IN THE HIGH COURT OF JUSTICE C0/2272/2021

KING’S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS

BETWEEN:

THE KING

(on the application of

BEMBRIDGE HARBOUR TRUST)

Claimant

-and-

BEMBRIDGE HARBOUR IMPROVEMENTS COMPANY LTD

Defendant

-and-

BEMBRIDGE INVESTMENTS LIMITED

Interested Party

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CLAIMANT’S SKELETON ARGUMENT

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*There are two hearing bundles. The first bundle is the core bundle (pages 1-330) and contains the pleadings, applications, orders, and witness statements. The second bundle (pages 331-869) contains the exhibits to the witness statements. When referring to page numbers the core bundle is referred to as bundle ‘‘A’’* and the exhibits bundle as bundle ‘‘B’’*. Pages are referenced as [A/B/page no]. Where witness statements are referred to the initials of the author are provided along with a number identifying which witness statement it is e.g. Philip Southall’s first witness statement (‘‘PS 1’’).*

Hearing Date: 23 March 2023

Court: Administrative Court Judicial Review

Time Est: 1 day

Pre-Reading Est: 3hrs

 *Dramatis Personae*

1. Bembridge Harbour Trust (‘‘BHT” or “the Claimant’’) - a registered charity (Charity No 1120225) and is also a company by limited guarantee (Company No 05671595), which aims to preserve and enhance Bembridge Harbour
2. Bembridge Harbour Improvements Company Ltd (“BHIC” or ‘‘the Defendant’’) - the Statutory Harbour Authority (‘‘SHA’’) for Bembridge Harbour. The beneficial owners are Malcolm and Fiona Thorpe via Hawk Property Development Co Ltd, the “parent company” of BHIC
3. Bembridge Investments Ltd (‘‘BIL’’) - owns land adjacent to the area of Bembridge Harbour. The beneficial owners are Malcolm and Fiona Thorpe via Hawk Property Development Co Ltd, the “parent company” of BIL
4. Bembridge Boat Storage BBS (‘‘BBS’’) [B/340]- a boat storage company owned by Malcolm and Fiona Thorpe.
5. Hawk Property Development Co Ltd (‘‘Hawk’’) [B/338]- the parent Company of the Defendant and BIL and BBS. Owned by Malcolm and Fiona Thorpe.
6. Philip Southall (‘‘PS’’ or “Mr Southall” ) - a Chartered Accountant, providing evidence on behalf of the Claimant
7. Oliver Goodwin (‘‘OG’’)- a Barrister at Setfords Law Ltd, he has conduct of the Claimant’s litigation
8. Jeremy Gully (‘‘JG’’) – Chair of the Board of Trustees for the Claimant
9. Malcolm Thorpe (‘‘MT’’) - Director and shareholder of the Defendant and BIL (a shareholder via “parent company” Hawk)
10. David Crook (‘‘DC’’ or “Mr Crook”) – A Chartered Institute of Public Finance Accountant, providing evidence on behalf of the Defendant
11. Graham Gover (‘‘GG’’) – Solicitor at Graham Gover Ltd, he has conduct of the Defendant’s litigation

Suggested Reading

1. Claimant’s Amended Statement of Facts and Grounds [A/73]
2. Defendant’s Amended Detailed Grounds of Resistance [A/110]
3. Order, Mrs Justice Lang DBE Granting permission for Judicial Review [A/161]
4. Consent Order, approved Mr Justice Sweeting, Amending Statement of Facts and Grounds [A/166]
5. PS 1 [A/176]
6. JG 1 [A/191]
7. PS 2 [A/208]
8. MT 2 [A/256]
9. DC 1 [A/261]
10. DC 2 [A/267]
11. DC 3 [A/309]
12. Proposed Draft Undertakings/Minutes of Order (attached to Skeleton)
13. Introduction
14. The Claimant, Bembridge Harbour Trust (“BHT”), is a registered charity established in 2007 with the purposes 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[[1]](#footnote-1). It has 190 full members[[2]](#footnote-2) and a Board of 7 Trustees. Its Patrons are Sir Paul Kenny, Lord Brabazon, Sir Robin Knox-Johnson, Christopher Bland and Michael Mac Innes[[3]](#footnote-3). BHT Trustees and Members are barred from personal gain as a result of membership of the Trust.
15. Members of BHT care deeply for Bembridge Harbour and its beautiful and ecologically important setting. They were greatly saddened when the Harbour went into administration, due, partly, to inter-company trading in 2011 and tried, unsuccessfully, to acquire and manage the harbour in the public interest at that time.
16. BHT has become increasingly concerned that the SHA, which is vested in BHIC, has become enmeshed in a web of private companies with no statutory function, but under the same ultimate ownership and control, and is being used as a vehicle to provide loan finance and security to support these other companies to the past, present and future detriment of the harbour undertaking.
17. This claim challenges the ongoing and increased provision of loan finance revealed in the 2020 accounts, published late (on 25 May 2021), and ongoing the use of the assets of the SHA to provide security for the borrowings of other companies, which have no statutory function to perform.
18. Concerns are compounded by the opacity surrounding the group of companies concerned, the minimal amount of financial information in the public domain, notwithstanding the nationally applicable Ports Good Governance Guidance 2018 (which emphasizes “the key principles of openness, accountability and fitness for purpose that are applicable to all SHAs”[[4]](#footnote-4)) and the complete absence of any SHA Board resolutions or minutes authorizing the use of SHA funds or assets for external purposes.
19. Moreover, the group takes its advice on financial matters from Mr Crook, an accountant who was severely reprimanded by the Institute of Chartered Accountants, fined and disqualified from membership for 15 years[[5]](#footnote-5) and has not, so far as we are aware, been re-admitted. Although Mr Crook describes himself as “a CIPFA accountant” [[6]](#footnote-6), the Claimant was unable to verify this independently at the time of the making of DC’s first WS on 8 Nov 2021[[7]](#footnote-7). The Claimant has constantly struggled to obtain further detail as to the financial relationships between this web of companies.
20. BHT’s concerns have been reinforced by the finding of the High Court in *Robertson & Greenwood v Bembridge Harbour Improvements Co Ltd* (“MY Tangent”) [2021] EWHC 1025 (Comm) on 23 April 2021, the same year in which the claim was lodged, that the SHA had failed to maintain the Marina in reasonably good working order and failed to keep appropriate maintenance records, resulting in a substantial award of damages against the SHA.
21. It is submitted that the evidence reveals that the SHA has been making substantial loans and providing security to companies, especially BIL, whose only connection with the SHA is that it has common Directors and shareholders via “parent company” Hawk.

