
From: Branks Kirsten
Sent: 05 December 2018 14:49
To: Williams Alex
Cc: Brown Andy (Corporate Affairs); Ritchie Charles; Carter Howard; Tagg Ella (ST); Thomson Linda
Subject: RE: Garden Bridge: draft note and attachments - TfL restricted

Alex

Mike has confirmed he is content with both recommendations. Please do confirm with City Hall and the DfT, and also provide the draft letter for Tom Copley at the appropriate time.

Many thanks
Kirsten

Kirsten Branks

PA to Commissioner

Phone: 0203 054 8904 (auto 88904)

11Y8, Palestra, 197 Blackfriars Road, London SE1 8NJ



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From: Williams Alex
Sent: 30 November 2018 17:51
To: Brown Mike (Commissioner)
Cc: Brown Andy (Corporate Affairs); Ritchie Charles; Carter Howard; Branks Kirsten; Tagg Ella (ST); Thomson Linda
Subject: FW: Garden Bridge: draft note and attachments - TfL restricted

Dear Mike,

Two points on the Garden Bridge, for your consideration:

Request for payment against the underwriting of cancellation costs

We talked recently about the latest position with the Garden Bridge Trust's request against the underwriting of cancellation costs, which the DfT agreed to provide (up to a maximum of £9m) from their share of funding in the case that the project did not proceed.

We have been in discussion with the Garden Bridge Trust for a number of months now, and have reached a position where their request is both significantly lower than the maximum possible amount, and also - through working closely with the Trust to minimise their exposure - much lower than their initial estimate of how large a claim could be.

We have now reached a point where we feel able to make a recommendation for payment against that request. This is set out in the attached paper, with supporting appendices, for your consideration.

If you would like to discuss any of this then please say and we can set up some time to do so.

If you were to approve the recommendations then the next step would be for us to confirm with the GLA and the DfT that this is the course of action we plan to take, to give them the opportunity to comment before we proceed with any payment.

Legal advice on whether we could prevent future or recover past payments to the Trust

You'll remember that there has been the separate but relevant question raised recently about whether the Trustees of the Garden Bridge Trust have breached their duties, and whether that would give us or the DfT any recourse to either withhold future payments or recover past payments.

We have taken advice from Robert Pearce QC, a specialist in charity law which is attached and referred to in more detail in the attached paper. The advice is fairly conclusive in saying that there is no reasonable prospect of TfL recovering or not paying money due to the Trust under the funding arrangements.

If you were to approve the recommendations in the paper and we were to proceed to make the payment, I would suggest that you send a letter to Tom Copley AM to explain our conclusions both on the payment and the legal point, shortly before we make the payment itself.

Many thanks,

Alex Williams | Director of City Planning

Transport for London | 9th Floor, 5 Endeavour Square, Westfield Avenue, Stratford, London E20 1JN

Telephone Number: 020 3054 7023 | Email: alexwilliams@tfl.gov.uk



Garden Bridge: Report on Underwriting Claim

Recommendation

- 1. The Commissioner is asked to approve the payment of up to £5,490,193 to the Garden Bridge Trust, in settlement of sums due under the £9million underwriting facility provided by TfL to the Trust. This is on the basis of the following:**
 - a first payment of £5,004,011 on account of the Exit Payment – which is calculated on the basis that the Trust first uses all its available cash reserves to meet liabilities with the exception of a cash balance of £50,000 that the Trust will retain as working capital to meet direct Trust costs up to closure of the Trust ;**
 - A four month period then follows in which the Trust can claim (with satisfactory evidence) for additional liabilities arising, including (i) estimated ongoing/future liabilities of £143,514 and (ii) provision for contingent liabilities of £342,688;**
 - The Trust has indicated it does not expect the total Exit Payment to exceed £5,490,193, and it is anticipated that it will be lower because the estimate of contingent liabilities is considered to be high. Note that further authority would be sought if this figure was exceeded;**
 - The Trust will provide evidence to us of each payment it makes.**

- 2. The Commissioner is asked to approve an adjustment to the terms of the underwriting facility to take account of the mechanism set out above.**

Background

Under the terms of the Deed of Grant dated 2 July 2015, as subsequently varied, TfL agreed to provide £40million of grant funding to the Trust for the Garden Bridge Project. This £40million was to be made up of £30million of funds from the Department for Transport (held by TfL), and £10million of TfL funds. In addition, a £20million loan facility was made available by TfL to the Trust under the Loan Facility Agreement dated 13 November 2015.

On 30 September 2016, TfL and the Trust entered into a Variation to the Deed of Grant and the Loan Facility Agreement. This Variation provided for an extension to the previously agreed underwriting facility, capped at £9million, available until the point that the Trust's main contractor commenced construction of the Garden Bridge. The underwriting was agreed by the DfT, and given out of DfT's funding contribution, held by TfL. The purpose of the underwriting was to enable the Trust to continue

fundraising, and incurring costs, secure in the knowledge that it would be able to meet its liabilities in the event that the Project was terminated.

To date, the money paid to the Trust by TfL (on behalf of TfL and DfT) totals £37.39million. This is split £13.45million from DfT and £23.94million from TfL. Any money paid to the Trust under the underwriting facility will be from DfT money (held by TfL).

Subsequently – at a meeting on 9 August 2017 – the Trustees of the Garden Bridge Trust took the decision to terminate the Project. On 12 October 2018 the Trust submitted a claim to TfL for a maximum of £5,490,193, updating information previously provided on 26 July 2018. The 12 October email, with Calculation of Exit Payment Schedule, are attached as Appendix 1 and Appendix 2. The evidence provided to us includes the identity of the donors, with full transparency, as we required.

The Trust has a contractual right to claim against TfL under the underwriting facility. Following questions raised about the actions of the Trustees – in particular, whether they had breached a duty to act with reasonable skill and care in concluding the Trust's construction contract with Bouygues – we sought advice from Robert Pearce QC. His opinion is that the Trustees did not owe TfL a duty to exercise reasonable skill and care to avoid causing loss to TfL (or DfT). There would appear to be little legal merit in seeking to recover costs from the Trust (or the Trustees), nor in withholding future payments to which we have committed contractually. Given the expense in pursuing the costs further we do not believe that further review is justified.

Accordingly, and as described in the Recommendation section above, it is our intention to make a payment on account of the Exit Payment of £5,004,011, with a four month period following in which further, evidenced applications for payment against the Exit Payment maximum may be made by the Trust.

Requirements of the Underwriting Facility

Under the terms of the Variation, the Trust is entitled to a single payment not exceeding £9million where it satisfies the following conditions:

- 1. The Trust has provided TfL with notice in writing of the decision of its trustees that the Project will not proceed, together with evidence of this decision (e.g. a copy of the minutes of the meeting of the trustees in which the decision was made);**
- 2. The Trust has provided TfL with a figure for the payment it requires (the "Exit Payment"), which must first deduct any cash reserves available to meet its commitments;**

3. **The Trust has provided TfL with such evidence as TfL reasonably requires to support the calculation of the Exit Payment including copies of documentation creating a legal obligation on the Trust to make payments to third parties (e.g. a notice of termination under the main construction contract, unpaid invoices from contractors for work to date, etc.) and evidence of its cash reserves.**

Once these conditions have been satisfied, TfL is obliged to transfer the Exit Payment to the Trust within 10 Working Days.

