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Case No: CO/2272/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2023

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

Between :

THE KING
on the application of
BEMBRIDGE HARBOUR TRUST

Claimant

- and -

BEMBRIDGE HARBOUR IMPROVEMENT COMPANY LTD

Defendant

BEMBRIDGE INVESTMENTS LIMITED

Interested Party

Mr Thomas Hill KC & Mr Ashley Pratt (instructed by Setfords Law) for the **Claimant**
Mr Jonathan Lopian (instructed by Graham Gover Solicitors) for the **Defendant**

Hearing date: 23rd March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 18 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Collins Rice:

Background

1. Bembridge Harbour is a picturesque location on the eastern shore of the Isle of Wight, within a Site of Special Scientific Interest. As well as berthing facilities and sailing activities in the harbour itself, there are sandy beaches, historical sites, wildlife and walks to enjoy in the area.
2. The harbour itself is owned by the Bembridge Harbour Improvements Company Ltd ('BHIC'), currently under the directorship of Malcolm and Fiona Thorpe. It was vested in BHIC in 1963 by an Act of Parliament, which confers on BHIC a range of statutory powers and duties enabling it to act as a Statutory Harbour Authority (SHA), managing and running the harbour. BHIC had been incorporated shortly beforehand, in order to take on the functions of a SHA. But it is a private company with public statutory functions; it is not itself a creature of statute.
3. BHIC's history as a SHA has not been all plain sailing. It went into administration in 2011, under a previous parent company, and a rescue package had to be put together, involving a substantial bank loan. The parent company's holding of BHIC shares was taken over by a new parent company (also owned by the Thorpes), Hawk Property Development Company Limited ('Hawk'), and its principal assets, including real estate around the harbour, by a company called Bembridge Investments Ltd ('BIL', itself also under the Hawk parent company umbrella).
4. At that time, another body had made an unsuccessful bid to take over the harbour, in what had been a public tender process. This was the Bembridge Harbour Trust (BHT), a registered charity established in 2007 with the purpose of preserving and enhancing Bembridge Harbour and its setting for the benefit of the public, including local communities, visitors and harbour users.
5. Relations between BHIC (the Thorpes) and BHT were, and are, mistrustful and antagonistic. It is put succinctly this way, in the skeleton arguments of, respectively, Mr Hill KC, Counsel for BHT, the claimant in these proceedings, and Mr Lopian, Counsel for BHIC, the defendant.

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.

BHT was outbid by Hawk in November 2011, when BHIC's administrators invited tender offers for the business. Since 2016, it has engaged in a series of campaigns against BHIC (and BIL)

and its management by Mr and Mrs Thorpe, spearheaded by Mr Gully who became chairman of BHT's board of trustees in December 2015. This claim is only the latest in a long list of challenges against BHIC by BHT and Mr Gully. It is almost as if they are engaged in some sort of vendetta against BHIC and its owners ... for having acquired the harbour, even though under its new owners BHIC has been turned into a profitable and financially secure business to the benefit of the harbour and its users...

6. The past couple of years have indeed seen legal challenges to BHIC's stewardship of the harbour. Judgment was handed down in April 2021 in the case of *Robertson & Greenwood v Bembridge Harbour Improvements Ltd [2021] EWHC 1025 (Comm)*. A claim had been brought by the owners of a yacht, the MY *Tangent*, moored in the harbour, for loss of the vessel, claiming breach of BHIC's contractual obligations arising from inadequate maintenance of the harbour. The judge was critical of the SHA, holding it to have failed to take reasonable steps to maintain the marina, and noting it had failed to keep proper maintenance records and provided only 'very vague' witness evidence of its maintenance history.
7. There have also been planning disputes. A judicial review challenge by BHT to a planning decision in 2021 did not, however, get beyond the permission stages.

The present proceedings

8. The present judicial review proceedings were launched by BHT in 2021 with a principal focus on planning issues. Permission was refused on all five planning related grounds in October 2021. Permission was also refused on a sixth ground relating to alleged breach of statutory duties to address the findings in the *Tangent* judgment.
9. Permission was, however, granted on a seventh ground, by consent. This relates to the SHA's filing, on 25th May 2021, of its accounts for the year 2019/20. The ground sets out that:

By making substantial loan payments to BIL and BBS [Bembridge Boat Storage Ltd – another Hawk company], the SHA is in breach of its duty under Article 31(1), which requires any monies received by the SHA which exceeds the expenses of the undertaking to be applied '*in or towards the dredging of the harbour or the renewal, construction or improvement of any of the works*'.

10. In giving permission on this ground, Lang J observed that '*The Defendant does not concede that any breach of Article 31(1) 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...*'.

