

**AGENDA ITEM: 11**      Pages 89 – 93

Meeting	Cabinet Resources Committee
Date	19 October 2010
<b>Subject</b>	<b>Care Contract – Decision of Catalyst Communities Housing Association Limited Arbitration</b>
Report of	Cabinet Member for Adults
Summary	This report provides the results and consequences of the arbitration proceedings, the associated costs incurred to date, details for a further hearing and details around a renegotiation of the Care Contract.

Officer Contributors	Kate Kennally, Acting Director of Adult Social Services Craig Cooper, Director of Commercial Services
Status (public or exempt)	Public
Wards affected	All
Enclosures	None
For decision by	Cabinet Resources Committee
Function of	Executive
Reason for urgency / exemption from call-in (if appropriate)	Not applicable

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## **1. RECOMMENDATIONS**

- 1.1 That the result of the arbitration and its outstanding issues be noted.**
- 1.2 That the costs of defending the Council against the claim so far be noted.**
- 1.3 That the work around the renegotiation of the Care Home Contract underway be noted.**

## **2. RELEVANT PREVIOUS DECISIONS**

- 2.1 Council, 23 October 2000 (Decision item 62) – approved the selection of Ealing Family Housing Association (now part of the Catalyst Group) to take a transfer of the majority of the Council’s elderly persons residential care homes and day centres on the basis that these would be replaced with modern purpose built facilities and achieve an ongoing revenue saving for the Council from the commencement of the contract.
- 2.2 Cabinet, 5 November 2002 (Decision item 10) – approved the swap of sites in Claremont Road, Brent Cross NW2 and East Road, Burnt Oak HA8 with Ealing Family Housing Association upon which to develop replacements for the Perryfields and Merrivale elderly persons care homes and day centre.
- 2.3 Cabinet Resources Committee, 8 August 2004 (Decision item 14) – subject to conditions, agreed:
  - i. the freehold interest in an appropriate area of land at Claremont Road, NW2 be transferred to Ealing Family Housing Association for the building of a replacement for the Perryfields elderly persons care home and day centre in exchange for the transfer back to the Council of the current Perryfields site at Tyrrel Way; and
  - ii. the freehold interest in an appropriate area of land at East Road, Burnt Oak HA8 be transferred to Ealing Family Housing Association for the building of a replacement for the Merrivale elderly persons care home and day centre in exchange for the transfer back to the Council of the current Merrivale site at East Road, Burnt Oak.
- 2.4 Cabinet Resources Committee, 3 September 2007 (Decision item 7) – noted the disagreement with Catalyst in respect of its Deficit Claim and also agreed that the dispute with Catalyst in respect of the Perryfields/Claremont Road and Merrivale/Child Guidance Centre sites swaps agreements, and the Project and Abortive Costs claims arising there from, be referred to arbitration and/or independent expert as appropriate.
- 2.5 Cabinet Resources Committee, 2 September 2008 (Decision item 16) – noted the action taken by Catalyst to initiate the arbitration procedure and instructed the appropriate Chief Officers to appoint Counsel and other appropriate consultants and that the costs relating to this would be met from reserves.
- 2.6 Cabinet Resources Committee, 23 April 2009 (Decision item 14) – noted the stage proceedings were at and the amount of money spent in relation to the arbitration.
- 2.7 Cabinet Resources Committee, 8 December 2009 (Decision item 18 and X2) – noted the stage proceedings were at; the amount of money spent in relation to the arbitration and formally agreed not to offer Catalyst a “drop hands” settlement.

- 2.8 Cabinet Resources Committee, 17 June 2010 (Decision item 19 and X7) – noted the stage proceedings were at; the amount of money spent in relation to the arbitration and the likely need to renegotiate the Care Home Contract, as well as the retention of Eversheds as legal advisors.

### 3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The 2010-2013 Corporate Plan priority of ‘Better Services with Less Money’ relates to the decisions made in relation to this arbitration and the issues which may result from it.

### 4. RISK MANAGEMENT ISSUES

- 4.1 The risks associated with the arbitration and its consequences have been formally logged in the Corporate Risk Register.
- 4.2 Provision for the estimated total cost of the award to March 2010 has been made in the 2009/10 accounts, funded from the risk reserve. The value of the award is not yet finalised, but depending on clarification of remaining issues by the Arbitrator, the range is likely to be between £5m to £7.5m.
- 4.3 The issue of reclamation of costs is still outstanding. Catalyst are yet to make it known if they will seek to reclaim their costs. In view of the fact that the Arbitrator found for the Council on one of the substantial decisions and for Catalyst on another, this could indicate that an appropriate balance has been struck (with the rest of the issues being peripheral). Clarity will be provided on 18 November 2010 at the meeting with the Arbitrator.
- 4.4 The Council is seeking to enter into a re-negotiation of the Care Contract led by the Deputy Chief Executive and Acting Director of Adult Social Services, to manage on-going financial and service delivery risks. This work has commenced and is aligned to the business and financial planning process for 2011/12.

### 5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 The referral of the deficit claim to arbitration has not affected the residential and day care services being provided to older people. The service is inclusive and provided to all older people eligible for residential care or requiring day care. There are specialist units for people who have dementia, people who have learning disabilities and a unit for Asian people.

### 6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)

- 6.1 The table below summarises the total amount spent on this matter to date including settlement of the over-billing for voids and single status agreement disputes outlined in the report to Cabinet Resources Committee on 17 June 2010.

