

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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