Evidence Provided

Condition 1

The Trust has provided a copy of the minutes of the Trustees' meeting on 9 August 2017 in which the "Trustees unanimously agreed to terminate the project to build the Garden Bridge and to wind-up the Trust".

Condition 2

In an email dated 12 October 2018 from the Deputy Chair Paul Morrell the Trust has provided TfL with a figure of **£5,490,193** for the Exit Payment. However, a number of points should be noted:

- The initial claim on account of the Exit Payment is for £5,004,011;
- This figure is calculated on the basis that the Trust first uses all of its available cash reserves to meet liabilities, with the exception of a cash balance of £50,000 that they will retain as working capital to meet direct Trust costs up to closure of the Trust;
- £143,514 of this figure is an estimate of ongoing/future liabilities, made up of legal, accountancy/audit and other professional service fees; and
- The Trust has made a contingency provision of £342,668 to cover other liabilities that may arise (although this is not considered to be likely).

As set out earlier in this paper the Trust would be entitled to make further (properly evidenced) claims against the Exit Payment for a period of four months after the payment on account, in respect of the ongoing and future liabilities and contingent liabilities, but the total of any payments is not expected to exceed a maximum of £5,490,194.

Condition 3

Over a period of months the Trust has provided information about the various elements making up its total claim for the Exit Payment. This information is summarised in Appendix 3.

The information provided has been examined and assessed and we are content that the sum claimed for the Exit Payment has been satisfactorily justified by the Trust.

20 November 2018

Brown Andy (Corporate Affairs)

From: Paul Morrell <paul.morrell@btinternet.com>
Sent: 12 October 2018 15:55
To: Brown Andy (Corporate Affairs); Ritchie Charles
Cc: Williams Alex; Breden Julie; Bee Emmott; Jim Campbell
Subject: Exit Payment
Attachments: Calculation of Exit Payment v2, 12.101.8.xlsx; Supporting documents 2.pdf

Following recent discussions and correspondence, we attach a substitute calculation of the Exit Payment, which has been updated since the application made with our letter dated 26 July.

This has been structured in a way that creates an audit trail back to the July application, but a summary of changes made since that time (using the references of the attachment) is as follows:-

- (1) Item 1.13: on further investigation, and as per my earlier email, revised legal advice in respect of the donation made by Kai-Yin Lo in 2014 is that it appears to be unconditional, and is therefore not refundable. It is possible that the donor may be able to refer to additional statements made at the time of making the donation that establishes it as conditional upon the project proceeding, but pending that we propose that it is dealt with as a contingent liability. Kai-Yin Lo is also named as a donor under the agreement made with Hong Kong Friends, and any donation that she made via that route will be refundable, as the agreement makes clear that it was conditional upon completion of the project.
- (2) Item 2.6: we have had no response to our attempts to get an invoice from Parsons Brinckerhoff, although we have previously acknowledged the liability, so have transferred this to section 6.0 dealing with ongoing/ estimated liabilities.
- (3) Item 2.9: an invoice for this additional fee relating to queries on the 2016/17 Annual Report and Accounts is included in the attached file of supporting documentation.
- (4) Items 4.4.1-7: these are amounts paid since the cut-off date for the previous application (24 June), accounting for the reduction in the balance of cash held. Again, invoices are included in the attached file of supporting documentation, where not previously provided. Item 4.5.6 relates to the following formerly directly employed staff who are retained on a call-off basis for the closure process (Unit One = Bee Emmott, Executive Director; Data Driven = Jim Campbell, Finance Director; RMG = Jane Hywood, Accounts Manager).
- (5) Item 4.5: bank statements totalling the amount of cash reserves held by the Trust are also included in the attached supporting documentation, as follows:-

	£
• Citi 1	2,772,332.30
• Citi 2	5,421.90
• Metro 1	607.60
• Metro 2	103,879.23
• Total	£2,882,241.03

- (6) Item 4.8: this is the reserve to be retained as cash at bank to handle direct staff costs and related expenses, as estimated through to the date of closure - which we have taken as the end of December.
- (7) Item 5.0: in accordance with our discussions, this represents the current application for a payment under the Deed of Variation, and further applications will be made periodically as and when costs are ascertained and supported by evidence. We would hope, however, that these can be handled within an approval envelope that permits approval of invoices at working officer level. Drawdowns against the cash reserve of £50,000 for Trust direct costs in organising/supporting the audit/solvent liquidation/closure process will also be accounted for in the same way, with any amount remaining at closure then being taken into the final balancing calculation.
- (8) Third party costs in the interim (principally professional fees re the same audit/liquidation/closure process) would then be the subject of supplementary applications under the Guarantee.
- (9) Item 7.0: we have adjusted the contingency to keep the bottom line the same as the July application, and you will see that there has been some reduction as a consequence of additional legal and accountancy/audit fees and prolonged operation of the Trust.

In summary, we believe this accords with our discussions and that all conditions of the Deed of Variation have been met. As you know, the Deed provides for payment to be made within 10 days of the satisfaction of all conditions, so we hope we can now regard that clock as counting down, and look forward to agreeing arrangements for the payment in, and for subsequent payments out to be made, with your knowledge and approval, to settle ascertained liabilities.

Regards
Paul Morrell
for and on behalf of Garden Bridge Trust

Click [here](#) to report this email as SPAM.

Commercially confidential

Garden Bridge Trust: Calculation of Exit Payment under 28 September 2016 Deed of Variation

Ref	Item	£	£	£
1.0	Donor repayments (excluding donations ring-fenced for repayment, held at bank)			
1.1	Bloomberg		2,273,321	
1.2	Garfield Weston Foundation		2,000,000	
1.3	Petr Aven		800,000	
1.4	Victor Lo (Hong Kong Friends)		500,000	
1.5	The Taylor Family Foundation		450,000	
1.6	Glencore		375,000	
1.7	United Way Foundation		103,818	
1.8	Aldama Foundation		50,000	
1.9	Michael Gross (Euston Estates)		33,000	
1.10	Royal Mail Group		25,000	
1.11	Ian & Carol Sellars		21,000	
1.12	Helen & Tim Throsby		21,000	
1.13	Kai-Yin Lo: transferred to contingent liabilities		-	
1.14	Jennifer McSweeney		20,000	
1.15	Caroline Townsend		17,000	
1.16	Barratt West		17,000	
1.17	Peggy Yeoh/Lee Seng Hung		17,000	
1.18	Lelia Govi		15,000	
1.19	Jane & Roger Madelin		15,000	
1.20	Mayank Patel		15,000	
1.21	Michael Burton		10,000	
1.22	Susan Li		10,000	
1.23	Florence St George		10,000	
1.24	Electra Toub		10,000	
1.25	Tony Chambers (Wallpaper)		10,000	
1.26	Lisa & Lance West		3,200	
1.27	Lawrence Sword		2,200	
1.28	Total of donor repayments			6,823,539
2.0	Add other ascertained liabilities, unpaid to 10 October 2018			
2.1	Consultant team - Arup (paid: see item 4.4.1)		-	
2.2	Main Contractor - Bouygues/Cimolai JV		774,550	
2.3	Third party - ITV		137,907	
2.4	Third party - City of Westminster		32,300	
2.5	Third party - London Borough of Camden		57,500	
2.6	Third party - Parsons Brinckerhoff: transferred to estimated liabilities		-	
2.7	Legal fees - Macfarlanes (paid - see item 4.4.2)		-	
2.8	Gift Aid to be repaid		7,750	
2.9	Crowe - invoice for CC letter		12,000	
2.10	Total of other unpaid ascertained liabilities			1,022,007
3.0	Current total of all ascertained liabilities			7,845,546

