



Llywodraeth Cymru
Welsh Government

Nick Ramsay MS
Public Accounts Committee Chair
National Assembly for Wales
Cardiff Bay
CF99 1NA

12 November 2020

Dear Mr Ramsay

REGENERATION INVESTMENT FUND FOR WALES: LEGAL SETTLEMENT

I am writing further to my letter of 24 February to draw to the attention of the Committee that the Welsh Government has now reached a settlement in relation to the legal action initiated with respect to the Regeneration Investment Fund for Wales (RIFW).

The Public Accounts Committee (PAC) report into RIFW published in January 2016 [<https://senedd.wales/laid%20documents/cr-ld10517/cr-ld10517-e.pdf>] was an important landmark for the Welsh Government. We are very conscious of the wide-ranging criticism it contained regarding the events which followed the establishment of the Fund in 2009. As a result, the report and the extensive Wales Audit Office investigation which preceded it have generated important changes to the way we conduct business. This has included a comprehensive programme of cross-government actions intended to improve our oversight of arms-length bodies. The Committee's report was also an important factor influencing the arrangements we established to manage the legal proceedings initiated in 2016 against RIFW's contracted advisors. The Committee has shown a continuing interest in the progress of this case and now that the legal action has been concluded I am pleased to be able to provide you with further information on the issues involved. Given the wide-ranging changes it has prompted I would also like to provide the Committee with an update on the wider lessons we have learned as a result of the RIFW case.

RIFW Legal Action

The suggestion that legal action should be initiated against RIFW's contracted advisors was one of the recommendations of the Committee's report in 2016. The Welsh Government's response to that report published on 8 March 2016 accepted all of the Committee's recommendations and confirmed that we had subsequently determined that legal action should be pursued. Initially the action took the form of pre-action correspondence setting out

RIFW's case against Lambert Smith Hampton (LSH) and Amber Fund Management. On 19 December 2017 RIFW issued formal legal proceedings in the Business and Property Courts in Wales for breach of contract and professional negligence.

Although this was a complex case, the main burden of RIFW's legal action concerned the advice provided to the RIFW board in 2011 recommending a portfolio sale of the properties transferred from Welsh Government without those properties having been openly marketed. We argued that this advice amounted to a breach of contractual duties and had failed to generate best value. Amber and LSH strongly disagreed and argued that it had been a good deal in the circumstances and that at that time the board of RIFW and the Welsh Government had been happy to accept the deal. A more detailed note on the background to this case and the management of the legal proceedings is at Annex A.

The key aspects regarding our conduct of this case and which I would wish to highlight for the Committee are:

- i. The importance and complexity of this case was recognised from the very beginning of this process. We therefore established a multidisciplinary team led at Director level and with the support of the Head of Legal Services and which already had detailed knowledge to the background to this case. We retained this team throughout the proceedings
- ii. We also recognised the importance of professional advice. A team of commercial lawyers with expertise in commercial disputes was engaged from the outset. The original decision to initiate legal action and all key steps throughout these proceedings were taken in consultation with, and in accordance with the advice received from, that legal team
- iii. The combination of an experienced team and professional advisers enabled us to assess the risks involved throughout this process. Cases of this nature involve considerable expense and it was important to be able to continually keep under review the balance between the legal costs involved and the potential benefits of pursuing this action.

We established our structures for overseeing the legal action in the spring of 2016. The multidisciplinary team continues to be in place to ensure that resources tied up in the fund while the case continued can now be released safely to support work elsewhere.

Legal Settlement

I am pleased to be able to report to the Committee that a settlement in this case was reached on 29 July 2020 and that this dispute has therefore been resolved without the need to incur the costs associated with a trial. This settlement has been reached on a commercial basis and without any admission of liability by any party. The detailed terms have been incorporated into a confidential settlement agreement between the parties. As a result of the settlement, Ministers have confirmed that the £40.7 million contained in the Fund as at 31 March 2020 can now be made available to support future investments across Wales. Annex A which describes our approach to the legal proceedings also provides further information on the steps which eventually led to this settlement.

