

**Malvern Hills Conservators**

**Inquiry into St Ann's Well Litigation**

**Documentation for Inquiry Committee Review**

**15th August 2011**

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## **TABLE OF CONTENTS**

1. INTRODUCTION.....	3
2. SUMMARY .....	4
3. RISKS AND FINANCIAL CONTROLS .....	7
4. CASE ON BREACHES.....	10
5. LACK OF POWER TO RUN A CAFÉ / CATERING BUSINESS .....	13
6. LACK OF POWER TO HAVE PROPOSED INFORMATION CENTRE .....	15
7. COMMERCIAL VIABILITY OF CAFÉ IF RUN BY MHC.....	17
8. NEED FOR A TRADING SUBSIDIARY .....	19
9. OPENING HOURS .....	21
10. DUTIES AS CHARITY TRUSTIES.....	22
11. KEY DECISIONS AND DOCUMENTS.....	26
12. REVIEW OF LEGAL ADVICE PROVIDED TO MHC .....	35
13. CONSERVATORS' CRITICISMS AND ASPIRATIONS FOR THE CAFÉ .....	39
14. ABBREVIATED TIMELINE .....	50
15. DETAILED TIMELINE.....	52
16. INDEX TO TIMELINE BUNDLE OF REFERENCED DOCUMENTS.....	67

# 1. Introduction

## To Members of the St Ann's Well Inquiry Committee:

### **Preliminary submissions**

This file contains preliminary submissions to the Inquiry regarding the Conservators' conduct over the St Ann's Well litigation. Further papers are likely to follow.

### **Qualification**

It is important to note that these papers have been prepared on the basis of an analysis of the papers available to us as at 5 August 2011 and they should be read with that in mind. They set the position as appears from the information available; it may be that some of the points raised in them are addressed by other documents that we have not yet reviewed. We would welcome the opportunity to examine MHC's correspondence files regarding the litigation and the Instructions to Counsel prepared by Harrison Clark., as well as any other documents examined by the Inquiry Committee.

### **Presentation**

We would welcome the opportunity to make a presentation to you setting out the main points of concern and dealing with any queries you may have. A public presentation may in any event be arranged.

### **Representative views**

While the papers have of necessity been prepared by a small group of people, they reflect concerns expressed by many of the 6,500 members of the Save St Ann's Well Facebook Group. There may well be other submissions from members of the public who have not been involved in the preparation of these documents.

### **Contact**

If you would like more information or wish to arrange a presentation, in the first instance please contact John Redman. Telephone 01684 560285 or email [jtredman@live.co.uk](mailto:jtredman@live.co.uk).

### **Guide to papers**

The papers in this file are indexed and are largely self-explanatory. We suggest you start with the **Summary** document. The six papers which follow it scrutinise cost and risk control and individual aspects of the litigation. They are followed by the **Paper on trustees' duties**. MHC is a charity and board members are charity trustees, regulated by the Charity Commission so it is essential for the Inquiry to use the Charity Commission's guidance as a yardstick against which to measure the conduct of the litigation.

An important analysis is the **Key Decisions** document. This identifies the principal decisions and lists the questions that need to be considered about each one in turn.

The **Timeline** is a detailed account of events in chronological order which is a useful reference document. There are also two versions of an abbreviated timeline to use as a quick guide.

The Index to the Timeline documents lists the documents that are currently held. These should all be available through MHC but contact us if you require copies of any of them.

15 August 2011

## 2. Summary

### A Personal vendetta at public expense?

Was this whole case nothing more than an example of institutional bullying of an individual in order to allow an influential minority to pursue a personal vendetta at public expense?

MHC have spent the last two years and about £120,000 of public money trying, and failing, to terminate John Redman's business tenancy of St Ann's Well Cafe. There is now to be an Inquiry into how they, the trustees of a charity, came to waste so much public money on litigation which they could not win.

The Inquiry must examine the motives for the litigation and why MHC seemed to disregard legal advice in November 2009 that they should stop the litigation, particularly as (as a charity) they should be risk averse. With more comprehensive legal advice they would have known that the need to operate through a subsidiary company was a fatal flaw to their plan to take over the Cafe. They also knew by then that the Cafe would at best be barely profitable under their management and so running it would not be an appropriate use of charitable assets.

Once they had decided to drop the allegations of breaches, because they had no evidence (ie objectively the tenant was not a bad tenant), was there any justification for continuing the litigation at all? What was the motive for continuing?

St Ann's Well Cafe is owned by the Malvern Hills Conservators, a publicly funded charity, who have leased it to John Redman for the last 20 years. John Redman runs the cafe and lives in the small flat above it. He paid £35,000 to buy the lease 20 years ago (which equates to £61,500 in today's terms).

The lease is a business tenancy protected by the Landlord and Tenant Act 1954. This means that when the lease comes to an end, Mr Redman, as tenant, is entitled to a new lease on the same terms unless MHC, as landlord, can prove one of several reasons to require him to leave.

In September 2009 MHC gave Mr Redman a Notice to leave at the end of his lease (March 2010) and said that they would oppose the renewal of his lease on two grounds: –

- (i) they said he had been seriously in **breach** of the lease
- (ii) they said they wanted **to take over the Cafe** and have an **Information Centre** in the upstairs Octagon Room.

The Conservators failed in all their attempts and have had to renew Mr Redman's lease and pay all the costs of the litigation.

They have spent a total of around **£120,000** on this. They have not admitted the full cost yet. Their own legal costs were about £52,000, Mr Redman's legal costs which they had to pay were £28,000 Their internal staffing and other management costs have been estimated (based on information on costs of answering public questions and Mr Rowat's remarks that he has spent 25-30% of his time on the litigation) at £40-50,000. All the costs will be met by Malvern ratepayers.

**They lost because their case failed on all counts -**

- They could not prove any breaches by Mr Redman.
- They were not legally allowed to run a cafe.
- They were not legally allowed to run the proposed information centre.

- If they had run the cafe it would have made a huge loss so their plan was not viable.
- As a charity they would not have been allowed to run a cafe at a loss except through a separate company and they are not allowed to own a separate company.

There was a great deal of support for Mr Redman. Despite that, and petitions signed by about 6,000 customers of the Cafe, the Conservators ignored the public. Their reputation has suffered over it for the last 18 months and that damage is still ongoing.

### More detail on why MHC lost –

1. **Alleged breaches of the lease.** MHC could not substantiate the alleged breaches. Mr Rowat referred to the only 4 complaints (which did not constitute breaches) over the 5 years of the lease. They related to lack of soap in a dispenser, a blown light bulb and a broken hand-dryer (these last two being the responsibility of MHC in fact). The 4<sup>th</sup> complaint related to some recycling rubbish accumulating when snow made it impossible to take it down the hill. The EHO had inspected and confirmed that there was no issue. – See tenant’s Witness Statement which includes copy EHO report.

Mr Rowat’s June 2009 Paper to the Board lied about the Cafe not opening when it should. Opening times can be evidenced by the Tenant’s till receipts and staff records.

2. **Intention of MHC to run the Cafe.** MHC has only the powers granted to it in the Malvern Hills Acts. It did not have the power to run a cafe.
3. **Intention to run an information centre.** Similarly it did not have the statutory power to do this. They had specifically been told that any information centre should be sited in a place that people could visit before they set out onto the Hills and could not be on any land owned by MHC as at 1995 including the Cafe. Several current Conservators had been on the Board at the time.
4. **Commercial viability of the Cafe.** As part of the case MHC had to have a business plan showing that they had a genuine intention to run the Cafe and a reasonable prospect of achieving that. This they failed to do, quite possibly because their motive was primarily to remove Mr Redman rather than to run the Cafe themselves. They simply had to maintain that they wanted to run the Cafe themselves in order to fit within the Landlord and Tenant Act. In order to try to do this they used 3 separate consultants and still did not end up with a viable business plan.

Claire Dolan prepared a Business Plan for MHC. Her Plan (August 2009) suggested that MHC might make a marginal profit of £2,380 pa, but even a cursory look at the figures show that that modest figure was unrealistic. Mr Redman’s Witness Statement of July 2010 exposed the detailed flaws in the figures. Rubus’ Feasibility Report of 27.09.10 demonstrated that the Business Plan prepared by Rubus themselves only days earlier was based on hopelessly over-ambitious figures and that “the potential risk to the charity is high”. Finally Turpin Smale (MHC’s cafe expert) said that it would “incur significant losses if [MHC] were to run it themselves”.

5. **Need for a trading subsidiary.** MHC is a registered charity. Under the Charity Commission’s rules a charity may not directly operate a loss-making business (as the Cafe would surely be if run

by MHC). A charity has to keep such a business at arm's length by setting up a separate subsidiary company to run the business. This was pointed out repeatedly to MHC by Mr Redman and members of the public asking formal questions but it was not seriously addressed until 1 December 2010 when Harrison Clark advised that a subsidiary would be required – and that was fatal to the case because the MHC had no power to own or finance a subsidiary.

MHC never had any prospect of success in this litigation. It was inappropriate for a charity to act in this way. The truth behind their motives must be examined.

*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

### 3. Risks and Financial Controls

#### Overview

This project constituted a major test of the Governance control framework. The result of £120,000 expenditure, spent on something which is not a primary object of the charity, in return for no value and a loss of reputation suggests that the control framework is thoroughly inadequate. MHC seems to have been neither risk averse nor in control of its costs, despite being a charity and a public body. It looks to be merely a speculative attempt to remove the tenant regardless of risk or cost.

#### Cost Control

The totals spent on legal fees and professional fees were reported, either individually or combined, every 3 months from March 2010. Apart from this there was little in the way of costs review by the Board:

- There was no report of detailed actual cost to date alongside projected costs to completion
  - there isn't even a published list of costs to date
  - There were no cost projections apart from some ball park figures for legal costs.
- There was no track of the cost of staff time, except in answering the public questions that followed from the huge public support for the tenant (£3,000 of Director time)
- There was no projection of the cashflow implications of the project
- There was no financing plan: The money came from the unrestricted fund and other budgets were cut to meet it. This was not planned.
- There was no attempt to control the legal costs and no breakdown of where they were incurred
- The poor process control led to excessive costs. For example:
  - Not applying the Landlord and Tenant Act to the negotiation on lease terms, as a result of which the legal cost of this was more than triple what it should have been;
  - Failing to understand the process and cost implications for the dispute over tenants costs, (8% interest, court fees, etc) resulting in legal costs being incurred for no benefit.

In response to public questions, MHC said that “money will come from the capital fund and from grants” and Peter Watson told Dr Cardone, one of his constituents, in June 2010 that “these legal actions are being funded by monies negotiated in the transfer of lands from the construction of Malvern Retail Park. They are not coming from the levy that is collected by MHDC on behalf of the Conservators”. In fact the entire cost of the case came from the money paid by ratepayers ie the unrestricted fund..

There was no effective monitoring and control of costs at any stage of the case.

#### Financial Control – Cost and Benefit

There are two aspects to the plan: (1) MHC wanted to renovate the building and improve the facilities, irrespective of who won the case; and (2) Improvement to the operation of the café, which could be achieved by negotiation with the tenant, or (arguably) by litigation to remove him.

Before going ahead, the scope of the project should have been defined in sufficient detail to allow assessment of the costs, benefits and risks. This should have considered the scale of the development and the alternatives e.g. major rebuild versus “lick of paint”. ***The project was never defined in sufficient detail to allow a cost, benefit and risk review. MHC paid consultants (Rubus) to define the vision for the project only at the end of June 2010.***

***There was also no attempt to look at the cost, benefits and risks of the case on breaches, in isolation.*** It was never strong enough to run with and simply cost around £20K for no benefit, whilst delaying and potentially jeopardising the case.

Before going ahead with litigation, ***MHC failed to consider whether the objectives could alternatively be met by renegotiating the lease.***

Throughout the case MHC spurned repeated offers by Mr Redman to meet their concerns by a revision to the lease and working together to improve the facility. There was no serious attempt to consider this. Two of MHC's lawyers referred to MHC putting in a new tenant should Mr Redman be persuaded to go. Clearly, the sole object of the litigation was to remove Mr Redman. With no objective benefit to the charity, there was no attempt to work out how much it was worth the charity paying to achieve this.

MHC knew the tenant paid £35K for the tenancy 20 years ago (£61K in today's terms). They offered an arbitrary £50K in March 2010 but would go no higher than this. Instead they ended up spending more than £70K on further Legal and professional fees in pursuing and losing the case. ***Was there any assessment of value for money on the litigation?***

## **Risk Control Generally**

### **Legal Risk**

As a creation of statute MHC have the risk that any new endeavour could be beyond their powers ("ultra vires"). Any new activity should first be fully thought through to see how it could work in order to allow checks that MHC have the powers required for each of the elements, otherwise it could be a showstopper. This was not done as the project was only defined in outline terms ahead of serving notice and litigating. A barrister's opinion was sought on November 09, after serving notice on the tenant, but he was not asked to consider all the questionable aspects of the operation.

### **Litigation Risk**

The Charity Commission guidance is for litigation to be a last resort. Even for a good case, the alternatives to litigation should first be given serious consideration. A charity should not be litigating on a speculative basis. Indeed, on 1 February 2007 D Judge (a solicitor, the former Clerk to the Board) asserted that 50:50 is not a basis for a charity and public body to litigate on.

Risk was assessed only in broad terms. It was written at the outset that MHC would not proceed without a strong legal case, however this standard was not applied throughout the case. The first barrister stated that the chances were no better than 50:50 in November 2009, and 40-45% in March 2010. MHC instructed a second barrister, who said on 28<sup>th</sup> April 2010 that the chances were "good".

MHC decided that the higher figure was correct, apparently without reconciling the two views. There also seems to have been no review of either opinion, both of which had flaws that MHC could and should have spotted (see the document headed "Legal advice received by MHC"). These flaws were exposed by the tenant's barrister at the mediation in mid July. MHC did not re-evaluate their risk in the light of this important information. ***Were MHC acting in a prudent way? They seem to have pursued the case despite advice to the contrary, accepting advice that suited them and ignoring, without justification, that which didn't.***

### **Financial risk**

None of the recorded discussions of the risk of the case considered what was the actual outcome (£80K external costs, after paying the tenant's costs; £40K internal costs; reputation suffering). There was thus no proper consideration of the downside risk and its potential impact on cashflow, requiring cuts in other areas to meet the cost. ***There was no proper evaluation of the risks to the case in terms of cash and reputation and hence no appraisal of whether the potential value was worth the risk.***

### **Business risk**

Running a café is known to be a risky business. St Ann's Well is a small café, up a steep windy path, with no car park and an outside toilet block. It is thus particularly susceptible to weather risk. MHC have no café or commercial expertise and yet were planning to manage it themselves via an employee.



There would be two lots of additional costs that the tenanted operation does not have: employee costs (due to holidays, sick pay, working time directive, NIC etc) and head office costs (review, supervision, account integration, training, etc). It was quite foreseeable that MHC would make an overall loss at the café, as was confirmed by each of the three consultants paid to look at the business.

MHC did not look at the full impact, including head office costs, of the business. There was also no consideration of the risks to the business posed by the variability of the return, for example the risk of a large VAT cost if turnover exceeded the VAT threshold. They would be taking on a risky return and losing annual rent, expected to be £6,000. There was no assessment of: the value/cost to the charity of running the business; the business risks; or the cashflow implications.

*NB This summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

## 4. Case on Breaches

Under the Landlord and Tenant Act a landlord may refuse to renew a lease if the tenant has been in substantial breach of the lease. MHC said that John Redman had been in breach of his lease but they had no evidence of any actual breaches that could have justified refusing him a new lease.

The A&R Committee based their initial decision on 4 complaints which had been discussed with Mr Redman. Although these were complaints they were not in fact breaches of his lease. They related to lack of soap in a dispenser, a blown light bulb and a broken hand-dryer (these last two being the responsibility of MHC in fact). The 4<sup>th</sup> complaint related to some recycling rubbish accumulating when snow made it impossible to take it down the hill. The A&R did not apparently examine the evidence; if they had it would have been clear that these were very minor matters which were not actually breaches.

**They were advised in November 2009 that they would lose on this ground but they persisted with it until May 2010. Why? Was it mere prejudice against Mr Redman that prevented them from accepting that he was not in fact in breach of his lease?**

The case on breaches was separate from the case based on MHC's alleged desire to take over the Cafe. If they could prove substantial breaches of the lease, Mr Redman would have been refused a new lease regardless of the other strand of the case. They had tried this before, at the lease renewal in 2005 and they were told then that the "minor infringements" as they were described in MHC minutes were not enough to justify refusing a lease. This meant that they should have known the standard required to succeed on this argument. That lesson seems to have been forgotten by 2009 despite 119 secret inspections of the premises undertaken by wardens to try to build up evidence of breaches.

One of their barristers said that the secret inspections suggested that MHC were "merely pursuing a policy of attempting to get him out of the premises rather than addressing the complaints that have been made".

MHC's solicitor quite correctly flagged that the case on breaches looked weak and by November 2009 MHC's barrister had advised that they had no more than a 50/50 chance of winning on this. He recommended that they stop the litigation and negotiate with Mr Redman. They did not attempt negotiation until March 2010 and did not drop the case on breaches until May 2010.

### **History of the case on breaches – and questions to be asked by the Inquiry**

**19 February 2009 Mr Rowat's** report to the A&R referred to 4 complaints over 5 years. None of those complaints constituted a breach of the lease but he did not explain that in the report.

They related to lack of soap in a dispenser, a blown light bulb and a broken hand-dryer (these last two being the responsibility of MHC in fact). The 4<sup>th</sup> complaint related to some recycling rubbish accumulating when snow made it impossible to take it down the hill. The Environmental Health Officer had inspected and confirmed that there was no issue.

Mr Rowat said that the relationship with Mr Redman was good and that he was "in the main" co-operative.

He also referred to 119 inspections of the public toilets by wardens, recording dirty toilets on 11 occasions over 5 years, none of which had been mentioned to Mr Redman.

The A&R committee decided “in view of the reported transgressions of the lease and the general state of the property” to oppose renewal. They omitted to reflect on the fact that MHC is responsible for the maintenance of the outside which has been sadly neglected.

- **Why did they think that the matters referred to by Mr Rowat could ever justify refusing a new lease? What attempt was there to evaluate the evidence? Who carried out any costs/benefit analysis on this element of the case (or any other)?**
- **Both Mr Rowat and Mr Wilcock had been closely involved at the last lease renewal in 2005, and so they should have known that the “reported transgressions” were nowhere near substantial enough. Did they explain what had happened on the last lease renewal?**

**June 2009** By the time Mr Rowat reported to the A & R committee in June he referred to “ongoing difficulties” with the tenant. Mr Rowat lied about the Cafe not opening in the winter and complained that the tenant did not act as an ambassador for Conservators.

- **Why did he change his mind so radically?**
- **Did anyone on the A&R ask what evidence he had for his startlingly different view compared to what he had said in February?**

**23 October 2009** In an email to Mr Rowat, Mr Cave (MHC solicitor) said with regard to lease breaches the “detail looked weak” and it “lacks conviction”.

- **Was this passed on to the Board?**

**26 November 2009** In a meeting with Mr Eyre (first barrister), Messrs Roberts and Rowat were told that, although there had been some breaches, these were not substantial enough to give MHC more than at best a 50/50 chance of winning the case. He advised them to negotiate an agreed settlement with Mr Redman ie drop the litigation. Clearly a charity should not indulge in speculative litigation.

- **Why did they not drop the case on breaches for a further 6 months?**
- **How did they reconcile continuing to spend money on a lost cause with their duties as prudent charity trustees?**
- **Did any of them recall David Judge’s view (February 2007) that 50/50 is no basis for a public body such as the MHC to litigate?**

**22 January 2010** MHC’s Defence document lodged at Court stated that the toilets, floors and windows of the toilet block had been stained and dirty, and that this was the case “regularly frequently and repeatedly throughout the term”.

It also said that the tenant “allowed bottles, food waste, plastic bags, discarded carpets and other rubbish” to be present at the property “regularly, frequently and repeatedly though the term”.

- **These statements were untrue and MHC never provided any evidence to substantiate them. Who told Mr Eyre to put them in the Defence and signed off on it?**

**26 March 2010** In Mr Eyre’s written opinion he said that the odds against MHC succeeding on breaches were 2/1 against. He had become even more pessimistic about this than he had been in November 2009.

**26 April 2010** **Guy Featherstonhaugh QC** said MHC was likely to fail on breaches.

**11 May 2010** The Cafe was shortlisted for the Worcestershire Welcome Award, which is plainly inconsistent with the allegations about rubbish etc.

