

Attn: Malcolm Thorpe
Bembridge Harbour Improvements Company
Limited Duver Boat Yard
The Duver,
St. Helens,
Ryde,
Isle of Wight,
PO33 1YB

Your ref:
Our ref: BG BEM1.3
Direct dial: 020 3319 3700
ben.garbett@keystonelaw.co.uk

28 May 2021

Dear Sirs,

Re: URGENT PREACTION PROTOCOL LETTER

1. This is a letter before action sent in line with the judicial review pre-action protocol.

The Claimant

2. Bembridge Harbour Trust ("BHT")
3. BHT is a charity established with the objective of preserving and enhancing Bembridge Harbour, its approaches and setting for the benefit of the public, including users of the Harbour and the communities of Bembridge and St Helens on the Isle of Wight.

Proposed Defendant

4. Bembridge Harbour Improvements Company Limited, the statutory harbour authority for Bembridge Harbour.

Decision to be Challenged

5. The decision to enter into a binding obligation dated 29 March 2021 in support of the development proposals of a private third-party development company, Bembridge Investments Limited, and further decisions and actions details of which are set out below, and further particulars of which are sought pursuant to the Duty of Candour.

Issues

6. BHT is seeking to understand the basis upon which Bembridge Harbour Improvements Company Limited, as the statutory harbour authority (hereinafter "SHA") for Bembridge

Harbour, has exercised its powers and performed its obligations pursuant to the Pier and Harbour Order (Bembridge Harbour) Confirmation Act 1963 (“the 1963 Order”) and the Harbour Act 1964 (“the 1964 Act”). As a public body, we remind you that the Court will expect the SHA to abide by the Duty of Candour which applies to its decision making and to provide BHT with all relevant information and all material facts (whether they support or undermine the SHA’s decision making) pursuant to the requests set out below. We will be obliged to draw to the attention of the Court any failure upon the part of the SHA to comply with the Duty of Candour, which, as you will know, also applies automatically to any solicitor or Counsel acting for a public body.

Details of the Proposed Claim

7. On 25th May, 2021, the SHA filed its accounts for the year to 31 March, 2020. These disclose the existence of loan of £488,731 to Bembridge Investments Limited (“BIL”) (a private company concerned with the development of building projects), a balance increased by £138,727 when compared to the previous year. Please explain how the making of this substantial loan to a private development company is authorised by Article 31 of the 1963 Order, which provides that if monies received by [the SHA] shall exceed the expenses of the undertaking, then the SHA shall apply such excess in or towards the dredging of the harbour or the renewal, construction or improvement of any of the harbour works. Article 31(2) of the 1963 Order defines what may be encompassed within “the expenses of the undertaking” and it is apparent that the making of substantial loans to a private development company does not fall within this definition. Please explain the basis for the making of this loan and supply the Board Minutes and any related supporting papers which address the principle and the lawfulness of this loan.
8. Also on the 25th May, 2021, other intercompany loan accounts reveal loans to Bembridge Boat Storage Ltd (“BBS”) and Hawk Property Development Company Ltd (“Hawk”), such that the total lent by the SHA to three companies owned by the same shareholders was £867,104, an increase of £417,517 in that year. Please explain how the making of these substantial loans by the SHA to these private development companies is authorised by Article 31 of the 1963 Order, which provides that if monies received by [the SHA] shall exceed the expenses of the undertaking, then the SHA shall apply such excess in or towards the dredging of the harbour or the renewal, construction or improvement of any of the works. Article 31(2) of the 1963 Order defines what may be encompassed within “the expenses of the undertaking” and it is apparent that the making of substantial loans to private development companies does not fall within this definition. Please explain the basis for the making of these loans and supply the Board Minutes and any related supporting papers which address the principle and the lawfulness of these loans.
9. Please set out the basis upon which the SHA determined not to file its annual accounts for the year to 31 March 2020 until the 25th May, 2021 and to incur fines for failing to comply with its statutory obligations pursuant to Article 32 of the 1963 Order. Please supply all relevant advice received in support of this course of action and all relevant Board Minutes and supporting papers.
10. On 23rd April, 2021, in the judgment of the High Court in *Robertson & Greenwood v. Bembridge Harbour Improvements Company Limited (“MY Tangent”)* [2021] EWHC 1025 (Comm), the Learned Judge found that the SHA had failed “to take all reasonable steps to maintain the



Marina in reasonably good working order” (para.101). In the course of his judgment (including paras.36-39), he also found that the SHA, acting by its Officers, had failed to keep appropriate records of ongoing maintenance requirements in relation to essential harbour infrastructure, leading in the instant case to a very large and avoidable award of damages against the SHA. Please explain whether (and if not, why not) this finding has led the SHA to undertake an immediate review of its maintenance obligations and protocols and its urgent capital expenditure programme. If nothing has been done in relation to these matters consequential upon the findings of the High Court, please explain the reason for this. Please supply any Board Minutes relating to consideration of these matters and any supporting papers.