1. However loudly the D protests that it has acted lawfully, it is highly significant that, since these proceedings have been commenced, major steps have been taken to reduce substantially the indebtedness of BIL to the SHA, including the sale of land by BIL to increase its available funds.

1. Looking to the future, BHT has sought undertakings from the SHA as to its future conduct and transparency. BHT awaits a response, but if an acceptable response is not forthcoming before this claim is heard on 23 March, then BHT will seek equivalent relief from the Court.
2. Procedural Matters
3. This is Bembridge Harbour Trust’s (‘‘the Claimant’s’’) skeleton argument in support of its application for judicial review following the order of Mrs Justice Lang DBE [A/161] granting permission for the claim to proceed on Ground 7. The Defendant had expressly agreed that Ground 7 was arguable and did not contest the grant of permission to bring these proceedings on this ground.
4. By way of consent order dated 3 March 2022 (approved by Mr. Justice Sweeting) [A/166] the parties agreed that the Claimant could amend its Statement of Facts and Grounds (‘‘SFG’’).
5. The amended SFG is contained at [A/73]. The amended SFG Ground 7 is contained at [A/77] and [A/105].
6. As mentioned above, the Claimant has submitted to the Defendant a Schedule of Undertakings which it seeks in order to preclude the SHA being exposed to unnecessary financial risk by entanglement with the other companies also ultimately controlled by Mr & Mrs Thorpe, to provide greater transparency as to the operations of the SHA going forward, and thereby address the concerns of BHT Members and Trustees. If these Undertakings are not given, then this Schedule provides a template for the Order which the Claimant seeks from the Court. The Schedule is attached to this skeleton argument.
7. The Law
8. The amended SFG summary heading for Ground 7 [A/105] states:

*‘‘GROUND 7: BY MAKING SUBSTANTIAL LOAN PAYMENTS TO BIL AND BBS AND/OR BY DECIDING NOT TO SEEK REPAYMENT OF EXISTING LOANS AND/OR PROVIDING SECURITY FOR OTHER GROUP COMPANIES, THE DEFENDANT HAS ACTED UNLAWFULLY AND ULTRA VIRES ITS POWERS UNDER THE 1963 ORDER AND IN BREACH OF ARTICLE 31’’*.

1. In pursuing Ground 7 the Claimant relies upon The Pier and Harbour Order (Bembridge Harbour) Confirmation Act 1963 that confirmed and brought into effect the Bembridge Harbour Order 1963 (‘‘the Order’’) (Order at [B/347]) and the Harbour Act 1964.
2. The Order provides for “the vesting in Bembridge Harbour Improvements Company Limited of the Bembridge Harbour…and to confer powers on the said Company with reference thereto and the maintenance, management and improvement thereof and other purposes”. Bembridge Harbour Improvements Company Limited was a pre-existing corporate entity. It is immediately apparent from the terms of the Order[[8]](#footnote-8) that that Parliament thereby established a detailed code for the maintenance, management and improvement of Bembridge Harbour whilst vested in the Defendant. This code is expressed comprehensively and encompasses both powers and duties - to regulate the operation of the SHA in such a way as to further the maintenance, management and operation of Bembridge Harbour.
3. Section 3 of the Order states: *‘‘the harbour means’’ the Bembridge Harbour…as described in Section 7 (Limits of the harbour) of this Order’’’*

*…*

*‘‘the undertaking’’ means and includes as the case may require the harbour or the entire undertaking of the Company in connection with the harbour’’*

*…*

1. There is express provision in relation to the management of the finances of the undertaking so as to further the overarching purpose of the Order. Thus section 31 provides under the heading “Application of surplus revenue”:

 *(1)* *‘‘If in respect of the financial year of the undertaking the moneys received by the Company on account of the revenue of the undertaking shall exceed the expenses of the undertaking, the Company shall apply such excess in or towards the dredging of the harbour or the renewal, construction or improvement of any of the works.*

*(2) In this section ‘‘the expenses of the undertaking’’ means 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 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’’*.