**13 May 2010 Board Meeting** agreed to drop the argument on breaches and so rendered MHC liable to pay all the tenant’s costs on that issue as well as its own.

- **Why did it take so long?**
- **Was it in fact the case that they did not check or consider the alleged breaches at all in their haste to attack the tenant?**
- **Why did they ignore the advice of their barrister for 6 months?**
- **Were they aware that for that period of 6 months they and the tenant were racking up legal costs which MHC would undoubtedly have to pay for both sides?**
- **Was it simply that they were prejudiced against Mr Redman and assumed that he must be in breach despite the complete lack of objective evidence to prove it?**
- **Why, when it had been established that there was no objective evidence of breaches by the tenant, did they still persist with the other strand of the litigation? If he was not a “bad” tenant then what was the benefit to the charity of removing him?**

*Note – this summary is based on papers available to the SSAW group as at 5 August 2010 which do not include general correspondence between MHC and Harrison Clark.*

## 5. Lack of Power to Run a Café / Catering Business

MHC opposed the renewal of Mr Redman's lease on the grounds that he was (a) in serious breach of the lease and (b) they wanted to run the cafe and information centre themselves. The case on breaches is dealt with elsewhere. This paper addresses the assertion that they wanted to run the cafe themselves and examines why that element of their case was bound to fail.

**The reason it was bound to fail was that MHC is not allowed under the Malvern Hills Acts to run a catering business. They were advised that this was the case when they (Messrs Roberts and Rowat) met with Mr Eyre, MHC's barrister, in November 2009.** They did not drop this element of their case, however, until November 2010.

MHC is a statutory corporation which means that the **only** powers they have are those which are (i) expressly granted to them in the Malvern Hills Acts or (ii) derived by reasonable implication from the Acts. There is no express power in the Malvern Hills Acts and on a proper legal interpretation of the Acts, they have no implied power either.

MHC received a variety of legal advice on this issue – see separate paper on Legal Advice. However there were several reasons why MHC board members should have hesitated over this from their own knowledge, **quite apart from the legal advice.** In particular –

- From a common sense perspective they should have asked themselves why the MHC had never run the cafe themselves if they were entitled to do so.
- Some claimed that there was a precedent for this in the 1960's when Mr and Mrs Bamford had run the Cafe. That arrangement had been called a "Management Agreement" but anyone reading it would see that all the risk and reward of the business stayed with the Bamfords, who were operating exactly as tenants. On a true construction of this agreement they were in fact tenants and MHC had just dressed up the agreement to try to avoid them getting the statutory protection given to tenants. So that was not a precedent and anyone who read and thought about it would have been able to see that.
- Under the 1930 Act, MHC is expressly allowed to grant leases of the Cafe to third parties. It is clear that none of the solicitors or barristers advising MHC noticed this. However, it is the job of the MHC as trustees not just to rely on lawyers but to do their own checks. If any of them had bothered to wonder how they were supposed to handle the Cafe, this power to grant leases would have given them the answer. Their QC even bases part of his opinion on his assumption that there is no such power in the Acts.
- Even on the most optimistic advice they received (from Mr Featherstonhaugh) it was clear that the running of a cafe could only at best be a marginal activity, incidental to their main purpose. Surely that in itself should have made them hesitate to spend so much money pursuing something that was not even a main object.
- Even if they thought that they had the power to run the Cafe, as charity trustees, they should have considered the economics of it and whether it would be a good use of charitable funds. It was apparent even from August 2009 that MHC could not realistically expect to make a profit from the Cafe and so they should have hesitated to pursue the project for this reason, quite apart from the legalities of their powers.

The Inquiry Committee must consider –

- Why MHC did not stop the litigation when advised in November 2009 that they should drop it.
- Whether MHC were acting properly and prudently as charity trustees in pursuing the litigation which (after November 2009) they knew was little more than speculative and which even if they won, would result in them owning a loss-making catering business.
- Why no member of the Board read the Acts sufficiently to spot the power to grant leases of the Cafe?
- Why MHC's lawyers did not notice this either.
- Why no-one queried the use of the Bamford agreement as a precedent given that under it, MHC did not take on any business risk or reward ie they were plainly NOT managing the business themselves. Mr Featherstonhaugh even flagged this as a trap for MHC to watch for if they set up a manager to run the Cafe, saying "Care must be taken to ensure that the employee is a genuine employee...."
- The broader question of motive. Mr Featherstonhaugh commented that he was not certain that he had actually found in the papers a "final decision" to run the cafe and he stressed that they needed to take and record that decision before they got to court. This was many months after the MHC had served the Notice on Mr Redman asserting that they wished to run the Cafe themselves.

*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

## 6. Lack of Power to Have Proposed Information Centre

MHC said that part of their proposed use of the Cafe if they were to succeed in taking over the Cafe would be to use the upstairs **Octagon Room as an information centre**. It was publicly pointed out to them in questions to the Board meeting and in detailed letters to the Gazette that they were not allowed to do this.

This was a subsidiary argument to their plan to take over the Cafe but it is nonetheless interesting to consider their barrister's advice on this and their treatment of members of the public.

### 1. Motive?

**8th July 2009 Harrison Clark's** advice suggested that MHC's duties included the preservation of the Hills and such "preservation" should include information and educational activities "as these undoubtedly assist in such preservation". (This proposition could be debated as a statement of fact). **However the Inquiry should consider whether MHC asserted that it wanted an "information centre" only because Harrison Clark told them that it might help their case. Until then it had not been mentioned. Was the prime/only real motivation their overwhelming wish to remove Mr Redman? Consider how little they subsequently promoted the concept of an information centre.**

In **MHC's Defence** document lodged at court, MHC said that they wanted to use the Cafe as a cafe "together with a centre for the provision of information and educational resources for those resorting to the Malvern Hills". Thereafter there is little reference to an information centre and much more vague talk of a "facility".

### 2. Mr Featherstonhaugh's Opinion May 2010 (paragraph 30)

This refers to the House of Lords Select Committee finding (which was passed into the 1995 Act). [By way of background, the MHC decided to seek a new Act (which eventually became the 1995 Act). They prepared a draft Act which was discussed in Parliament then studied in detail by a Select Committee. The Select Committee cross-examined David Judge the then Clerk to the MHC, and others, and then produced a report directing the form of the final version of the Act.]

The Select Committee's report said "**We believe that if the MHC wish to provide information centres, they should do so in places which people are likely to visit before they set out to walk on the Hills**". Mr Featherstonhaugh notes this then remarks that although the "apparent intention" of the committee was that information centres should be other than on the Hills themselves, "that intention does not seem to have found its way into the drafting of the Act itself".

Given the care with which Acts are prepared that would be a rather startling conclusion and it is in fact quite incorrect. If Mr Featherstonhaugh had tracked the drafting of section 9 of the 1995 and understood its genesis he would have realised that the Act did exactly what the Committee wanted. The key is that, under Section 9 of the 1995 Act, the use of buildings as information centres is conditional upon MHC "acquiring" them in the future. If they already owned them (like St Ann's Well) they could not then use them as information centres. These accords perfectly with what the Select Committee wanted.

### 3. MHC's own state of knowledge

MHC had evidently understood the situation in the past, since the summary of the 1995 Act on **MHC's own website** says that information centres must be sited "off their land".

In the Board minutes of 3 September 1993 the Clerk (Mr Judge) reported that "**With regard to information centres, this had been approved but these should be sited in any new premises acquired by the MHC in the future and not on land at present under their jurisdiction**". The Clerk's view on this was clearly authoritative as he had been intimately involved with the preparation and discussion of the 1995 Act and he was a solicitor who had been involved with MHC for many years.

In a letter to the Gazette of 16 July 2010 L Sire pointed this out in precise detail. L Sire subsequently pointed out that Mr Wilcock and Mr Hall Jones had been at the 1993 meeting but had evidently not mentioned the point when the 2009 lease renewal was being contemplated. **Why did they remain silent?**

#### **4. Clive Smith's response to public questions and apology**

Curiously Clive Smith (but not Messrs Wilcock or Hall Jones) did respond to the letter in the Gazette. He claimed that L Sire's letter was "extremely misleading". He said that the Select Committee denied the MHC the option of building new structures on their land rather than restricting what they could do in existing buildings. He concluded "I know because I was also present when the board meetings referred to took place. It strikes me that L Sire and others of his ilk think that if a myth is peddled with sufficient frequency it somehow becomes fact. That is not the case."

Mr Smith's reference to myths was quite apposite when it became apparent that (a) he had not even been a Conservator at the time of the relevant board meeting (and there had been no members of the public present) and (b) the Act plainly does not say what he claimed it said. At the next Board meeting he was picked up on both issues and gave an apology, while still mis-stating the advice from the Clerk -

*"Mr Clive Smith apologised for getting the chronology wrong. However although he was not in attendance at the meeting in 1993 he was a Board member at the time of the run up to the 1995 Act and the then Clerk did advise that the restriction on information centres related to any new build on MHC land and not existing buildings."*  
[Replies to public questions September 2010 Board meeting].

- **Why did Clive Smith respond to L Sire so rudely, especially when L Sire was correct?**
- **Why did he continue to deny both the evidence of the 1993 Minutes and the wording on the MHC's own website?**
- **Why did Messrs Hall Jones and Wilcock remain silent?**
- **What is the point of long-serving Board members if they do not share the benefit of their experience for the benefit of the charity?**

*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*



## 7. Commercial Viability of Café if Run by MHC

In the litigation over the Cafe MHC needed to be able to demonstrate that it had a genuine intention to run a catering business from the Cafe and a reasonable prospect of being able to achieve that. If it could not demonstrate those two elements then it would fail to satisfy the Landlord and Tenant Act and it would be obliged to renew John Redman's lease.

In the litigation the Court would expect to see a business plan for MHC as evidence of its genuine intention to run the Cafe. Since MHC was a charity this business plan was extra important because charity trustees must use the charity's resources prudently without, for example, pouring money into a loss-making business.

Accordingly MHC needed a viable Business Plan and they engaged 3 consultants in succession to help them. Claire Dolan produced the first Business Plan (cost £2,000) which was submitted to court. It was later recognised as being inadequate and Rubus were paid £5,000 to produce a new Plan. Within 3 days of that being drafted, Rubus themselves said it was not feasible and that it represented too great a risk to the charity. Finally Turpin Smale, a Cafe expert, was paid £1,000 to advise that MHC would incur significant losses if they were to run the cafe themselves.

John Redman's Witness Statement (July 2010) demolished the financial assumptions underpinning the Dolan Plan and explained in great detail why MHC's plans would prove uneconomic.

- **Why did they wait until Rubus and Turpin Smale both confirmed what Mr Redman said before admitting that MHC did not have a viable business case?**
- **Why did no-one at MHC realise the the Dolan Plan was unrealistic?**
- **Who reviewed Mr Redman's Witness Statement?**
- **Did any of the Board consider whether it was consistent with their duties as charity trustees to seek to operate a business that had little or no chance of operating at a profit?**

### History of the Business Plans

**August 2009 Dolan Business Plan** (which was submitted to the Court) suggested that MHC might make a marginal profit of £2,380pa from running the Cafe. This was based on figures which were later recognised to be unrealistic. This Plan seemed to be quietly dropped in the second half of 2010 after it had been submitted to Court and endorsed in Mr Rowat's Witness Statement.

**Mid-October – Ian Rowat comment** recorded on MHC website (still quoted on the Best of Malvern website and used in the brief for the architect competition) "We need to go **beyond providing a commercial cafe** facility....the information centre, toilets and cafe can be open **around visitors' needs rather than commercial needs...**".

- **Was he suggesting that MHC would operate the Cafe in the expectation that it would make a loss and not as a viable business?**

**July 2010 Mr Redman's Witness Statement** exposed the flaws in Ms Dolan's Plan in great detail. She had failed to understand the fundamental difference between a business operated by a sole trader and one using employees with all the accompanying extra costs and constraints eg over working hours and paid holidays, as well as including an unrealistically low salary for the proposed manager.

- **Who reviewed this from MHC?**

**23rd September 2010 Rubus Business Plan** Rubus produced a plan with unrealistic visitor numbers and staffing costs. Some financial figures were left blank pending the outcome of discussions on the need for a trading subsidiary (see separate Paper).

**27th September 2010 Rubus Feasibility Review of the Rubus Business Plan** The Feasibility review reviewed Rubus' own Business Plan and concluded that it was not viable. It said –

- “The margins are too tight
- Visitor numbers are ambitious
- Ability to service visitor numbers is debateable
- Potential risk to charity if it is not possible to set up a trading company is high
- Investment required from MHC to support cash flow is substantial”.

**28th September 2010 Turpin Smale (MHC's cafe expert) report** said “MHC's local authority staff rates and on-costs would mean that this type of cafe operation would incur significant losses if they were to operate it themselves”.

This leading expert could instantly recognise the issue for a cost of about £1,000. Why did it take MHC so long to seek a real cafe expert?

The appointment of Ms Dolan (who apparently had 8 months experience managing a cafe in Malvern) had been strongly criticised by the public at board meetings. The appointment of Rubus was queried by Mr Chamings who asked whether they had any catering expertise. The reply was that they had none but they had been recommended by MHDC and had to be appointed without any other tenders being obtained (in breach of MHC's own Standing Orders), due to the closing date for applying for the Advantage West Midlands grant. Ms Neilsen suggested that MHC should defer appointing Rubus until it had become apparent whether MHC would actually get hold of the cafe, which with hindsight would have saved about £5,000. Her point was similarly quashed by other members of the Board..

- **Why did the board suppress the perfectly valid points raised by Mr Chamings and Ms Neilsen?**
- **It was apparent from the tenant's Witness Statement that MHC could not run the Cafe profitably. Why did they spend a further £5,000 appointing Rubus to create a Business Plan anyway, which Rubus then completely undermined in their feasibility Review?**
- **Where were the controls on this spending and why were the only two queries on these appointments quashed?**

**30th September 2010 St Ann's Well Working Party meeting** still anticipated the Rubus Plan being produced in Court. This was despite them having had Turpin Smale's Report saying that MHC would incur “significant losses”. They also knew that MHC would need a trading subsidiary but they did not consider the implications of that (see separate Paper on MHC's Need for a Trading Subsidiary).

**7th October 2010 Board meeting** At last “several members expressed concern that even if the court case was won, the Rubus report showed that the Cafe would run at a loss”.

- **Why did it take so long and costs so much to get to this conclusion? Did none of them read the tenant's Witness Statement?**

## 8. Need for a Trading Subsidiary

Under the Charity Commission guidance, a charity such as MHC which wishes to run a business that is likely to make a loss must operate the business through a separate subsidiary company, so as to keep the losses ring-fenced from the charity's assets.

That meant that if MHC, a charity, wanted to run a catering business from the Cafe it must set up a separate subsidiary company to run it. It did not have the power to do that. Furthermore the only way such a company could be financed was to have money pumped into it by MHC. As charity trustees, MHC are extremely restricted as to the investments that they may make and putting money into a loss-making business would certainly not be acceptable. So it could not finance the subsidiary even if it had the power to set it up.

MHC obtained some advice on this in July 2009 from Harrison Clark. That advice focused mainly on the tax treatment of such a trading operation rather than on MHC's specific situation ie whether it needed a subsidiary and whether it could own and finance one. The Inquiry must consider whether such advice was adequate and sufficiently clear. It should also check when this issue was revisited up to December 2010 when the problem was definitely acknowledged.

Despite Mr Redman and members of the public pointing out that these were major issues, it appears that MHC did not consider this aspect fully until 1 December 2010 when it was recognised as being one of the fatal flaws in MHC's plans. David Judge advised that MHC did not have the necessary powers (the date of his advice is unclear – but it was recorded in a note of 22 September 2010).

**July 2009** Harrison Clark initially advised on the ability of MHC as a charity to trade. The advice was mainly on the tax implications of a charity trading. Its conclusion was "Unless it is expressly prohibited by the governing statutes, there does not seem to be any bar on MHC trading from [the Cafe] unless it is for non-primary purpose trading carrying "significant risk" [defined as the risk of turnover not covering costs]. The Inquiry must consider whether this advice might be regarded as a bit confusing in a number of ways –

1. It indicates that MHC can trade unless "expressly prohibited" by its statutes. That is the wrong way round. MHC has only the powers given to it in its statutes. It is not the case that it can do anything it likes, except whatever is expressly prohibited – that would have led to some very lengthy statutes indeed if they had to list all the things that MHC could NOT do! This is a fundamental. This was compounded by referring to the "objectives" (a paraphrase set out in the annual report produced for the Charity Commission) instead of reviewing the actual Malvern Hills Acts. Since the paraphrased "objectives" wording is misleading (as pointed out by public questions) it adds to the confusion.
2. HC did not review whether MHC had the statutory power to own shares in a subsidiary company;
3. HC did not review whether MHC would be allowed to finance a trading company. Any money lent or paid to the subsidiary by MHC would be viewed as a trustee investment and tested against the usual criteria for such investments. Clearly this would fail the test, given that trustees are strictly limited as to the types of companies they may invest in, and they are supposed to "be particularly wary of speculative forms of investment" (CC14 guidance).

**August 2009** The Dolan Plan correctly states that "as a charity we are under an obligation not to engage in any trading activity which is likely to make losses". It also assumed (appendix 1) that the Cafe would operate as a trading subsidiary of MHC for VAT reasons.

**12th June 2010** MHC gave replies to public questions submitted to the A&R – Question: Please confirm whether you intend to set up a separate trading company to satisfy concerns which the Charity Commission is likely to have about the cafe making a loss? MHC Answer - *The Conservators are not considering setting up a separate trading company*

**6th July 2010** Further public question - Please explain why the Board are paying Rubus to draft a business plan but at the same time are not planning to set up a separate trading subsidiary. Is it because the Board feels that the Charity Commission guidance on this does not apply to them or is it because the Board has no statutory power to own a subsidiary? MHC Answer - *The Conservators have received advice and have never ruled out setting up a separate trading arm.*

This suggests that further advice had been received but we have not yet seen that.

**July 2010 Mr Redman's Witness Statement (para 29 and 31)** explained the need for a trading subsidiary and the difficulties which MHC would experience if it tried to establish or finance one. **Did this prompt anyone at MHC to revisit this issue?**

**16th July 2010 Harrison Clark's Position Statement** (exchanged with the tenant prior to the mediation) said that the points about a trading subsidiary raised by the tenant in his Witness Statement were "considered unfounded". "[MHC]'s power to run a cafe through a ..subsidiary..flows from the same source as the power to run a cafe – or indeed grant a lease to a third party to do so". They were still labouring under the misapprehension that MHC had no express power to grant leases (overlooking the 1930 Act). The right to own a subsidiary cannot possibly be derived from the power to grant leases of the Cafe. **Did anyone at MHC query this?**

**22th September 2010 (or earlier?) David Judge** advised that MHC did not have the power to set up or own a subsidiary company. **When was this advice given and who was aware of it?**

**1st December 2010 Board meeting** Harrison Clark summary "With regard to whether MHC as a registered charity could run a trading subsidiary was another issue that required investigation but initial advice was that on a strict interpretation of MHC's statutory powers, these would not extend to setting up a trading company and for the MHC to hold shares in it. Mr Cave urged more specialist advice on this point".

**The public and the tenant gave MHC ample opportunity to realise that they needed to address this issue as it was a potential show-stopper, both as to owning a subsidiary and as to financing it.**

**Why did it take until December 2010 for MHC to appreciate that it was a problem?**

*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

## 9. Opening Hours

**Opening Hours seemed to be MHC's favourite complaint about the Cafe yet they had no evidence of any breach of the opening hours obligations and therefore it did not feature in their official court Defence document.**

Under Mr Redman's lease he is obliged to open the Cafe during certain "core" hours. Apart from those he may open as he wishes since it is his private business. MHC agreed in 2005 to reduce the "core" opening hours in recognition that longer hours may be uneconomical (meeting of 23rd April 2005).

MHC have often referred to the tenant's opening hours being unsatisfactory. This is curious as the tenant not only opened for the 996 hours specified in his lease but actually opened for 1400 hours pa ie 40% extra. This was evidenced by till receipts and staff records. MHC had no evidence of him failing to open in accordance with the lease.

Despite the lack of evidence, Mr Rowat, in his Paper to the Board in June 2009, said (untruthfully) that the Cafe did not open at weekends in winter and referred to "problems with opening hours". This lie was repeated in Ms Dolan's Business Plan and she added a new lie that "the Cafe regularly remains closed even during its advertised opening hours".

