

BEMBRIDGE HARBOUR
LEGAL ANALYSIS OF FINANCIAL MANAGEMENT ISSUES
RELATING TO
BEMBRIDGE HARBOUR IMPROVEMENTS COMPANY
LIMITED (“BHIC”)

Keystone Law

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for and on behalf of

Bembridge Harbour Trust (“BHT”)

ABSTRACT

- (A) There are multiple examples of the directors of BHIC using artificial means to divert value away from BHIC and into their own commercial companies. In addition to legitimate payments, there are reasonable grounds to conclude that at least £1,539,828 has been extracted from BHIC since 2012. In the case of BHIC these transactions give rise to a breach of the Harbour Act, and cannot be rendered lawful by being ratified by BHIC’s shareholders.**
- (B) It is believed that the directors have done this to enable them to personally profit from the harbour in breach of the terms of the Harbour Act. This also enabled them to make the case for a planning permission that would not be granted if BHIC was running a healthy profit.**
- (C) The impact of this falls on the community and the users of the harbour firstly because it is not being adequately maintained, and secondly because BHIC has been compelled to take on unreasonable liabilities, and it is therefore at risk of becoming insolvent. This also impacts potentially on the creditors of BHIC.**

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Executive Summary

- (I) BHIC has taken steps to reduce its profits by transactions at undervalue, and by other transactions, with Other Companies: Hawk Property, Bembridge Investments and Bembridge Boat Storage, all owned by the same two shareholders who own BHIC.
- (II) Harbour law requires that BHIC's surplus profits are reinvested in the harbour. These improper transactions have suppressed the profits of BHIC and therefore reduced the sums which BHIC invests in harbour maintenance and improvements. The suppression of profits has been so extensive that BHIC has reported losses or only broken even each year 2012-2018, leaving no money for harbour works.
- (III) These actions have placed BHIC at serious risk of insolvency. Moreover, BHIC has entered into guarantees in respect of the bank debts of Other Companies owned by the same shareholders, which are owed to Handelsbanken, and has granted charges over its assets. In the event of Handelsbanken - as the main creditor of the Other Companies - calling in its charge, BHIC would become insolvent. The Other Companies do not have sufficient assets to underwrite their own bank loans.
- (IV) There is a further risk of insolvency in that BHIC's accounts significantly overstate the value of its assets. Indeed, the valuation in BHIC's accounts appears to include assets which are in fact owned by Other Companies.
- (V) Whilst company law permits, in "normal" commercial circumstances, the directors of a company to enter into transactions which reduce the assets of the company (for example by selling an asset to a related party at a discount) provided the shareholders consent to this (and there is no impact on creditors or HMRC) in the case of BHIC such transactions give rise to a breach of section 31 of the Harbour Act, and cannot be rendered lawful by being ratified by BHIC's shareholders.
- (VI) The improper actions of BHIC, none of which are for the proper purposes of the harbour undertaking, or in the best interests of BHIC, include the following:
 - Artificial reduction of profit from undervalue sale of houseboat plots, including the sale of one such plot to a company owned by the same shareholders for £1, which then re-sold it on the same day for £87,500. Total reduction of profit from sales and projected sales of houseboat plots is £447,528 or more.
 - Improper payments of fees and costs incurred for the purposes of Bembridge Investments' planning application. BHIC claims it has paid in excess of £300,000.
 - Agreeing legally binding commitments for future rent at more than double the current rent, to be paid to Other Companies owned by the same shareholders, that cannot be supported by BHIC as it has consistently made a loss over a number of years.
 - Since 2012 BHIC has been deprived of £160,000 in fees for gravel extraction from the sea bed.
 - Taking a loan of £1,200,000 from Hawk Properties in order to fund the costs of its own acquisition, when Hawk Properties had agreed to "contribute" the relevant amount rather than lending it.

- Payment of annual interest at widely varying rates up to 7.3% per annum to Hawk Properties on the above loan, but no steps have been taken to reduce the outstanding balance; the reality is that this loan is a mechanism for the shareholders of BHIC to secure a financial return via their other companies which is in excess of that permitted by harbour law.
- Providing cross-guarantees and security over assets as security for the borrowings of Other Companies of approximately £1,350,000.
- Providing loans to Other Companies which are unlikely to be repaid, e.g. one to Bembridge Investments at approximately £350,000 which was unsafe, as BIL's (readily realisable) assets were only half the amount of the loan.
- Artificially creating losses in the company and reducing the profit and loss reserves.

(VII) Conclusions

- BHIC has entered into numerous contracts with Other Companies within the same ownership, which have had the effect of reducing the surplus available for harbour maintenance. These transactions almost exclusively benefit Other Companies in the same ownership while being to the detriment of BHIC. Some of these transactions are deemed distributions in accordance with the Companies Act 2006 section 845, and where the company has insufficient distributable reserves to make them, they are unlawful and void.
- There are reasonable grounds to conclude that there has been serious misconduct by the directors, to the detriment of the beneficiaries and stakeholders of BHIC and in breach of the Harbour Act. The effect of such misconduct has been to divert benefit out of BHIC as the Statutory Harbour Authority, and towards the ultimate owners of Other Companies owned by the same shareholders.
- The improper transactions have placed BHIC at serious risk of insolvency. BHIC has been compelled to assume liability for a large intercompany debt at a high interest rate, and to enter into cross-guarantees and charges in respect of Other Companies' borrowings. BHIC has also been compelled to lend its surplus cash to Other Companies, without receiving interest thereon, and its affairs have been structured in such a way that it makes artificial losses and its P&L account is gradually being depleted to the benefit of the shareholders of Other Companies. These transactions rely on asset valuations which are both substantially overstated and are not readily realisable.
- Substantial harm has been occasioned to the harbour and to the community and this is set to worsen in the absence of intervention. There are reasonable grounds to conclude that at least £1,539,828 has wrongfully been extracted from BHIC since 2012. Moreover, if matters are allowed to continue, over the next ten years an estimated further £2,194,562 will be wrongfully extracted from BHIC. This has had a very serious impact on the statutory functions of the harbour authority, especially in relation to siltation of the harbour and essential maintenance and repairs. There is direct harm to the users of the harbour, and to the local communities. The continuation of wrongful extractions from harbour funds into the future as predicted will exacerbate the harmful effects experienced to date, and the risk to creditors and to the community through insolvency is increasing. It is strongly in the public interest now that appropriate action is taken.

Authorship

Caroline Graham is a Partner at Keystone Law specialising in Corporate Law. She has extensive experience of all areas of company law and of complex corporate structures. Caroline authored the earlier Report relating to BHIC in December 2016 for BHT, and co-authored the document analysing the responses of BHIC to that Report, dated June 2017.

Oliver Goodwin is a partner at Keystone Law specialising in Planning and Public Law. He has extensive experience of planning and public law, including complex planning applications planning agreements, powers of public bodies and harbour legislation. Oliver has advised BHT on the planning application by Bembridge Investments since submission in 2014, and on BHIC's application for houseboats since submission in 2016. Oliver co-authored the document analysing the responses of BHIC to the first Report, dated June 2017.

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Glossary of Terms

BBS - Bembridge Boat Storage Limited (directors and shareholders Malcolm Thorpe and Fiona Thorpe)

Bembridge Harbour Authority - not a legal entity or recognised term of art, but a term used by BHIC to describe itself, and on occasion, when representing other companies

BHIC - Bembridge Harbour Improvement Company Limited, which is the Statutory Harbour Authority (directors and ultimate owners Malcolm Thorpe and Fiona Thorpe - via Hawk Property)

BHAG - Bembridge Harbour Advisory Group, an unincorporated association established by BHIC

BHT - Bembridge Harbour Trust, a charitable trust formed in 2007 whose object is *“To preserve and enhance Bembridge Harbour....”*

BHUG - Bembridge Harbour Users Group, an unincorporated association

BIL - Bembridge Investments Limited (directors and ultimate owners Malcolm Thorpe and Fiona Thorpe- via Hawk Property)

Companies Act - the Companies Act 2006

DfT - Department for Transport

DVS - District Valuer Service

DVS Report - the report of 6th April 2017 commissioned by the IWC in relation to the Planning Application

Enabling Development – a planning concept which permits development which would otherwise be unacceptable in order to finance an otherwise unaffordable public benefit

First Legal Report - Legal Analysis of Financial Management Issues Relating to BHIC Ltd, Keystone Law December 2016

Harbour Act - the Pier and Harbour Order (Bembridge Harbour) Confirmation Act 1963

Harbour premises - the land and buildings occupied by BHIC as the SHA, the majority occupied under licence from the owner of the land, BIL

Hawk Property - Hawk Property Development Company Limited (directors and shareholders Mr. & Mrs. Thorpe)

IWC - the Isle of Wight Council

LPA - the local planning authority, the IWC

Other Companies - some or all of the companies other than BHIC (as the context requires) sharing directors and shareholders with those of BHIC, namely Hawk Property, BIL, BBS

PGGG - the *Ports Good Governance Guidance* March 2018 - national guidance on the governance of ports published by the government in March 2018

Planning Agreement - the legal agreement under s.106 of the Planning Act relating to the Planning Application

Planning Application - the application by BIL of May 2014, reference P00637/14, for development of 13 houses and replacement harbour offices and facilities on land adjacent to the harbour including harbour premises

SHA - Statutory Harbour Authority - the company with public powers and obligations conferred by the Harbour Act

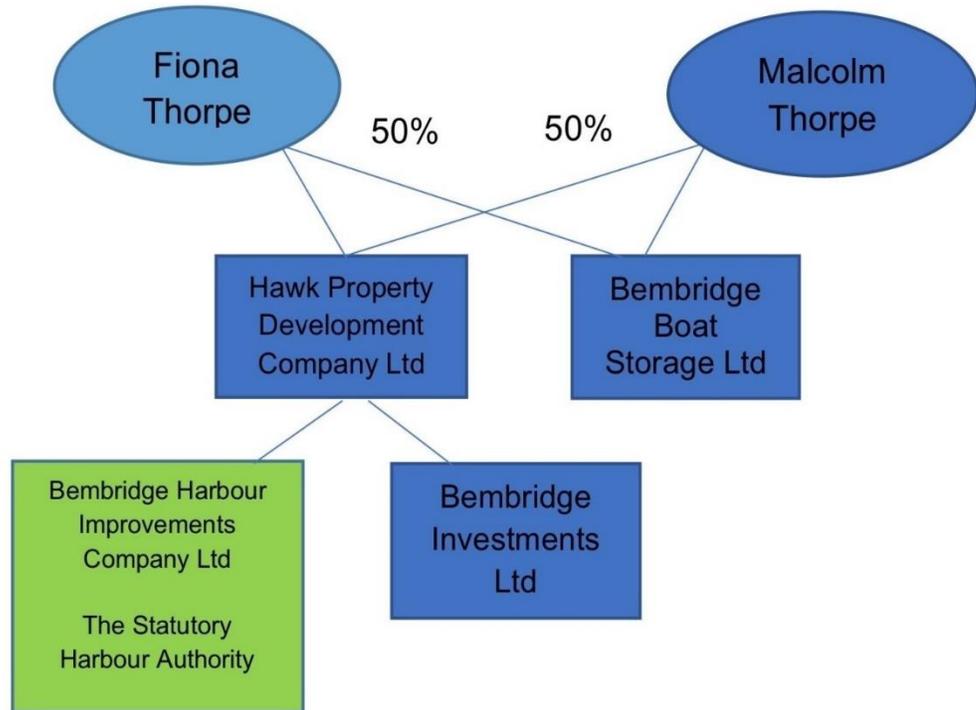
1. Introduction

Summary: There was a serious flaw in the company structure after privatising the harbour. In the 1960's, the owners of the harbour company orchestrated a situation where the harbour company owned only the seabed to highwater mark, and a separate private development company acquired the harbour-side land on which the harbour company depended in order to function. This situation was unlawfully exploited in the 1960s, leading to a political scandal in the 1970s. The structure led again to illegalities and to the harbour being placed into administration in 2011. The problems persist to this day. There are reasonable grounds to conclude that at least £1,539,828 has been extracted from BHIC since 2012. This report analyses the current problems and implications for the future survival of the harbour.

- 1.1 Bembridge Harbour Improvements Company ("**BHIC**") is the Statutory Harbour Authority ("**SHA**") for Bembridge Harbour, created by the Pier and Harbour Order (Bembridge Harbour) Confirmation Act 1963 (the "**Harbour Act**"). The Harbour Act confers special public rights and responsibilities on the harbour owners (i.e. BHIC) for the management of the harbour in the public interest. In particular, section 31 of the Harbour Act provides that any excess of the company's revenues over its expenses is to be applied towards "the dredging or the harbour or the renewal, construction or improvement" of the jetties, piers, quays, roads, buildings etc.
- 1.2 BHIC was set up in the public interest by statute, but the governance has been open to unlawful abuse. The harbour has suffered at the hands of previous owners. The first abuse was the division and sale of harbour land. BHIC retained ownership of the harbour bed, up to high water mark, whilst sections of the property surrounding the Harbour were sold off to a separate development company. This land was required by BHIC to function properly as a harbour, and this state of affairs has compromised the harbour ever since, both operationally and financially. This led to a political scandal in the sixties involving the local MP, Mark Woodnutt, and the Leader of the Isle of Wight Council ("**IWC**"), Charles Selwyn, who both controlled BHIC and the separate development company. More recently, unlawful financial transactions led to the company being placed into administration in 2011.
- 1.3 The current owners purchased BHIC from the administrators for £1, after agreeing to make a "contribution" to the company sufficient to enable it to satisfy Handelsbanken (but not its other creditors). In fact, the current owners made a substantial interest-bearing loan to BHIC in place of such a "contribution". The harbour is not currently being managed in the public interest and is manifestly being harmed, at a cost to harbour users and to the local community. In particular, it is believed that the shareholders have used a variety of artificial devices to divert the company's revenues into other companies within their control, in order to receive investment income from the harbour to which they are not entitled, so reducing the sums available for the purposes referred to in paragraph 1.1.
- 1.4 Malcolm Thorpe and Fiona Thorpe (a married couple) are the sole exclusive Directors of four companies; BHIC, Hawk Property Development Company Limited ("**Hawk Property**"), Bembridge Investments Limited ("**BIL**") and Bembridge Boat Storage Limited ("**BBS**"). Malcolm Thorpe and Fiona Thorpe are the sole shareholders of Hawk Property and BBS. Hawk is the sole shareholder of BHIC and BIL, making Malcolm and Fiona

Thorpe the ultimate owners of all four companies.¹ The financial affairs of these four companies are all inter-related.

Company structure (from 2018)



- 1.5 There is clear evidence that through the inter-relationships of these four companies, the profits of BHIC have been artificially reduced, including by diverting value to each of the Other Companies: Hawk Property, BIL and BBS. For example, there are reasonable grounds to conclude that at least £1,539,828 has been wrongfully extracted from BHIC since 2012. The resultant shortage of funds available to BHIC has impacted on its ability properly to manage the harbour.
- 1.6 Under company law, in “normal” commercial circumstances, the directors of a company can enter into transactions which reduce the assets of the company, for example by selling an asset to a related party at a discount, and provided the shareholders consent to this (and there is no impact on creditors or HMRC) this will usually be lawful. In the case of BHIC, however, such transactions give rise to a breach of section 31 of the Harbour Act, and any such breach cannot be rendered lawful by being ratified by BHIC’s shareholders.
- 1.7 The Harbour Act specifically defines the expenses that may be deducted from the revenues of BHIC in order to calculate the surplus which is to be used towards harbour works and improvements. Only the following may be deducted: “*moneys expended or applied by the Company in the working, management and maintenance of the undertaking and in meeting such other costs, charges and expenses of the undertaking as are properly*

¹ APPENDIX 1 [BHIC and Other Companies](#)

chargeable to revenue, including reasonable contributions to any reserve, contingency or other fund and a reasonable return upon the paid-up share capital of the undertaking". "The undertaking" is defined as "the entire undertaking of the Company in connection with the harbour".

- 1.8 Expenses must therefore be "*properly chargeable to revenue*". Company law provides that a transaction at undervalue (i.e. where a company pays more for an asset or a service than its fair value) with a person connected to its shareholders is to be treated as a deemed distribution (i.e. a dividend) to the extent of the over-payment, rather than a cost of the company chargeable to revenue.
- 1.9 Similarly, where BHIC provides assets or services to a connected person for which it does not receive full value, this is to be treated likewise as a deemed distribution (i.e. a dividend) to the extent of the under-payment.
- 1.10 This report has been prepared by Keystone Law for the Bembridge Harbour Trust ("**BHT**") a charitable trust whose object is "*To preserve and enhance Bembridge Harbour, its approaches and setting, for the benefit of the public including the users of the harbour and the communities of Bembridge and St Helens on the Isle of Wight*". This is the second report prepared by Keystone Law for BHT.
- 1.11 The IWC as Local Planning Authority asked questions of BHIC raised in the First Legal Report of December 2016. BHIC and its professional advisers provided explanations to the IWC, many of which were conflicting, inconsistent or implausible. Because of these responses and in light of further important information and events, BHT's concern has increased regarding the financial management of the harbour and the resulting consequences for the harbour.
- 1.12 The report considers BHIC's financial management and activities in the context of its legal obligations and duties under the Companies Act and the Harbour Act and these obligations and duties are described in outline at Appendix 2² and Appendix 3³ respectively.

² APPENDIX 2 [Summary of relevant company law](#)

³ APPENDIX 3 [Summary of relevant law governing Bembridge Harbour](#)

2. Synopsis of Report

Note; Numbers of paragraphs reflect numbers of sections of the report for ease of reference.

1. Introduction

There was a serious flaw in the company structure after privatising the harbour. In the 1960's, the owners of the harbour company orchestrated a situation where the harbour company owned only the seabed to highwater mark, and a separate private development company acquired the harbour-side land on which the harbour company depended in order to function. This situation was unlawfully exploited in the 1960s, leading to a political scandal in the 1970s. The structure led again to illegalities and to the harbour being placed into administration in 2011. The problems persist to this day. There are reasonable grounds to conclude that at least **£1,539,828** has been extracted from BHIC since 2012. This report analyses the current problems and implications for the future survival of the harbour.