1. There is no provision authorising the making of loans to other corporate entities, nor authorising the use of the assets of the SHA thereby vested in BHIC to provide security for loans to other corporate entities. The Defendant seeks to argue that, because provision for such activities was made in the standard form of the old-style memorandum and articles of association under which BHIC Ltd was originally incorporated in 1962, these powers may be assumed for the SHA. In the Claimant’s submission this plainly overlooks the entire purpose of the Order, which superimposes a detailed regulatory framework for the operation Bembridge Harbour, at which point BHIC Ltd ceased to operate purely as a private company. The Order is clear that it overriding objective is good stewardship of Bembridge Harbour and this would be completely inconsistent with BHIC Ltd as SHA being empowered to make substantial loans for non-harbour related purposes or to allow the liabilities of other parties (whatever they might be) to be secured against the assets of the harbour undertaking. Had Parliament intended for the SHA to operate in this unfettered way as to its finances and to have the power to expose the assets of the SHA to substantial risk, then express provision would have been made in the Order.

1. It is submitted that this approach is entirely consistent with the general law in relation to the powers of statutory bodies.
2. The basis of Ground 7 is that the Defendant has acted in breach of the Order (and in particular section 31 thereof and in so doing has acted unlawfully and *ultra vires* in respect of loan payments it has made and/or security that it has provided.
3. The Court is well versed in the overarching public law principles that apply in such cases.
4. In *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997, the *Padfield* principle is long-established and requires that *‘‘statutory powers must be used for the purpose for which they were conferred and not for some other purpose’’*. (See summary provided in *R v (Lumba) SSHD* [2011] UKSC 12 at para 199, per Lady Hale.)
5. It is accepted that a public body will not be constrained solely to act in accordance with express powers, but will also be able to do: "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires" (Lord Selborne in *[Att-General v Great Eastern Railway Co (1880) 5 App.Cas 473](https://uk.practicallaw.thomsonreuters.com/D-000-6040?originationContext=document&transitionType=PLDocumentLink&contextData=(sc.Default)&ppcid=b17ea14163c34b0dae9296576e7e2a38)* at 478). This common law rule was given statutory force for local government in [*section 111*](https://uk.practicallaw.thomsonreuters.com/4-508-2809?originationContext=document&transitionType=PLDocumentLink&contextData=(sc.Default)&ppcid=b17ea14163c34b0dae9296576e7e2a38) of the [*Local Government Act 1972*](https://uk.practicallaw.thomsonreuters.com/9-508-0346?originationContext=document&transitionType=PLDocumentLink&contextData=(sc.Default)&ppcid=b17ea14163c34b0dae9296576e7e2a38) (LGA 1972).
6. A well-known example of a case where a local authority was found to not have incidental powers was in [Hazell v Hammersmith & Fulham LBC [1992] 2 A.C. 1](https://uk.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991222170&pubNum=4651&originatingDoc=I526927B00B8111E8B025E69498066066&refType=UC&originationContext=document&transitionType=CommentaryUKLink&ppcid=ad262b3735c1482184558869b47f1517&contextData=(sc.Category)&comp=wluk) In  Hazell, the local authority were entering into swap transactions, and the court found that the statute conferred no such powers.

1. It is submitted that the making of loans to other companies, such as a land investment company which provides no services to the SHA, but happens to have common Directors and shareholders via a “parent company”, or the giving of the SHA’s assets as security for such a company’s loans cannot sensibly be interpreted as being “incidental” to the comprehensive code of powers and duties established for the SHA by the Order.
2. Consideration of the evidence
3. It is necessary to make some brief observations at this stage about the other companies which feature in this claim.
4. BIL is Bembridge Investments Limited. It is concerned with investment in and development of land. As Mr Gover, the Defendant’s solicitor, reports[[9]](#footnote-9): “BIL do not provide any [management] services to BHIC”, ie the SHA. Indeed, he makes clear the absence of a trading relationship between BIL and the SHA. There is, accordingly, no reason for there to be any inter-company trading balances as between BIL and the SHA. The only common link is that they are in the same ownership. The Claimant’s starting point in relation to BIL, expressed colloquially, is therefore: why on earth should BIL be in debt by nearly £500,000 to the SHA, unless this is the product of a “smoke and mirrors” exercise by accountants? Moreover, if this sum were available directly to the SHA and not tied up as a loan to BIL, could most or all of these funds not be available to maintain and improve the harbour in accordance with section 31?
5. BBS is Bembridge Boat Storage Limited. BBS does have a trading relationship with the SHA, but it is not a statutory body and does not perform any of the SHA’s statutory functions on behalf of the SHA.
6. Hawk Property Development Limited is the parent company of BHIC and BIL, and along with BBS, are controlled by Mr & Mrs Thorpe[[10]](#footnote-10). Upon acquisition of the BHIC in 2011, BHIC became encumbered with a loan of £1.2m from Hawk, none of which has yet been paid down, although interest payments are made to Hawk.
7. It will be apparent from our submissions above, that the Claimant submits that the SHA may not act as a free agent in relation to its finances and that the Order expects the SHA to manage its finances so as to invest any surplus in order to promote the good stewardship of the harbour in accordance with section 31.
8. Against this background, the Claimant has sought disclosure from the SHA as to its financial activities and, in particular, the nature and size of debts owed to the SHA by the other companies in common ownership. This search for information has been prompted by the firm view of BHT and its advisers that the SHA should not, once again, be exposed to third party debts or be providing guarantees to secure the liabilities of third parties in a way which might frustrate the purposes of the Order and ultimately place the harbour undertaking in jeopardy.
9. The exercise of extracting information has been painful in the extreme, compounded by the (apparent) complete absence of *any* SHA Board resolutions or minutes authorising the SHA to make capital available to third parties, the terms or interest rates payable or authorising the use of SHA assets as security for loans to third parties. Nothing whatsoever has been forthcoming in this regard.

