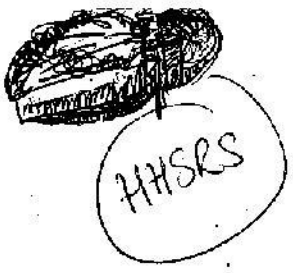

IN THE MATTER OF

THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

LEASEHOLD FLAT ENTRANCE DOORS

SUBMISSION ON BEHALF OF RBKC IN RESPECT OF FIRE ENFORCEMENT RESPONSIBILITIES IN RESPECT OF DEMISED LEASEHOLD DOORS

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1. By this submissoon, the Royal Borough of Kensington and Chelsea ("RBKC") seeks the guidance of the Secretry of State as to its responsibilities to take enforcement arising out of the application of the Regulatory Reform (Fire Safety) Order 2005 ("the FSO") and the Housing Act 2004 ("the HA") to leasehold flat entrance doors within buildings in multiple occupation which it owns and manages through Kensington & Chelsea Tenant Management Organisation ("TMO") within the Borough. RBKC has made significant efforts to reach consensus with the London Fire and Emergency Planning Authority ("the LFEPA"), but without success. RBKC seeks the Secretary of State's guidance as to whether it or LFEPA is lead enforcement authority in respect of leasehold flat entrance doors and how the two authorities are to interact to cooperate in respect of enforcement as opposed to RBKC operating under the threat of enforcement action from an authority which otherwise disavows a duty to act.

2. In particular, guidance is sought on:

   (1) the dispute between RBKC and as to the interpretation of the protocol between them for giving effect to the provisions of the FSO and the HA ("the Protocol");

   (2) how RBKC / TMO should both discharge their statutory and common law responsibilities and protect their positions should the LFEPA bring enforcement action against them under the FSO, having particular regard of the implications for RBKC's resources. In particular, we are to consider in this context potential enforcement action which RBKC / TMO could bring against their leaseholders and / or occupiers via any or all of the following mechanisms:

   (a) pursuant to their leases;

   (b) enforcement notices; and / or

   (c) injunctive relief from the high court.

Summary of Submission

3. For the reasons set out below, RBKC submits that LFEPA's interpretation of the Protocol, that RBKC are the lead enforcement authority in respect of leasehold doors, is unsustainable. Whilst, pursuant to the Protocol, RBKC have undertaken to enforce fire safety standards in accordance with the HA, such duties are distinct from those which arise under the FSO, for which LFEPA remains the lead authority pursuant to the Protocol. Moreover, LFEPA have threatened RBKC / TMO with prosecution if LFEPA considers that leasehold doors place the 'responsible person' as defined by the FSO in breach of that Order. RBKC submits that this approach is entirely contrary to the spirit of cooperation encapsulated by the Protocol and the model protocol previously approved by the Undersecretaries of State, and would amount to an abuse of the Court's process. LFEPA are seeking to hold RBKC hostage by wielding their enforcement powers over RBKC, in order to obtain a concession that enforcement of fire safety legislation in respect of leasehold flat entrance doors is RBKC's duty.

Documentation

4. The following documentation to which this submission refers is attached:

   (1) Protocol between RBKC and LFEPA dated 17th November 2011 and 20th February 2012 respectively (**Exhibit RBKC 1**);

   (2) Local Government Group Fire Safety in purpose-built blocks of flats guidance (July 2011) ('the LGG Guidance') (**Exhibit RBKC 2**);

   (3) A sample lease between RBKC and leaseholder (address 20 Gilray House, London SW10) (**Exhibit RBKC 3**);

   (4) LACORS Housing Fire Safety Guidance ('the LACORS guidance') (**Exhibit RBKC 4**);

   (5) The Housing Health & Safety Rating System (England) Regulations 2005 ("the 2005 Regulations") (**Exhibit RBKC 5**);

   (6) Housing Health & Safety Rating System Operating Guidance (issued February 2006) ("the Operating Guidance") (**Exhibit RBKC 6**);

(7) Housing Health & Safety Rating System Enforcement Guidance (issued March 2006) ("the Enforcement Guidance") (Exhibit RBKC 7).

