

**MINUTES OF THE ALEXANDRA PALACE AND PARK BOARD
TUESDAY, 18 OCTOBER 2011**

**MINUTE
NO.**

SUBJECT/DECISION

144.1 Standards Hearing Exempt reports for publication

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Local Democracy and Member Services

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8th November 2011**Alexandra Palace and Park Board – 18th October 2011****CONSIDERATION OF OUTCOME OF LB HARINGEY STANDARDS
COMMITTEE DETERMINATION HEARING (PAGES 1 - 26)**

The report of the Interim General Manager – Alexandra Palace –
Considered by the Alexandra Palace and Park Board on Tuesday 18th
October 2011 - now available for public viewing.

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This report is not for publication as it contains information classified as exempt under Schedule 12A of the Local Government Act 1972 in that it contains information relating to the financial or business affairs of any particular person (including the authority holding that information).

Alexandra Palace the people's palace.

Agenda item:16

ALEXANDRA PALACE & PARK BOARD

On 18th October 2011

Report Title: **Consideration of Outcome of LB Haringey Standards Committee Determination Hearing**

Report of: **Andrew Gill, Interim General Manager, Alexandra Palace & Park**

1. Local Government (Access to Information) Act 1985

1.1 This document is not for publication as it contains exempt information under category 3: 'Information relating to financial or business affairs of any particular person including the authority holding that information'.

2. Purpose

2.1 To seek a decision from the Board as to whether it wishes to give further consideration to possible proceedings against a former Chair of the Board.

3. Recommendations

3.1 The Board is asked to consider the advice in this report and its appendix and to resolve to take no further action in this matter.

3.2 The Board is asked to instruct the Interim General Manager or Chief Executive to respond to the Council's Monitoring Officer, informing him of the resolutions of this Board.

Report Authorised by: **Andrew Gill, Interim General Manager**



This report is not for publication as it contains information classified as exempt under Schedule 12A of the Local Government Act 1972 in that it contains information relating to the financial or business affairs of any particular person (including the authority holding that information).

Contact Officer: Andrew Gill, Interim General Manager, Alexandra Palace & Park, Alexandra Palace Way, Wood Green, London N22 7AY. Telephone number 0208 365 4340.

4. Executive Summary

4.1 This report should be read in conjunction with Appendix 1, the report of the Trust's Solicitor into Advice on possible proceedings against a former Chair of the APP Board dated 18 October 2011.

4.2 Members of the Board will also be aware that In October 2009 Clive Carter made a complaint that Cllr Charles Adje had, whilst Chair of the APP Board between May 2006 and May 2007, breached the London Borough of Haringey Code of Conduct.

4.3 On 11 May 2011 Haringey's Monitoring Officer referred to the Interim General Manager the findings of Haringey's Standards Committee Determination Hearing Panel held on 30 and 31 March 2011. On the same day the Interim General Manager instructed Howard Kennedy to consider and advise on the questions of:

a. whether there may be a claim against the former Chair, Cllr Adje who was subject of the Standards Committee Determination, for breach of trust, namely the loss of the opportunity of the charity to avoid having made the loss by entering into the licence with Firoka and

b. how likely it is that the Board might be successful with such a claim.

4.4 This report and its appendix addresses these issues. It concludes that it would be difficult to show a breach of trust leading to quantifiable losses and there are limited prospects of the Trust recovering any monies.

4.5 For reasons that are given in the report, the IGM advises that the Board resolves to take no further action in this matter.

5. Reasons for any change in policy or for new policy development (if applicable)

5.1 N/A

6. Use of Appendices/Tables/Photographs

6.1 Trust Solicitor's advice on possible proceedings against a former Chair of the APP Board dated 18 October 2011

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7. Background and Summary of the Issues for Consideration

- 7.1 This report should be read in conjunction with Appendix 1, the report of the Trust's Solicitor into Advice on possible proceedings against a former Chair of the APP Board dated 18 October 2011.
- 7.2 Members of the Board will be familiar with the matters associated with the independent 'Walklate' reports commissioned by the Council's senior officers into the 'Firoka issue' and the historical events arising henceforth.
- 7.3 Members of the Board will also be aware that In October 2009 Clive Carter made a complaint that Cllr Charles Adje had, whilst Chair of the APP Board between May 2006 and May 2007, breached the London Borough of Haringey (LBH) Code of Conduct.
- 7.4 Following receipt of this complaint, the Monitoring Officer appointed Martin Walklate to undertake a further investigation and report, now known as 'Walklate 3'. He presented this third report in September 2010. This, together with very extensive background papers and documents running to nearly 500 pages, was presented to the Council's Standards Committee.
- 7.5 Walklate 3 expressed the author's judgement that he believed Cllr Adje's action was founded on the need to secure the contract in the interests of the charity and the Borough.
- 7.6 The Standards Committee concluded that Cllr Adje's response to Keith Holder's Briefing Note of 17 April 2007, which advised that no action was required, was that a "no action" response was not supported at the level of the leadership of Haringey Council.
- 7.7 Cllr Adje's failure to disclose the Briefing Note of 17 April 2007 to the Board on 24 April 2007 was a breach of Haringey Council's Code of Conduct.
- 7.8 That breach brought the office of Cllr Adje and the Council into disrepute.
- 7.9 It may be alleged that Cllr Adje was in breach of trust by keeping from his fellow trustees the content of the Briefing Note of 17 April 2007.
- 7.10 On 11 May 2011 Haringey's Monitoring Officer referred to the Interim General Manager the findings of Haringey's Standards Committee Determination Hearing Panel held on 30 and 31 March 2011. On the same day the Interim General Manager instructed Howard Kennedy to consider and advise on the questions of:
 - a. whether there may be a claim against the former Chair, Cllr Adje who was subject of the Standards Committee Determination, for breach of trust,

