

WATER CHARGES LITIGATION – BRIEFING NOTE

1. The Court of Appeal recently ruled that the Royal Borough of Kingston-Upon-Thames is liable to repay council and social housing tenants for overcharging for water and sewerage services between 14 January 2003 and 3 August 2017¹. This follows the High Court judgment in the same case and the earlier High Court judgment in the *Jones v Southwark* case², which have consistently held that councils have to repay their tenants for the excess charges. Kingston Council have not appealed the Court of Appeal's judgment, so it now stands as the last word on the issue. Hundreds of thousands of council tenants and former tenants should now receive a refund.

The Background

2. The issue of water overcharging came to light when significant numbers of local authority tenants were evicted due to non-payment of water rates (after changes to housing benefit rules). Eviction would not have been possible if Thames Water had been supplying the tenants direct. We found that the water supply contract was not with the tenants at all, but was between Thames Water and the relevant council landlords. Under this arrangement the council then recovered water rates from their tenants under the terms of their tenancy agreements. However, councils were charging their tenants standard water rates and were not passing onto them the group discount that they had negotiated with Thames Water. Nor were these same tenants easily able to access discounts offered to low-income customers by Thames Water because of the lack of a direct customer-supplier relationship.
3. Councils' failure to pass on to tenants the discount they had negotiated with Thames Water breached the Water Resale Orders 2001 and 2006, which prevented landlords from profiteering by requiring them to pass-on any water and sewerage charges to tenants without charging a premium on top. Because the excess water and sewerage charges breached this legislation, the Court of Appeal found that Kingston Council was liable to repay tenants the difference.

What Happens Now?

4. The direct effect of the Court of Appeal decision is that Kingston Council, like Southwark Council before it, is liable to repay its tenants the difference between the water and sewerage charges they levied between 14 January 2003-3 August

¹ <https://dpglaw.co.uk/court-of-appeal-reaffirms-that-london-councils-overcharged-local-authority-tenants-for-water/>

² <https://dpglaw.co.uk/hundreds-thousands-overcharged-water/>

2017 and the discounted amount they paid to Thames Water for the same supply. This is likely to be around £600-£1000 for someone who had been a tenant for the entire period. Kingston Council has now put in place a compensation scheme³, like Southwark Council did before it⁴.

5. Note that there are problems with Kingston Council's scheme: principally that it has not disclosed how it is calculating interest and it appears that it has adopted a method of interest calculation that miscalculates the amount due (see below); nor has it put in place a scheme accessible to former Kingston Council tenants who no longer have active rent accounts with the authority.
6. The implications do not stop with Kingston and Southwark. Thames Water had in place very similar agreements with virtually all London authorities during the relevant period. As the legal effect of the judgments is clear, those other London councils should now put in place arrangements to repay their tenants.

Which Councils Are Affected?

7. Whether other councils are liable to pay refunds depends on the wording of the arrangements they had in place with Thames Water. Where that is materially the same as that considered in the Jones and Kingston cases then those councils will be liable too. We already know that many councils had in place materially identical arrangements.
8. Kingston Council's evidence in the recent case stated that:

*"other [Local Government Association] members signed written agreements with [Thames Water] which are in materially the same terms...: LB Brent; LB Camden; City of London Corporation; LB Croydon; RB Greenwich; LB Hackney; LB Haringey; LB Hammersmith & Fulham; RB Kensington & Chelsea (by its tenant management organisation); LB Lambeth, LB Lewisham; LB Newham; LB Tower Hamlets; LB Waltham Forest; Dacorum BC; Slough BC; and Waverley BC. I do not know if others also signed a similar agreement with TWU."*⁵

9. It is possible that local authorities outside London also had in place arrangements that contravened the Water Resale Orders. Kingston Council also stated in evidence that:

*"most if not all local housing authorities in England and Wales had written agreements with their relevant water and sewerage undertaker for the collection of water and sewerage charges ("water charges") in respect of those council-owned properties that were not served by a meter to measure water consumption."*⁶

³ See <https://www.kingston.gov.uk/thameswaterpayments>. See also https://www.kingstonlibdems.org/201028_victory_on_water_charges. On the accuracy of this post, see <https://dchkingston.wordpress.com/waterrategate/>.

⁴ <https://www.southwark.gov.uk/housing/water-refunds?chapter=4>

⁵ Witness Statement of Shelagh O'Brien dated 12 June 2019, para 7

⁶ Witness Statement of Shelagh O'Brien dated 12 June 2019, para 3.

However, whether such local authorities are in fact liable will depend on the wording of the arrangements that they had in place.

Other Issues

10. The date range applicable to other London councils is likely to be different in each case. The start date will depend when the authority contracted with Thames Water for the supply of water following the Water Resale Order (which came into force on 1 April 2001). Most councils seem to have entered into agreements in 2003. Councils also abandoned these arrangements at different times, so the end date will also differ. In the case of Kingston it was 3 August 2017. Other London councils will have abandoned this arrangement at some point between the *Jones v Southwark* judgment in 2016 and April 2021 (though that last date may have been brought forward now in view of the Court of Appeal judgment).
11. Councils will also have to pay interest on the amounts they owe to tenants. This is stipulated by Article 10 of the Water Resale Order 2006, which requires interest to be paid on the over-payment amount at twice the average base rate of the Bank of England applicable during the relevant charging period. Interest continues to accrue until it is paid. This means that the calculation of interest really becomes a series of separate calculations: one for each year that applies to a particular tenant. So if the base rate in that year was 3%, then interest will be payable at 6% per annum on that year's overpayment until it was repaid. A calculation will have to be made for each year of water & sewerage charges in the same way. Prior to 2006, pre-judgment interest⁷ should be payable at a broadly equivalent rate. Councils can deduct an "administration charge" of 1.5p per day (so c.£5 p.a.).
12. The legal principles are now sufficiently clear for all affected councils to put in place repayment schemes. Tenants associations should now put pressure on their local authorities to set up such a scheme. We do not have the capacity to act for large groups of tenants in seeking compensation, but if tenants request refunds or ask their council to establish a repayment scheme and are refused then we may be able to advise (please email newcaseenquiries@dpqlaw.co.uk). Tenants should seek copies of their council's relevant water agreement(s) with Thames Water under the Freedom of Information Act 2000 if their council is not putting in place refund arrangements.

Note: persons wishing to pursue legal action should obtain independent legal advice, as litigation involves costs risks and requires consideration of other issues such as limitation periods (time limits on legal claims). This note is intended to help them request refunds from their council, but is not a replacement for legal advice.

Deighton Pierce Glynn is one of the leading civil rights and judicial review law firms in the UK, with offices in London and Bristol. For more details, please see www.dpqlaw.co.uk.

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⁷ *Carrasco v Johnson* [2018] EWCA Civ 87