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Case No: A3/2020/0030

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Mr Justice Morgan
PT-2018-000194

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th October 2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE ARNOLD

- -

Between :

THE MAYOR & BURGESSES OF THE ROYAL BOROUGH OF KINGSTON-UPON-THAMES	**Appellant**
- and -	
MR DEREK MOSS	**Respondent**

- -
- -

MR RANJIT BHOSE QC & MS RUCHI PAREKH (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
MR MARTIN WESTGATE QC & MR TOM CLEAVER (instructed by **Deighton Pierce Glynn**) for the **Respondent**

Hearing dates : 20th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Tuesday 27th October 2020.

Lord Justice Lewison:

The issue

1. Mr Derek Moss is the tenant of a one-bedroomed flat. His landlord is The Royal Borough of Kingston-upon-Thames ("Kingston"). His weekly rent includes a charge for water. Like many local authority landlords, Kingston has a written agreement with the water undertaker (in this case Thames Water Utilities Ltd or "TWU") for the supply of water to its thousands of let properties. The relevant agreement was made on 14 January 2003 ("the 2003 agreement"). If Kingston was a re-seller for the purposes of the Water Resale Orders 2001 and 2006 then the amount that Kingston can pass on to its tenants is capped. The main issue on this appeal is whether Kingston, under the terms of the 2003 agreement, was a water re-seller before it was varied in 2017. Morgan J held that it was. His judgment is at [2019] EWHC 3261 (Ch). Like the judge, I have set out the text of the agreement in an Appendix to this judgment. It is common ground that if Kingston was a water re-seller, the charge that it has made to Mr Moss exceeds the cap.

The legislative background

2. The supply of water and sewerage services is governed by the Water Industry Act 1991. Under section 6 of that Act the Secretary of State has the power to appoint a company to be a water undertaker for an area within England and Wales. As mentioned, TWU is the undertaker for Kingston's area. A water undertaker has a statutory duty to supply water to domestic premises ("the domestic supply duty"); and to maintain the connection between the undertaker's water main and the service pipe by which that supply is provided to those premises: section 52 (1). Two categories of persons can demand a domestic supply of water: an occupier of the premises or a person who is the owner of the premises at that time and agrees with the undertaker to pay all the undertaker's charges in respect of the supply demanded: section 52 (5).

3. The domestic supply duty is enforceable by "the consumer": section 54 (1).

4. A water undertaker has power to disconnect a service pipe, or to cut off a water supply, if it is reasonable for the disconnection to be made, or the supply cut off, for the purpose of carrying out any necessary work: section 60 (1). Except in an emergency, before exercising that power the water undertaker must give notice to "the consumer": section 60 (3). It also owes a duty to "the consumer" to carry out the works with reasonable dispatch; and not to interrupt a supply of water for more than 24 hours without making an emergency supply available: section 60 (4).

5. The "consumer" is a person who is liable to pay charges to the water undertaker in respect of the supply: section 93 (1).

6. Section 142 (1) gives a water or sewerage undertaker the power to fix charges for services provided in the carrying out of its functions and to demand and recover those charges from any person to whom the undertaker provides services. In the case of a dwelling the charges must be fixed by a charging scheme made under section 143.

The charging scheme must be approved by the regulator: section 143 (6). Section 144 (1) provides:

> "(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."

7. Under section 144, therefore, liability to pay water charges is that of the occupier "except in so far as provision to the contrary is made by any agreement to which the undertaker is a party". One question that arises is whether the agreement between Kingston and TWU is an agreement which provides to the contrary.

8. Section 150 gives the regulator power to fix maximum charges for services provided with the help of undertakers' services. It provides:

> "(1) The [regulator] 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.
>
> …
>
> (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, [...]
>
> (a) the amount of the excess; and
>
> (b) if the order so provides, interest on that amount at a rate specified or described in the order,
>
> shall be recoverable by that person from the person to whom he paid the charge."

9. In 1999, the regulator published a consultation paper on the use of its power to make a Water Resale Order. The consultation paper said (among other things):

> "… water resale occurs when water … provided to a customer by a licensed undertaker (a supplier) is sold by that customer to a third party. Such arrangements are most commonly found on mobile home parks, in flats and apartments and other rented or leasehold accommodation… In the absence of a maximum resale order, the price which can be charged is governed only by any contractual arrangements existing between the parties. Cases raised with Ofwat suggest that misunderstandings or disputes often arise because such contractual arrangements are either insufficiently clear or allow the reseller too much freedom."