3. Placing BHIC at risk of insolvency

Improper transactions have placed BHIC at serious risk of insolvency by having compelled it to become liable for a large intercompany debt, as well as cross-guarantees and charges for Other Companies' borrowings, making disproportionate and high-risk loans to Other Companies, and artificially suppressing revenues and inflating costs so as to procure that BHIC trades at an accounting loss. Moreover we believe that the balance sheet in BHIC's abbreviated accounts substantially overstates the value of its assets, which are in any event not readily realisable. The position is worsening generally, and the risk to creditors and to the community is increasing.

Table 1 Risk of Insolvency

Description of risk	Assets	Risk amount
Total assets less liabilities (March 2019)	£2,667,566	
Loan from Hawk Property		£1,200,000
Exposure to BIL borrowings (2019) ⁴		£229,240
Exposure to Hawk Property borrowings (2019) as last disclosed		£1,086,375
Exposure to non-payment of BIL loan (2019)		£350,171
TOTALS	£2,667,566	£2,865,786*
(before unpaid interest or recovery costs)	Shortfall	(£198,220)**

⁴ APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See schedule 1.1 line "amounts due after more than one year" Net assets line for Hawk Property and in Schedule 1.3 for BIL)

***Note; total exposure to the debts of, and the loan from, Hawk Property, and the debts of BIL was even greater on acquisition in 2012 – at £3,250,000- than it was in 2019 – at £2,515,615**

****Note: The investment property valuation is overstated by at least £899,999.⁵ The shortfall is therefore likely to be in excess of £1,121,594.**

4. Intercompany Debt

(A) Hawk Property loan to BHIC

On acquisition of BHIC in 2011 by its current owners, rather than making a “contribution” to BHIC to enable it to pay its debts, as had been agreed with the administrators from whom the shares of BHIC were acquired, those owners instead compelled BHIC to accept a loan of £1,200,000 from its parent company, Hawk Property, which is also owned by the same individuals. As a result, BHIC’s funds are reduced each year by payment of interest to Hawk Property. Based on the five years for which figures are available this amounts to some £574,450 in total (years ending March 2012-2019 inclusive) and averages approximately £72,000 per annum. Furthermore, no steps have been taken to reduce the principal sum of £1,200,000. Rather than being a legitimate loan to BHIC for its own purposes, this amounts to an artificial mechanism to divert profits of a company which is not permitted to pay more than nominal dividends to its owner.

(B) BHIC loan to BIL

The BHIC accounts to March 2018 show an increase to a sum identified as a loan to BIL from £15,820 to £350,171, an increase in that year of £334,351. It is not clear why BHIC made such substantial loans to BIL in that year. These loans are subordinate to other loans made to BIL by its bank. BIL’s assets are too low to support such a loan without sale of land the harbour relies upon. BHIC receives no interest on this loan and the risk of non-repayment is high.

⁵APPENDIX 51 [Notice of end of administration](#)

Table 2 Summary of funds improperly extracted 2012 – 2019 visible in accounts or based on written statements from BHIC

Issue	Amount	Non-compliance with
Sales of houseboat plots to 2016 (Section 7)	£171,027	Harbour Act s.31 Companies Act s.172, s175
Interest on Hawk properties loan (Sections 4 and 11)	£574,450	Harbour Act s.31 Companies Act s.172, s175
BHIC loan to BIL (Sections 4 and 11)	£334,351	Harbour Act s.31 Companies Act s.172, s175
Payments for BIL's planning application (Section 8)	£300,000	Harbour Act s.31 Companies Act s.172, s175
Depriving BHIC of gravel extraction income 2012 -2019 (Section 10)	£160,000	Harbour Act s.31 Companies Act s.172, s175
Other transactions (not quantified)	£ [- - , - - -]	
Interim total	£1,539,828	

Table 3 Summary of amounts that would be improperly removed over next ten years, on the disclosed proposals to sell houseboat plots and expectation of repayment of wrongful debt to Hawk Property

Issue	Amount	Non-compliance with
Sales of houseboat plots (Section 7(C))	£276,500	Companies Act s.172, s.175 and Harbour Act s.31
Interest on Hawk Property loan (Section 4(A))	£718,062	Companies Act s.172, s.175 and Harbour Act s.31
And /or repayment of Hawk Property loan (Section 4(A))	£1,200,000	Companies Act s.172, s.175 and Harbour Act s.31
Areas of concern set out in other sections of this report - Not Quantified	£ [- - , - - -]	
Interim total (assumes interest for 10 years prior to repayment)	£2,194,562	

5. BHIC exposure to the liabilities of Other Companies

BHIC has also been compelled by its current owners to guarantee their owners' Other Companies' bank debt, and to charge its assets in respect of that guarantee, thus using BHIC assets to underwrite Other Companies' borrowings. Bank debts of Hawk Property and BIL guaranteed total **£1,350,000**. It is worth noting that an identical arrangement led to BHIC going into administration

in 2011, such that no reasonable director would have entered into such a transaction again. This places BHIC at risk of insolvency; this is addressed in more detail at 3, above.

6. Reduction in the profit and loss account

Over the four years ending March 2016 there is an unexplained difference between the loss (reduction in P&L account figure in the balance sheet) shown in the filed accounts and the annual profit declared by Mr Thorpe in a written statement to IWC on 6th July 2017. This unexplained difference amounts to **£313,408**. BHIC is not required to publish a detailed profit and loss account. However, the annual interest charges **total £311,646** paid to one of the Other Companies owned by BHIC's shareholders must go a significant way to explain the pattern of losses. In that same period BHIC has advised that it made '*net operating trading profits*' of £216,099. If this is in fact a reference to the 'Operating Profit', this further indicates that the reduction in the account will represent interest paid by BHIC, most significantly to Hawk Property. Whatever the explanation for the differences, this clear pattern over four years on its face indicates a very significant problem for BHIC. Uncorrected BHIC would not be able to carry out its basic functions. It is prima facie evidence of financial mismanagement.

7. Sale of Houseboat Plots

In April 2014 BHIC sold a houseboat plot to BBS for **£1**, which BBS (whose directors and shareholders are the same as BHIC's) immediately sold on for **£87,500**. This deprived BHIC of a potential profit of £87,499 (subject to deduction of expenses). This transaction at undervalue was clearly intended to artificially suppress the revenues of BHIC so as to divert value into BBS, apparently in order to frustrate the legal requirement on BHIC to use its surpluses for harbour improvement. Sales of other houseboat plots up to 2016 similarly improperly deprived BHIC of another £93,000, totalling **£171,027** up to 2016. BHIC has advised its intention to deduct other amounts from the profits on two other sales made since 2016 and on five future sales projected by BHIC, leading to a total deduction from profits of **£276,500** or more which in our opinion is not justified by normal accounting practices. Therefore the total that BHIC aims improperly to deduct from BHIC's profits will amount to **£447,527** or more. There is cause for concern about the treatment of these plot sales in accounts. These amount to significant irregularities in the affairs of BHIC.

8. BIL's Planning Application for residential development and associated legal agreement

(A) The application

There is evidence that BHIC has paid for part of the costs of making and pursuing a planning application for the benefit of BIL. BHIC claims that it has paid in excess of **£300,000**. BIL sought improperly to extract a further £946,500 in developer's profit over and above the £1,200,000 profit agreed with the IWC as part of the Enabling Development. This was with the knowledge of, and at the direct expense of, BHIC. The application justifies building 13 houses on operational harbour land on the sole basis that BHIC cannot afford to build new facilities for itself. It is clear however that BHIC could fund its own facilities if its surpluses had not been artificially reduced.

(B) The Legal agreement under s.106 of the Planning Act (“Planning Agreement”)

In connection with BIL’s planning application, the section 106 proposals put forward on behalf of BIL and BHIC strongly favour BIL and severely financially disadvantage BHIC. Once again this appears to be an example of the directors of BHIC managing its affairs for the benefit of those directors’ Other Companies, so that its shareholders receive the benefit rather than it being used in pursuit of BHIC’s Harbour Act obligations. As such this represents a clear breach of their statutory duties by the directors of BHIC and of the Harbour Act.

9. Rental of Harbour Premises

(A) Rental of current premises

The premises currently occupied by BHIC are owned by BIL. Inconsistent and conflicting explanations have been given by BHIC for current rental levels, with no security of tenure for the harbour.

(B) Rent for replacement harbour premises

The premises which BIL is building as a replacement for the existing premises will (as per the agreed Planning Agreement) be subject to a rent of approximately **£45,000** p.a. This will further suppress BHIC’s profits to the benefit of BIL. As BHIC has been consistently operating at an annual loss, BHIC plainly cannot afford an increase in rent of **£27,000**. Further, BHIC owns two thirds of the land on which the new offices are to be built, and yet this has not been taken into account in setting the rent. BHIC has stated that their bank prohibits it from paying discounted rent, but separately BHIC and its professional advisers have stated that the current rent is heavily discounted.

(C) Future Rent calculation for harbour premises proposed by BIL / BHIC

BIL had originally proposed that the annual rent for the new replacement harbour premises would be between **£118,000** and **£144,000** p.a. BHIC would have been paying between 100% and 200% in excess of market rate. Over the 25 year term of the lease, this would have meant sums in excess of **£1,000,000** improperly extracted from BHIC and diverted to the benefit of BIL. The proposal was rejected by the IWC, but BHIC’s directors argued strongly in favour of this additional diversion of the assets of BHIC to Other Companies owned by the same shareholders.

(D) Obligation on BHIC to acquire freehold of new harbour premises

Terms were also proposed in the Planning Agreement which would have obliged BHIC to purchase the freehold of the replacement harbour facilities at a cost of at least **£1,107,000**, which it patently could not afford and would cause major financial distress to BHIC. Further, BHIC had previously stated twice that it could not contemplate such an acquisition financially. This proposal was also rejected by the IWC but again demonstrates a pattern

of the directors of BHIC repeatedly seeking to divert its assets into the hands of its shareholders' Other Companies.

Table 4 Summary of amounts that would have been improperly allocated to BIL, to BHIC's cost, if the terms proposed by BIL (and agreed by BHIC) had not been corrected. These were corrected by intervention from BHT and accepted by IWC.

Event	Amount	Non-compliance with
At completion of development: Proposed profit of up to 20% and retention of "retained investments" by BIL, contrary to DVS advice (Section 8.7)	£946,500	Harbour Act s.31, Companies Act s.172, s.175
Either: At completion of development: Proposal to oblige BHIC to buy new facilities (Section 9.20)	>£1,075,000	Harbour Act s.31, Companies Act s.172, s.175
Or: Over the first 10 years of the proposed 25 year term of the lease: Proposal to rent at 10% of total costs i.e.>£118,000 over lease period of 25 years index linked (market rent estimate £45,000 pa) overpayment £73,000 p.a. (Section 9 C)	>£730,000	Harbour Act s.31, Companies Act s.172, s.175

10. Rental of other premises owned by BIL - Irregularities

BIL is the landlord in a lease to a company, in circumstances in which BHIC is providing services or rights to that company, but is not receiving (directly or indirectly) any revenues for those services and rights. However, the rent which is paid by the company under the lease is significantly in excess of market value. Moreover, in the lease there is an explicit provision that no sum is to be paid to BHIC. It appears clear that BIL is taking, through inflated rent, sums which should properly be paid to BHIC. It is able to do so only because the directors of BHIC (who are also the directors and shareholders of BIL) are complicit in these arrangements. The lease involves the diversion to BIL of substantial sums over a prolonged period. BHIC has been deprived of **£160,000** in fees for gravel extraction over an eight year period. It is believed that this pattern has been repeated with at least one other lease granted by BIL. This amounts to serious misconduct by the directors of BHIC.

11. Placing the commercial interests of Other Companies above the interests of BHIC as SHA

Directors have improperly and repeatedly prioritised the interests of their Other Companies over those of BHIC, which is required to use its surpluses for the maintenance of the harbour in accordance with the Harbour Act. This shows a systematic pattern of serious misconduct by BHIC's directors. These actions place BHIC at risk of Insolvency and frustrate BHIC's ability to perform its statutory undertakings.

12. Muddling the financial affairs of BHIC with those of Other Companies

When challenged on these matters BHIC and its professional advisers have offered explanations which appear to suggest that the financial affairs of BHIC and the Other Companies have consistently and improperly been treated as if they were one company, without regard to the separate legal personality of each company, and more significantly without regard to BHIC's special status as a statutory harbour authority.

13. Efforts to resolve issues with BHIC

BHT have since 2014 tried to hold BHIC to account via the IWC in relation to the Planning Application; BHT and others have lobbied the Department for Transport responsible for ports and harbours, but the DfT advises it has no specific powers under which it can audit BHIC; the community in Bembridge sought to obtain answers through a special public meeting; the GMB Union identified harm to the community and passed a formal resolution demanding answers; a local community group 'Show Us The Books' lobbied for transparency; local community groups BHAG and BHUG sought to broker cooperation with BHIC. It was proposed that an expert be jointly appointed by BHIC and BHT to review BHIC's accounts, but this was rejected by BHIC in early 2020. All attempts have been unsuccessful.

14. Significant Harm to the Harbour and Community

There are reasonable grounds to conclude that at least **£1,539,828** has wrongfully been extracted from BHIC since 2012 (See Table 2) and diverted to Other Companies owned by BHIC's directors and from which they are able to extract personal benefit. There are reasonable grounds also to conclude that over the next ten years an estimated further **£2,194,562** will be wrongfully extracted from BHIC for similar purposes (See Table 3). Collectively these losses place the sustainability of BHIC at great risk as a going concern. The very substantial loss of funds to date have had a very serious impact on the ability of the statutory harbour authority to carry out its statutory functions, in particular in relation to slowing the rate of siltation and carrying out essential maintenance and repairs, with direct harm to the users of the harbour, and indirectly to the local communities. The continuation of wrongful extractions from harbour funds into the future as predicted will exacerbate the harmful effects experienced to date.

15. Conclusions

- (A) There are multiple examples of the directors of BHIC using artificial means to divert value away from BHIC and into their own commercial companies. In addition to legitimate payments, there are reasonable grounds to conclude that at least **£1,539,828** has been extracted from BHIC since 2012. In the case of BHIC these transactions give rise to a breach of the Harbour Act, and cannot be rendered lawful by being ratified by BHIC's shareholders.
- (B) It is believed that the directors have done this to enable them to personally profit from the harbour in breach of the terms of the Harbour Act. This also enabled them to make the case for a planning permission that would not be granted if BHIC was running a healthy profit.

- (C) The impact of this falls on the community and the users of the harbour firstly because it is not being adequately maintained, and secondly because BHIC has been compelled to take on unreasonable liabilities, and it is therefore at risk of becoming insolvent. This also impacts potentially on the creditors of BHIC.

3. Placing BHIC at risk of Insolvency

Summary: Improper transactions have placed BHIC at serious risk of insolvency by having compelled it to become liable for a large intercompany debt, as well as cross-guarantees and charges for Other Companies' borrowings, making disproportionate and high-risk loans to Other Companies, and artificially suppressing revenues and inflating costs so as to procure that BHIC trades at an accounting loss. Moreover we believe that the balance sheet in BHIC's abbreviated accounts substantially overstates the value of its assets, which are in any event not readily realisable. The position is worsening generally, and the risk to creditors and to the community is increasing.

- 3.1 The directors of BHIC have entered into arrangements with Other Companies and their bankers which expose BHIC to risk of insolvency in the short to medium term. It has been compelled to assume liability for its own costs of acquisition and to pay substantial interest on that liability. It has also entered into cross guarantees and debentures in respect of the borrowings of its shareholders' Other Companies. Table 1 (below) sets out the types of risk and the sums involved. If Handelsbanken called in their debenture⁶ over BHIC relating to the Other Companies' debts BHIC would not be in a position to settle its liabilities. Table 1 uses the numbers in the accounts, which even on this basis show a current risk of insolvency. BHT has good reason to believe that the figure for total assets is grossly inflated, and the shortfall between assets and liabilities is significantly greater. Further, the majority of the asset value is in property, which under the Harbour Acts (1963 and 1964) BHIC cannot readily sell to realise the value if called upon.

⁶ 50_APPENDIX [Legal Charge over BHIC assets](#)

Table 1

Description of risk	Assets	Risk amount
Total assets less liabilities (March 2019)	£2,667,566*	
Loan from Hawk Property		£1,200,000
Exposure to BIL borrowings (2019) ⁷		£229,240
Exposure to Hawk Property borrowings (2019) as last disclosed *		£1,086,375
Exposure to non-payment of BIL loan (2019)		£350,171
TOTALS	£2,667,566	£2,865,786*
(before unpaid interest or recovery costs)**	Shortfall	(£198,220)**

***Note: total exposure to the debts of, and the loan from, Hawk Property, and the debts of BIL was even greater on acquisition in 2012 – at £3,250,500- than it was in 2019 – at £2,515,615**

****Note: The investment property valuation of £2,700,000 is overstated by at least £899,999. The shortfall in assets against potential liabilities is therefore likely to be in excess of £1,098,219 (See 3.2 below).**

3.2 The basis of asset value on which the investment property value based is not founded on BHIC's assets alone. The harbour estate is almost entirely covered by water at high tide and has restricted earning capacity. BHT are advised by a reliable source that the valuation at £2,700,000 first made in 2008 included the property owned by Maritime and Leisure Ltd at that time. The administrators' report in 2011 report the sale of the remainder of Maritime and Leisure's assets to BIL at £ 899,999⁸. This would leave BHIC's liabilities secured against the balance of £1,800,001 at 2008 at the very most, but in BHT's view on a proper valuation BHT's land would be valued at significantly less than this. On this basis BHIC's exposure to debt and loan guarantee could not be met, and BHIC may even be technically insolvent already.

3.3 Mr Thorpe has advised that a due diligence process was carried out prior to purchase. Such a process would have revealed that much of the property value behind the

⁷ APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See Schedule 1.1 line "amounts due after more than one year" Net assets line for Hawk Property and in Schedule 1.3 for BIL)

⁸ APPENDIX 51 [Notice of end of administration](#)

£2,700,000 was historic and lay in other companies. It is also clear from the Harbour Acts of 1963 and 1964 that such asset value as did lie in land owned by BHIC was not capable of being readily realised. The directors' position in having taken on substantial debt and loan guarantees which cannot be met is unsustainable.