You will appreciate that the decision to agree a negotiated settlement also involved a delicate assessment of risk and potential benefits. Pursuing this case involved significant legal costs and those costs would have increased still further had the case progressed to trial. The arrangements we have had in place since 2016 to oversee these proceedings placed us in the best possible position to make these difficult judgements in consultation with our legal advisers. The RIFW oversight team had an extremely detailed understanding of the weaknesses as well as the strengths of our case. They were therefore in a good position to interrogate the professional advice we received and assess the impact of the various twist and turns in this case as we approached a trial this autumn.

I am, therefore, able to assure the Committee that from an Additional Accounting Officer perspective I am satisfied with the process we followed in the conduct of these legal proceedings. I was also satisfied with the process we followed in determining whether to settle in advance of a trial and the terms on which ultimately we did settle. It is important to underline that the decision to agree a settlement of this case and the terms of that settlement were fully in line with the advice from our legal team, including Counsel. We were clear, therefore, that we should recommend this settlement in advance of a trial to Ministers. We were satisfied that a settlement at this time was the right decision and represented a positive outcome for the public purse given the balance of risks and uncertainties involved in a complex legal case of this nature.

Although the terms of the legal agreement are confidential, it includes specific provision for responding to any further queries which the Committee may have with regard to this matter.

Lessons Learned

In providing this update to the Committee I also think it is important to underline the very wide range of lessons which the Welsh Government has learned as a result of the RIFW case and the very significant changes that have as a consequence been made to our working methods. We are acutely conscious that in 2016 the then First Minister felt the need to apologise during a plenary session in the Senedd for the Welsh Government's oversight of the RIFW project. I would, therefore, like to draw the Committee's attention to the report at Annex B which provides a summary of the main changes made to Welsh Government corporate procedures as a result of this case.

The majority of the changes referred to in Annex B refer to the internal workings of government. But on a more strategic level I would also highlight the impact which RIFW has had in generating a much more sophisticated approach to our use of loan finance. An important aspect of the Auditor General's report into RIFW was that the original concept of a recyclable fund to support regeneration projects rather than traditional grant finance was sound. It is notable therefore that as a result of this case and in areas as diverse as refurbishing empty properties to investing in small firms we are now making far more creative use of loan finance - especially in the Housing and Regeneration portfolio. This is generating a wide range of public benefits and allowing us to make better use of the funds we have available. What the RIFW experience has highlighted is that realising these benefits is crucially dependent on adopting a far more rigorous assessment of risks and benefits.

Conclusion

I am satisfied from an Additional Accounting Officer perspective that the decision to agree settlement terms in the RIFW legal action was in the public interest. The decision involved a careful assessment of risks and benefits but, as a result of careful oversight of this case

throughout, we were in a position to be able to make a clear recommendation to Ministers. Another important benefit of having agreed a settlement is that it removes the significant uncertainty which has surrounded this matter over such a long period. Ministers have announced separately that the public funds tied up in RIFW can now be made available to support future investments across Wales. I hope the Committee will see that as an organisation we have reflected on the lessons we needed to learn as a result of this difficult case.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tracey Burke'.

Tracey Burke
Director General, Education and Public Services

Annex A

REGENERATION INVESTMENT FUND FOR WALES – LEGAL ACTION

Background

The Regeneration Investment Fund for Wales (RIFW) was established by the Welsh Government in 2009 as an arms-length, wholly owned Limited Liability Partnership (LLP) designed to pursue regeneration projects under the EU JESSICA Fund. The £55 million fund was originally made up of £25 million of European Regional Development Fund convergence funding and £30 million from the Welsh Government. Some £20 million of the Welsh Government contribution was in the form of a transfer to RIFW of a portfolio of 18 properties. The portfolio included land at Lisvane in Cardiff which subsequently achieved significant value on the basis of its inclusion in Cardiff's Local Development Plan.