10. Following the consultation exercise the regulator made the Water Resale Order 2001 and, subsequently, the Water Resale Order 2006. The agreement with which we are concerned straddles the period covered by both orders; but the definitions in each order are the same. It is necessary to refer only to the 2001 Order. It contains a series of definitions which include:

> "Purchaser" means a person who occupies any dwelling and who buys from a Re-seller any water or sewerage services.
>
> "Relevant Undertaker" means a Water Undertaker or a Sewerage Undertaker.
>
> "Relevant Pipe" means a water main (including a trunk main), resource main, discharge pipe or service pipe.

> "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 supply system."

11. If a person is a re-seller, the charges he may pass on are capped by a formula which differs from the formula to be found in a charges scheme. The formula also differs as between the two Orders, but the differences need not concern us.

12. Section 1 of the Local Authorities (Goods and Services) Act 1970 gives local authorities power to enter into agreements with public bodies to provide the public body with administrative, professional or technical services. Paragraph 20 of Schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991 provides:

> "… the powers of a local authority under that Act shall be deemed to include power to enter into an agreement for the collection and recovery by the authority, on behalf of any water undertaker or sewerage undertaker, of any charges fixed by the undertaker under Chapter I of Part V of the Water Industry Act 1991."

13. This power replaced a similar power previously contained in section 32A of the Water Act 1973. It is this power which Kingston says that it has been exercising in collecting water charges from its tenants. In other words, it has been acting "on behalf of" TWU in collecting from its tenants' charges fixed by TWU. There is no doubt that it could have exercised this power. The question is whether it did.

Approach to interpretation

14. The critical question, then, is whether TWU has supplied Kingston, directly or indirectly, with a supply of piped water and/or a sewerage service. Kingston argues that it has not. It says that TWU has supplied water directly to the tenants of the various dwellings, and that its own function was merely to collect water charges on TWU's behalf. Mr Moss, on the other hand, says that under the terms of the agreement, TWU has supplied piped water and sewerage to Kingston; and that he has bought the water and sewerage service from Kingston in the shape of the water charge payable under the terms of his tenancy. He also says that the agreement between Kingston and TWU is one that places the responsibility on Kingston to pay water charges.

15. One might have thought that the answer to the question posed on this appeal is simply a question of the interpretation of the Water Resale Orders and the 2003 agreement

between Kingston and TWU. But Mr Bhose QC, for Kingston, submits that the 2003 agreement cannot be understood without reference to previous agreements made between Kingston and a previous water authority under a different statutory regime.

16. There are, undoubtedly, cases in which a previous contract between the same parties has been considered as part of the relevant background. In almost all cases, however, consideration of a previous contract has been found to be unhelpful. Even where the court has considered a previous contract made between the same parties, there is a difficulty as Rix LJ pointed out in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161 at [83]:

> "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."

17. Moreover, the material upon which Mr Bhose wished to rely included not only a previous agreement between different parties under a previous statutory regime, but also pre-contractual negotiations passing between them, and documents that were internal to Kingston. In a number of instances we were asked to infer that there had been communications between Kingston and Thames Water Authority (TWU's predecessor) that were undocumented. The totality of that material goes far beyond anything sanctioned by the principle that a contract must be objectively interpreted. Although there is some similarity between parts of the 2003 agreement and the earlier correspondence, there are also significant differences between them. Mr Bhose pointed to the similarities, while glossing over the differences. It must also not be forgotten that one of the purposes of entry into a formal written agreement (especially one with an "entire agreement" clause) is that the written agreement will contain a definitive record of the parties' rights and obligations. In addition, clause 9.1 of the 2003 agreement states that the agreement would supersede all previous arrangements or agreements relating to the matters referred to in it. That is a clear recognition of a fresh start. The attempt to match clauses in the 2003 agreement to parts of the earlier correspondence is not, in my judgment, the correct way to interpret a formal written contract of this kind.

18. In the event the judge did consider that material, and made his findings at [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."

19. The grounds of appeal did not challenge those factual conclusions. Parties filing appellants' notices should clearly identify any challenges to the lower court's findings of fact in their grounds of appeal and squarely address those challenges in their skeleton arguments, so as to ensure that (i) the judge considering the application for permission to appeal appreciates that such a challenge is being mounted and can decide whether or not to grant permission for it and (ii) if permission is granted, the members of the court hearing the appeal can prepare accordingly: *Taylor v Van Dutch Marine Holding Ltd* [2020] EWCA Civ 353, [2020] Bus LR 1486 at [63]. It also gives the opposing parties proper notice of the points in issue; and enables them to prepare their response. This applies both to the question whether a judge's findings of fact were wrong; and also to the question whether the judge should have found further facts.

