Public Accounts Committee

Report on Ministerial Decision MD-PH-2008-0020: 26th March 2008: St. Helier Yacht Club – surrender and renewal of lease

States of Jersey
States Assembly

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REPORT

Introduction

1. This report has been based on interviews with Andrew Le Bousteler, Finance Director of Harbours, Mike King, Chief Officer of the Economic Development Department, David Flowers, Director of Jersey Property Holdings, Paul Griffin, Senior Valuer of Jersey Property Holdings, Steven Izatt of WEB and Charles Blampied, Treasurer of the St. Helier Yacht Club, together with letters and documentatior supplied by these individuals.

2. Our thanks are due to everyone involved with this report for their assistance; their input is much appreciated.

Terms of Reference

3. To examine the terms of the Lease to St. Helier Yacht Club.

   To review the procedures for agreeing the lease, including the utilisation of professional advice.

   To examine the consistency of the terms of leases being given by Harbours.

   To consider whether the policy of providing subsidies is appropriate.

   To consider whether the management and granting of lease for properties should properly be within the remit of JPH.

Conclusions

4. It was unfortunate that the negotiations over the lease began under the Committee regime and were continued under the new Ministerial regime as this appears to have led to confusion.

5. The States is not large enough to justify the employment of a qualified property professional in each Department or by each Trading Operation. It is eminently sensible to set up a specialised property organisation, staffed by property specialists. It is necessary; however, if such an organisation is set up, to ensure that property transactions are always referred to this department, allowing sufficient time for a proper review.

6. It appears that changes in management may have resulted in Harbours being unclear as to the management of property transactions following the formation of Jersey Property Holdings, in particular that all property matters such as leases should be ratified by JPH. This uncertainty was accentuated by the fact that P.95/2005 did not require the transfer of all property administered by the former Trading Committees to JPH. This proposition implied that these organisations would continue to administer the day to day operation of their property assets separately. Standing order 168, however, states that the Minister for Treasury and Resources is responsible for and authorises all property transactions. This issue is resolved if the role of JPH as the "superior landlord" acting on behalf of the Public is understood together with the need to obtain "landlord's consent for property transaction.

7. The original negotiations were to renew the lease at the same value as the closing rent of the previous lease with some modification due to the leasing of the ground floor area in addition to the existing property. Since this began in 2003, the negotiators would have been following existing Harbours procedures.

   It is also a matter of concern that there should have been a major error in the calculations of the RPI uplift. Since there are some 400 leases being administered by Harbours the significant leases should have beer reviewed as soon as the error was pointed out. The Public Accounts Committee notes that this is now being undertaken by JPH in conjunction with Harbours.

8. The apparent lack of adherence to agreed procedures by all States Funded Bodies and by the Trading Organisations is unsatisfactory and should be addressed.

Whilst initial training was provided details of processes and procedures do not appear to have been enshrined in financial directions. The lack of absolute clarity has led to this particular lease being bounced between departments and resulted in a lack of consistency in the terms to be applied.

In hindsight, it would have been better if the arguments for a special case had been made to the Minister for Treasury and Resources sooner and before the final decision had been made.

9. If the proper procedures had been followed then the juxtaposition of the grant and the difference between the original rental and the MRV would have seemed less coincidental.

10. This particular lease has been identified as a special case since the premises are unable to be used for any purposes other than a yacht club and since SHYC will be providing courses to improve inshore safety. Whilst these might well be considered valid grounds for such treatment, there should be a clearly defined policy to cover this. An ad hoc treatment is not satisfactory for planning and budgeting.

11. The procedure proposed by JPH and the current Financial Director appears sound but it is not clear whether this is consistent with the procedures being followed by the Airport and by States Departments which may also be handling leases.

It is essential that this should be clarified as soon as possible and the procedures understood by other organisations, such as the Airport and Housing.