- 3.4 It is noted that the figure for investment property value has not changed since a valuation in 2008, and this is even today the figure relied upon in the accounts. It is suggested that this is because any reasonable revaluation of the property assets of BHIC would reveal the value to be significantly lower, which is against the interests of the Other Companies which rely upon a high value of BHIC to provide security for their debts.
- 3.5 This gross overvaluation of assets feeds into the figure of the Revaluation Reserve in accounts. In the 2019 accounts it is £1,323,369 (and has remained the same figure since 2012). Whilst this appears to be indicative of solvency, as it is based significantly upon the overvalued property asset, it is fundamentally unsound and cannot be relied upon.
- 3.6 The underlying assets are required for the performance of the undertaking, are protected by legislation and therefore not readily realisable, see the Harbour Act⁹ at Section 28 - 30 and the 1964 Harbours Act¹⁰ at Schedule 2. Approval of the Minister of Transport is required prior to any disposal, via a Harbour Revision Order, a statutory process which commonly takes at least a year; this would be too slow to realise assets to meet a call on funds. It would also be non-sensical for the borrower to repay the lender by selling the property on which the lender relies for its operation.
- 3.7 As such only redundant land-based assets can be sold. In those circumstances ultimate control is in the hands of the DfT as a Harbour Revision Order would be required to enable sale of land. Clearly the calling in of BHIC's obligations is likely to create the need for such a Harbour Revision Order, which would take at least a year to achieve, with uncertainty of outcome.
- 3.8 For robustness the £2,700,000 investment property valuation as stated in the accounts has been used in our analysis, and on the assumption that it is as if readily realisable to settle the obligations of the Company. Even on this basis Table 1 (above at 3.1) illustrates a shortfall of £198,220 and puts BHIC at risk of insolvency by the decisions of its directors. The reality is a significantly lower asset value which it is very difficult to realise at short notice. Finally, it is noted that the solvency of BHIC has also been put at risk by the extraction of funds leading to losses as set out in Sections 6, 7 and 10 below. This factor is all the more important because the underlying assets are not readily realisable.
- 3.9 The position summarised in Table 1 (above at 3.1) exposes the creditors of BHIC to a risk they are not aware of. Contractors are not advised of the company's over exposure when entering contracts. They cannot research the risk effectively as company accounts as posted at Companies House do not reflect an accurate picture of the company's liquidity. These contractors include many small businesses in the local community. The same concern applies to harbour employees from the community whose employment depends upon the financial stability of their employer. Also, the interests of customers, like the berth-holding members of the public are also exposed, as if the company ceases trading

⁹ APPENDIX 32 [The Pier and Harbour Order \(Bembridge Harbour\) Confirmation Act 1963](#)

¹⁰ APPENDIX 40 [The Harbours Act 1964](#)

the contracts for provision of moorings, often paid annually in advance, need not be honoured.

- 3.10 The general pattern is that exposure to creditors has steadily increased during the current ownership. If BHIC is permitted to continue trading as it has done to date, the outcome for creditors will be much worse in future years.
- 3.11 With the asset value being much lower than stated, and security and debts far outstripping the asset value, it will not take much to trigger a serious financial difficulty for BHIC. BHT understands that there is currently a subrogated insurance claim against BHIC directly (not its insurers) in the region of at least £400,000 (including costs). This arose from the sinking of a yacht on the marina, allegedly due to the failure of a pontoon / pile which had not been maintained or repaired properly.
- 3.12 There is a further serious issue: Hawk Property, BHIC's parent company in respect of whose debts BHIC has given a guarantee, does not have assets to settle its indebtedness to Handelsbanken, and appears to rely for its solvency predominantly on both the charges it makes to BHIC and the recoverability of its loan to BHIC of £1,200,000. Therefore if the bank turns to Hawk Property at any time, Hawk Property will inevitably look to BHIC for repayment, which, as has been shown, BHIC would be unable readily to satisfy.
- 3.13 Hawk Property have lent BHIC £1,200,000 (see below at Section 4(A)). This loan could also be called in at any time or its terms varied. BHIC does not have available resources to settle this debt without sales of assets.
- 3.14 BHIC has made loans to BIL totalling £350,171 (see below at Section 4(B)). There is no indication that the loan to BIL is secured or that BIL pay interest. According to the 2014 BHIC accounts *"All group loans have no set repayments terms"*¹¹. As such there appears to be no undertaking not to call in intercompany debts within any set period and the position of BHIC as a going concern is at risk. As such its position as reported in the accounts may not be a true reflection of its position as a going concern. The accounts of BIL to March 2018¹² show net assets of £172,388. There are insufficient assets to secure the loan without the sale of land on which the harbour relies.
- 3.15 The directors of BHIC have made it liable to Handelsbanken for the debts of other companies.¹³ *"The company also provides security to the group's bankers for the borrowings held in other group companies"*. These borrowings are secured by a debenture¹⁴ over BHIC's cash and income as well as its other assets. The amount secured is some £1,350,000. If called in, such payments would be an improper use of BHIC's incomes under section 31 of the Harbour Act as they do not relate to the proper costs of performing the undertaking. Further BHIC would not be in a position to settle its liabilities without disposal of the assets which BHIC must retain to perform its obligations as the undertaker as set out in the Harbour Act.

¹¹ APPENDIX 19 [BHIC Accounts to March 2014](#) (See Section 4 notes to Related party Transactions)

¹² APPENDIX 4 [Analysis of accounts of BHIC, BIL, BBS and Hawk Property](#) (See Schedule 1.3 line shareholders funds)

¹³ APPENDIX 19 [BHIC Accounts to March 2014](#) (See Section 4 notes to Related party Transactions)

¹⁴ APPENDIX 50 [Legal Charge over BHIC assets](#)

4. Intercompany Debt

(A) Hawk Property loan to BHIC

Summary: On acquisition of BHIC in 2011 by its current owners, rather than making a “contribution” to BHIC to enable it to pay its debts, as had been agreed with the administrators from whom the shares of BHIC were acquired, those owners instead compelled BHIC to accept a loan of £1,200,000 from its parent company, Hawk Property, which is also owned by the same individuals. As a result, BHIC’s funds are reduced each year by payment of interest to Hawk Property. Based on the five years for which figures are available this amounts to some £574,450 in total (years ending March 2012-2019 inclusive). Furthermore, no steps have been taken to reduce the principal sum of £1,200,000. Rather than being a legitimate loan to BHIC for its own purposes, this amounts to an artificial mechanism to divert profits of a company which is not permitted to pay more than nominal dividends to its owner.

- 4.1 Until 2011, BHIC was owned by Maritime & Leisure Investments Limited (“MLI”), which itself was ultimately owned by Mr Blatch through EBB Investments Ltd. During the period of Mr Blatch’s ownership, MLI borrowed monies from Svenska Handelsbanken ab (“**Handelsbanken**”) and BHIC entered into a guarantee in relation to this debt, so that when MLI became unable to meet its repayments, BHIC became jointly and severally liable with MLI. MLI and BHIC went into creditors’ voluntary administration in 2011.
- 4.2 The administrators agreed to sell the share capital of BHIC, rather than its underlying assets, as part of a composite transaction pursuant to which the purchaser would agree to repay some of the debts owed by MLI to Handelsbanken. The shares in BHIC were sold to Hawk Property for £1.¹⁵ As part of the agreement, Hawk Property agreed to make a “contribution” to BHIC to enable it to pay £1,200,000 to Handelsbanken¹⁶. In the event, rather than making a contribution – which is usually understood to mean a subscription for share capital or a gift - it made a loan of £1,200,000 to BHIC, and BHIC made the corresponding repayment to Handelsbanken. A loan should not be regarded as a “contribution”, because it does not enhance the balance sheet of the recipient at all: BHIC simply ceased to be indebted to Handelsbanken, and became indebted to Hawk Property instead.
- 4.3 The effect of making this contribution by way of interest bearing loan (rather than by subscription for share capital or gift) is that the interest paid by BHIC forms part of the profits of Hawk Property, and can, ultimately, be paid to its shareholders as dividends.
- 4.4 Meanwhile, the interest reduces the profit earned by BHIC and enables BHIC to claim that there is a correspondingly lower “excess” of revenue over expenses for the purposes of section 31 of the Harbour Act, and thus that there is less money available for maintenance of the harbour.
- 4.5 The payment of interest on a loan made for such a purpose cannot be regarded as *“moneys expended or applied by the Company in the working, management and*

¹⁵ APPENDIX 13 [Joint supervisors final report](#) (See section 2 final paragraph)

¹⁶ APPENDIX 13 [Joint supervisors final report](#)

maintenance of the undertaking and in meeting such other costs, charges and expenses of the undertaking as are properly chargeable to revenue, including reasonable contributions to any reserve, contingency or other fund and a reasonable return upon the paid-up share capital of the undertaking” (s.31 Harbour Act). Rather, as the loan itself represented, in effect, the price paid by Hawk Property for the share capital of BHIC, the interest should not properly be regarded as an expense “of the undertaking” of the harbour. It is a purchase expense of Hawk.

- 4.6 These interest deductions should therefore be disregarded in determining whether there is an “excess” for the purpose of section 31 of the Harbour Act. Indeed, any other interpretation would enable BHIC to incur any debts it chose, regardless of their size or purpose, in order deliberately to divert excess revenues to the pockets of BHIC’s ultimate owners rather than applying them to improve the harbour.
- 4.7 The fact that interest was charged was confirmed by BHIC’s 6th July 2017 email to IWC ¹⁷ *“The outcome on the interest cost is exactly the same as if BHIC had an equivalent loan from the bank”*. BIL provided an interest rate to the DVS for the viability exercise in relation to the planning application - recorded as 7% in the DVS Report of 7th April 2017¹⁸. If applied here it would amount to an annual charge of £84,000, totalling £672,000 (2012 to 2020 inclusive). However, for the years in which abstract accounts show the amount of interest paid by BHIC to Hawk Property, namely years ending June 2012 – 2016, the amount fluctuates very significantly. For example, in 2013 BHIC paid £88,036, approaching twice as much as in 2012, at £47,385.¹⁹ This does not reflect the pattern of charges from a bank, as claimed by Mr. Thorpe. A bank’s interest charges are linked to a base lending rate, which will not have changed like this over this period (eg. see Bank of England base lending rate).
- 4.8 The average over the 5 year period for which interest received is identified in Hawk Property’s accounts is £71,806 This figure is used to calculate totals in Tables 2 and 3. The interest received by Hawk Property for the 4 years in which “net operating trading profits” are also given by BHIC (2013-2016) varies from £62,547 to £88,036, (average £79,911). The figure of £71,806 is applied in Section 6 in relation to the P&L account.
- 4.9 This inconsistency contradicts Mr. Thorpe’s statement²⁰ that the interest charged by Hawk Property to BHIC is the same as charged by Handelsbanken to Hawk Property.
- 4.10 It is noted that long term indebtedness of both Hawk Property and BIL to their bank has reduced significantly between 2012 and 2019, together totalling some £760,010²¹ whereas BHIC’s long term indebtedness has remained unchanged at £1,200,000.²² This state of affairs is not in the best interests of BHIC. It is all the more concerning because BHIC has during the same period loaned a significant sum to BIL, which does not appear to incur any interest. This is considered in the section below, at (B).
- 4.11 It is unclear why BHIC borrowed this money from Hawk Property in the first place. It appears that, at the time of the acquisition of BHIC, it was necessary for the shares in the

¹⁷ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#) (See section 4 Inter Company Debt)

¹⁸ APPENDIX 8 [DVS viability report for IWC 7th April 2017](#) (See last Para. Section 2 f) Development Costs)

¹⁹ APPENDIX 4 [Analysis of accounts of BHIC, BIL, BBS and Hawk Property](#) (See schedule 3 1 interest line)

²⁰ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#) (See section 4 Inter Company Debt)

²¹ APPENDIX 4 [Analysis of accounts of BHIC, BIL, BBS and Hawk Property](#) (See schedule 2)

²² APPENDIX 9 [BHIC Accounts to March 2019](#) (See Balance Sheet amounts falling due after more than one year)

company to be acquired, rather than merely its assets, in order to avoid undue complexity with regard to the applicability of the Harbour Act. It is noted that BHIC was insolvent because it had unlawfully entered into guarantees in relation to its former owner's other, unrelated, liabilities. Hawk Property borrowed from its bankers sufficient sums to restore BHIC to solvency, but rather than this being treated in the accounts as a cost of acquisition and thus a liability of Hawk Property as the acquirer, Hawk Property instead immediately on-lent the money to BHIC, and now charges BHIC interest on this loan. In more usual acquisitions from insolvent companies, the assets would be acquired directly and the acquirer would be liable for the debt incurred to fund the purchase. BHIC does not derive any benefit from these arrangements. In our opinion, the directors were acting in breach of their statutory duties in permitting BHIC to enter into them. The fact that the interest on the loan has the effect of materially reducing BHIC's profits and increasing Hawk Property's is equally problematic.

(B) BHIC loan to BIL

Summary: The BHIC accounts to March 2018 show an increase to a sum identified as a loan to BIL from £15,820 to £350,171, an increase in that year of £334,351. It is not clear why BHIC made such substantial loans to BIL in that year. These loans are subordinate to other loans made to BIL by its bank. BIL's assets are too low to support such a loan without the sale of land on which the harbour relies. BHIC receives no interest on this loan and the risk of non-repayment is high.

- 4.12 The BHIC accounts to March 2018²³ show an increase to a sum identified as a loan to BIL from £15,820 to £350,171, an increase in one year of £334,351. In the absence of a compelling explanation this constitutes use of BHIC funds contrary to section 31 of the Harbour Act.
- 4.13 As one would expect BIL accounts for that year show an increase in amounts falling due within one year of £328,891²⁴ a figure which correlates closely with the £334,351 increase in BHIC's loan. The accounts of BIL to March 2018²⁵ show net assets of £172,388. There are insufficient assets to secure the loan without the sale of land on which the harbour relies.
- 4.14 BHT drew this issue to the attention of the IWC in a submission which was copied to BHIC inviting an explanation from BHIC. An explanation was provided by Hunt and Ptrs. accountants to BHIC in a letter of 13th June 2019, which BHIC submitted to the IWC in response²⁶.
- 4.15 Hunt and Partners advised a reduction of the harbour's indebtedness, whereas BHIC 's overall liabilities increased by £80,840 in the period March 2017 and March 2019. BHIC long term debt remained constant at £1,200,000. This is contrary to the assertion by Hunt and Partners that BHIC "*has been gradually repaying that money over the last few years when small amount[s] have become available*". The only possible reading is that Hunt and Partners were referring to BIL and Hawk Property where debts have reduced substantially

²³ APPENDIX 11 [BHIC Accounts to March 2018](#)

²⁴ APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See schedule 1.3)

²⁵ APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See Schedule 1.3 line shareholders funds)

²⁶ APPENDIX 10 [Letter from Hunt and Ptrs. to BHIC 13th June 2019](#)

during the period. This is a further illustration of the muddling of the affairs of BHIC with Other Companies.

- 4.16 Though invited by IWC to do so, Hunt and Partners' response does not explicitly address the loan. The letter appears to suggest that the sum was not in fact a loan as stated in the accounts but rather represents repayment by BHIC of a debt owed to BIL. There is nothing in the accounts of either company to support this statement. There is no indication in the accounts of BHIC of a loan to it from BIL. It is unequivocal from the accounts that the opposite is true.
- 4.17 There has been a subsequent development. Despite the loan to BIL apparently being repayable within one year, the reduction in amounts due within one year had only reduced marginally to £373,054 in March 2019 accounts of BIL and BHIC. This demonstrates a further misuse of funds of BHIC the Statutory Harbour Authority in breach of the Harbour Act.

Table 2 Summary of funds improperly extracted 2012 – 2019 visible in accounts or based on written statements from BHIC

Issue	Amount	Non-compliance with
Sales of houseboat plots to 2016 (Section 7)	£171,027	Harbour Act s.31 Companies Act s.172, s175
Interest on Hawk properties loan (Sections 4 and 11)	£574,450	Harbour Act s.31 Companies Act s.172, s175
BHIC loan to BIL (Sections 4 and 11)	£334,351	Harbour Act s.31 Companies Act s.172, s175
Payments for BIL's planning application (Section 8)	£300,000	Harbour Act s.31 Companies Act s.172, s175
Depriving BHIC of gravel extraction income 2012 -2019 (Section 10)	£160,000	Harbour Act s.31 Companies Act s.172, s175
Other transactions (not quantified)	£ [- - -, - - -]	
Interim total	£1,539,828	

Table 3 Summary of amounts that would be improperly removed over next ten years, on the disclosed proposals to sell houseboat plots and expectation of repayment of wrongful debt to Hawk Property

Issue	Amount	Non-compliance with
Sales of houseboat plots (Section 7(C))	£276,500	Companies Act s.172, s.175, s845 and Harbour Act s.31
Interest on Hawk Property loan (Section 4(A))	£718,062	Companies Act s.172, s.175 and Harbour Act s.31
And /or repayment of Hawk Property loan (Section 4(A))	£1,200,000	Companies Act s.172, s.175 and Harbour Act s.31
Areas of concern set out in other sections of this report - Not Quantified	£[- - - , - - -]	
Interim total (assumes interest for 10 years prior to repayment)	£2,194,562	

5. BHIC exposure to the liabilities of Other Companies.

Summary: BHIC has also been compelled by its current owners to guarantee their Other Companies' bank debt, and to charge its assets in respect of that guarantee, thus using BHIC assets to underwrite Other Companies' borrowings. Bank debts of Hawk Property and BIL guaranteed total £1,350,000. It is worth noting that an identical arrangement led to BHIC going into administration in 2011, such that no reasonable director would have entered into such a transaction again. This places BHIC at risk of insolvency; this is addressed in more detail at Section 3.