namely the loss of the opportunity of the charity to avoid having made the loss by entering into the licence with Firoka and

b. how likely it is that the Board might be successful with such a claim.

7.11 The advice requested above is contained within Appendix 1, which Board members are urged to read carefully before further considering the IGM's report and recommendations.

8. The Interim General Manager's Advice to the Board

8.1 In formulating the advice in this report the IGM has consulted with the incoming Chief Executive and the Trust's Head of Finance. Board members may therefore safely assume that the advice and recommendations contained in this report are supported by three Chief Officers of the Trust.

8.2 The Standards Committee found that Cllr Adje acted inappropriately in his handling of advice received from the Trust's Chief Officer. Cllr Adje has been found to bring his office and the Council into disrepute and had a sanction issued by the Standards Committee, which has been served.

8.2 The issue of whether any loss suffered by the Trust is recoverable as a consequence of that alleged breach is a difficult one because of the problems of proving a causal link between the alleged breach and any loss.

8.3 In addition to uncertainty as to any amount of recoverable loss, there remains the issue of whether, even if Cllr Adje had shared the Briefing Note of 17 April 2007 with his fellow trustees, in view of the evidence of "the leadership response," the Trustees would have taken any different a course of action.

8.4 If any monies are recovered there is no present certainty that the Trust would benefit directly because Haringey might insist on any sums being used to reduce the Trust's debt to it.

8.5 The effects on the Trust of Cllr Adje's actions are less easy to determine. It is noteworthy following a complaint which was made to the Charity Commission in relation to a significant number of issues surrounding the grant of the Licence, the Commission wrote on 21 November 2008 saying that having considered the detailed terms of our response it was satisfied the trustees had acted reasonably and honestly, found no evidence of mismanagement or misconduct or deliberate wrongdoing and that it was not appropriate to open an inquiry. It said it had "closed the case."

8.6 It is likely to be extremely difficult to prove a causal link between the former Chair's failure to disclose the briefing note and the loss.

8.7 Board members are reminded, as ever, that they must act solely in the best

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interests of the Charity. They have no latitude to take into account any other matters in their deliberations, no matter how forcefully those views may be held.

- 8.8 The Board should be mindful that, should it resolve to effectively 'reopen' the case, it will be subjecting to yet further scrutiny the events of 2007, which have been so comprehensively covered by the three Walklate reports.. This would be at a particularly sensitive time for the Trust as it welcomes a new Chief Executive, struggles with the lack of revenue and capital funding and makes its case for assistance with Regeneration.
- 8.9 It seems clear that there are limited prospects of the Trust recovering any monies from its former Chair. It is equally obvious that there are excellent mitigations for not being 'seen' to progress the matter in the Interests of the Trust.
- 8.10 The Trust's Solicitor has identified in his report a number of options for the Board to consider; only one of those options, i.e. to take no further action, is low risk and no cost. The other options undoubtedly involve significant cost and come with a reputational risk for the Trust.
- 8.11 Taking account of all of the above points, it is the clear and definitive advice of the Interim General Manager that the Board should resolve to take no further action in this matter, beyond instructing the IGM/Chief Executive to respond to the Council's Monitoring Officer with its resolution.

9. Financial Implications – Comments of the Trust's Head of Finance

- 9.1 There are significant cost implications in terms of legal and professional advice (in addition to officer) time associated with progressing this matter to a claim or to further investigate the possibility of a claim.
- 9.2 Further legal advice would be costly and if the option of Counsel's Opinion were pursued, this would be likely to cost in excess than £10K (for the Counsel's opinion alone).
- 9.3 The Board is reminded that any decisions on this Report and possible action are in the context of work presently being undertaken upon the Regeneration Project. If the Board does decide to take steps with a view to seeking to recover damages from a former Chair this is likely to create further uncertainty and create unwelcome external attention for the Trust and its business at a time when the Trust is seeking new partnerships to create a sustainable future for the Park and Palace.