Description	Amount spent/(received)
Eversheds	£884,559
Franklin & Andrews	£63,658
Counsel	£135,310
Arbitrator (half share)	£45,000
RSM Bentley Jennison/RSM Tenon	£559,448
Laing & Buisson	£92,962
Catalyst – Single Status Agreement	£290,525

<b>Description</b>	<b>Amount spent/(received)</b>
Catalyst – Over-Billing for Voids	(£822,367)
<b>Total</b>	<b>£1,249,095</b>

6.2 These costs have been met from the corporate litigation reserve, balances and service line budgets within the 2009/10 accounts.

6.3 A provision of £7.012m to cover the deficit award has been made in the 2009/10 accounts.

## **7. LEGAL ISSUES**

7.1 All relevant legal issues are addressed in the report.

## **8. CONSTITUTIONAL POWERS**

8.1 The Council's constitution, Part 3, Responsibility for Functions, paragraph 3.6 states the terms of reference of the Cabinet Resources Committee including capital and revenue finance, forecasting, monitoring, borrowing and taxation.

## **9. BACKGROUND INFORMATION**

### **Overview of Arbitration Proceedings**

9.1 Catalyst commenced arbitration proceedings against the Council in July 2008, seeking an adjustment under Condition 11.2.1 of the Care Contract. Condition 11.2.1 provides that Catalyst may seek an appropriate adjustment to the care fees if it has incurred, or forecasts that it is reasonably likely to incur, a Deficit (as defined in Condition 11.3.5). The dispute arose by virtue of a number of ambiguities in the Care Contract, including (i) whether the Deficit provision in Condition 11 only applied in respect of changes to legislation or guidance which affected the running costs of the care homes, and (ii) how any losses were to be shared between Catalyst and the Council under Condition 11. Importantly, Catalyst also failed to provide sufficient information to the Council to enable it to validate the numbers which made up its claim.

9.2 Catalyst's claim increased during the course of the arbitration proceedings such that it was claiming £12 – 17 million in respect of the first 6 years of the Contract, plus interest on the amount of any claim. The losses resulted from Catalyst significantly underestimating both the operating costs of the care homes and the development costs of the new care homes.

### **The Award - Summary of key issues**

9.3 The key issues with significant financial implications included:

- Whether Condition 11 operated so as to allow losses less than 10% of the Income in a particular year (or the first 10% where losses exceed 10% of Income) to be carried forward and brought into account in any calculation of Deficit; and
- How the sale proceeds of the surplus sites and the development costs of the new homes should be taken into account in any Deficit calculation.

### **Summary of the Arbitrator's findings**

9.4 The Council was successful on the interpretation of the key provisions in Condition 11 regarding loss sharing. The Arbitrator decided that Catalyst must bear the first 10% of any losses in each financial year and that only this "top slice" of losses over 10% can be claimed or carried forward by Catalyst to a future financial year.

9.5 The Arbitrator decided that the sale proceeds from the vacated sites arising from the re-development should be deducted from the loans taken out by Catalyst to fund the project, thereby reducing the “expenditure side” of the Deficit calculation. This ruling means that the profits from the sale of the surplus homes are spread over the life of the Care Contract in the same way as the development costs of the new care homes, rather than being taken into account in full as income in the particular financial year in which the property was transferred.

#### **Financial implications of the Award**

9.6 The Arbitrator’s finding in relation to the treatment of the sale proceeds increases the amount of the Deficit in the first 6 years of the Care Contract (because the majority of the sales, and therefore receipts, took place in the first 6 years); but in relative terms reduces the losses thereafter.

9.7 The finding that Catalyst must bear the first 10% (relative to Income) of any losses (referred to as the “bottom slice”) and cannot carry forward any losses less than this 10% “threshold” has a very significant impact in terms of the losses which Catalyst should bear, both in the first 6 years of the Care Contract and future years.

9.8 There is a need for confirmation from the Arbitrator in some areas in order to determine the size of the award to Catalyst. These include:

- Calculation of interest charges on the losses;
- Calculation of interest on the claimable deficit from 2 April 2007 onwards; and
- Costs which are at the discretion of the Arbitrator.

9.9 A hearing before the Arbitrator has been provisionally fixed for 18 November 2010 to resolve any issues which can not be resolved with Catalyst by agreement. This was the first date which was available for the Arbitrator and both parties’ representatives.

9.10 Condition 11.2.1 of the Care Contract simply talks about an “appropriate adjustment to the care fees so as to recover and/or avoid (as the case may be) the Deficit.” There is no set mechanism for converting the Deficit into a bed price adjustment. This will be discussed and agreed between the Council and Catalyst.

#### **Commercial considerations going forward**

9.11 The Council is building up a range of options to minimise the losses likely to be incurred by Catalyst and thus the level of deficit funding which the Council might need to meet. Preliminary work is underway for the Council to enter in a renegotiation of the Care Contract with Catalyst. This will be reported back to Cabinet Resources Committee once there is significant progress. This is likely to be within the next six months.

9.12 As agreed through the CRC report of 17 June 2010, the Council will be retaining Eversheds as the legal advisors to support the renegotiation of the Care Contract following the completion of the arbitration process.

9.13 Officers are working to conclude the renegotiation of the Contract within the financial year 2010/11 in order to give some assurance regarding future potential liabilities as part of the financial and business planning process for 2011/12 onwards.

## **10. LIST OF BACKGROUND PAPERS**

10.1 None.

Legal – PJ  
CFO – NH