3.0	Total of all ascertained liabilities (brought forward)			7,845,546
4.0	Less amount covered by balance of Trust cash			
4.1	Total cash at bank as at 27 June 2018		2,989,975	
4.2	Add interest accrued		226	
4.3	Sub-total		2,990,201	
4.4	Less amounts paid since 27 June 2018			
4.4.1	Arup (invoice forwarded previously)	7,605		
4.4.2	MacFarlanes (invoice forwarded previously)	32,737		
4.4.3	BDB	8,436		
4.4.4	CCW	32,400		
4.4.5	PwC	2,340		
4.4.6	Trust support costs	23,967		
4.4.7	Sundry standing orders re IT and insurance	475		
4.4.8	Total paid since 27 June 2018		107,960	
4.5	Total cash at bank as at 10 October 2018		2,882,241	
4.6	Add cash held by BDB for third party undertakings		9,294	
4.7	Total cash available		2,891,535	
4.8	Less cash retained for direct Trust costs to closure		50,000	
4.9	Cash to be set against ascertained liabilities			2,841,535
5.0	Total of first payment			5,004,011
6.0	Ongoing/future liabilities (estimated)			
6.1	Third party legal fees (re IBM and ITV)		9,294	
6.2	Legal fees - BDB		8,600	
6.3	Legal fees - Macfarlanes		3,000	
6.4	Audit fees, 2016/17 - Crowe (paid - see item 4.4.4)		-	
6.5	Audit fees, 2017/18 - Crowe		28,140	
6.6	Third party - Parsons Brinckerhoff		22,480	
6.7	Liquidation/advisory fees - PwC		55,000	
6.8	Accountancy/audit support staff costs: see item 4.8		-	
6.9	Document filing/storage		12,000	
6.10	Escrow Agent's fees/Bank charges		5,000	
6.11	Total of estimated liabilities			143,514
7.0	Provision for contingent liabilities			342,668
8.0	Estimated total of Exit Payment at closure			5,490,193

GBT - 12 October 2018

Appendix 3

Claimant	Type of Claim	Nature of Claim	Value £	Evidence	Assessment
Donor Repayments					
Bloomberg	Donor	Repayment of funds received under the terms of a £3.2m grant funding agreement.	2,273,321	Copy of grant agreement provided, and a (June 2018) calculation of interest.	Accepted
Garfield Weston Foundation	Donor	Repayment of donation received under terms of grant funding letter (as varied).	2,000,000	Copy of grant funding letters provided.	Accepted.
Petr Aven	Donor	Repayment of grant funding for a specific purpose (creation of Garden Number 13).	800,000	Copy of letter agreement provided. Grant was for a specific purpose which was not fulfilled.	Accepted
Victor Lo (Hong Kong Friends)	Donor	Repayment of donation.	500,000	Correspondence in advance of payments states that donation is to be repaid if the project is not completed.	Accepted
The Taylor Family Foundation	Donor	Settlement of claim from donor for repayment of £655k donation made pursuant to a £2m grant agreement.	450,000	Grant agreement and GBT's legal advice provided.	Accepted
Glencore	Donor	Repayment of donation for a specific purpose (purchase of a copper-nickel alloy).	375,000	Correspondence provided which shows donation was made subject to obligation repay.	Accepted
United Way Foundation	Donor	Repayment of \$150k donation.	103,818	Grant agreement provided. Includes repayment obligation.	Accepted
Aldama Foundation	Donor	Repayment of donation.	50,000	Correspondence provided shows GBT agreed donation would be repaid if project not progressed.	Accepted

Michael Gross (Euston Estates)	Donor	Repayment of donation.	33,000	Correspondence provided shows GBT agreed donation would be repaid if project not progressed.	Accepted
Royal Mail Group	Donor	Repayment of donation for bench.	25,000	Obligation to repay for non-performance.	Accepted
Ian & Carol Sellars	Donor	Repayment of auction bid for bench.	21,000	Correspondence provided shows GBT agreed donation would be repaid if project not progressed.	Accepted
Helen & Tim Throsby	Donor	Repayment of auction bid for bench.	21,000	Correspondence provided shows GBT agreed donation would be repaid if project not progressed.	Accepted
Jennifer McSweeney	Donor	Repayment of donation for balustrade engraving.	20,000	Evidence provided (file note) of discussions with donor confirming donation would be repaid if project did not progress.	Accepted
Caroline Townsend	Donor	Repayment of bid for "Garden Bridge Experience" auction prize.	17,000	Prize not delivered, contractual obligation to repay.	Accepted
Barratt West	Donor	Repayment of bid for "Garden Bridge Experience" auction prize.	17,000	Prize not delivered, contractual obligation to repay.	Accepted
Peggy Yeoh	Donor	Repayment of bid for "Garden Bridge Experience" auction prize.	17,000	Prize not delivered, contractual obligation to repay.	Accepted
Lelia Govi	Donor	Repayment of donation.	15,000	Correspondence provided shows GBT agreed donation would be repaid if project not progressed.	Accepted
Jane & Roger Madelin	Donor	Repayment of auction bid for balustrade engraving.	15,000	Evidence provided (file note) of discussions with donor confirming donation would be	Accepted

				repaid of project did not progress.	
Mayank Patel	Donor	Repayment of donation for balustrade engraving.	15,000	Evidence provided (file note) of discussions with donor confirming donation would be repaid of project did not progress.	Accepted
Michael Burton	Donor	Repayment of donation for balustrade engraving.	10,000	Evidence provided (file note) of discussions with donor confirming donation would be repaid of project did not progress.	Accepted
Susan Li	Donor	Repayment of donation for bench.	10,000	Correspondence provided shows GBT agreed donation would be repaid if project not progressed.	Accepted
Florence St George	Donor	Repayment of donation for balustrade engraving.	10,000	Evidence provided (file note) of discussions with donor confirming donation would be repaid of project did not progress.	Accepted
Electra Toub	Donor	Repayment of donation for balustrade engraving.	10,000	Evidence provided (file note) of discussions with donor confirming donation would be repaid of project did not progress.	Accepted
Tony Chambers (Wallpaper)	Donor	Repayment of donation.	10,000	Evidence provided (file note) of discussions with donor confirming donation would be repaid of project did not progress.	Accepted
Lisa & Lance West	Donor	Repayment of auction bid "table tennis with Boris"	3,200	Prize not delivered, contractual obligation to repay.	Accepted
Lawrence Sword	Donor	Repayment of auction bid "breakfast on the bridge"	2,200	Prize not delivered, contractual obligation to repay.	Accepted