- 5.1 BHIC accounts state that BHIC *"... provide security to the group's bankers for the borrowings held in other group companies"*. This is stated in the accounts of 2013,14,15,18²⁷ (but not in other years because different reporting requirements applied in those years).
- 5.2 It is also noted that BHIC itself has no long term borrowing from Handelsbanken, the beneficiary of the charge.
- 5.3 There is a charge over all the assets and the shares in BHIC in favour of Handelsbanken²⁸. Another instrument between BHIC and Handelsbanken will give effect to the statement in accounts (quoted above).
- 5.4 This facility cannot be in the reasonable commercial interests of BHIC even if it were to make a very substantial charge for this facility and there is no evidence of any such charge. Moreover, placing the harbour assets at risk in this way is in breach of the Harbour Act.
- 5.5 The result of this is that BHIC is potentially liable to Handelsbanken for the debts of all or any of the Other Companies. Hawk Property's indebtedness alone to Handelsbanken stood at £1,086,375 (June 2019). In March 2019 BIL's long term debt was £229,240. In previous years the figures were higher²⁹. If both companies' debts are secured against BHIC the total liability appears to be at least approximately £1,300,000. This is a fundamental breach of the Harbour Act as it is not in furtherance of the powers and responsibilities of the harbour (see Harbour Acts).
- 5.6 The accounts reveal that immediately on acquisition the directors of BHIC compelled it to take on the liability for Hawk Property's liabilities to Handelsbanken of £1,300,500, BIL's liabilities to Handelsbanken of £750,000 and a direct liability for a loan of £1,200,000 from Hawk Property. The total of £3,250,500 compares with £2,515,615 in 2019. It is well in excess of the stated fixed and current assets as set out in the 2012 accounts of BHIC – £2,865,067³⁰. This is notwithstanding that BHIC's assets at the time were in fact very significantly less than as stated in accounts, as remains the position today (see 3.2 above).
- 5.7 The exposure of the harbour to financial liability in respect of the liabilities of third parties places BHIC's solvency at serious risk and is outside the control of the harbour. If

²⁷ APPENDIX 11 [BHIC Accounts to March 2018](#) (See Section 5 Related Party Transactions)

²⁸ APPENDIX 12 [Charge registered by Handelsbanken against BHIC assets](#)

²⁹ APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#)(See schedule 1.1 and 1.3 "amounts due after more than 1 year"

³⁰ APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#)
(See schedule 1.2)

Handelsbanken were to call in Hawk Property or BIL's liability BHIC would be forced into administration. This is not a remote prospect. This is precisely the financial structure and sequence of events which put BHIC into administration under the previous ownership in 2011. This is summarised in the Joint Administrator's final progress report of 21st December 2011. It stated at Section 5 "*The Company granted a debenture and legal charge in favour of Handelsbanken on 6 February 2009 who hold a fixed and floating charge over the assets. Handelsbanken are owed circa £3,200,000 and MLI and the Company are jointly and severally liable for all monies due to Handelsbanken*"³¹

- 5.8 These issues along with other issues place BHIC at serious risk of insolvency. This is addressed at Section 3 and is illustrated in Table 1 there.

³¹ APPENDIX 52 [Joint Administrators final progress report](#)

6. Reduction in the profit and loss account

Summary: Over the four years ending March 2016 there is an unexplained difference between the loss (reduction in P&L account figure in the balance sheet) shown in the filed accounts and the annual profit declared by Mr. Thorpe in a written statement to IWC on 6th July 2017. This unexplained difference amounts to £313,408 (see Table 5). BHIC is not required to publish a detailed profit and loss account. However, the annual interest charges total £311,646 paid to one of the Other Companies owned by BHIC's shareholders must go a significant way to explain the pattern of losses. In that same period BHIC has advised that it made '*net operating trading profits*' of £216,099. If this is in fact a reference to the 'Operating Profit', this further indicates that the reduction in the account will represent interest paid by BHIC, most significantly to Hawk Property. Whatever the explanation for the differences, this clear pattern over four years on its face indicates a very significant problem for BHIC. Uncorrected BHIC would not be able to carry out its basic functions. It is prima facie evidence of financial mismanagement.

(A) BHIC was operated at a loss 2013-2016

- 6.1 The balances in profit and loss account of BHIC for the years ending March 2013-2016³² (appendix 4, schedule 1.2) show a reduction of £97,518. The company was being run such that it incurred losses or made only marginal profits to a level that is dangerous to the liquidity of the company. This clear pattern over four years on its face indicates a very significant problem for BHIC. If it is an accurate representation of the financial state of BHIC, it is prima facie evidence of serious financial mismanagement.
- 6.2 One of the conclusions presented in the executive summary of the First Legal Analysis Report for BHT was that "BHIC has made regular accounting losses in recent years, and its accounts show that as at 31st March 2015, its profit and loss reserves had fallen to £60,267, in comparison to £159,690 as at 31st March 2012". At the IWC's request, BHIC provided full responses to the matters raised in the Legal Analysis Report, both on 16th May 2017. BHIC took issue with a number of statements and conclusions in the Report, however BHIC did not seek to correct the statement in the Report concerning regular accounting losses.
- 6.3 Keystone Law on 7th June 2017 submitted to the IWC a supplemental document to its report, responding to, and reaching conclusions in light of, BHIC's responses in the two emails of 16th May 2017. One such conclusion was that "the financial position demonstrates that there should be sufficient funds from the sale of houseboats and better management to fund the proposed enhanced facilities". This was because, despite the accounts showing losses, costs appeared to be inflated, and profits suppressed.
- 6.4 The IWC requested that BHIC respond to this finding of the Report of 7th June 2017. Director Mr. Thorpe responded to the IWC on behalf of BHIC on 6th July 2017. In arguing that BHIC could not afford to fund its improvement works, he set out what he described as "the net annual operating trading profit"³³. This showed modest "net" profits for each of the four relevant years, rather than the losses shown in the profit and loss accounts. Because

³² APPENDIX 4 [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See schedule 2 penultimate line)

³³ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#)

of the summary nature of the accounts information provided, there is no support from the published accounts for the profit figures provided by Mr. Thorpe. The figures provided are set out below, and then placed into table 5 with the figures from the profit and loss account, to illustrate the discrepancy.

The Director of BHIC, Mr. Thorpe wrote to the IWC on 6th July 2017³⁴;

“With regards to the net annual operating trading profit made by BHIC:

Year ending

03/2013 +£56,519

03/2014 +£37,071

03/2015 +£67,014

03/2016 +£55,495”

Table 5: BHIC's filed P&L account figures compared to figures provided in BHIC's 6th July email

BHIC accounts, year ended	Start P&L a/c balance showing in filed account	End P&L a/c balance showing in filed account	BHIC email 6th July “Net profit”. Therefore, change in P&L expected	Actual change showing in P&L in filed accounts	Unexplained difference
03/2013	£159,690	£126,125	£56,519	-£33,356	-£89,875
03/2014	£126,125	£75,261	£37,071	-£50,864	-£87,935
03/2015	£77,921 *	£60,267	£67,014	-£17,654	-£84,668
03/2016	£60,267	£62,172	£55,495	£1,905	-£53,590
		Totals	£216,099	-£99,969	-£316,068
			Net totals *	-£97,518	-£313,408

Note: * The 2014 end of period balance was re-stated in the 2015 accounts with a £2,660 adjustment. This means the actual reduction in P&L in filed accounts over the four year period was £97,518 and the net unexplained difference shown in final column is £313,408.

6.5 There is a likely explanation. Mr Thorpe describes his figures as *“the net annual operating trading profit”*. This is not a recognised standard accounting term. The terminology *“net annual operating trading profit”* is a muddling of normal accounting terms. The addition of the word ‘net’ to an amalgam of the terms ‘operating profit’ and ‘trading profit’ leaves considerable scope for misinterpretation. “Operating profit”, however, is a recognised term. This is the profit before accounting for interest charges (and tax). Interest charges paid by BHIC to Hawk Property in respect of the debt of £1,200,000 total £311,646 (see

³⁴ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#)

Section 4(A) above). If the known interest payments to Hawk Property are deducted from the “net profit” figures provided by Mr. Thorpe, the total interest paid for the four years is very close to the total unexplained difference in the P&L accounts for those four years - £311,646 interest, £313,408 unexplained in P&L accounts (shown in last column of Table 5, above). The directors of BHIC were reporting losses. BHIC’s submission of 6th July 2017 setting out “net profits” and stating that “...*BHIC has become a viable commercial business during the past 5 years*” on its face appears disingenuous.

- 6.6 Further, in BHIC’s response to the IWC concerning the BHT Report on the day before, the 5th July 2017³⁵, Mr Thorpe advised the IWC “*Our average annual profits for the trading years ending 03/2013 to 03/2016 (inclusive) is £54,024 [which BHT are fully aware of] and are not of the level to support the necessary funding. This has been explained in full detail before and is extracted from our annual published accounts*”. Mr. Thorpe has drawn this average figure from the figures for each of the four years set out in his submission of the following day. Tellingly, in the 5th July submission he has not used the word “operating” so the figure stated is clearly intended to be read as profit. Its source is the same as the figures in the 6th July response. It is noted that these figures are not “*extracted from published accounts*” as stated.
- 6.7 In addition to the serious concern for the health of BHIC arising from these cumulative losses, there is also serious cause for concern about the way the directors muddle the explanation of the accounts, to such a degree as to present losses as profits. This adds to the strong grounds to conclude that there are significant irregularities in the affairs of BHIC.
- 6.8 On the basis that BHIC was run at an operating loss in 2012-2016, the decision of the directors of BHIC and BIL in 2014 to build new facilities and increase BHIC’s rental from £18,000 to approximately £45,000 (see Section 9(A) below) was unsustainable. Further, directors of BHIC and BIL subsequently proposed greatly increased rental costs or outright acquisition (see 9(D) and 9(E) below) both at costs which were even more unsustainable on the basis of published accounts. These decisions are not in the interests of BHIC placing the directors of BHIC in breach of their duties to do the best for the company.

(B) Alternative explanations

- 6.9 If the “*the net annual operating trading profit*” BHIC advised was a “net” in the sense of being after tax and interest, an alternative explanation would be needed. The profits are stated as £216,099 over four years to March 2016. In the filed accounts the actual loss or reduction shown in the P&L account was £97,518, meaning that over the four year period there was a net unexplained difference of £313,408 (see Table 5). In a normal company such a reduction in the retained profit would typically be the result of a dividend being declared (i.e. profits deemed surplus to the needs of the company distributed to the shareholders). However, in BHIC there is a limit on distribution of profits to “*a reasonable return on the share capital invested*” which capital stands at £4,000.
- 6.10 The only other way that the profit and loss account balances can diminish is if transfers are made in or out of reserves, but these would be shown in the balance sheet and they are not.

³⁵ APPENDIX 26 [Email BHIC to IWC 5th July 2017](#)

- 6.11 Whether the profit and loss account balance was reduced by questionable payment of interest on a debt to Hawk Property or by declaration of dividends, the net outcome is similar; the sums lost should have been available to BHIC, but were transferred to Malcolm and Fiona Thorpe, who are the sole shareholders and directors of both BHIC and Hawk Property.
- 6.12 Contrast with earlier trading is noted: In the year to March 2005 BHIC³⁶ accounts show an operating profit of £127,470 from a turnover of £435,241. It also sold an asset (quantum similar to a single house boat plot at £83,897) leading to a net profit (after tax and interest) of £189,440. By contrast in the year to March 2015 when BHIC advise a turnover of £602,309 and a “*net operating trading profit*” of £67,014 (before tax and interest)³⁷. BHIC sold three pieces of land in this financial year³⁸. However, according to the figures provided by Mr Thorpe, it made an operating profit of 11.1% of turnover against the 43.5% of turnover in 2005.

³⁶ APPENDIX 49 [BHIC accounts to March 2005](#)

³⁷ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#)

³⁸ APPENDIX 4 [Analysis of accounts of BHIC, BIL, BBS and Hawk Property](#)
(See schedule 4)

7. Sale of Houseboat Plots

Overall summary: In April 2014 BHIC sold a houseboat plot to BBS for £1, which BBS (whose directors and shareholders are the same as BHIC's) immediately sold on for £87,500. This deprived BHIC of a potential profit of £87,499 (subject to deduction of expenses). This transaction at undervalue was clearly intended to artificially suppress the revenues of BHIC so as to divert value into BBS, apparently in order to frustrate the legal requirement on BHIC to use its surpluses for harbour improvement. Sales of other houseboat plots up to 2016 similarly improperly deprived BHIC of another £93,000, totalling £171,027 up to 2016. BHIC has advised its intention to deduct other amounts from the profits on two other sales made since 2016 and on five future sales projected by BHIC, leading to a total deduction from profits of £276,500 or more which in our opinion is not justified by normal accounting practices. Therefore the total that BHIC aims improperly to deduct from BHIC's profits will amount to £447,527 or more. There is cause for concern about the treatment of these plot sales in accounts. These amount to significant irregularities in the affairs of BHIC.

(A) Sale of a plot to BBS at undervalue

Summary: The grant of a lease by BHIC to BBS for £1 is a straightforward transfer of property at undervalue between a company and another entity in the ownership of its shareholder, and thus clearly a deemed distribution within the scope of Companies Act 2006 section 845. As a deemed distribution, the transaction is unlawful and should be "added back" and treated as part of BHIC's excess revenue for the purposes of the Harbour Act section 31, in the sum of £87,499 (subject to the deduction of legitimate expenses).

- 7.1 In April 2014, BHIC (jointly with BIL, which owns the freehold of the car park) granted a 99 year lease of a houseboat mooring (plot 20) and associated parking space to BBS for the nominal sum of £1. On the same day, BBS sold the lease to a Mrs Olivia Dowling for £87,500³⁹. Olivia Dowling is the wife of Mr Niall Dowling, who is one of the freehold owners of BBS's operational land, through the Trustees of his pension fund.
- 7.2 The grant of this lease by BHIC to BBS appears to be a straightforward transfer of property at undervalue between a company and another entity in the ownership of its shareholder, and thus clearly a deemed distribution within the scope of Companies Act 2006 section 845⁴⁰. Enquiries were made to establish whether, as a deemed distribution, the transaction should be treated as part of BHIC's excess revenue for the purposes of the Harbour Act section 31.
- 7.3 **The first explanation.** BHIC in its first response to IWC of 16th May (at 08:44)⁴¹ stated that BHT had quoted incorrect figures for the sale of houseboats. BHIC then set out a schedule of all houseboat plot sales. It presented the sale of plot 20 in precisely the same

³⁹ APPENDIX 14 [Land Registry entry plot 20](#)

⁴⁰ APPENDIX 2 [Summary of relevant company law](#)

⁴¹ APPENDIX 15 [Email BHIC to IWC 16th May 2017 at 08.44](#) (See Houseboat Sale proceeds section)

form as other sales by BHIC, showing a sales price for £ 87,501, followed by purported deductions, showing net proceeds of £48,029. The relevant extract is set out below:

“BHT has quoted incorrect figures of the sales of houseboats. Below is set out in detail the correct net proceeds of sales achieved from houseboat plots by BHIC and the date when the sales were completed.

Plot 20	<i>Date of sale completion</i>	<i>7 April 2014</i>
	<i>Sale price</i>	<i>£87,501</i>
	<i>Less</i>	
	<i>Legal fees + costs</i>	<i>£6,972</i>
	<i>BIL parking space</i>	<i>£2,500</i>
	<i>Original acquisition cost</i>	<i>£30,000</i>
	<i>Net proceeds</i>	<i><u>£48,029</u></i>

- 7.4 BHIC’s response did not address the sale by BHIC to BBS for £1, nor the onward sale by BBS on the day of purchase for £87,500.
- 7.5 **The second explanation.** The IWC was not satisfied with the response and sought further explanation from BHIC. This was provided in a response to the IWC of 6th July 2017⁴². Mr Thorpe did not explain the sale to BBS for £1. Instead, he sought to demonstrate that BHIC had received the net proceeds of the sale of plot 20 by providing an extract of a bank transfer showing a payment to BHIC of £80,000 on 14th April, seven days after completion. Curiously, the identity of the payer has been redacted from the extract provided. As BHIC claims that the payer was BBS this is not sensitive information. Mr. Thorpe states this figure is *“slightly over the net figure”*. This explanation fails to explain the original sale of a houseboat plot to BBS for £1, for onward sale at full value on the same day. IWC officers referred this issue to its barrister, Michael Bedford QC who asked specifically for an explanation of these linked transactions.
- 7.6 **The third explanation.** BHIC’s solicitor provided a response to the QC’s questions on 28th July 2017⁴³ He pointed out, however, that the answers provided were those of his client, Malcolm Thorpe, rather than those of the author. The response also sets out the questions asked by the QC. Here BHIC presented an entirely different account of the transaction to that of its formal responses to IWC of 16th May and 6th July. BHIC now asserted that sale of a houseboat plot by BHIC to BBS for £1 enabled (part) repayment by BBS of an earlier debt owed to BHIC.

⁴² APPENDIX 7 [Email BHIC to IWC 6th July 2017](#)

⁴³ APPENDIX 16 [Email BHIC’s Solicitor to IWC 28th July 2017](#)

- 7.7 The response states that *“The Board decided to regularise a debt of circa £90,000 that BBS owed BHIC.”* It attached three identical board resolutions (BHIC, BBS, and BIL) dated 31st March 2014⁴⁴. The resolutions set out *“the commercial reasons for the transaction...: 5. BBS will receive the full purchase price of £87,500. 6. BBS will pay that to BHIC in repayment of the loan.”* In the words of the resolutions, therefore, BHIC were to receive the payment of £87,500 as part repayment of the debt and not as payment for the houseboat plot. Therefore BHIC did in fact receive £1 for the houseboat plot, as confirmed in Land Registry records. Not £48,029 as stated in BHIC’s first response of 16th May, and not £80,000 as stated in BHIC’s second response of 6th July, because the sum of £80,000 that BHIC did receive was the repayment of a debt owed by BBS, and not the purchase price for the houseboat plot.
- 7.8 To complete the analysis, the response of 28th May, BHIC also provided its solicitors’ completion statement for BBS of 7th April 2014⁴⁵. This shows the sale price of £87,500 and makes deductions for fees etc leaving a total payable to BBS of £80,527. The response explains that a further £527 was due to be paid from the proceeds in further part settlement of the debt. Curiously, no account is made for the deduction of £2,500 for payment of the related parking space, as set out in the calculation in the first response of 16th May, unlike all other houseboat transactions, and BHIC’s projected future transactions.
- 7.9 Neither the board resolutions, nor the solicitors, nor Mr. Thorpe, state the precise amount of the debt. They all state “nearly £90,000”. The accounts of BHIC for the year ending March 2014 show a debt owed by BBS £87,626⁴⁶. However, BHIC has not identified this as the debt in question. It is not known whether BBS has subsequently paid the outstanding portion of the debt.
- 7.10 Crucially, BHIC do not claim that, in addition to the partial settlement of the debt, BBS has paid to BHIC the value of the houseboat plot - £87,500 (which BBS realised by sale of the houseboat plot on the same day as acquisition).
- 7.11 In summary, documents show that BHIC started with a receivable debt of “nearly” £90,000 to BBS and a houseboat plot worth at least £87,500 – totalling “nearly” £177,500. BHIC were to receive £80,527 *“in [part] repayment of the loan”* according to the resolution. It could not at the same time be receiving that sum as net proceeds from the houseboat plot sale, as stated in BHIC’s first and second explanations. It clearly cannot be both. On the basis of BHIC’s final explanation, BHIC have only received £1 in value for the houseboat plot which was sold for £87,500.
- 7.12 This transaction cannot be explained with reference to compliance with the Harbour Act. The BHIC director’s explanation shows the BHIC has been wrongfully deprived of “nearly” £95,000.