Background

5. TMO manage approximately 2,600 leasehold flats within RBKC on RBKC's behalf. The Fire Risk Assessment performed by RBKC in accordance with the FSO has identified approximately 68 leasehold flats whose doors are likely to breach the requirements of the FSO. These doors lead into common parts of their buildings and impact on exit routes from other parts of the buildings.

6. RBKC considers that, as the enforcing authority of the FSO, LFEPA should be pursuing the individual leaseholders whose doors are unsafe pursuant to articles 5(3) and 5(4) of the FSO and the Protocol concluded between RBKC and LFEPA. However, LFEPA seeks to lay the responsibility for ensuring compliance with RBKC and has threatened to take enforcement action against RBKC if non-compliance is discovered.

7. RBKC consider that this approach from LFEPA contradicts the official guidance set out below.

8. RBKC seeks clarification of its duties and the propriety of threatened action against it by LFEPA.

The Guidance

9. The published guidance in respect of entrance doors greatly informs the correct approach as to the determination of the issues at large. It can be summarised as follows.

10. The LGG Guidance, Exhibit RBKC 2, includes the following:

"It needs to be ensured that the fire-resisting enclosure of flats is maintained at all openings, including:

- *flat entrance and other doors"* (para. 17.3)

"Original flat entrance doors in many older blocks will not meet current standards. In some situations, it will be appropriate to accept the door as it is; in others, upgrading or replacement of the doors will be necessary. This will depend on the risk.

"... Sometimes, flat entrance doors may be outside the control of a freeholder. For example, often, under each resident's lease, the door is legally part of the demised premises and so responsibility for the maintenance of the flat entrance door rests with the resident. The landlord has no legal right to force a tenant to upgrade the door to the current standard, nor to carry out the works unilaterally. ***However, in a case of impasse, a landlord should refer the matter to the relevant enforcing authority"*** (para. 28.5, emphasis added)

"29.2 Common examples of the influence of fire safety measures within flats on the fire safety of the common parts include the following.

Front Doors

The flat entrance doors are critical to the safety of the common parts in the event of a fire within a flat. The doors must be self-closing and afford an adequate degree of fire resistance. Where these doors are, under tenancy agreements, the responsibility of the freeholder, the FSO and [the HA] *may both be used to address deficiencies,* ***but, in many cases, it will be the FSO that is more appropriate to apply.***

In the case of many existing leasehold flats, the responsibility for maintenance of the entrance doors rests with the residents. ***In this case, the freeholder's power to arrange for defects to be rectified may be limited or non-existent, making enforcement action on the freeholder inappropriate.***

Under these circumstances, the residents might be regarded as other person having control of premises (as defined by Article 5(3) of the FSO), with a duty to ensure the adequacy of the flat entrance doors. ***However, use of powers under*** [the HA] ***may be a more appropriate and better defined route to achieving compliance with the FSO.*** *In new leases, ideally the freeholder should retain control over all flat entrance doors...*

... 29.3 Under [the Government endorsed protocol], *arrangements are put in place for consultation and communication between the local housing authority and the fire and rescue authority,* ***so that unnecessary duplication is avoided and one authority can take the lead in any given case"*** (emphasis added).

The fitting of suitable self-closing devices to flat entrance doors is an essential short-term measure" (Part F)

"52.7 It must be recognised that it will not always be reasonably practicable to achieve solutions that conform to today's standards. The appropriate solution may simply be to restore what was originally there until such time as it can be upgraded through the normal process of refurbishment of the building. The objective is to establish whether the departures from the current benchmarks create significant risk and, if they do, to determine a realistic solution that can be implemented within the constraints of an existing building.

