The Bellozanne Covenant

For consideration by the Parish Assembly
on 29 March 2017 at 7.00pm

PARISH OF ST HELIER

P.05/2017

PROPOSITION

THE PARISHIONERS are asked to take into consideration and if deemed advisable to approve

the recommendation of the Constable, Procureurs du Bien Public and the Roads Committee of the Parish of St Helier that the States be asked to negotiate with the Parish to agree a fair price for the lifting of the 'Bellozanne Covenant'.

REPORT

Introduction

Parishioners may be aware that the Bellozanne Covenant has been declared spent and extinguished by the Royal Court and that this decision, though for different reasons, has recently been upheld in the Court of Appeal. This report sets out the background to the matter and recommends that, in view of the uncertainty of a successful outcome and the cost to the Parish of further legal proceedings, the Constable takes a proposition to the States Assembly to seek to obtain a fair price for the lifting of the covenant.

Background

The Bellozanne Covenant was put in place on 31st May 1952, when the Parish sold, at the States' request, the land and equipment in Bellozanne Valley which provided for the Parish's waste disposal. The President of the Public Health Committee, Senator Edward Le Quesne, had initially approached the St Helier Roads Committee as the States wished to create a centralised sewage operation on the site. At an early stage in negotiations the Parish's Roads Committee made it clear that it would accept the sale of its waste disposal facilities 'at a suggested price of £35,000, providing that a clause be inserted in the contract to the effect that all Parish refuse, of any description whatsoever, must be accepted at the destructor, free of charge, at the appropriate time of collection as at present, and that there be included in the Contract any further conditions which might be considered necessary to safeguard the interests of the Parish.' (*Roads Committee minutes, 22 August 1950.*)

The Committee considered the matter again the following month and were recommended by the Procureurs du Bien Public to seek the higher price of £45,000 for the sale of the Parish's land and assets; it was also decided 'that the Public Health Committee should take over and administer the destructor at as early a date as possible after the passing of the Contract, as it was felt that having two official bodies concerned with running the plant would not make for efficient and smooth working.' (*Op. cit. 5th September 1950.*) By the time the proposed sale was put to the Parish Assembly on 24th July 1951, the States had made a final offer of £22,000 while the Roads Committee was prepared to accept £22,500; the latter sum was accepted by the Parish Assembly.

There remained the question of what conditions the Parish would wish to be embodied in the Contract of Sale. At this stage in the negotiations a number of Parishioners sought to include conditions that would provide specific safeguards for the residents in the First Tower area. However, according to the Parish's lawyer, Robert H. le Masurier, in a letter to the Constable, the Solicitor General could see no point in meeting to discuss this particular matter 'inasmuch as the residents in the First Tower area cannot be safeguarded by any terms which may be inserted in the contract of transfer. The position in law is that no person can claim the benefit of a contract made between third parties.' This advice was endorsed by the Parish lawyer: 'the residents in the neighbourhood of the Destructor are to a certain extent protected by the Common Law of the Island which provides that no person may use his property in such a way as to cause a nuisance.' The Parish lawyer concludes: 'the Parish may of course include in the contract any clause for its own protection and benefit, and will undoubtedly wish to do so.'

The conditions of sale were agreed by the Parish Assembly on 11th September:

1. 'That the Public Health Committee Department undertake to receive all refuse and scrap metal that are at present being received by the Parish;
2. That the times of delivery to Bellozanne Destructor shall be as at present, that is, from 8 a.m. to 5 p.m. for six days per week, and that all market offal, fish, etc., shall be received as at present, the hours of delivery varying from 6 to 8 p.m.;
3. That the special collections from hotels during the summer months shall be received at the Destructor from 7 a.m., as occasion arises;
4. That the Public Health Department above absorb all men at present employed at the Destructor;
5. That all the necessary topsoil in the present Nursery be transferred to the new Parish Nursery at Bellozanne;
6. That the necessary time lapse will be given to the Parish, on the taking over of the Bellozanne site, to enable the new Nursery to be established.'

A contract of sale was agreed between the Parish lawyer and the Crown Officers acting for the Public Health Department and was sworn in the Royal Court on 31st May 1951, before the Bailiff, Sir Alexander Coutanche and Jurats Billot and Riley, by the Constable of St Helier, Henry Grant and Procureurs du Bien Public, Edwin Hettich and James Le Poidevin, with respect to the 'Actes' of the two Parish Assemblies referred to above, and on behalf of the Public by the Attorney General, Ralph Vibert and the Greffier, Francis de Lisle Bois.