1. PS 1, dated 23 June 2021, sets out that under the Section 1 A (Small Entities) of Financial Reporting Standard 102 that [A/178]:

*‘ ‘Information about individual transactions may be aggregated according to their nature, except where separate information is necessary for an understanding of the effects of the related party transactions on the financial position of the small entity.’’* (emphasis added)

1. PS sets out that the reported balances for the Defendant’s March 2020 accounts [A/177] Note 5 (Note 5 accounts [B/377]) fail to identify *‘‘…which entity owes which entity money…that the accounts have failed to achieve the stated purpose of FRS 102, as there is insufficient information disclosed to enable an understanding of which related company owes which related company…’’*.
2. The Related Party Transactions for the March 2020 accounts set out that:

The Related Party Transactions are described in Note 5 as *‘‘Current account loan over period of ownership’’*.

BIL

At 1 April 2019: £350,004 At 31 March 2020: £488,731

BBS

At 1 April 2019: £71,851 At 31 March 2020: £143,476

1. The stated assets and liabilities for BIL and BBS at March 2020:

BIL Current Assets £0 Current liabilities (£517,584)

BBS Current Assets £57,370 Current liabilities (£162,419)

1. PS criticises the Defendant’s accounts for the years 2019 and 2020 for failing to state whether the Related Party Transactions between the Defendant, BIL, and BBS *‘‘represent sums owed to BHIC from the related parties, or represent sums owed by BHIC to those related parties, or a combination of both’'* [A/177] para 6.
2. PS says that the Related Party Transactions must be loans from the Defendant to BIL and BBS as *‘‘…these amounts are not assets of BI or BBS as at 31 March 2020…the balances reported in Note 5 to the BHIC March 2020 accounts represent sums owed to BHIC by BI and BBS respectively.’’* [A/178] para 15
3. He concludes that *‘‘…the amounts owed to BHIC from BIL and BBS, which total £632,207 in aggregate, represent sums loaned by BHIC to BIL and BBS that have not been repaid by 31 March 2020. The amount loaned by BHIC to BIL and BBS had increased by £210,352 during the year, from £421,855 which had been loaned to those entities as at 31 March 2019’’*. [A/179] para 22
4. In response to PS1 the Defendant produced DC1 [A/261] dated 8 November 2021.
5. DC confirms that PS was correct to say that the Related Party Transactions (DC describes them as intercompany balances) between the SHA, BIL and BBS were non-compliant with FRS 102 and UK GAAP. [A/262] para 8.
6. DC confirms that the SHA is owed money from BIL and BBS. [A/263] para 9. He confirms that there is an error in the abridged accounts in the amount recorded for BBS he says [A/263 para] 10:

*‘‘(1) The amount of £143,476 is the movement in that year, not the balance figure;*

 *(2) It should be netted off against the 2019 balance of £71,850 (which was owed by BHIC)* *to give a figure of £71,413. This is the amount that BBS owed BHIC as at 31 March 2020’’*.