Amber Fund Management (Amber) was appointed to manage RIFW and its business assets, subject to the direction of RIFW's Management Board and on the basis that it would sub-contract with Lambert Smith Hampton (LSH) for the provision of asset management and investment management services. LSH's responsibilities included services relating to the management, value enhancement and sale of the properties. In February 2012 RIFW exchanged contracts with South Wales Land Developments for the sale of 15 of the properties. The sale price was £21.75million plus a share of any future profits achieved on two of the properties in Monmouth and Lisvane.

The circumstances surrounding that portfolio sale were subsequently the subject of a report by the Wales Audit Office [\[hyperlink\]](#). The Auditor's General's concerns which led to the investigation included the fact that the land assets had been sold as a portfolio; that they were sold privately without being offered on the open market; the failure to offer other options to the RIFW board; the failure to report interest from other potential purchasers; and the fact that LSH went on to represent the purchasers of the property without informing the RIFW board. The summary chapter of the Auditor General's report provides a concise account of the conclusions he reached surrounding the circumstances of that sale and the Welsh Government's oversight of RIFW from the outset.

The Public Accounts Committee (PAC) report into RIFW which followed on from the Auditor General's investigation was published in January 2016. That report made a number of recommendations regarding RIFW but also in relation to the Welsh Government's oversight of arms-length bodies more generally. One of the recommendations was that Welsh Government should consider initiating legal proceedings against RIFW's contracted advisors. The Welsh Government's response to the report in March 2016 confirmed that all of the Committee's recommendations had been accepted. Following an exchange of correspondence in which the two contractors denied any liabilities in this case, formal legal proceedings were initiated by RIFW in December 2017 with a court hearing eventually scheduled for the autumn of 2020.

RIFW's Legal Case

RIFW's legal case closely mirrored the concerns expressed by the Auditor General regarding the portfolio sale of the land assets transferred to the Fund. RIFW's case was that the manner in which Amber and LSH conducted the sale amounted to breaches of their contractual duties. RIFW further argued that had it not been for these breaches it would not have sold the 15 properties in the manner that it did. Rather it would have managed those properties over a

longer period and engaged in a phased disposal which more closely matched the Fund's investment requirements.

Amber and LSH denied RIFW's claim in full. They argued that the claim did not take proper account of the context in which RIFW was established and operated, or the fact that it was established to invest in regeneration projects and not to manage land assets. They further argued that the sale to SWLD had obtained good value and had allowed RIFW to move on to focus on its primary purpose and that more than one source of valuation evidence had supported this case.

We were acutely aware of the risks surrounding the decision to pursue legal action in this case. The basis of our claim involved a highly technical contract where what constituted a 'reasonable' discharge of contractual duties was always likely to be a matter of dispute. In addition, the land assets involved had already been the subject of at least three valuation exercises as a result of earlier investigations and each had produced a different estimate of the land's value at the point of sale. We were also conscious that the financial benefits which might potentially have been derived from a legal action of this nature needed to be set against the very significant legal costs which legal action would involve. On the other hand, we were also aware that in the absence of any movement from the parties following pre-action correspondence RIFW was due to make significant payments to the contractors under the terms of the original contract. And given our very serious concerns (and the Auditor General's concerns) about the way those duties had been discharged we were clear that those payments would have been very difficult to defend. As we sought to balance these risks the crucial factor was that the legal advice we received suggested very clearly that there were solid grounds reinforcing our concerns. The decision to launch formal proceedings in December 2017 was wholly in line with this advice and was taken following a careful assessment by the team of the risks and potential benefits involved.