11. This ground was subsequently amended by a consent order in March 2022 to add the following:

Further or alternatively, the payment of these sums to BIL and BBS and/or the decision to increase the sums loaned to BIL and BBS during the financial year 2019-2020 by in excess of £210,000 rather than prioritising the needs of the harbour is contrary to the underlying statutory purpose of the 1963 Order to maintain and manage the harbour in the public interest and is therefore ultra vires the SHA's powers under the 1963 Order.

12. There is an agreed list of issues arising in these proceedings, as follows:

Did the defendant act in breach of its duties pursuant to article 31(1) of the order?

Did the defendant act ultra vires and unlawfully in making funds available to other companies to the extent revealed in the claim?

Did the defendant act ultra vires and unlawfully in providing security for other companies?

If the defendant did act ultra vires and unlawfully, what is the appropriate relief?

Legal framework: the 1963 Act

13. BHIC is amenable to judicial review not as a public body, but as a private company on which public functions have been conferred by statute. The proper discharge of those functions comes within the supervisory jurisdiction of a reviewing court, in accordance with ordinary public law principles.
14. Determining the nature and extent of those public functions, and of the reviewing court's role, is a matter of statutory interpretation, to be approached in the usual way by considering the relevant statute as a whole and in context.
15. The Pier and Harbour Order (Bembridge Harbour) Confirmation Act 1963 ('the 1963 Act') was a private (local) Act of Parliament. It confirmed, and thus gave legal force to, a 'provisional order' ('the Order') made by the Minister of Transport under the General Pier and Harbour Act 1861. This Order is set out in the schedule to the 1963 Act.
16. The Order recites that it provides for vesting Bembridge Harbour in BHIC, and conferring associated powers on BHIC with reference to that vesting, to the maintenance, management and improvement of the harbour, and for other purposes.
17. Beyond vesting, the specific powers conferred by the Act cover activities such as maintenance and improvement works to the harbour, dredging and sale of minerals,

disposal of wrecks, and retention and disposal of land. Powers are conferred to levy rates, charge for moorings, and make bylaws. There are also powers to sell and lease the undertaking. The exercise of these powers is in a range of specified respects made subject to ministerial oversight functions.

18. The Order then makes provision of particular relevance to the present proceedings as follows:

Application of surplus revenue

31.- (1) If in respect of any 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 money 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.

‘The undertaking’ is defined in section 3 of the Order. It *‘means and includes as the case may require the harbour or the entire undertaking of the Company in connection with the harbour’*. ‘The Company’ is of course BHIC.

19. The Order continues as follows:

Annual accounts to be sent to Minister

32.- (1) The Company shall within six months after the date to which their annual accounts and balance sheet are made up send a copy of the same to the Minister, and section 16 of the General Pier and Harbour Act 1861 Amendment Act shall apply to and include the Company and any and every such accounts.

(2) The Company shall as from the expiration of that period be liable to a fine not exceeding twenty pounds for every refusal or neglect to comply with the foregoing provisions.

20. The reference to the Amendment Act is a reference to an Act of that name of 1862. Section 16 makes provision as follows:

As to audit of account on complaint to Board of Trade

If, on complaint in writing by any person interested, it appear to the Board of Trade that there is reasonable ground for believing that such last-mentioned account has not been duly kept, or that any rates have been improperly or unfairly levied by the company, or have not been applied in accordance with the order, then the following provisions shall take effect:

(1) The Board of Trade may appoint an auditor to audit and examine such account, and inquire into the matters complained of, and report to the Board of Trade on such account and matters.

(2) The company shall on demand produce to such auditor all or any of their accounts, books, deeds, papers, writings, and documents, and afford to him all reasonable facilities for examining and comparing the same.

(3) In case any such complaint be found to be true, the reasonable expenses of the auditor shall be paid to the Board of Trade by the company.

(4) In case any such complaint be not found to be true, the reasonable expenses of the auditor shall be paid to the Board of Trade by the complainant.

(5) In either case, such expenses shall be a debt due to the Crown from the company or from the complainant (as the case may be), and shall be recoverable as such, with costs; or the same may be recovered with costs as a penalty is recoverable from the company, or from any person liable to a penalty under the provisional order (as the case may be).

It is common ground that the relevant functions of the Board of Trade have since devolved onto the Secretary of State for Transport.

21. The Order makes further general provision in relation to ministerial functions:

Inquiries by Minister

34.- The minister may cause to be held any such inquiry as he may consider necessary in regard to the exercise of any powers or duties conferred or imposed upon him and the giving of any consent or approval or the making of any order or the confirmation of any byelaw under this Order...

22. The statutory scheme therefore confers a range of functions – powers and duties – on BHIC as SHA. It also specifies a range of ministerial functions with a bearing on the exercise by BHIC of its own statutory functions.