Other Ascertained Liabilities, Unpaid to 10 October 2018					
Bouygues/ Cimolai JV	Main Contractor	Amount outstanding	774,550	Evidence provided of final statement of 14.06.18 with amount outstanding	Accepted
ITV	Third Party	Costs	137,907	Evidence provided – latest ITV statement of 31.05.18 shows this amount outstanding.	Accepted
City of Westminster	Third Party	Costs of work carried out by Westminster in respect of a s.106 planning agreement (which was not completed)	32,300	Invoice provided. GBT have accepted this is payable.	Accepted
London Borough of Camden	Third Party	Costs of work carried out by LB Camden for LB Lambeth in respect of a s.106 planning agreement (which was not completed)	57,500	Invoice provided. GBT has accepted that this is payable.	Accepted
Gift Aid to be repaid	HMRC	Tax	7,750	We are satisfied this is payable following explanations provided by GBT. The liability to repay 25% Gift Aid crystallises on the return of two donations totalling £31,000 (Sellars and St George).	Accepted
Crowe	Accountants	Invoice for Charity Commission related work	12,000	Copy of invoice provided.	Accepted

Opinion

1. I am asked to advise Transport for London (TfL):
 - (1) whether the directors of Garden Bridge Trust (GBT) owed TfL and the Department of Transport (DfT), as grant funders, a duty to exercise reasonable skill and care;
 - (2) if so, what are TfL's and DfT's prospects of:
 - (a) establishing that the directors failed to discharge that duty, and in consequence
 - (b) recovering from the directors money already paid to GBT, and withholding from GBT further payments;
 - (3) whether there are any other remedies available to TfL or DfT to recover, either from GBT or its directors, payments it has made to GBT, or to justify withholding further payments from GBT.

2. I have been provided with copies of:
 - (1) the Articles of Association of GBT;
 - (2) the contractual documents described below;
 - (3) a report of an investigation by the National Audit Office into DfT's funding of the Garden Bridge, dated 11 October 2016;
 - (4) a case report on GBT by the Charity Commission, dated 28 February 2017;
 - (5) a report on the Garden Bridge by Dame Margaret Hodge, published on 7 April 2017;
 - (6) a letter from Lord Davies, the Chair of GBT, to Lady Hodge, dated 12 April 2017;
 - (7) a partially redacted Opinion of Jason Coppel QC, dated 2 April 2018;
 - (8) a letter from Mr Tom Copley, an Assembly Member, to Mr Mike Brown, the TfL Commissioner, dated 6 August 2018.

3. I have also discussed the matter in consultation with senior officers of TfL. The information I have derived from these sources has enabled me to form a general understanding of the course of events, but I was not asked to conduct a full review of

the project, comparable to that conducted by Lady Hodge. I have not reviewed TfL's files.

4. A summary of my conclusions is at the end of this advice.

Background

5. TfL is a body incorporated by the Greater London Authority Act 1999. GBT is a charitable company limited by guarantee whose objects are (in summary) the provision and maintenance of a garden bridge.

The Deed of Grant

6. On 2 July 2015 GBT and TfL entered into an agreement contained in a Deed of Grant. The following is summary of its most material provisions.
7. The Deed recited that GBT had been established to deliver a garden bridge; that the Mayor of London had directed TfL to provide £30 million of funding to the project; that the Secretary of State for Transport had agreed to provide £30 million of additional funding to TfL on the basis that TfL would apply this additional funding towards the grant; and that DfT and TfL had agreed that TfL would apply their contributions to GBT on a pari passu basis, taking account of the amounts already spent by TfL on the project.
8. By clause 2.1, GBT made representations and gave undertakings. These included that:
 - (1) All information, documents and accounts given by GBT to TfL for appraisal in relation to the project or for the purposes of the agreement were, when given, complete, accurate and not misleading; no change had occurred since the date on which such information was given that rendered the same untrue; and there had been no material adverse change in GBT's business, assets, operations or prospects since such information was given (2.1.6).
 - (2) GBT was not aware, after due enquiry, of anything which materially threatened the delivery and completion of the project in accordance with the agreement and the programme (2.1.9).

9. By clause 2.2, the representations and undertakings were to be deemed to be repeated by GBT when each instalment of grant was payable as if made with reference to the facts and circumstances existing at the date of payment of the instalment. By clause 2.3, GBT was required to inform TfL in writing if any information previously supplied became misleading. By clause 2.4, if there were any change in GBT's circumstances that would cause any of the representations and undertakings to be breached if they were repeated at that time, GBT was required to inform TfL of that in writing.

10. GBT's principal obligations as regards the execution of the project were, in summary, as follows:
 - (1) By clause 3, GBT was required to select a main contractor following a robust procurement process, and to do so on the basis of overall best value.
 - (2) By clause 4, GBT was to manage and be responsible for the risk of costs overrun in relation to the project.
 - (3) By clause 9.1, GBT was to "diligently progress the Project in accordance with the terms of this Agreement".
 - (4) Clause 9.2 provided that GBT would "subject to meeting the post-contact award Conditions of Payment set out in Part 1 of Schedule 2, promptly and efficiently complete the Project in accordance with the Specification and the Programme and all other requirements for delivery of the Project".

11. TfL's principal obligations as regards payment were, in summary, as follows:
 - (1) By clause 16.1, TfL agreed to pay the grant in accordance with Schedule 2. Schedule 2 was divided into two parts. Part 1 was headed "Conditions of Payment" and Part 2 was headed "Payment Profile".
 - (2) Part 2 itemised sums totalling £60 million, divided into four categories: the amount spent to date; pre-contract award payments; construction payments; and a final payment.
 - (3) Part 1 set out general principles of funding, and set out the conditions for the making of payments. Pre-contract payments were to commence within 10 days of the date of the agreement or on satisfaction of four conditions, whichever was the later. Post-contact payments were to commence on award of the main construction contract, subject to satisfaction of six conditions of payment.

- (4) Four of these conditions were that:
- (a) “[GBT] has demonstrated to TfL’s satisfaction that it has secured or is able to secure a sufficient level of funding, including the Grant from TfL, to cover the costs of construction of the Garden Bridge”.
 - (b) “[GBT] has demonstrated to TfL’s satisfaction that it has secured or is able to secure all necessary consents needed to deliver the Project”.
 - (c) “[GBT] has demonstrated to TfL’s satisfaction that an appropriate project go/no go gateway review has been passed, including proper assessment and management of risks”.
 - (d) “[GBT] has demonstrated to TfL’s satisfaction that it has secured a satisfactory level of funding to operate and maintain the Garden Bridge once it is built for at least the first 5 (five) years”.