Oversight of RIFW Legal Proceedings

Given the complexity of this litigation and the importance we had attached to securing a successful outcome for the public purse we were anxious to ensure effective oversight arrangements from the outset. Importantly we were able to ensure that the multidisciplinary team that coordinated both the Welsh Government's response to the Auditor General's report and our closure of the Fund in October 2013 was retained to oversee the legal action. This team was led at Director level and with the full support of the Welsh Government's Head of Legal Services. This has ensured that our oversight of this highly complex legal case has been informed by a detailed understanding of the history of the Fund and of the conduct of the contractors which had been commissioned to advise the RIFW board and manage the Fund's business.

The multidisciplinary team drew on expertise from the Housing and Regeneration Department, Land Division and Legal Services Department. My predecessor and I have been provided with regular reports on the team's work. The team made sure that key decisions throughout this process - including the original decision to initiate legal action and the negotiating brief for the later mediation sessions - were approved by the Principal Accounting Officer. The team also ensured that Ministers were kept fully briefed on our conduct of the case.

Geldards solicitors were appointed to act on RIFW's behalf in pursuit of the claim. The commercial legal team provided a degree of continuity having also advised us during the period when the fund was originally suspended. The decision to pursue legal action was

based on advice received from Leading Counsel and all significant steps subsequently taken in the litigation were taken in consultation with, and in accordance with, advice from, the same QC. He led RIFW through two mediation sessions where we sought an earlier resolution to this dispute and continued to be our lead advisor in shaping the negotiations which ultimately resulted in a settlement. The legal claim was also informed by expert advice from an independent property adviser.

Overage Provisions

One of the additional factors which coloured the conduct of this case has been the evolving position on overage achieved by RIFW as a result of the portfolio sale. The sale terms agreed in 2012 included provisions whereby RIFW would benefit from any uplift in value achieved by SWLD (within certain time windows) on two of the properties. These overage payments were in addition to the original sale price but only applied to the properties in Monmouth and Lisvane. SWLD completed the sale of the Monmouth property in 2015. This generated an overage payment to RIFW worth £5 million. The situation surrounding Lisvane is slightly more complicated in that SWLD have yet to complete a sales process that has been underway for some time. At the moment the sales in Lisvane have generated gross overage receipts of circa £9 million, but which will be subject to certain contractual deductions. In addition two further overage payments are anticipated but at this time the relevant sale transactions have not been completed. These overage sums that RIFW will receive are in addition to the original £21.75 million sale price generated in 2012. The share of profits generated for RIFW as a result of these onward sales was one other aspect of this case that the oversight team had to take into consideration in formulating their advice which led to the legal settlement.

Reaching a Settlement

Our initial claim made clear that we would be prepared to enter into an alternative dispute resolution process to examine whether our claim for damages could be resolved without having to incur the significant costs associated with a formal court hearing. Although the circumstances of every case are different, the very clear legal advice we received was that the majority of cases of this nature settle out of court. Having failed to secure meaningful progress towards resolving this case by the end of 2018 it was agreed between the parties that we would, therefore, enter a mediation process to explore whether we could resolve the claim. Mediation subsequently took place in February 2019 but was unsuccessful. The parties entered a second mediation process on 26 May 2020 but that was also unsuccessful. Subsequent to that second mediation process it was important for us to maintain a close watch on these proceedings and the RIFW team continued to balance the strength of our legal claim against the risks associated with a legal hearing. We were also aware that each of the parties would be conscious of the very significant escalation in costs associated with the final stages of the preparations for a court hearing which in this case had been scheduled for October 2020. Despite having failed successfully to mediate a settlement in May 2020 we therefore continued to actively review – in conjunction with our legal advisers – whether there was a public interest in settling this case prior to trial. Eventually these discussions resulted in our reaching agreement with the other two parties on settlement terms on Friday 31 July. The terms of the settlement are confidential but conscious of the Committee's continuing interest in this case the agreement does allow us to respond to any further queries you may have on this matter.