1. The result of all the above is that: DC on behalf of the Defendant says that, as at 31 March 2020, the SHA “is owed £560,144 by BIL and BBS”. [A/263, para.11].
2. DC says that “net indebtedness” to the SHA (if its own debt to Hawk is netted off) by BIL and BBS was £352,979, as at 31 March 2020, “this figure having increased in the year 2019/2020 by £47,093”. [A/264, para 12]
3. Thus DC, on behalf of the Defendant, acknowledges that BIL and BBS owed monies to the SHA (and accepts a net increase in the amount owing during the 2019/2020 accounting year).
4. However, DC describes the balances, as being unrelated to whether the Claimant has made a surplus for the purposes of section 31 of the Order, but rather as intercompany balances. DC contends (in respect of BBS only) that BBS would use the Defendant’s credit card, as it did not have one of its own for purchases. DC contends that the Defendant would make occasional payments to BIL and BBS for *‘‘maintaining liquidity or paying down historic balance sheet debt’’* [A/264] para 15.
5. DC states that the Defendant made a total profit for the 2019/2020 tax year in the sum of £153,942 (after tax and interest) and that £52,410 was used by the Defendant in accordance with its obligations under section 31 of the Order. [A/265] paras 17-23
6. PS 2 is dated 29 November 2021 [A/208].
7. PS considers that DC has agreed with his propositions that [A/209] para 8:
8. The Defendant has been loaning monies to BBS and BIL;
9. The total loans were for at least £560,144;
10. There were errors in the Defendant’s 2020 accounts;
11. The only apparent disagreement is the precise figure for the loans; and
12. PS considers that the difference in the figures between them can be resolved with further accounting information.
13. PS’s view of the loaned sums following consideration of DC 1 is, *‘‘…then BHIC was indeed owed £560,356 in aggregate by BBS and BIL as at 31 March 2020 (being £71,625 owed by BBS plus £488,731 owed by BIL) and the analysis in my first witness statement is correct’’*. [A/210] para 12.
14. PS considers that DC confirms that purchases were being made on behalf of BBS and funds were being loaned for the purposes of liquidity to BIL. [A/211] para 23 and [A/264] para 15.
15. PS suggests that the funds being provided by the Defendant to BBS and BIL were for ‘‘working capital’’ in order to continue to make payments and ‘‘potentially remain solvent’’. [A/211] para 24
16. In respect of BBS PS says that it reported net current liabilities of £105,049 as at March 2020 [A/212] para 26.
17. PS identifies that BBS reported net assets of £11,021 for year ending March 2020 and points out that it therefore did not have sufficient assets to repay the Defendant’s loan without selling fixed assets [A/212] para 27. It appears therefore that BBS utilised the loans to buy fixed assets and fund its losses.
18. BIL had also retained losses for the year ending March 2020. As with BBS, BIL *‘‘…did not have sufficient assets then to repay BHIC without selling its own fixed assets, which I understand to be the very harbour facilities on which BIHC depends’’*. [A/212] para 31
19. PS identifies that the funds loaned to BIL for the year ending March 2020 were used to reduce the amounts owing to third party creditors in the sum of £94,197 [A/212] para 32. A table is provided at [A/213] para 33 which identifies the amounts owing to the Defendant from BIL as increasing, as BIL’s debt to third party creditors decreases.
20. In summary PS concludes that [A/213] paras 36-38:
21. BIL and BBS did not have sufficient assets to repay the Defendant without selling their own fixed assets;
22. The monies received in or around January 2020 (cash in bank at March 2020, £121,717 [B/371]) for berthing contracts was being used to fund the Defendant without which MT says [A/260] para 17 *‘‘Without this money in advance, we would be unable to fund the business during the new berthing contract year’’*; and
23. If the Defendant had retained cash of £560,356 (see current debtors balance for March 2020 [B/371]) then it would axiomatically have been in a better financial position.
24. It is submitted that it quite clear that the SHA’s funds were being used to loan monies to BIL and BBS. The accounts for 2019/2020 clearly demonstrate that the loan monies provided by the SHA were being used by BIL and BBS to maintain liquidity and to paydown its historic balance sheet [A/217] para 62.
25. It is submitted that DC changed his position from his letter supporting the Defendant’s pre-action response letter- [A/17] Letter of Hunt and Partners dated 1 June 2021 [A/9] the Defendant’s pre-action response. In his letter he says [A/18] *‘‘As far as ‘lending more’ is concerned then this is also ‘wrong’. Had they examined the Balance Sheet then it would have become obvious that the Net Current Liabilities had improved during the year’’*.
26. Whilst it is accepted that the figures reflected in the March 2020 accounts [B/371] did account for a decrease in the Net Current Liabilities, the letter completely failed to address the increased debtor’s figure (£563,016) reflected in the accounts which, as set out above, DC accepts is money owing to the SHA by BIL and BBS and that this indebtedness increased in 2019/20. [A/263 paras 9 & 12]
27. In answer to PS 2, DC 2 was produced. [A/267]
28. DC 2 makes the following points, in summary:
29. The Claimant has misunderstood the Defendant’s finances and the way that inter-company transactions work and have taken place in this instance between its parent Company Hawk, and “associated” companies BIL and BBS [A/268] para 5;
30. At any point in time there will be intercompany balances, which are nothing to do with revenues and expenses. Whilst monies were owed they are not loans, but are intercompany balances [A/272] para 17;
31. The Defendant’s accounts were nothing more than a snapshot of the intercompany balances [A/273] para 19
32. Section 31 of the Order is concerned with profit and loss (i.e. revenue and expenses) of the Defendant and not with its balance sheet (i.e. its assets and liabilities), and says that the Claimant has *‘‘oddly’’* chosen to focus on loans (to BIL and BBS) as opposed to revenues and expenses [A/269] para 8;
33. He repeats DC 1, and says that the net surplus for 2019/2020 accounts was £153,942 and of that £52,410 (net of depreciation) of the surplus revenues was expended on items that were within the remit of section 31 of the Order [A/270] para 12;
34. DC denies that he has ever stated that BIL and BBS were loaned monies [A/280] para 31. Contrast this with DC 1 [A/263] para 9 *‘‘I can confirm that the balance with both BIL and BBS should show that BHIC is owed money by those companies…’’*; and
35. He accepts however that the Defendant did provide BIL with *‘‘some liquidity to repay some of its bank debt during the year…’’* [A/283] para 38