12. Other relevant provisions of the agreement were:

- (1) Clause 17, which enabled TfL to reduce, suspend or withhold payment of grant in specified circumstances, including if circumstances arose or events occurred that in TfL’s opinion (acting reasonably) adversely affected GBT’s financial standing or ability to deliver the project in accordance with the agreement or resulted in a risk that the project will not be completed.
- (2) Clause 18, which entitled TfL to require repayment of the grant in certain circumstances. These included where there had been an overpayment of grant, save to such extent that the overpayment had been spent or legally committed and GBT did not know and could not know that an overpayment had been made, and where there has been financial irregularity, impropriety or negligence in relation to the operation of the project, such that part of the grant has been used for improper or fraudulent purposes.
- (3) Clause 23, which entitled TfL to terminate the agreement in specified events. These included financial irregularity, impropriety or negligence in relation to the operation of the project which was not rectified within a timescale (if any) reasonably specified by TfL, and the making of representations and undertakings pursuant to clause 2.1 which were incorrect or untrue in a material respect. By clause 24, termination of the agreement was expressed to be without prejudice to accrued rights and liabilities.

Variation of the Deed of Grant

13. It was subsequently agreed that £20 million of the grant of £60 million was to be converted into a loan, to be made by TfL to GBT. By a Deed of Variation dated 13 November 2015 the provisions of the Deed of Grant were varied to reflect this. The variations included substituting a new payment profile in Schedule 2 part 2 of the Deed of Grant, comprising sums totalling £40 million. The original four categories into which these payments had been divided were now replaced by five: the amount spent to date; pre-contract award payments; preliminary activities payments; construction payments; and a final instalment. The new preliminary activities payments were payable subject to the following condition (clause 6):

“In respect of reach preliminary activity payment, that [GBT] has demonstrated to TfL’s satisfaction that there is a realistic prospect that the Conditions of Payment in respect of payments during the construction phase will be met”.

The conditions referred to were those mentioned in paragraphs 11 (3) and (4) above.

14. The construction payments were varied to be a single payment of £7 million payable within 10 days of the award of the construction contract, but still subject to the conditions of payment set out in the Deed of Grant (clause 7).
15. The loan was regulated by a Loan Facility Agreement between TfL and GBT, also dated 13 November 2015. This provided that GBT was to be able to draw down the loan in two instalments of £10 million, the first to be available seven months after the date of the award of the main construction contract and the second nineteen months after the date of the award. The provision of the loan was subject to seven conditions of payment, of which the first six corresponded to the conditions which the Deed of Grant applied to construction payments. The additional condition was:

“GBT has demonstrated to TfL’s satisfaction that it has taken all appropriate steps to reduce the Total Project Cost, while maintaining the integrity of the Project and to actively continue to seek private funding prior to and during the construction phase

towards the capital cost of the project in order to minimise its recourse to the Loan Facility”.

16. The Loan Facility Agreement entitled TfL to require immediate repayment of the loan in certain circumstances, including where there had been financial irregularity, impropriety or negligence in relation to the operation of the project.

The construction contract

17. In February 2016 GBT entered into a contract with Bouygues Travaux Publics and Cimolai SpA for the construction of the bridge (the construction contract).

Events subsequent to the construction contract

18. By a written agreement dated 25 April 2016 the Deed of Grant was varied so that during May 2016 TfL would pay GBT an exit payment of up to £1.3 million, on certain conditions. These were, in summary, that GBT had decided that the project would not proceed, and that GBT had provided TfL with such evidence as TfL reasonably required to support the calculation of the payment, including evidence of a legal obligation of GBT to make payments to third parties. The agreement provided that all the other terms of the Deed of Grant remained the same. The evident purpose of the agreement was to require TfL to make payments to GBT to enable GBT to meet its legal obligations in the event that the project was cancelled. This agreement expired without the obligation to make the exit payment arising.
19. On 7 May 2016 Sadiq Khan was elected Mayor of London in succession to Boris Johnson.
20. By a further written agreement dated 27 May 2016 the Deed of Grant and the loan facility agreement were further varied to provide for a newly-defined exit payment. The period covered by the agreement was 1 June to 30 September 2016, and the maximum amount of the exit payment was the substantially greater sum of £15 million, which was allocated as to about £3.5 million to the Deed of Grant and as to about £11.5 million to the loan facility. The agreement provided that on payment of the exit

payment both the Deed of Grant and the loan facility agreement will “terminate forthwith”, which I understand to mean that GBT would not be liable to repay the sums paid under them. The agreement provided that all the other terms of the Deed of Grant and the Loan Facility Agreement “remain the same”. This agreement also expired without the obligation to make the exit payment arising.

21. By a further written agreement dated 28 September 2016 the Deed of Grant and the loan facility agreement were again varied to provide for a newly-defined exit payment. The period covered by the agreement was until the main contractor began construction of the bridge. The maximum amount of the exit payment was revised down to £9 million, which was allocated as to £2.6 million to the Deed of Grant and as to £6.4 million to the loan facility. The agreement again provided that on payment of the exit payment both the Deed of Grant and the loan facility agreement will “terminate forthwith”, and that all the other terms of the Deed of Grant and the Loan Facility Agreement “remain the same”. This is the only one of the three agreements for the making of an exit payment that remains in force. I henceforth refer to it as “the Exit Payment Agreement”.
22. On 7 April 2017 Lady Hodge published a review of the project. Among other conclusions, she concluded that it was better for the taxpayer to accept a loss from terminating the project than to risk additional demands if the project proceeded.
23. In the course of her review, Lady Hodge considered the decision to award the main construction contract¹. She stated that she was shocked that GBT entered into the contract with so many issues unresolved, and that it was astonishing that the Mayor, TfL and DfT did not stop GBT doing so. She described the decision to enter into the contract as “risky and premature”. She stated that it seemed that there was an incentive to get the project to the point of no return, and that “letting the contract was the most likely way of securing the building of the bridge, whatever the implications for value for money or the taxpayer”. She considered that GBT, TfL and the government were all responsible, formally or informally, for taking substantial risks by allowing the contract to be agreed.

¹ Paragraphs 116 – 122.

24. By a letter dated 12 April 2017 to Lady Hodge, Lord Davies, the chairman of GBT, demurred from her criticism of the decision to enter into the construction contract. He stated: “We have always ensured that we had the necessary resources to meet our obligations and that there were exit points throughout”.
25. According to the report and financial statements for GBT for the period ending 30 March 2017, on 28 April 2017 the Mayor confirmed that he would not sign the guarantee for annual maintenance costs of the bridge that was a condition of the planning permissions for it, and the directors of GBT subsequently resolved to wind up the project.
26. I am instructed that the project has consumed £37.4 million of public money and that GBT has made a demand to TfL for a substantial exit payment under the Exit Payment Agreement.

Questions arising

Turning to the questions I am asked:

- (1) Whether the directors of GBT owed to TfL and DfT a duty to exercise reasonable skill and care**

Position of DfT

27. DfT provided its contribution to the project by an increase in the grant it provided to TfL, and DfT was not a party to the contractual documents described above. In those circumstances, DfT is unlikely to be in a better position than TfL to pursue remedies against the directors of GBT. Further, the report of the National Audit Office referred to above does not, in my view, reveal any grounds on which DfT could advance a stronger claim against the directors of GBT than TfL could. Accordingly, I proceed on

the basis that DfT's position is no stronger than that of TfL. In what follows, in the interests of simplicity, I shall, in general, not make separate reference to DfT.