10. Consultation

Beyond consultation between officers of the Trust and its advisors and officers of the Council, there has been no specific consultation on this report.

11. Legal and Financial Comments

11.1 **The Trust solicitor's advice** has been taken into account in the preparation of this report.

11.2 **The Council's Acting Head of Legal Services** has been consulted in the preparation of this report, and makes the following comments;

11.2.1 The advice given by the Trusts' solicitor at Appendix 1, does adequately set out both the test which any claim against Councillor Adje for breach of trust will have to meet, coupled with significant obstacles which may potentially prevent that test from being reached, namely issues over the ability to establish that, on a balance of probabilities - that is that it is more probable than not - there is a causal link between the action taken by Councillor Adje in relation to the 16th April 2007 briefing note, and the resulting loss to the Trust, and the ability to quantify exactly what that loss is in terms of Councillor Adje's personal liability, bearing in mind the fact that he resigned as Chair of the Board shortly after the licence was granted to Firoka.

11.2.2 With the above in mind, if the Board resolves to not accept the officer recommendation contained in this report, and resolves instead to pursue this issue, then it is advised to authorise the Interim General Manager / Chief Executive to instruct Counsel to advise on the merits of any potential claim, and to report back to the Board thereafter with the contents of that advice, so that a review of the decision to pursue the issue can be undertaken".

11.3 Comments of Director of Corporate Resources and Chief Finance Officer

11.3.1 In considering this matter and deciding if any further action should be taken the Trust should be mindful of:

- a) the ability to prove if there is any liability on the part Cllr Adje. If that is proven then,
- b) the ability to prove to quantum i.e. the size of the loss relating to the actions of Cllr Adje, then
- c) the ability to recover any sums.

11.3.2 I refer Trustees to Appendix 1 from the Trust Solicitor and the comments on the Acting Head of Legal Services in respect of these matters.

11.3.3 In taking any action the Trust would incur legal costs and need to allocate senior staff resources to pursue the action. A business case would need to be made to show that the costs of pursuing any action would be financially beneficial.

NOT FOR PUBLICATION by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972.

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- 11.3.4 The Trust has limited financial and staff resources and regard should be given to focusing those on the priorities for the Trust going forward. The Trust has its core activities to deliver, many challenges that it has no choice but to address and the future regeneration of the site.
- 11.3.5 If the Trust does decide it wishes to pursue a claim I would advise that a counsel's opinion is sought on the merits of any potential claim and a report brought back to the board setting out the full business case relating to the matter.
- 11.3.6 Overall I support the recommendation being made to the Board by the Interim General Manager to take no further action on this matter.

11. Equalities Implications

- 11.1 There are no perceived equalities implications.

12. Use of Appendices / Tables / Photographs

- 12.1 Trust Solicitor's' advice on possible proceedings against a former Chair of the APP Board dated 18 October 2011

Exempt from publication under
the Local Government Act 1972
for the reasons given in
paragraph 4.1

ALEXANDRA PALACE & PARK BOARD

Agenda Item No

18 OCTOBER 2011

REPORT OF HOWARD KENNEDY, THE TRUST'S SOLICITORS

RESPONSIBLE AUTHOR:

Iain Harris Tel: 020 - 7546 8986

REPORT TITLE:

Advice on possible proceedings against a
former Chair of the APP Board.

REPORT AUTHORISED BY:

Iain Harris of Howard Kennedy of 19
Cavendish Square, London W1A 2AW.
Trust's Solicitors.

1. PURPOSE

- 1.1 To seek a decision from the Board as to whether it wishes to give further
consideration to possible proceedings against a former Chair of the Board.

2. SUMMARY

- 2.1 Walklate 3 expressed the author's judgement that he believed Cllr Adje's
action was founded on the need to secure the contract in the interests of the
charity and the Borough. (Paragraph 5.19)
- 2.2 The Standards Committee concluded that Cllr Adje's response to Keith
Holder's Briefing Note of 17 April 2007, which advised that no action was

required, was that a "no action" response was not supported at the level of the leadership of Haringey Council. (Paragraph 5.19)

- 2.3 Clr Adje's failure to disclose the Briefing Note of 17 April 2007 to the Board on 24 April 2007 was a breach of Haringey Council's Code of Conduct. (Paragraphs 5.20 and 5.22.)
- 2.4 That breach brought the office of Clr Adje and the Council into disrepute. (Paragraph 5.20)
- 2.5 It may be alleged that Clr Adje was in breach of trust by keeping from his fellow trustees the content of the Briefing Note of 17 April 2007. (Paragraph 5.33)
- 2.6 The issue of whether any loss suffered by the charity is recoverable as a consequence of that alleged breach is a difficult one because of the problems of proving a causal link between the alleged breach and any loss. (Paragraph 5.44)
- 2.7 If any monies are recovered there is no present certainty that the charity would benefit directly because Haringey might insist on any sums being used to reduce the charity's debt to it. (Paragraph 5.51.)
- 2.8 In addition to uncertainty as to any amount of recoverable loss, there remains the issue of whether, even if Clr Adje had shared the Briefing Note of 17 April 2007 with his fellow trustees, in view of the evidence of "the leadership response," the Trustees would have taken any different a course of action. (Paragraph 5.39)
- 2.9 Enquiry may be made of those who were Board members in April 2007 as to whether they would have made a different decision had they had drawn to their attention the contents of the 17 April 2007 Briefing Note. The attention of those consulted is particularly drawn to the content of Paragraph 5.40.