Analysis

(a) Preliminary

23. The ground on which permission for judicial review was originally given in this case focuses on an allegation of breach of statutory duty, or acting ultra vires, based on failure to comply with the terms of s.31 of the statutory scheme. The subsequent expansion of the scope of the challenge brings within its purview not only the precise wording of s.31 but a more general issue about the nature of the SHA functions. It asserts an ‘*underlying statutory purpose of the 1963 Order to maintain and manage the harbour in the public interest*’. That is a proposition which requires further exploration.
24. More generally, this challenge raises some significant, and interconnected, structural issues. The first is the need to identify what role, precisely, is envisaged for a reviewing court within the relevant statutory scheme. The second is closely related. Although framed in the familiar public law terms of breach of statutory duty and ultra vires, this challenge does not proceed on any consensus as to what the relevant factual matrix is, to which the scheme falls to be applied. On the contrary, it turns out to reveal a fundamental factual disagreement about what relevant financial transactions BHIC has actually made and how they should correctly be characterised and understood from an accounting viewpoint.
25. The principal evidence on which the challengers rely is the company’s published accounts for the financial year 2019/20, on the basis that they reveal a profit (or ‘excess’) for that year, which consequently engages s.31, and that that profit has not been applied as required by that section. But there is a dispute about how to read those accounts. The hearing before me was substantially preoccupied with something of an attempted exercise in forensic accountancy, with rival historical and factual narratives put forward ‘explaining’ the accounts and the true nature of the transactions underlying them. No oral evidence, expert or otherwise, was put forward. It was an unusual exercise with which to expect judicial review proceedings to engage on any basis, and there is a question about the proper approach of a reviewing court to it.
26. A third issue is that the factual challenge has been made on what appears to be a somewhat evolutionary basis. In the first place, it was proposed that the accounts reveal on their face substantial ‘loans’ and securities provided by BHIC to its associated companies – loans and securities it is said to have had no right or power to give consistently with its statutory functions. But BHIC explains the accounts differently. Then it was said that that explanation is insufficient, or indeed evasive. There is, in other words, some flavour of an accusation of bad faith in the challenge as it developed. To that extent, there would be a high evidential bar for any litigant to clear in making good such an accusation, and it would have to be tackled explicitly and directly. Judicial review proceedings, moreover, are conducted in the expectation that a defendant has complied with its duty of candour to a court, subject to a basis for the contrary appearing.
27. In all these circumstances, it has been necessary to return to some extent to first principles, and locate this unusual public law challenge carefully within its proper legal framework.

(b) The statutory scheme and the role of a court of review

28. Working out the proper role of a reviewing court in these judicial review proceedings requires looking at the scheme of the 1963 Act as a whole.
29. The single most significant and obvious feature of this statutory landscape, from a public law perspective, is the balance Parliament has struck between the roles of the executive and the courts in supervising the discharge by the SHA of its public functions. Of course, the Act is a piece of law and as such a court of review will always be the ultimate arbiter of compliance with it. But this particular Act does not only confer functions on the SHA, it also confers *complementary* functions on the minister. These sets of complementary functions have to be considered together to get the complete picture. And their complementarity must be respected by a court of review, as expressing Parliament's intention about how the public interest in securing compliance with the scheme is to be served.
30. The entire origin and purpose of the 1963 Act lies in Parliamentary confirmation of a ministerial draft or 'provisional order' (*'which is not of any validity or force whatever'*), thereby giving legal effect to it. That Order was itself prepared in the exercise of ministerial powers and reserves significant oversight and intervention functions to the minister in relation to the SHA functions. That is a theme threaded throughout the fabric of the scheme.
31. For example, the geographical extent of the harbour for the purposes of the Act is controlled by the minister (section 7). The important powers of the SHA to charge (or 'levy rates') are made subject to ministerial approval (section 13, section 15). The SHA's functions in relation to wrecks are subject to detailed Ministerial consent provisions (section 20). SHA powers to dredge and sell minerals are subject to Crown rights and a degree of ministerial regulation (section 23 and section 46). The quasi local authority functions of making bylaws include a ministerial function as 'confirming authority' (section 24). SHA powers to sell and lease the undertaking are subject to ministerial oversight (sections 29 and 30). The installation of cables, pipes and wires is made subject to a degree of ministerial specification (section 35). The minister has a default function of appointing an arbitrator in relevant disputes (section 39). And, significantly, there is a long-stop provision in section 42 *'if the Company fail to maintain the undertaking to the satisfaction of the Minister'* for the harbour to be transferred to the local authority. So the general maintenance of the undertaking 'to the satisfaction of the Minister' itself appears as a part of the pattern of the scheme.
32. Reading the Act as whole, then, the scheme provides for SHA functions to be discharged subject to a significant, and particularised, degree of ministerial engagement, oversight and control – both on a function-by-function basis and more generally. That degree of ministerial engagement with the detail of the discharge of public functions has implications for decision-making (in which the SHA and the minister must play their respective parts as indicated), for public accountability and for the role of a reviewing court.
33. Where, on a proper analysis, the scheme puts the minister in a functional position of inquiring into, superintending, or having to be satisfied with, the discharge of the SHA's functions, then that is the primary means determined by Parliament for holding BHIC to account. Where that is the minister's appointed function, a court of review in judicial review proceedings will hold the minister to account for performance of that role, but

will not itself oust the ministerial function and attempt to discharge it itself, since that is not what Parliament has provided for.

