IN THE HIGH COURT OF JUSTICE C0/2272/2021

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

Mrs Justice Collins Rice

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS

BETWEEN:

THE KING

(on the application of

BEMBRIDGE HARBOUR TRUST)

Claimant/Appellant

-and-

BEMBRIDGE HARBOUR IMPROVEMENTS COMPANY LTD

Defendant/Respondent

-and-

BEMBRIDGE INVESTMENTS LIMITED

Interested Party

ADVICE ON MERITS OF AN APPEAL

Introduction

1. This advice concerns the potential grounds of appeal and the merits of the same following the decision of Mrs Justice Collins Rice reported at [2023] EWHC 1185 (Admin). It was circulated in draft for comment on 31st May, 2023.

2. Permission to appeal to the Court of Appeal will only be granted where:

   (a) the court considers that the appeal would have a real prospect of success; or

   (b) there is some other compelling reason for the appeal to be heard.

3. This advice is presented in two parts: the first part addresses the Judge's construction of the legal framework in respect of the Pier and Harbour Order (Bembridge Harbour) Confirmation Act 1963 (''the 1963 Act'') and specifically what the Judge describes as a ''*misconception''* as to how the statutory scheme operates (para 39 judgment), and the second part of this advice concerns the merits of the challenge (para 42 onwards).

4. Before we turn to matters of detail, it is perhaps useful to make some overarching observations on the judgment. In our view, this has been purposefully constructed in such a way as to minimize the prospects of a successful appeal to the Court of Appeal. The first part of judgment seeks to establish the existence of a statutory framework and process for the review of the merits of a harbour authority's actions in relation to its accounting practices and to restrict the role of the Court to one of supervising the lawfulness of that process once it has been engaged. The second part of the judgment seeks to highlight the evidential difficulties which the trial Judge suggests she has had in wrestling with the merits of the material before the Court.

5. The themes fixed upon in both parts of the judgment and mentioned in summary above will, of course, tend very much to dissuade all but the most intrepid Lord or Lady Justice of Appeal from opening the door to an appeal to the Court of Appeal. It will also be necessary for BHT to consider as an *alternative* response whether it should use the contents of the first part of the judgment to resume its campaign to provoke a DfT investigation of BHIC's accounting practices, by reformulating its complaint in the light of the material which has been newly disclosed during the litigation in the newly established context of the statutory code which the Judge sets out in the judgment. This *plainly and directly contradicts* the account given

by the DfT[1] of its own understanding of its powers when BHT first raised these matters in 2019 and the immediately preceding years, when it denied that the Minister had the power to undertake an audit of the statutory harbour authority, let alone "hold an inquiry in regard to the exercise of *any* powers or duties conferred or imposed upon him…." (para 21 judgment).

6. I would encourage BHT to give careful consideration to this option. Whilst I recognise that this account of the Minister's powers has come as something of a surprise and is completely inconsistent with the response which BHT has received from DfT over the years, it now stands as a clear statement of the law and the powers which the Minister wields. It is true that, so far as we are aware, these powers have only been exercised in the past in relation to the levying of harbour dues and rates, but that may be explained by the error which this judgment has revealed. The light now shone on the Department's erroneously narrow view can be viewed as a positive outcome for the members of the Bembridge community represented by BHT.

Part 1- the 1963 Act ''the misconception''

7. Para 39 of the judgment found that the terms of reference for judicial review were *''…something of a misconception as to how the statutory scheme operates''*.

8. In arriving at this conclusion, the Judge embarked upon her own extensive exploration of the legal framework underlying the statutory scheme.

9. The Court is, of course, at liberty to undertake whatever examination of the law it considers necessary in order to determine the dispute before it, but it is necessary to record that neither party had suggested in their written or oral submissions that the judicial review should not or could not proceed because the Secretary of State for Transport had not performed the function of inquisitor under s.32 or s.34 of the Order (bar a very short intervention by the judge acknowledging that she was

[1] See Letter from Nusrat Ghani, the then Minster for Transport, dated 8 May 2019

considering s.32 and s.34). In effect the Judge arrived at the conclusion that, whilst a decision of the Secretary of State could be the subject of judicial review, it was a ‘‘misconception’’ to proceed on the basis of a judicial review as against the SHA in these circumstances.

10. As noted above, BHT had previously written to the Secretary of State seeking a review of BHIC’s accounts, but the Secretary of State had refused to intervene. The Judge correctly points out that the decision of the Secretary of State was not challenged by judicial review nor was the Secretary of State made a party to the proceedings.

11. Whilst the Judge acknowledges (para 9 judgment) that permission for judicial review was granted by consent, there is no discussion as to what effect the consent might have on determining the claim i.e. BHIC knew that the Secretary of State had refused to intervene in reviewing their accounts, but they continued to proceed on the basis that they would be bound by the review under the terms of the permission to bring the claim, which were agreed by consent (as subsequently amended).