It should be noted that while it is not specifically stated in the contract that the Public will accept Parish waste free of charge, this is implicit in the Public's obligation to accept the refuse. One cannot be under an obligation to do something and then make the fulfilment of such an obligation contingent on payment being received for so doing. The intention of the Parish in this regard is clearly expressed in the minutes referred to above.

The argument, subsequently relied upon by the Royal Court in its judgement of July 2016, that the Public's obligation to accept Parish refuse expired when the 'Destructors' were replaced with a single large incinerator in 1979, is plainly wrong: the intention of the Parish was to be able to continue to bring its rubbish to the Public waste disposal facilities and to have it destroyed by whatever means the Public chose to use, otherwise the Public could

simply have removed the Destructors as soon as the sale had gone through court and the covenant would have been worthless. Any common sense reading of the half dozen conditions which the Parish arrived at over a period of some 18 months backs up this interpretation. After all, the Parish was giving up its ability to manage its own waste disposal; true, it was losing some of the liabilities involved, but it is noteworthy that the suggestion that Parish staff be transferred to the Public Health Department is not on the original list of conditions to be met: what concerned the Parish's Roads Committee when it first discussed the matter was that the Parish would not see any reduction in the level of service provided with regard to its waste disposal and that it would be free.

It is noteworthy the Parish received only half of its original asking price for its property and assets.

The 1994 Contract

Four decades after the Bellozanne Covenant was established the Parish was again approached by the States to sell land in the valley: Le Parcq du Bas (Field 1489), which was at that time rented out for £100 p.a. for farming purposes. The Roads Committee was informed that 'Public Services are desperate for extra land in that area and may be interested in buying the field.' (*Roads Committee minutes, 8 September 1993*.) The sale for £25,875 was approved by the Parish Assembly on 30th August 1994 and the contract went through court on 23 December, 1994, before the Deputy Bailiff, Philip Bailhache, sworn by the Constable of St Helier, Robert Le Brocq and the Procureurs du Bien Public, Edwin Buesnel and Fred W. Clarke, and for the public, the Attorney General, Michael Birt and the Greffier, Geoffrey Coppock.

The Contract specifically referred to the Bellozanne Covenant, with all parties swearing that: 'for the avoidance of any doubt, the provisions of the first and second new clauses contained in the said contract of the said day 31st May 1952, of hereditary purchase by the said Public of this Island from the said Vendor Parish shall remain and shall stay in full force and vigour in perpetuity.' It is highly unlikely that the Crown Officers who swore the oath on behalf of the Public, and especially the then-Attorney General, acting inter alia as adviser to the States on conveyancing matters would have agreed in such a way to the contents of the deed unless they were entirely satisfied that it was right.

Early negotiations to lift the covenant

In the early years of the new Millennium, the Public Services Department (PSd), faced with mounting volumes of rubbish to dispose of and the high cost of replacing the incinerator at Bellozanne, sought to introduce a 'user pays' approach to waste disposal. Having requested copies of the Parish's records, the Department approached Mr Jim Gray, the former Town Surveyor, who advised that previous attempts by PSd to introduce waste charges during the constableship of Fred Clarke were prevented following legal advice from his Advocate.

PSd subsequently received legal advice from the Solicitor General that the Covenant would prevent it from charging for waste disposal, and this advice is repeated in the Solid Waste Strategy by the Environment and Public Services Committee of 10th May 2005: 'When the

Bellozanne site was sold by the Parish of St Helier to the Public of the Island, a covenant was included, stipulating how waste should be received. The legal advice to the Committee is that it is implicit in this obligation to accept the refuse free of charge. The Committee has made preliminary investigations into the options for resolving this situation, and will negotiate with the Parish of St Helier to find a satisfactory way forward. This may incur some costs which cannot be quantified in advance of discussions with the Parish.' (8.1.4)

Negotiations had been begun with the Parish in 2003, involving the present Constable and Procureurs du Bien Public, Clive Barton and Stewart Mourant. The Parish was offered £3.4m for the removal of the Covenant, comprising £2m for the lifting of the Covenant and £1.4m as the termination of the loan taken out by the Parish at the time of the construction of St Ewold's residential home. It was further proposed that if the States were to pay rates on their properties, the revenue would be approximately equivalent to the cost of waste disposal which was estimated at £1.5m annually.