52.8 An example that illustrates this approach is the replacement of a flat entrance door by a resident with a non-fire-resisting door that is not self-closing [and therefore non-compliant]... *If the door that had been replaced was in a block dating from, say, the 1960s, it is most likely that the original door would be fire-resisting, but might only be fitted with rising butt hinges. It would not incorporate intumescent strips and smoke seals.*

52.9 In the situation described above, the replacement door does not meet current benchmark standards. It also does not meet the standards of the day the block was built. Those standards have not been relaxed. The new door, if replaced with a door similar to the one originally fitted, would still not meet current standards. As explained later, the lack of a positive action self-closing device at the very least is considered to create a significant risk. In practice, replacement of the new door with an FD30S door, fitted with a positive self-closing device, would be the appropriate solution...

...62.16 Upgrading existing doors simply because they are not fitted with intumescent strips or smoke seals, or fail to meet some other requirement of current standards, should not be made a generic recommendation applicable to all existing blocks of flats. Similarly, upgrading existing letterboxes in flat entrance doors to meet current standards is not always necessary...

...62.17 It will not be practicable to test existing doors to confirm their actual fire resistance...

...62.21 In many existing blocks of flats, it will normally be acceptable, taking into account the fire risk, to accept existing fire-resisting doors and not replace or upgrade the doors as a matter of course. For this to be the case, any existing fire-resisting door will need to be well fitting in its frame and be in good condition. In addition, although it may be appropriate to upgrade or replace doors, this will not necessarily mean that this work has always to be undertaken as a matter of urgency. In many blocks of flats, the upgrading or replacement of doors can be part of a planned, and possibly phased programme"

"Arrangements for managing fire safety in a block of flats should include the following:...

...

- *arranging similar programmes to monitor the condition of other fire safety measures, such as fire-resisting doors..."* (Part G: Managing the fire risk)

"Fire risk assessors and enforcing authorities must understand what is achievable by management and be realistic in their expectations" (para. 73.5)

"82. Inspections and repairs of other fire safety measures

...

Fire-resisting doors

82.3 Good practice is to inspect timber fire resisting doorsets on a six monthly basis as part of a programme of planned preventative maintenance...

*...82.4 Flat entrance doors should be included within this programme. **Where leasehold flats are involved, this will only be possible if there is legal right of access, by means of a condition within the lease to carry this out. It is important that any new leases include such a condition"*** (emphasis added)

In addition, the two relevant case studies in Appendices 7 and 9 to the LGG Guidance advise that the relevant remedial action will be to require leaseholders to replace non-compliant entrance doors.

11. This guidance was the result of consultation with, among others, the Office of the Chief Fire and Rescue Adviser, and states that, *"it is expected that enforcing authorities will have regard to this guide"*. LFEPA's current stance appears to RBKC to disregard it wholesale.

12. Further guidance is found in the LACORS Guidance, endorsed by the Under Secretaries of State for housing and fire safety, **Exhibit RBKC 4**, as follows:

"The upgrading of non-fire-resisting door assemblies should be avoided wherever possible. The practice is generally impractical and uneconomic and is reliant upon strict adherence to an approved specification and upon a high standard of workmanship. Replacement with

suitable, purpose designed and tested doorset constructions is always preferable" (para. 21.8)

"A.30 Consultation with fire and rescue authorities

Before taking any of the actions outlined above in respect of a fire hazard in an HMO or in the common parts of flats, [RBKC] *must consult with* [the LFEPA]. *For emergency remedial action or emergency prohibition, this requirement applies only so far as it is practical to do so before taking those measures (section 10* [of the HA]*)"* (emphasis added).