34. All of this is important context for reading and understanding not only s.31 but the ministerial functions provided for in s.32 and s.34.
35. Section 32 imposes a duty on BHIC to send its annual accounts to the minister, and hence confers a complementary ministerial function of receiving those accounts. That sits over and above its ordinary company law accounting duties and, of course, enables the minister to ensure in the first place simply that accounts are properly produced at all – that is, that the SHA is demonstrably in control of the detail of its finances. But it is also part of the backdrop to the particular ministerial function referenced within s.32 itself of directing an audit in response to individual complaints. The complementary functions of sending and receiving the accounts do not, however, depend on the individual complaints function actually having been engaged; they are standing annual functions. So the juxtaposition of the substantive accounting and financial obligations imposed on the SHA by s.31 in relation to the application of funds, and the immediately following functions of sending and receiving accounts, is a pointer to considering the relationship between the two, and the nature and purpose of this particular ministerial function.
36. Sections 31 and 32, read together, make a connection between on the one hand the duty of the SHA to *apply* its ‘excess’ (as statutorily defined by reference to accounting principles and concepts) in a specified way, and on the other hand a ministerial function of receiving the relevant accounts. It makes a further connection with the ministerial function in relation to the examination of accounts by appointing an auditor where there is a complaint about the accounts or about the *application* of revenue. And the minister has an ancillary power under s.34 to cause to be held *any* necessary inquiry in regard to the exercise of any or all of these functions. This cluster of ministerial functions around receiving, considering and causing inquiry into BHIC’s accounts is a deliberate and specific form of statutory public accountability for the discharge by BHIC of its statutory financial functions, including its duties to apply excess revenue as specified. These sections, together, put the minister in a fully equipped position to perform an assurance role in relation to compliance with the provisions of s.31.
37. If Parliament intended to place primary responsibility for looking at the accounts, and being satisfied of the SHA’s compliance with its special statutory financial duties, on a minister, as a critical audit exercise, then that would be an entirely unsurprising and pragmatic solution, and of a piece with the ministerial functions threaded throughout the Act. Investigating compliance with s.31 is essentially a two-stage exercise. First, it requires identification of and comparison between the ‘revenue’ and the ‘expenses’ of the undertaking to see whether there is an available ‘excess’ – in other words, an exercise beginning with analysing the profit and loss account. Then it requires identification of how any excess had been ‘applied’, and specifically whether it has been applied *in or towards the dredging of the harbour or the renewal, construction or improvement of any of the works*. Both of these are factual issues which can be investigated by inquiry into the accounts with, if appropriate, the assistance of an auditor. Of course, the meaning of the words defining an ‘excess’, and limiting the objects of the ‘application’ of any excess, is a matter of statutory interpretation – a question of law. But if a dispute of law genuinely did arise as to the meaning of the statutory language, it could then straightforwardly be resolved by a court on the basis

of the facts as established as to how the excess had been applied in practice; the court could then consider if necessary whether that fell within the statutory terms or not.