**9th October 2009 Gazette article** MHC issued a statement to the Gazette referring to the opening hours ('Facebook Fans defend St Ann's Well proprietor' 09-10-09):

A statement released by the Conservators this week says: "There have been reports over recent years that the café and the toilets are not open when required."

Mr Roberts as chairman implied a similar criticism in his replies to public questions at the November 2009 Board meeting during the following exchange –

**M.G. Taylor:** Why have the Conservators publicly criticised Mr Redman's opening hours, when he opens longer hours than required by the lease?

**Chair:** We are saying that the cafe should be available around the visitors needs.

**M.G. Taylor:** Sorry, I asked a specific question. That does not relate to the question I've just asked you.

**Chair:** Well we are saying it doesn't open – always – around visitors' needs. That's our answer.

**M.G. Taylor:** But Mr Redman does open around visitors needs. That's why he opens longer hours. I'm asking why do the conservators publicly criticise Mr Redman's opening hours if he opens longer than he is required to.

**Chair:** I'm afraid we have to say that the cafe should be available around visitors needs, and these will all be brought very clear, I'm sure Mr Redman knows the answers.

**M.G. Taylor:** I'm sure he doesn't. (General laughter)

There seems to have been a misapprehension by MHC that whenever someone complained that the cafe was shut, it automatically meant that the tenant had breached the lease. Of course there are many hours of the day when his lease does not require him to be open and MHC did not seem to have followed up by asking whether the Cafe should have been open at the time it was closed. **A complaint does not automatically equate to a breach of the lease.**

**There never was any breach of the tenant's opening obligation as to opening hours.**

## 10. Duties as Charity Trustees

MHC is a registered charity and the Board members are charity trustees. There is a huge amount of guidance published by the Charity Commission as to the duties of trustees. It is far from clear that the MHC trustees had proper (or any) regard to those duties in their conduct of the litigation. Some of the most relevant sections of the CC guidance have been annexed to this Paper.

Particular duties to bear in mind are the duties to:

- Be prudent with the Charity's money
- Avoid undue risk
- Use charitable funds only to further the charity's objects
- Ensure that the charity complies with its governing Acts
- Not let personal views or prejudices affect their conduct as trustees
- Avoid trustee body being dominated by one or two individuals
- Avoid culture of secrecy or deference
- Avoid arbitrary overriding of control mechanisms
- Avoid pursuit of personal agendas

**MHC's conduct of the litigation should be reviewed against the benchmark of these duties especially –**

- i. Why did MHC go straight to confrontational litigation instead of discussing matters with the tenant in the summer of 2009?
- ii. Why did they not discuss matters with the tenant, especially after his solicitor's letter in October 2009 suggesting such discussions?
- iii. Was there any objective assessment of the benefit to the charity of removing the tenant as opposed to working with him to achieve some of MHC's objectives?
- iv. What was the real motivation for the litigation? Was it simply to remove Mr Redman as tenant?
- v. In the initial decision to try to remove the tenant, what was the perceived benefit for the charity as compared to the risk of costs and reputational damage?
- vi. Why did MHC decide not to follow Mr Eyre's advice given in November 2009?
- vii. Once it was established that there were no real breaches (ie the tenant was not objectively a "bad" tenant), what was the benefit to the charity of prolonging the litigation?
- viii. Was the MHC action driven by prejudice? (see in particular the note produced by B Smith and A Myatt regarding the types of people who frequent the Cafe).

- ix. Why did MHC disregard the views of the thousands who signed the petitions?
- x. Why did MHC ignore the points made in public questions which were specifically being asked to help MHC understand the weaknesses of their case?
- xi. Did MHC fail in their duty to be familiar with and apply the Malvern Hills Acts? MHC had been intimately involved with the drafting of these as they were private Acts promoted by MHC itself.
- xii. Were MHC risk averse as a charity should be?
- xiii. Did MHC demonstrate in their decision-making any awareness of their duties as charitable trustees and custodians of public assets?
- xiv. Was the litigation being driven primarily by a small group of trustees driven by personal animosity (at some meetings “hatred and vitriol” towards the tenant were observed by one board member).
- xv. Why was there not even a site visit, as is usually carried out for the smallest of easements?
- xvi. Was anyone responsible for project management, cost control, and cost/ benefit analysis? What evidence of these analyses is there?
- xvii. Was the project a good use of £120,000 of public charitable funds?
- xviii. Was MHC also motivated by the prospect of the Advantage West Midlands grant of up to £250,000 that they mistakenly thought might be available? If so why did they not consider applying for that with the tenant remaining in place? And why did no-one read the terms of the grant from which it was readily apparent that the project could never meet the grant’s criteria?
- xix. Will MHC report this as a “serious incident” to the Charity Commission? Such incidents include those which result in significant financial loss to the charity, or which could damage the reputation of the charity.

The cost of £120,000 should be reviewed in the context of the annual income from ratepayers of £370,000 ie about a third of one whole year’s money from Malvern ratepayers has been devoted to this single project.

## **Appendix – Charity Commission Guidance**

### **1. Extracts from the Charity Commission guidance “The Essential Trustee”**

#### **Duty of prudence - Trustees must:**

- (7) Use charitable funds and assets reasonably, and only in furtherance of the charity's objects.
- (8) Avoid undertaking activities that might place the charity's endowment, funds, assets or reputation at undue risk

**Personal conduct of trustees:** Trustees must act reasonably and prudently in all matters relating to the charity and need always to bear in mind that their prime concern is its interests. They must not let any personal views or prejudices affect their conduct as trustees.

## 2. Extracts from CC26 Charities and Risk Management

### Governance risks

- Trustee body dominated by one or two individuals or by connected individuals
  - a. Decisions made outside of trustee body
  - b. Conflicts of interest
  - c. Pursuit of personal agenda
  - d. Culture of secrecy or deference
  - e. Arbitrary overriding of control mechanisms
  - f. Decisions are made bypassing the trustees
  - g. Poor decision making reflected in poor value for money on service delivery
  - h. Lack of information flow and poor decision making procedures
  - i. Uncertainty as to roles and duties
- Activities potentially outside objects, or powers
  - a. Potential breach of trust and regulatory action
- Reporting to trustees
  - a. inadequate information resulting in poor quality decision making
  - b. failure of trustees to fulfil their control functions
  - c. trustee body becomes remote and ill-informed

## 3. Extract from Charity Commission's draft guidance on litigation by charities

### 7. If Trustees have decided that taking or defending legal proceedings is the option that is in the best interests of the charity, what are their duties and responsibilities?

If charity trustees do decide, having explored the other options of resolving the issue, that litigation is likely to be the best option, they need to fully consider the decision in accordance with the process set out in paragraph 3 above (of this guidance).

Trustees must ensure that they are satisfied before taking a decision that litigation is in the best interests of the charity. They should consider –

- Taking and considering legal advice. This would be usual except for trivial claims or ones that are routine for the particular charity.



- The relative strengths of their case and of any defence or counterclaim which may be brought against them by the other party involved. Specialist legal advice and possible other expert advice, for example, from an accountant or a chartered surveyor will help here. Trustees need to consider the advice to ensure that it accurately takes account of the issue the charity faces and test whether it fully addresses the merits of the case, the likelihood of success, the likely costs, the risks surrounding recovery of costs and the risk of adverse costs orders.
- The ability of the defendant to deliver the remedy sought.
- The ability of the defendant to meet payments if they lose the case.
- What will be the consequences for the charity if it just walks away and the issue is not resolved.
- Whether the charity has sufficient funds to meet the costs involved – any party is likely to incur significant costs regardless of whether they win or lose, although the costs are likely to be higher for the losing party.
- What the impact will be of spending the funds on litigation so that they are not available for other work carried out by the charity.
- The availability of conditional fee agreements and legal expenses insurance to mitigate costs risks.
- The impact on the charity of diverting management resources, energy and focus to the litigation.
- The impact on the charity's reputation and any publicity it may attract. In particular the impact on the charity's donors or funders, of money being spent on litigation.
- Whether any of the trustees are conflicted in making the decision – and ensuring that this conflict is managed appropriately, for instance by their not being part of the decision making team.

Legal proceedings carry a high risk and the consequences of taking or defending legal proceedings can be very expensive. The fact that trustees have received legal advice that they have a strong case is not in itself enough to justify taking proceedings, The decision to take proceedings must be based on what is in the best interests of the charity.

*Note – this summary is based on papers available to the SSAW group as at 5 August 2010 which do not include general correspondence between MHC and Harrison Clark.*

## 11. Key Decisions and Documents

	Decision / Document	What was done	Comment	Questions for Inquiry
1.	<p><b>19 February 2009 A&amp;R Committee</b></p> <p><b>Decision to appoint a solicitor to oppose the grant of a new lease</b></p>	<p>A&amp;R committee decided to try to oppose renewal of the lease despite Ian Rowat's report that the relationship with the tenant was good and that he was "in the main" co-operative.</p> <p>Ian Rowat (Paper dated 5.2.2009) had referred to 4 complaints in 5 years (related to lack of soap in a dispenser, a blown lightbulb and a broken hand-dryer (these last two being the responsibility of MHC in fact). The 4<sup>th</sup> complaint related to some recycling rubbish accumulating when snow made it impossible to take it down the hill. The EHO had inspected and confirmed that there was no issue. – See tenant's Witness Statement which includes copy EHO report.</p> <p>The Paper refers to the previous lease renewal when MHC had tried to remove the tenant on grounds of breaches. Instead of applying lessons learnt then to the 2009 situation, the Paper suggests that it was lack of evidence rather than lack of breaches that had caused MHC to fail to remove the tenant in 2005. That is not what the note of the legal advice on 23.04.05 actually says as it refers to the breaches not being "substantial".</p>	<p>Complaints are very very minor.</p> <p>Complaints in themselves do not necessarily constitute breaches of the lease.</p> <p>These complaints are not those on which the Defence document allegations were based (referred eg to old carpet lying around).</p> <p>At the last lease renewal in 2005 the Board was given clear advice from its then solicitor as to the need for breaches to be substantial. Ian Rowat and Brian Wilcock had been at the meeting with the tenant on 23.04.05 when this was explained by MHC's solicitor and the advice had been circulated.</p> <p>Brian Wilcock proposed the resolution for the A&amp;R on 19.02.09.</p> <p>Note that at this stage there is no suggestion that MHC wish to run the Cafe themselves. That emerged only later when Harrison Clark suggest that as a way to avoid granting a new lease under the Landlord and Tenant Act.</p>	<p>Since these complaints cannot begin to justify spending £120,000 of public funds, what was the real reason to try to evict the tenant?</p> <p>Who verified the Defence document? Mr Cave emailed Mr Rowat 23.10.09 to say that "detail looked weak" and "lacks conviction".</p> <p>Had Mr Wilcock forgotten what had happened before and the need for breaches not to be trivial?</p> <p>Consider whether the decision is compatible with the Board's duty as charity trustees in deciding whether to enter litigation.</p>

2.	<p><b>Director's paper to the A&amp;R Committee dated 2 June 2009</b></p> <p><b>Ian Rowat set out next steps for removal of tenant following legal advice.</b></p>	<p>Harrison Clark had advised that the tenant could be removed if MHC wanted to manage the building themselves.</p> <p>Referred to "ongoing difficulties" with tenant. Lies about him not opening in the winter, lies about ethos of cafe, says (incorrectly) that cafe could make MHC a profit.</p> <p>Gives very different impression from that in Rowat Paper of February 2009.</p>	<p>MHC had not expressed any wish to run the cafe but only to remove the present tenant. They constructed such a wish because their solicitor told them that was the way to remove the tenant. These lies were bound to be found out. Tenant's till receipts and staff records prove that the cafe was open.</p> <p>The assertion that the cafe would make a profit demonstrates a naivety which would ultimately have proved a major stumbling block (if the MHC case had not already been fatally flawed).</p>	<p>Ask Ian Rowat to explain why he wrote the Paper as he did. Was he under pressure from anyone else or did he construct it alone?</p> <p>Ian Rowat recognised the need for the legal case to be "watertight". How did he or the Board monitor that as the case developed?</p>
3.	<p><b>Dolan Business Plan 20 August 2009 prepared to bolster the MHC case by Claire Dolan who had run the Bluebird Tearoom for 8 months. She was paid £2000 for it.</b></p>	<p>It repeats the lies from Ian Rowat's Paper and adds a new one (that cafe remained closed during its advertised opening hours).</p> <p>It showed only a risky profit of £2,380 pa (compared to the risk-free rent of £4,500 pa received by MHC).</p> <p>It incorporated some legal advice about MHC (being a charity) trading by running the Cafe. The summary of advice comes from a Harrison Clark note which might be viewed as somewhat confusing. The activity would be non-primary purpose trading so would need to be run through a separate trading subsidiary since there was clearly a risk that it might make a loss. (See Ian Rowat's statement that the cafe would go "beyond the commercial": press comment 8.10.09).</p> <p>Advice does not then consider whether</p>	<p>Easily provable as lies because the tenant had till receipts and staff records.</p> <p>In order to achieve this modest profit it included wildly improbable figures (see tenant's Witness Statement for detailed analysis).</p> <p>Public questions in November 2009 and [June 2010] and Tenant's Witness Statement in July 2010 all cast doubt on this advice.</p> <p>By September 2010 D Judge had told them that they could not have a subsidiary. By 1 December 2010 Harrison Clark were advocating obtaining some more specialist advice as they finally recognised that a trading subsidiary would indeed be required and that MHC are not allowed to have a trading subsidiary – fatal flaw.</p> <p>Appendix 1 contains Harrison Clark's advice on statutory power. Its analysis of the Bamford</p>	<p>What objective evidence did Claire Dolan have? Why did no-one correct her? Eg Mr Pilcher has since told the tenant that he knew perfectly well that he was open at weekends.</p> <p>Which members of the Board reviewed the figures and assumptions in the Business Plan? Why did Ray Roberts deny the existence of a Business Plan in reply to public questions at the November 2009 Board meeting?</p> <p>Who considered the need for a subsidiary when it was raised by the public questions and in the tenant's Witness Statement?</p> <p>Ask Harrison Clark to explain their analysis of this agreement given</p>

		<p>MHC has statutory power to own a subsidiary (it does not) nor how it could finance a subsidiary (a loan or capital injection into a subsidiary would be too risky as a trustees' investment).</p> <p>Plan states that "our legal advisers are confident we would win. We would not proceed ...unless we were satisfied that we had a strong legal case".</p>	<p>"management agreement" in 1965 which they put forward as a precedent should be reviewed. That agreement was a lease dressed up to look like a management agreement as was common to try to avoid tenants getting a secure lease. Alternatively he suggested implying a power to run a cafe because cafes can manage litter and so "preserve " the Hills is very tenuous to use as a serious foundation for a charity to litigate on.</p>	<p>that the Bamfords retained all the risk and reward of the business.</p> <p>Did HC or any trustees consider the propriety of a charity spending thousands of pounds on litigation which had such a fragile basis?</p>
5.	<b>22 October 2009 letter from tenant's solicitor</b>	<p>Asked for evidence of breaches.</p> <p>Told HC that MHC did not have statutory power to run cafe / information centre.</p> <p>Said "tenant is willing to consider changes to the lease that would enable services to the public to be extended in accordance with the objectives that the [MHC] have set out."</p>	<p>No evidence has ever been provided.</p> <p>Email from HC on 11 June 2010 said that MHC would have just re-let to another tenant if JR had left ie would not bother running it themselves. What were the real reasons for requiring his removal?</p>	<p>Was this letter circulated?</p> <p>Did the Board consider possible changes to the lease which might achieve objectives without removal of tenant?</p> <p>What would those objectives have been and could they not be achieved with tenant in place?</p>
6.	<b>26 November 2009 Meeting with Stephen Eyre barrister</b>	<p>Attended by Andrew Cave, Ian Rowat, Ray Roberts and Val Moore.</p> <p>Eyre recommended that in view of the fact that although there had been some breaches of the lease by John Redman, these were not substantial enough to give the Conservators more than at best a 50/50 chance of winning the case and that the Conservators did not have express powers under the Malvern Hills Acts to run a cafe, the Conservators should negotiate with John Redman to vacate the premises.</p>	<p>At this stage MHC had legal advice telling them to stop litigating and instead try to negotiate with the tenant.</p> <p>On the business side they had the Dolan Plan telling them that (based on some unrealistic figures) they might make a tiny profit of £2,300 if they ran the Cafe.</p> <p>The case on breaches was not dropped until May 2010. During that time solicitors on both sides were running up costs which MHC knew they would end up paying as soon as they conceded the breaches argument which they knew was inevitable.</p>	<p>This was clear advice that MHC should stop litigating and start negotiating. Why was that ignored for so long?</p> <p>As charity trustees why did they consider that it was in the best interests of the charity to persist in litigating?</p> <p>Why did they not concede at least the case on breaches at this stage?</p>

7.	<b>3 December 2009 Special Board meeting</b>	Report of Eyre's advice and decision to seek to negotiate to pay off the tenant with £50,000. Urgent business sub-committee to be on stand-by to agree higher figure.	They seem to have considered only paying the tenant to go and not the grant of a new lease incorporating requisite changes as suggested by tenant's solicitor on 22 October 2009.	Why not discuss a new lease?  Why did they fix on £50,000? What valuation advice did they obtain to assess the value of the tenant's business, home and legal costs to date? Did they take account of the fact that the tenant would be a reluctant seller and so the price would need to be above market value?
8.	<b>Meeting with tenant on 4 March 2010</b>	Meeting attended by Ian Rowat, Ray Roberts and Andrew Cave of HC. Ray Roberts started by saying that the relationship with the tenant had irretrievably broken down so the only thing he was prepared to discuss was paying him to leave. £50,000 was offered and refused. Tenant's solicitor suggested that he might look favourably on an offer of £75,000.	Only £50,000 was offered and tenant was given 24 hours to decide. No larger sum was ever offered.  Contrast R Roberts' statement with Ian Rowat's appraisal in February 2009 (relationship good and tenant in the main co-operative"). What happened to urgent business sub-committee being available to increase offer?	Why did it take so long to set up? What evidence did R Roberts have for his statement about breakdown of relations? Why did HC agree a detailed agenda of possible changes to a new lease when all that Ray Roberts was prepared to discuss was paying the tenant to go?
9.	<b>11 March 2010 Report from Ian Rowat on the meeting with the tenant</b>	Said tenant valued business at £125,000 and did not mention £75,000. Said tenant had paid £35,000 20 years ago. Said chance of winning in court was 50%. Omitted to mention risk of having to pay tenant's costs. Concern about "loss of face". Timing concerns driven by wish to get hold of a £250,000 grant (which ultimately was not suitable in any case).	50% is a poor chance of success for a private person to undertake litigation. It is inadequate for a charity to base a case upon. See D Judge remarks that 50/50 is no basis for litigation, 1 February 2007 and Charity Commission draft guidance.	Why no mention of the figure of £75,000? Did the Board consider their duties as charity trustees? Did anyone suggest trying to agree a revised lease with the tenant? What plans meant that this particular tenant had to be removed (as opposed to working with him?)

