 1.5 pence per day per purchaser, or £5.48 per annum for each purchaser.

122. It follows that the maximum charges permitted by the Water Resale Orders are to be calculated in accordance with the above reasoning.

The position under the tenancy agreements

123. I have referred above to the relevant terms of the tenancy agreements between Kingston and Mr Moss. Under the original terms of the tenancy agreement, Mr Moss is liable to pay water charges to Kingston which charges are to be "the actual amount payable for the premises". Under the revised terms of the tenancy agreement, the charges are to be "the exact amount payable for the property to the water authority".

124. These terms of the tenancy agreement received very little attention in the submissions of the parties. During Mr Bhose's submissions, I asked him if I was being asked to consider the contractual position pursuant to the tenancy agreements as distinct from the issues as to Mr Moss's claim to recover alleged overpayments pursuant to section 150(5) of the 1991 Act and paragraph 10 of the Water Resale Order 2006. Mr Bhose told me that I was not required to address the contractual position. Later in the hearing, I was told that I should consider the contractual position and I received brief submissions in relation to it.

125. The List of Issues does not clearly raise any issue as to the contractual position although it is possible that the contractual position might need to be considered by reason of the use of the word "solely" in Issue 4. I note that the Defence and Counterclaim does assert that Kingston has claimed from Mr Moss water charges in excess of what is permitted by the tenancy agreement but no specific head of relief is connected to that claim.

126. In the event, I will consider the operation of the terms of the tenancy agreement in relation to water charges. In view of the very brief submissions on this question, I will similarly deal with the matter briefly.

127. In the original set of terms, Mr Moss is liable to pay "the actual amount payable for the premises". This phrase does not specify whether it is referring to a sum payable by Kingston or by Mr Moss. It is certainly possible to read the words as referring to an amount payable by Kingston rather than by Mr Moss. However, the words have to be construed in the context of the words which follow in the same provision which indicate that the charge is being paid by Mr Moss to Kingston on the basis that Kingston is acting as agent for the water authority. Although on my analysis of the actual situation between Kingston and TWU, Kingston was not collecting the charges as agent, the contract between Kingston and Mr Moss, under which Kingston was recovering a charge from Mr Moss, was on the agreed basis that Kingston was collecting the charge as agent for TWU. On that basis, I consider that "the actual amount payable for the premises" is to be read as referring to the amount payable on the basis that Mr Moss is liable to pay it to the water authority and Kingston is collecting that sum on behalf of the water authority. On that basis, the "actual amount" is the amount chargeable for the premises before applying the 3.5% void allowance or the 9.3% "commission".

128. The revised wording of the tenancy agreement relating to water charges differs from the original wording. Under the revised wording, there is no reference to Kingston acting as agent for the water authority. As before, the phrase "payable for the property" does not say by whom the charge is payable. The case for saying that the amount is the amount paid by Kingston to the water authority is appreciably stronger than under the original wording. The wording does involve a contrast between the phrase "[t]he amount of the charges to be paid by you" and "the exact amount payable for the property to the water authority" which might suggest that "payable for the property" does not

mean "payable by you for the property" which suggests that it means "payable by Kingston for the property".

129. It does not seem that one gets much help with the construction of the revised terms from relevant background matters. I do not think that Kingston can argue that the original terms can be relied upon by it in support of a construction in its favour of the revised terms; this is because the revised terms are different and may well mean something different. Indeed, Mr Moss can possibly rely on the original terms and argue that the revised terms have been changed to remove the reference to Kingston acting as agent for the water authority thereby suggesting that Kingston was no longer acting as agent. A construction of the revised terms in favour of Mr Moss would produce an uncommercial result for Kingston (in that it would have to pass on to its tenants the 9.3% "commission" which as between TWU and Kingston was intended to be retained by Kingston to compensate it for the cost of collection and for bad debts). However, it was not suggested that the arrangements between TWU and Kingston would have been reasonably available to Mr Moss so that they could be relied upon as relevant background.

130. I conclude that the revised terms restrict Kingston to recovering from Mr Moss the amount payable by Kingston to TWU for the property. On that basis, the amount payable by Kingston is the amount reduced by 9.3% as "commission".