Position of TfL

28. The directors of GBT did not incur contractual liability to TfL under the terms of the agreements, summarised above, between TfL and GBT, because the directors were not parties to those agreements.
29. The directors of GBT owe duties to GBT, arising under the provisions of Part 10 Chapter 2 of the Companies Act 2006. These include duties to act within their powers; to act in a way that the director considers, in good faith, would be most likely to achieve the company's purposes; to exercise independent judgment; and to exercise reasonable care, skill and diligence². These duties are, however, owed to the company: see section 170 (1). They are not owed to third parties, such as TfL.
30. A person may also in the law of tort become under a duty to exercise reasonable care towards another, and a breach of that duty which causes loss can give rise to a liability to pay damages. The circumstances in which a duty arises to exercise reasonable care to avoid causing economic loss (i.e. loss not resulting from physical damage) to another are restricted in various ways, one of which is that it is, in general, necessary, to find an assumption of responsibility towards the other. In the absence of special factors, a director of a company would not be held to have assumed direct responsibility to a third party dealing with the company, so as to give rise to a duty on the director to exercise reasonable care to avoid causing economic loss to that third party. I am not aware of any factors pointing to the directors of GBT having assumed such responsibility to TfL.
31. In my opinion, therefore, the directors of GBT did not owe TfL a duty to exercise reasonable skill and care to avoid causing loss to TfL.

² Companies Act 2006 sections 171 – 4.

(2) Tfl's prospects of:

- (a) establishing that GBT's directors failed to discharge that duty, and in consequence**
- (b) recovering from GBT's directors sums paid to GBT and withholding further payments to GBT on the ground of breach of that duty.**

32. Since I do not consider that the directors of GBT owed Tfl a duty to exercise reasonable skill and care to avoid causing loss to Tfl, these further questions do not arise.

(3) Other remedies available to Tfl to recover payments it has made to GBT, either from GBT itself or its directors, or to justify withholding further payments from GBT

33. I deal first with Tfl's possible remedies against GBT. I then consider whether, notwithstanding my opinion that the directors of GBT did not owe to Tfl a duty to exercise reasonable skill and care to avoid causing loss to Tfl, Tfl may be able to benefit from a claim brought against the directors by GBT itself.

Possible claims of Tfl against GBT

34. I first describe Tfl's possible remedies against GBT arising under the law of contract, then those arising in other ways.

Contract

35. For simplicity, I refer only to the Deed of Grant and the Exit Payment Agreement. The Loan Facility Agreement gives Tfl similar, but in some respects less extensive, remedies to those in the Deed of Grant, and if a remedy arose under the Deed of Grant it would then be necessary to see to what extent the position was replicated by the Loan Facility Agreement.

Express provisions

36. The Deed of Grant contains undertakings by GBT to TfL. The general effect of those undertakings was to require GBT to provide and to keep up to date full and accurate information about the project. If GBT breached any of those undertakings and the breach caused TfL loss, TfL could claim damages from GBT. I understand that TfL does not consider that GBT breached these undertakings, and I have not become aware of any grounds on which TfL could make a claim on this basis.
37. Clause 17 of the Deed of Grant enables TfL to withhold payment in certain circumstances. These include circumstances which give rise to a risk that the project may not be completed. Such circumstances have obviously arisen. The Exit Payment Agreement varies the Deed of Grant to provide for the making an exit payment out of the undrawn sums payable under the Deed of Grant, but it also provides that all other terms of the Deed of Grant “remain the same”. This gives rise to the question whether TfL can withhold the exit payment pursuant to clause 17 of the Deed of Grant, on the ground that the project will not be completed. I do not think TfL can do so: such a reading of the agreements would deprive the Exit Payment Agreement of all effect. In my opinion, the Exit Payment Agreement impliedly overrode clause 17 of the Deed of Grant to the extent necessary to enable the exit payment to be made.
38. Clause 18 of the Deed of Grant gives TfL a right to recover overpayments of grant in certain circumstances. Such circumstances could only arise if payments were made in excess of those provided for in the payment schedule, or if there were financial irregularity, impropriety or negligence in relation to the operation of the project. I understand that TfL does not consider that such circumstances have arisen, and I have not become aware of any grounds on which TfL could make a claim on this basis.

Implied term in the Deed of Grant to use reasonable care and skill

39. The Deed of Grant does not include a general obligation for GBT to exercise reasonable skill and care, although a number of provisions cover some of that ground. Section 13 of the Supply of Goods and Services Act 1982 provides that “In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is

an implied term that the supplier will carry out the service with reasonable care and skill.”. Section 16 of the Act provides that this duty can be varied by an express term in the contract that is inconsistent with it.

40. Assuming (as I think it is reasonable to do) that the Deed of Grant was “a relevant contract for the supply of a service” by GBT to TfL and that GBT was “acting in the course of a business”, it is clearly arguable that, insofar as not provided for or inconsistent with any of the express terms of the Deed of Grant, GBT owed TfL an implied duty to exercise reasonable care and skill in providing the services GBT was to provide by virtue of the Deed of Grant.
41. GBT’s principal obligations in the Deed of Grant as regards the execution of the project are summarised above. One of the most significant is in clause 9.1, which provides that GBT would “diligently progress the Project in accordance with the terms of this Agreement”. In so far as this is not already implicit in the word “diligently”, GBT was required to progress the Project in accordance with the terms of the Deed of Grant with reasonable care and skill. Many decisions would require the exercise of judgment, balancing the cost of a commitment against the progress it would achieve. The duty implied by section 13 of the Supply of Goods and Services Act 1982 required GBT to make such judgments with reasonable care and skill.
42. Lady Hodge’s review is strongly critical of GBT’s decision to enter into the main construction contract. Her findings are summarised above. I have not had access to the same materials as she had, and so it would not be appropriate for me to either endorse or contradict her findings on the issue.
43. I should, however, draw attention to arguments which I would expect GBT to raise if TfL made a claim against it based on the proposition that entering into the construction contract was a breach of GBT’s implied contractual duty to exercise reasonable care and skill.
44. First, entering into the construction contract did not of itself trigger an obligation for TfL to make payments. In order to become entitled to funds from TfL to meet liabilities under the construction contract, GBT had to satisfy the six pre-conditions to payment

in Schedule 1 Part 2 of the Deed of Grant or the seven such conditions in the Loan Facility Agreement. TfL had stipulated for these conditions to protect the funds for which it was responsible. GBT satisfied TfL that the conditions in the Deed of Grant were met³. GBT would be able to argue that its duty to exercise reasonable care and skill did not extend to preventing TfL become liable to make payments in accordance with conditions to which TfL had previously agreed.