20. The high point of Mr Bhose's case on the previous arrangements was a letter from Thames Water Authority to Kingston of 27 October 1977. That, he said, was an offer which Kingston had accepted such as to bring a binding contract into existence. That submission depended on selecting parts of the letter, much of which is expressed in very tentative terms, as identifying the terms (or, as Mr Bhose put it, the "core terms") of the putative contract. But in the case of the proposal about void allowances, for example, two methods of calculation were proposed neither of which was quantified. The only document amounting to an alleged acceptance that we were shown was a resolution of Kingston's finance and general purposes sub-committee, dated over four months later, which purported to accept "arrangements" with Thames Water Authority, including a void allowance of 1.75% in respect of water rates. That figure does not feature in the letter of 27 October 1977. There is no direct evidence of a

communicated acceptance; and no evidence about what happened between 27 October 1977 and the resolution of 1 March 1978.

21. In addition, the judge made no finding that there was any obligation on Kingston's part to collect water charges on behalf of Thames Water Authority; and none could be teased out of the correspondence that we were shown. Finally, it seemed highly likely that precisely the same issues of classification of the pre-2003 arrangements would have arisen as arise under the terms of the 2003 agreement.

22. Having considered the material, the judge held at [86] that it was unhelpful. I see no ground upon which that conclusion could be impeached. In essence, Mr Bhose's argument under this head assumed what he needed to demonstrate.

The 2003 agreement

23. There are many features of the 2003 agreement which, taken together, point unerringly to the conclusion that Thames supplied piped water and sewerage services to Kingston; and that the agreement is one which replaces the liability of the occupier under section 144:

    i) Kingston is described as "the Customer." Labels like these are not chosen at random. They usually encapsulate the concept that they are intended to represent. If Kingston is the Customer, it is the recipient of the provision of a good or service; not merely an intermediary.

    ii) Recital (3) says that the Customer "will pay for the Services", rather than saying that it will collect charges payable to TWU. An agreement to pay indicates primary liability.

    iii) Clause 2.1 repeats that the Customer "shall pay for all the Provider's charges".

    iv) Clause 2.2 says that the Charges "will be raised" by applying the relevant tariffs. But that is only the starting point. What Kingston is actually liable to pay is the tariffs "less the allowances and reductions" to which Kingston is entitled under clause 3. Clause 4.1 says that TWU will send Kingston "an invoice". An invoice usually denotes a sale. Kingston must pay the charges irrespective of whether it can recover anything from its tenants. The risk of non-payment is therefore Kingston's rather than TWU's.

    v) Clause 3.1 reduces the tariffs by 3.5 per cent in recognition of the fact that in any given year some properties will be unoccupied for short periods. However, it appears that the charge for an individual property is not waived in respect of a period during which it is empty. This means that Kingston will be paying water charges in circumstances in which there is no occupier liable to pay; and hence no other person potentially liable to TWU. This can only be a primary liability. It is difficult to see how payments made by Kingston to TWU have different characteristics when they are paid under a single agreement. As Mr Westgate QC submitted on behalf of Mr Moss, this provision clearly breaks any link between the charging scheme promulgated by TWU and liability under the 2003 agreement.

vi) Under clause 4.2 the charges are payable in 8 instalments from April to November, whereas Kingston's tenants pay their charges weekly. Moreover, it appears that no charge is made from December to March, whereas Kingston's tenants continue to pay their weekly charges.

vii) If Kingston does not pay on time, clause 4.5 requires it to pay interest. So the risk of late payment is borne by Kingston rather than TWU.

viii) Clause 6 deals with a year-end reconciliation statement. Amongst other things, clause 6.6 envisages that even if Kingston has demolished properties, it may be still be liable to pay charges unless it gives timely notice to TWU.

24. The only possible counter-indications are that:

i) Clause 3.2 provides that after the deduction under clause 3.1 (i.e. the allowance for voids) "the balance of the Charges will be reduced by a further 9.3% by way of the Customer's commission".

ii) Clause 4.6 requires Kingston to send TWU an invoice "in respect of any" VAT that is payable in respect of the commission.