⁴⁴ APPENDIX 17 [Copy Board resolutions of 31st March 2014](#)

⁴⁵ APPENDIX 18 [Coffin Mew completion statement for BBS](#)

⁴⁶ APPENDIX 19 [BHIC Accounts to March 2014](#) (See Section 4 Related Party Transactions)

(B) Sales of other houseboat plots 2012-2016

Summary: Deductions from Plot 20 and two further plots plus a narrow strip totalling £93,000 has been or will be improperly deducted from BHIC's income. When adding plot 20, as BHIC received £1 instead of £87,500 (– £6,972 fees a/c to BHIC and £2,500 to BIL) then the total wrongly deducted from these sales is £171,027.

- 7.13 Between 2011 and 2015 BHIC (always acting jointly with BIL, which holds the title to the parking spaces) granted two further leases of houseboat plots, and a further lease of an adjacent strip of land, for total proceeds of £232,501 (net of BIL amount). It is clear from BHIC's two responses to IWC on 16th May 2017 08.44 and 08.59⁴⁷ that BHIC is not accounting for these transactions correctly. The result is that very substantial sums which should form part of BHIC's profits are being wrongfully deducted from BHIC's profits, thus suppressing the surplus available for works under the Harbour Act. It is noted that BHIC stated in mid-2017 that *"As yet deductions totalling £93,000 have not been made"*.⁴⁸ The explanation for this must be that the sums were at that time represented in inter-company loan accounts with the cash yet to be withdrawn.
- 7.14 As seen from BHIC's first response of 16th May 2017, BHIC purport to deduct £30,000 from each sale of a houseboat plot, annotated as *"original acquisition cost"*. However, the original acquisition cost for the entire area of land containing houseboats was £1⁴⁹. Mr. Thorpe in his submission on behalf of BHIC to the IWC on the 5th July 2017⁵⁰ confirms that the houseboat area of land was purchased for a nominal sum.
- 7.15 BHIC in its response to the IWC of 08.44 16th May⁵¹ states at the foot of page 1 *"every asset was appraised on a cost purchase basis....all vacant houseboat plots were appraised at 25% of perceived sales value"*. As the plots were acquired for a nominal sum there is no accounting basis for this treatment. Later BHIC state £115,000 is the average house plot sales figure. If an earlier estimate was £120,000, this may account for the figure of £30,000, representing 25% of *"perceived sales value"*. Such a deduction from BHIC's income has no legitimate basis. It is clear that the original cost to BHIC was £1 in total. The lease of the land containing all the houseboat plots was surrendered to BHIC on 10th May 2012 for £1⁵². For the avoidance of doubt the claimed costs cannot be attributed to the freehold interest already held by BHIC as the entirety of the freehold was originally acquired for less than £25,000. In any event the assets belong to BHIC which should receive and have use of the proceeds.
- 7.16 The result of these deductions is that a total of £93,000 has been or will be wrongly deducted from BHIC's income in respect of plots 16, 23 and 32. When adding plot 20, as

⁴⁷ APPENDIX 5 [Email BHIC to IWC 08.59 16th May 2017](#) and APPENDIX 14 [Email BHIC to IWC 16th May 2017 at 08.44](#)

⁴⁸ APPENDIX 16 [Email BHIC's Solicitor to IWC 28th July 2017](#) (See Section v. Page 3)

⁴⁹ APPENDIX 20 [Surrender intervening long lease BIL to BHIC at £1 10th May 2012](#)

⁵⁰ APPENDIX 26 [Email BHIC to IWC 5th July 2017](#) (See "BHT alternative plans" page 2)

⁵¹ APPENDIX 15 [Email BHIC to IWC 16th May 2017 at 08.44](#) (See foot of page 1)

⁵² APPENDIX 19 [Surrender intervening long lease BIL to BHIC at £1 10th May 2012](#)

BHIC received £1 instead of £78,027 (£87,500 – £6,972 fees a/c to BHIC and £2,500 to BIL) then the total wrongly taken from these sales is £171,027.

(C) Sales of houseboat plots granted / to be granted post 2016

Summary: Sums BHIC advise they will deduct from two sales since 2016 and five future sales projected by BHIC total £276,500 or more. Therefore the total BHIC aim improperly to deduct from BHIC's profits totals £447,527 or more.

7.17 At 2016 two houseboat plots had been sold⁵³ in addition to the 25 the subject of the LDC application. BHIC state in the first response to the IWC of 08.44 on the 16th May 2017⁵⁴ that they intended to apply for permission for seven infill plots around the existing houseboats. They are always, of course, at liberty to apply for more. Since the Legal Report and responses of 2017 there have been two further sales of houseboat plots, repeating the intention to intention to apply for more. The sale of the seven plots gives a further deduction of £30,000 X 7 = £ 210,000.

7.18 In addition, BHIC state in their response to the IWC of 16th May 2017 08.44⁵⁵ that they will deduct a further 20% from future sales in addition to the £30,000. This was set out as follows:

Total net proceeds of 3 x £78,500 = 235,500

less return on sales [same as for regeneration housing sales] of 20% = 52,000

7.19 There is no justification whatsoever for this deduction; BHIC have, as the text indicates, taken this figure from the DVS Report into profit from the housing development the subject of the planning application. That percentage figure represented the total target profit from the sale of the houses. As these plots are BHIC assets there is no basis for allowing this as an additional percentage to deduct from BHIC's actual profits.

7.20 BHIC does not seek to explain why the additional 20% is to be deducted from future sales, but not past sales. As the accounts are all "opaque" there is, however, nothing to prevent BHIC from retrospectively deducting the further 20% from past sales.

7.21 In BHIC's response to the IWC of 08.44 16th May 2017⁵⁶ BHIC posits sales at £115,000 and deductions of £53,833 (51.35%) per plot. It is apparent that £30,000 is first deducted and then 20% is deducted from that net figure.

7.22 However, to be conservative we model based on the actual sales of plots 3 and 4 at £80,000. On advised sales figures of £80,000, after deduction of £2,500 (BIL payment for car parking). BHIC profits are £77,500 from which it would pay fees. However, when further deductions are made: £30,000 per plot "original acquisition cost", A figure of £47,500 is arrived at. BHIC deduct a further 20% "return on sales" from the £47,500 (ie £9,000). Total deductions would be £39,500 per plot.

⁵³ APPENDIX 21 [Schedule of Houseboat plots sales as recorded at Land registry](#)

⁵⁴ APPENDIX 15 [Email BHIC to IWC 16th May 2017 at 08.44](#) (See first para page 4)

⁵⁵ APPENDIX 15 [Email BHIC to IWC 16th May 2017 at 08.44](#) (see centre of page 4)

⁵⁶ APPENDIX 15 [Email BHIC to IWC 16th May 2017 at 08.44](#) (see centre of page 4)

The profit on seven plots should be £77,500 x 7 = £542,500

BHIC's stated approach gives £38,000 x 7 = 266,000

This amounts to a wrongful deduction of BHIC profits of £276,500 post 2016. Added to pre-2016 wrongful deductions (totalling £171,027) this give a total of £447,527.

(D) Accounting for disposal of property assets

Summary: The value of investment properties has not decreased at all following sale of houseboat plot leases. Nor does it appear from BHIC statements on “*net operating trading profits*” that such sales have been treated as trading profit. There is clear cause for concern that BHIC are not correctly accounting for these transactions, and that there are significant irregularities in the company's affairs.

- 7.23 The value of “Investment Properties” as part of BHIC's assets at the time of acquisition in 2011 were stated as £2,700,000. This amount is greatly in excess of BHICs' asset value and has been knowingly misrepresented - see Section 3, above. Under the current ownership on 10th May 2012⁵⁷ BHIC the freeholder acquired the intervening long leasehold interest of the land including the houseboat plots for £1. BHIC placed a value of each saleable houseboat plot at £115,000 at 2016 and expected to sell at least a further 7 houseboat plots⁵⁸. This places a value of these investment properties at that date of in excess of £800,000. However, BHIC has at no time increased the value of Investment Properties in its accounts to reflect this ability to create long leases having incorporated its freehold interest with the intervening long leasehold interest, out of which previous sales were achieved - see accounts at 2012 and 2015⁵⁹.
- 7.24 There has been no change in the value of investment properties, either when substantial property value was added upon acquisition of the long leasehold interest in 2012, or when the value of the property was substantially reduced through the sale of houseboat plots.
- 7.25 It is noted that Mr Thorpe advises that “*the net sale proceeds for houseboats...form part of the revenue of BHIC for the purposes of s.31 Harbour Act*” in the response to IWC of 08.59 16th May 2017⁶⁰. However, in the summaries of profits set out by Mr. Thorpe in his separate response of the same day, the term used by Mr. Thorpe to describe profits is “*net operating trading profits*”. The normal definition of “Trading Profit” does not include the incomes from the property disposal (here houseboat plots). But because of Mr. Thorpe's earlier statement it appeared that income from houseboat plots was included in these figures.
- 7.26 However, in the years houseboat plot sales were completed BHIC's turnover figures as reported by BHIC on the 6th July 2017⁶¹ do not vary correspondingly in quantum, i.e. the

⁵⁷ APPENDIX 19 [Surrender intervening long lease BIL to BHIC at £1 10th May 2012](#)

⁵⁸ APPENDIX 15 [Email BHIC to IWC 16th May 2017 at 08.44](#)

⁵⁹ APPENDIX 22 [BHIC accounts to March 2012 and](#)

APPENDIX 24 [BHIC accounts to March 2015](#)

⁶⁰ APPENDIX 5 [Email BHIC to IWC 08.59 16th May 2017](#) (See e) Houseboat plots)

⁶¹ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#) (See section 5 page 4)

turnover increases by only £22,885 from an accounting year with no houseboats sales⁶² (to March 2014) when compared to 2015 when there were £126,001 of sales by BHIC (and a further £87,500 by BBS). One would expect to see some sort of correlation, all things being equal. Treatment of the income from the sale of houseboat plots appears not to be visible in published accounts.

- 7.27 The submission on 16th May 2017 (above) of summaries of profits were designed to show that BHIC were making, and would make, very little profit from the sale of houseboats, such that BHIC would have no surplus funds to pay for upgrading of its own facilities. But what this reveals is that, with “opaque” accounts, BHIC is able to disguise the financial position with apparent impunity. The only losers would normally be the shareholders of the companies involved, Malcolm and Fiona Thorpe. Here, however, the Harbour Act requires that profit must be re-invested in the harbour. To the extent that profits are not properly accounted for, that is lost to the harbour.
- 7.28 It is noted that in the two accounting years in which the leases of plots 16, 20, and 23 were sold (namely to year end March 2013 and March 2015) the amounts paid by BHIC to Hawk Property for “management charges” significantly increased, to approximately double the amount for the preceding year in each case.

⁶² APPENDIX 21 [Schedule of Houseboat plots sales as recorded at Land registry](#)

8. BIL's Planning Application for housing and associated legal agreement

(A) The application

Summary: There is evidence that BHIC has paid for part of the costs of making and pursuing a planning application for the benefit of BIL. BHIC claims that it has paid in excess of £300,000. BIL sought improperly to extract a further £946,500 in developer's profit over and above the £1,200,000 profit agreed with the IWC as part of the Enabling Development. This was with the knowledge of, and at the direct expense of, BHIC. The application justifies building 13 houses on operational harbour land on the sole basis that BHIC cannot afford to build new facilities for itself. It is clear however that BHIC could fund its own facilities if its surpluses had not been artificially reduced.

- 8.1 Malcolm Thorpe has recently claimed that BHIC has paid in excess of £300,000 in pursuing BIL's planning application. In his letter to BHUG of 17th November 2021 he states in relation to the application that *"the cost to BHA in dealing with the various claims made by BHT is actually well in excess of the anticipated cost of repairing the groyne."*⁶³ Mr. Thorpe is clearly referring to the contractor's quote to BHUG of March 2019, or if a lower quote, total costs of £300,000 as Mr. Thorpe quotes VAT at £60,000. This is an unlawful use of BHIC's funds as they are not being applied for specific harbour uses pursuant to s.31 of the Harbour Act. This statement is contrary to Mr. Thorpe's previous stated position on BHIC payments for the BIL's application. Mr. Thorpe has stated to the IWC in an email of 25th September 2020 that by "BHA" he means BHIC.⁶⁴
- 8.2 In 2017 Mr. Thorpe in his responses to the IWC appeared to deny that any BHIC funds had been expended upon BIL's planning application. At least six reports prepared by specialist consultants in support of BIL's planning application were addressed to BHIC. The cost in total is estimated to be in the range of £10,000 - £20,000. Professional reports are invariably addressed to the client of the professional for legal reasons, the client being the party that pays for the report. When invited by the IWC to explain this, BHIC did not contradict this conclusion by stating that the applicant BIL had paid for the reports, but rather, stated that *"no costs for consultant's reports are shown within the BHIC accounts"*⁶⁵. This is a non-answer, as the abstracts of accounts as submitted do not descend to this level of detail so such payments if made would not be shown in any event.
- 8.3 BIL's application is for 13 houses on land largely currently used by BHIC for harbour purposes. BIL and BHIC claim that the sole purpose of the application is to fund essential upgrades to the harbour facilities which BHIC could not otherwise afford. If indeed upgrading of premises is required, which is highly questionable, it is clear BHIC could fund such an upgrade out of its own surpluses, were those surpluses not artificially suppressed by the various transactions described in this report. At Duver Marina the scheme necessitates the demolition of the current harbour offices in good repair and of the recently furnished building with washing facilities (less than 20 years old) to accommodate the

⁶³ APPENDIX 53 [BHIC letter re BHUG 17.11.2020](#)

⁶⁴ APPENDIX 54 [BHIC email to Ben Gard 25.09.2020](#)

⁶⁵ APPENDIX 5 [Email BHIC to IWC 08.59 16th May 2017](#) (see section H)

housing. Car parking is reduced and land is lost to harbour use. At Bembridge Marina the scheme necessitates the loss of the building with washing facilities and loss of the car park adjoining the Marina in order to accommodate the housing.

- 8.4 The explanation offered by BIL is the only basis in planning policy on which consent could be granted on this site (“Enabling Development”), and so a further consequence of the artificial suppression of BHIC’s profits (in addition to diverting value to companies from which its shareholders can extract dividends) is to secure the grant of planning consent to BIL that would not otherwise have been granted to it. However, financial information initially submitted by BIL to the IWC in 2014 in support of its case was highly questionable. A parallel exercise commissioned by BHT (ERMC, February 2015) demonstrated that very considerable profits would be made by BIL, far in excess of that needed to fund BHIC’s replacement facilities, as costs were inflated “*Total estimated uplift from anticipated actual costs 38%*”⁶⁶.
- 8.5 Further, an exercise demonstrated that BHIC could indeed afford to fund the construction of its own facilities on the basis of the market rent which BIL propose to charge BHIC as a mortgage payment, without loss or waste of existing facility that forces additional works (e.g. an otherwise unnecessary replacement car park). BHIC would be significantly worse off as a result of the development; substantial areas of land used for harbour purposes lost for all time at both marinas, including the loss of external space for the annual fund raising festivities at the Duver Marina; reduced car parking at the Duver Marina; substitution of quayside parking by remote parking on land not attached to the harbour and divided by a road, loss of marina berthing to the replacement floating shower facilities.
- 8.6 The planning application process has revealed irregular financial and other arrangements all of which prejudice BHIC to the benefit of BIL.
- 8.7 BIL persuaded the IWC, through a meeting and confirmed in the solicitor’s submission of 28th July 2017 (cited above) that BIL was entitled to 20% profit in cash from the development, i.e. £1,244,300 on the DVS figures. The solicitor’s letter recorded Mr. Thorpe as stating “*...total debt repayment, including that of BHIC, will be effected from the net sale proceeds of the 13 houses*”. As BHIC debt to Hawk Property alone stood at £1,200,000 it was clear that BIL stated that cash profits would exceed this amount. This was confirmed in the report to the IWC committee of 12th December 2017 for the planning application. The officer stated (at paragraph 2.23) that, “*the applicants have confirmed that it is the intention for the loan to be repaid following the completion of the development, as the development should allow the loan to be repaid with the 20 percent developer profit*”.
- 8.8 BIL had actively misled the IWC; the 20% developer’s profit as confirmed by the DVS comprised the value of the new harbour premises, to be retained by BIL and valued at £946,500 plus the cash balance of £1,244,300 namely £297,800. Both BIL and the IWC had accepted the findings of the DVS Report (cited above) some 6 months previously. Now the IWC officer had been persuaded by BIL that it was entitled to retain £1,244,300 cash plus the value of the retained investments; a return of some 35% GDV rather than the 20% agreed. It was only representations of BHT prior to the committee which caused this to be corrected. This action by the directors of both BHIC and BIL if successful would have eliminated the prospect of any profits above 20% reaching BHIC, as had been agreed between BIL and the IWC, with serious adverse consequences for BHIC. Further,

⁶⁶ APPENDIX 25 [ERMC build cost comparison report](#) (See page 19)

BIL reneged on its written commitment to utilise the cash element of the 20% profit to reduce BHIC's debt, see paragraph 8.11, below.