10.	<b>11 March 2010 Board Meeting</b>	<p>Board still wanted to terminate the lease “in order to maximise this facility”.</p> <p>Concern about HC saying that chance of winning was only 50%. Decided to ask Eyre to provide written opinion and to get another new barrister to give written opinion.</p> <p>MHC would then consider obtaining a valuation of the business.</p>	<p>If new opinion differed from Eyre’s opinion which would they prefer? The one that told them what they wanted to hear?</p> <p>How had they fixed on £50,000? Did they consider that the tenant was a reluctant seller and they were a special purchaser so the valuation would be above market? Compare a stranger knocking on your door asking to buy your house at market value when you do not wish to sell.</p>	<p>What did they mean by “maximise this facility”. Why could they not work with the tenant to do that? Why did HC choose a barrister specialising in rent review, developments, easements and restrictive covenants when what was in issue was statutory interpretation?</p> <p>Why did they not accept Eyre’s advice? (Contrast Val Moore’s letter of 21 July 2010 assuring Board that they had always followed legal advice).</p>
11.	<b>26 March 2010 Stephen Eyre’s written opinion</b>	Said odds against succeeding on breaches were 2/1 against. Odd on MHC having power to run cafe were 55/45 or 60/40 against.	Not a suitable case for charity trustees to be running.	Any awareness of duty as trustees? Why was this opinion ignored? What evaluation was there of cost/benefit to charity?
12	<b>8 April 2010 Special Board meeting</b>	<p>Beverley Neilsen called meeting due to concerns over PR damage, clarity in strategy and escalating costs.</p> <p>Board reminded (who by?) of reasons they wanted to take over cafe – tenant not giving level of service expected by public regarding Opening hours, Cleanliness, Attitude to the public and MHC.</p> <p>Board decided to pursue mediation though on what terms and with what objective was unclear at this stage</p>	Tenant had had 5,000 people signing petitions supporting him including statements as to cleanliness, also been highly commended for Worcestershire Welcome award in June 2010. MHC has never produced any evidence of these allegations.	<p>What objective evidence did MHC have for saying tenant failed on these issues?</p> <p>Who made these misleading statements?</p> <p>What weight was given to the public support given to the tenant (as compared to the conspicuous adverse PR being suffered by MHC which had partly triggered the need for this meeting?)</p>

13	<p><b>26 April 2010</b>  <b>Opinion from Guy Featherstonhaugh</b></p>	<p>Opinion said that MHC would lose on breaches (as they had been told in November 2009, six months ago) but said that they had “good prospects” of winning on the basis that they wanted to run the cafe themselves.</p>	<p>There are several major flaws in this Opinion which make its conclusion unreliable and incorrect. Refer to separate Paper on Legal Advice for detailed analysis.</p> <p>As charity trustees, even if the Board did not notice the flaws in this opinion, did they consider whether they should continue litigating and resisting a new lease instead of trying to agree terms for a new lease?</p>	<p>Did Mr Cave analyse and comment upon these flaws?  Did the Board try to reconcile this opinion with Mr Eyre’ advice?  How did MHC decide that this opinion was better than Mr Eyre’s opinion? Was it just because it gave the answer they hoped for?  Review Instructions from Harrison Clark to check if they were correct, especially on the Bamford agreement.</p>
14.	<p><b>13 May 2010</b>  <b>Board meeting</b>  <b>Decided to consider grant of new lease and to mediate</b></p> <p><b>Finally decided to drop case on breaches (as advised in November 2009)</b></p>	<p>The Myatt / B Smith report to this meeting referred to MHC “belief” that tenant does not “adequately service the needs” of visitors to the Hills. Set out elaborate scheme for putting tenant on probation to see if he (a) reached a quality threshold and (b) attracted a representative cross-section of people visiting hills.</p> <p>Myatt/Smith claimed that MHC had tried but failed over a long period to get improved standard at Cafe. Where was there any evidence of this?</p> <p>Myatt/Smith referred to optimistic advice from Featherstonhaugh but did not refer to or reconcile advice with Mr Eyre’s earlier opinion.</p> <p>Decision to send Myatt, and B Smith to mediate with authority to offer £50,000 to go.</p>	<p>Scheme for probation type arrangement has no place in the Landlord and Tenant Act and ignores tenant’s legal rights under it.</p> <p>What is the concern over policing the cross-section of people – was it to be measured by income, class, dress, colour???</p> <p>Demonstrates the MHC prejudice against cafe and those who support it. If they had read the petitions they would have found senior clerics, professors and the wife of one Conservator amongst the thousands of signatories.</p> <p>Much discussion of whether MHC could get hold of Natural Assets grant. Why so eager to get hold of grant when (as noted) MHC has £3m cash which it can use only on capital projects such as this?</p> <p>What is the special appeal of grant finance?</p>	<p>Why did they persist in assuming there were problems with the service at the cafe despite the evidence of thousands of people to the contrary? By this stage the Cafe had also been shortlisted for a tourism award.</p> <p>What were they getting at when they wanted to monitor the type of people patronising the Cafe?</p> <p>Why did Myatt and B Smith ignore Landlord and Tenant Act which had to provide the context for the mediation?</p> <p>Why did the Mr Cave “express concern “at the proposal that members should talk directly to the tenant? No cost, compared to £8,000 for one day of mediation.</p>

15	<b>Letter from Mr Rowat regarding Natural Assets grant 18 June 2010</b>	Mr Rowat told the Board that the possible grant for the project had now been reduced to 40% instead of 90%. He said that many elements of it were outside the remit of MHC.	Why had the grant been such a driver (eg so that MHC set aside Standing Orders so as to pay Rubus £10,000 to apply for the grant)? Myatt/ Smith mentioned that MHC could instead fund it all from its £3m capital fund.	What was the special attraction of grant finance as opposed to paying from MHC's own capital? Did MHC lose interest in the litigation once they realised that grant was not available?
16	<b>Witness Statement of John Redman Dated 12 July 2010</b>	This explained the four complaints (re soap dispenser etc), exposed lies in Rowat and Dolan documents, flagged up the lack of any maintenance by MHC, demolished the financial assumptions and conclusions of the Dolan Plan and explained that a trading subsidiary would be needed to satisfy the Charity Commission if MHC took over.	This highlighted the lies that Mr Rowat had put forward at the crucial stage when the Board was deciding whether or not to oppose renewing the lease.  It also demonstrated that there was no possibility of MHC making a profit from the cafe (as later confirmed, for yet more cost, by Rubus and Chris Brown).	Who spoke to Mr Rowat about the veracity of his June 2009 Paper? Who saw this Statement? Who reviewed and analysed it? Who considered how its contents should impact on MHC case? Did anyone care that the Cafe could not be run at a profit? And that a subsidiary would be needed which was an insuperable obstacle (as flagged to them by the tenant in November 2009). Why was trading subsidiary point not followed up? (Mr Cave in July 2010 Position Statement said that the concerns were "unfounded").
17.	<b>Position Statement for the mediation prepared by the Tenant's barrister</b>	This set out the legal position. It was presented at the mediation to Messrs Rowat, Cave, Tuthill, Myatt and B Smith. It explained the barrister's firm conviction that the tenant would inevitably win the litigation.	At the mediation the MHC representatives were also shown that MHC had power in 1930 Act to grant leases of the Cafe which they and all their lawyers had overlooked. Several points in the opinions had been based on the perceived absence of any express power to grant leases and so the revelation that there was such a power should have prompted a radical rethink of the advice.	How was this reported back to the Board? Who analysed it and sought to reconcile it with the MHC advice? Who sent it to the MHC barristers to ask for their views on it? Did they actually do that? Did anyone tell the MHC how poor their case had been shown to be?



18.	<b>Mediation meeting 19 July 2010</b>	A costly yet unproductive session. The MHC reps refused to discuss the legal position or to put forward any suggestions as to what changes they might like to the lease.	The tenant made numerous suggestions including extending opening hours, working together to improve the building, possible information boards, etc etc. The MHC reps specifically said they would not volunteer any suggestions about the possible terms of a new lease and kept asking for a business plan. Used a lot of phrases like “wanting to see more positive commitment from tenant” but did not define what that meant. Complete lack of progress over a long day led to suggestion to involve Chris Brown.	How was this reported back to the Board? Did they hear of proposals from tenant eg for longer hours? Did the MHC reps explain why they prevented any progress being made? Why did they stale-mate the talks? Was it because they were thrown by the revelation of the legal position and did not know how to take it forward?
19.	<b>27 September 2010 Rubus Feasibility report (reviewing their own Rubus Business Plan prepared 4 days earlier)</b>	Not clear what prompted this but Rubus did a Feasibility Review of their own Business Plan (cost: £5,000) for the cafe and found it was completely unrealistic. This was to be the Plan to be used at Court instead of the Dolan one which had been quietly ditched (cost: £2,000)	Rubus said the Rubus Plan had margins too tight, visitor numbers ambitious, risk to charity if it is unable to set up a trading subsidiary is high.  Note that the Rubus Plan had said that Mr Judge (a lawyer, the former Clerk to MHC) had said that MHC lacked the power to own a subsidiary.	Who presented this to the Board?  Did anyone think about how this might affect the litigation?
20.	<b>28 September 2010 Report from Chris Brown of Turpin Smale cafe expert</b>	Chris Brown appointed by MHC following suggestion at mediation. Said opening hours in line with other similar places, praised cakes etc and fact that it was vegan/vegetarian and said was no way MHC could run at a profit because of staff rates, overheads etc that self-employed tenant did not have. Pointed out small potential due to location up steep hill with no car access or parking and weather-dependency.	Did not say much that had not already been said either in public questions to the Board or by tenant in Witness Statement.	Why did SAW Working Party two days later still recommend the Rubus Business Plan to the Board?
21.	<b>30 September 2010 St Ann’s Well Working Party meeting to recommend the</b>	Despite Rubus totally undermining their own plan, the Working Party voted to recommend it to the Board.	Seemed to have ignored Turpin Smale report as well as Rubus’ attack on its own report. Included more realistic salary of £22,000 pa instead of £10,000 for manager.	Why did they do this? Mr Morgan was there so maybe he can explain.

	<b>Rubus Business Plan to the Board</b>	Mr Rowat said that a trading subsidiary would be needed and would add extra costs (£9,000 pa).	He did not add that this was an insuperable barrier as the MHC is not allowed to own or finance loss-making subsidiary companies.	Did anyone understand the significance of this or recall that the public had pointed it out in November 2009 and subsequently?
22	<b>7 October 2010 Special Board meeting</b>	Finally agreed to face to face discussions with the tenant to try to agree terms of a new lease.	Agreed to discuss lease but not at this stage dropping litigation (nearly a year since the first barrister had told them that they should).	Consider why it took so long.
23	<b>1 December 2010 St Ann's Well Working Party meeting</b>	Summary from Mr Cave as to difficulties MHC legal case was now in.  Suggested major flaw in case was MHC's lack of a true intention and lack of a viable plan to run the cafe.  Referred to conflicting barristers' opinions but made no attempt to reconcile them. No mention made of tenant's legal advice. Recognised that need for a trading subsidiary was a major problem and suggested further advice. Alerted MHC to risk of paying tenant's legal costs. P Watts gave a misleading summary of the lease negotiations (see Timeline for C Smith email of 24 November to the tenant).	The Working Party did not agree to drop the case on running the cafe themselves.  This might be because there was no such genuine intention. Mr Cave had told the tenant's solicitor that if they did not have to satisfy the Landlord and Tenant Act they would have just put in another tenant. Was it all about getting rid of John Redman personally with the case for running it themselves based upon a pretence?  Why no mention of tenant's legal advice? Flagged up by public questions in November 2009. Also tenant's Witness Statement in July 2010.	Why not? (again Mr Morgan was there so perhaps can explain).
24.	<b>1 December 2010 Board meeting Decided to drop the litigation</b>	Interesting that 6 still opposed it.	This was a year and 5 days after Mr Eyre had told them to do this – and 6 still preferred to litigate!	

## 12. Review of Legal Advice provided to MHC

MHC were advised, at a very substantial cost, by solicitor Andrew Cave of Harrison Clark, a Birmingham barrister, Stephen Eyre, and a London QC, Guy Featherstonhaugh. Mr Cave advised on a day-to-day basis and attended several board meetings to do so. The barristers gave opinions on particular issues.

### Initial advice by Harrison Clark – July 2009

Between the A&R meetings of February and April 2009, Harrison Clark evidently suggested that MHC should say they wished to run the cafe themselves. Until then MHC had been contemplating basing their opposition to the new lease purely on the alleged breaches of the lease. By April 2009 they had been told to say that they wanted to run the cafe themselves while keeping the breach allegations as a “makeweight”. The snags in this were –

- (a) It does not appear to be true to say that MHC wanted to run the cafe. Mr Cave himself said in an email that if Mr Redman had just left then they would have found another tenant. They just wanted to get rid of Mr Redman personally.
- (b) MHC did not have power to run a catering business like the cafe. Mr Cave did consider this on 8 July 2009 and concluded that “there are good arguments that can be presented to support MHC’s case [to run the cafe] and which would have a real prospect of success”.
  - **Given this lukewarm advice why did the MHC as charity trustees consider that it was appropriate for them to pursue the litigation even at this early stage? The Charity Commission draft guidance says that charity trustees should use litigation as a last resort even if they have a strong case.**
  - **Why was this advice translated into the Dolan Plan (to which it was appended) as “Our legal advisers are confident we would win (we would not proceed with taking the cafe under our management unless we were satisfied we had a strong legal case)” and “Harrison Clark are confident that MHC have a very strong legal case”?**
- (c) Harrison Clark advised separately on the need for a trading subsidiary to insulate the charity from potential losses of the business. See separate paper on Need for a Trading Subsidiary.

*NB Harrison Clark would have given each barrister some written “Instructions” setting out the matters on which advice was requested. The opinions will only ever be as reliable as the instructions on which they are based and so the Instructions in each case need to be scrutinised.*

### Advice given in meeting by Stephen Eyre, barrister – November 2009

Mr Eyre recommended, in view of the fact that the breaches were not substantial enough to give the Conservators more than at best a 50/50 chance of winning the case, and that the Conservators did not have express powers under the Malvern Hills Acts to run a cafe, **that the Conservators negotiate with Mr Redman to vacate the premises.** He did not therefore recommend proceeding with the litigation.

In the report given to the Board on 3 December 2009, Mr Eyre’s advice was reported as having been qualified by the opening words “Although it was not a hopeless case...” which seems a far cry from the statement in Mr Rowat’s Paper of 2 June 2009 when he said that he would check with the lawyers that MHC had a “watertight legal case”.

- **Why did MHC not even meet with Mr Redman until March 2010?**
- **Why did MHC not drop the breaches argument until May 2010?**

- **Why do MHC claim that they followed legal advice throughout?**
- **Why did MHC obtain another opinion and how did they decide that the second opinion was more likely to be correct than Mr Eyre's one?**
- **Did anyone have regard to the general principle on litigation by MHC enunciated by David Judge on 1 February 2007 when he said that "my view is that a 50% chance of success does not justify litigation"?**

### **Advice given in writing by Mr Eyre – March 2010**

In March 2010 Mr Eyre was asked to advise in writing. **Why was he asked to advise again since his original advice had been quite clear and it seems unlikely that any new facts had come to light since his original advice?**

He said that the odds against succeeding on breaches were 2/1 against. He said the odds against proving that the Conservators had power to run the Cafe were 55/45 (or 60/40) against.

Parts of his opinion were flawed. For example, he recognised that if Parliament felt it necessary to spell out detailed powers such as the power to put benches on the Hills, then it was wrong to assume that Parliament would have left something as major as running a catering business to be implied. However Mr Eyre then **misdirected** himself by saying that the power to put benches related to land not owned by MHC. This is wrong. No such distinction is drawn in the 1909 Act. **Did Harrison Clark or MHC challenge this?**

Also he ignored the rule "inclusio unius exclusio alterius" ie if a matter is expressly addressed in an Act then it is presumed that that was all that Parliament intended to say about that matter and you cannot imply other intentions. Hence if the Act says that the Conservators can run the cafe only if it is burnt down you cannot imply that they can run it if it is not burnt down.

Without those two elements, his opinion contains almost no support for the idea that the Board could run a cafe.

- **As charity trustees, did MHC consider that the odds he gave meant that pursuing either element of the litigation was appropriate? It would plainly be speculative at best, and therefore a very poor use of charitable money.**

### **Advice given in writing by Mr Featherstonhaugh – May 2010**

Mr Featherstonhaugh gave MHC the same advice regarding breaches that Mr Eyre had given in November 2009 ie it would fail. **Was it a good use of charitable funds to get an extra opinion on this subject?**

So far as MHC's powers were concerned he gave more optimistic advice saying that MHC "have good prospects of defeating the tenant's application for the grant of a new tenancy" [on the grounds that they want to run the cafe]. Unfortunately there are several flaws in his opinion (which may or may not flow from what he was told in his Instructions which we have not seen) which mean that this conclusion is incorrect.

- A. He was **misinformed or wrong** over the supposed "management agreement" from 1965 which was merely a lease dressed up to look like a management agreement – but under which in fact the commercial risk all stayed with the tenant not the Board and so was no help to the Board as a precedent.
- B. Crucially, he **overlooked** the provisions of the 1930 Act which provided for the Board to grant leases of the Cafe to third parties.

- C. He asserts that there is “no distinction in practice ...between the Conservators running the business themselves and letting it to someone else to do it.” **This statement ignores the very significant factor of who carries a commercial risk.** The landlord of a cafe only has to think about whether the tenant will pay the rent. The tenant of the cafe has to carry the entire risk of success or failure of the business. Mr Featherstonhaugh equates the two positions without considering who carries the commercial risk of the business and this flows in part from him not noticing that the Board do have an express power to grant leases of the Cafe to third parties.
- D. He **blurs the distinction** between the Board, which can do only what its statutes say it can do, and a human being (eg Mr Redman), who is perfectly entitled to run a cafe business if he wishes without a statute to say he can. He almost seems to think that Mr Redman would have needed a statute to say that he can run a cafe business which is nonsense. He has ended up treating the question of personal powers as if it were a matter that attached to the Cafe itself a bit like a planning permission, instead of realising that the tenant will obviously have a different set of powers from the Board. An example illustrates it – a council cannot run a supermarket business but it has no problem in leasing a building to Tesco which can of course run such a business. Tesco does not derive its ability to run a supermarket from the statutes which govern the council!
- E. He based much of his argument on the case of Small v Smith which allows statutory bodies to do things which are incidental to their main purpose. He claims that running a cafe is incidental to the MHC’s main purpose whereas a better construction is probably that it was intended to cover things like eg buying an office computer. He fails to explain how, if his view is right, it was still necessary for Parliament in 1995 to agree that MHC could allow 6 instead of 3 ice cream concessions on the Hills. Surely if running a whole cafe was “incidental” then allowing a few extra ice-cream vans would be even more incidental.

If MHC had considered the implications of this view, they would have realised that it would have rendered most if not all of the contents of all their Acts after 1884 redundant. That would be an improbable conclusion which might have indicated to them that they should review the advice. They should in any case have been familiar with their own statutes.

This opinion is seriously flawed.

- **Why did HC or the Board not challenge it as they had challenged Mr Eyre’s advice?**
- **Why did they not attempt to reconcile the two conflicting opinions?**
- **Now MHC had one opinion going each way so why did they decide to ditch the first and accept the second?**

### **Harrison Clark’s Position Statement prepared for Mediation**

To a large extent this paraphrased the opinion from Mr Featherstonhaugh.

It still challenged the tenant’s legal analysis, saying that if the tenant was correct and MHC had no power to run the Cafe, it followed that they did not have the power to grant him a lease of it either. They thought that this “throws up an interesting dilemma” for him; this somewhat surprising conclusion might have perhaps prompted them to review the Acts again, whereupon they might have found the express power to grant leases. However, until the mediation itself (when the tenant’s lawyer pointed this out) they continued to labour under this misapprehension.

**MHC’s opportunity to receive the correct legal advice given by Mr Redman’s barrister at Mediation July 2010**

As part of the preparation for the Mediation session, the parties provided “Position Statements” setting out the basis of their legal claim. This meant that all of Messrs Cave, Rowat, Tuthill, B Smith, and Myatt saw and heard the proper advice explained directly by Mr Evans (barrister). He was entirely convinced of the case being decided in favour of the tenant.

- **Who else saw Mr Evans’ advice and had a report of it including the reference to the express power to grant leases of the Cafe?**
- **How was it reported back to the rest of the Board?**
- **Was it passed to Mr Featherstonhaugh with a request for him to reconcile it with his advice?**
- **Did Mr Cave attempt to reconcile it with the advice MHC had received?**
- **What did Mr Cave say about it?**
- **What did the trustees say about it? Did any of them wonder how it should be reconciled with their own advice?**

#### **Mr Cave’s review on 1 December 2010 at Board meeting**

Mr Cave referred to the breaches ground being “makeweight”. **In that case, how inappropriate was it for a charity to pursue them for 6 months after they had been told they would fail?**

He said that the issue of MHC’s power to run the Cafe was a “significant issue”. He referred to the two conflicting Counsel’s opinions. **Did he refer to the tenant’s barrister’s opinion which robustly confirmed that MHC could not win in court?**

**Did he consider the special issues applicable to a charity pursuing litigation? It is not clear from our papers the extent to which Mr Cave advised on this very important factor.**

He referred to the lack of an “unequivocal commitment” by MHC to manage the cafe. He seems to have doubted that a court would be satisfied on this count. See separate paper on Commercial Viability of the Cafe.

He reported that initial advice indicated MHC had no power to set up a trading subsidiary – and suggested that they get more legal advice on this. [See separate paper on the need for a trading subsidiary with particular reference to the attempts by the public and Mr Redman to get this point across to MHC].

*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

## 13. Conservators' Criticisms and Aspirations for the Café

### **[This was prepared in anticipation of the trial but not ultimately needed]**

This note is an attempt to analyse the criticisms made by the Conservators in relation to the Cafe in order to assess how far those criticisms might be valid. It considers the criticism in Harrison Clark's email of 11 June 2010 and other issues which emerge from some of the other points made by the Conservators.