12. It appears that these negotiations have taken place against the background of conceptual plans for the area East of Albert. As yet, no reports on this have been presented to the States, WEB has no official remit for this area and no judgements can be made.

13. The Public Accounts Committee has no problem with the terms of this lease as at 25th April 2008, providing that the terms are stated clearly and transparently.

Recommendations

14. In its previous reports the Public Accounts Committee has examined the operation of Jersey Property Holdings. The Committee is totally supportive of a centralised property department and considers that it is essential that all property transactions are dealt with by specialised property professionals.

15. The evidence from this investigation is that not all property transactions are being discussed with JPH at an early stage in the negotiations. Furthermore, there are no Financial Directions which give guidance in leasing transactions where the States is the Lessor. It is essential that JPH should be apprised of all such leases by all Departments.

16. With the delay in incorporation of the Harbours Department and the Airport, it is essential that all property transactions by these organisations are brought within the ambit of JPH. Leases given by Harbours are already being reviewed by JPH. A similar review should be set up for leases and property related transactions entered into by the Airport.

17. Additional Financial Directions should be compiled to include procedures to be followed when grants or subsidies are to be made.

18. The Public Accounts Committee has no difficulty with the SHYC lease being treated as a special case. However, there may be a concern that treating this lease as a special case may have repercussions in other cases. The Committee recommends that the parameters for special cases are clearly identified and added to Financial Directions. If a particular property transaction is to be treated as a special case then

application should be made to the Minister for Treasury and Resources, through JPH, at the beginning of negotiations.

19. It is apparent that there are a considerable number of grants and subsidies given by the States to Non-Profit-making Organisations such as Clubs and Charities. These should all be listed in the Accounts of the States for transparency.

20. The Committee considers that, for transparency, the information attached to Ministerial Decisions should contain more information. There should also be a list indexed by number so as to identify a quoted decision or to identify when a decision has not been posted to the government website.

History

21. St. Helier Yacht Club (‘SHYC”) has rented the designated premises of the South Pier property belonging to the States and administered by Harbours Department since 1950. The existing lease was created in 1992 when the Club undertook a major refurbishment of the premises at its own expense and finishes on 31st March 2013.

22. On 5th March 2003 the Harbours and Airport Committee inspected the premises accompanied by Officers of SHYC. The Committee had been approached by SHYC seeking to replace the existing lease with an agreement for the long-term tenure of the premises in order that the premises could be modernised and re-developed. This would require substantial investment and , according to the Harbours and Airport Committee Minutes this “*could not be warranted unless an agreement in the order of 99 years could be guaranteed*.” At that stage the storage area on the ground floor beneath the premises was leased by other tenants and diesel fuel tanks operated by South Pier Shipyard were also sited underneath the Club House.

23. The Committee minutes note that there were 8 years still to run on the old lease although the lease actually terminates on 31st March 2013.

24. The renovations were to provide modern facilities for members and visiting yachtsmen including –

New sanitary and dining facilities

Training and conference provision

Changing rooms

Disabled access.

25. The Harbours and Airport Committee, in its minute B8 of 5th March 2003, “*accepted that there were logistical problems to be overcome with regard to the structural requirements and that the continuing mix of social and commercial activities in the area would need to be addressed.*”

The Committee “*agreed to support, in principle, the long term tenure of the premises by SHYC, subject to an agreement on terms*”. The Commercial Director was “*authorised to commence negotiations with representatives of the Club*”.

26. On 23rd December 2005, the then Commercial Director of Harbours and the Commodore of the Yacht Club signed the Heads of Agreement for a 99 year lease commencing at the rental payable under the existing lease (stated at £18,254.32) plus the rental for the ground floor (which was currently let elsewhere at a rental of £4,016.08) less a reduction for the savings effected by Harbours not having to maintain and insure the buildings which were the subject of the lease.

The Commercial Director signed this document on behalf of the Minister for Economic Development on 23rd December 2005.