(B) The s.106 Legal agreement (“Planning Agreement”).

Summary: In connection with BIL's planning application, the section 106 proposals put forward on behalf of BIL and BHIC strongly favour BIL and severely financially disadvantage BHIC. Once again this appears to be an example of the directors of BHIC managing its affairs for the benefit of those directors' Other Companies, so that its shareholders receive the benefit rather than it being used in pursuit of BHIC's Harbour Act obligations. As such this represents a clear breach of their statutory duties by the directors of BHIC and of the Harbour Act.

- 8.9 A Planning Agreement is required to secure matters connected with the planning permission. BIL as landowner and BHIC as owner of the harbour have obligations to the IWC. The approach to negotiation and terms of the agreement proposed on behalf of BIL and BHIC clearly demonstrate a consistent pattern that those representing BIL and BHIC wrongly allowed the commercial interests of BIL to override the interests of BHIC as Statutory Harbour Authority, to the significant detriment to the latter. Examples are given below in paragraphs 8.10 - 8.18 These are drawn from submissions by BHT to the IWC, in particular a submission on the Planning Agreement draft of May 2018.⁶⁷
- 8.10 BIL refused IWC's reasonable requests to provide a plan showing land to be included in the lease to BHIC. It transpires this was because BHIC in fact owns approximately two thirds of the land on which its new offices are to be built. BIL does not acknowledge this and proposes to charge BHIC full market rent to BHIC for use, in part, of its own land. BHIC have ignored the fact that BIL cannot build its houses without the consent of BHIC, in effect a ransom position. As proposed, BHIC suffers very significant financial loss.
- 8.11 BIL's refusal to include its commitment to apply all the cash element of profit from its 20% profit on the development to repayment of the harbour's debts. This was set out in a formal legal submission to the IWC on 28th July 2017⁶⁸ and was relied upon by the planning officer in his report to committee. This deprives BHIC of the benefit of in excess of £1,200,000 and benefits BIL in the same amount.
- 8.12 Directors proposed that BIL had the right to require that BHIC acquire the freehold of its new facilities at value which on BIL's and BHIC's published figures it was inconceivable that BHIC would be able to afford this, and would burden BHIC with additional debt of in excess of £1,000,000 (failing to acknowledge that BHIC already own a substantial part of the land and therefore the facilities to be built on that land).
- 8.13 In relation to a silt lagoon owned by BIL, the restoration of which is required as mitigation for ecological harm from BIL's housing. BIL now proposes very substantial works at the lagoon to seek to overcome serious objections from a statutory body. These include the creation of a lagoon of some 70 metres in length and some two metres in depth. BIL / BHIC propose that ownership is transferred to BHIC and that BHIC accept full financial liability for ongoing maintenance. This will incur a costly legal liability in perpetuity, which

⁶⁷ APPENDIX 41 [BHT representation to IWC re s106](#)

⁶⁸ APPENDIX 16 [Email BHIC's Solicitor to IWC 28th July 2017](#) (see item x on page 5)

due to the extent and nature of the works proposed could be very substantial. Acquisition of land for an addition to a nature reserve and its future maintenance is outside the powers of the Harbour Act and its area of authority.

- 8.14 Directors proposed to delete the requirement to maintain the existing facilities at Bembridge Marina until the new facilities are provided. This harms the operation of the harbour, and financially benefits BIL.
- 8.15 Directors proposed to delete the obligation to complete all of the 13 houses. As the obligation to account for any excess profits to be provided to the harbour only arises on completion of all of the houses (as drafted) this puts delivery at risk. This harms BHIC, and benefits BIL, potentially very significantly financially.
- 8.16 BIL proposed to delete reference to the obligation to construct the replacement car park at Bembridge Marina. This harms the operation of the harbour, and financially benefits BIL, the developer.
- 8.17 Directors proposed to delete reference to a number of elements of the benefits from the definitions of the facilities to be secured as benefits, thus not guaranteeing their delivery. This would have harmed BHIC, and financially benefited BIL.
- 8.18 Directors proposed to delete the requirement for a lease to be granted by BIL to BHIC for its facilities. IWC proposed this in early 2016. This would have harmed BHIC, which would have continued to have no security of tenure, and would have given BIL unfettered control.
- 8.19 The above points in 8.10 - 8.18 above are all clear examples of clear conflicts between the interests of BIL and BHIC, where the same directors and professional advisers act for both companies. In each case the decision taken by the directors clearly favours the financial interests of BIL, at the financial cost of BHIC. These are each in clear breach of s.175 of the Companies Act and the duty in s.172 of the Companies Act to promote the success of BHIC, and also breach the Harbour Act and harm the interests of the harbour and the community.

9. BHIC payment for the harbour premises

(A) Current rent of the harbour premises

Summary: The premises currently occupied by BHIC are owned by BIL. Inconsistent and conflicting explanations have been given by BHIC for current rental levels, with no security of tenure for the harbour.

- 9.1 BHIC's accounts in 2012-15 identify sums stated as "rental of harbour offices" many times in excess of market rates with the figure fluctuating significantly each year⁶⁹. It is noted that whilst BHIC's accounts refer to "rental of harbour offices" this term is shorthand and refers to the rental of all harbour premises, which term is adopted here. BHIC explained that "management" in Hawk Property's accounts referred to payment to Hawk Property for rent and management, and that "rent" in BHIC's accounts (with a different accounting year, preventing direct comparison) also referred to rent and management. It is therefore not possible to identify the amount paid for rental of harbour premises. BHIC and Hawk Property respectively chose to continue this practice in accounts of subsequent years after the discrepancy in presentation in accounts was pointed out to the Directors. This inconsistency in the descriptions used for the same payments across the different companies' accounts ("rent" in one and "management fee" in the other) is highly unusual, as is the fact that the companies continue to maintain this practice. This is another indication of a less than rigorous approach to the attributing and accounting of intercompany charges.
- 9.2 When the IWC invited BHIC to confirm "what rents had been paid by BHIC", BHIC chose not to do so in its formal response of 16th May 2017⁷⁰. The IWC also invited BHIC to explain why rent was not paid to the owner of the land - BIL- but rather to Hawk Property which has no legal interest in the land. BHIC chose not to do so. These two failures to explain the position are a matter of concern. On the IWC pressing further, BHIC's accountant, Mr. Crook of Hunt and Partners, submitted a letter of the 19th June 2019 in which he advised that the "appropriate" annual rent was £18,000.⁷¹ BHIC Director Mr. Thorpe subsequently confirmed that this was the total amount of annual rent which was in fact paid. No documentary evidence is publicly available, or has been provided, in support of this figure.
- 9.3 As the question posed by the IWC related to all rents paid by BHIC, it was clear that £18,000 was the sum for all rents, as stated both by the accountant and separately by BIL / BHIC Director Mr. Thorpe. However, in a subsequent legal submission to the IWC the following month (28th July 2017)⁷² the solicitor acting for both BIL and BHIC advised that the rent paid for Duver Marina only was £18,000, and provided a detailed breakdown. The solicitor stated he was using information provided by Director Mr. Thorpe. The only possible explanations are that BHIC have failed properly to explain the rent paid for premises and land at Bembridge Marina, or that no rent is charged for land and buildings at Bembridge Marina.

⁶⁹ APPENDIX 4 [Analysis of accounts of BHIC, BIL, BBS and Hawk Property](#) (see Schedule 3 and note 1)

⁷⁰ APPENDIX 5 [Email BHIC to IWC 08.59 16th May 2017](#)

⁷¹ APPENDIX 25 [Letter from Hunt and Ptrs 19th June 2017](#)

⁷² APPENDIX 16 [Email BHIC's Solicitor to IWC 28th July 2017](#)

Claim by BHIC to discount current rent of harbour premises

- 9.4 Prior to determination of the planning application for replacement harbour premises (see also at Sections 10, 11 and 13), Mr. Thorpe as Director of applicant BIL indicated that BIL may charge rent for the replacement premises at a discounted rate, representing a significant benefit to the Statutory Harbour Authority flowing from the permission for houses. When the IWC subsequently sought to discuss provisions for discount BHIC Director Mr. Thorpe replied in a submission to IWC of 5th July 2017⁷³ that his bankers and consultant valuers advised that it would not be acceptable to offer a discounted rent as this would “*artificially dilute [the] asset in a company’s accounts...and HMRC would levy a tax charge.*” Yet in the very same letter Mr. Thorpe states with reference to the current rent of £18,000 that “*...this figure is substantially below the associated rateable value*”.
- 9.5 In addition to the “discount / no discount” contradiction in the BHIC submission referred to above, the “no discount possible” is also contradicted by the detailed evidence in relation to current rental levels submitted by solicitor to BIL/BHIC, who provided a detailed breakdown to arrive at the rental figure relating to the Duver marina only at £18,000, equating to £7.65 per sq ft. a comparable was presented of the commercial rental of offices by BIL to De Survey at £15.16 per sq ft. It goes on to state that Mr Thorpe concludes that “*In summary I believe that BHIC do not pay an excessive annual rent – indeed far from it.*” Clearly on the figures presented by the solicitor this is correct; it represents a discount of more than 50%.
- 9.6 On a related point, on being asked by IWC, BHIC advised that BHIC does not currently have a lease of its premises from BIL. The absence of a lease or any formal rental agreement cannot be in the interests of BHIC. BHIC’s directors have failed to explain why (when acting independently) they should be content with an arrangement for the use of essential facilities that provides no security of tenure. It is noted that the commercial interests of BIL as a developer, who would require vacant possession to build houses they applied for, are best served if BHIC has no security of tenure, and this consideration has overridden the interests of BHIC as Statutory Harbour Authority.

(B) Rent for replacement harbour premises

Summary: The premises which BIL is building as a replacement for the existing premises will (as per the agreed Planning Agreement) be subject to a rent of approximately £45,000 pa. This will further suppress BHIL’s profits to the benefit of BIL. As BHIC has been consistently operating at an annual loss, BHIC plainly cannot afford an increase in rent of £27,000. Further, BHIC owns two thirds of the land on which the new offices are to be built, and yet this has not been taken into account in setting the rent. BHIC has stated that their bank prohibits it from paying discounted rent, but separately BHIC and its professional advisers have stated that the current rent is heavily discounted.

- 9.7 BIL as owner of the bulk of land occupied for harbour uses by BHIC has the benefit of a resolution to grant planning permission for replacement harbour premises as part of a larger scheme to construct housing on land occupied for harbour purposes by BHIC. The current premises have to be demolished to provide land on which to build the houses. The

⁷³ APPENDIX 26 [Email BHIC to IWC 5th July 2017](#) (See Section 1)

permission is subject to the completion of a legal planning agreement which includes provision for the rent payable by BHIC to the owner BIL.

- 9.8 The s.106 agreement provides that market rent is to be paid. An assessment of the rental value of the new harbour premises was made by BIL's surveyors, Hose Rhodes Dickson. This was included in the business case dated October 2014 submitted in support of the planning application. This assessed the rental value at £35,548. This excluded rental of the new proposed car park near Bembridge Marina, estimated by BHT at approximately £10,000 giving a total of £45,548.
- 9.9 On the basis of the figures for annual operating profit submitted by BHIC, averaging approximately £54,000 per year⁷⁴ it does not make commercial sense for BHIC to accept arrangements which increase its annual rent from £18,000 as stated to approximately £45,000 for the replacement facilities, leaving a net operating profit of only £27,000 per year, cutting previously stated profits by 50%. Further, on one analysis of the annual decrease in the profit and loss account between 2012 - 2016, BHIC was operating at a significant annual loss (see Section 6). On this basis the decision of BHIC directors at that time to accept a future increase in rent from £18,000 to approximately £45,000 was not in the best interests of BHIC.
- 9.10 It is noted that BHIC states it expects to increase visitor income as a result of the new showers and lavatories in the new harbour facilities. However, BHIC has stated that the berths are at 100% capacity during periods of peak demand. There are no published plans to increase the number of berths. Accordingly the only increase in income can be outside the periods of peak demand. It is seriously doubted whether a small increase in the number of showers and lavatories and office upgrade will be responsible for generating a material increase in the number of visits.
- 9.11 No predictions have been produced to show that increases in revenue would compensate for increases in cost of rent let alone generate a surplus to improve the harbour's position. as would be required to sustain previous operating profits (let alone increase them).

(C) Future Rent calculation for harbour premises proposed by BIL / BHIC

Summary: BIL had originally proposed that the annual rent for the new replacement harbour premises would be between £118,000 and £144,000 pa. BHIC would have been paying between 100% and 200% in excess of market rate. Over the 25 year term of the lease, this would have meant sums in excess of £1,000,000 improperly extracted from BHIC and diverted to the benefit of BIL. The proposal was rejected by the IWC, but BHIC's directors argued strongly in favour of this additional diversion of the assets of BHIC to Other Companies owned by the same shareholders.

- 9.12 BIL submitted s106 terms "*The Owner [BIL] may in its absolute and unfettered discretion dispose of the Bembridge Harbour New Facilities either by way of transfer of the freehold ("Harbour Authority Transfer") or grant of a lease ("Harbour Authority Lease") and such disposal shall be in accordance with the Heads of Terms set out at Appendix E*".⁷⁵ The

⁷⁴ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#) (See page 4)

⁷⁵ APPENDIX 26 [s106 draft 31st August 2018](#) (See 1st schedule clause 1.1)

Heads of Terms for the new lease to form part of the s.106 legal agreement in July 2018 stated that the “ *Annual rent of 10% of the total costs as advised by the DVS within their report dated 06/04/2018 exclusive of vat to be paid three monthly in advance subject to (a) a capped maximum figure as identified within the DVS report and (b) inflation equal to RPI as from the date of the report to practical completion*”.⁷⁶

- 9.13 It was therefore proposed that future rent be fixed as 10% of “total costs” identified in the report of the District Valuer (“DVS”) of April 2016⁷⁷. This report considered the cost of building the new harbour premises as well as the new housing in order to inform the IWC upon the level of benefit to BHIC to come from the development for planning purposes. It was necessarily a “broad brush” exercise. For this purpose, an estimate of costs was provided by the developer company BIL and was in outline. There was no detailed design or specification as the basis of calculation
- 9.14 The ‘total’ costs of the harbour premises in the DVS Report are between approximately £1,180,000 and £1,440,000, giving a rent of between £118,000 and £144,000. Supporting calculations are available.⁷⁸ BIL’s surveyors, Hose Rhodes Dickson assessed the rental value of the replacement premises at £35,548. This excluded rental of the car park near Bembridge Marina, estimated by BHT at approximately £10,000 giving a total of £45,548, see para 9.8 above. At its lowest, this would be an overpayment of £73,000 per year. Therefore the method of calculating rent proposed by BIL would result in between twice and three times the market value being charged. Both BIL and BHIC were plainly aware of this, as it was their own figures submitted in support of the same application.
- 9.15 A payment to a related company of rent in excess of fair market value is a deemed distribution to the extent of the excess, pursuant to Companies Act 2006 section 845. Furthermore, on the basis of trading figures submitted by BHIC Director Mr. Thorpe, BHIC could not possibly afford or reasonably contemplate paying this level of rent. Mr. Thorpe in his submission to the IWC of 6th July 2017⁷⁹ sets out BHIC average operating profits for the years 2013-2016. These are broadly similar and average at approximately £54,000 p.a. With rental levels proposed this would be converted to an annual average ‘operating loss’ of approximately £56,000 p.a. (i.e. before taking into account interest payments to Hawk), with the additional funds being diverted to companies from which Mr and Mrs Thorpe are entitled to draw dividends. It is self-evident that this is unsustainable and calls into serious question the actions and motives of the Directors of BHIC.
- 9.16 It made no commercial sense for BHIC to propose or to accept this method of calculation of its rent. The numbers on which the calculation is based are hypothetical, historical and clearly result in a rental figure between 100% and 200% above market rental. The appropriate professional commercial approach to take is to value the premises and assess rental level either on the basis of detailed design and specification (neither of which have been prepared to date) or upon practical completion, and there is no plausible reason for taking the approach adopted by BIL and accepted by BHIC. It is plainly directly contrary to BHIC’s interests, as Malcolm Thorpe, Director of both BHIC and BIL, an experienced property developer and former surveyor, must know.

⁷⁶ APPENDIX 28 [Heads of terms to lease](#) (See 4. annual rent)

⁷⁷ APPENDIX 8 [DVS viability report for IWC 7th April 2017](#) (See final page spreadsheet)

⁷⁸ APPENDIX 29 [Calculation of rent as proposed in Heads of Terms](#)

⁷⁹ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#)

9.17 For the avoidance of doubt it is not open to BHIC to claim that it made a mistake or was an oversight. The wrongfulness of the method proposed by BHIC was set out in detail by BHT and was challenged by the IWC in the summer of 2018. BIL continued to argue for the adoption of its proposed method for more than a year after that. The IWC eventually prevailed, however the agreed wording of the s.106 legal agreement still leaves room for BIL, or any third party developer, (with BHIC) to argue for a method which would result in non-commercial terms unfavourable to BHIC.

9.18 BHT made representations to the IWC making the point on affordability which the IWC agreed and rejected the proposals of BIL and BHIC, after a prolonged period of argument by BIL and BHIC.

(D) Obligation on BHIC to acquire freehold of its new harbour premises proposed by BIL / BHIC.

Summary: Terms were also proposed in the Planning Agreement which would have obliged BHIC to purchase the freehold of the replacement harbour facilities at a cost of at least £1,107,000, which it patently could not afford and would cause major financial distress to BHIC. Further, BHIC had previously stated twice that it could not contemplate such an acquisition financially. This proposal was also rejected by the IWC but again demonstrates a pattern of the directors of BHIC repeatedly seeking to divert its assets into the hands of its shareholders' Other Companies.