45. Second, although I have not seen the construction contract, I am told that it contained provisions entitling GBT to terminate it. These are presumably the “exit points” referred to by Lord Davies in his letter of 12 April 2017. If that is correct, it would follow that entering into the construction contract would not take the project beyond the point of no return: it would only commit GBT to funding work on the project down to the first exit point. The judgment GBT had to make was, therefore, whether it was appropriate to incur that further degree of commitment.
46. Third, Lady Hodge finds that DfT and TfL were aware of GBT’s intention to enter into the construction contract. TfL has confirmed to me that it was aware of GBT’s intention to enter into the construction contract and of the “exit points” that the contract contained. Although Lady Hodge is critical of DfT and TfL’s failure to stop GBT entering into the construction contract, their prior knowledge of GBT’s intention to do so and their not having objected to GBT doing so would strengthen GBT’s argument that, in doing so, it complied with its duty to exercise reasonable care and skill.
47. In the light of these considerations, I am unable to conclude that a claim by TfL against GBT that GBT’s decision to enter into the construction contract was a breach of GBT’s implied contractual duty to TfL to exercise reasonable care and skill would have a reasonable prospect of success.

³ The National Audit Office’s Report dated 11 October 2016, para 3.13, records that on 27 January 2016 GBT wrote to TfL to set out how it had satisfied these conditions and that on 29 January 2016 TfL wrote to DfT that it was satisfied that GBT had met the conditions.

Scope of the Exit Payment Agreement

48. The Exit Payment Agreement gives examples of evidence that TfL may require to support GBT's calculation of the exit payment. The examples concern contracts with building contractors. This prompts the question whether the Exit Payment Agreement was intended to also cover repayments to other donors who made gifts conditional on the project reaching a stage it did not reach.
49. I have been told that prior to the conclusion of the Exit Payment Agreement GBT provided TfL with information showing that GBT was including its contractual obligations to other donors in its calculation of the maximum amount of the exit payment. Such evidence would be admissible as an aid to the interpretation of the Exit Payment Agreement. If GBT provided TfL with information showing that GBT was including its contractual obligations to other donors in its calculation of the maximum amount of the exit payment, an argument that the exit payment was not intended to cover payments contractually due to other donors would not have a reasonable prospect of success.

Other remedies

50. If TfL was induced to enter into the Deed of Grant, the Loan Facility Agreement or the Exit Payment Agreement by misrepresentations made to it by GBT, TfL might be entitled to claim damages from GBT under the Misrepresentation Act 1967. TfL has instructed me that it does not consider that it was induced to enter into any of these agreements by misrepresentations made to it by GBT, and I have no reason to doubt the correctness of those instructions.
51. If GBT made a false statement to TfL knowing it to be untrue, or being reckless as to its truth, intending TfL to rely on it, then, if TfL did rely on the statement to its detriment, TfL might have a remedy against GBT in the tort of deceit. TfL has instructed me that it does not consider that any of the statements GBT made to it in the course of the project were false or misleading, and I have no reason to doubt the correctness of those instructions.

52. Accordingly, I am unable to conclude that claims by Tfl against GBT based on these possible causes of action would have a reasonable prospect of success.

Conclusion

53. On the basis of the information I have been given, I am unable to conclude that claims by Tfl against GBT to recover money already paid, or to withhold sums due under the Exit Payment Agreement, would have a reasonable prospect of success.

Possible claims of GBT against its directors

54. In the preceding section of this advice, I did not identify any claim by Tfl against GBT to recover money already paid, or to withhold sums due under the Exit Payment Agreement, which would have a reasonable prospect of success. However, if, contrary to that conclusion, Tfl were able to make a successful claim against GBT, and if GBT were unable to satisfy it, GBT would be put into insolvent liquidation, and Tfl would have the rights of a creditor in the liquidation.
55. As noted above, GBT's directors did not owe to Tfl a duty to exercise reasonable care. They did however owe a duty to GBT to exercise reasonable care, skill and diligence⁴.
56. A liquidator of GBT would be able to enforce any claims GBT had against its directors for breach of duty, and Tfl, if it were a creditor of GBT, could benefit from the fruits of that claim. There may be other similar routes by which Tfl could benefit indirectly from a remedy available to GBT against its directors for breach of duty.
57. I have had the benefit of reading a partly redacted copy of an Opinion dated 2 April 2018 by Jason Coppel QC. His advice is directed at the position of a person seeking to

⁴ Companies Act 2006 section 172. The full text of this section is:

“Duty to exercise reasonable care, skill and diligence

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has.”

exercise remedies on behalf of GBT against its directors. One section of his advice discusses whether the directors of GBT breached their duty to act with reasonable skill and care, in particular in relation to entering into the construction contract. His reasoning on this point, in summary, is that GBT's directors owed an equitable duty to act with the degree of skill and care which would be exercised by an ordinary prudent man of business acting in the management of his own affairs, having regard to any special knowledge or experience that he holds himself out as having; that a prudent businessman may take risks, but will run only a prudent degree of risk; and that the question is whether there are good and sufficient reasons to support the directors' decision. He advises that Lady Hodge's findings in relation to the decision to enter into the construction contract provide reasonable grounds for believing that the directors acted in breach of the equitable duty of care.

58. Jason Coppel QC enters a caveat on that conclusion, which is that:

“Lady Hodge’s findings suggest that [the directors] acted in furtherance of the objects of [GBT], which are, essentially, to provide the Garden Bridge, in circumstances where a prudent man of business would not have done so. I would be surprised if [the directors] were entitled to act with disregard for the prudent use of money which had been granted and donated to [GBT] merely on the grounds that so acting would increase the likelihood of the key object of [GBT] being achieved”. He concludes by describing this as an area of legal uncertainty⁵.

59. Given the possibility (which, on what I presently know, is entirely hypothetical) that TfL could benefit indirectly from a claim by GBT against its directors for breach of duty, it is necessary for me to form my own view on the strength of a claim by GBT against its directors for breach of duty in entering into the construction contract.

60. The first point to note is that, since GBT is a company, the duties its directors owe to it are not, as Jason Coppel QC assumed, equitable duties, but the statutory duties enacted in Part 10 Chapter 2 of the Companies Act 2006⁶. These include a duty to exercise

⁵ See in particular paras 5 to 13 of his Opinion.

⁶ It is clear that Jason Coppel QC was not provided with details of GBT's constitution.

reasonable care, skill and diligence⁷. However, this misdescription of the source of the directors' duties does not, of itself, invalidate Jason Coppel QC's reasoning, since the statutory duties of company directors are to be interpreted and applied having regard to the equitable principles and common law rules from which they are derived⁸. One such principle was that the standard of care to be expected of a trustee was the standard which an ordinary prudent man of business would apply in the management of his own affairs⁹. It is therefore permissible to interpret the statutory duty to exercise reasonable care, skill, and diligence with the assistance of that principle. Applying that approach, the prudent man of business is a hypothetical person whose standards are a criterion against which to judge whether a director has acted in accordance with his duty to exercise reasonable care, skill and diligence.

61. Turning to a more central issue, Jason Coppel QC points out that Lady Hodge's findings suggest that the directors acted in furtherance of GBT's objects, and he treats this point as a caveat to his prior conclusion that Lady Hodge's findings in relation to the construction contract provide reasonable grounds for believing that the directors acted in breach of the equitable duty of care. In my opinion, the point identified by Jason Coppel QC in his caveat is fundamental to the question whether GBT's directors breached their duty to exercise reasonable care, skill and diligence.