- 2.10 Counsel's advice may be sought as to the level of loss, if any, that may be recoverable from Clr Adje. (Paragraph 5.53)

3. **RECOMMENDATIONS**

- 3.1 The Board must decide what further action, if any, it wishes to be taken.
- 3.2 The Board may agree to take no further action. The Trustees may conclude that the issue of the Licence has already taken up substantial management time and associated costs and professional fees. The prospects of recovery and possible benefit may be thought to be insufficiently clear and certain to justify spending further time and incurring yet more costs.
- 3.3 The Board may direct that further consideration be given to a possible claim, perhaps starting with a request to those who were Trustees in April 2007 for their views (Paragraph 5.40) and thereafter require that the Interim General Manager instruct that Counsel's Opinion be sought both on the issue of the level of loss recoverable, if any, and generally. In answering any request those consulted must respond on the basis of what is in the best interests of the charity, putting aside any political or other considerations.
- 3.4 The Board may however in the first instance wish to seek the view of Haringey as to whether, in the event of any recovery, it would permit the charity to retain any benefit or insist on using the monies to reduce the charity's indebtedness to Haringey.

4. **LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985**

- 4.1 This Report is not for publication as it contains exempt information, namely information relating to an individual and information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- 4.2 The following papers were relied upon for the preparation of this Report:-
- a. Board papers and reports of 2007 and 2008
 - b. Accounts for 2007/8

- c. Walklate Reports of August 2008 and March 2009
- d. Papers presented to the Standards Determination Hearing Panel on 30 and 31 March 2011
- e. Minutes of Standards Committee hearing on 30 and 31 March 2011.

5. THE REPORT

INTRODUCTION

5.1 On 11 May 2011 Haringey's Monitoring Officer referred to the Interim General Manager the findings of Haringey's Standards Committee Determination Hearing Panel held on 30 and 31 March 2011. On the same day the Interim General Manager instructed us to consider and advise on the questions of:

- a. whether there may be a claim against the former Chair, Cllr Adje who was subject of the Standards Committee Determination, for breach of trust, namely the loss of the opportunity of the charity to avoid having made the loss by entering into the licence with Fireka and
- b. how likely it is that the Board might be successful with such a claim.

5.2 Preparation of this Report has required a careful and detailed consideration of a substantial quantity of documentation, in particular, the papers relating to the Standards Committee hearing on 30 and 31 March 2011 and the minutes, which were not published until 22 June.

BACKGROUND

- 5.3 In early 2008 Martin Walklate was appointed by the S 151 officer of the London Borough of Haringey (LBH) to prepare a report on the development, use and monitoring of a licence to operate between the charity and Firoka granted in May 2007 and determined in December 2007.
- 5.4 This report, known as Walklate 1, was put before the Board on 26 September 2008. At that meeting the Board asked that a second report be prepared upon the issues of whether the charity had suffered losses as a result of the grant of the Licence, and if so the extent to which the then General Manager, Keith Holder might have been responsible for such losses.
- 5.5 Walklate 2, as it became known, was presented to the Board on 16 April 2009. In consequence of the conclusion of the report, we were asked to advise the Board as to the prospect of recovery of any loss suffered by the charity from the former General Manager personally and whether any further action was warranted.
- 5.6 For the detailed reasons set out in our exempt report to the Board on 16 April 2009, we advised that there was no real prospect of a successful claim against the former General Manager and there was no evidence that he could pay any substantial sum even if an action against him was successful.
- 5.7 By way of further relevant and material background, in August 2008 a complaint was made to the Charity Commission in relation to a significant number of issues surrounding the grant of the Licence. We responded to those matters by letter dated 18 September 2008. The Commission wrote on 21 November 2008 saying that having considered the detailed terms of our response it was satisfied the trustees had acted reasonably and honestly, found no evidence of mismanagement or misconduct or deliberate wrongdoing and that it was not appropriate to open an inquiry. It said it had "closed the case."
- 5.8 In October 2009 Clive Carter made a complaint that Clr Adje had, whilst Chair of the APP Board between May 2006 and May 2007, breached the London Borough of Haringey (LBH) Code of Conduct.
- 5.9 Following receipt of this complaint, the Monitoring Officer appointed Martin Walklate to undertake a further investigation and report. He presented this

third report in September 2010. This, together with very extensive background papers and documents running to nearly 500 pages, was presented to the Standards Committee.