It has been very difficult to pin down any specific criticism of the Cafe by the Conservators; while they are clearly critical of Mr Redman they have struggled to articulate anything specific and they have failed to provide any back-up information to substantiate any of the alleged shortcomings. The nearest they came to articulating a summary of their criticism seems to have been in an email from Harrison Clark, their solicitor, on 11 June 2010.

In addition to that email they have made various comments in their own board papers and in public statements and in documents prepared by their various consultants. These have been gathered together in the Appendix to this note together with a commentary.

### **Summary**

Harrison Clark say that Mr Redman cannot provide the level of service that they consider to be necessary ie a "high quality facility for the whole range of people who use the Hills". They asked him to provide some performance indicators which would allow MHC to measure his performance over the course of a new lease. Their criticism implies that they have already assessed the current standards of the Cafe although of course they had not since no such performance indicators have been set. Was their criticism based purely on prejudice and preconceptions?

The Conservators failed throughout to take any account of the overwhelming vote of confidence in the way that the Cafe is currently operated which is embodied in the thousands of satisfied customers who have signed the petitions and otherwise expressed their support for him. That is the only objective evidence that has been produced in relation to the current performance of the Café

It also shows that if they genuinely felt there is a need for an information centre then the solution to that would be to accommodate it in their own building which is perfectly located and which they are actually allowed to use for this purpose.

#### **1. Harrison Clark email of 11 June**

In Harrison Clark's email of 11 June they said that the Conservators do not believe that Mr Redman can provide the level of service they consider necessary to meet their wishes for the premises- ie to provide a "high quality facility for the whole range of people who use the Hills". In order to address this alleged concern, they suggest that Mr Redman should provide a business plan setting out measurable performance targets with a view to using this in the mediation.

#### **2. Service level agreement within lease**

In 20 years of running the cafe, Mr Redman has not been informed of any level of service they aspire to beyond what they have asked of him in his lease. The terms of the lease are equivalent to a Service Level Agreement on which a tenancy may be terminated for material failure to meet the standards therein. Apart from hours of opening there has been no discussion of terms that the Conservators would like to flex or include.

#### **3. No inadequacy identified by Director**

In the Director's note of 5 February 2009 reviewing the forthcoming lease expiry there was no mention of any perceived insufficiency in the level of service, not even on opening hours. If the level of service was truly believed by them to be inadequate it would surely have been mentioned in this note in which the only ground for opposing the tenancy renewal was a soft case on breaches. Furthermore, the Director

stated that “during the last four years the relationship with the cafe tenant has been good and in the main he has been co-operative”.

The Director’s note of June 2009 refers to “problems with opening hours” and contains lies (which can clearly be discounted as such) about Mr Redman not opening the cafe at weekends in the winter.

A further criticism of the level of service is included in the “vision” paragraph in that note suggesting a dislike of “wrapped ice creams and canned drinks” which cause a litter problem (although they still allow concessions to up to six ice cream vans elsewhere in relation to which there will be the same issue). It is also worth noting that the cafe, as Mr Redman runs it, was held up as an exemplary model of ethical and generally “green” catering in the film made by Transition Malvern Hills.

Beyond those points the Director’s note is silent on levels of service to the public but it does refer to the merits of a visitor information centre and to a refurbishment of the property. There is mention of the manager of the cafe acting as an Ambassador for the Conservators, which is not a service to the public but to the public image of the Conservators.

It also states that there will be negative PR associated with the termination of the tenancy, indicating an understanding that the cafe is indeed popular with the public. This view has been vindicated by the high level of public support for Mr Redman and by his achieving a “Highly Commended” in the Worcestershire Welcomes Award announced in June 2010.

#### **4. No inadequacy noted in Conservators’ Management Plan 2006-2012 – page 41**

In the Conservators’ own Management Plan for 2006-2012 (page 41) they stated that “Over 1m people use the hills and commons each year. Less than 0.1% of people using the hills voice any concerns they have about their experience on the Malvern Hills every year.”

It follows that there is no record of dissatisfaction from visitors to the hills generally. So far as the cafe itself is concerned something like 95% of the customers have signed one of the petitions and their comments on the petitions show overwhelmingly that they are satisfied too.

#### **5. Business plan prepared by Dolan**

The Business Plan produced in August 2009 contains only the same points of dissatisfaction raised in the June 2009 Director’s note, except that it said that the toilets are to open daily throughout the year. The new cafe is to offer the same fare as before but with slightly longer opening hours. It might also sell cagoules, walking sticks and mugs, all of which are already on offer to users of the hills at two shops within 10 minutes walk of the Cafe. This plan “falls short in a number of areas” (according to replies from Board to M Taylor dated 12 June 2010) and seems to have been quietly dropped once Rubus were appointed, even though it had been submitted to Court.

#### **6. Octagon Room as public facility?**

Their aspiration to use the Octagon Room as a public facility failed to consider the issues over disabled access, fire escape, security and a separate toilet. There was no attempt to define what they meant by a “public facility” in order to make a proper appraisal of the commercial opportunity that such a facility would afford. MHC must always remember that Mr Redman is trying to run a business for which he bears all the financial responsibility. *They are his landlord, not his business adviser.*

#### **7. Existing public building in location approved by House of Lords**

The Conservators make the criticism that the public is not served by Mr Redman in respect of the use of a public building. They would like to offer to the public the facilities afforded by an information and visitor centre, the absence of which they claim constitutes a serious lack of service to the public.

Their offices are also a public building. The Conservators had identified a clear need for an information centre in advance of the 1995 Malvern Hills Act. It was clear from the House of Lords Evidence and rulings on the 1995 Act that the Conservators were empowered to take on offices in Malvern and to run any information centre from there but not from a location on the Hills such as St Ann’s Well. Their office



and foyer have surplus space, which is partly now leased to the AONB. The Conservators are now taking a renewed interest in meeting this long-term insufficiency in the service they are providing to the public. It is clear that they could seek to terminate the lease to the AONB and establish the Information Centre in their offices, or they could have an internal re-arrangement to make better use of the ample space available to include an information centre at least as big as one that could fit into the Octagon Room.

The Conservators' offices are currently open for the convenience of the Conservators and not the public i.e. from 10-1 and 2-4 on weekdays only. They should therefore also extend their opening hours to meet visitors' needs. This will also meet the requirements for an ambassador, and even tie in with the Council's latest initiative for the "Route to the Hills".

### **8. Evidence of Cafe's success and popularity as it is currently operated**

These are addressed in more detail elsewhere but consider, for example –

1. The over six thousand signatories to the petitions and their hugely supportive comments;
2. More than six thousand five hundred people are members of the Save St Ann's Well Facebook group;
3. The very positive feedback from independent guides such as the 'Lonely Planet Guides' which identified it as the best cafe in Malvern, and the praise from the Vegetarian Guidebook of Great Britain;
4. The support of the vegan and vegetarian community as evidenced by high-profile "celebrities" such as Benjamin Zephaniah and Martin Shaw;
5. Being highly commended in the Worcestershire Welcome Awards for 2010 which had a particularly high number of entries this year; the judges particularly congratulated Mr Redman for what he had achieved in a such a restricted space;
6. The hard fact that it has succeeded in operating for the last 20 years which makes it the second longest lasting catering business in Malvern;
7. The Cafe was listed as a "Hot Ticket" in the Times on 6 August 2010;
8. The complimentary report prepared by Chris Brown of Turpin Smale, MHC's cafe expert.

## Malvern Hills Conservators – Litigation over St Ann’s Well Conservator Criticisms and Aspirations – Appendix – Comments by Source

This is a summary of the criticisms made by the Conservators, and also their apparent aspirations, in relation to the Cafe and Octagon Room at St Ann’s Well, Malvern.

### Sources and key to the different Fonts

The source of each comment is indicated by the font that has been used and the key to those is as follows –

Board - This indicates comments made in Board papers or publicly by the Conservators or their Director

**Dolan Plan (DP)** - This indicates comments contained in the Dolan Plan prepared by Claire Dolan in August 2009 for the Conservators

Rubus Vision (RV) - This indicates comments set out in the Rubus notes headed “Scoping the Vision for St Ann’s Well” prepared in June 2010. These were proposed before the Rubus Feasibility Report of 27 September 2010 which cast doubt on margins, visitor numbers and viability generally of the MHC / Rubus business Plan

MEDIATION (M) - This indicates comments made by the Conservators (delivered by the mediator) at the Mediation on 19 July 2010

Cave (C)- This indicates comments made by Mr Cave the solicitor for the Conservators.

	<i>Comment</i>
<p><b>1 Reasons expressed by the Board to justify take-over the Cafe - A&amp;R 9.04.09</b> – “To present a positive face and for the public to have the service they require”.</p> <p><b>Special Board meeting 3.12.09</b> – Mr Cave referred to potential to install a new tenant if negotiated John Redman’s departure.</p> <p><b>Board meeting 11.03.10</b> – Board wished to terminate lease “to maximise this facility”.</p> <p><b>Board meeting 8.4.10</b> – “It was felt that Mr Redman did not give the level of service expected by the public regarding opening hours, cleanliness and attitude to the public and MHC generally”.</p> <p><b>Board meeting 13.05.10</b> – Myatt referred to Board’s belief that the present arrangements did not adequately service the needs of visitors. Proposed improvements to fabric of building, display about the Hills and “ensuring that the standard of service and quality of refreshments provided had potential to enhance the enjoyment of a day on the hills for the majority of visitors.</p> <p><b>Paper to Board 13.05.10 – Myatt and B Smith Paper</b> – “objective of the exercise is to provide a cafe and information facility which is (a) of a</p>	<p><i>Very vague aspirations which were never translated into specific items.</i></p> <p><i>Not consistent with expressed aspiration of MHC to run it themselves. Was it just that they wanted anyone other than John Redman?</i></p> <p><i>Vague</i></p> <p><i>No evidence to substantiate any of these assertions.</i></p> <p><i>The Board had no objective evidence to support these statements.</i></p> <p><i>The fabric of the building could be improved working together with the tenant. It was not essential to remove him in order to address this concern.</i></p> <p><i>(a) Is meaningless. (b) seems to be informed by a prejudice which permeates several aspects of the MHC conduct. How they planned to check that the requisite cross-section were patronising the Cafe is open to speculation. It is not clear which sections of visitors Mr Myatt and B Smith believed to be</i></p>

	<p>standard which reflects the quality of experience gained from visiting the Hills and (b) is of a nature which attracts a representative cross section of the people who choose to visit the Hills.</p> <p><b>Rowat Witness Statement</b> – para 16 “By the time the lease came up for renewal in 2005 the MHC were becoming concerned at the manner in which the business was being run and the general attitude of Mr Redman towards both the MHC and the general public. In short it appeared to the MHC that Mr Redman was not operating the cafe in a manner which meets the needs of the visitors to the Hills as a whole”.</p>	<p><i>under-represented and how they were classifying them – income, class, dress, colour, religion, dietary requirements, ????</i></p> <p><i>No evidence on which MHC could have based this view at the renewal in 2005. They tried and failed to oppose renewal in 2005. They failed as there were no breaches to justify refusing a new lease. What was Mr Rowat’s evidence for this statement? The popularity of the Cafe and the fact that it has survived for 20 years and attracted a huge amount of public support all suggest that Mr Rowat is entirely mistaken.</i></p>
1.	<p>RV - They want from the Café:</p> <ul style="list-style-type: none"> <li>a) Fresh bright café with an open and friendly ambience</li> <li>b) A welcoming space to meet, reflect and enjoy the setting</li> <li>c) Staff that champion the Conservators</li> </ul>	<p><i>(a) &amp; (b) This is already there, as evidenced by the petitions. Needs minor care and repainting of external woodwork, and perhaps a lick of paint inside.</i></p> <p><i>(c) Inappropriate. They should champion themselves</i></p>
2.	<p>Café Fare: ISSUES</p> <p>Board - Wrapped ice creams and canned drinks present a litter problem</p> <p><b>a) DP - selling packaged goods which can add to the litter problem</b></p>	<p>This is less of a litter problem than that posed by the concessions. The Conservators also propose selling ice creams.</p>
3.	<p>Café Fare: VISION</p> <ul style="list-style-type: none"> <li>a) Board - Café to offer simple, good quality food for walkers (soup, cakes, bakery goods, hot and cold drinks, ice creams) locally sourced where possible</li> <li><b>b) DP - Café offers sandwiches (no longer bakery goods) all now ethically produced</b></li> <li><b>c) DP - Revenue from sale of high quality branded goods: cagoules, walking sticks, mugs</b></li> <li><b>d) DP - Sell car parking passes</b></li> <li><b>e) DP - Providing at cost refreshments for the sponsored walks</b></li> <li>f) RV - Support activity on the hills .I.e refreshments for charity walks.</li> <li>g) RV - provide high quality drinks and snacks/ meals</li> </ul>	<p><i>(a) (b) &amp; (g) This is what the café already provides. It was highlighted by Transition as a good example of this.</i></p> <p><i>(c) These goods are available 5-10 minutes walk down the hill, where walkers set out from. This has been tried in the past and was not profitable.</i></p> <p><i>(d) ok.</i></p> <p><i>(e) &amp; (f) Refreshments are offered to walks; what is lacking is the communication from the Conservators as to when any walks are passing by. Goods can be at cost if subsidised.</i></p>

4.	<p>Opening Hours: ISSUES</p> <p>h) Board - Experienced some problems with opening hours They are not optimal: lots of visitors every weekend in winter but tenant unwilling to open then.</p> <p><b>i) DP - Café regularly remains closed even during its advertised opening hours</b></p> <p><b>j) DP - and is often closed during major events like charity fund-raising walks</b></p> <p>k) RV - Conservators wish to increase café opening hours</p>	<p>(a) Winter hours are longer than those offered by the Conservators &amp; it is <b>untrue</b> to say that the café is not open on weekends.</p> <p>(b) There is no evidence for this assertion which is <b>untrue</b>.</p> <p>(c) See 3(e).</p> <p>(d) This is an aspiration based on no evidence or analysis of demand to suggest that to do so would be profitable. The Conservators themselves have stated that the increase in hours is “beyond commercial”. Refer to tenant’s Witness Statement and the Rubus feasibility report of 27 September 2010 and Chris Brown (Turpin Smale) report.</p> <p>There is no evidence to suggest that MHC carried out any research or analysis of demand for longer hours or the opening hours of similar businesses. Chris Brown said the hours “appear reasonable and match those in similar locations”.</p>
5.	<p>Opening Hours: VISION</p> <p>a) Board - Café to open longer hours every day of week</p> <p><b>b) DP - Open 10-4 winter weekends and 10 – 5 every day from Easter through end of September</b></p> <p>c) RV - Open daily between 10 and 5-30 in the summer, winter to be decided</p> <p>d) RV - Longer and more reliable opening hours will increase enjoyment of those visiting the site and should encourage more hill users to visit the café.</p> <p>e) M - WANT A MORE POSITIVE COMMITMENT ON OPENING HOURS</p>	<p>(a)-(c) The Defence document refers to 10am to 6pm. The variety of different suggestions confirm the comment on 4(d) i.e. that these suggestions are not based on any research or evidence of demand but are merely ideas with no substance behind them.</p> <p>Additional hours might have been available in exchange for a reduction in lease rent or losing the toilet cleaning duties.</p> <p>(d) the hours are reliable and are clearly shown on the signboard at the foot of the path.</p> <p>There is no evidence for these assertions</p> <p>(e) Not clear what this means.</p> <p>Note that each of the Rubus, Dolan and Defence documents suggested opening the Cafe for FEWER days than the tenant currently opens for. (Rubus 25 Dolan 16 and Defence 31 fewer days).</p>
6.	<p>Toilet: ISSUES</p> <p>a) Board - Toilet maintenance has improved</p> <p>b) Board - Toilets to be open all year round</p>	<p>(a) and (b) They seem to be unhappy with the current cleaning despite having no evidence of any material breach of the cleaning terms. They mentioned no concerns to the tenant during the term of the lease. They rejected the opportunity to resolve this during the lease negotiations.</p>

7.	<p>Building refurbishment: ISSUES</p> <p>a) Board - The building and its presentation are not of sufficient quality, the condition reflects poorly on the conservators.</p> <p><b>b) DP - Incorporation of the current internal yard into the building...</b></p> <p><b>c) DP - Part of these costs will be incurred whether or not MHC took over the management</b></p> <p>d) RV - Need to repair and refurbish the building</p>	<p><i>(a) MHC should paint / repair it in line with their obligations.</i></p> <p><i>(b) &amp; (c) Certain improvements to the building might be acceptable subject to discussion and agreement. Need to consult all parties, especially the tenant, who should be compensated for loss of business during any closure.</i></p> <p><i>The scope of what can be achieved can only be determined in connection with architect and planning officers.</i></p> <p><i>Whether these offer value for the café can be determined in consultation with the tenant. This could include disabled access, provision of an internal toilet, fire escape and security</i></p> <p><i>(d) There is a need for some modest repairs and external decoration to be carried out by MHC.</i></p>
8.	<p>Building refurbishment: VISION</p> <p>a) Board - to be sympathetically restored</p> <p>b) RV - To be sympathetic to the sites heritage and the environment</p>	<p><i>(a) &amp; (b) refer to 7(b) above.</i></p>
9.	<p>Facilities: VISION</p> <p><b>c) Board - Kitchen upgraded</b></p> <p>d) Board - Other parts upgraded to improve living accommodation</p> <p><b>e) DP - Kitchen upgraded to provide good quality catering facilities</b></p> <p>f) RV - Wish to develop the facilities to offer a better experience for customers</p> <p>g) RV - Upgrades the café facilities</p> <p>h) M - IMPROVE FACILITIES TO MEET DEMANDS OF TODAYS VISITORS</p> <p>i) M - INCREASE THE USE OF THE FACILITIES ON THE HILL</p>	<p><i>(a) - (c) &amp; (e) There is no problem with the current operation however, options for this could be considered along with 7(b) to see if there is mutual benefit on offer.</i></p> <p><i>(d), (f) &amp; (g) There is no record of customer dissatisfaction, the petitions show that customers are content with their experience. Visitor demands are the same today as always. Again, there is no mention of any specific facility that is missing or inadequate and if there were it would be on the basis of no evidence.</i></p> <p><i>(g) There will be a marginal, unprofitable increase in use from the extended hours. There is no evidence that there would be an increase in use resulting from upgraded facilities, as there is plenty of evidence that customers are happy with the ones currently in place.</i></p>
10.	<p>Information Centre: VISION</p> <p>a) Board - Exhibitions on Conservator work</p> <p>b) Board On-site computer offer access to MHC web site</p> <p>c) Board - Leaflets</p> <p>d) Board - Could be used for school parties and educational</p>	<p><i>(a), (d), (e) (g) &amp; (j) The Conservators are specifically not allowed to establish an information centre at the Well, (see section 9 of the 1995 Act, Select Committee Report and Conservators' own website); however, some information boards could be supported at the Cafe if subsidised, provided the issues of access, fire escape, etc are</i></p>

	<p>initiatives</p> <p>e) <b>DP - Part of the café area to act as a visitor information centre</b></p> <p>f) RV - Develop the facilities to include information and displays that champion the work of the conservators.</p> <p>g) RV - include information about the hills, flora, fauna, history etc and how to use the hills in a way that support their conservation.</p> <p>h) RV - Include suggested walks and points of interest that will encourage people to explore different parts of the hill, opening out new experiences for them and potentially reducing negative impacts on the most popular ones.</p> <p>i) RV - An interpretive centre with a wide range of displays, information and leaflets related to the hills and its history that open people up to new ways of exploring and enjoying the hills.</p> <p>j) RV - Develop the Octagon Room for displaying information</p>	<p><i>sorted</i></p> <p><i>(b) Security concern. Also, the website has little to offer the café patron and needs to be radically overhauled to include the information centre ideas. Mobile phones can access the web so there is no need for this PC.</i></p> <p><i>(c) JR could offer leaflets at the Cafe. This should be on the website and on the information boards at the car parks.</i></p> <p><i>(d) Can be done for a subsidy</i></p> <p><i>(b) &amp; (i) Why should this information be given only to visitors to the Cafe? This is a small minority of hill users and a lot of whom are repeat locals who will not be seeking information. Information should be made generally available to all the visitors via the MHC website and on the information boards at the car parks.</i></p>
11.	<p>Other Use of Building: VISION</p> <p>a) Board - At busy times, Volunteers could be based there to offer information and advice</p> <p>b) Board - Exhibition space for Malvern Museum artefacts</p> <p>c) Board - Showcase local artists</p> <p>d) Board - Hosting concerts or theatrical events in summer</p> <p>e) BOARD - Room as venue for special occasions</p> <p><b>f) BOARD - Tea room to operate in Octagon Room as well as in ground floor room</b></p> <p><b>g) DP - Meeting / entertaining room to local societies at nominal cost</b></p> <p><b>h) DP - Santa's grotto</b></p>	<p><i>(a) fine</i></p> <p><i>(b) not the Conservators' duty/ business</i></p> <p><i>(c) tried before, SAW is the wrong place for it. Happy to rent the room out to anyone who wants to try once the issues in answer to 7(b) are resolved.</i></p> <p><i>Similarly for (e) (f) &amp; (g).</i></p> <p><i>(d) Have tried this but it is not sustainable. If anyone wants to try, the room can be hired out</i></p> <p><i>(h) Town traders were not happy with past plan to do this as it drew customers out of the town.</i></p>
12.	<p>All This Offers: VISION</p> <p>a) Board - Interface with people who use hills for PR and education</p> <p><b>b) DP - This would guarantee the provision of a good quality café facility on the hills</b></p>	<p><i>(a) not sure what this means in practical terms.</i></p> <p><i>(b) Already provided.</i></p> <p><i>(c) Would only reach the minority of hill users who call in at the Cafe. This is best</i></p>