1. The Claimant submitted an amended application seeking specific disclosure, dated 29 July 2022 [A/143], following receipt of DC 2.
2. In response to the Claimant’s application the Defendant produced DC 3 [A/309]. DC 3 produced further documentation in response to the application for specific disclosure. [A/312] para 11 and the Claimant took the pragmatic view that the latest disclosure, whilst being far from complete, was sufficient to enable the claim proceed to hearing. The specific disclosure application was therefore disposed of by consent order [A/170] as approved by Mrs Justice Thornton on 21 November 2022.
3. It is submitted that DC 3 simply produces some of the documents requested and repeats his argument that the Claimant is wrong to say that loans were made, and describes part of the increase in the sums owing as ledger book entries and intercompany balances. Mr Crook repeats his view that the intercompany balances are nothing to do with the surplus in revenue in respect of section 31 of the Order. [A/324] paras 47-50.

Summary of key facts in relation to loans by the SHA and engagement of section 31

1. Even with the limited disclosure achieved, and following corrections to the accounts made by Mr Crook, it is established that:
2. As at the end of the financial year 2019/20, the SHA was owed substantial sums (approximately £560,000) by BIL and BBS[[11]](#footnote-11)
3. Gross sums owing to the SHA by these entities increased by £282,000 during this financial year
4. Even if the sum owing by the SHA to Hawk is netted off, total indebtedness of BIL and BBS to the SHA still increased by £47,000 in the financial year under consideration[[12]](#footnote-12)
5. The SHA made a profit (revenues less expenses) of £153,000 in 2019/20[[13]](#footnote-13)
6. Only £52,000 of this profit has been applied to harbour works
7. The balance of £101,000 is said represent “a reduction in net current liabilities”[[14]](#footnote-14) and can be expressed in those terms;
8. However it has been deployed in part to increase the capital/cash available to BIL and BBS, represented by the increase of £47,000 in their indebtedness to the SHA at the end of the financial year, acknowledged by Mr Crook at DC1[A/264, para.12]
9. Thus this £101,000 surplus has certainly not been deployed in accordance with section 31 of the Order
10. Nor has it been deployed to reduce the SHA’s long term debt of £1.2m[[15]](#footnote-15)
11. No contemporaneous or other evidence has been adduced on behalf of the SHA to meet the challenge made by BHT: no explanation has been given as to why section 31 was not applied to the total profit (£153,000) - or to a greater proportion of the profit than one third - for works for the maintenance and improvement of the harbour (in a year when the High Court was highly critical of the maintenance regime of the SHA)
12. No explanation has been given as to why it was deemed necessary to increase the sums owed by BIL and BBS to the SHA at this time, especially bearing in mind that BIL does not have a significant trading relationship with the SHA and is simply a land investment and property development vehicle for Mr and Mrs Thorpe.

Subsequent course of action

1. Since BHT has shone a spotlight on the impropriety and unlawfulness of SHA funds being deployed to provide capital to BIL and BBS, BIL has taken urgent steps to address this situation. Thus, Mr Crook explains at DC3, para. 46, BIL has sold a parcel of land, which has raised capital, and enabled a reduction in the amount owed by BIL to the SHA by 31 March 2022. It is submitted that this constitutes a clear recognition by the SHA that it should not have its capital tied up on the balance sheet of private companies which do not have statutory duties to perform in accordance with the Order.
2. Whilst this recognition is accepted by BHT to be a step in the right direction, it seeks legally enforceable assurance that the SHA, under Mr Crook’s direction on financial matters, will not lapse again, so that the SHA is exposed in the way that it has been with substantial sums owing from third party companies under common control.

Security

1. PS 2 states [A/214] para 40:

‘‘…To the extent that that assets of BHIC are being utilised as security for either BBS or BIL, then this puts the assets of the harbour at risk as the business could not function without the cash and assets secured under the un-discharged debenture held by Handlesbanken registered at Companies House…

[41]…There is no evidence that that these cross guarantees are extinguished… Consequently, Harbour assets appear to be put at risk and due to the creditors of BIL, BBS and Hawk’’.

1. Mr Crook’s WS2 addresses the “security” issue at para.46-48[[16]](#footnote-16). There appears to be little dispute as to the facts. It is accepted by Mr Crook that:
2. It was a cross-guarantee which put the SHA into administration in 2011.
3. The SHA as vested in BHIC continues to provide security for the borrowings of other companies and its assets are at risk if they default.
4. Mr Crook’s principal riposte is that the risk to the SHA has “substantially reduced” under recent management. However, he does not dispute that this risk continues to exist.
5. This does not address BHT’s grave concern that the harbour undertaking is at risk at all and seeks the re-arrangement of the affairs of this group of companies, so that the borrowings of third party companies, with no statutory duties to perform, are not secured against the assets of the harbour undertaking, especially in the light of the significant adverse financial consequences to the SHA of the 2011 administration.

