Confidential Item

Supplementary Confidential Item

For Council meeting to be held on

Tuesday 7 March 2017 at 7.30 pm

Refer Item 11.11

Supplementary Confidential Item

11.11 Legal Advice - The ARC Campbelltown

TRIM Reference: B1210/3 Chief Executive Officer, Paul Di Iulio's Report

Purpose of Report

To seek direction from Council on the legal matter versus Caltex (Caltex Petroleum Pty Ltd).

Strategic Plan Link

Strategy 1.3.1 Provide leisure services that deliver a wide range of sporting, leisure and recreational opportunities

Background

As advised at a previous CEO Briefing Session, a conciliation hearing was held on Friday 11 November 2016 with Judge Cole whereby both parties provided their positions. Council's position was in line with the Calderbank Offer (ie $275,000 inclusive of interest plus costs) where Caltex's initial offer was $100,000 all inclusive of costs. At that hearing Caltex agreed to move their offer to $200,000 all inclusive of costs, however I advised that I was not in a position to accept that offer nor would I be recommending to Council that they should accept that offer as it was significantly lower than the Calderbank Offer.

In discussions I made it clear that I would be prepared to recommend a figure to Council if it was in the order of at least $300,000.

Following further discussion, Judge Cole questioned whether a settlement of $250,000 would be suitable to both parties. Again my response was that I wasn't in a position to either accept or reject that offer, however I would be prepared to seek Council's position provided Caltex agreed that they would increase their offer of settlement to $250,000.

Judge Cole agreed with this approach and provided Caltex with 7 days to confirm their offer and set another hearing date for Thursday 8 December 2016.

Discussion

On 18 November 2016, Mr Griffen, Council's Lawyer, received advice (attached) that Caltex had considered the matter and confirmed that their final offer was $200,000 all inclusive of costs in full and final settlement and subject to a Deed of Settlement.

At the hearing on 8 December 2016 this information was conveyed to Judge Cole along with the advice that it is highly unlikely that Council would accept this offer and that Council was extremely disappointed that Caltex was not prepared to consider increasing their settlement offer. As a result, Judge Cole has set a new hearing date for 16 February 2017.

Members may recall the following advice from Mr Griffin was considered at its meeting on 20 December 2016:

> 'Please find enclosed letter from Durrant requesting that we formally respond to the Offer to settle made by Caltex at the mediation conference.
>
> We have up till now neither accepted or rejected the offer. That was because the decision on the offer was one that would be made by Council after it had regard to your views as to whether the offer was one that should be accepted. Clearly our view is that the offer is inadequate and does not meet the costs that Council has been forced to incur to ensure the integrity of the site and the safety and wellbeing of those that attend the Recreation Centre. Caltex on the other hand is proceeding on the basis that the risk of further pollution of the site and the pool is so minimal that Council should have ignored the advice of the independent engineers and instead just followed the advice of Caltex which was in effect to do nothing.
>
> Our advice remains the same which is that Council is fully entitled to pursue Caltex for all the costs it has incurred as a consequence of dealing with the pollution of the site. Whilst Judge Cole urged the parties to reach a financial settlement not based upon the actual loss suffered but to bring an end to the proceedings the figure that she urged Caltex to put they refuse to do so.
>
> On the basis our advice is that the claim of Council has serious merit and deserves to succeed the offer from Caltex whilst bringing an end to the proceedings does not in our view adequately reflect their exposure to damages in these proceedings. Furthermore it seems to us that Caltex have determined to adopt a hardball strategy with Council expecting them to fold rather than take the matter to trial. Experience tells us that parties will ordinarily increase their offers to settle as the inevitability of a disputed hearing becomes more apparent.
>
> We advise that the offer is inadequate and should be rejected. We do not suggest you make a counter offer but instead stick to the Calderbank Offer which was deliberately tailored to be able to be bettered by Council at trial which creates the adverse cost implications for Caltex.
>
> May we please have your formal instructions to reject the Caltex offer and to advise them that the matter will go to hearing unless they make a more commercial offer of settlement.'

As a result of that advice and subsequent discussion Council unanimously resolved that Council:

1. reject the Offer from Caltex Petroleum Pty Ltd for $200,000 all inclusive of costs in full and final settlement and subject to a Deed of Settlement

2. reaffirm its position that any settlement should be in accordance with the Calderbank Offer.

In the days leading up to the 16 February hearing, Caltex provided a further, without prejudice, offer through the lawyer Mr Michael Durant. Their offer (see attached) has now been increased to $250,000 however is subject to execution of a Deed of Settlement (attached).

As you will note in the correspondence from Mr Griffin there are some concerns associated with the Deed of Settlement in regards to the Confidentiality Clause.

In regards to the new offer from Caltex, Council's Senior Counsel, Mr Michael Roder (see attached) believes Council should accept the offer of $250,000 however he also notes concerns with the Confidentiality Clause. However Mr Griffin (see attached correspondence) is still of the view that Council has a strong case and should at the very least seek compensation in accordance with its Calderbank Offer which was reaffirmed at its meeting on 20 December 2016.

Social Implications

There are no social implications in relation to this report.

Environmental Implications

There are no environmental implications in relation to this report.

Asset Management Implications

There are no asset management implications in relation to this report.

Governance / Risk Management

There is always a risk in any litigation process, however the advice to date indicates that Council's case is very strong against Caltex as there is no doubt that they have contaminated Council's property.

Community Engagement

There are no Community engagement implications in relation to this report.

Regional Implications

There are no regional implications in relation to this report.

Financial Implications

If the Offer from Caltex is accepted it would draw this matter to a close and Council would recover $250,000. However if the offer is not accepted, the process will continue and although Council will continue incurring costs, it is hopeful that with a successful outcome these will be recoverable through the courts in line with the Calderbank Offer which has been previously submitted.

Recommendation

That Council:

1. **reject the Offer from Caltex Petroleum Pty Ltd for $250,000 all inclusive of costs in full and final settlement subject to the Deed of Settlement**

2. **reaffirm its position that any settlement should be in accordance with the Calderbank Offer.**