The Procureurs were of the view that a higher sum would be necessary to protect the Parish's interests; however, no further negotiations took place as the States proceeded to buy a new incinerator with cash and to fund its operation from revenue budgets. During the extensive discussion and debate on the Solid Waste Strategy, the Bellozanne Covenant was frequently referred to as preventing PSd from charging for waste; this situation was unaffected by the States' decision to build the new incinerator at La Collette instead of in Bellozanne Valley.

The Parish Assembly considered the issue of the Covenant on 26th February 2004 in response to a call by Mr Chris Whitworth for a referendum to be held on the issue of waste charges: 'To discuss a proposition to reaffirm that should an Island wide rubbish/waste tax be considered, parishioners of St Helier would be exempt from this due to an existing covenant in respect of waste disposal at Bellozanne and that a vote is called for in support of a Parish referendum to consider the removal or non removal of the covenant.' Chairing the meeting, Procureur Mourant stated that, 'The Parish is well aware of the terms of the contracts and the covenants written into the contracts and everyone fully understands that these covenants cannot be removed without the ratepayers agreeing. When the time comes, all the facts and details from both sides will be put in written form and presented to an Assembly of ratepayers for their decision. There is absolutely no question of a deal being done without full consultation with ratepayers.' The majority of those who spoke at the Assembly felt that a referendum was unnecessary in view of the Parish's position and the proposition that a referendum be held was defeated with 28 votes in favour and 38 votes against.

Recent events

The Minister of the Department for Infrastructure took the Parish to court last year in an effort to have the Covenant declared spent and exhausted. This involved the Parish in legal costs in employing the Parish lawyers to defend its position. The Royal Court held that the Covenant only lasted as long as the original waste disposal equipment (the Destructors) on the land that was sold to the States. Having lost the court case, the Parish was placed in the position of having to pay the Minister's costs, although these have yet to be quantified or invoiced, as well as its own legal fees.

The Constable and Procureurs du Bien Public decided that an appeal should be made as the intentions of both parties at the time of the original Contract of Sale were very clear; furthermore, a person formerly employed by the Parish at the time of the sale provided an affidavit to the effect that the Covenant was never intended to be time limited. The Constable wished to take the question of whether to appeal to a Parish Assembly in view of the increased costs that would result if it was unsuccessful; however, the Parish lawyer advised that to do so would be to prejudice the outcome of the appeal. The Court of Appeal heard the case in January this year and gave its judgement on February: it upheld the Royal Court's judgement that the Covenant was spent; however, it determined that the Royal Court's reasoning had been wrong, stating that the force of the Covenant continued until the new incinerator was built at La Collette.

Not only is this latest legal opinion at variance with that of the Royal Court and with that of a former Crown Officer; it also suggests that the Parish of St Helier was naïve in the extreme, if it was willing to risk at some future time being unable to have its waste disposed of should the States decide to do something else with the land in Bellozanne Valley. This is why the Bellozanne Covenant is worded as it is: the Public would be 'obliged to accept in the same way as did the said parish before the passing of the present deed' the Parish's refuse.

At the time of the debate on the removal of solid waste disposal facilities to La Collette there was never any suggestion that the States were pursuing this option in order to invalidate the terms of the Covenant. The Parish could, if necessary, take its refuse to Bellozanne and the States would have to 'accept' it, but it was in no one's interests for this to be done so when the new incinerator opened at La Collette the Parish refuse collectors took Parish waste there.

The judgement of Mr John Martin, Q.C., President of the Appeal Court, includes arguments which fly in the face of the intentions of both the Parish and the States in respect of the Bellozanne land. One of his contentions is that because not all of the conditions of sale agreed between the Public and the Parish (e.g. that Parish staff at Bellozanne were to be transferred to the employment of the Public Health Department, or that topsoil could be taken by the Parish from the site) are capable of being carried out 'in perpetuity', the principal requirement of the Parish, namely its ability to dispose of its refuse 'in the same way as did the said parish before the passing of the present deed' cannot be seen as operating 'in perpetuity' either.