27. In February 2007 the Treasurer of SHYC, Charles Blampied, realised that the RPI rent increases under the existing lease had been calculated incorrectly and brought this to the attention of the Harbours Finance Director. The revised rental for the lease was adjusted to £23,561 with effect from 1st April 2007. The Harbours Finance Director proposed that the starting rental on the new lease be stated at £26,561.89. This calculation is based on the existing rent with an addition for the ground floor area and a reduction as SHYC would be taking over responsibility for the maintenance of the premises.

28. Housing consent for the occupation of the attached flat for staff was applied for on 5th April 2007 and obtained on 23rd April 2007. The consent document stated that the lease was for a period of 99 years at a rental of £26,561.89 and included conditions relating to the occupation of the flat.

29. During March and April 2007 there were negotiations during which the then Commercial Director, together with Harbour's lawyers, prepared a Fourth Draft of the 99 Year Lease. This was agreed by SHYC on 30th April 2007.

30. Following the appointment of a new Business Development Director in May 2007 Jersey Property Holdings ("JPH") was contacted regarding the suitability of entering into a 99 year lease with the SHYC JPH advised Harbours that this would not be advisable bearing in mind the uncertainty as to the final nature of the Harbour redevelopment plan.

31. At a meeting on 29th May, with Officers of SHYC, Harbours explained that they were not bound by the Heads of Agreement. Harbours also undertook to discuss this matter with JPH and the Law Officers Department ("LOD") and would come forward with proposals for consideration by SHYC.

32. Harbours made a formal request to JPH for clarification of the strength of the previous Heads of Agreement on 30th May 2007 and JPH submitted an enquiry to this effect to the LOD on 31st May 2007.

33. On 4th June 2007 the Treasurer of SHYC telephoned the Chief Executive of Harbours to ask whether Harbours had formulated alternative proposals for the lease. The Chief Executive asked whether the Club would accept a 21 year lease but the Treasurer thought this would not be acceptable in view of the substantial expenditure required to renovate the ground floor area. On 5th June 2007 the Treasurer e-mailed the Chief Executive of Harbours suggesting that a 27 year lease (recognising the 6 year remaining on the current lease) with the option to renew the lease might be acceptable to the members of SHYC.

34. On 19th June SHYC contacted Harbours and confirmed that they would no longer consider a 99 year lease but would consider a 27 year lease. This was effectively a 21 year lease plus the time outstanding o the old lease.

Harbours also stated that they would not confirm that SHYC would be able to stay in the particular premises but said that "*there would always be a home for SHYC in the area*".

35. A letter dated 19th June from the Director of Business Development, Jersey Harbours, was received by SHYC on 5th July 2007 This letter stated that the lawyers for Harbours had been instructed to make the following amendments to the draft lease –

Term of lease 27 years

Option to renew for a further 21 years

Break clause to be agreed between both parties

SHYC to complete the development in 2 phases within 3 years of obtaining planning consent

Training facility to be able to be used for non-marine commercial activities with the individual event permission of Jersey Harbours

Area for deliveries and bins to be extended

Agreement on the definition of “commercial usage”.

36. In the intervening period, on 20th June 2007 the lawyer for the SHYC contacted the lawyer for Jersey Harbours to question the fact that a meeting took place on 29th May 2007 between Harbours and SHYC to discuss the terms of the lease without lawyers for either party being present.

On behalf of SHYC he also contended that the Minister was bound by the decisions of the Harbours and Airports Committee, as stated in the States of Jersey (Transfer of functions from Committees to Ministers) (Jersey) Regulations 2005. On this basis he contended that they were due special damages and compensation for the proposed change in the terms of the lease.

37. Also, on 20th June, the Commodore of SHYC wrote to the Minister for Economic Development noting that 3 weeks had passed since the meeting of 29th May and asking for the written proposals.

38. The Director of Business Development, Harbours, wrote to the Treasurer of SHYC on 25th June confirming Harbours acceptance of the proposed 27 year lease which comprised a 21 year lease plus th balance of the existing lease.