131. The position in relation to the void allowance is more difficult. One course would be to ignore the void allowance on the ground that the void allowance was not a discount for the specific property let to Mr Moss. Instead, the void allowance was an allowance in relation to several thousand properties to reflect the possibility that some of those properties would be vacant and not liable for water charges. As Mr Moss's property was not vacant at any relevant time, the exact amount payable for his property is not reduced by a void allowance given to reflect the possibility of other properties being vacant. I conclude that the revised terms do not require Kingston to deduct 3.5% from the charges other wise payable for the property. The answer in relation to the Water Resale Orders was different in relation to the void allowance but that was because the calculation required for those orders is different.

The charges schemes

132. The List of Issues raise a number of questions in relation to the validity of, and the operation of, charges schemes made by TWU which were in force for the period from 1 April 2002 to 31 March 2010. As I will explain, these charges schemes provided that, in some specified circumstances, the owner of a property (rather than the occupier) would be liable to pay the water and sewerage charges to TWU. Kingston contends that these provisions in the charges schemes were invalid as they went beyond the statutory power to make a charges scheme. Kingston further contends that if these provisions were valid, then Kingston did not come within the specified circumstances and so was not liable as owner to pay the relevant charges. Mr Moss contends that these provisions in the charges schemes were valid and that Kingston came within the specified circumstances so that it was liable as the owner (and Mr Moss was not liable as the occupier) to pay the relevant charges to TWU.

133. In view of my earlier conclusions as to the effect to the 2003 agreement, the resolution of these issues is not necessary to decide the outcome of the present dispute between

Kingston and Mr Moss. However, they were fully argued and I will deal with them albeit more briefly than might have been appropriate if my decision was determinative of the outcome in this case.

134. Each of the charges schemes for the period 1 April 2002 to 31 March 2010 contained the following provision under the heading "Payment of Charges in respect of unmetered supplies":

> "Persons chargeable
>
> a) The person responsible for payment of charges under this scheme shall be the occupier of the relevant premises to which the supply is made except where some other person is liable by agreement with Thames Water.
>
> b) Where there are two or more people occupying the relevant premises to which the supply is made, the occupiers shall be jointly and severally liable for the payment of the charges.
>
> c) Where the relevant premises to which the supply is made is let on a tenancy of less than 12 months or licence, the owner of the premises shall be regarded as the occupier and be liable for charges except where some other person has paid the charges or is liable by agreement with Thames Water."

135. The particular provision which is relied upon by Mr Moss but which is said by Kingston to be invalid is paragraph (c) above.

136. The argument for Kingston as to the invalidity of paragraph (c) is as follows:

i) Section 144(1) of the 1991 Act provides that, subject to certain qualifications, the liability to pay water and sewerage charges is imposed on the occupier;

ii) The qualifications to which section 144(1) of the 1991 Act is subject are stated to be the provisions of section 144 itself and a contrary provision in an agreement to which the undertaker is a party;

iii) As indicated in section 144(1), other provisions in section 144 specify when someone other than an occupier is liable to pay the charges; these provisions provide for persons who have ceased to be occupiers to be liable in specified circumstances; these provisions also identify some special and limited circumstances in which an owner of premises, rather than an occupier, is liable to pay the charges: see section 144(8);

iv) Section 144(1) does not provide for a further qualification such as where there is a provision to the contrary in a charges scheme; this suggests that a charges scheme cannot make a provision to the contrary;

v) There is nothing in section 142 of the 1991 Act which allows a charges scheme to impose liability for charges on persons who would not otherwise be liable;

vi) There is nothing in section 143 of the 1991 Act which allows a charges scheme to impose liability for charges on persons who would not otherwise be liable; in particular, the wording of section 143(4) does not extend to imposing liability on an owner instead of an occupier;

vii) Therefore, the power of TWU to make a charges scheme under section 143 of the 1991 Act does not extend to a power to make a scheme which imposes liability for charges on persons who would not otherwise be liable.

137. The argument for Mr Moss as to the validity of paragraph (c) is as follows:

i) Pursuant to section 142(1)(b), TWU has power to demand and recover charges from any person to whom it provides services;

ii) In a case where the occupier was different from the owner of a property to which services were provided, the services were provided to both the owner and the occupier for the purposes of section 142(1)(b); see *South West Water Authority v Rumble's* [1985] AC 609;

iii) Section 143(4) provides that a charges scheme may make different provision in relation to different circumstances and may contain supplemental and consequential provision for the purposes of the scheme.