12. At para 10 of the judgment, the Judge acknowledges that *‘‘In giving permission on this ground, Lang J observed that ‘the Defendant does not concede that any breach of Article 31 (1) (sic) of the 1963 Order has occurred. It considers that its accounts have been misinterpreted, and wishes to address this matter in its Detailed Grounds. At this stage, the Defendant accepts that the point is arguable and that permission should be granted. Accordingly, I grant permission on Ground 7…’’.*

13. There was no mention of s.32 or s.34 of the Order at the permission stage and it is clear that BHIC was proceeding on the basis that the accounts could, as a matter of principle, be reviewed.

14. Thus, given that there was a Consent Order (and judgment in respect of the same) did the Judge correctly intervene in applying the terms of s.32 and s.34 of the Order?

15. In our view it was open to the Judge to conclude that the Secretary of State did have power to review the accounts in its supervisory function, even though this was not how the parties had approached the claim review or what the parties had consented to.

16. However, in consenting to the grant of permission, it was clear that BHIC wanted to defend its position in respect of its treatment of the accounts under s.31 of the Order in full knowledge that the Secretary of State had declined BHT's invitation to intervene in a review of the accounts.

17. The Court is usually reluctant to set aside the terms of a consent order unless there are grounds of fraud, mistake, misrepresentation or incapacity.

18. As set out above, none of these arguments was made before the court and in any event BHIC was fully aware of the fact that the Secretary of State had refused to intervene in respect of its s.32 and s.34 functions.

19. As such it is unclear on what basis the judge says she was able to embark on a freestanding judicial exploration of the sections of the Order, in circumstances where there had been a Consent Order and a judgment. None of the usual rules for setting aside the Consent Order were addressed by the parties and as such it is arguable that the judge went beyond the terms of reference provided in the judgment of Lang J: see *Purcell v FC Trigell Ltd (t/a Southern Window & General Cleaning Co)* [1971] 1 QB 358.

20. We also note that (at paragraph 40 of the judgment) the Court was of the view that whilst the Secretary of State would be equipped to review the accounts, the Court was of the view that it was *''... plainly ill-equipped to perform such a role itself''*. If the Court was of the view that it required additional assistance, then this was not made clear at either permission stage or prior to handing down the judgment; neither did the Court request that the Department for Transport be joined in the proceedings as *amicus curiae;* nor was this issue raised with the parties.

21. As such, for the reasons given, it is arguable that the judge went impermissibly beyond the terms of reference set by the Consent Orders and erected a bar to the Claim which frustrates the effect of the earlier Orders of the Court which set agreed parameters for the judicial review. At the very least, having reached such sweeping conclusions as to the statutory framework, the Judge should have given the parties the opportunity to make further submissions to address them - either orally or in writing.

22. It is necessary to add, however, that this is essentially a procedural rather than a substantive argument and the Court of Appeal is bound to be interested in whether, ultimately, the Judge was correct in her interpretation of the statutory framework. It seems to us that there are good reasons (in terms of carrying forward its campaign – and any future campaigns) why BHT might want to have this interpretation upheld rather than overturned.

23. It is important, in our view, that BHT understands that whilst this ground is arguable, without being provided with permission under Part 1, the Court of Appeal is unlikely to entertain any arguments under Part 2.

Part 2 – The Merits

Preamble

24. In addressing the merits of the claim, the Judge accorded BHIC considerable latitude and declined to accept the existence of any public law duties beyond those expressly set out in the Order and associated legislation. She approached the interpretation of the 2019/20 accounts very generously (from the perspective of BHIC) and found that leaving the £101,532 balance of the admitted section 31 surplus on the balance sheet as "a reduction in net current liabilities" did not contravene section 31. She did not investigate the evidence on loans to third party companies such as BIL; nor did she address the issue of providing security for the loans of BIL against the assets of the harbour as represented by BHIC, notwithstanding that the latter is *expressly* identified as in the "agreed list of

issues" at paragraph 12 of the judgment. The latter failings may be regarded as a reflection of her conclusions in Part 1 of the judgment and her clearly expressed lack of enthusiasm for grappling with the detailed evidence in Part 2, as foreshadowed in paragraph 41. We have to acknowledge that the Court of Appeal will be bound to have sympathy with the trial Judge's expressly stated views that the Administrative Court is an imperfect forum for resolving forensic accounting disputes. However, we consider that she has fallen into error in a number of respects.

25. The draft judgment circulated confidentially to Counsel before hand down contained a substantially different paragraph 48 from that contained in the final judgment. In the draft judgment, the judge had proceeded on the incorrect basis that the initial £1.2m loan was being used to fund (as 'a pump-priming loan') the harbours' repair and maintenance needs, and that the loan would put the harbour on a sound financial footing. This was a complete misconception and one which BHIC's Counsel swiftly sought to put right, although the Judge offered only the briefest opportunity for BHT to address the implications of this error and its correction, notwithstanding that its Leading and Junior Counsel were unavailable on the afternoon when this matter arose.