25. Although the reduction under clause 3.2 is referred to as "commission" it does not carry any of the hallmarks of a commission. Moreover, it is referred to in clause 2.2 simply as a "reduction" or "allowance". A commission is usually a payment due from principal to agent where the agent has effected some actual transaction on the principal's behalf. Typically, the agent will have sold goods or collected monies on behalf of the principal. The commission will generally be a percentage of the proceeds of what the agent has actually achieved. But in this case the commission is not dependent on what Kingston actually collects from its tenants. What it is liable to pay TWU is fixed by the agreement, whether the tenants pay or not. Although called a "commission," it is in reality no more than a reduced price reflective of the fact that Kingston has relieved TWU not only of the administrative burden of collecting water charges from tenants individually; but also the risk of non-payment and late payment.

26. The provision of water and sewerage services is zero rated for VAT. So the requirement of an invoice under clause 4.2 is said to show that there was an agency relationship between TWU and Kingston. But, as the judge pointed out at [63], the clause refers to "any" VAT payable; so the agreement contemplated that there might be none to pay. The so-called "commission" encompassed both the risk of non-payment by individual tenants, and also the administrative burden of collection. Mr Bhose asserted and accepted that on his analysis only the latter could be a taxable supply; and that each of the 8 payments in any given year was a separate supply. There would, therefore, have to be a series of apportionments between that part of the so-called "commission" referable to the risk of non-payment, and that part which was referable to the supply of a service. The 2003 agreement contained no machinery or guidance about how to do it. Depending on how much Kingston actually managed to recover from its tenants during the relevant period, the apportionment might be different each time. This is an improbable exercise for the parties to have intended.

27. Mr Bhose placed some reliance on clause 7.1 of the 2003 agreement which provided that it would commence on 1 April 2002. That element of retrospectivity, he said,

showed that the parties intended to achieve continuity. In the first place, that argument is inconsistent with clause 9.1 which states expressly that the 2003 agreement was intended to supersede all previous arrangements. Second, since the previous arrangements themselves lead to no clear answer, the effect of the 2003 agreement must be found within its own terms.

Previous cases

28. Mr Bhose relied on previous decisions of this court about different forms of agreement made between water authorities and local authorities. The most important was *Rochdale MBC v Dixon* [2011] EWCA Civ 1173, [2012] HLR 6.

29. Before considering that case in any detail, it is worth recalling what Sir George Jessel MR said in *Aspden v Seddon* (1874-75) LR 10 Ch App 394:

> "No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say, I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result especially in some cases of wills, has been remarkable. There is, first, document A, and a Judge formed an opinion as to its construction. Then came document B, and some other Judge has said that it differs very little from document A—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C, and the Judge there compares it with document B, and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner."

30. The principal issue in *Rochdale* was whether the local authority had entered into an agreement with the water authority to collect water charges on its behalf. This court held that under section 1 of the Local Authorities (Goods and Services) Act 1970 it had the power to do so and had exercised it. The impact of the Water Resale Orders

was not in issue. Rix LJ set out a number of the provisions of the agreement in that case.

31. In my judgment, there are many differences between the agreement considered in the *Rochdale* case and the agreement in our case. The main ones are:

    i) Recital C of the agreement in that case stated that it was "an agreement for the collection and recovery by the council *on behalf of the company* of charges fixed by the company for the supply of water and sewerage services."

    ii) The "Customers" under that agreement were the tenants; not the local authority.

    iii) Clause 2.1 of the agreement contained an obligation by the local authority "to provide the services".

    iv) Clause 2.2 contained express authority given by the water authority to the local authority "to collect the charges on behalf of the company."

    v) By clause 3 the local authority agreed to use reasonable skill and care. It also agreed to ensure that all customers (i.e. the tenants) were correctly invoiced.

    vi) By clause 4 the water authority agreed to deal with all inquiries and complaints from customers (i.e. from the tenants).

32. All these points (and more) were made by Rix LJ at [41].

33. In contrast with the agreement considered in *Rochdale*, the agreement in our case:

    i) Does not refer to the collection of charges from Kingston's tenants. They are not referred to at all.

    ii) Contains no authority conferred by TWU for Kingston to act on its behalf.

    iii) Contains no obligation by Kingston to provide any services to TWU, let alone an obligation to perform them with reasonable skill and care. Mr Bhose submitted that such an obligation should be implied. But apart from the multiple ways in which such an obligation could be framed (an absolute obligation, a best endeavours obligation, a reasonable skill obligation etc) which are themselves an objection to an implied term, the 2003 agreement works perfectly well without such an obligation. Kingston pays TWU whether it has collected from its tenants or not.

    iv) Contains no obligation on the part of Kingston to account to TWU for any monies that it in fact receives.

    v) Contains no obligation by Kingston to ensure that its tenants are correctly invoiced.

    vi) Contains no obligation by the water authority to deal with customer complaints.