WALKLATE 3

5.10 The Standards Committee gave full and detailed consideration to Walklate 3. The Report was at pages 93 to 127 of the Committee's papers. A brief summary of a number of key findings of this report will help the Board members in their present deliberations. This is in the main because Mr Walklate interviewed the key characters and was able to make his own assessment of their evidence.

5.11 Mr Walklate found that Cllr Adje's

"record of events throughout the three investigations demonstrate a number of inconsistencies which are hard to reconcile with other stated versions of events. Notable are his failures in the first report to inform the investigation of the briefing note produced by Mr Holder and the discussions with Firoka that led to its production." (Paragraph 19)

5.12 Mr Walklate found that Mr Holder's

"actions are constantly difficult to pin down and his responses are often vague and limited. One has a constant feeling that he is drip feeding his information and does not have the confidence in his situation to be honest and open at the outset. (Paragraph 22)

Mr Walklate gave as a good example:

"Mr Holder's failure to disclose the 16 April 2007 Briefing Note to Walklate 1 but to readily produce it as his major defence in Walklate 2. (Paragraph 23.)

5.13 We highlight these assessments not to cause any embarrassment to the key figures but to demonstrate the difficulty of arriving at clear evidence based conclusions.

- 5.14. Having made these assessments Walklate then went on to record, in the context of Cllr Adje making no reference to Keith Holder's apparent U turn between his Briefing Note of 16 April 2007 and his tabled report to the Board on 24 April 2007, that each present two opposing views of what happened. He, Walklate, had to make his determination by looking at the two versions of events to see which was the most plausible. (Paragraph 103 and 104.)
- 5.15 Walklate then went on to determine that Cllr Adje, in deliberately not informing his trust colleagues of the Briefing Note, failed to allow them to make a balanced decision. Instead, they accepted a recommendation to pursue a licence they might well not have agreed had they been in possession of the full facts. (Paragraph 133.)
- 5.16. Before reaching this determination Mr Walklate recorded, at paragraph 75, that:

"I would wish to stress that I have no evidence whatsoever to suggest that any alleged motivation that Cllr Adje may, or may not, have had in this matter was founded upon any personal material gain either sought or actual. If it is eventually concluded that his pursuance of such an instrument (the licence) was the probable situation, then it is my belief that this is founded upon the need to secure the contract in the interests of the charity and the Borough."

STANDARDS COMMITTEE

- 5.17 The Standards Committee held a Determination Hearing Panel on 30 and 31 March 2011 to determine Mr Carter's complaint.
- 5.18 The Minutes, running to 107 pages, are key to this item. However, in the interests of economy these are not attached to this Report but a copy can be provided by the Committee Clerk on request. We recommend trustees to request a copy and read it.
- 5.19 The Panel set out its findings of fact at paragraph 920 as follows:

"There was a meeting held on the 11th April 2007, between Firoz Kassam, Keith Holder and Cllr Adje, where concern was expressed by

Mr Kassam about the delays involved in the Charity Commission order and the ultimate lease, and where he threatened to withdraw from the process. There were then telephone conversations during the weekend of 14th /15th April 2007, between Cllr Adje and Mr Kassam, with regard to matters raised at the 11th April meeting. As a result of this, Cllr Adje asked Keith Holder to prepare a briefing note, addressing the issues raised at that meeting. Keith Holder produced a note, dated 16th April and sent on 17th April to Cllr Adje. This briefing note contained his own professional advice on the problem of Firoka's dissatisfaction with the redevelopment and lease project, which advice was based on legal advice from the project advisers BLP, specialist commercial lawyers. The thrust of the briefing note was that there was no legal basis for Firoka to withdraw.¹ Following receipt of this note by Cllr Adje, a conversation took place between Keith Holder and Cllr Adje about that briefing. On the evidence we have heard, we do not find the Keith Holder volunteered an alternative solution to that proposed in the briefing. We do consider that Cllr Adje indicated that the briefing was not supported at the level of the leadership, and that an alternative way forward should be found to prevent Firoka from withdrawing from the process. We accept Keith Holder's evidence that he was asked to present a further report encompassing this. At the meeting on the 24th April Chaired by Cllr Adje, the Board accepted a tabled report, not printed on the agenda, that was written by Keith Holder, which was very different in its conclusions and recommendations from the briefing note. In place of no action, Alexandra Park and Palace Board trustees were now recommended to begin a phased transfer of the charity business, staff and contracts to Firoka, following the grant of the Charity Commission's order. Cllr Adje, the Chair, said nothing himself about Keith Holder's previous advice, or queried the apparent change of mind indicated by the tabled report. After the meeting of the Board, and as a result of their decision, we find that a licence was granted by the Council as trustee to permit Firoka to occupy Alexandra Palace on favourable terms, which was initially for a 3-month period. "

¹ The final sentence of the Briefing Note was "Nevertheless it does not appear that we have to take any action at this point other than to keep a watchful eye on progress."