Interpretation of the Protocol between LFEPA & RBKC

13. Appendix 1 to the LACORS guidance, states as follows:

"A.6 In view of the dual enforcement regime, there is a clear need for consistent and coherent joint working arrangements between local housing authorities and fire and rescue authorities when applying the two sets of legislation. Uncoordinated regulation places a burden on housing providers and leads to confusion, duplication and unnecessary expense. With this in mind, in May 2007 the fire safety housing working group published a Protocol between local housing authorities and fire and rescue authorities to improve fire safety..."

14. The May 2007 protocol referred to appears at Appendix 2 to the LACORS Guidance. Its central purpose was the integration of enforcement policy in respect of fire safety between the relevant fire and local authorities. It was expressly endorsed by the Under Secretary of State with responsibility for Housing, Baroness Andrews OBE, and the Under Secretary of State with responsibility for Fire Safety, Angela Smith MP. The Under Secretaries commended the protocol to local authorities and fire authorities alike to promote a *"collaborative"* approach to the *"partnerships"* between the authorities at a local level.

15. The Protocol between RBKC and LFEPA, **Exhibit RBKC 1**, signed on 17th November 2011 and 20th February 2012 respectively, was produced under the auspices of the Government endorsed protocol. In particular, it reflects the presumptions that

(1) the purpose of the protocol is to promote LFEPA and RBKC working together to agree how their respective strategies can complement one another;

(2) the responsibilities for inspecting certain categories of property are expressly discrete *"to promote the efficient use of resources"*;

(3) LFEPA will be the lead enforcement authority in respect of all multiple-occupied accommodation that is owned or managed by RBKC;

(4) similarly, "[RBKC] *acknowledges that LFEPA will monitor and enforce fire safety standards, to a satisfactory standard, in premises* [including all multi-occupied accommodation owned or managed by RBKC)";

(5) RBKC will remain responsible for enforcing the provisions of the HA having regard to the principles and requirements of the FSO, and will monitor and inspect its own premises to ensure adequate fire safety standards; and will enforce fire safety standards in accordance with the HA and the Housing Health & Safety Rating System ("the HHSRS"), having regard to relevant published documents.

16. In addition, the Protocol provides that, *"LFEPA acknowledges that the fire safety standards required by* [RBKC] *under* [the HA] *will, in most cases, achieve a satisfactory level of fire safety for relevant persons as required under* [the FSO]". Moreover, one of the *"underlying principles"* of the Protocol is, *"to acknowledge that both authorities will always seek to act in good faith"*.

17. LFEPA have now clarified their position in seven important respects:

(0) LFEPA do not accept that the wording of section 3 means that it would take the lead on enforcement in respect of common parts in purpose built blocks;

(1) Whilst the LFEPA retain an "overall" enforcement role, it is for RBKC to take any enforcement action against individual leaseholders. Moreover, the LFEPA is prepared to issue notices against RBKC as landlord (i.e. as *"responsible person"*) notwithstanding the LFEPA's ability to enforce against individual leaseholders pursuant to article 5(3) of the FSO;

(2) LFEPA consider RBKC are able to enforce against individual leaseholders under the HA;

(3) clause 3(i) of the sample lease, **Exhibit RBKC 3**, equips RBKC with a civil cause of action against its leaseholders who do not comply with fire precautions under the HA / FSO. In

this regard, LFEPA seek to rely upon an unidentified decision of the Upper Lands Valuation Tribunal, which seems likely to RBKC to be that of *Sheffield CC v. Oliver* [2007] (Lands Tr);

(4) LFEPA's resources are under greater strain than RBKC's;

(5) LFEPA is seeking guidance from the Secretary of State in respect of *"this entire issue"*.

(0) Construction of section 3

18. RBKC submits that LFEPA's position on this point is untenable. Not only is the wording of the Protocol entirely clear, unambiguous and plain, it also reflects the Government approved protocol. There is simply no support for LFEPA's construction in the Protocol itself. The LFEPA's stance on this point is indicative of its attitude to the issues which arise, which in itself gives rise to concern on RBKC's part.