She also requested a meting to discuss further the proposed sponsorship of St. Helier Yacht Club's Youth Training Programme over the next 3 to 5 years.

39. A letter was sent by the Assistant Minister for Harbours and Airport on 26th June 2007, confirming that a 99 year lease would not be granted and that, on the basis of advice from the Solicitor General, the Minister was not bound by the Heads of Agreement dated 23rd December 2005.

40. The lawyers for SHYC wrote to the Assistant Minister on 27th July protesting at his interpretation of the advice given by the Solicitor General, particularly in view of the fact that a copy of this advice had been supplied to the lawyers for SHYC.

41. On 2nd August 2007, the Executive Committee of SHYC gave notice of a Special General Meeting to members stating that, subject to some amendments, they would recommend the lease of 27 years with an option to renew for a further 21 years.

42. The Market Rental Value (MRV) of the SHYC property was assessed by JPH for Jersey Harbours in August 2007.

43. SHYC state that their lawyer was advised by the lawyers for Harbours on 12th September 2007 that Harbours had recently conducted a review of the premises to ascertain its current market value, and that the advice received was that the current MRV would be £40,000 per annum. The lawyers for Harbours stated that Harbours proposed to honour its commitment to SHYC of a starting rent of £26,561.

44. It is not clear when this MRV was shared with SHYC. The first record of it appears in reference to a meeting between Harbours and SHYC on 24th September 2007.

45. On 26th October 2007 SHYC lawyers wrote to the lawyer acting for Harbours to agree the terms of the lease apart from a number of minor items.

46. On 10th December 2007 the Business Development Director, Jersey Harbours wrote to JPH with a draft copy of the proposed lease and EDD Ministerial Decision (“MD”). JPH responded on the same day that a number of items would require explanation in the JPH report and MD to the Minister for Treasuryand Resources. Also, that it would not be acceptable to show the starting rent at £26,000 even if this was the net rent to be paid by the SHYC following a grant from Jersey Harbours reducing the MRV of £40,000. JPH stated that there was no transparency in simply presenting the net figure of £26,000 as the starting

rent.

47. On 11th January 2008, following receipt of details of a proposed development break clause (DBC), JPH wrote to Harbours stating that the proposal to provide on 6 months' notice would have a material effect on the lease. JPH explained to Harbours that a longer period of notice was normal and usually acceptable to both parties.

48. A Ministerial Decision, MD-E-2008-0011, was signed off by the Assistant Minister for Economic Development on 11th January 2008 agreeing an MRV of £40,000 with a proposed grant from Harbours to the SHYC of £14,000 resulting in a stated commencing rent of £26,000. The proposed lease now included a Development Break Clause allowing Harbours to regain possession of the property subject to the provision of 6 months' notice. These amendments had not been discussed or agreed with SHYC by Harbours.

49. This decision was ratified by MD-PH-2008-0006 which stated the commencing rent to be £40,000 p.a but did not specifically refer to the subsidy of £14,000 p.a. or the development break clause.

50. Following concerns expressed by the SHYC regarding the inclusion of the Development Break Clause in the proposed lease a meeting was convened on 19th February 2008 with representatives of WEB, SHYC, EDD and Property Holdings to discuss MD-E-2008-0011 and MD-PH-2008-0006 which had caused concern to SHYC.

No members of Harbours management were present at the meeting nor were lawyers for either party to the proposed agreement It should be noted that no one present at this meeting (on either side) had the power to make a binding agreement.

At this meeting it was proposed and accepted that –

(a) the Development Break Clause should be changed such that it could only be invoked "by mutual agreement";

(b) Harbours would provide a grant to the SHYC which would effectively maintain the current rent passing as the starting rent in the new lease.

At review the rent would be assessed by reference to Open Market Value.

