

Item No.	Classification	Date	MEETING NAME
1	Open	20 May	Overview and Scrutiny
Report Title:		Recommended Legal Mechanism for Compensation	
Ward (s) or groups affected:		All	
From:		Chief Executive (Borough Solicitor & Secretary)	

Recommendations:

1. That OSC recommends that the Council offers to enter into an Arbitration with THK World Entertainment (the Company) to resolve the following issues:
 - (i) Whether the Council has been guilty of misfeasance in public office.
 - (ii) If so, whether any compensation is payable by the Council and to whom such compensation is payable.

Background Information:

At your meeting of 6 May 2004 the Assistant Borough Solicitor (Community Services) gave a presentation on the options available to the Council for assessing whether any compensation is payable in respect of Imperial Gardens. During the course of the Scrutiny more details of the Company's claim against the Council have become available. Misfeasance in public office by the Council is alleged. Solicitors acting for the potential claimant have indicated that damages in excess of £1m will be claimed.

Key Issues for Consideration:

Misfeasance in public office is a civil claim against the Council. It arises when either the Council or its officers misuse Council powers, or recklessly fail to exercise those powers and as a consequence a third party has suffered loss. Such an allegation is very serious and involves bad faith on the part of the Council. Such a claim would normally be heard in the High Court.

As previously advised, because of the nature of the proceedings any trial would be lengthy and incur heavy legal costs for both parties. It is not at this stage possible to give an estimate of the legal costs, but as an indication the Council would normally expect to incur costs of at least £10,000 for every day of a High Court hearing. It is unlikely that the claim would be heard for at least one year because of the nature of Court proceedings and the delays inherent in the legal process.

The only other option for resolving this claim would be Alternative Dispute Resolution (ADR). Two mechanisms are possible, both of which require the consent of both parties.

Mediation

This involves the appointment of an independent person who seeks to negotiate a solution that is acceptable to both parties, without necessarily seeking to apportion blame.

Mediation can be very useful in resolving disputes, but it is not recommended in this case for the following reasons:

1. Given the nature and seriousness of the claim of misfeasance in public office, it is highly unlikely that a compromise on this issue could be agreed.
2. Given the amount of the claim against the Council, it is highly unlikely that Council officers could recommend a substantial settlement where there has not been a finding of liability against the Council.
3. The Company is in liquidation. In law any compensation payable would first of all have to be paid to the Liquidator. If any money is outstanding after the debts of the Company have been paid, the remainder might then be paid just to the Company. It would, however, be necessary to involve the Liquidator in the mediation as the Liquidator might have to compromise claims brought by creditors of the company. This would inevitably complicate the mediation process.

Arbitration:

This involves the appointments of an independent person who is an accredited arbitrator certified by the Institute of Arbitration. This person could be appointed by, for example, the Bar Council. His or her task would be to adjudicate on whether the Council is guilty of misfeasance in public office and, if so, whether compensation is payable by the Council and, if so, to whom it is payable.

The terms of the arbitration would have to be agreed by both parties. The arbitrator would set the procedures to be followed in the arbitration so as to resolve the dispute speedily. The arbitrator can specify which documentation is to be disclosed by both parties and also set a limit on the legal costs to be incurred by each party in preparing its case. The arbitrator can also limit the length of the hearing.

This would enable the dispute to be resolved much more quickly than through a High Court trial. The cost of the arbitration could be borne by the Council.

However, as previously advised, arbitration is only possible if both parties consent to the process and agree to be bound by the arbitrator's decision. This is because of the very limited possibility of appealing the decision. Sections 68 and 69 of the Arbitration Act 1996 only enables a party to seek permission from the High Court to appeal the arbitrator's award in the following circumstances:

- (i) There has been a serious procedural irregularity in the conduct of the arbitration causing injustice.
- (ii) The arbitrator has made an error of law that is material to his decision.

The limited grounds of appeal are more restricted than those that would apply to a decision of the High Court. Nonetheless, it is considered that arbitration offers the best prospect of resolving the claim as quickly as possible, whilst recognising the fiduciary duty of the Council to safeguard public funds.

Comments of the Director of Finance

Financial information obtained by the Director of Finance has been referred to in the body of this report.

Background Documents:

Background Papers: OSC Reports of 5.04.04, 6.05.04 and 13.05.04
Public Documents available at Companies House

Held At: Town Hall

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Community Services

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Key decision? No

Consultation with other Officers

Borough Solicitor & Secretary	Yes	Yes
Chief Finance Officer	Yes	Yes