(1) Responsibility for enforcement

19. In respect of this related point, the Protocol provides both for LFEPA to be the lead authority in respect of accommodation in multiple occupation owned or managed by RBKC. However, it also provides for RBKC to inspect its own premises. Whilst apparently contradictory, in this respect the Protocol chimes with the terms of the HA and the official guidance which accompanies it. Paragraph 1.4 of the Enforcement Guidance provides as follows:

"...Although local authorities cannot take statutory enforcement action against themselves in respect of their own stock they will be expected to use HHSRS to assess the condition of their stock and to ensure their housing meets the Decent Home Standard".

RBKC submits that the guidance accordingly expressly disowns any suggestion that the local authority could be the lead enforcement authority for fire issues in respect of its own stock.

20. Whilst RBKC acknowledges its ongoing responsibility to make inspections under the HA, it is notable that following inspection, section 10 of the HA requires RBKC to notify LFEPA if an inspection under the auspices of the HA reveals a prescribed fire hazard (i.e. a Category 1 or 2 hazard where the risk of harm is associated with exposure to uncontrolled fire and associated smoke (reg. 4 of the 2005 Regulations)).

21. This requirement, in RBKC's submission, identifies the fundamental flaw in LFEPA's position both in respect of who should be the lead enforcement authority and who the appropriate

target of any enforcement action should be: on LFEPA's analysis, it will be for RBKC to inform LFEPA of matters which would form the basis of enforcement action by LFEPA against RBKC. Such an approach by LFEPA could not, it is submitted, be regarded as consistent with the principles of the Protocol as expressed or the spirit of the Government endorsed protocol which it seeks to emulate. It flies in the face of the fundamental principles of collaboration and distinct expenditure of resources between the two authorities which expressly lie at the heart of the Protocol.

(2) Enforcement against Leaseholders under the HA

22. In terms of the suggestion, that RBKC could / should take direct action against leaseholders, the prescribed method of assessing risk provided by the 2005 Regulations becomes relevant. The Housing Health and Safety Rating System (HHSRS) for the hazard of Fire requires an individual assessment of each flat and the common parts to be carried out and risk assessed by carrying out an inspection inside the flat. This results in an unwieldy and cumbersome approach for assessing risks in large purpose built blocks which does not take into account an overall assessment for the whole block. HHSRS is primarily based on assessing the risk to the occupants of the flat. The FSO provides a more appropriate approach as it is based on an overall assessment of risk in the block.

23. Risks are highly likely to be assessed as much lower for the purposes of the HA than as assessed by the LFFPA for the purposes of risk. This is because for the HA, the risk is based on an individual risk assessment of the likelihood of a fire causing harm to the occupier within the twelve months after the inspection, whereas the LFEPA approach assesses the risks of injury on the assumption that a fire occurs.

24. It is all but impossible to envisage the HA assessment of a substandard entrance door which could *per se* cross the threshold from Category 2 into Category 1 by the application of the HHSRS. . RBKC submits that it is contrary to current jurisprudential thinking that the authority whose prescribed method of risk assessment relatively minimises the risks should be the lead authority, in particular bearing in mind given the Court's approach in cases such as *LFEPA v. Shell* (2008) and *LFEPA v. New Look* [2010] EWCA Crim 1268:

'..."when it comes to fire, one does not have to think very deeply in order to appreciate the potential for disaster."'. (New Look at para. 40 rehearsing the judgment of HHJ Rivlin QC at first instance)

25. Moreover, LFEPA's suggested approach runs directly contrary to the Protocol between LFEPA and RBKC. The terms of the Protocol take into account that it is appropriate that the FSO takes precedence and that the LFEPA is the authority to enforce that legislation, which makes particular sense not least as LFEPA has the expertise and experience in enforcing the "defend in place fire strategy" that is used to protect residents in the event of a fire.