51. A lease was subsequently drawn up by lawyers acting for Harbours following the proposals discussed on 19th February. This lease quoted the rental as £26,561.89 and rental reviews were based on RPI.

52. A new Ministerial Decision was prepared by EDD (Jersey Harbours) on 19th March, again stating that the annual rent to the SHYC represented the MRV of £40,000 less the grant of £14,000.

53. The EDD MD–E-2008-0059 was received by JPH on 26th March and a report and Ministerial Decision, MD-PH-2008-0020, was prepared on the same day and presented to and approved by the Minister for Treasury and Resources on 27th March. This Decision is the subject of this enquiry.

The decision quotes the terms of lease as being amended from those in the decision outlined in paragraph 35 in that–

Rent review based on market value rental at the second review.

Lessee to pay all legal costs.

The starting rent shown in the lease to be stated as £40,000 per year with a grant by Harbours being subject to a separate agreement.

These amendments were not discussed with SHYC.

54. On 25th April 2008 the Director of Property Holdings wrote to the Treasurer of SHYC to say that Jersey Harbours are prepared to accept that the starting rent is reduced from £40,000 to £26,561; that all rent reviews will be based upon the starting rent of £26,561; that the provision of named guarantors is not appropriate and that Jersey Harbours have accepted that both sides will meet their own legal costs.

55. The grant will be covered by a service level agreement, a copy of which was made available to SHYC on 8th May 2008. This is not yet agreed by SHYC.

Matters Arising

56. JPH considers that it operates under Standing order 168. This appears to conflict with the original P.95/2005 which states that the former Trading Committees (Harbours and Airports) are not included within the remit of JPH. However, it was anticipated at that time that Harbours and Airports were shortly to be incorporated.

However, JPH resolves this issue by considering that it acts in the role of "superior landlord" with the trading organisations having beneficial "ownership" of their properties as tenants with long term leases with no payment due to the landlord but an obligation to seek landlord's consent under SO 168.

57. A report was taken to the Corporate Management Board soon after the formation of JPH in order to set out procedures with regard to States Funded Bodies. It appears, pending review of that report, that the same report may not have been transmitted to the trading organisations.

However, the previous Director JPH has reported that –

"*at the onset of Ministerial Decisions, all Chief Officers were aware of the procedures regarding the templates(procedures) and attended training sessions set up by the States Greffe, for themselves and members of staff, to obtain inputting training and also to follow instructions issued by the States Greffe for Ministerial Decisions*.

It should be noted that at least 6 MDs were progressed by JPH to ratify EDD (Jersey Harbours) MDs prior to the SHYC MD without issue.

58. In theory all properties to be administered by JPH were transferred on 1st January 2006. However, in practice, properties were only transferred to JPH when resource and budget allocations were transferred. Currently Planning and Environment and Home Affairs are still outstanding (although these properties do not represent a significant proportion of the total estate).

In addition there have been a number of occasions where commitments have been made in respect of property transactions without reference to the Minister for Treasury and Resources via JPH.

59. There do not appear to be consistent directions for the processing of leases being given by the States. The current Finance Director of Harbours outlined the procedure which he intends to take with regard to leases. This will be the general discussion of the terms with the lessee followed by an "in principle" letter of confirmation to the lessee. The details will then be sent to JPH for negotiation and arrangement.

60. There are some 400 leases administered by Harbours. Thirty of these are in the area from La Folie to the Barracks. The Fuel farm is 9 years, some of the others outstanding are 60 to 70 years.

61. A programme is underway by JPH to amend leases so that payment dates are synchronised and that calculations are correct but not all leases administered by Harbours have yet been checked.

It is intended to insert development break clauses upon renewal into all of these properties which it is believed may fall within the port development area. However there are inherent problems due to the fact that there is the uncertainty arising from the plans to move the port. Where it is necessary for a business to be located near the port then it will be essential to define the relocation policy.