- 5.20 The Panel set out its findings in terms of breaches of code of conduct at paragraph 921 as follows:

"Our findings in terms of breaches of code of conduct are as follows. Paragraph 5 of the code of conduct, we find that Cllr Adje was in breach of paragraph 5 of the code when he failed to disclose the key information and advice contained in the briefing note of 16th April to the Board meeting on 24th April. We made this finding in the context of the importance of the decision that the Board was to take, the importance of the advice contained in the briefing for that decision and the duties Cllr Adje had as Chair of the Board, a committee of the Council and a board of trustees. We conclude that by this failure, Cllr Adje brought his office and the Council into disrepute. Paragraph 3.2.d of the Code of Conduct – having found that in the course of the telephone conversation held by Cllr Adje and Keith Holder, which discussed the briefing note of 16th April, that Keith Holder was asked not to distribute the briefing note and instead produce a new report, we do not consider on the basis of the evidence that we have heard that Cllr Adje's request compromised or was likely to compromise Keith Holder's professional impartiality, there being insufficient evidence that undue pressure was applied to Keith Holder, so we have not found a breach in respect of paragraph 3.2.d."

- 5.21 We have set the above out in full as it is important for Board members to read the detail in order to make an informed decision on the matter now before them.
- 5.22 In summary, the finding against Cllr Adje was that he breached Haringey Council's Code of Conduct by failing to disclose the key information and advice (that no action was necessary) in Keith Holder's briefing note of 16 April 2007 to the Board meeting of 24 April 2007. Whilst the briefing note said there was no need for the charity to do anything to keep Firoka "on board" as developer, the report to the Board on 24 April 2007 recommended that the Board approve a "phased transfer of the charity business staff and contracts" which was eventually achieved by the grant of a licence to Firoka.

THE ISSUES

- 5.23 As indicated at paragraphs 5.1 a and b above, the issues upon which we have been instructed to advise are whether there may be a claim against the former Chair for breach of trust, namely the loss of the opportunity of the charity to avoid having made the loss by entering into the licence with Firoka, and prospects of success in any claim. In addressing the issues it is appropriate to set out the legal principles in relation to a claim for breach of trust.

BREACH OF TRUST

- 5.24. In the absence of evidence to the contrary, it is presumed that trustees have faithfully discharged their duty. Any act by a trustee with reference to the trust property in contravention of the duties imposed on him by the trust or in excess of those duties and any neglect or omission on his part to fulfil those duties and the concurrence or acquiescence by one of several trustees in a similar act, neglect or omission on the part of a co-trustee, constitutes a breach of trust.
- 5.25. However, a trustee who is guilty of negligence or breach of contract is not necessarily guilty of breach of trust or fiduciary duty. If the breach of trust entails a loss to the trust estate, then as a general rule the trustee is liable. It is, however, necessary for a causal connection to be shown between the breach of duty and the resulting loss.
- 5.26. A trustee may be relieved from liability by the provisions of the instrument creating the trust or by statute, or by the fact that the breach of trust has been occasioned by necessity or some other adequate cause or has been due to an innocent mistake. A mere error of judgment does not in itself constitute a breach of trust, and a trustee is presumed to have dealt honestly and properly with the trust estate until the contrary is shown.
- 5.27. If a breach of trust can be established then it is necessary to consider the measure of a defaulting trustee's liability to compensate the trust fund.
- 5.28. If a trustee uses trust money for his own purposes, for purposes not in accordance with the trusts, occasioning the destruction of the trust property,

improperly alienating it, or negligently allowing others to misappropriate it, he is strictly liable to make good any deficiency or loss.

- 5.29. Although the court has been severe with trustees who wilfully, corruptly or negligently misapply the trust property, it has acted leniently where the administration of the funds has been honest but mistaken.
- 5.30. The Charity Commission and the court have statutory powers to relieve a trustee from liability for breach of trust or duty. The Commission may exercise this power where it considers a trustee is or may be personally liable for a breach of trust or breach of duty committed in his capacity as such a person, but that he has acted honestly and reasonably and ought fairly to be excused for the breach of trust or duty.
- 5.31 Similarly, If it appears to the court that a trustee is or may be personally liable for any breach of trust but has acted honestly and reasonably and ought fairly to be excused for the breach and for omitting to obtain the court's directions in the matter in which he committed the breach, the court may relieve him wholly or partly from that personal liability. In such a case the onus is upon the trustee to prove that he acted both honestly and reasonably: this is a question of fact depending on the circumstances of each case.
- 5.32. In this case the following "found matters" may be said to be alleged breaches of trust by Clr Adje:-
- a. his failure to put or cause to be put to all the trustees Keith Holder's Briefing Note of 16 April 2007 saying there was no need for the charity to do anything to keep Firoka "on board."
 - b. his request that Keith Holder should find an alternative way to prevent Firoka from withdrawing from the process.
- 5.33 In summary, it may be alleged that Clr Adje was in breach of trust by keeping from his fellow trustees the Briefing Note of Keith Holder dated 16 April 2007 advising that nothing needed to be done to "keep Firoka on board" and causing there to be tabled to the Board on 24 April 2007 a report recommending that a licence be granted.