(3) Using clause 3(i) of the sample lease to enforce against leaseholders

26. An absence of adequate fire protection *per se* will not render a door *"out of repair"* thereby triggering either of the parties' competing covenants to repair or maintain the door. A door will only be *"out of repair"* such as to enable RBKC to use clause 3(i) of the lease at the point at which it fails to operate as a barrier to the outside or similar. A shortfall in fire protection rating or similar simply will not fall within the requisite classification.

27. Indeed, RBKC submits that for exactly the same reason, the matter goes further and also dispenses with the issue of *"protection of the building"* on which the LFEPA seek to rely in clause 3(i) of the lease, because this is a category of maintenance, repair and upkeep. The considerations which arise under the cases following *Quick v. Taff Ely BC* [1986] QB 809 regarding maintenance or repair as opposed to betterment still apply. In particular, we note the observations of Laws LJ in *Alker v. Collingwood HA* [2007] 2 EGLR 43: unless a door has deteriorated so as to afford less protection to the building than it did previously, it could not be said to be *"out of repair"*, notwithstanding that fire safety standards have changed in the meantime. It is only in circumstances in which it is possible to identify that a particular leaseholder has changed the nature of the door by reference to the protection that it affords the building since the commencement of his lease that clause 3(i) would enable RBKC to bring an action for breach of covenant.

28. The position RBKC faces in respect of the entrance doors is that described in paragraph 28.5 of the Local Government Group's Guidance at tab 10 of our papers ("the LGG Guidance"), which states as follows:

"... Sometimes, flat entrance doors may be outside the control of a freeholder. For example, often, under each resident's lease, the door is legally part of the demised premises and so responsibility for the maintenance of the flat entrance door rests with the resident. The landlord has no legal right to force a tenant to upgrade the door to the current standard, nor

to carry out the works unilaterally. ***However, in a case of impasse, a landlord should refer the matter to the relevant enforcing authority"*** (emphasis added).

29. This guidance represents a further strong indication that it falls to the LFEPA to take any necessary action against the leaseholder, not RBKC.

30. Moreover, the absence of any actionable term of the lease with respect to updating the doors precludes bringing an action for injunctive relief / specific performance in the High Court. No cause of action would lie unless RBKC could prove that the leaseholder has altered / damaged / replaced the previous door such that the protection it / the new door affords the building has been reduced.

31. RBKC also draws the Secretary of State's attention to article 5(4) of the FSO. It provides as follows:

"Where a person has, by virtue of any contract or tenancy, an obligation to any extent in relation to –

(a) the maintenance or repair of any premises, including anything in or on the premises, or

(b) the safety of any premises,

that person is to be treated, for the purposes of paragraph (3), as being a person who has control of the premises to the extent that his obligation extends".

32. Given the analysis of the relevant clauses of the leases above, the question arises as to whether a leaseholder could seek to rely on article 5(4) against the LFEPA were it to bring enforcement action against the leaseholder on the basis that the application of the FSO to the leaseholder is limited to the clauses to maintain and repair. However, in RBKC's submission, the leaseholder could not. The *"control"* for the purposes of article 5(3) on the basis of which LFEPA could act against a leaseholder in respect of the condition of an entrance door does not derive from the covenant to repair, but rather from the demise of the entrance door to the leaseholder in the lease. This analysis is consistent, in particular, with the guidance in paragraphs 29.1 to 29.3 of the LGG Guidance (set out in full above, and at **Exhibit RBKC 2**). Whilst that guidance identifies that it may be more appropriate for ensuring the purposes of the FSO are met in respect of entrance doors, it also states that

this will be subject to (and the very reason for) such protocols as exist in this case to identify which authority will take the lead.

33. Further in this regard, clause 2(iii) of the sample lease provides as follows:

"(iii) Upon receipt of any notice order direction or other thing from any competent authority affecting or likely to affect the whole or any part of the demised premises the Building or the Estate whether the same shall be served directly on the Lessee or the original or a copy thereof be received from any other sources or persons whatsoever forthwith so far as such notice order direction or other thing or the Act regulations or other instrument under or by virtue of which it is issued or the provisions hereof require him so to do to comply therewith at his own expense..."