	<p><b>(c) DP - Educating visitors about how their behaviour impacts on the hills</b></p> <p><b>d) DP - Opportunity to be a good corporate citizen</b></p> <p>e) RV - Linkage with the Route to the Hills Initiative</p>	<p>on the website and car park boards.</p> <p><i>(e) Tried to link with Route to the Hills. They will not liaise with Mr Redman. The council / consultants on the Route to the Hills repeatedly have said that it stops at Rosebank Gardens</i></p>
13.	<p>Suggestions: ACTIONABLE IDEAS</p> <p>a) RV - Leaflets could be distributed via local hotel and B&amp;Bs TIC, articles in local publications about the history of the site etc</p> <p>b) RV - Signs and information boards that improve the direction finding to the café</p>	<p><i>All fine.</i></p>
14.	<p>Tenant: ISSUES</p> <p>a) Board - Does not act as ambassador for conservators</p> <p>b) Board - Ongoing difficulties with the current tenant</p> <p><b>c) DP - Past attempts to end this tenancy have failed</b></p> <p>d) C - Tenant does not provide the level of service they consider necessary to meet their wishes for the premises – to provide a high quality facility for the <u>whole range</u> of people who use the hills.</p>	<p><i>(a) Nor should be. Their own actions speak for them.</i></p> <p><i>(b) Not to his knowledge.</i></p> <p><i>(c) because he has never been in material breach of the lease.</i></p> <p><i>(d) The lease terms hold the level of service the Conservators have asked for. They have never specified any level of service beyond this. If they did this would be on the basis of no evidence for change. Which part of which range does the café not provide for? Food preferences? Such as indian, italian, chinese...allergies and celiacs...the café is open for everyone but is too small to cater to every taste.</i></p>
15.	<p>Tenant: What they want from him: WANT</p> <p>a) M - A BUSINESS PLAN TO SAY HOW HE'LL PROGRESS THE BUSINESS AND INCREASE THE USE OF THE FACILITIES ON THE HILL</p> <p>b) M - WORK WITH THEM IN DEVELOPING THE SITE FOR MUTUAL BENEFIT</p> <p>c) M - INPUT : TO WORK WITH THEM TO DEVELOP THE SITE AS A VENUE ON THE HILLS</p> <p>d) M - LOOKING FOR IDEAS FROM TENANT</p> <p>e) WANT A COMMITMENT TO PROGRESS THE BUSINESS</p> <p>f) Want something showing how performance can be measured / assessed</p>	<p><i>(a) They needed a business plan to assist their case for eviction. The tenant should not have been expected to assist their case. Such a plan cannot be made for unspecified changes to facilities.</i></p> <p><i>(b) This sensible option should have been pursued from day 1.</i></p> <p><i>(c) They can discuss it with him (they are the ones who rejected talking) .</i></p> <p><i>(d) Ideas need to be commercial or subsidised to be sustainable. The tenant has tried many different ideas over the last 20 years and is quite busy day-to-day running his business.</i></p>

		<p><i>(e) It is clearly in the tenant's interest to ensure that his business is profitable.</i></p> <p><i>(f) The Conservators have demonstrated that they are desperate to evict the tenant and the expectation is that they would use any sort of performance measure as a stick to beat him with in the future. Unless they are able to earn some degree of trust from the tenant this would be too risky for him to accept.</i></p>
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## Reflections on the drivers for change

There have been no sustainable objective criticisms of the running of the Café, whereas it can be clearly and objectively demonstrated that it is popular and profitable and offers good value.

**The Conservators have expressed a desire to enhance the café facilities whilst neither criticising the existing facilities nor stating what these enhancements are to be. They have at no stage explained why it would be necessary to remove Mr Redman in order to enhance the building.**

**They aspire to longer opening hours and wish to retain the current ethos and ambience and will offer the same fare. There is also a wish to find some “public use” for the Octagon Room including an information centre. They have stated that these plans are “beyond the commercial”. As a charity they would have to run the cafe through a loss-making subsidiary. They do not have the statutory power to own or fund a subsidiary and so this was a fatal flaw to the plans.**

**They say they would like stronger tie-ins to walking groups and the walking festival, but have previously kept Mr Redman out of the loop when they themselves have been approached by such groups.**

The Conservators are subject to the 1995 Act that prevent them from establishing an information centre at the Well.  
The Cafe is poorly signposted from the hills and from the town.

## 14. Abbreviated Timeline

Date	What was Done
Apr 04	Failed to evict tenant on breaches because they were minor. Agreed to lower opening hours
19 Feb 09	A&R oppose renewal of the lease due to the breaches (on thin evidence that was not reviewed)
2 Jun 09	Paper to A&R: talks up the case for eviction. Legal advice is for MHC to manage the café directly (to get rid of a longstanding tenant).
20 Aug 09	Dolan business plan: adds to the criticism. Predicts a small profit on unrealistic terms. Trading is to be through a subsidiary company.
22 Oct 09	Paytons letter: want evidence of breaches; says MHC do not have the statutory powers to effect their plans, and, the tenant is willing to consider changes in the lease to meet the MHC objectives.
26 Nov 09	Met with Barrister (Eyre) who advised that the chance of winning was at best 50:50, MHC did not have an express power to run a café, and they should negotiate with the tenant to vacate the premises instead of litigating.
3 Dec 09	Special Meeting: decide to negotiate to pay off the tenant up to £50K with Urgent Business sub committee on stand by for extra if required
4 Mar 10	Met with tenant. £50K offered and refused. Tenant's solicitor suggested an offer of £75,000 might find favour. Refuse to negotiate on new lease saying "relationship has irrevocably broken down"
11 Mar 10	Report on meeting said the tenant wanted £125K, did not refer to the £75,000 counter offer. Concerns were expressed on timing for a £250K grant.
11 Mar 10	Board meeting. Concerned about the 50% chance of win, they decided to seek a second opinion. MHC would seek a valuation of the business ahead of any higher offer.
26 Mar 10	Eyre written opinion saying that the odds were 2/1 against on breaches and 45:/55 or 40 / 60 against on having the power to run a café.
8 Apr 10	Special Meeting: The Board decided to pursue mediation.
26 Apr 10	Opinion of a second barrister (Featherstonhaugh) said MHC would lose on breaches but they had "good prospects" of a win on the basis of running the café for themselves. Was there any review of the Opinion, several elements of which were flawed? Was there any cross check with the first Counsel?
13 May 10	Board meeting: dropped the case on breaches. Agreed to mediation, proposed offering a trial lease on ill-conceived, onerous terms with a subjective test of "adequate service" to "a representative cross section" of hill users
12 Jul 10	Mr Redman's Witness Statement: exposed lies in the 2 June 09 paper and the Dolan plan; demolished the Dolan business plan and explained the need for a trading subsidiary.
16 Jul 10	Exchange of Position Statements (each side sees the other side's legal arguments).
19 Jul 10	Start of mediation: Tenant's barrister set out the arguments against the Conservators' legal position, explaining why he was fully confident that the tenant would win the litigation.

19 Jul 10	Mediation: A waste of time and money (£7,000). Apart from agreement to let a cafe expert look at the business, MHC fail to make any suggestions as to what changes they might like to the lease, ignoring all the suggestions by the tenant on extending opening hours, working together to improve the building, information boards etc.
27 Sep 10	Rubus Feasibility Review of their own business plan (commissioned to supersede Dolan's plan) concluded that it was completely unrealistic and based on assumptions that could not be defended in court.
28 Sep 10	Café expert Chris Brown inspected the café concluding that there was no way MHC could run it at a profit primarily because of staff costs. He said current opening hours were in line with similar places and that the café operation was appropriate for the weather dependent location.
30 Sep 10	SAW working party vote to recommend the Rubus plan to the Board! It was pointed out that a trading subsidiary would be needed, which would add to the cost.
7 Oct 10	Special Board Meeting. Agreed to discussions with the tenant to agree terms of a new lease.
1 Dec 10	SAW Working Party. Mr Cave said that a major flaw in the legal case is MHC's lack of a true intention and viable plan to run the café. The need for a trading subsidiary was a further major problem. Referred to the conflicting barristers' advice, with no attempt to reconcile them, but no reference to the tenant's legal advice. Alerted MHC to risk of paying tenant's legal costs.
1 Dec 10	Board meeting to drop litigation ( yet still 6 opposed this!).
Late 10 – early 11	Lease negotiations: no real attempt to negotiate. 8 drafts made, 4 shown to tenant. Agreeing the terms of the lease only to omit them from the next draft. Rejected concessions offered by tenant on hours etc. Failure to understand the LTA rules that the basis for negotiation was the old lease, despite this having been made clear earlier. Costs racked up with no control.
March – July 2011	Dispute over Mr Redman's costs, following a court order to pay them in Dec 2010. A complete lack of cost control over process so further legal costs were racked up in making a saving of £34.

*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

## 15. Detailed Timeline

*SAW refers to St Ann’s Well, Mr Cave is the solicitor from Harrison Clark acting for the Conservators, Claire Dolan is the author of the first Business Plan. Rubus is the author of the second Business Plan.*

	<b>Background / context</b>
October 2001	Meeting on Route to the Hills which ends at SAW. Inaugural meeting of partnership between Conservators, county councils, MHDC, AONB and Countryside Agency. They discussed the concept of encouraging tourists to park away from the main attraction [ie the Hills] then funnelling them past shops and cafes where they spend money. Chairman of Conservators Richard Graves said “We want to see greater income in the local economy through visitors. We have to get them to come here in the first place, stay longer and spend more”. <b>No awareness that tourism is not within MHC remit.</b>
	<b>Previous Lease renewal</b>
7 January 2004 NEED COPY	Letter from V Whittaker to J Croshaw (previous solicitor for MHC) referring to “numerous incidents where the tenants have not fulfilled the terms of their obligations under the lease”. [referred to in J Croshaw’s letter of 13 January 2004].
13 January 2004	Letter from J Croshaw listing possible grounds for opposing a new lease. “I would need more information....to see whether the breaches were so substantial as to justify a refusal of a new tenancy”.
26 February 2004	<ol style="list-style-type: none"> <li>(1) [From Mr Rowat’s Paper F] In Forward Strategy – “[In relation to an Information Centre on the Hills]....using the existing facilities at St Ann’s Well, more could be done to make this into an Information Centre and walkers’ cafe although there are limits to the number of people this could attract. If a new purpose-built Information Centre is deemed appropriate then siting it in the town of Malvern would help the traders and increase the visitor spend within the Malvern Hills area”.</li> <li>(2) [From Paper F] Messrs Angell and B Smith proposed monitoring the tenant’s compliance with his obligations over the next 6 months.</li> <li>(3) A&amp;R Committee (secret session) considering the Forward Plan. R Hall-Jones said “although “Information Centre, Donkey Shed, Other Properties” was in the second tier of projects, MHDC as part of their Town Centre Strategy were keen to set up a partnership with the Conservators to see how a link could be extended to access the Hills from Great Malvern town centre”.</li> </ol>
26 August 2004	A&R committee (secret) The Director advised that “ <b>minor infringements</b> ” had taken place. On proposal of Messrs Hall-Jones and Myatt it was agreed to give notice to the tenant subject to legal advice.
28 April 2005	A&R Committee Paper E – report on meeting on 23 April 2005 with tenant and solicitors (Mr Croshaw acting for Conservators) regarding new lease. The notice served on the Redmans had not opposed renewal of their lease and so it was too late to oppose it. Even if they had wished to oppose renewal there had been no substantial breaches sufficient to persuade the court not to renew. Advice recorded about the principles applicable to the terms of a renewal lease.  On Opening Hours “Even though [tenant’s proposal] constituted a reduction from

	<p>the regime set out in the current lease, these were acceptable as it was pointed out that to open at other times was uneconomical”.</p> <p>The Conservators present at the meeting (Willcock and Angell) asked Rowat to carry out weekly inspections to ensure the covenants in the lease were being carried out.</p>
28 April 2005	<p>A &amp; R Committee minutes para 11.1 – “Following the usual procedure the Director advised that he would be sending out tenders to local solicitors in order to review the legal advice”.</p> <p>This seems to have been the point at which J Croshaw was replaced by Harrison Clark although not stated to be that as such. <b>Was it because he gave unpalatable (but correct) advice?</b></p> <p>Para 12 – Rowat said that the Warden and Voluntary Warden visited the Cafe separately once a week and Board members were also urged to visit the premises regularly.</p>
8 December 2005	<p>A&amp;R Committee considered the possibility of paying the tenant to surrender the lease. Advice indicated that “in paying the sum the Conservators would need to prove that it would be of benefit to the Board in the future”.</p>
	<p><b>Progress on Route to the Hills Scheme</b></p>
21 June 2007	<p>A&amp;R Committee noted Conservators had been working with others to make Rose Bank Gardens the Gateway to the Hills. The Conservators had already done first phase ie cleared the views and improved path between RBG and Foley Terrace. Now Conservators were asked to pay £15,000 towards a bandstand type information point in the Gardens, playing a “major role “ in financing the project. Wilcock proposed and B Smith seconded that the Board would pay. It was intended to open up the area so it could be seen from town to encourage people to use the Gardens. Unanimous (Cordey, MacMillan, Myatt, Roberts, Rumney, B Smith, Tretheway and Wilcock). <b>No awareness that tourism not within MHC remit (Rosebank is not owned by MHC).</b></p>
	<p><b>2010 Lease renewal and litigation</b></p>
5 February 2009	<p>Director’s report to the A&amp;R Committee asking whether they wanted to renew SAW lease or oppose renewal.</p> <p>Referred to 4 complaints from public over 5 years discussed with the tenant. Said that the relationship with Mr Redman was good and that he was “in the main” co-operative.</p> <p>Reference to 119 inspections of toilets by wardens, with record of dirty toilets, floors or windows on 11 occasions over 5 years last being in 2008, none of which were mentioned to the tenant.</p>
19 February 2009	<p>A&amp;R committee (<b>Morgan</b>, Myatt, Roberts, B Smith, J Smith, Thomas, Tuthill, Watson, Wilcock, and Thetford attending) decided in view of the “reported transgressions in the lease and the general state of the property” to appoint a solicitor to oppose renewal. Willcock proposed and B Smith seconded. One abstention.</p>
	<p><b>KEY DECISION</b></p>
12 March 2009	<p>Board approved the A&amp;R decision</p>
4 April 2009	<p>David Hawkins had altercation with John Redman asking him to open on a day when the cafe was (legitimately) closed. Incident described in tenant’s Witness Statement in July 2010.</p> <p>Anecdotal evidence that following this Hawkins was extremely angry and visited the Conservators’ office to register his displeasure. He also wrote to the Gazette but the</p>

	editor refused to publish the letter as it was too defamatory. Briefly online in April 2009 then removed by editor. He later wrote to Conservators about it on 17.12.09.
9 April 2009	<p>A&amp;R meeting. [Check if <b>Morgan</b> present] Legal advice circulated. It suggested opposing the renewal of the lease by saying Board wanted to run the cafe themselves as well as alleging breaches. That was unanimously agreed proposed by Wilcock and seconded by P Watts.</p> <p>Reason stated was “to present a positive face and for the public to have the service they required”. <i>[What evidence did they have as to the tenant not giving such service? – ask Wilcock and Watts?]</i></p> <p>Cave advised that legal costs of litigating could be £20-25,000 for each party.(taken from 8/4/10 summary). <i>[Who monitored costs?]</i></p> <p>Working party of Roberts, Thetford and P Watts set up.</p>
2 June 2009  <b>KEY DOCUMENT</b>	<p>Rowat paper to the A &amp; R committee now referring to “ongoing difficulties” with the tenant. <b>Lies</b> about him not opening in the winter plus recognition that the Conservators had not kept the building in good repair. Lies about it not being “in keeping with the ethos of locally sourced food”; complaint that tenant did not act as ambassador for Conservators. Still says “some of the problems with opening hours and toilet maintenance have improved”.</p> <p>Says will check with lawyers that case is “<b>watertight</b>” then will need detailed business plan. <i>[Who monitored whether the case was “watertight as it progressed? Duty as charity trustees not to indulge in speculative litigation]</i></p> <p>Says (incorrectly) that the cafe should “generate a small profit”. Later proved to be completely unrealistic by tenant, Rubus and Chris Brown.</p> <p>Does not explain Landlord and Tenant Act protection of the tenant – just says that the “lease is up for renewal presenting a rare opportunity to take control of the building”. Even though this paper was after advice had been obtained from Harrison Clark.</p>
11 June 2009	A&R Committee (including <b>Morgan</b> ) agreed to formation of a business plan for £2,000. Proposed by B Smith seconded by R Thomas.
20 August 2009 <b>KEY DOCUMENT</b>          <b>KEY DECISION</b>	<p>Dolan Business Plan presented to A&amp;R Committee (including <b>Morgan</b>). Dolan confirmed figures were based on her experience of being an owner /manager of a cafe in town <i>[did she mention it was only for 8 months?]</i>.</p> <p>The plan showed a profit of £2,380 pa. It assumed that the business would be run through a trading subsidiary. No consideration of whether MHC could own or finance a subsidiary company.</p> <p>Plan (page 3 penultimate paragraph) states that “our legal advisers are confident we would win. We would not proceed with taking the Cafe under our management unless we were satisfied we had a strong legal case”.</p> <p>Dolan Plan repeated lies in Mr Rowat’s paper and added a new one saying “the Cafe regularly remains closed even during its advertised opening hours”.</p> <p>Misunderstood PR situation entirely saying “With skilled handling this can be turned into a very positive story for MHC and enhance their profile in Malvern and, indeed, nationally”.</p> <p>The Dolan Plan incorporated advice from Harrison Clark about whether MHC had power to run the cafe – concluding that “there are good arguments that can be presented to support the MHC’s case and which would have a real prospect of success”.</p> <p>It also included some advice from Harrison Clark on the ability of charities to trade but this did not really analyse whether MHC needed a trading subsidiary and if so whether it had the power to own and finance one.</p>