The Appeal Court also placed great significance on the fact that the arisings from the Destructors were intended to be used as part of the States treatment of sewage. Paragraph 19 of the judgement reads: 'The key fact in the background material is that to the knowledge of all parties the purpose of the acquisition of the Bellozanne land was to construct a sewage works on it. At the time, the preferred method of dealing with the Island's sewage was to combine solid matter with household waste; and accordingly retention of the ability to process refuse on the Bellozanne land suited both parties to the transaction. The processing of refuse was, however, merely ancillary to the primary purpose of sewage treatment. It must have been obvious that, as technology advanced, other methods of achieving the primary purpose would or might be developed that left no place for the ancillary purpose of refuse

disposal. That is in fact what happened. In those circumstances, it seems to me that the parties cannot be taken to have intended that the Parish should continue to be entitled to take all its rubbish to the site and leave it there, notwithstanding that there was no longer any need for it in the process of sewage disposal.'

This is an entirely novel and bizarre interpretation of the matter in hand which bears no relation at all to the actual context of the sale of the Parish's interest in the Bellozanne land, as is set out in the correspondence between the Parish and the Public Health Committee, nor to the evidence in the Acts of the relevant committees. It is difficult to imagine how anyone could reasonably infer from an ordinary reading of the documentation that the disposal of refuse at Bellozanne – where the original 'Destructors' were later replaced with the Island's main incinerator – was an 'ancillary purpose'. It is submitted that the 'key fact in the background material' is not the specifics of how waste was disposed of in 1952 but rather the concern to ensure that the people of the Parish were not disadvantaged by the sale of the Bellozanne land to the Public. Before the passing of the 1952 contract the Parish collected all the waste/rubbish of Parishioners and business in the Parish and then took it to Bellozanne. The key fact in the background material is, therefore, the Parish's civil responsibility to the Parishioners.

A number of other opinions are included in the Appeal Court judgement which are extremely concerning, including the fact that 'a fin d'heritage' or 'in perpetuity' does not necessarily mean 'for ever.' It has been pointed out by local property lawyers that such a ruling drives a coach and horses through dozens of property contracts involving covenants which have been sworn before the Royal Court. When the Parish of St Helier Roads Committee reviewed the position at its open meeting on 22nd March, the judgement was described as 'earth shattering' by one of its members who is well versed in local property law.

This fact alone might be sufficient cause for the Parish to take the matter to a higher court as the recent rulings in respect of the Bellozanne Covenant could have far reaching consequences to anyone whose property rights involve a covenant sworn before the Royal Court. However, the main argument in favour of an appeal to the Privy Council is that the States should not be allowed to renege upon the agreement made with the Parish by striking out the conditions or safeguards that were agreed at the time of the original sale of the Parish's land and waste disposal facilities.

On the other hand, an appeal to the Privy Council will add considerably to the cost of legal fees if the Parish is again unsuccessful. It could take many months, even years, to reach court and in the process the appeal would also deprive the Minister of DFI from approximately £7.5m p.a. from 2018 which is when it is planned to start charging for the disposal of commercial waste. This would be subject to the approval of the charging regime by the States which could not debate the matter were the Parish of St Helier to take the dispute with the States to the Privy Council. While local commercial operators might be gratified by this prospect, it has never been the view of the Parish that charging businesses for waste disposal is a bad thing, as it is unfair that the taxpayer should foot the bill for the processing of as much waste as commercial enterprises generate. Indeed, the Parish has already shown that it is willing to enter into negotiations with the States over the lifting of the covenant.

The Parish's lawyers have indicated that the odds of a successful appeal to the Privy Council are not good: 'The cost of seeking leave to appeal will not be high. However, the likely cost of the appeal as a whole will be significant. It is difficult to estimate the likely cost with any certainty as there is an unknown quantity, namely the instruction of an English QC. He/she would need to read in to the matter and consider the papers filed in the previous hearings. The Parish should also be alive to the adverse costs risk in the event that the appeal is unsuccessful … Considering all aspects together, our view is that there would be a greater chance of losing any appeal to the Privy Council than winning it.'

Conclusion

It is the view of the Constable, Procureurs du Bien Public and the Roads Committee of the Parish of St Helier, supported by the Parish lawyers, that the best course of action is for the Constable to take the matter to the States Assembly and to seek agreement that the States negotiate a fair price for the lifting of the Bellozanne Covenant. This would mean, at the very least, that the legal costs incurred by the Parish would not fall upon ratepayers, who have been dragged into court by the States in spite of the Parish's willingness to negotiate the lifting of the covenant without recourse to law.

It is considered appropriate that, as the train of events which led to the creation of the Bellozanne Covenant was first set in motion by a Senator of the States Assembly, and the matter approved by the States Assembly on 22nd April, 1952, that it should be the States Assembly, sixty-five years later, that decides whether to honour the terms of its agreement with the Parish.