**Submissions**

1. The Defendant appears to contend that it may operate (effectively) as free agent in accordance with the old style memorandum and articles of association of BHIC, which date from the time when it was incorporated in 1962, prior to the enactment of the Order. BHT submits that this cannot be the case and that Parliament has constituted the SHA and vested it in BHIC with public purposes clearly in mind, such that BHIC must conduct its affairs in a way which is consistent with the good stewardship of the harbour undertaking and its “maintenance, management and improvement” and that surpluses generated must be applied for these purposes pursuant to section 31. To the extent that BHIC undertakes other activities which do not relate to the harbour undertaking, then it is accepted that these will unaffected by the code set out in the Order.
2. It is also accepted that BHIC will have incidental powers to manage the SHA’s affairs which go beyond those expressly stated in the Order. However, these cannot extend to powers which would frustrate or risk frustrating or jeopardising the purposes of the Order. To suggest otherwise would raise fundamental questions about Parliament’s intent in enacting the Order in the first place.
3. It is immediately apparent from the welter of written evidence and corrected accounts, that the SHA sits within a web of companies which have been treated as a single entity by those controlling their financial reporting. It is equally apparent that the stipulations of the Order have not been foremost in the minds of those controlling these companies. The Defendant has been unable to produce a single Board resolution of the SHA which demonstrates that it has considered the implications of the Order in making substantial capital/cash sums available to BIL and/or BBS; nor are there any details of interest payments or repayment terms.
4. The Defendant asserted initially that these large balances were simply snapshots resulting from inter-company trading. However, this is disputed, certainly in relation to the nearly £500,000 owed by BIL. No invoices or trading records (for harbour related activities) have been produced by BHIC which could possibly support genuine transactional indebtedness of BIL or BBS to the SHA to the extent shown in the end of year accounts for 2019/20.
5. Moreover, it submitted that it is highly significant that, since these proceedings were commenced, BIL has now taken steps to liquidate some of its own assets to reduce its substantial borrowings from the SHA/BHIC[[17]](#footnote-17). It is further submitted that this represents a belated recognition that this state of affairs was outwith the terms of the Order and needed to be remedied.
6. It is agreed that for the financial year 2019/20, the SHA made a profit of £153,000. However, only £52,000 of this profit was applied to harbour works in accordance within section 31 of the Order. It is stated that the balance of £101,000 reduces BHIC’s “net current liabilities”[[18]](#footnote-18), which is not disputed. However, at the very same time, we know that the indebtedness of BIL and BBS to BHIC increased by £47,000[[19]](#footnote-19). This would not affect the apparent reduction in BHIC net current liabilities, but it is impossible to see why the deployment of BHIC’s funds in accordance with the Order would involve increasing the capital sums owed by BIL and BBS to BHIC.
7. Three matters flow directly from the above:
8. Why did the SHA not choose to spend more than £52,000 of its admitted surplus of £153,000 on harbour works in accordance with section 31 of the Order, especially when it was already mired in the MY Tangent litigation, which would result in substantial criticism of the discharge of its maintenance obligations by the High Court? There are no SHA Board minutes produced and there is no evidence as to how the decision was taken not to spend some or all of the balance of £101,000 in accordance with its statutory obligation pursuant to section 31.
9. What was the SHA doing in this very same time period increasing its exposure to BIL and BBS by £47,000, where there are no documents in evidence to explain the need or justification for this movement. NB. This increased loan to BIL and BBS would not affect its existence as a component of Mr Crook’s £101,000 reduction in the SHA’s “net current liabilities”, but these sums have certainly not been deployed in accordance with section 31.
10. We also note that the £101,000 was not deployed to pay down the SHA’s long term structural debt to Hawk, which remains at £1.2m[[20]](#footnote-20).
11. Additionally, and as foreshadowed above, the Claimant submits that the Order provides no mandate for the debts of third party companies to be secured against the assets of the harbour. Although this situation appears to have been has been ongoing for some time, it is plainly capable of being reviewed. Just as Mr Crook reports that BIL has, since this litigation was commenced, now liquidated an asset to reduce its indebtedness to the SHA, which the Claimant says was unlawful, so the affairs of this web of companies can and should be re-ordered so as to remove completely the risk to the SHA of providing security in respect of the borrowings of other companies with no statutory function to perform.