	A&R unanimously agreed to recommend giving notice to the tenant to terminate the lease.
10 September 2009 <b>KEY DECISION</b>	Board decided unanimously, proposed by Wilcock seconded by Thetford, to terminate the lease.
25 September 2009	Landlord and Tenant Act Notice served on John Redman.
Around 8 October 2009	Comments from Ian Rowat on MHC website (still quoted on the Best of Malvern website and in brief for architect competition) “We need to go beyond providing a commercial cafe facility....the information centre, toilets and cafe can be open around visitors’ needs rather than commercial needs...”
15 October 2009	Mr Wilcock at A&R, in reply to public question 5 about whether they had undertaken any surveys of visitor needs, referred to an “enquiry survey” prepared at a cost of £2,000 which provided “a guide for members on what could be achieved”. <b>[If that is the Business Plan, why did he call it an enquiry survey?]</b>
22 October 2009 <b>KEY LETTER</b>	Letter from Paytons (tenant’s solicitor) to Harrison Clark querying whether the MHC had the necessary powers to run a cafe and querying lease breaches.  Statement that <b>tenant is “willing to consider changes to the lease that would enable services to the public to be extended in accordance with the objectives that [MHC] have set out”</b> . Why did MHC ignore this suggestion?
23 October 2009	Email Cave to Rowat. Refers to lease breaches “detail looked weak” and “lacks conviction”. Suggests obtaining barrister opinion on whether MHC had necessary powers. <b>Note – Harrison Clark’s brief summary of possible outcomes did not include the ACTUAL outcome of tenant winning and MHC having to pay all his costs. Why not?</b>
2 November 2009	SAW Working Party (Roberts, C Smith, Chamings, Tuthill, P Watts, Wilcock, <b>Morgan</b> ) met with Cave. Legal situation reviewed. Decision to obtain barrister’s opinion from Stephen Eyre. First suggestion of getting grant from Advantage West Midlands for £250,000. Decision to seek grant was put on hold till legal outcome was known. <b>[See meeting on 13 May 2010 – why was this decision reversed...then the grant application abandoned anyway?]</b> Decided to put notice in Malvern Gazette inviting public questions over SAW.
7 November 2009	Letter from Lenni Sykes to all members of the Board individually. Raised issues such as disabled access to Octagon Room, opening hours being dictated by what was commercially viable, likelihood that MHC could run it only at a loss, arrival times for visitors as set out in AONB Visitor Survey. No substantive replies were ever given to this letter although Ms Neilsen tried to address it.
12 November 2009	Board meeting at which questions from the public relating to SAW were invited – but Board failed to give any substantive replies on SAW. Particular points to note - A. Steve Price asked if there was a business plan and how would losses be paid for. Roberts said “when a business plan is prepared the potential will become clearer” and “we have commissioned a study that will bring ideas forward for the building for public consultation”. B. Martin Taylor asked why the recent feature in the Gazette had not

	<p>mentioned their plans for SAW. Roberts said “it was not appropriate as actual plans have not yet been prepared”.</p> <p>C. Martin also asked “Do any plans for SAW exist and if so when were they initially proposed....” Roberts said “Conservators do have an outline of facts and possibilities but no firm plans have been produced”</p> <p><b><i>The Dolan Plan had been presented to A&amp;R committee on 20 August 2009. That Plan was later submitted to Court as the Board’s business plan. Why did Mr Roberts try to conceal it?</i></b></p> <p>In reply to a question from John Redman, Mr Roberts said “<i>With regard to MHC being a registered charity, we have received advice and there does not appear to be any bar on MHC trading from St Ann’s Well</i>”. See also 12 June 2010 Q&amp;A and tenant’s Witness Statement in July 2010 – all apparently ignored.</p> <p>D. Finally Roberts said that he would answer Lenni Sykes’ written questions in a letter, which he never did.</p> <p><i>[From this meeting onwards it is clear that there were major issues with the charity’s reputation among the public]</i></p>
<p>26 November 2009</p> <p><b>KEY MEETING</b></p>	<p>Conference with Stephen Eyre, barrister with Harrison Clark, Rowat, Roberts and Val Moore.</p> <p>This was to review whether the Conservators had the power to run the Cafe. <b><i>[Why had Harrison Clark not already checked this before serving the Notice?]</i></b></p> <p>Our information about this conference is derived from what is recorded by Mr Eyre in his subsequent opinion and the Summary document prepared for the Special Board meeting of 8 April 2010.</p> <p>Mr Eyre recorded that “frustration and surprise” were expressed when he explained the limits on the Conservators’ powers. [Note - JR’s solicitor and members of the public had already explained the lack of powers by this stage as well.]</p> <p><b><i>Why did the Board refuse to accept his advice?</i></b></p> <p>The Summary states “in view of the fact that although there had been some breaches of the lease by John Redman, these were not substantial enough to give the Conservators more than at best a 50/50 chance of winning the case and that the Conservators did not have express powers under the Malvern Hills Acts to run a cafe, Mr Eyre recommended that the Conservators negotiate with John Redman to vacate the premises.” <b><i>Why did they not even have a meeting with JR for a further 4 months and continue litigating for another year?</i></b></p> <p><b><i>At this point they had advice not to litigate and Dolan Plan saying cafe could barely make a profit – ie legal and commercial both pointed to stopping litigation at this point. Why was it continued?</i></b></p>
<p>3 December 2009</p> <p><b>KEY DECISION</b></p>	<p>Special Board meeting saw report from SAW Working Party and Harrison Clark. Barrister recommended that Board negotiate with the tenant and offer to buy him out. Referred to MHC being public and a charity and therefore should be “risk averse” and to tenant’s offer to have discussions.</p> <p>Decided to offer up to £50,000 for tenant to go.</p> <p><b><i>How did they decide on that figure?</i></b></p> <p><b><i>Why no consideration of negotiating a new lease especially given the advice on breaches ie objectively he was not a bad tenant. Purely personal? Why no negotiation at all for 3 months?</i></b></p> <p>They decided to seek grant for buggy (proposed by Pilcher and seconded by C Smith). <b><i>[No review of whether it was beyond their powers or not]</i></b></p>
<p>17 December 2009</p>	<p>David Hawkins letter referring to his defamatory letter to Gazette plus other incidents “that I am unable to substantiate”.</p>
<p>11 January 2010</p>	<p>SAW Working Party met (Chamings, Neilsen, Roberts, Rouse, Tuthill, Wilcock). Decided that work should be done anyway to maintain building regardless of</p>



	<p>litigation outcome since it is listed building.</p> <p>Mr Rowat said that while cafe would be closed if MHC evicted tenant, they would need to provide some refreshments and had details of a “portable hot drinks outlet”.</p> <p>Plan supposed to go into Library but it did not. Rowat still pursuing buggy plus donkey shed rebuilding to house it. They decided to get advice about whether they could run a buggy or whether MHDC would do it or if grant would be available.</p>
22 January 2010	<p>Conservators filed Defence in which they set out details of the alleged breaches and of their wish to run the cafe themselves.</p> <p><i>(cross-refer to the report from Rowat in February 2009 and bear in mind that for breaches to justify non-renewal of a lease under the Landlord and Tenant Act they must be substantial breaches which have a material adverse effect on the value of the landlord’s interest in the land ie they should not be trivial).</i></p> <p>Their Defence stated that throughout the term [ie for 5 years] the toilets, floors and windows of the toilet block had been stained and dirty and that this was the case “regularly frequently and repeatedly throughout the term”.</p> <p>The Defence also said that Mr Redman failed to tidy up litter.</p> <p>It also said that he “allowed bottles, food waste, plastic bags, discarded carpets and other rubbish” to be present at the property and that this was so “regularly frequently and repeatedly though the term”.</p> <p>These statements were untrue.</p> <p>See below for how they delayed in providing evidence of this and finally abandoned this whole line of argument as they had no objective evidence.</p> <p><i>The lack of evidence to back up their allegations calls into question the original decision in February and it suggests that there may have been other motivations since the real reason could not have been the tenant’s misbehaviour. At that stage (February 09) they were not thinking of running the cafe themselves as they were unaware of that part of the Landlord and Tenant Act).</i></p>
18 February 2010	<p>Mr Rowat’s Paper F to A&amp;R. “it is understood that the unanimous decision of the board in September 2009 still stands and we will not consider offering a new lease”.</p> <p><i>[No plan B if tenant did not want to be bought out- compare to someone offering to pay market price for your home at a time when you don’t want to sell – you want to stay put, not be paid money and have to leave].</i></p> <p>Lots about the electric buggy but no awareness of it being beyond MHC’s statutory powers.</p>
25 February 2010	<p>A&amp;R (Myatt, Neilsen, Roberts, Tuthill, Rouse, Cheeseman)</p> <p>Design by student circulated. Agreed to discuss plan with Roger Hall Jones and Conservation officer. Agreed they saw buggy as part of package of improvements with this coinciding with reopening of cafe.</p>
4 March 2010	<p>Meeting between Tenant and Messrs Roberts, Rowat and Cave.</p> <p>A detailed agenda had been agreed with a view to seeking compromise whereby tenant could remain while eg having information boards.</p> <p>Mr Roberts refused to discuss any items except paying tenant to leave, He referred to the relationship between landlord and tenant having irretrievably broken down <i>(contrast with Rowat’s appraisal in February 2009).</i></p> <p>He would not discuss any possibility of settling the matter so that a new lease could be granted and so refused to go through agenda previously agreed. No agreement was reached.</p> <p>Final offer from MHC was £50,000. Tenant’s solicitor suggested he might look favourably on an offer around £75,000 but Mr Cave told him that that was beyond the MHC reps’ authorisations.</p> <p><b>[ Why did £75,000 figure never emerge in reports of this meeting?]</b></p>

<p>11 March 2010 Rowat / Roberts' report on 4 March meeting</p> <p><b>KEY DOCUMENT</b></p>	<p>Did not refer to £75,000 suggestion, only rejection of £50,000. Mentioned that the tenant had paid £35,000 for the lease 18 years ago (value in today's terms of about £62,000) - so Board aware it had capital value.</p> <p>Risk assessment for litigating said there was a 50% chance of winning and omitted to mention the risk of paying tenant's costs if MHC lost case. No reference back to need for "watertight" case. No assessment of management time/cost in litigating (Mr Rowat later said he was spending 30% of his time on it). Legal costs would be extra £30,000 and MHC might lose.</p> <p><b>No awareness of whether it was appropriate for them as a charity to pursue speculative litigation.</b></p> <p>The risk identified in connection with negotiating with the tenant was "loss of face". Time pressure felt because of the plan to get a Natural Assets grant.</p> <p>Single consultant had been approached for quote for grant application etc (in breach of standing orders);</p>
<p>11 March 2010</p> <p><b>KEY DECISION</b></p>	<p>Reviewed Report on meeting with tenant. £75,000 not mentioned.</p> <p>Board decided to ask first barrister for a written opinion and to obtain a second barrister's opinion as well. <b><i>The advice from Eyre was clear. Given need for watertight case why get a second opinion and why dump Eyre's opinion?</i></b></p> <p>Noted Board's wish to terminate lease "in order to maximise this facility". <b><i>What does that mean? Does it have to involve removing tenant?</i></b></p> <p>Public relations consultant introduced. More cost. Concern expressed at adverse reaction of a number in the community and the need to take their anxieties seriously...</p> <p>Public questions -</p> <ul style="list-style-type: none"> <li><i>A.</i> Despite the concerns over public anxiety, Chairman (Roberts) refused to answer 16 questions about the litigation. This avoided having to confront any of the serious concerns from the public. <i>[How much money would have been saved if they had actually addressed those questions at this stage?]</i></li> <li><i>B.</i> Roberts said that their code of conduct covering confidential matters followed the codes of other bodies like councils. This was untrue – the Code did not comply and it has now been change <b><i>[But a cryptic note ostensibly not related to anything at all says "A&amp;R would consider the procedure the Board was currently using". Why not be open and admit the public had a point?!]</i></b></li> </ul>
<p>26 March 2010</p> <p><b>KEY DOCUMENT</b></p>	<p>First written barrister's opinion received from Stephen Eyre.</p> <p>He said that the odds against succeeding on breaches were 2/1 against.</p> <p>He said the odds against proving that the Conservators had power to run the Cafe were 55/45 (or 60/40) against.</p> <p>He <i>[incorrectly]</i> said that spelling out detailed powers eg to place benches (a small thing) did not exclude the possibility of implying a power to run a cafe (a major thing) because the benches power related to land not owned by the Conservators.</p> <p><b><i>This is wrong. No such distinction is drawn in the 1909 Act. Did Harrison Clark not challenge this?</i></b></p> <p>Also he ignored the rule "inclusio unius exclusio alterius" ie if a matter is expressly addressed then it is presumed that that was all that Parliament intended to say about that matter and you cannot imply other intentions. Hence if the Act says that the Conservators can run the cafe only if it is burnt down you cannot imply that they can run it if it is not burnt down.</p> <p>Without those two elements, his opinion contains almost no support for the idea that the Board could run a cafe.</p>
<p>8 April 2010</p> <p><b>KEY DECISION</b></p>	<p>Special Board meeting called by Neilsen, Myatt, C Smith and W Watts.</p> <p>Mr Eyre's opinion had previously been circulated. Board noted that he said MHC would lose on breaches – seemed unaware that he had already said that to Messrs Roberts and Rowat in November 2009, 5 months earlier.</p>

	<p>Ms Neilsen explained that she had called meeting because of concern over damage done to MHC PR, lack of clarity in explaining MHC actions to the public and escalating legal costs.</p> <p>Members were reminded [<i>who by?</i>] that the reason why MHC wanted to take over as “it was felt that Mr Redman did not give the level of service expected by the public regarding opening hours, cleanliness and attitude to the public and MHC generally”.</p> <p>Agreed to offer mediation at cost estimated at £3,000 for each side.</p> <p><b><i>Was there any consideration of cost of mediation as compared to just talking to the tenant (cost – zero)?</i></b></p>
13 April 2010	<p>Date when MHC and the tenant were due to file their respective lists of documents to support their case.</p> <p>Mr Redman filed his list on time and it included two petitions with around 2000 signatures each plus many letters in support with particular reference to the cleanliness of the toilets and the lack of litter.</p> <p>The Conservators failed to file their list of documents until much later (see below)</p>
26 April 2010	<p>The Court issued an Unless Order due to the failure of the Conservators to file their List of documents (originally due on 20 April). They were given until 10 May to file it (and will have to pay costs associated with the Order)</p>
26 April 2010 <b>KEY DOCUMENT</b>	<p>Opinion from Guy Featherstonhaugh QC. The opinion said that MHC had “good prospects” of defeating the tenant’s claim for a new lease on grounds that MHC wanted to run Cafe themselves.</p> <p>However, the Opinion is <b>flawed</b> in several ways, some of which may possibly be attributable to his Instructions from Harrison Clark [Important to review Instructions]</p> <p>F. He was <b>wrong</b> over the supposed “management agreement” from 1965 which was merely a lease dressed up to look like a management agreement – but under which in fact the commercial risk all stayed with the tenant not the Board and so was no help to the Board as a precedent for it managing the cafe.</p> <p>G. Crucially, he <b>overlooked</b> the provisions of section 8 of the 1930 Act which provided for the Board to grant leases of the Cafe to third parties. [<i>This requires only a careful reading of the Acts which any Board member or Director might have been expected to do....</i>]</p> <p>H. He asserts that there is “no distinction in practice ...between the Conservators running the business themselves and letting it to someone else to do it.” <b>This statement ignores the very significant factor of who carries a commercial risk.</b> The landlord of a cafe only has to think about whether the tenant will pay the rent. The tenant of the cafe has to carry the entire risk of success or failure of the business. He equates the two positions without considering who carries the commercial risk of the business and this flows in part from him not noticing that the Board do have an express power to grant leases of the Cafe to third parties.</p> <p>I. He <b>blurs the distinction</b> between the Board, which can do only what its statutes say it can do, and a human being (eg Mr Redman), who is perfectly entitled to run a cafe business if he wishes without a statute to say he can. He almost seems to think that Mr Redman would have needed a statute to say that he can run a cafe business which is of course nonsense. He has ended up treating the question of personal powers as if it were a matter that attached to the Cafe itself a bit like a planning permission, instead of realising that the tenant will obviously have a different set of powers from the Board. An example illustrates it – a council cannot run a supermarket business but it has no problem in leasing a building to Tesco which can of</p>

	<p>course run such a business. Tesco does not derive its ability to run a supermarket from the statutes which govern the council!</p> <p>This opinion is seriously flawed. <b><i>Did HC or the Board challenge it as they had challenged Mr Eyre's advice?</i></b></p> <p><b><i>Why did they not attempt to reconcile their two conflicting opinions? Now had one going each way so why did they decide to go with second?</i></b></p> <p>Worth noting the barrister's comment on MHC's approach to alleged breaches and real motive - "Indeed I can see no evidence that notice of any of the dissatisfactory features that were logged was actually given to the Tenant. If that is right then the Tenant will be justified in saying that the MHC have merely been pursuing a policy of attempting to get him out of the premises at the end of the term of the Lease rather than addressing the complaints that have been made".</p>
5 May 2010	Letter from tenant to all Conservators setting out proposed agenda for settlement discussions (use of Octagon room, opening hours, toilet opening, Donkey shed etc). No-one replied.
11 May 2010	From 11-13 May tenant and various of his supporters were contacted with requests for the next set of public questions for the Board meeting on 15 May to be withdrawn. They were not withdrawn.
11 May 2010	The Cafe was shortlisted for the Worcestershire Welcome Awards as a result of a public vote. <b><i>[Did anyone on the Board wonder how this (or indeed the numbers signing the petitions) tallied with the allegations of breaches?]</i></b>
13 May 2010	<p>Board meeting. Cave in attendance.</p> <p>B Smith, Mr Myatt and Mr Roberts had prepared proposals for mediation. Not based on Landlord and Tenant Act principles but on availability of grant and on perceived shortcomings of tenant (despite all evidence to contrary). <b><i>Why did no-one challenge assumption that tenant in breach especially since 2 barristers had now said that breaches were minor and inadequate to justify non-renewal of lease?</i></b></p> <p>Set out elaborate scheme for putting tenant on probation to see if he (a) reached a quality threshold and (b) attracted a representative cross-section of people visiting hills. Unclear if this was to be based on class, income, dress, colour, gender, religion....None of this was mentioned at the mediation.</p> <p>Referred to advice from Mr Featherstonhaugh that MHC might win litigation – but did not mention existence of Mr Eyre's opinion that they would not. <b><i>How did they decide which opinion should prevail?</i></b></p> <p>No evaluation of prospects of success/ risk of failure / cost/benefit analysis or objective appraisal of perceived shortcomings in cafe. Nor any awareness of whether charity should be continuing to rack up legal costs.</p> <p>Chamings proposed and Hunt seconded proposal that Board would consider granting new lease.</p> <p>Mr Cave advised against any direct negotiation with the tenant <b><i>[WHY? No reason given – would have been much cheaper]</i></b>. Mediation cost £8,000 for one day. Still making £50,000 available to buy out tenant. <b><i>[How had that sum been calculated and why no reference to £75,000 proposal?]</i></b></p> <p>Decided to appoint Rubus to apply for grant. No time now available to do proper tender process – breach of standing orders.</p> <p>Agreed to drop argument on breaches.</p> <p>Decided to leave buggy till cafe project was finished.</p>
17 May 2010	The Conservators withdrew argument relating to the alleged breaches. No explanation was given and they had at that stage produced no evidence at all relating

<p><b>KEY DECISION</b></p>	<p>to their allegations.  The Court ordered them to pay the tenant's costs on the breaches case. <b><i>They had been advised that the breach argument would fail 6 months earlier. Why persist with it (more costs) until May?</i></b>  The Conservators were due to produce a copy of the documents on their list to Mr Redman – still had not been produced.  <b><i>Did they also consider dropping the whole case at this stage. If (objectively) there were no breaches, then (objectively) the tenant was not a bad tenant and so there was no need to remove him? What was the benefit to the charity of continuing to litigate at this stage?</i></b></p>
<p>25 May 2010</p>	<p>The Conservators finally produced the copy documents on their list.</p>
<p>11 June 2010</p>	<p>Email from Cave to Tenant's solicitor stated that if tenant had just moved out, then MHC would have put the cafe out to tender for a new tenant. Demonstrates that MHC did not truly want to run it themselves; they just had to say that to fit within the Landlord and Tenant Act in order to remove John Redman. Does that make it a personal vendetta? It indicates that the entire case was constructed upon a lie? Ultimately (1 December 2010 meeting Mr Cave said this lack of a true wish to run the cafe themselves could be fatal to the MHC case (amongst other reasons).</p>
<p>12 June 2010</p>	<p>Replies to questions raised in writing with the A&amp;R committee – Please confirm whether you intend to set up a separate trading company to satisfy concerns which the Charity Commission is likely to have about the cafe making a loss?  Answer - <i>The Conservators are not considering setting up a separate trading company.</i>  Compare item on this in JR Witness Statement and meeting on 1 December 2010 when this was finally admitted to be problematic. <b><i>Why was it not looked at properly in June 2010?</i></b></p>
<p>18 June 2010</p>	<p>Letter to Board from Rowat explaining that grant might cover only 40% (not 90%) of project costs and that many proposals fall outside MHC remit.</p>
<p>18 June 2010</p>	<p>Bradshaw electric vehicles gave quote for a buggy for £21,000 plus VAT.</p>
<p>UNDATED</p>	<p>Ryder Partnership carried out risk assessment on all sorts of transport up the hill. No assessment of whether Conservators had the statutory power to run them.</p>
<p>28 June 2010</p>	<p>Discussion between some Board members and Rubus to “scope the vision” for SAW.  Led to ideas such as materially longer opening hours which (by 27 September 2010) Rubus themselves had dismissed as over-ambitious.  Rubus recommended that grant was not pursued any further.  <b><i>[(Total cost of Rubus for preparing a business plan that they themselves then said was not feasible, and for looking at a grant that was not suitable - £5000 plus VAT). Have they been asked for a refund?]</i></b></p>
<p>6 July 2010</p>	<p>Board meeting - Public question - Please explain why the Board are paying Rubus to draft a business plan but at the same time are not planning to set up a separate trading subsidiary. Is it because the Board feels that the Charity Commission guidance on this does not apply to them or is it because the Board has no statutory power to own a subsidiary?  Answer - <i>The Conservators have received advice and have never ruled out setting up a separate trading arm. [But as late as 1 December 2010 HC were advising Board to get detailed advice on this because HC had realised that MHC had to operate the Cafe through a trading subsidiary but had no power to own a subsidiary – fatal flaw to their plan (amongst others). First raised by public in November 2009.]</i>  Natural Assets grant was dropped as only 60% of money available and it required</p>