38. In the present case, however, the focus of the challenge is principally on the prior question – how the excess has *in fact* been ‘applied’. I am told BHT did make an approach to the Department for Transport to complain about the 2019/20 accounts and to ask it to appoint an auditor to look into the factual matters raised in these judicial review proceedings, but that it declined to do so. That is a decision which is itself no doubt *in principle* amenable to judicial review. But the Department/minister is not a party to, nor is any challenge made to it in, the present proceedings.
39. It seems to me that in all these circumstances this challenge proceeds on something of a misconception as to how the statutory scheme operates. On the assumption (but without needing to determine the point) that BHT is a person properly interested in the discharge of the SHA’s statutory financial duties, then the scheme envisages that it is open to it to complain to the minister on the basis of such evidence as there may be, including BHIC’s accounts, that there are reasonable grounds to believe there has been a failure to comply with those duties or to account properly for their compliance. The minister has discretionary powers to make further inquiry and to appoint an auditor to investigate if appropriate. If the minister concludes there is no sufficient case for further inquiry or appointing an auditor, that provides public assurance as to the discharge by the SHA of its statutory financial functions. It is a decision in principle subject to judicial review, but otherwise determinative: the power given by Parliament to the minister to take further action includes a power to decide not to do so, and these powers must of course be exercised for the purposes for which they were conferred. If the minister does take further action, and breach of statutory duty by the SHA is or may be indicated, then remedies (including declaratory) and/or legal consequences may duly flow from that. Either way, any court subsequently reviewing the matter or considering points of law arising would do so on the basis of being suitably informed as to the underlying factual matrix, and the perspective of the minister.
40. But the scheme does not, in my view, envisage placing a court of review in the position of effectively having to audit the SHA’s accounts itself in order to establish the relevant facts – including in circumstances where the minister has declined to do so. The minister is in the role of primary inquisitor and decision-maker here and is statutorily equipped with the necessary inquisitorial powers and expert assistance should they be thought necessary. A court can review the exercise (or non-exercise) of the minister’s role, but is itself plainly ill-equipped to perform such a role itself. For the reasons set out above, I do not consider it to be envisaged by the scheme as doing so.
41. To the degree that the public interest is engaged by this challenge, I have, to the extent set out below, endeavoured nevertheless to consider the merits of this challenge as it was put. If limitations on the extent to which that has been possible appear, then that is illustrative of the force of the conclusions I have reached on this initial question of how the statutory scheme is intended to work.

(c) The factual dispute and the evidence

42. BHT’s challenge proceeds on the factual premise that BHIC used its profit in 2019/20 not (exclusively) for the statutory purposes including those indicated by s.31, but to make loans to and provide security for the borrowing of its associated companies, for

purposes which were not the statutory purposes but were instead those of the unrelated private financial interests of those companies and of the Thorpes.

43. Its principal evidence for that is BHIC's 2019/20 accounts, specifically its profit and loss account for the year and its end-year balance sheet. There is no dispute that in 2019/20 BHIC's revenue exceeded its expenses by £153,942. That is what its profit and loss account for the year ending 31st March 2020 says. Nor is there any dispute that it was accordingly in surplus or 'excess' for the year within the meaning of s.31.
44. Of that profit figure, it is not disputed that £52,410 (net of depreciation) was accounted for in-year by BHIC in buying new equipment for use within the harbour – including a new dredger, a wi-fi system, and a water taxi – and in refurbishing the visitors' lavatory block. I can see that figure reflected in BHIC's balance sheet as at 31st March 2020 in an increase in BHIC's 'tangible assets'. There is no dispute that this money was properly 'applied' within the terms of s.31.
45. The factual dispute revolves around how the balance, a figure of £101,532, has been 'applied'. BHT says it has gone on *making substantial loans, and providing security for loans, to companies, especially BIL, whose only connection with the SHA is that they have common Directors and shareholders – the Thorpes – via parent company Hawk*. It points to recent steps taken by BIL *since these proceedings have been commenced*, including the sale of land, said to be evidence of addressing an admitted substantial indebtedness to BHIC. It says that no interest has ever been received by BHIC for these loans for the benefit of the SHA. It says that SHA property has been used as security for loans taken out by BIL, thereby putting the SHA's assets at risk – the same kind of thing that previously precipitated the company going into administration. It says that whatever BHIC is able to do qua private company, it has no powers qua SHA to make such loans and offer such securities. In doing so it has acted ultra vires, and breached its statutory duties. It has put private interest above its duties to the public interest. BHT says the company's accounts are a *'smoke and mirrors exercise by accountants'* to mask the true destination of these funds.
46. These are BHT's submissions. The evidence relied on in support of them, and of the 'loans' premise in particular, begins with BHT's own reading of BHIC's accounts for 2019/20. It is said they show a transfer or flow of funds from BHIC to those companies which is not otherwise explained, for example by invoices or board decisions. We spent a lot of time at the hearing on the question of what the accounts for that year reveal on their face. So that is where I begin.

(i) *BHIC's 2019/20 accounts*

47. I can see from the balance sheet as at 31st March 2020 that the disputed £101,532 – the difference between the profit for the year of £153,942 and the £52,410 uncontroversially spent on equipment – is accounted for as a reduction in the company's 'net current liabilities'.
48. As set out in BHIC's evidence, the explanation for this is as follows. When Hawk first took on the harbour, it was loss-making because of substantial under-investment in previous years. Investment was judged necessary, to make major equipment purchases and help meet the cost of dredging and mooring in the financial years 2012/13 – 2014/15, with a view to longer-term profitability. These expenses were funded at the

time out of BHIC's revenue and by incurring short-term debt. That meant that in those financial years the harbour continued to run at an annual loss, and BHIC's net current liabilities – the amount of additional debt it incurred in-year – climbed. The corner was turned in 2015/16. That was when BHIC started to make a profit. It also started paying down its net current liabilities – the year-to-year balance of (total new) debt incurred over and above its (total increased) assets.

