

## **Briefing note: Legal view on various points of principle regarding sharing of information**

### **COUNCILLORS RIGHTS OF ACCESS TO INFORMATION**

#### **Background:**

At common law a member has *prima facie* a right to inspect documents which are addressed to the council of which he/she is a member. This right exists because members are under a duty to keep themselves informed of council business which relates to their role as elected representatives and which they have “a need to know”. If their motive for seeing documents is indirect, improper or ulterior this may be raised as a bar to their entitlement. Councillors are therefore not entitled to a “roving commission” through council documents. The importance of this qualification is apparent with the realisation that council business is conducted through committees of the council. If a councillor is a member of a committee then he/she has a right to inspect documents relating to the business of that committee. If not a member of the specific committee, the councillor has to show cause as to why sight of them is necessary to perform his or her duty (R v Southwold Corp, Ex p. Wrightson (1907); R v Hampstead BC, Ex p. Woodward (1917); R v Barones Borough Council, Ex p. Conlan (1938); R v Clerk to Lancashire Police Committee, Ex p. Hook (1980); R v Birmingham City DC Ex p. O (1983) – In the Birmingham City case the council allowed access to a councillor the documents of the Social Services Committee of which she was not a member and related to a proposed adoption. The conclusion of the Court was that she did “need to know” even though not a member of the committee.

#### **Application of Common Law**

The position is that the “need to know” is a simple and straightforward test. Clearly all members on a basic understanding have a “need to know” the financial position of AVB Ltd on the basis that public money has been put into the project. I would not consider such a desire to be an “improper or ulterior” motive.

The above though requires to be balanced against the fact that AVB Ltd is a separate legal entity – albeit wholly owned (95%) by the council. AVB Ltd is entitled to consider certain information as being commercially sensitive and not share that information with the Shareholder (Council).

The issue then is what information is the Shareholder entitled to and what about information shared with the Shareholder Representative and officer directors by the company.

### **ROLE AND RESPONSIBILITY OF SHAREHOLDER REPRESENTATIVE**

There is no description of the Shareholder Representative’s role or responsibilities and there is nothing in law that states what they should be other than the usual common law position of a fiduciary duty.

### **DUTIES OF DIRECTORS**

The Companies Act 2006 replaces the existing duties found in common law rules and equitable principles. There are seven general cumulative obligations:

1. Duty to act within the company’s powers.

i.e. “acting in accordance with the articles of association and only exercise powers specifically conferred”

2. Duty to promote success of the company.

i.e. “acting in good faith, to promote the success of the company having regard to the likely consequences of any decision; the interests of employees; the need to foster business relationships with suppliers and customers; reputation; and the need to act fairly between members of the company”

3. Duty to exercise independent judgement.

4. Duty to exercise reasonable care, skill and diligence.

5. Duty to avoid conflicts of interest.

i.e. “A director must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts or possibly may conflict, with the interests of the company.”

6. Duty not to accept benefits from third parties.

7. Duty to declare interest in proposed transaction or arrangement with the company.

The above duties are owed to the company, and only the company is able to enforce them.

The duties are not owed to individual shareholders.

#### WHAT CAN MEMBERS INSTRUCT OFFICERS TO DO

The respective roles of councillors and officers can be summarised as follows:

“Councillors and officers are servants of the public and they are indispensable to one another. But their responsibilities are distinct. Councillors are responsible to the electorate and officers are responsible to the Council. Their job is to give advice to councillors and to the authority, and to carry out authority’s work under the direction and control of the Council, the Cabinet and relevant committees etc..”

In a situation where an officer is also a director the situation clearly becomes difficult in that the officer has to exercise the above duties in relation to being a director and balance that with requests for information. In many instances the duty to promote the success of the company aligns with what the Council as shareholder requires and in some instances it does not –but that is the exercise of discretion on the part of the director officer.

#### THE ARTICLES OF ASSOCIATION FOR AVB

AVBs Articles of Association do not entitle the Council automatically to know all the Company’s business or to demand copies of all information which the company receives. However, the Council’s “Officer Director” can provide information to the Council without breaching duty to AVB (Article 20.4.2) – This does assume though that the Board is in receipt of information that is not considered confidential or commercially sensitive.

In addition, the Council and its authorised representative have the right to inspect the books and records of the Company upon reasonable notice.

#### THE LOAN AGREEMENTS

The Council has the right to request any information relating to the business (Clause 10.1(d)) there is however no complimentary right to access the Company’s premises to take any information and

failure to deliver the information does not constitute an event of default. Consequently , if the Company fails to provide any information when requested under the Loan Agreements , the only remedy is to seek specific performance.

#### THE SHAREHOLDER AGREEMENT

There is a draft Shareholders Agreement (unsigned) that requires AVB to provide information relating to its business that is reasonably requested by the Council (clause 3.1.5).

#### WHAT INFORMATION CAN AND CANNOT BE SHARED NOW THAT COMPANY ASSETS HAVE BEEN SOLD

All information in the hands of AVDC whether with an officer director or shareholder representative is potentially disclosable to all members on the “need to know “ basis. That does not extend to information/documents etc that the company considers to be commercially sensitive and particularly includes information contained within the Non-Disclosure Agreement the Asset Purchase Agreement and related Disclosure documents and any other Agreements considered confidential to AVB.