	<p>“outputs” which were outside MHC’s remit. <b><i>Why did it take so long to realise this and how significant had the prospect of this grant been to the whole scheme?</i></b></p> <p>Mr Chamings queried Rubus’ expertise in catering (they had none) and Ms Neilsen suggested deferring their appointment until after mediation but both were overruled.</p>
<p>12 July 2010</p> <p><b>KEY DOCUMENT</b></p>	<p>Witness Statement of John Redman covered –</p> <ul style="list-style-type: none"> <li>A. Lack of complaints from Conservators / others</li> <li>B. Lies in papers prepared by Ian Rowat for the Board.</li> <li>C. Lack of any objective evidence of breaches</li> <li>D. Lack of maintenance by the Conservators</li> <li>E. Demolition of figures in Dolan plan – detailed explanation as to why Conservators could not possibly make a profit.</li> <li>F. Lies in Dolan plan</li> <li>G. The fact that a trading subsidiary would need to be set up by the Conservators.</li> </ul> <p><b><i>[Were the Board informed of any of these points? This exposed the lies that formed the basis for the litigation and demonstrated that MHC would be unable to run the cafe at a profit. MHC later paid Rubus about £5,000 to produce a business plan that confirmed what Mr Redman had set out in his statement. Who chose to disregard his Statement? Was it presented and analysed by the Board?]</i></b></p>
<p>16 July 2010</p> <p><b>KEY DOCUMENT</b></p>	<p>Harrison Clark’s Position Statement for the Mediation. Still not noticed that the 1930 Act gives an express power to grant leases of the Cafe – so runs very tenuous arguments based on that misapprehension.</p> <p>States that the points made in JR’s statement about charity law are “<b>unfounded</b>” (see meeting of 1 December 2010 when he said that on a strict interpretation the MHC’s powers did not extend to owning a subsidiary company].</p>
<p>16 July 2010</p> <p><b>KEY DOCUMENT</b></p>	<p>Roger Evans’ Position Statement sent to HC. This exposed the flaws in the MHC case and why fundamentally they would lose the argument in court. <b><i>[How was this presented to the Board and who analysed it, comparing and contrasting with the Board’s own flawed opinion from Featherstonhaugh? Did the mediators (Myatt, Tuthill and B Smith) report on it and on the revelation that MHC did have an express power to grant leases of the Cafe? When was this discussed by the Board?]</i></b></p>
<p>19 July 2010</p>	<p><b>Mediation Meeting</b></p> <p>The tenant made numerous suggestions including extending opening hours, working together to improve the building, possible information boards, etc etc. The MHC (Messrs Rowat, Roberts, Tuthill and Myatt) specifically said they would not volunteer any suggestions about the possible terms of a new lease and kept asking for a business plan. Used a lot of phrases like “wanting to see more positive commitment from tenant” but did not define what that meant.</p> <p>Seemed to have been paralysed by the exposition of the legal situation by the tenant’s barrister – yet refused to discuss it.</p> <p>Complete lack of progress over a long day led to suggestion to involve Chris Brown.</p> <p><b><i>How was this reported back to the Board?</i></b></p> <p><b><i>Did they hear of proposals from tenant eg for longer hours?</i></b></p> <p><b><i>Did the MHC reps explain why they prevented any progress being made?</i></b></p> <p><b><i>Why did they stale-mate the talks? Was it because they were thrown by the revelation of the true legal position and did not know how to take it forward?</i></b></p> <p><b><i>Had Mr Cave referred back to either barrister for their view on the tenant’s barrister’s explanation?</i></b></p>

21 July 2010	<p>Letter from Ms Moore to Conservators regarding M Taylor letter on personal liability. Quoted the “objects” registered for the Charity Commission which does not tie back to the MH Acts but is just an inaccurate paraphrase.</p> <p>Wrongly stated that “legal advice has been sought and followed throughout...” (But Mr Eyre’s advice in November 2009 which recommended negotiating with the tenant at that stage and indicated that they were unlikely to succeed on the ground of breaches had not been followed. The case on breaches had not been dropped for 6 months after he told them they would lose).</p> <p>More seriously, Mr Taylor was flagging the breach of their duty as charity trustees and those duties go beyond “<b>Could</b> we litigate” to include “<b>Should</b> we litigate”. Ms Moore’s assurances ignored that aspect completely.</p>
29 July 2010	<p>SAW Working Party meeting NO COPY MINUTES</p>
30 August 2010	<p>Letter from tenant to Rowat cc Conservators requesting a draft lease, noting it will be “broadly the same as the old one”, suggesting direct discussions about it. No reply. <b>Why not? This was the eventual outcome and could have saved much money and bad PR if offer taken up.</b></p>
23 September 2010	<p>Rubus Business Plan Financials – not fully addressed pending outcome on need for trading subsidiary. Doesn’t address lawfulness of MHC loan to subsidiary. <b>[ Would have been an unlawful investment for MHC as too risky for a charity]</b></p> <p>For criticism of this Plan – see Feasibility Review also produced by Rubus themselves saying their own Plan was not viable.<b>[How did this happen? Why were Rubus paid to prepare a plan that they then said was not viable??]</b></p>
27 September 2010 <b>KEY DOCUMENT</b>	<p>Feasibility Review by Rubus of the Business Plan produced by Rubus.</p> <p>The [Rubus] author’s view was that the (Rubus) Business Plan was not viable – margins too tight, visitor numbers too ambitious, risk to charity was too high etc.</p>
28 September 2010 <b>KEY DOCUMENT</b>	<p>Turpin Smale report to the Board and (separately) to JR. Points included</p> <ul style="list-style-type: none"> <li><i>A.</i> The opening hours appear reasonable and match those in similar locations <i>(ie as stated the opening hours analysis attached to the tenant’s Witness Statement in July 2010. MHC did no analysis of opening hours but relied on (prejudiced) anecdotal evidence that was untrue]</i></li> <li><i>B.</i> The Conservators’ local authority staff rates and on-costs would mean that this type of cafe operation would incur significant <b>losses</b> if they were to operate it themselves <i>(ie as stated in the tenant’s Witness Statement in July 2010 – why had that been disregarded?)</i></li> </ul>
30 September 2010 <b>KEY DECISION</b>	<p>St Ann’s Well Working Party (<b>Morgan, Roberts, Rouse</b>).</p> <p>Turpin Smale report discussed. Rowat said legal advice indicated that Board did not have power to set up trading subsidiary and this would have the effect of adding £9,000 to costs (annually?). <b>As already mentioned in tenant’s question to the Board in November 2009 and his Witness Statement in July. By 22 September 2010 (date unclear) David Judge had already opined that MHC could not own a subsidiary. Why was that ignored?</b></p> <p>Reviewed Rubus Business Plan. Agreed Board should “own” the business plan. Salary for manager should be £22,000 not £9,640 (more than double) and recommended their changes to the Business Plan to the Board. <b>How could they recommend such a plan which was deeply flawed and over ambitious as recognised by Rubus themselves on 27 September? How did they reconcile the Rubus plan with the financial information provided by the tenant in his Witness Statement?</b></p>

	Not clear whether this group had by this time seen the damning Feasibility Review also prepared by Rubus dated 27 September 2010.
7 October 2010 <b>KEY DECISION</b>	Special Board meeting. Rowat had previously circulated a report on situation so far and costs so far. COPY OF THAT PAPER? Board considered more mediation, reverting to court and negotiation with tenant. B Smith provided a summary including referring to the Board's previous attempt to terminate the lease in 2005. He proposed further mediation and spoke against direct negotiation. Myatt seconded that proposal. Turpin Smale report had been received. Board members were worried that even if the Board won, the cafe would run at a loss. <i>[Why had they not reviewed this earlier as the same points were made in the tenant's Witness Statement in July 2010? Even the Dolan Plan indicated only a tenuous profit of £,2830 pa based on totally unrealistic costs and income]</i> C Smith seconded by Chamings proposed direct talks to try to agree terms with the tenant. Named votes taken. Approved by all except Wilcock, Watson and P Watts. Myatt and Baldwin abstained. C Smith and P Watts were to meet the tenant.
18 October 2010	SAW Working Party met ( <b>Morgan</b> , Neilsen, Roberts, Rouse C Smith, B Wilcock) to discuss terms of new lease. Note - the Landlord and Tenant Act provides that a renewal lease will be broadly in line with the old lease unless either side can justify a change which is fair to the other side. That general principle seems to have been ignored as Board members suggested all sorts of new conditions to be added to the lease without any objective evidence as to why they were needed or how they might be fair to impose on the tenant. Seemed to be under impression that they could still refuse a lease if tenant did not agree with new terms. <i>Did they have no advice on the terms of the new lease? See letter from tenant of 30 August.</i> <i>Final lease was virtually identical to old one in all material respects apart from a modest rent increase.</i>
11 November 2010	Board meeting discussed new lease terms. Ms Adeney suggested and Board agreed requiring CRB checks for tenant and staff. Demonstrates ignorance of what would be acceptable under Landlord and Tenant Act – as if still unaware of how terms of new lease are settled. Also suggestive of prejudices against tenant?
16 November 2010	Meeting between C Smith, P Watts, tenant and Ms Musgrove (retired solicitor, who was assisting tenant pro bono). Detailed discussion of terms of lease and it was virtually agreed. Subsequently Harrison Clark prepared several new drafts which did not reflect the agreement reached. [A table summarising the course of the negotiations included in Timeline bundle]
24 November 2010	Tenant emailed C Smith pointing out that drafts did not reflect agreed terms. Clive Smith replied "You are correct with regard to the draft lease. I have forwarded your email to Andrew Cave and instructed him to work on a new draft". <i>[Compare to P Watts quoted in the Gazette of 4 February 2011 - Three leases have been offered to date and the tenant has refused them all on various possibly "specious" grounds..Mr Watts said that MHC had gone to great efforts to offer Mr Redman a suitable lease negotiating over a period of some six hours. How accurate a representation was that?]</i>
1 December 2010 <b>KEY</b>	SAW Working Party (Chamings, Neilsen, Rouse, Roberts, C Smith, Tuthill, P Watts, Wilcock and Mr Cave of Harrison Clark). Cave referred to breaches ground being "makeweight". <i>In that case, how inappropriate was it for a charity to pursue them for 6 months</i>



<p><b>DECISION</b></p>	<p>He also referred to the two conflicting Counsel’s opinions (although seems to have attempted no analysis to evaluate them at all). Did not refer to or analyse the tenant’s barrister’s opinion which robustly confirmed that MHC’s case could not win in court.</p> <p>Did he consider special issues applicable to charity pursuing litigation? <i>Was Mr Cave alert to the fact that MHC is a charity and that trustees have particularly strict duties in that regard?</i></p> <p>Referred to the lack of an “unequivocal commitment” by MHC to manage the cafe. If they did not genuinely want to run the cafe themselves (as he had stated in his email of 11 June 2010 that if the tenant had just left then MHC would have just put the cafe out to tender for another tenant ie they did not wish to run it themselves). Suggests the whole case was constructed on a false premise. This would have become apparent on cross-examination of Mr Rowat at trial.</p> <p>Initial advice indicated MHC had no power to set up a trading subsidiary – suggested they get more advice on this. <i>Compare R Roberts’ reply to the public question in November 2009 that this was not a problem and Mr Cave’s remark in his Position Statement that he thought the tenant’s points on charity law were “unfounded”.</i></p> <p>Warned of risk of having to pay tenant’s costs (around £30,000) if MHC dropped opposition to the new lease. Even if won, Board would be at risk on costs because the tenant would be unable to pay because MHC would have bankrupted him.</p> <p>C Smith reported on meetings with tenant. No reference to terms having been agreed in meeting then “unagreed” via Harrison Clark [see emails of 24 November 2010]. Unsuccessful attempt to force agreement from tenant by giving him short deadline to agree lease.</p> <p>C Smith proposed, seconded by Chamings, that WP should recommend Board dropping Ground G opposition. No agreement reached by Working Party as to way forward. <i>[Remarkable that some still wanted to litigate since there was really by this stage no-where else for MHC to go except to grant new lease. What objective analysis was there as to the benefit to the charity of persisting in the litigation? Was there any awareness at all of their duties as trustees and risks of wasting even more of the charity’s money?]</i></p>
<p>1 December 2010 <b>KEY DECISION</b></p>	<p>Board meeting straight after Working Party. Legal advice repeated. Pilcher proposed and Chamings seconded that Ground G opposition to lease be dropped. Passed by 10 to 6. Still 6 who wanted to litigate!</p>
	<p><b>Known complaints flowing from this</b></p>
<p>12 December 2010</p>	<p>Complaint from member of the public about Board misleading the public over allegations of breach by tenant and over Mr Rowat contacting her employer under the pretence that MHC was a client of the company. That was not true and they suspected that Mr Rowat had made that claim purely to try to deter her from voicing her concerns and intimidating her.</p> <p>Fear of this sort of thing is one reason why many public questions were submitted under the cover of the Save St Ann’s group since it avoided individuals being exposed in this way.</p> <p>[At her complaints panel hearing P Watts told her that they suspected the tenant had had free legal advice and was planning to put in a fraudulent costs claim for such advice – defamatory towards Mr Redman, his solicitor and his retired solicitor friend, Ms Musgrove, who had given her help freely].</p>
<p>March / April 2011</p>	<p>Complaint from John Redman over defamatory remarks by Mr Rowat at a public talk.</p> <p>His solicitor complained to MHC’s solicitor but had no substantive response. At formal complaint hearing, no apology for the defamation was offered and Mr Wilcock stated that “quite a lot of people think you are an <b>argumentative little</b></p>

	<p><b>cuss”.</b></p> <p>Perhaps not the best way for a publicly funded charity to handle a complaint. Full transcript available if required..</p> <p>Mr Redman told Clive Smith on 17 May 2011 that he was not satisfied with the way his complaint had been handled and requested a full hearing before the board. He awaits a response.</p>
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*Note – this summary is based on papers available to the SSAW group as at 5 August 2011 which do not include general correspondence between MHC and Harrison Clark.*

## 16. Index to Timeline Bundle of Referenced Documents

No	Date	Document	Parties
1	13.01.04	Letter	J Croshaw (solicitor) to MHC
2	26.02.04	A&R Minutes	MHC
3	26.02.04	Paper F for A&R meeting	MHC
4	26.08.04	A&R Minutes	MHC
5	28.04.05	Paper E for A&R meeting	MHC
6	28.04.05	A&R Minutes	MHC
7	27.10.05	A&R Minutes	MHC
8	08.12.05	A&R Minutes	MHC
9	21.06.07	Paper D for A&R meeting	MHC
10	5.02.09	Paper for A&R meeting	MHC
11	19.02.09	A&R Minutes	MHC
12	9.04.09	A&R Minutes	MHC
13	2.06.09	Paper relating to Cafe	Ian Rowat
14	11.06.09	A&R Minutes	MHC
15	20.08.09	Paper E for A&R meeting including Dolan Business Plan and advice from Harrison Clark on MHC statutory powers and the need for a charity to trade through a subsidiary company	Claire Dolan / Harrison Clark (MHC solicitor)
16	20.08.09	A&R Minutes	
17	August 09	Competition Brief for architecture students	Ian Rowat
18	10.09.09	Board minutes	MHC
19	25.09.09	Letter with notice to terminate lease	Harrison Clark to John Redman
20	08.10.09	Land management minutes	MHC
21	15.11.09	Extract from "Best of" website incorporating quotation from Ian Rowat	
22	22.10.09	Letter	Paytons (solicitor for tenant) to Harrison Clark
23	23.10.09	Email	Harrison Clark to Ian Rowat
24	2.11.09	Notice of urgent business sub-committee	MHC
25	2.11.09	Minutes of St Ann's Well Working Party (SAW WP)	MHC
26	7.11.09	Letter	Lenni Sykes to each Conservator individually
27	12.11.09	Board Minutes	MHC
28	Nov 2009	Beacon Newsletter extract	MHC
29	3.12.09	Special Board minutes	MHC
30	17.12.09	Letter	D. Hawkins "to whom it may concern"
31	31.12.09	Notice of meeting of SAW WP	MHC
32	11.01.10	SAW WP Minutes	MHC
33	22.01.10	Defence document	MHC
34	18.02.10	Paper D for A&R meeting	MHC
35	25.02.10	A&R Minutes	MHC
36	11.03.10	Board Minutes	MHC
37	11.03.10	St Ann's Well Update	Ian Rowat
38	26.03.10	Opinion of Mr Eyre barrister for MHC	
39	02.04.10	Gazette press cutting	

40	08.04.10	Special Board minutes	MHC
41	08.04.10	St Ann's Well Summary for Special Board meeting	MHC
42	26.01.10	Written opinion of Mr Featherstonhaugh second barrister for MHC	
43	05.05.10	Letter enclosing agenda for possible discussions	J Redman to all Conservators individually
44	10.05.10	List of documents MHC planned to submit to court	MHC
45	13.05.10	Board minutes	MHC
46	13.05.10	Paper for Board on Mediation	MHC
47	13.05.10	Paper on Mediation strategy	B Smith and A Myatt
48	13.05.10	Public questions at board meeting	
49	21.05.10	Witness Statement	Ian Rowat
50	May 2010	Brief for architect	MHC
51	11.06.10	Email	Harrison Clark to Paytons
52	18.06.10	Letter enclosing briefing notes from Rubus	Ian Rowat to Conservators
53	25.06.10	Defendant's reply to Part 18 request plus annexures - A&R minutes 15.10.09 - Replies dated 10.06.10 to public questions	Ian Rowat
54	27.06.10	Letter	P Watson to constituent
55	6.07.10	Letter	I Rowat to Rubus
56	8.07.10	Paper for Board meeting	MHC
57	8.07.10	Paper for Board meeting	MHC
58	12.07.10	Witness Statement of John Redman	
59	14.07.10	Letter	M Taylor to all Conservators individually
60	21.07.10	Letter	V Moore to all Conservators
61	14.07.10	Email forwarding email from t Musgrove enquiring about cost benefit analyses etc	I Rowat to Messrs Chamings, P Watts, Roberts and Kelly
62	16.07.10	Position Statement from Harrison Clark prepared for the Mediation	
63	16.07.10	Position Statement from Roger Evans barrister for Mr Redman	
64	28.07.10	Letter	Constituent to P Watson
65	29.07.10	Agenda for SAW WP meeting	MHC
66	30.08.10	Letter suggesting trying to start agreeing form of new lease	J Redman to I Rowat
67	23.09.10	Draft Business Plan	Rubus / MHC
68	27.09.10	Feasibility Assessment of Rubus' Business Plan	Rubus
69	28.09.10	Reports to (a) MHC and (b) J Redman about the Cafe	Chris Brown of Turpin Smale
70	30.09.10	SAW WP Minutes	MHC
71	7.10.10	Paper for Special Board Meeting	I Rowat
72	7.10.10	Special Board minutes	MHC
73	18.10.10	SAW WP minutes	MHC
74	11.11.10	Board Minutes	MHC
75	24.11.10	Email exchange regarding lease drafts	Clive Smith and John Redman
76	November 2010	Summary of lease negotiation points (and later related Gazette article)	J Redman

77	01.12.10	SAW WP Minutes and Board minutes	MHC
78	07.12.10	Letter	Paytons to Harrison Clark
79	12.01.11	Email	I Rowat to Board
80	13.01.11	Board minutes	MHC
81	31.01.11	Email	M Graham to I Rowat
82	05.02.11	Letter	J Redman to all Conservators individually
83	12.12.11	Complaint about I Rowat	Member of public to MHC
84	17.05.11	Complaint about I Rowat including annexed letter regarding defamatory remarks	J Redman to C Smith