1. In summary, it appears to BHT that the Defendant is conflating the ordinary course of business dealings with its duty as a Statutory Harbour Authority pursuant to the Order. As such, it is submitted, that the SHA has been exposed to loans (and risks) which are not within the scope of the Order and, specifically, that the surplus revenues of the SHA have not been deployed in accordance with section 31 of the Order.
2. Relief
3. The Claimant is realistic and pragmatic about the relief which the Court can order. It seeks declaratory relief in the terms of the judgment which it hopes the Court will deliver, accepting its construction of the Order and the limitations upon the ability of the SHA to make the capital of the harbour undertaking available to others or to offer the assets of the harbour as security for the borrowing of private companies.
4. BHT has proposed to the Defendant that, if it were to offer undertakings as to the future conduct of the SHA, then it would not feel it necessary for this matter to proceed to trial. These undertakings are considered to be reasonable and proportionate and would assist in giving confidence to BHT that the future conduct of the SHA (as vested in BHIC) will be in accordance with the law. The Draft undertakings are set out in the Annex to this Skeleton Argument. If such undertakings are not forthcoming, then the Claimant will ask the Court to make an order in similar terms.
5. Conclusion
6. For the reasons set out above, the Claimant respectfully requests that the Court uphold Ground 7 of this claim (as amended by Order of the Court) and grants the relief sought.

**THOMAS HILL KC**

**ASHLEY PRATT**

**39 Essex Chambers**

**London WC2A 1DD**

**9 March 2023**

**ANNEX**

**(follows at pp.24-25)**

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS

BETWEEN:

THE KING

(on the application of)

BEMBRIDGE HARBOUR TRUST

Claimant

-and-

BEMBRIDGE HARBOUR IMPROVEMENTS COMPANY LTD

Defendant

-and-

BEMBRIDGE INVESTMENTS LIMITED

Interested Party

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

PROPOSED UNDERTAKINGS TO BE GIVEN BY THE DEFENDANT

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**1 All loans to other companies**

* Loans shall not be made by the Defendant except when clearly evidenced for the furtherance of the purposes of the harbour undertaking and only when such loans are made in accordance with section 31 of the 1963 Harbour Order.
* Where such a loan is made, a loan agreement, including statement of the purpose, security and repayment terms including interest at the market rate shall be put in place.

**2 Existing loans (as at March 2020) to other companies**

* Interest to be applied at market rate and collected by BHIC from the date of the loan to the date of the repayment. A schedule of interest is to be provided within 14 days of this undertaking.
* Any outstanding loans which are not for the purposes of the harbour undertaking will be repaid within a specified timetable.

**3 Loans from other companies**

* All future borrowings by BHIC to be for the purposes of the harbour undertaking only and in accordance section 31 of Harbour Order 1963.

**4 Risk of paper transactions**

* No accounting arrangements such as journal entries to be made that put a liability on BHIC, unless for an identified purposes directly related to performance of the undertaking.

**5 Future reporting**

* BHIC accounts to be prepared by accountants who are registered with and regulated by either the Institute of Chartered Accountants in England and Wales or the Association of Certified Chartered Accountants, in accordance with the appropriate financial reporting standard for BHIC at the time; this is currently Financial Reporting Standard 102, including the provisions of Section 1A “Small Entities”. Each set of annual accounts prepared should include:
	+ An accountants’ report, including a specific note confirming that BHIC has used all harbour incomes, revenues and loans, for the purposes of the harbour undertaking in compliance with Harbours Legislation (including Section 31 of the 1963 Order); and
	+ Related party disclosure, showing the individual entities, changes and balances with the direction (owed to or by BHIC) in each case.
* Details of any loans, borrowings, or paper transactions including their purpose, terms and duration, along with each annual accountants’ report, are to be placed on the Harbour website, consistent with the Ports Good Government Guidance 2018 (PGGG)

**6 Offering security to other companies**

* BHIC shall not offer security for other companies’ borrowings that are not for the purposes of the harbour undertaking.
* The debenture over BHIC and its assets shall be removed within a specified timetable.

**7 Costs**

To settle the costs incurred by the Claimant in bringing this claim (in accordance with Aarhus).

**[Draft 4th March 2023]**

1. A/183 [↑](#footnote-ref-1)
2. A/192 [↑](#footnote-ref-2)
3. A/192 [↑](#footnote-ref-3)
4. B/223, para.13 [↑](#footnote-ref-4)
5. B/561-563 [↑](#footnote-ref-5)
6. A/261, WS1, para.2 [↑](#footnote-ref-6)
7. The CIPFA website had no record of DC, so clarification on this point was sought directly from the D’s solicitors by letter in November 2021. This point was not answered. [↑](#footnote-ref-7)
8. See Bundle of Authorities [↑](#footnote-ref-8)
9. B/516 [↑](#footnote-ref-9)
10. The companies have common ultimate ownerships (which are also referred to a “related companies” or “companies under common ownership”) [↑](#footnote-ref-10)
11. DC1 [A/263, para.11(1) [↑](#footnote-ref-11)
12. DC1 [ A/264, para.12] [↑](#footnote-ref-12)
13. DC1 [A/265, para.17] [↑](#footnote-ref-13)
14. DC2 [A/270, para.13] [↑](#footnote-ref-14)
15. B371 [↑](#footnote-ref-15)
16. A/285-6 [↑](#footnote-ref-16)
17. A324, para.46 [↑](#footnote-ref-17)
18. A294, para.66 [↑](#footnote-ref-18)
19. A264, para.12, and this sum already factors in monies owed by BHIC to Hawk. [↑](#footnote-ref-19)
20. B371 [↑](#footnote-ref-20)