11. Further to the above, in particular, please explain why, after being alerted to the problem of a new hole by the Bembridge Harbours User Group (“BHUG”) on 2nd April 2021, and your assurances as to inspections, this hole has not been repaired. Please explain why, knowing that any holes are most apparent at low tide, it appears to have been decided not to carry out inspections at low tide, such that currently, in addition to the hole brought to your attention by BHUG, there are holes in piles on two other pontoons, A and C which would have been evident in any conscientious inspection. If it is claimed that, unlike the hole in Pile at pontoon B, they were identified, please explain why a decision was made not to repair immediately.
12. Please set out the basis upon which SHA considered it to be both lawful and in the best interests of the Bembridge Harbour undertaking for the SHA to enter into a planning obligation dated 29 March 2021 imposing binding obligations upon the SHA which enabled the issue of a grant of the planning permission to BIL for various developments directly affecting Bembridge Harbour. Please disclose the relevant Board Minutes of SHA authorising this decision and the supporting Board Papers prepared by Officers for this and all related decisions by which the SHA has determined to lend its support to the proposals of a private development company.
13. Please set out the basis upon which the SHA has agreed pursuant to the abovementioned planning obligation dated 29 March 2021 to undertake a 25 year maintaining lease of a large silt lagoon which lies beyond Embankment Road at Bembridge. In particular, please explain how this obligation is consistent with express statutory restriction imposed by Article 12 of the 1963 Order that authorises the maintenance and improvement of works “within the limits of the harbour”. Please disclose any Board Minutes or supporting papers which explain the legal basis and rationale for the SHA undertaking a long-term binding obligation for the maintenance of land which plainly lies wholly outwith and beyond the harbour limits.
14. Please set out the basis upon which the SHA has agreed pursuant to the abovementioned planning obligation dated 29 March 2021 to take a 25-year lease at market rent a new harbour facilities building at The Duver, the overwhelming majority of which is to be constructed upon land to which the SHA already has registered title. Please explain how this arrangement is consistent with the performance of the SHA’s duties. In particular, this arrangement, by which the Landlord is to be BIL and the Tenant is to be the SHA implies that the SHA has agreed to dispose of its interest in the greater part of the site of the proposed new harbour administration and facility complex at The Duver. Please explain how this disposal is consistent with the express limitation imposed upon the SHA by Article 28(1)(b) of the 1963 Order, namely that the SHA may “sell, lease, exchange or otherwise dispose of any such land or interest no longer required for the purpose of the undertaking...” (emphasis added). The land upon which the new facilities at The Duver are to be constructed plainly is still *required for the purpose of the*



undertaking. Please explain how the SHA has reached its decision to dispose of its interests in this land at The Duver and supply any relevant Board Minutes or supporting papers which explain the basis for this decision and address its lawfulness.

15. For many years, it has been apparent that the SHA needs to undertake repairs to the Groyne at Bembridge Harbour. These works were originally identified as necessary in the Strategic Harbour Plan. Many private individuals and other bodies had pledged monies to undertake these works. The Groyne works are unreferenced in BIL's planning application and no funds are hypothecated to the repairs to the Groyne in the abovementioned planning obligation. On 1st April, 2021, Mr Thorpe of the SHA wrote to local Parish Councils and, it is believed, other bodies advising that these long overdue works of maintenance would be postponed "for months or possibly even years" if BHT was to make a legal challenge to BIL's planning permission. Please explain the basis upon which the existence or otherwise of a challenge to BIL's planning permission is a relevant consideration in the undertaking of the SHA's long overdue maintenance of the Groyne. Please supply Board Minutes and/or any supporting papers which explain and authorise the course of action taken by Mr Thorpe.
16. Please set out the basis upon which the SHA, in determining to support the construction of 13 houses, a large new carpark on a greenfield site and other related development at Bembridge by entering into the above mentioned planning obligation, has discharged its duty under section 48A of the Harbours Act 1964 as a harbour authority, in formulating or considering any proposals relating to its functions under any enactment, to have regard to the conservation of the natural beauty of the countryside and of flora, fauna and geological or physiographical features of special interest and to take into account any effect which the proposals may have on the natural beauty of the countryside, flora, fauna or any such features. Please disclose the advice received by the SHA from its Officers or appointed consultants in relation to the discharge of this duty and all relevant Board Minutes and supporting papers relating to its decisions in relation to this duty.

Details of Advisors Dealing with this Claim

17. Ben Garbett
Solicitor, Keystone Law
48 Chancery Lane
London WC2A 1JF
Ref. BG/BEM1.3

18. **Details of Information Sought**

N/a

Details of Interested Parties

19. Bembridge Investments Limited

Details of Any Documents That Are Considered Relevant and Necessary



20. The Claimant reserves their right to amend or add grounds upon receipt of further information, either provided in response to this letter or otherwise.

Address for Reply and Service of Court Documents

21. Ben Garbett
Solicitor, Keystone Law
48 Chancery Lane
London WC2A 1JF

Ref. BG/BEM1.2

Proposed Reply Date

22. We request a response to this letter within 14 days, i.e. by **Friday, 11 June 2021**.

Yours faithfully,

Keystone Law

cc. Bembridge Investments Limited (interested party)