34. In initially attempting to support its preferred interpretation of the agreement by reference to *Rochdale*, Kingston was, in my judgment, committing the very mistake that Sir George Jessel MR deprecated. To be fair, however, Mr Bhose did not press this in oral argument.

On behalf of

35. Mr Bhose submitted that even if Kingston was not TWU's agent for the collection of water and sewerage charges, it nevertheless collected the charges "on behalf of" TWU and was thus exercising the power in paragraph 20 of Schedule 1 to the Water Consolidation (Consequential Provisions) Act 1991. The judge dealt with that argument at [78]. He said:

> "In [*Rochdale*] 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 [*Rochdale*], "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."

36. I agree.

37. In addition, Mr Bhose's argument was based on the premise that the collection by Kingston of water charges "on behalf of" TWU was incompatible with its being a water re-seller. That may be so, if "on behalf of" is given the narrow meaning of agency. But if the meaning of the phrase extends to "in place of" or "instead of" there is, in my judgment, no incompatibility. That is another reason for rejecting Mr Bhose's argument.

Consequences

38. Mr Bhose submitted that if the 2003 agreement meant what the judge said it meant, then Kingston had made a very bad bargain; and had also deprived its tenants of valuable rights which they would otherwise enjoy as "consumers". He went on to say

that the Water Resale Order 2001 was "reasonably available" to the parties at the date of the 2003 agreement; and that the parties cannot be taken to have intended that their agreement should fall foul of it.

39. I accept that the legal background is a relevant factor in interpreting a contract. There is no direct evidence that either party knew of the Water Resale Orders, although it is a fair inference that TWU did. Whether Kingston did is more doubtful. I accept also that if there are two realistic interpretations of a contract, on one of which it is valid and on the other of which it is invalid, the court will choose that interpretation which validates the contract. In this case, however, the 2003 agreement is a valid agreement, as between TWU and Kingston, whether or not if falls within the scope of the Water Resale Orders. So the validation principle does not apply. Nevertheless, the process of interpreting a contract, and classifying or categorising it according to some legal description, are different processes.

40. In *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 the Privy Council considered whether an agreement created a fixed charge or a floating charge. Lord Millett explained:

> "In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it. A similar process is involved in construing a document to see whether it creates a licence or tenancy."

41. To much the same effect, Buckley LJ said in *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612:

> "One has first to find out the true nature of the transaction and then see how the Act operates on that state of affairs. One should not approach the problem with a tendency to attempt to find a tenancy because unless there is a tenancy the case will escape the effects of the statute."

42. So in this case, one must first interpret the 2003 agreement to see what substantive rights and obligations it contained; and then see whether it meets the terms of the Water Resale Orders. In my judgment it does. It may well mean that Kingston made a bad bargain but that cannot change the effect of the agreement. I might also add that,

from the perspective of TWU, it was a matter of indifference whether the agreement did nor did not fall within the scope of the Water Resale Orders; so there is no reason to attribute to TWU any particular desire to avoid their effect.

43. As far as loss of rights is concerned, Mr Bhose's point was that if Kingston was "the consumer" as defined by the legislation, then the obligations of the water undertaker were owed to it, rather than to the occupier. The loss of these rights seems to me to be more of a theoretical than a practical concern. In any event since the Act expressly permits the water undertaker to enter into an agreement placing liability for water charges on someone other than the occupier, that potential mismatch is inherent in the scheme of the Act. But even if I am wrong about that, the loss of those rights is simply a consequence of the agreement that Kingston in fact made.

Conclusion

44. There is, in my judgment, no real doubt that under the terms of the 2003 agreement TWU supplied water and sewerage services to Kingston, rather than to Kingston's tenants. The agreement was thus an agreement "to the contrary" for the purposes of section 144. It follows that under that agreement Kingston was a re-seller with the meaning of the Water Resale Orders.

45. Kingston raised one further ground of appeal relating to the interpretation of a clause in Mr Moss' tenancy agreement. But that ground only became relevant if Kingston succeeded on the main ground. Since it has not, no more needs to be said about the detailed terms of the tenancy agreement.

46. Accordingly, I consider that on the main issue raised on this appeal the judge was right for the reasons that he gave; and that Newey J was also right in his interpretation of an agreement in the same form between TWU and Southwark LBC: *Jones v Southwark LBC* [2016] EWHC 457 (Ch), [2016] PTSR 1011.

Result

47. I would dismiss the appeal.

Lord Justice Arnold:

48. I agree.

Sir Terence Etherton MR:

49. I also agree.

APPENDIX

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 Act1991 ("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 [affect] 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.