Conclusion

I am satisfied from an Additional Accounting Officer perspective that the decision to agree settlement terms without having to incur the costs associated with a trial was in the public

interest. Throughout this process we have drawn upon expert legal and professional advice. The decision to agree a settlement of this case involved a careful assessment of the risks and potential benefits associated with continuing to trial. That assessment was made by a team that was intimately involved in all aspects of this complex case and therefore able to carefully interrogate the expert advice available to it. The decision to agree a settlement was fully in line with the expert legal advice we received.

The other benefit of having agreed a settlement in this case is that it removes the significant uncertainty which has surrounded this matter over a long period. The public funds tied up in RIFW can now be made available to support future investments across Wales. And we can do so harnessing a variety of policy approaches that reflect a more sophisticated approach towards community regeneration projects as a consequence of the experience gained in this difficult case.

Annex B

REGENERATION INVESTMENT FUND FOR WALES – LESSONS LEARNED

As well as recommending that we should consider legal action, the PAC report on RIFW was critical of our oversight of the Fund and of certain aspects of the Welsh Government's working methods at the time. A number of changes were made to our internal working arrangements during the last Senedd term as an immediate response to the Auditor General's findings. Now that the legal action with regard to RIFW has been concluded this paper summarises the lessons learned as a result of this case and the further actions taken as a consequence during the current Senedd term.

The most prominent areas of improvement have been:

- i. **Supervision of Arms-Length Bodies** - a central element of the PAC Report into RIFW related to the Welsh Government's supervision of arms-length bodies. Significant changes have been made to improve the coordination of our work in this area throughout this Senedd term. The role of our new Public Bodies Unit is now well established. We have improved the training made available to board members of public bodies. And we have issued far stricter and more detailed guidance on the role of Welsh Government observers on external boards
- ii. **Corporate Governance** - we have also established a corporate governance centre of excellence to improve our oversight of governance across the organisation. In addition we continue to draw on lessons coming out of the RIFW history in our continuing training programmes and our wider work on good governance
- iii. **Additional Accounting Officer Support** - the experience gained during the RIFW investigations has also influenced the structures we established to support Additional Accounting Officers. The period since the RIFW land sale in 2012 has for example seen an important evolution of Audit, Risk and Assurance Committees supporting each of the Additional Accounting Officers across government. The same is true of the Operations Teams which support each of the Additional Accounting Officers in discharging their corporate and Accounting Officer responsibilities. The work of these teams also provides us with a much stronger understanding of major projects (like RIFW) being managed across departments and the risks associated with those projects. The arrangements put in place by Operations Teams to manage budgets and projects transferring between departments following Ministerial portfolio changes were also introduced as a result of this case. The management of these issues following the 2016 Senedd elections demonstrated that we now have much more robust procedures in place in line with the Committee's recommendations.
- iv. **More Effective Use of Loan Finance** - another impact of the RIFW experience is that it has led to the more effective use of loan finance across government. The original report from the Auditor General in 2015 highlighted that the concept of being able to recycle loan finance in support of regeneration projects was sound. We have reflected on that observation and over the last eight years made far greater use of loans rather than grants where that is possible. Loan finance is for example at the heart of our Help to Buy Cymru programme which has made more than £500 million

available by way of equity loans since 2013 to support the purchase of more than 10,000 new homes. In addition, we have invested some £80million in the Wales Property Fund and the Stalled Sites Fund to provide loans that support the construction of new homes by SME builders who are unable otherwise to access project finance.

Each of these projects are managed by the Development Bank of Wales. Each therefore benefits from the ability of the Development Bank to conduct expert due diligence to scrutinise individual loan applications. The introduction and oversight of each of these projects has also been informed by a clear and developing appreciation of the risks surrounding these sorts of development. Responding to the concerns regarding RIFW caused us to look again at the way that we utilise loan rather than grant finance across the wider Housing and Regeneration portfolio. These examples highlight the value for money benefits we have derived as a result.

In conclusion I am able to inform the Committee that these legal proceedings have been settled and that we can now move on to make best use of the resources that have been tied up in the fund. But I hope you will see that we have as an organisation learned a number of important lessons from the RIFW experience.