26. The final version of paragraph 48 of the judgment omitted the reference to the £1.2m loan and instead stated that the harbour required further funding as there had been "substantial under investment in the previous years". In our view it is arguable that Judge has gone beyond correcting the judgment and instead amended the judgment beyond what is permissible in allowing corrections/amendments to errors. (see PD 40 E para 3.1- corrections). The draft judgment is handed down for corrections of errors only (see, *Counsel General v BEIS (No.2)* [2022] EWCA Civ 181.

27. The £1.2m loan, as was set out in the evidence, was provided immediately back to the bank (Handlesbanken) which produced a negative on the balance sheet. BHIC were then left having to pay circa £80,000 per annum in interest on the loan. This was not reflected in the judgment.

28. The basis of the judicial review was that loans were being made to third party companies out of BHIC's revenue, when that money could have been used to fund expenditure in accordance with s.31. This *potentiall*y included BHIC being able to use excess revenues to repay the £1.2 million loan (thereby reducing the interest burden and allowing profits to increase) as opposed to making loans to companies that were not connected to BHIC for the purposes of s.31. However, there is no evidence that this was ever done during the period which was the subject of the claim.

29. Notwithstanding the last-minute amendment to paragraph 48, paragraph 55 continues to refer to reducing "historic indebtedness…. including indebtedness to its parent company…. " as one of the destinations for the £100,000 *not* spent in 2019/20 on the maintenance of the harbour in accordance with section 31. As noted above, there was no evidence of the paying down of any historic indebtedness in the years which were the subject of the claim.

30. Paragraph 66 of the judgment also states that *''…I cannot see why paying down historic indebtedness and losses, if incurred by and for the purposes of 'the entire undertaking in the Company in connection with the harbour' (s.3) is not money expended or applied 'in the working, management and maintenance of the undertaking'. It is, indeed, hard to see how the for-profit model… would work otherwise'*. As the Claimant set out in its written and oral submissions, particularly with regard to BIL (a land investment company), loaning sums to a land investment company as opposed to acting in accordance with s.31 is *ultra vires* as BIL is not 'connected' with BHIC other than for the fact that it has the same directors. However, the Judge took a very broad view of BHIC's powers under s.31(2), even though this flies in the face of the express words of s.31(1).

31. Therefore, bringing the above points together it appears to us that it is at least arguable that the judge proceeded on an incorrect basis that [i] there had initially been a £1.2m investment 'a pump priming loan', as per the draft judgment [ii] failed to appreciate that there was an £80,000 per annum interest payment on the loan, which detrimentally affected the financial footing of BHIC and had never

been paid down; [iii] found that there was a connection between BIL and BHIC when there clearly wasn't for the purposes of s.31 and [iv] failed to grapple with the existence (and size) of the loan to BIL, which plainly went beyond an inter-company trading balance.

32. As such, it appears that the Judge arguably fell into error in that (as per paragraphs 55 and 66 of the judgment) she found that there was no issue with paying down historical indebtedness in circumstances where the companies were connected with the harbour. As set out above, it was not accepted that BIL was "connected with" BHIC and this finding also appears to ignore Mr Southall's expert evidence that in fact the monies were owed to BHIC and were loans to BIL and not repayments of historic indebtedness. Indeed, as already noted, the inter-company loans position was expressly in evidence before the Court, but is unreferenced in the judgment, as is the payment of interest and the security issue.

33. The Judge found that BHIC, as part of the judicial review process, had a duty of candour, but failed to record that BHT's case was, as per Mr Southall's evidence, that, far from complying with this duty, BHIC was providing loans to third party companies that were not concerned with the performance of the SHA's functions. The whole point of the review was that the accounts did not show candour and BHT had to go to considerable effort and expense to obtain partial disclosure of BHIC's finances.

34. In our view it is arguable that the Judge did have the necessary evidence to make findings on the matters referenced above, including the giving of security for third party company's loans, but that the evidence was almost entirely ignored or by-passed and that the disputes are unresolved by the judgment. For the purposes of appeal, however, addressing these deficiencies would require BHT to plead some very detailed grounds of appeal and to seek to penetrate once again deep into disputed forensic accounting territory. This is an exercise which the trial Judge eschewed and it seems highly likely to us that the Court of Appeal will seek to take similar evasive action, relying upon the role of the Minister in so doing.

Conclusions

35. The judgment in this case is plainly highly unsatisfactory to BHT in the context of its overarching objective of protecting Bembridge Harbour through these proceedings. We consider that there are arguable grounds for appeal in respect of both Parts of the judgment, but we cannot hold out strong prospects of success for an application for permission to appeal or indeed the substantive appeal if permission is granted. We consider that the Court of Appeal will be attracted by the Judge's analysis in Part 1 of the judgment and reluctant to plunge into the issues required to be determined in order to overturn Part 2 (the merits).

36. We also consider that the first Part of the judgment represents a positive step for concerned members of the Bembridge community represented by BHT in the context of its separate long-running engagement with DfT. We would advise that every opportunity be taken to capitalise on this aspect of the judgment. This would potentially relate to a range of matters (going well beyond the narrow confines of this claim for judicial review) where the Court has concluded that the Minister for Transport was intended by the statutory scheme to have a supervisory role.

8th June, 2023

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