ASSESSMENT OF POTENTIAL BREACH OF TRUST CLAIM.

- 5.34 In making an assessment of whether there has been any breach of trust, the law requires that Board members must start from the presumption that Clr Adje has faithfully discharged his duty. (See paragraph 5.24.)
- 5.35. Board members must then move on to consider any evidence to the contrary, namely that Clr Adje did not faithfully discharge his duty. In this case the evidence constitutes the matters found, as set out in paragraph 5.32 above.
- 5.36. The Standards Committee heard, at paragraph 198, Mr Mitchison's submission on the Charity Commission guidance as to trustee decision making. He reminded the Committee that:

"Trustees must make decisions acting collectively, and as a team. Decisions do not need to be unanimous ...you can have a majority vote but each trustee present at a meeting has to take personal responsibility for the decision and make it on the basis of the information they have available. All the trustees are in that sense equal, they are equal decision makers. As they have that duty to make a collective decision it is important that they all have the same information and in this case it was particularly important that a briefing note which contained such clear advice that no action should be taken was made available with the report recommending the phased transfer."

- 5.37. Clr Adje accepted that only he had a copy of Keith Holder's briefing note dated 16 April 2007. He accepted he had not circulated or asked that this be circulated to the other trustees. He said at paragraph 571 that there was

"no reason for the Trustees, the others, to have sight of " it.

- 5.38. In considering this question - as to whether there is evidence that shows Clr Adje did not faithfully discharge his duty - Board members may find it helpful to review the exchange at the Standards Hearing at paragraphs 720 and 721 between Clr Reece and Clr Adje thus:

"720 KR.

That wasn't my question, my question was don't you think that if you had asked the trustees, as objective people, would they have not been interested or influenced if they had known there had been this earlier briefing note, would their decision have been the same? I'm not putting this properly, I'm not a barrister, but, you know, you get the gist of what I'm saying. If the trustees had been told about the earlier briefing note, the one on the 16th April saying Firoka's locked in, do you think they would have agreed the contents and the resolution that it did make at the meeting on the 24th April?

721. CA

Maybe they would, maybe they wouldn't. I can't confirm that. Although I did say that they probably would have because of the way that things were panning out, because we had, at the time, even before then, Keith had been winding down the company because of insolvency, the [unclear] came in, we had to sign some documentation on the trading side and the two non-executive directors also had left at the time."

- 5.39 It appears from this exchange that Clr Adje is uncertain whether, if the Board members had known the contents of Mr Holder's Briefing Note dated 16 April 2007, they would have arrived at a different conclusion.
- 5.40. One option now would be for the Board to direct enquiry of those Board members who made the 24 April 2007 decision. According to the minutes those present, in addition to Clr Adje, were Clrs Egan, Hare, Peacock and Thompson, although he is recorded as having arrived towards the end of this item. One appreciates the difficulty of asking for views so long after the decision and if this request is made those consulted will have the benefit of hindsight. If this course is followed those consulted must do their best to indicate their view on the basis of what was, in April 2007, in the best interests of the charity and what is now in its best interests. They must put aside any political or other considerations.
- 5.41. In assessing whether any different a decision would have been made the Board must also consider the evidence that Keith Holder gave to the Standards Committee Determination Hearing at paragraph 252. In describing

his conversation with Clr Adje, within a couple of days after he sent his Briefing Note, he said:-

"The conversation was along the lines of having read my briefing note he had a discussion at a senior political level and I believe there was some involvement with possibly the Chief Executive. And that essentially, as I said in the documents in the bundle, it wasn't to fall on his or the then Leader's watch. That, whilst recognising that what I was saying may be the factual position, the reality is they wanted to do something to keep Firoka on board."

- 5.42. If Board members consider that in all the circumstances Clr Adje's conduct may have been in breach of trust, and they will need to consider whether they wish to direct further investigations into what decisions the then Board members might have made had they been provided with full information, they will need to consider what loss may have been caused by the breach.

LOSS ALLEGED TO FLOW FROM ANY BREACH

- 5.43 Walklate 2 addresses the question of loss to the charity which arose as a result of the decision of the trustees on 24 April 2007 to grant a licence. In paragraph 109 he suggests that depending on the method employed "and the accuracy of the allocation" the loss is somewhere between £1,487M and £2.023M.

- 5.44. The question of loss to which Board members must now give consideration is not as simple as saying that if Clr Adje is liable for breach of trust then he is liable to make good the loss as calculated by Walklate. As stated at paragraph 5.25, it is necessary to establish a causal connection between the breach of duty and the resulting loss.

