

10 OCTOBER 2007

REPORT OF HOWARD KENNEDY, THE TRUST'S SOLICITORS

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REPORT TITLE: Outcome of the Application for Judicial Review of the
Charity Commission decision and consideration of the
Charity's present options

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1. PURPOSE

1.1 To report to the Board upon the outcome of the application for judicial review of the
Charity Commission decision, to consider the Charity's options and make decisions
in regard to further conduct.

2. SUMMARY

2.1 The High Court quashed and declared unlawful the Charity Commission order of 4 May
2007 authorising the Trustees to complete the Lease to Firoka. Accordingly the Trustees
are unable to complete.

2.2 The options of the Board as charity trustees are outlined and the Board is invited to give
instructions to officers and advisers.

3. RECOMMENDATIONS

- 3.1 The Board notes the outcome of the judicial review application.
- 3.2 The Board decides whether to reaffirm its general strategy and objective of granting a long lease to a developer and its specific strategy of granting such a lease, in the terms agreed to Firoka.
- 3.3 Depending upon its decision, the Board instructs its officers and advisers to proceed accordingly.

4. LOCAL GOVERNMENT (ACCESS TO INFORMATION)

ACT 1985

- 4. No specific papers were used in the preparation of this report other than the court bundles from the judicial review hearing.

5. THE REPORT

- 5.1 Following a debate in the First Standing Committee on delegated legislation on 14 January 2004 the Charities (Alexandra Park and Palace) Order 2004 was made and came into force on 10 February 2004.
- 5.2 The Order empowered the Trustees to lease the whole or part or parts of the Palace and its immediate surrounding area for a term not exceeding 125 years subject to obtaining the consent of the Charity Commissioners by Order made under the Charities Act 1993.
- 5.3 During the course of the parliamentary debate the Minister gave certain assurances with regard to steps that the Charity Commission would take before authorising the grant of any Lease.
- 5.4 The Minister said inter alia:-

“However, it is important that there is an opportunity to have specific consultation on the beneficial issue, as well as on issues connected with the established procedures such as planning. I therefore asked the Commission for an undertaking, which I have now received, to publish the draft of any Order that it might make authorising a Lease under the Scheme and to invite and consider any representations that it may receive.”

- 5.5 Subsequent to the coming into force of that Order, on 10 February 2004, the Trustees conducted a development competition and, in January 2006, selected Firoka as their preferred development partner.
- 5.6 Documentation was eventually agreed between the Trustees, represented in the negotiation process by Berwin Leighton Paisner and Firoka. On 24 November 2006 a Master Agreement was exchanged. The Master Agreement referred to and annexed an agreed draft Lease and Project Agreement. Charity Trustees will recall that this documentation was provided to them as part of the induction process at a meeting on 28 June 2007. It is contained at marker 6 of the bundle that was provided to Trustees on that occasion.
- 5.7 Subsequent to the exchange of the Master Agreement on 24 November 2006, the Charity Commission advertised its intention to make an Order authorising the grant of the long Lease under the 2004 Order.
- 5.8 In February/March 2006 the Charity Commission agreed that it would not require the Lease terms to be published. This agreement was contained in an exchange of correspondence consisting of our letter of 24 February 2006 and the Commission's response of 15 March 2006.
- 5.9 Following publication of the Commission's intention to make an Order Jacob O'Callaghan wrote to the Commission on 3 November 2006 requesting the Commission to provide him with a copy of the Project Agreement and draft Lease. He wrote repeating this request on 5 January 2007.
- 5.10 In accordance with the agreement between the Trustees and the Commission in March 2006 the Commission declined to provide a full copy of the relevant documentation. A redacted copy of the Lease was provided after the consultation

period had closed but the Commission declined to provide a copy of the Project Agreement.

5.11 Following extensive representations to the Commission it eventually decided to authorise the grant of the Lease on 27 April 2007 and an Order was made authorising the grant of both the Lease and the Project Agreement, in substantially the form that was published in November 2006.

5.12 Jacob O'Callaghan challenged the Commission's decision and Order by Judicial Review proceedings that were issued on 26 July 2007.

5.13 The Board as Charity Trustees has previously been provided with copies of documentation in relation to these proceedings and it is not the role of this report to repeat these matters.

5.14 The judicial review application was duly heard on Friday 5 October. Mr Justice Sullivan:-

(a) Granted permission to seek judicial review.

(b) Declared that the Charity Commission Order of 4 May 2007 authorising the Lease was unlawful.

(c) Quashed that Order.

He also directed the Trustees to make a contribution of 50% of Mr O'Callaghan's costs.

5.15 The Judge gave a long and detailed Judgment at the end of the Hearing. We have requested a full transcript of this Judgment which will be provided to Board Members in due course. There is, however, appended to this Report a contemporaneous note of the Judge's reasoned decision.

5.16 In essence, the Judge's decision turned upon the fact that a Minister of the Crown, in the course of a debate in Parliament, had given a solemn promise that there would be specific consultation. The Minister referred to the undertaking she had received from the Commission to publish the draft of any Order. The Judge expressed the view that the Minister's solemn promise needed to be construed

purposively, that is having regard to the purpose for which the assurance was given, rather than legalistically. A purposive construction would mean that the full documentation would need to be made available, while a legalistic construction would mean that only a draft of any Order would need to be made available.

5.17 The Judge took the view that consultation which entailed publication of the draft of the Order, which referred to the draft Lease and Project Agreement, but not these latter documents would render the consultation process “a complete nonsense”. In his Judgment he posed the rhetorical question as follows

“I ask rhetorically what is the point of publishing a draft Order referring to the Lease and refusing to publish the Lease. Mr Kovats (Counsel for the Charity Commission) refers to a confidentiality agreement but it is difficult to see how such a private agreement could negate the effectiveness of a consultation which had been publicly promised by a Minister in Parliament.”

5.18. The Board as Charity Trustees now need to consider what steps they wish to take.

5.19. The strategy and objective of the Trustees has, for many years, been that of seeking to grant a long Lease that would substantially “shift the risk” associated with the Trustees’ ownership of the Palace building. This strategy and objective is consistent with the willingness of the local authority to continue to fund the Charity’s substantial trading deficit whilst it undertakes the process of securing a willing development partner and ultimately granting a long Lease. The Board as Charity Trustees are asked to consider and decide whether this remains its strategy and objective.

5.20 If it does, then the Board will need to consider whether it wishes to direct its officers to continue negotiations and discussions with Firoka. At the time of preparation of this Report Firoka has indicated both through its principal and its solicitors that it remains willing to continue to negotiate although this position may change.

5.21 So long as this remains Firoka’s position, and the Board as Charity Trustees is agreeable to pursuing a course of negotiations, then the next steps will be to engage with the Charity Commission in order to establish what steps they now wish to take in order to comply with the Minister’s assurance with regard to consultation in the 2004 Parliamentary debate.

- 5.22 From informal discussions with the very senior officers at the Charity Commission who were at court at the conclusion of Friday's hearing it is anticipated that the Commission will wish for both draft Lease and Project Agreement to be made available as part of the consultation process, with some of the key financial aspects and provisions in relation to guarantees redacted.
- 5.23 If the Board as Charity Trustees is not prepared to authorise ongoing discussions then serious issues arise with regard to the solvency of the Charity. In the limited time available for preparation of this Report, we have not been able to identify these issues in detail and they will need to be subject of further consideration and a further Special Board Meeting to be convened, if appropriate, as a matter of urgency.