49. The 31st March 2020 balance sheet, however, is a snapshot. Its arithmetic shows a difference between the picture on that date and the picture on the same date the previous year. Those differences, on each line, do not represent the transfer of discrete sums of money in one direction or the other. The figures for total creditors (liabilities), debtors and cash (assets) reflect hundreds of in-year transactions, and they can and do fluctuate on a daily basis. Holding that in mind, the 31st March 2020 balance sheet shows an increase from the previous year's sheet in the total indebtedness of all the related companies to BHIC of £47,093 – that is, a net change in the overall inter-company debt/credit balance in BHIC's favour. But, BHIC explains, that figure is not about 'loans' or discrete sums of money transferred: it represents a snapshot on that particular day of the balance of the flows of money between the relevant companies – companies in a close commercial relationship all of which are contributing to the business of the harbour (and its profits and losses) in ways which have to be accounted for in money terms as between them.
50. BHIC provides further evidence to explain the balances as between itself and each of its related companies. It sets out how, as between BHIC and BBS, the closing balance stood in favour of BHIC but in the previous and subsequent years there was an equivalent or larger balance in favour of BBS. It sets out the detail of the property transactions made by BIL (the landowning entity in the cluster) to improve its own balance sheet and liquidity, and to make substantial improvements to its total holding of net assets which it could make available for harbour purposes.
51. In all these circumstances, accounting for the disputed £101,532 as a reduction to the 'net current liabilities' figure means, according to BHIC, that its accounts reflect a continuing diminution of its cumulated historical indebtedness, including but not limited to its indebtedness to its parent and partner companies. It represents its continuing success in investing and trading its way out of its inherited financial predicament. That narrative, it says, is entirely able to be reconciled with the balance-sheet fluctuations in BHIC's inter-company indebtedness because two completely different propositions are involved. The former explains a year-on-year increase in the company's overall worth – an improving gap between its assets and its liabilities; the latter is a snapshot of the company's cumulative end-year balances. That is all there is to say; no gap is left to be filled with other explanations.
52. So, says BHIC, the challenge made in these judicial review proceedings is entirely misconceived in its understanding of the facts and its reading of the accounts. No 'loans' have been made by BHIC to its related companies. BHT has misread a snapshot inter-company balance which, on that date in that year, happened to be in BHIC's favour although in other years it was not.
53. Importantly, says BHIC, in so far as this challenge goes beyond seeking to impugn *how* it accounted for its 'excess' in 2019/20 and seeks to impugn *why* it did so, then the explanation is also to be found in the imperative of overall improvement of its financial

stability. BHT says the balance of the ‘excess’ could and should have been spent on acquiring more equipment for the harbour, or on providing more dredging and other maintenance services. But, says BHIC, if it had done the latter it would have suffered a loss on its profit and loss accounts, and if it had done either that would have had to result in an increase, pound for pound, in its net current liabilities. Those have to be met sooner or later, if not from in-year profits then from future profits. BHIC’s net current assets (debtors plus cash) have always been less than its net current liabilities (its short-term creditors). If it does not service and reduce the latter, it risks losing the funds it needs on its balance sheet to spend on the harbour, the weakening of its business model, and its inability to discharge its SHA functions.

(ii) *Consideration*

54. BHIC says on this basis that the 2019/20 accounts by themselves reveal no irregularity – and no ‘loans’. They do reveal flows of debts and credit within the family of companies, all of whom are making contributions to the discharge of the SHA’s functions. That reflects that BHIC and BBS are in a straightforward trading relationship, and that BIL provides real-estate facilities to BHIC, BHIC in turn providing liquidity or security as necessary to support BIL’s investment finances without, says BHIC, any question of putting its assets at ‘risk’ thereby. And, importantly, the historical and longitudinal context is essential for a fair reading and understanding of the accounts in any event. There are very substantial limits on what can be understood by looking at one year’s accounts in isolation.
55. So far as they go, I can see nothing on the face of BHIC’s 2019/20 accounts to contradict its proffered narrative that that year’s surplus (the profit balance of turnover or ‘revenue’ minus expenses) was one-third spent on (invested in) new assets and the rest accounted for to reduce its historic indebtedness, including, but not confined to, its indebtedness to its parent company and its other associated companies. It had in effect been subsidised in the past and needed sooner or later to redress that imbalance.
56. I can see nothing either in the accounts or in the simple facts of the inter-company structure itself to cast doubt on that explanation or raise suspicion about the accounts. The structural rationale provided appears straightforward enough. The business model Hawk set up for running the harbour includes, but is not confined to, the delivery of the *specific* statutory functions. Its statutory functions are themselves predicated on being delivered by a for-profit company dependent on maintaining sound finances by its own commercial endeavours. The business model has BHIC responsible for managing the overall SHA function; BIL an investment company providing land, including offices and facilities to BHIC the value of which has to be accounted for; and BBS providing dry land storage facilities and maintenance services for customers’ boats, including providing engineering and maintenance services for BHIC’s own boats, water-taxis and dredger, for which it charges. This is not on its face a surprising business model.
57. It is inherent in a business model of this sort that each company’s annual accounts, including its end-year balance-sheet, will reflect its trading and other financial interdependencies in relation to the other companies. A single year’s accounts cannot be understood in isolation; in the context of a history of taking on an enterprise from administration, and incurring initial expenses and losses with a view to turning it around, BHIC’s explanation of its profits in 2019/20 having been applied to bring down