34. This covenant would require the leaseholder to comply with an enforcement notice, whether issued by the LFEPA under the FSO or by RBKC under the HA. As it applies to both statutory regimes, at first blush it is of neutral impact as to which authority should take the lead for enforcement. However, it does ensure that enforcement action by the LFEPA would have teeth as against the leaseholder. It does not appear that the LFEPA currently refer to this clause in particular in relation to its interpretation of the Protocol.

(4) & (5) Resources

35. RBKC submits that LFEPA's contention based on resources is unattractive (both authorities are funded from the public purse), and certainly does not displace the plain and clear agreement reached in the Protocol, as discussed above. In truth, LFEPA's position seems very significantly driven by an attempt to avoid having to expend resources discharging responsibilities which it has undertaken to perform, not only as a matter of duty under the FSO, but in accordance with the Protocol. RBKC submits its position cannot be sustained, not least as it would lead to very significant duplication of expenditure of public resources which is specifically one of the consequences which protocols such as that enacted between LFEPA and RBKC are designed to avoid.

Threat of prosecution

36. As discussed briefly above, RBKC submits that enforcement action against RBKC by the LFEPA is abusive of the Court's process, and is therefore unsustainable on that stand-alone basis. It is axiomatic that any enforcement action has to be justifiable on the terms of an enforcement authority's own policy. The Protocol now forms part of the LFEPA's policy as to how it will enforce the FSO. RBKC submits that it would be entirely contrary to the ethos of cooperation and collaboration underlying the Protocol, let alone the central tenet of minimising the expenditure of public resources, for the LFEPA to pursue RBKC in circumstances in which RBKC has itself continued to comply with the Protocol, in particular, in respect of matters which have been brought to LFEPA's attention by RBKC pursuant to section 10 of the HA. However, this is exactly the course which LFEPA have threatened.

37. The issue of enforcement notices issued or prosecutions by LFEPA against RBKC would be an abuse of the Court's process on the basis that it was wholly contrary to the Protocol which now forms part of the LFEPA's enforcement policy, following the rationale of *R. v. Adaway* [2004] EWCA Crim 2831.. In *Adaway*, a trade descriptions prosecution, the enforcement policy only permitted prosecution if the defendant had acted fraudulently, deliberately or persistently. Mr. Adaway had not. The Court of Appeal upheld his appeal that the proceedings were an abuse of the Court's process. The Court was unsympathetic to the prosecution's failure to apply its own policy:

"We cannot emphasise too strongly that before criminal proceedings are instituted by a local authority, acting in relation to the strict liability offences created by the Trade Descriptions Act, they must consider with care the terms of their own prosecuting policy. If they fail to do so, or if they reach a conclusion which is wholly unsupported, as the conclusion to prosecute in this case was, by material establishing the criteria for prosecution, it is unlikely that the courts will be sympathetic, in the face of the other demands upon their time at Crown Court and appellate level, to attempts to justify such prosecutions".

38. This category of abuse of process is now well established and has been extended to other areas of regulatory prosecution (e.g. *Stroud DC v. Equiland* (28th-30th April 2008, Bristol Crown Court, HHJ Ticehurst, unreported)). RBKC submits that the terms of the Protocol and its context are such that enforcement action such as that overtly threatened by LFEPA against RBKC falls into the same category, and should not be countenanced.

Conclusion

39. In light of all the matters set out above, RBKC seeks the Secretary of State's guidance as to whether it or LFEPA is lead enforcement authority in respect of leasehold flat entrance doors and how the two authorities are to interact to cooperate in respect of enforcement as opposed to RBKC operating under the threat of enforcement action from an authority which otherwise disavows a duty to act.

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20th February 2013

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