- 5.45. The Licence granted contained provision for termination. It was for 3 months from 1 May 2007 ending on 1 August 2007. It could be terminated by not less than 5 days notice. The Trustees deliberately chose not to terminate the Licence because of their continuing negotiations with Firoka throughout 2007. Although the judicial review was determined on 5 October negotiations continued thereafter and it was not until near to the end of 2007 that these

reached a sufficiently unsatisfactory state that the Trustees decided to terminate the licence.

- 5.46. In addition, as was accepted in the representations of Terence Mitchison, as representative for the investigating officer at the Standards Committee Determination Hearing Panel, not all of the loss was attributable to any misconduct of Cllr Adje. He said as follows, at paragraph 187:

"I have to say that, as a matter of fairness, it is not suggested by Martin Walklate that Cllr Adje bears responsibility personally for all the losses that ensued, clearly he was only Chair of the Alexandra Park and Palace Board until, I think, it was 20th April 2007² - the greater part of the losses occurred late in 2007. I think what is being said is that the decision of the Board of the 24th April and the licence effectively opened the door to an arrangement whereby Firoka were in occupation of the Palace, initially for a three month period when the licence agreement could have been revoked. In all the events that happened the licence was not revoked, it simply continued through the summer and through the period of the autumn when the judicial review that challenged the Charity Commission's decisions in the courts, there was decision on that of the 5th October 2007. Throughout that period, the licence remained in force. It wasn't terminated until towards the end of the year and effectively Firoka had the profits arising from the profitable events around Christmas, including I think the world darts competition which was held, and, in consequence, the Council as trustee of the Alexandra Palace Trust lost a sum of roughly £1.5m. But it's not been said that that loss was all of it attributable to any misconduct of Cllr Adje. The reason for this is simply that the decision that gave rise to a licence, the licence was revocable, no decision was taken to revoke the licence, so effectively what has been said is that the door was opened, the situation was allowed to continue, it was other people at the time who were in charge both politically and managerially of the Trust. Clearly the panel has to bear in mind that to some extent the start of that whole process began with the decision of the Board on the 24th April and Cllr Adje must bear some responsibility for the way that decision was

² In fact Cllr Adje resigned on 21 May 2007, on the same date as Cllr Cooke was appointed Chair. See Accounts for 2007/2008.

reached and the breaches of the code that Martin Walklate said were relevant and which the Committee says have to be considered. So I think I've put it as fairly as I can that it's opening the door, it's not all £1.5m that is the personal responsibility of Cllr Adje."

- 5.47. Whilst the issue of loss was put at the Standards Committee hearing as set out above, because it cannot be argued that all the loss is attributable to any misconduct, the issue we have been instructed to advise on is expressed as the charity's "loss of opportunity" to avoid having made a loss.
- 5.48. Even if a breach of duty which caused a loss of opportunity is established then the true nature of any alleged loss needs to be analysed. Whilst on first blush there may be said to be a loss to the charity, in fact given that in the period under consideration (2007/2008) the charity made a significant loss, in reality what has transpired is that it has made a greater loss than might have been the case had it not granted the Licence.
- 5.49. Haringey in effect meets and underwrites the charity's losses from its corporate funds. What therefore happened in 2007/8 is that Haringey funded a greater loss than might otherwise have been the case. On 22 July 2008 the then General Manager reported on the provisional outturn for 2007/8. In paragraph 6.6 of his report (Page 64 of the Board papers) he wrote that:
- "The year end figure of £3.1 M is in line with the revised deficit requested by the Board and adopted by Cabinet in December 2007."
- 5.50 The total indemnification provided by Haringey is shown in the annual accounts and for 2007/8 accounts the total for the period from 1995/6 to 2007/8, with interest, is shown as £19.082M. The note records that:
- "It is the Council's current policy to continue providing this support until such time as it is no longer required."
- 5.51. In consequence of the above, if there is any recovery by the charity of compensation, any sum recovered would reduce the charity's loss and liability to Haringey. It may not be of any direct benefit to the charity for the simple reason that Haringey may insist it is paid to it. Board members may therefore

consider that the view of Haringey, as Council, should be sought before any further steps are taken.

5.52. In summary, whilst we can see the argument that if Cllr Adje was in breach of trust he may have some liability for the losses, we find it very difficult to advise how a court might approach the question of assessment of loss flowing from such a breach. The question is further complicated by the facts that

- a. Cllr Adje ceased to be a trustee in April 2007 and the Board, under the new trustees, could have determined the licence in accordance with its provisions, but chose not to do so whilst it continued its negotiations with Firoka and
- b. Haringey might insist on receiving any compensation awarded to the charity and recovered from Cllr Adje in diminution of the debt owed to it.

5.53. These issues are of sufficient complexity to justify the Board, if it is desired to pursue the matter, authorising the Interim General Manager to instruct us to seek Counsel's advice

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