9.19 In the draft of July 2018 Planning Agreement (referred to at paras 8.9 onwards above) BIL proposed (and BHIC agreed) that "*[BIL] may in its absolute discretion... dispose of the New Harbour Facilities by way of transfer of the freehold...*" BHIC could not be acting in its own best interests in accepting that BIL could impose an obligation upon BHIC to buy the freehold of the replacement facilities at an outline price stated by BIL. The accompanying draft heads of terms⁸⁰ provided that the price be determined in accordance with the DVS Report of April 2017. The figure for the value of the replacement facilities in that report is BIL's own figure of £946,500. Stamp duty legal fees and the addition of RPI in line with BIL's proposals would have increased the cost as at today to around £1,075,000. A 7% loan amortised over a 20-year term would mean mortgage repayment costs of some £100,000 pa annually (compared to current rental of £18,000). Patently BHIC cannot afford this level of cost, set against its average annual 'operating profit' of £54,000, before interest.

9.20 Further, Mr. Thorpe had in the previous year stated on behalf of BHIC that BHIC could not afford to take on costs or debt of half the above amount. Mr Thorpe's submission to the IWC on the 5th July 2017⁸¹ "*We [BHIC] have demonstrated that we do not have the annual income and profit to justify the large borrowings that BHT relate with and certainly we have no intention of taking on costs and debts of £500,000+ as per their [BHT's] suggestion*". Accounts show there was no dramatic improvement in BHIC's financial position to possibly explain this reversal.

9.21 This is clear evidence in BHIC's director's own words of acting directly against its interests in proposing to accept a unilateral obligation to take on further debt of over £1,000,000.

⁸⁰ APPENDIX 30 [Proposed Heads of Terms to Buy](#) (See 4. Sale Price)

⁸¹ APPENDIX 26 [Email BHIC to IWC 5th July 2017](#) (See under 6. in "BHT alternative plans")

This is of course in addition to the existing debt BHIC wrongfully accepted of £1,200,000 (see Section 4). It is also another example of a BHIC Director flatly contradicting himself on a matter of major financial importance to BHIC.

- 9.22 BHT made representations to the IWC making the point on affordability which the IWC agreed and rejected the proposals of BIL and BHIC, after a prolonged period of argument by BIL and BHIC.
- 9.23 In addition to the email of the 5th July, in an email of the 6th July, (the following day), BHIC reaffirmed its inability to carry the costs of the new improvements as follows: *“Whilst BHIC has become a viable commercial business during the past 5 years, it does not have the necessary income stream to raise finance to provide the benefits that can accrue as a direct result from the enabling development”*.

Table 4 Summary of amounts that would have been improperly allocated to BIL, to BHIC’s cost, if the terms proposed by BIL (and agreed by BHIC) had not been corrected. These were corrected by intervention from BHT and accepted by IWC.

Event	Amount	Non-compliance with
At completion of development: Proposed profit of up to 20% and retention of “retained investments” by BIL, contrary to DVS advice (Section 8.7)	£946,500	Harbour Act s.31, Companies Act s.172, s.175
Either: At completion of development: Proposal to oblige BHIC to buy new facilities (Section 9.20)	>£1,075,000	Harbour Act s.31, Companies Act s.172, s.175
Or: Over the first 10 years of the proposed 25 year term of the lease: Proposal to rent at 10% of total costs i.e.>£118,000 over lease period of 25 years index linked(market rent estimate £45,000 pa) overpayment £73,000. (Section 9(C))	>£730,000	Harbour Act s.31, Companies Act s.172, s.175
Totals. Either: With BHIC obliged to buy	£2,053,905	
Or: With BHT obliged to rent at artificial levels	£1,676,500	

10. Rental of other premises owned by BIL - Irregularities.

Summary: BIL is the landlord in a lease to a company, in circumstances in which BHIC is providing services or rights to that company, but is not receiving (directly or indirectly) any revenues for those services and rights. However, the rent which is paid by the company under the lease is significantly in excess of market value. Moreover, in the lease there is an explicit provision that no sum is to be paid to BHIC. It appears clear that BIL is taking, through inflated rent, sums which should properly be paid to BHIC. It is able to do so only because the directors of BHIC (who are also the directors and shareholders of BIL) are complicit in these arrangements. The lease involves the diversion to BIL of substantial sums over a prolonged period. BHIC has been deprived of £160,000 in fees for gravel extraction over an eight year period. It is believed that this pattern has been repeated with at least one other lease granted by BIL. This amounts to serious misconduct by the directors of BHIC.

- 10.1 In a lease⁸² from BIL (as landlord on acquisition of the freehold from M&L), HJ Bennett and Sons Limited (“H.J. Bennett”) agreed to pay rent of £32,000 pa for an area land with a rateable value of £12,000. The rateable value is based on an assessment of the market rental value at the valuation date. BHT believes that this disparity is explained by parallel arrangements provided for HJ Bennett to extract aggregate from land within jurisdiction of BHIC, without making any payment to BHIC in respect of those arrangements.
- 10.2 In the lease (at 3.25) it is made clear that no sums for the right to extract are to be paid to BHIC *“no such royalties will be paid or due on materials dredged from the seabed owned by the landlord or Bembridge Harbour Improvements Company Ltd”*. The amounts are very significant at over 20,000 cubic metres pa and only permissible by use of the powers granted under section 23 of the Harbour Act⁸³. It is plainly wrong that BIL receives more than the rental value of the site if that money represents value provided by BHIC, which receives no reward. This arrangement stopped in late 2019 as the lease was not renewed.
- 10.3 The level of apparent over charge by BIL of £20,000 p.a. was constant for the 8 years to and including 2019 it would amount to £160,000 of funds that should have been paid to BHIC.
- 10.4 In a lease between BIL and DeSurvey an office rent was increased at review to £14,000 from BIL’s own valuation of £9,100. Mr Thorpe explained that *“other services to the tenant”*⁸⁴ were provided. It is unclear what other services BIL could have provided, but it is noted that the tenant kept a large boat at Bembridge marina owned by BHIC immediately adjacent to the offices. The amount of overcharge on the rent broadly equates to the annual mooring charge for a yacht of that size. It would be plainly wrong for BIL to receive income related to a BHIC mooring, and as such this would represent another example of the directors of BHIC deliberately diverting monies to which BHIC is rightfully entitled to their own commercial companies, thus increasing the profits of their own businesses while artificially suppressing the surpluses of BHIC that could otherwise be required to be used for harbour improvements.

⁸² APPENDIX 31 [Lease between M&L and HJ Bennett](#) (Note BIL stand in the place of M&L on acquisition)

⁸³ APPENDIX 32 [The Pier and Harbour Order \(Bembridge Harbour\) Confirmation Act 1963](#) (See section 23)

⁸⁴ APPENDIX 16 [Email BHIC’s Solicitor to IWC 28th July 2017](#) (See section viii)

11. Placing the commercial interests of Other Companies above the interests of BHIC as SHA.

Summary: Directors have improperly and repeatedly prioritised the interests of their Other Companies over those of BHIC, which is required to use its surpluses for the maintenance of the harbour in accordance with the Harbour Act. This shows a systematic pattern of serious misconduct by BHIC’s directors. These actions place BHIC at risk of Insolvency and frustrate BHIC’s ability to perform its statutory undertakings.

- 11.1 In transactions involving both BHIC and BIL outlined in this report there are numerous instances of both actual and potential conflicts of interest, and of directors of BHIC improperly diverting monies from BHIC towards their own commercial enterprises. There is a series of examples in relation to BIL’s planning application and the planning agreement for that application (see paragraphs 8.8 to 8.17 above), and on the leasing of land assets and the sale of leases of houseboat plots. On each occasion the companies determine the issue to the benefit of BIL and at the expense of BHIC.

Pooling of management charges

- 11.2 It is clear that in 2013, shortly after acquisition, the exercise of balancing and off-setting charges for management amongst the companies as described by Hunt and Partners (see 11.3 below) was not undertaken. The notes to BHIC accounts to March 2013⁸⁵, show that BHIC charged BIL £100,000 *“for the provision of its administrative functions”* in that year it is noted that Hawk Property’s charge to BHIC for management (with rent) of £124,000 was higher than in any other year. Clearly BHIC Director Mr. Thorpe treats the amounts as being offset against each other *08.59 16 05 207 “BHT has incorrectly stated the figure [rent and management] for the year ending 03/2013 is £124,000. The correct figure is £24,000. BHT has made an incorrect statement and overstated this item by £100,000.”* However, this is not how the sums were treated in the accounts. It shows that in a year when BHIC received a single large element of income, the costs levied against it for management were increased by a very similar amount.
- 11.3 In this year where all the costs have not been “pooled” in the accounts of various companies, the transactions indicated give rise to questions. First why have Malcolm and Fiona Thorpe (for Hawk Property)⁸⁶ charged the highest figure for management of BHIC (£106,000 after rent) above the £102,000 p.a. stated by accountants Hunt and Partners (19th June 2017)? Regarding the charge from BHIC to BIL for services, it is not known what this represents; this may be for use of BHIC’s offices, support services and the time of Malcolm and Fiona Thorpe. Malcolm Thorpe states the correct [balanced] figure is £24,000 for Hawk Property’s management services to BHIC. The management fee charged by Hawk Property to BHIC does not approach anything like this low figure of £24,000 in any other years. However, there has been no apparent change to the operation of BIL or BHIC to account for this substantial difference in total management charges. The inexplicability of these financial transactions clearly calls for an explanation. Such

⁸⁵ APPENDIX 6 [BHIC accounts to March 2013](#) (See section 4. Related Party Transactions)

⁸⁶ APPENDIX 7 [Email BHIC to IWC 6th July 2017](#) (See last para item 6)

transactions are hidden from public view in subsequent years because of the “pooling” described by Hunt and Partners of the charges with Other Companies.

No lease to secure BHIC’s use of its operational premises

- 11.4 BHIC is an independent corporate and statutory entity. In order to function it requires the use of land owned by BIL. Under any prudent management BHIC would seek security of tenure for the land it uses for a known period.
- 11.5 Prior to BIL’s planning application, despite BHIC having occupied the land facilities for a considerable time, BHIC had no lease, but did own part of the land itself. The lack of a lease was to the disadvantage of BHIC leaving it exposed to the risk of loss of its facilities. The situation is further muddled as any payments made by BHIC for the use of BIL’s land are not made to that company, but to Hawk Property who were said to hold an intervening licence. BIL did not share common ownership with Hawk Property or BHIC until 2018.
- 11.6 BIL clearly had plans to develop much of the land BHIC occupied and some of which it owned. This creates a conflict of interest between BIL and BHIC.
- 11.7 Further during the application process BIL initially resisted BHIC being granted any lease over any new facilities. This would have resulted in BHIC having no security of tenure over the facilities that they were supposed to benefit from under the “Enabling Development” proposals.
- 11.8 BIL, at the request of the IWC, offered a lease but for only 10 years⁸⁷, well under the expected useful life of the improvements. This was rejected by the IWC and subsequently the term was increased to 25 years. On every relevant occasion, the directors of BHIC can be seen to support the case that is in the interests of BIL rather than those of BHIC.

The Government’s Ports Good Governance Guidance - Serious non-compliance

- 11.9 Reasonable transparency called for and refused outright. The government’s *Ports Good Governance Guidance* (“PGGG”) March 2018 in its Introduction at 1.4 calls for “*openness, accountability and fitness for purpose that are applicable to all SHAs given the similarity of their key objectives in managing in the broad public interest*”.
- 11.10 It is noted that senior counsel for IWC speculated that the management charges may include directors’ remuneration (albeit that the directors of Hawk Property, BIL and BBS are the same as for BHIC). In this context, PGGG advises independent review of directors’ remuneration by non-executive directors. BHIC has not appointed any non-executive directors to be capable of performing this role, contrary to guidance in PGGG 2018 “*The board should establish a remuneration committee, including at least three NEDs (or for smaller organisations two). The committee should have delegated responsibility for setting remuneration for all directors and the chair including, where relevant, pension rights and any compensation payments.*”⁸⁸
- 11.11 Further, PGGG calls for full transparency on all management matters, including remuneration. This has been formally requested of BHIC. The response of director

⁸⁷ APPENDIX 28 [Heads of terms to lease](#)

⁸⁸ APPENDIX 33 [Ports Good governance Guidance](#) (Section 2 applying to all SHA’s)

Malcolm Thorpe has been to refuse to publish any further information, on the (incorrect) basis that as the harbour is small PGGG does not apply. PGGG expressly states that it applies to all ports and harbours that are Statutory Harbour Authorities. The lack of transparency means it is not possible to check that BHIC is complying with the Harbour Act, or indeed that directors are complying with their other statutory duties.

Styling as Bembridge Harbour Authority when acting on behalf of other companies

- 11.12 When writing on behalf of the planning applicant BIL to promote an application made by BIL Mr Thorpe consistently writes as “Bembridge Harbour Authority”. This muddling of the affairs of the BIL by associating it with the harbour authority creates misunderstanding.
- 11.13 The only harbour authority is BHIC being the Statutory Harbour Authority. This active use of trading style serves to mislead the reader into an assumption that they are receiving correspondence from the Statutory Harbour Authority, BHIC, when this is often not the case.
- 11.14 This tactic is widely used for example 10th Dec 2014 in the business case to support the BIL’s planning application made on “Bembridge Harbour Authority” headed paper⁸⁹. On the 5th July 2017 in an email to the IWC with sign off and footer as “Bembridge Harbour Authority” Mr Thorpe makes statements on BIL matters at points 1,3 and about Selwyn Land (owned by BIL) with item 6. Elsewhere writing on BHIC matters and all on behalf of ‘Bembridge Harbour Authority’.⁹⁰ However, Mr. Thorpe is clear in his own mind that by BHA he means BHIC, and he confirmed as such in a recent email to the IWC lawyer on 25th September 2020.

BHIC improper actions in support of BIL’s application for housing

- 11.15 BHIC on its website stated that BHIC (rather than the applicant) was bearing financial cost and expending management time in pursuance of BIL’s planning application, and that this was at considerable cost to harbour related management. It also stated that BHIC was holding back £60,000 in reserve funds in the event of a legal challenge to BIL’s permission for use in resisting such a challenge⁹¹. BHIC has recently stated that it has spent £300,000 on BIL’s planning application (see Section 8 A). These are both clear misuses of funds of BHIC, in contravention of the Harbour Act s.31. BHIC stated, again on its website, that this expenditure of funds on the application had direct adverse consequences for the harbour and its users; the dredging programme was deferred, causing reduced depths and users were warned of the need to take extra care. Plans for the acquisition of a dredger were shelved⁹². Harm to the harbour and its users is addressed in more detail below at Section 14.

Improper linking by BHIC of harbour works - groyne repair to BIL’s housing application

- 11.16 Repair of the groyne was included in the harbour management plan which the current owners inherited on acquisition. The plan has never been renewed or updated. BHIC has recently identified repair of these harbour works as its top priority for the harbour. Having

⁸⁹ APPENDIX 34 [Example letterhead](#)

⁹⁰ APPENDIX 35 [Example email footer](#)

⁹¹ APPENDIX 35 [Examples of costs incurred by BHIC in relation to BIL application](#)

⁹² APPENDIX 35 [Examples of costs incurred by BHIC in relation to BIL application](#)

proposed and subsequently withdrawn a provision for funding of a groyne at the harbour entrance, BHIC stated that it would not use its statutory powers to repair the groyne forming harbour works (at a cost of up to approximately £300,000, to be funded by third parties) unless and until the grant of permission for BIL's application. As such this is a clear mis-use of powers of the Statutory Harbour Authority, placing the commercial interests of BIL above the public interest in repairing harbour works pursuant to BHIC's statutory powers. Bembridge Harbour Advisory Group's minutes of September 2019⁹³ show the directors' position.

- 11.17 BHIC advised BHUG that it would not progress the works to the groyne (that it would be put into "limbo"), even though funded by the local community, unless and until BIL's application for housing was granted permission by completion of the s.106 planning agreement. This application by a third party is unrelated to the groyne. Mr Thorpe on behalf of BHIC wrote recently to BHUG that *"Our views have not altered at all with regards to limbo [still in place] – as you have been advised of this view many times and in very clear terms. Once 'limbo' is cleared [ie: the S106 planning agreement being completed fully], that will be the time to discuss quantum of contribution"* 15 Sept 2020.

Directors of BHIC frustrating contributions towards harbour works

- 11.18 BHAG minutes of the 6th December 2018⁹⁴ confirm that the directors of BHIC made or approved a complaint to the Fund Raising Regulator. *"MT confirmed that a formal submission had now been issued to the Charity Commissioners and the Fund Raising Regulator requesting that the activities of BHT be reviewed as to conforming to their charitable status"*. The substance of the complaint to the Fund Raising Regulator was that BHT (jointly with Coop) should not be raising funds to donate towards the repair of the groyne. The groyne repair is a declared first priority for repair by the directors of BHIC. This action, to frustrate funds being raised for BHIC's use, was against the interests of BHIC.

⁹³ APPENDIX 36 [BHAG minutes 19th September 2019](#) (See section 10.b.)

⁹⁴ APPENDIX 48 [BHAG minutes 6th December 2018](#) (See section 9.d.)

12. Muddling the affairs of BHIC with those of Other Companies

Summary: When challenged on these matters BHIC and its professional advisers have offered explanations which appear to suggest that the financial affairs of BHIC and the Other Companies have consistently and improperly been treated as if they were one company, without regard to the separate legal personality of each company, and more significantly without regard to BHIC's special status as a statutory harbour authority.