62. As leases come up there is a JPH policy to move towards Market Rental Value for leases. If a lease is underpriced then the intention is to adopt MRV for a new lease unless there are special conditions. The intention is to develop a consistent approach and transparency.

Harbours consider that there is a case for RPI rather than OMV as this gives more certainty to all parties.

63. Harbours are working with JPH to standardise leases as they come up for renewal. If leases are for low level amounts then the standard lease will apply and they do not expect changes with these. If there are changes required then the policy will be for the lessee to pay legal costs for the changes. It is expected that changes are more likely to be required for large commercial leases and in these circumstances each party will pay its own legal costs.

64. The term of the lease being completed with SHYC will allow the Club to assign the lease under certain conditions. JPH consider that it is essential that the MVR is clearly stated in the lease as the starting rent as this would apply to any assignee. In the case of assignment the grant will cease. A clause may however be inserted stating that the effective starting rent for SHYC is reduced to £26,591.89 as a result of a grant from Jersey Harbours.

65. Whilst SHYC have reviewed each version of the proposed lease carefully, there have been certain major areas of contention. These are the length of the lease, the rental to be charged, the terms of the rental review and the requirement to provide a guarantor.

66. The provision of a guarantor was originally included in the lease at the request of the Minister. It has now been acknowledged that there is a precedent for a club not providing a guarantor as all the member of the club are jointly and severally liable for meeting the terms and conditions of any lease into which they might enter.

67. In March 2008, EDD requested JPH to deal with the proposal as a matter of some urgency. The JPH report was prepared and presented to the Minister for Treasury and Resources within 2 days of the receipt of the papers from EDD. All variations were agreed with Harbours by way of telephone conversations but were not discussed with SHYC.

68. WEB is advising EDD on the possible redevelopment of the port and the proposed East of Albert scheme. WEB's remit has not been extended officially to develop the East of Albert site.

The proposed Development includes some 1,500 – 1,600 residential units on the Elizabeth Terminal and associated car park site, extension of the La Collette reclamation site by way of a further reclamation La Collette 3. It is proposed to move the harbour to make provision for larger vessels and to move the fuel farm. There is also the possibility of more residential units and an additional marina.

69. The Minister for Treasury and Resources specifically requested that WEB provide confirmation that they would not require the SHYC property for the future development of the harbour East of Albert, and this they did. WEB consider that it is possible that, should the development include a new marina, SHYC might well want to relocate. However, this has not been discussed with SHYC.

70. The original Ministerial Decision from EDD merely stated that the reduction in the rent from £40,000 to £26,000 was as a result of a grant by Harbours. The details of the grant were not quantified at that stage. This has now been quantified by Harbours in terms of the education to be provided.

Harbours have also confirmed that if other sailing clubs, such as St. Catherine's and The Royal Channel Islands Yacht Club, provide evidence of their educational programmes, then similar grants on the same terms will be available to them.

71. Harbours confirmed that there are no other grants or subsidies payable to lessees. This is an exception for a club providing a service.

72. The grant is for RYA training and inshore safety training, following the objectives set out by the Coastguard. The service level agreement will link payment and results. This will follow the format used with CI Air Search and the Hyperbaric chamber.

73. The calculation of the grant was apparently commenced on 3rd July 2007 before the JPH valuation of the MRV was calculated in August 2007.

The rationale is that 50% of the grant is due to the fact that this is a club which is effectively a valuable part of the infrastructure and is providing various socioeconomic benefits. 50% is based on a grant to cover the provision of education to improve inshore safety training.

There is a per capita allowance for people attending courses and a reduction in rent on the classroom facilities. The balance is for promoting Jersey Coastguard together with an allowance for inability to use premises for full commercial considerations.

74. The original draft of the grant procedures was, according to the dating on the document, prepared on 3rd July 2007 and revised on 10th December 2007 with the latest version dated May 2008.

75. Financial Directions do not give guidance for either States Funded Bodies or for Trading Operations such as Harbours and Airports when negotiating leases as the lessor.