138. I accept the submissions made on behalf of Kingston. As to the submissions made on behalf of Mr Moss:

i) The reference in section 142(1)(b) to the person to whom the undertaker provides services is to be construed in accordance with the specific terms of section 144 as to the identity of the person to whom services are provided and in accordance with any agreement to the contrary of section 144 (as permitted by section 144(1) itself); section 142(1)(b) is not to be interpreted as permitting the undertaker to take the view that other persons benefit from the provision of a service to an occupier and to assert that it is also providing services to those other persons;

ii) Although it was said in *South West Water Authority v Rumble's* at 618H-619A that a provision in the Water Act 1973 which referred to "persons for whom [it] perform[s] the services" involved the question of whether the person benefitted from the services, the statutory provisions there being considered were significantly different from the relevant provisions in the 1991 Act;

iii) The general words of section 143(4) should not be construed so as to permit the making of a provision which is contrary to section 144 which was to operate subject to the two exceptions specified in section 144(1), which exceptions did not include the possibility of there being a charges scheme providing to the contrary of section 144;

iv) Mr Westgate did not argue that, if he failed on his other arguments, paragraph (c) came within the reference to supplemental or consequential provisions in section 143(4) and I would not have accepted any such argument: see *Daymond*

v Plymouth Council [1976] AC 609 at 644G-H as to the meaning of "supplementary".

139. Kingston also argued that if paragraph (c) of the charges scheme had been valid, it would not have applied to the premises let to Mr Moss. Paragraph (c) referred to premises being "let on a tenancy of less than 12 months or licence". Kingston submitted that this phrase should be read as if it had said "let on a tenancy for a term certain of less than 12 months or licence". Kingston then submitted that Mr Moss had throughout been a weekly tenant and because a weekly tenancy is not a letting for a term certain, that tenancy did not come within paragraph (c). Kingston did not explain why I should change the wording of paragraph (c) so as to introduce a requirement that the tenancy was for a term certain. So far as I can see, there is no basis for me introducing this further requirement unless it could be shown that it is not possible to ask whether a tenancy was a tenancy of less than 12 months unless the tenancy in question was a tenancy for a term certain. So I ask myself, is it possible to answer the question (is the tenancy a tenancy of less than 12 months) when the tenancy in question is a periodic tenancy?

140. In answering my own question, I can put out of account considerations as to whether the tenancy attracts statutory security of tenure of some form or other. I consider that if the relevant tenancy were a tenancy for a fixed period of 6 months, then one would say that it was a tenancy of less than 12 months and it would nonetheless be such a tenancy even though it attracted security of tenure which would allow it to continue after the end of the 6 months or which would allow the occupier to remain in possession on a statutory basis after the end of the 6 months.

141. I consider that it is possible to say that a weekly or a monthly or a quarterly tenancy is a tenancy of less than 12 months. This is because the tenant is not able to say at the outset of the tenancy that he has a right to continue as tenant for 12 months. As it is possible to answer the question posed earlier, I consider that one should answer the question posed by the wording of paragraph (c) and not change that wording to some different wording which introduces a further requirement.

142. Accordingly, if contrary to my earlier conclusion, paragraph (c) had been valid, I would have held that Mr Moss's weekly tenancy was a tenancy of less than 12 months within paragraph (c).

The decision in Jones v Southwark LBC

143. I referred earlier to the decision of Newey J in *Jones v Southwark LBC* [2016] PTSR 1011. Mr Bhose argued that that case was wrongly decided and that I should not follow it. In the event, although the arguments before me were not the same as the arguments before Newey J, I have reached the same overall conclusion as he did. I therefore do not need to decide whether I would have followed the earlier decision if I had been otherwise minded to reach a different overall conclusion. I have reached a different conclusion from Newey J on one point, namely, as to the validity of paragraph (c) in the charges scheme. However, the outcome in this case is not affected by my decision in relation to the charges scheme and so the difference between the reasoning in the two decisions is not material to the result of the present case.