62. In my opinion, one cannot consider a director's duty to act with care, skill and diligence in isolation; it forms part of a set of duties, another of which is to act in a way that the director considers, in good faith, would be most likely to achieve the company's purposes¹⁰. The principal purpose of GBT was to provide the garden bridge. GBT had been given funding on the terms of the Deed of Grant, as varied by the Deed of Variation and the Loan Facility Agreement, to achieve that purpose. The crucial question is, in my opinion, whether the directors' decision to commit GBT to the construction contract was made in breach of the duty to act with the care, skill and diligence to be expected of persons in that position.

⁷ Companies Act 2006 section 174.

⁸ Companies Act 2006 section 170.

⁹ Speight v Gaunt (1883) 9 App. Cas. 1.

¹⁰ Companies Act 2006 section 172.

63. If one is to invoke the hypothetical prudent man of business to assist in setting the standard to be expected of GBT's directors when deciding whether to cause GBT to enter into the construction contract, one has to place him in their situation. A prudent man of business placed in their situation might decide to enter into the construction contract, thereby committing himself to spend resources to meet his obligations under that contract, even though, had he been given the same resources with no strings attached, he might have thought that it would be more prudent to use those resources in some other way. I therefore do not think the contrast drawn by Jason Coppel QC in the passage I have quoted in paragraph 58 above between the prudent use of money and the use of money to increase the likelihood of GBT's objects being achieved is of great assistance in determining whether the directors were in breach of duty. The decisions made by the directors of GBT in connection with the construction contract could have been made in compliance with their duty to exercise reasonable care, skill and diligence, even if they resulted in the expenditure of TfL's funds in a way which, in other contexts, would be imprudent.
64. When considering whether the directors were in breach of their duty to GBT to exercise reasonable skill, care and diligence by causing it to enter into the construction contract, similar arguments arise to those noted in paragraphs 44 to 46 above in relation to GBT's own duty, implied into the Deed of Grant, to exercise reasonable care and skill. To summarise them briefly, first, entering into the construction contract did not of itself trigger an obligation for TfL to make payments: GBT still had to satisfy TfL that the pre-conditions for the post-contract payments were met, and GBT did so in relation to the conditions in the Deed of Grant. Second, the construction contract contained "exit points", which limited GBT's exposure under it. Third, TfL and DfT both had prior knowledge of GBT's intention to enter into the construction contract and did not object.
65. Lady Hodge's findings in relation to the decision to enter into the construction contract are strongly expressed, but I do not regard them as providing a secure foundation for the conclusion that there are reasonable grounds for believing that the directors of GBT were in breach of their duty to exercise reasonable skill, care and diligence when considering whether to cause GBT to enter into the construction contract. Lady Hodge's terms of reference did not in terms require her to address the question whether the directors of GBT acted in breach of their duties to GBT, and her report does not

expressly consider that question. Lady Hodge's first term of reference was to assess the public sector contribution to the project and whether value for money had been achieved. Her findings in relation to the entering into the construction contract are one of the elements which led to her conclusion that the project provided poor value for public money. But it would be an over-simplification to state that the directors of GBT were subject to a legal duty only to incur expenditure if it secured good value for public money. An accurate summary of the legal position would be that GBT was under express and implied obligations in the Deed of Grant and the Loan Facility Agreement, the purpose of which was to safeguard the funds to be provided by TfL and DfT, and that the directors of GBT were subject to a group of duties to GBT, the two most relevant of which were to exercise reasonable care, skill and diligence and to act in a way that they considered, in good faith, would be most likely to achieve the company's purposes.

66. On the information I have, I am unable, despite Lady Hodge's conclusions, to advise that a claim by GBT against its directors for breach of their duty to exercise reasonable care, skill and diligence in causing GBT to enter into the construction contract would have a reasonable prospect of success.
67. Even if the directors of GBT were in breach of duty to GBT in causing GBT to enter into the construction contract, the measure of the damages that GBT could recover in any claim against its directors for breach of duty to GBT would be the loss the breach caused to GBT (not to TfL). Lord Davies's brief comment in his letter dated 12 April 2017 on GBT's decision to enter into the contract includes the statement that "We have always ensured that we had the necessary resources to meet our obligations ...". If GBT's exposure under the construction contract was balanced by a corresponding increase in its ability to draw funds from TfL under the Deed of Grant and the Loan Facility Agreement, entering into the construction contract caused no loss to GBT.

Summary

68. My principal conclusions can be summarised as follows:

- (1) The position of DfT in relation to claims against GBT or its directors is no stronger than the position of TfL (see paragraph 27).
- (2) The directors of GBT did not owe contractual duties to TfL, because they were not parties to the agreements between TfL and GBT (see paragraph 28).
- (3) The directors of GBT owe statutory duties to GBT. These include duties to act within their powers; to act in a way that the director considers, in good faith, would be most likely to achieve the company's purposes; to exercise independent judgment; and to exercise reasonable care, skill and diligence. These duties are not owed to TfL (see paragraph 29).
- (4) The law of tort would not (absent special circumstances, which I am not aware exist here) impose a direct duty of care on the directors of GBT to avoid causing economic loss to TfL (see paragraph 30).
- (5) The express terms of the Deed of Grant enable TfL to make claims in a variety of circumstances against GBT to recover payments made to GBT, or to withhold further payments. I have not become aware of any grounds on which TfL could make a claim against GBT under these provisions (see paragraphs 36 - 38).
- (6) Where such a duty would not be inconsistent with the express terms of the agreements between GBT and TfL, GBT owed TfL a duty to carry out the services provided for by the Deed of Grant with reasonable care and skill. I am unable to conclude that a claim by TfL against GBT that GBT's decision to enter into the construction contract was a breach of that duty would have a reasonable prospect of success (see paragraph 47).
- (7) If GBT made misrepresentations to TfL which caused TfL to suffer loss, TfL might have a claim against GBT under the Misrepresentation Act 1967 or, if the misrepresentations were made fraudulently, in the tort of deceit. I have not become aware of any grounds on which TfL could make a claim against GBT on any such basis (see paragraph 52).
- (8) The directors of GBT owed to GBT a duty to act with reasonable care, skill and diligence. If GBT were put into insolvent liquidation, it would be open to a liquidator to pursue any such claims for the benefit of GBT's creditors. If, contrary to my conclusions above, TfL had claims against GBT which GBT

were unable to satisfy, TfL might by this route be able to benefit indirectly from a claim by GBT against its directors for breach of duty (see paragraphs 54 - 56).

- (9) On the information I have, I am unable to advise that a claim by GBT against its directors for breach of their duty to exercise reasonable care, skill and diligence in causing GBT to enter into the construction contract would have a reasonable prospect of success (see paragraph 66).
- (10) In any event, the measure of the damages that GBT could recover in a claim against its directors for breach of duty would be the loss suffered by GBT, not by TfL (see paragraph 67).

69. I will be very happy to advise further on any points arising out of the above.



Robert Pearce QC,
Radcliffe Chambers,
Lincoln's Inn,
London

14 November 2018

2018

RE
THE GARDEN BRIDGE TRUST

OPINION

Transport for London

Ref CR