its accumulated indebtedness, including to other associated companies, gives no obvious ground for concern.

58. But BHT remains dissatisfied and wary. It says BHIC's 'net current liabilities' explanation is not enough to explain what has happened to the disputed hundred thousand pounds of surplus; it is a compendious term which potentially contains or reflects a lot of variables. It needs to be unpacked to see whether it is properly s.31 compliant. There may be hidden inter-company benefits here, including loans and underlying debt/credit imbalances, which are contrary to the public interest – or at least unknown unknowns. They suspect all is not as it should be.
59. BHT, in other words, wants more interrogation of these accounts and disputes the transparency, or indeed veracity, of BHIC's explanation. But if there are substrata of hidden loans, cross-subsidies and profiteering to be unearthed from the accounts, I was not placed in a position or given the necessary equipment to do so. The issue is unlikely to be determinable by considering a single year's accounts in any event; if there are hidden irregularities here they are unlikely to yield themselves without something more of a detailed longitudinal perspective, and that was not fully put before me. And all of this is precisely what the statutory ministerial functions are for. The function of receiving annual accounts and considering them, including on the basis of auditor's advice, as appropriate, provides exactly the necessary equipment and perspective. Bringing to court a cloud of general suspicion, mistrust and innuendo will not do. Neither the inter-company structure, nor BHIC's own business model, nor its 2019/20 accounts, presents singly or together any apparent basis for rejecting its proffered and ostensibly reasonable account of what it did with its 2019/20 profit. Nor have I otherwise been put in a sufficient position evidentially properly to do so.
60. My conclusion therefore is that I have been given no sufficient evidential basis on which I can proceed on any factual premise other than that a third of the revenue/expenses surplus in 2019/20 was applied to the acquisition of new assets and two-thirds to the reduction of net current liabilities, the latter reflecting BHIC's history of restructuring and turning around an ailing enterprise.

(d) The legal issues

61. The present challenge must therefore be understood as being that, on those facts, BHIC has acted in breach of statutory duty under s.31 or ultra vires its SHA functions.
62. Considering the terms of s.31 itself, there are different ways in which BHIC's position might be put. It says for example that, by applying the (balance of the) excess for 2019/20 to paying down its balance of net current liabilities, it has duly applied it '*in or towards the dredging of the harbour or the renewal, construction or improvement of any of the works*' within the terms of s.31(1) because it was precisely by way of such expenditure historically that its liabilities were incurred in the first place. Another way of putting it is to note the extended definition of '*the expenses of the undertaking*' in s.31(2); that allows money applied 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*' to be netted off against revenue before calculating the excess in the first place.