- 12.1 Due to the limited financial information required to be published by companies of these sizes, it is not possible to build a complete picture of their financial dealings with each other.⁹⁵ Nevertheless, the material in the public domain gives clear reasons for serious concern. There has been one significant exception to the lack of information and that is in relation to BIL's current planning application at the harbour, where applicant BIL sought to justify an exception to planning policy to allow housing to support a harbour authority, BHIC, that lacked funds. The law relating to planning generally requires openness and transparency and it has been in this arena that it has best been able to scrutinise the financial transactions of these companies in the context of the application. Indeed it was purely as a result of information published in connection with the application that BHT first had cause for serious concern about the use of the harbour's funds.
- 12.2 BHT in 2016 commissioned Keystone Law to provide a legal analysis, together with advice from accountants, on financial management issues of BHIC and the Other Companies. The IWC invited BHIC to provide responses to questions raised in the report. BHIC's responses, rather than answering the concerns, tended to give rise to further serious questions. Whilst information came to light in connection with the planning application, the implications are far wider and go to the heart of the financial management of the Statutory Harbour Authority, BHIC. This section addresses the financial management of the harbour generally.
- 12.3 BHT's Legal Analysis Report of 2016 drew attention to features of the accounts of BHIC and the Other Companies and raised a series of questions including in relation to management and rental. The IWC invited BHIC to provide a formal response. BHIC's response to the IWC on the 16th May 2017⁹⁶ stated that:
- "All charges for rents [and management services] are decided by the Board of Directors on an annual basis and are provided between the companies as required."*
- 12.4 It is clear from this statement that finances of BHIC and Other Companies (two of which were entirely separate legal entities at the time) were addressed collectively. The responses on behalf of BHIC are entirely inadequate and do not address the question of what management services are provided, which would enable an assessment to be made of whether fair market value has been paid for these services. The response implies that there is one Board of Directors which makes these decisions on behalf of all of the companies. When actual decisions made by this method are scrutinised (addressed in previous sections, above) it shows that there have been many breaches of directors' statutory duties, including the misuse of the assets of BHIC. The deliberate lack of clarity

⁹⁵ APPENDIX 4 [Analysis of accounts of BHIC, BIL, BBS and Hawk Property](#)

⁹⁶ APPENDIX 5 [Email BHIC to IWC 08.59 16th May 2017](#) (See page 4 section k para G)

on which company has been paying for what services increases our concern that BHIC was paying more for these services than they are actually worth, with the effect of suppressing the amount of any surplus available to BHIC for harbour improvements. Company Law is clear that any such overvalue payments must be treated as distributions or dividends (requiring commensurate distributable reserves), and so to the extent that they exceed what would amount to a reasonable rate of return on its share capital of £4,000, are in breach of Harbour Act section 31.

- 12.5 The IWC raised further questions in light of the 16th May responses and BHIC's accountants Hunt and Partners sought to address some of these in a letter to BHIC of 19th June 2017⁹⁷, which BHIC submitted to the IWC.

“However, on an annual basis there are costs and services incurred by Bembridge Harbour Improvements Limited on behalf of other companies within the group. Rather than make unnecessary charges between the companies it was agreed that it would be more appropriate for any charges relating to other companies to be made by Hawk Property Development Company Limited, and then a reduction takes place in the overall charges to Bembridge Harbour Improvements Company Limited.”

- 12.6 It is clear from this statement from the accountant that the financial affairs of BHIC and the Other Companies are “muddled”. It is wrong to muddle the financial affairs of BHIC with Other Companies as it is a statutory body and is separately accountable by statute.

- 12.7 It is noted that Hunt and Partners in their letter of 19th June 2017⁹⁸ seek to distinguish the current arrangements between the companies as described from the arrangements made between BHIC and various companies by the previous owner.

“You may recall, that the previous owner of Bembridge Harbour Improvements Company Limited made many charges between that company and other companies within the group and this tended to create confusion within all the companies that were in existence at the time and the bank did not appreciate this confusion. In order to avoid a similar situation arising we have ensured that the minimum balances arise between the companies within the group and that the majority of transfers take place between the holding company and other companies.”

- 12.8 The current arrangements as described give rise to precisely the same difficulties as those under the previous owners. It is also noted that one of the previous owners of BHIC was prosecuted for financial irregularities in transactions relating to BHIC and Other Companies in which he had an interest.

- 12.9 We give an example of an unexplained variation in accounts. In the Micro-entity Accounts of Hawk Property for the year to 30th June 2018 filed at Companies House the Micro-entity Balance Sheet for the year to 30th June 2017 was restated. The original 2017 Balance Sheet showed that as at 30th June 2017 ‘Creditors: amounts falling due within one year’ were £673,505 and ‘Capital and Reserves’ were a deficit of £230,047. In Hawk Property’s Accounts for year to 30th June 2018, the 2017 Balance Sheet included as a comparison to the 2018 Balance Sheet shows as at 30th June 2017 ‘Creditors: amounts falling due

⁹⁷ APPENDIX 25 [Letter from Hunt and Ptrs 19th June 2017](#)

⁹⁸ APPENDIX 25 [Letter from Hunt and Ptrs 19th June 2017](#)

within one year' were £433,505 and 'Capital and Reserves' were positive at £9,953. There is no note explaining why this £240,000 adjustment in the amounts owed by Hawk Property as at 30th June 2017 was made. In the absence of such a note, we do not know whether this phenomenon relates to transactions with BHIC, with BIL, BBS or indeed other bodies. But it raises the question.

- 12.10 In general, the responses of BHIC clearly demonstrate a “muddling” of the affairs of the various companies. It is not uncommon for the owners of small companies to treat them as, in effect, one single entity. Although unlawful, in normal circumstances this only leads to difficulties in practice when one or more of the companies becomes insolvent. In the case of BHIC, however, this approach is entirely inappropriate, because it could (and, it seems to us, clearly does) lead to the suppression of the surplus generated by BHIC (which would be available for harbour improvements) and the inflation of the profits of Other Companies, for the personal benefit of their shareholders.
- 12.11 It is established law that when a company pays more than market value for something, to its shareholders or another entity in the control of its shareholders, the excess over market value that is paid is to be treated as a distribution or dividend. However, BHIC is prohibited from making distributions or dividends to its shareholders (other than a reasonable return on the paid-up share capital of the undertaking, which is £4000), and so any such distribution or dividend is unlawful.
- 12.12 This Report addresses the many types and specific significant instances on the financial mismanagement of BHIC, especially in connection with the financial affairs of Other Companies. These illustrate in each case failures by directors to address conflicts of interest, and of directors failing to have due regard for the best interests of BHIC. Individually and taken together they give strong grounds to conclude that there are significant irregularities in the affairs of these companies, which are all controlled by the same directors, and in particular that the assets of BHIC have not been treated correctly, to the financial harm of BHIC.

13. Efforts to resolve issues with BHIC

Summary: BHT have since 2014 tried to hold BHIC to account via the IWC in relation to the Planning Application; BHT and others have lobbied the Department for Transport responsible for ports and harbours, but the DfT advises it has no specific powers under which it can audit BHIC; the community in Bembridge sought to obtain answers through a special public meeting; the GMB Union identified harm to the community and passed a formal resolution demanding answers; a local community group 'Show us the books' lobbied for transparency; local community groups BHAG and BHUG sought to broker cooperation with BHIC. It was proposed that an expert be jointly appointed by BHIC and BHT to review BHIC's accounts, but this was rejected by BHIC in early 2020. All attempts have been unsuccessful.

IWC as Local Planning Authority

- 13.1 It was BIL's planning application for housing on harbour operational land in 2014 which first signified financial irregularities in the accounts of BHIC and in its dealings with Other Companies. According to planning policy, permission would not be granted for housing which is outside settlement boundaries and in the flood plain. An exception can be made in policy terms ("Enabling Development") if an institution (here the harbour) needs investment, that institution cannot fund the investment itself but it can be funded by profit from other development (here the housing). It must be in the broad public interest. Thus BHIC had to make out a case that replacement facilities (which had to move in any case to accommodate the housing) were essential to BHIC, and that it could not afford to fund these.
- 13.2 Financial concerns of planning applicants are rarely relevant in the consideration of planning applications, and the local planning authority has no powers to compel disclosure. It can only ask questions. The IWC did provide BHT's Legal Analysis Report to BHIC in 2017 and invited responses to the questions it raised. BHIC's responses of 16th May 2017 and subsequently, rather than allay concerns raised in the report, gave BHT further cause for concern, as set out in BHT's legal response of June 2017 and subsequently.

Department for Transport ("DfT")

- 13.3 BHT have written to the DfT in its capacity as the body responsible for the oversight of ports and harbours. This has been over a prolonged period, starting in 2017. BHT met the MP for the Isle of Wight, Bob Seely MP, on the 24th October 2018 to seek to engage him in securing the involvement of the DfT. Questions of the Minister for Transport in relation to the financial affairs have also been raised in the House of Lords. DfT have asserted that there is not a specific statutory provision to form the basis for enquiry. No action has resulted, as was the case when seeking involvement of the DfT when the harbour was placed into administration in 2011. The DfT advised it has no specific powers under which it can audit BHIC.

BHT meetings with MT / Together with Local Council Ward Members

- 13.4 Following submission of BIL's application in the course of consideration of the application BHT met with BIL / BHIC Director Malcolm Thorpe to seek to find common ground. Subsequently local ward members arranged a meeting with BHIC director Malcolm Thorpe and BHT trustees to seek to find common ground. None of these had any real measure of success.

Public meeting 2018

- 13.5 Members of the local community arranged a public meeting in November 2018 at Bembridge village hall to discuss issues relating to the harbour. Representatives of the GMB Union were present and Sir Paul Kenny, the ex General Secretary of the GMB, chaired the meeting. Representatives of BHIC were invited to attend to explain the situation in relation to the harbour and to answer questions but declined to do so.

Follow up to public Meeting 2018

- 13.6 BHIC / BIL Directors Malcolm and Fiona Thorpe met Sir Paul Kenny in an attempt to find common ground on various issues, including transparency on certain BHIC matters. The meeting and follow up correspondence was not successful in this aim.

Initiative by Harbour interest groups BHAG and BHUG, 2019 / 2020

- 13.7 The advisory group established by BHIC, (BHAG), together with the Harbour Users Group, (BHUG) set up an initiative to seek to reach an understanding between BHIC and BHT. There were at least two meetings between Directors of BHIC / BIL and trustees of BHT. This process resulted in a proposal for an expert to be jointly appointed (i.e. by BHIC and BHT) to review BHIC financial conduct, to be funded by BHT.
- 13.8 Particularly bearing in mind the concerns set out in the original report and in this one, it is regretted that Mr Thorpe has declined to participate in this process. In a letter to BHAG members re. Meeting minutes of 6th December 2018⁹⁹ it is stated; *"I therefore doubt whether it will come as any surprise in such circumstances that we cannot contemplate following such a process and will continue to retain our financial records in total confidence."* And *"nobody has any rights, whether legally, commercially or indeed morally – to see any management accounts or detailed figures relative to these companies [including BIL the developer and BHIC, the SHA]"*.
- 13.9 This uncooperative position has been reaffirmed recently (email 19th February 2020), when in response to BHAG's suggestion that a voluntary independent review of BHIC accounts (funded by BHT) but jointly instructed was declined by Malcolm and Fiona Thorpe : *"Under these circumstances, we doubt it will come as any surprise that we have reached the conclusion that it's time to draw this dialogue to a close rather than continuing to go round and round in extremely time consuming circles"*.

⁹⁹ APPENDIX 46 [Mr Thorpe to BHAG December 2018](#)

14. Significant Harm to the Harbour and Community

Summary: There are reasonable grounds to conclude that at least £1,539,828 has wrongfully been extracted from BHIC since 2012 (See Table 2 at Section 4) and diverted to Other Companies owned by BHIC's directors and from which they are able to extract personal benefit. There are reasonable grounds also to conclude that over the next ten years an estimated further £2,313,000 will be wrongfully extracted from BHIC for similar purposes (See Table 3 at Section 4). Collectively these losses place the sustainability of BHIC at great risk as a going concern. The very substantial loss of funds to date have had a very serious impact on the ability of the Statutory Harbour Authority to carry out its statutory functions, in particular in relation to slowing the rate of siltation and carrying out essential maintenance and repairs, with direct harm to the users of the harbour, and indirectly to the local communities. The continuation of wrongful extractions from harbour funds into the future as predicted will exacerbate the harmful effects experienced to date.

Siltation of the Harbour

- 14.1 BHIC has a licence to dispose of some 43,000 cubic meters in the 10 years 2019 to 2029 incorporating some private works by Bembridge Sailing Club. The proportion available to BHIC to maintain depths in identified channels and marinas is some 37,000 cubic meters.
- 14.2 Limited dredging from 2014 to 2019 created a backlog of around 26,000 cubic meters in these areas. The dredging in 2020 was approx. 7,000 cubic meters, this "caught up" in a small section of the harbour only. BSC dredged some 4,000. This left a shortfall of some 15,000 cubic meters in BHIC's areas when compared to the rate anticipated in the licence to maintain target depths. Other areas un-dredged since 2004, but licenced required dredging to regain BHIC stated depth targets in Lymington Technical Services report and the BHIC says are an appropriate standard. However, if these areas were addressed the licence would no longer be sufficient to subsequently maintain against the rates of siltation predicted by the harbour's advisers, Lymington Technical Services.
- 14.3 The decision not to spend harbour funds on dredging, as stated on the BHIC website 3rd August 2016 but to reserve those funds to support BIL's planning application has additionally contributed to a state of affairs that as things stand is irreversible. *"...and have held back our 2016 dredging programme to conserve circa £60,000 in case we need to appoint a leading barrister to present our planning case and assist the LPA in defending their position" 3rd August 2016*¹⁰⁰ Mr Thorpe affirmed on the 14th September 2020 BHIC say [we] *"... [the harbour] has all the required long term permissions needed for dredging works using its own dredger on an effective basis."*¹⁰¹ Indicating that they will not be addressing the shortfall. As such the harm caused by failure to employ BHIC funds in dredging would be irreversible as the quantities in the current licence does not allow for any catching up, and BHIC has advised that it does not intend to apply for further licences

¹⁰⁰ APPENDIX 36 [Examples of costs incurred by BHIC in relation to BIL application](#)

¹⁰¹ APPENDIX 37 [BHIC letter to BHT patrons 14th August 2020](#) (See second paragraph under Bembridge Marina Dredging)

to seek to make up at least some of the deficit caused by the years when no or limited dredging took place.

- 14.4 The backlog in dredging has been particularly damaging to some areas more than others, in particular Bembridge “long stay” Marina and Fisherman’s pontoon. The prolonged lack of dredging at these locations under the current ownership (none at Fisherman’s and not since 2013 at Bembridge Marina and until 2020) has resulted in a number of owners removing their boats to other harbours.

Failure to repair the harbour groyne to reduce siltation

- 14.5 BHIC has declared that the repair of ‘the groyne’ (a groyne and training wall at the entrance of the harbour that would slow the rate of siltation) as a first priority for the harbour¹⁰². Works can only be carried out by BHIC as the SHA.

- 14.6 On the understanding that BHIC did not have the funds to repair the groyne, BHUG have sought to raise public funds for approaching £300,000 for the works. BHUG has paid for design works at approximately £15,000. The community of funders includes local clubs, fundraising through Co-op, and BHT.

- 14.7 Three features combine to put the future usable water depth in the harbour at grave risk. First the chronic shortfall in dredging, coupled with the inability to redress the shortfall under present licensing together with a stated intention not to apply for further licences. Second the chronic failure to repair the groyne, together with a stated refusal to enable such repair unless and until an unrelated commercial planning application for housing is granted permission. Third the failure to secure a replacement for the commercial land based dredging operation (as referred to at 10.2 above). The current rate of siltation is already at approximately one metre per ten years in significant parts of the harbour. The outcome of the three elements listed above is that this rate will increase in future years resulting in impractical moorings and large parts of the harbour will be unnavigable for boats drawing one metre even at high tide and materially shorter periods on each tide for all vessels, to the disadvantage of all harbour users.¹⁰³

Failure to maintain and repair harbour facilities and infrastructure

- 14.8 Failure to employ funds to carry out essential maintenance and improvements to infrastructure and facilities at Bembridge Marina (long stay) including pontoons and piles have caused damage including the loss of a vessel. These have contributed to a number of long term harbour users leaving the harbour and relocating to other harbours, in particular East Cowes. Failure to maintain and improve facilities at Duver Marina (visitors) has, BHIC advise, caused dissatisfaction by users and cancellation of rallies, causing significant loss of income.

- 14.9 The local communities of Bembridge and St. Helens derive very substantial income and benefit from activities generated by the harbour, including the marinas, two sailing clubs, fishing wharf and angling club, boatyards, boat sales, outdoor activity centre, powerboat training centre, yachting chandlery, and three cafes / restaurants and a public house. This is in addition to the eating and retail facilities of the two villages which are a short walk

¹⁰² APPENDIX 38 [BHIC response to BHUG 16th Dec 2019](#) (see 3rd Paragraph)

¹⁰³ APPENDIX 39 [BHT briefing note harbour dredging 2020](#)

from the harbour. Loss of activity at the harbour will seriously affect all these uses both directly and indirectly.

15. Conclusions

- BHIC has entered into numerous contracts with Other Companies within the same ownership, which have had the effect of reducing the surplus available for harbour maintenance. These transactions almost exclusively benefit Other Companies in the same ownership while being to the detriment of BHIC. Some of these transactions are deemed distributions in accordance with the Companies Act 2006 section 845, and where the company has insufficient distributable reserves to make them, they are unlawful and void.
- There are reasonable grounds to conclude that there has been serious misconduct by the directors, to the detriment of the beneficiaries and stakeholders of BHIC and in breach of the Harbour Act. The effect of such misconduct has been to divert benefit out of BHIC as the Statutory Harbour Authority, and towards the ultimate owners of Other Companies owned by the same shareholders.
- The improper transactions have placed BHIC at serious risk of insolvency. BHIC has been compelled to assume liability for a large intercompany debt at a high interest rate, and to enter into cross-guarantees and charges in respect of Other Companies' borrowings. BHIC has also been compelled to lend its surplus cash to Other Companies, without receiving interest thereon, and its affairs have been structured in such a way that it makes artificial losses and its P&L account is gradually being depleted to the benefit of the shareholders of Other Companies. These transactions rely on asset valuations which are both substantially overstated and are not readily realisable.
- Substantial harm has been occasioned to the harbour and to the community and this is set to worsen in the absence of intervention. There are reasonable grounds to conclude that at least £1,539,828 has wrongly been extracted from BHIC since 2012. Moreover, if matters are allowed to continue, over the next ten years an estimated further £2,194,562 will be wrongfully extracted from BHIC. This has had a very serious impact on the statutory functions of the harbour authority, especially in relation to siltation of the harbour and essential maintenance and repairs. There is direct harm to the users of the harbour, and to the local communities. The continuation of wrongful extractions from harbour funds into the future as predicted will exacerbate the harmful effects experienced to date, and the risk to creditors and to the community through insolvency is increasing. It is strongly in the public interest now that appropriate action is taken.

Keystone Law, 4th December 2020