Conclusions in relation to the List of Issues

144. In accordance with the above reasoning, and in the light of certain other matters which were accepted at the hearing, the answers to the questions raised by the List of Issues are as follows:

i) The result of the 2003 agreement was that Kingston was a Re-seller for the purposes of the Water Resale Orders 2001 and 2006;

ii) The relevant provision in the charges schemes (referred to above as paragraph (c)) was invalid; this conclusion does not affect the overall result;

iii) It is agreed that Kingston ceased to be a Re-seller with effect from its entry into the Deed of Clarification and Agreement on 3 August 2017;

iv) Kingston is bound by the maximum charges provisions of the Water Resale Orders 2001 and 2006; it was not disputed that, if Kingston were bound by those provisions, then it had charged Mr Moss sums in excess of the maximum charges but the precise amount of the maximum charge has not been calculated;

v) Mr Moss has a right to recover overpayments of charges pursuant to section 150(5) of the 1991 Act and paragraph 10(1) of the Water Resale Order 2006; Kingston stated that it does not seek to rely upon a limitation defence to such a claim;

vi) Mr Moss has overpaid the charges which were due under the revised terms of his tenancy agreement; it was not disputed that, in such a case, Mr Moss may have a claim in restitution for recovery of those overpayments but the precise scope of such a claim and any possible defences to it were not investigated at this trial;

vii) Mr Moss did not pursue the claim that Kingston had acted in breach of the transparency provisions in paragraph 9 of the Water Resale Order 2006.

APPENDIX

THE 2003 AGREEMENT

THIS AGREEMENT is made the 14th day of January 2003
BETWEEN THAMES WATER UTILITIES LIMITED ("the Provider") whose registered office is at [address] and
ROYAL BOROUGH OF KINGSTON UPON THAMES ("the Customer") whose principal office is at [address]

WHEREAS

(1) The Customer is a Local Housing Authority within the meaning of the Housing Act 1985.
(2) The Provider is a water and sewerage undertaker within the meaning of the Water Industry Act 1991 ("the Act") and provides water and sewerage services ("the Services") to premises ("the Premises") managed by the Customer in its capacity as Local Housing Authority.
(3) The Provider and the Customer have agreed that the Customer will pay for the Services in respect of some of the Premises in accordance with the provisions of this Agreement.

1 **Premises Affected**

1.1 THIS Agreement covers all of the Premises where the water supply given by the Provider is not measured by a meter ("the Unmetered Premises").

2. **Liability for Charges**

2.1. The Customer shall pay for all of the Provider's charges ("the Charges") in respect of the Services provided to the Unmetered Premises.
2.2 THE Charges will be raised by applying the relevant tariffs ("the Tariffs") for the Services, less the allowances and reductions to which the Customer is entitled under Clause 3.
2.3 THE Tariffs will be those that are in force at the relevant time by virtue of inclusion in Charges Schemes made by the Provider under Section 143 of the Act (or any subsequent change to that provision).

3. **Allowances and Reductions**

3.1 THE Tariffs will be reduced by 3.5% in recognition of the fact that in any given year a number of the Unmetered Premises are likely to be unoccupied for a period of less than three months.
3.2 FOLLOWING the deductions under clause 3.1 the balance of the Charges will be reduced by a further 9.3% by way of the Customer's commission.

4. **Payment Terms**

4.1 THE Provider shall send the Customer an invoice ("the Invoice") for each financial year (commencing 1 April).

4.2 THE Charges will be payable in 8 instalments on the 15th day of each month for the months of April through to November ("the Payment Dates") PROVIDED ALWAYS that if the Invoice is not sent before the 15th day of April, the first Payment Date will be postponed until fifteen days from the date on which the Invoice is sent.

4.3 WHERE a Payment Date is a Saturday or Sunday payment shall be made on the immediately preceding Friday.

4.4 PAYMENT will be made by way of cheque and will be deemed to have been made on the date that a cheque is received by the Provider provided that cheque is honoured by the bank on which it is drawn on the first occasion it is presented.

4.5. IF payment is not received by any of the Payment Dates, then unless the Provider agrees otherwise in writing, interest shall accrue from day to day from that date a rate of 2% above the base lending rate of the National Westminster Bank.

4.6 THE Customer shall send the provider an invoice ("the VAT Invoice") in respect of any Value Added Tax that is payable in respect of the Customer's commission referred to in Clause 3.2.