63. BHT develops a number of themes in this context, including that there is no obvious scope in s.31 for making the sort of historical, rather than purely in-year, application on which BHIC necessarily relies, and that there is no scope either for permitting the sort of inter-company credit/debit fluidity which is an essential feature of BHIC's narrative.
64. My necessary starting point in this context is the obvious one that the express premise of s.31 – and indeed of the entire scheme – is that the SHA functions, and the ownership and running of the harbour, were consciously and deliberately vested in a private company, a corporate 'person' the powers and duties of which, as such, are statutorily supplemented but not limited otherwise than as the Act provides for. That is a relatively straightforward model for the delivery of functions in which there is a public interest – no doubt they *could* have been discharged on a charitable or trust-based model, or by a statutory corporation, but that was plainly not considered essential or even desirable, given the outcome of the tendering process. Section 31(2) acknowledges in terms that the company is entitled to make a ('reasonable') return on the paid-up share capital for its shareholders in the normal way – that is, to be run for private profit.
65. There is no further special provision in the 1963 Act as to business model, corporate structure or company governance. Companies are regulated entities already, the powers, duties and liabilities of directors extensively provided for in company law. The starting point from a public law perspective, therefore, must be that, unless the contrary appears, the SHA is entitled to run itself and manage its affairs as any other company may, so long as the statutory functions are discharged as provided for and subject to the minister's complementary functions.
66. Inherent in that model is a general liberty, unless the contrary appears, to make business decisions, including financial, investment and procurement decisions, as the directors think best to secure the present and future flourishing of the enterprise. I cannot find, either in s.31 or elsewhere, any express or implied restriction on the normal business of managing indebtedness, investment, profitability or growth on a medium-term basis, across financial years or otherwise. Indeed it seems to me that s.31(2) positively affirms that default position; I cannot see why paying down historic indebtedness and losses, if incurred by and for the purposes of '*the entire undertaking of 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 business model – or for that matter any other model in which investment for the future can be made and the books ultimately balanced – would work otherwise.
67. To the extent that BHT seeks to dispute that – and in particular to the extent to which it seeks to imply into the statutory regime some – more general restrictions on the freedom of the SHA, by reference to the 'public interest' in general, over and above the express provision made by the Act – I find no basis in the scheme for doing so. The private company model adopted presupposes a 'public interest' decision by Parliament at the macro level that competently run for-profit private enterprise is a good way to deliver the prescribed public functions, subject only to the complementary functions of the minister. The SHA role is recognised as an opportunity as well as an obligation.
68. Nor do I find support in the authorities for such a proposition. BHT relied in this connection on some observations made in *R(oao) Akester & Melanaphy v DEFRA & Wightlink* [2010] EWHC 232 (Admin). That was a case concerning another private company SHA, this time subject to judicial review proceedings for introducing a new

type of ferry which, it was said, unlawfully breached protections for designated nature conservation sites and risked environmental damage. Owen J commented (at [85]) that '[t]he discharge of its public duties [as a statutory harbour authority] must override commercial considerations'. BHT says that is a general principle placing, as it were, the public interest above ordinary business principles in the day-to-day conduct of the company. But that is to take these observations out of context and to extrapolate impermissibly.

69. Owen J was dealing with an argument that the SHA could not be a 'competent authority' subject to habitats law in the first place because '*it is a private company responsible to its shareholders, the pursuit of whose commercial interests might conflict with the exercise of a public duty as a competent authority*'. He rejected that argument. A private company could of course be made subject by statute to public duties and the discharge of those duties was then an express and unqualified legal obligation upon it. That is an entirely uncontroversial proposition about the prevalence of statute law. It is not a proposition capable of founding the implication of *additional* duties to subordinate ordinary business common-sense by reference to some external standard of, or quasi-fiduciary deference to, 'the public interest', over and above what it is specifically asked to do by statute.

Conclusions

70. Owen J made the further entirely uncontroversial observation in the *Wightlink* case that if a private company fails in the discharge of the public duties that have been imposed on it by statute, that will be subject to supervision by a court undertaking judicial review.
71. The relevant public duties identified for supervision in this case are those imposed by s.31 and s.32. For the reasons I have given, I accept and proceed on the factual basis that BHIC places before me: BHT has provided no sufficient evidential basis for me to do otherwise. Much less has it enabled me to make findings of untruthfulness or covert financial/accounting impropriety. Such matters must be clearly identified, pleaded and evidenced, and the challenge in the present case does not advance beyond question, suspicion and innuendo. Judicial review proceedings in any event set high standards for defendants exercising public functions, in placing before a reviewing court all documents and information relevant to the issues before it (the classical statement is that of Lord Donaldson MR in *R v Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941). BHIC is of course subject to this duty of candour attaching to public authorities for the purposes of judicial review proceedings. Breach of that duty was not alleged as such in these proceedings.
72. On that basis, I am not satisfied that BHIC has failed to apply excess revenue as directed by s.31, whether because reducing its net current liabilities as described falls within the terms of s.31(1) by itself or because, by operation of s.31(2), it properly reduces what must be regarded as relevant excess revenue in the first place. I am unable therefore to conclude that BHIC has breached its statutory duty thereby, or – which is the other side of the coin – to conclude that it has acted ultra vires in applying excess revenue in other ways inconsistent with that duty. Nor am I persuaded that there is any other statutory duty, express or implied, with which its account of its application of its excess revenue is inconsistent.

73. If there is any irregularity or illegality in the calculation or application of BHIC's profits, inconsistent with the statutory scheme, it can lie only beneath the factual premise on which, as I have explained, I have to proceed. There is provision in the scheme to penetrate further beneath that factual premise in appropriate circumstances: by way of the ministerial functions of receiving BHIC's accounts, and making further inquiry or directing audit if appropriate. These are themselves public interest functions which a court of review can oversee if appropriately engaged to do so. But that is not the position in these proceedings.
74. In all of these circumstances, and for the reasons given, this claim for judicial review is dismissed.