5. Information

THE Customer shall give to the Provider the following information ("the Information"):

(a) a monthly list of Long Term voids, defined as Unmetered Premises that have remained unoccupied for a continuous period of three calendar months or more, specifying in the case of each one that period during which it has remained unoccupied; and

(b) a list of additional Unmetered premises acquired and/or disposed of by the Customer. This list shall be provided regularly at times convenient to the Customer PROVIDED ALWAYS that the Provider shall be advised as soon as is reasonably practicable when there has been a Significant Stock Movement. A Significant Stock Movement occurs when more than two hundred and fifty Unmetered Premises have been acquired and/or disposed of since the last list given to the Provider under this paragraph.

6. End of Year Reconciliation

6.1 THE Provider will use all of the Information given before the fifteenth day of December in any year to generate an end of year reconciliation ("the Reconciliation"). The Reconciliation will show any amendments that have been made to the charges shown in the Invoice already submitted for that year.

6.2 SUBJECT to Clause 6.3 a copy of the reconciliation will be provided to the customer before the Invoice for the following financial year and the total payment due under that Invoice will be amended accordingly.

6.3 WHERE the provider has been advised of a significant Stock Movement before the final Payment Date in any financial year, the Provider will submit an emended invoice ("the Amended Invoice") to the customer for that financial year.

6.4 THE Amended Invoice will show the amounts due for the remaining Payment Dates in that financial year and shall otherwise be subject to the provisions of Clauses 4.3, 4.4 and 4.5 of this Agreement.

6.5 WHERE the Provider has been advised of a "Significant Stock Movement" after the final Payment Date in any financial year any changes will be taken into account in the next Reconciliation due under this Agreement.

6.6 ANY information relating to the demolition of any Unmetered Premises must be given to the Provider within three months of the completion of the demolition. If it is not, the Provider will not be obliged to take account of the demolitions in any Reconciliation or Amended Invoice or otherwise adjust the Charges to reflect the demolitions for any period prior to which the Provider was made aware of the demolitions.

7. Duration Of Agreement

7.1 THIS Agreement will commence on the 1st day of April 2002 and will continue for a minimum period of five years ("the Minimum period").

7.2 THIS Agreement may be terminated by either party giving to the other a minimum of six months notice in writing to expire at any time after the completion of the Minimum Period.

7.3 IF this Agreement is terminated under clause 7.2:

(a) the Customer will send to the Provider a list of all of the Unmetered Premises together with the occupiers names; and

(b) the Provider will send a final Reconciliation to the customer together with any payment to which the customer may be entitled. However, if the final Reconciliation shows a final payment due to the Provider, a final invoice ("THE Final Invoice") will also be included.

7.4 THE Final Invoice shall be paid by the Customer within twenty eight days of receipt and shall otherwise be subject to the provisions of Clause 4.3, 4.4 and 4.5 of the Agreement.

8. Confidentiality

NEITHER party will disclose to any third party details of this Agreement without the prior written consent of the other except where they are bound to disclose under compulsion of law or where requested by regulatory agencies.

9. Entire Agreement

9.1 THIS Agreement shall supersede all arrangements or agreements relating to all matters which are referred to and which were previously entered into or made between this parties hereto and all such arrangements or agreements are hereby terminated.

9.2 THIS Agreement represents the entire agreement between the parties and no modification or alteration hereto shall effect (*sic*) unless the same is agreed in writing between the parties.

9.3 IN the event that any provision of this Agreement shall be void or unenforceable by reason of any provision or applicable law, it shall be deleted and the remaining provisions hereof shall continue in full force and effect and, if necessary, be so amended as shall be necessary to give effect to the spirit of this Agreement so far as reasonably practicable.

10. Contracts (Rights of Third Parties) Act 1999

THE parties to this Agreement do not intend that any term of this Agreement should be enforceable, by virtue of the contracts (Rights of Third Parties) Act 1999, by any person who is not party to this Agreement.

11. Law

11.1 THIS Agreement shall be governed and construed in accordance with the laws of England and any dispute or difference arising hereunder shall be subject to the jurisdiction of the English courts.

11.2 NOTHING in this Agreement shall in any way prejudice or exclude the exercise by the Provider of any of its statutory or common law rights and powers arising otherwise than by virtue of this Agreement.