Neutral Citation Number: [2024] EWHC 3293 (Admin)

Case No: AC-2024-LON-000737

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th December 2024

Before :

JUDGE MELANIE PLIMMER
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

THE KING (on the application of LITTLEHAMPTON HARBOUR BOARD)

Claimant

- and -

ARUN DISTRICT COUNCIL

Defendant

-and-

(1) WEST SUSSEX COUNTY COUNCIL
(2) DEPARTMENT FOR TRANSPORT

Interested Parties

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- -

Richard Moules KC (instructed by **Ashfords LLP**) for the **Claimant**
Meyric Lewis KC (instructed by **the Solicitor to Arun District Council**) for the **Defendant**

Hearing dates: 10th December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18th December 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

Judge Melanie Plimmer:

INTRODUCTION:

In this claim for judicial review, Littlehampton Harbour Board ('the Claimant') challenges a decision taken by Arun District Council ('the Defendant') dated 5 December 2023, as maintained at a 25 January 2024 meeting, that it would not pay sums requested by the Claimant under s.19 of the West Sussex County Council Act 1972 ('the 1972 Act').

1. The Claimant is constituted in accordance with s.6 of the 1972 Act, as amended by the Littlehampton Harbour Revision Order 1986 ('the 1986 Order'). Article 7 of the 1986 Order substituted the Defendant in the place of Littlehampton Council. The Defendant and the First Interested Party are referred to as "*the two Councils*" in the 1972 Act. The two Councils each appoint four Board members to the Claimant, albeit they are required to act independently.

2. In summary, the sums requested by the Claimant relate to investigation and design infrastructure works, which have been described by the Claimant as 'Future Project Needs' or as part of the Harbour Entrance Renewal Scheme ('HERS'). The Defendant considers these costs to be disproportionate and unaffordable costs of a capital nature, which do not come within the ambit of s.19 of the 1972 Act. The Claimant's challenge is predicated upon this being a misinterpretation of the 1972 Act and thus an error of law.

3. Both parties have contended that stark and significant adverse consequences flow from the Defendant's payment or non-payment of the requested sums. The Claimant's Chief Executive Officer, Mr Monk has clearly stated that if the Defendant continues to refuse to pay the sums requested under s.19 "*associated with infrastructure expenditure, the Claimant will become bankrupt in the FY 2024/25 as it will not have sufficient funds to meet its core duties*". Mr Monk also alleges that the consequences of non-payment would mean, amongst other things, an increased risk of catastrophic failure of infrastructure and possible breaches of health and safety legislation. The Defendant's head of finance, Mr Baden, has highlighted its budget deficit and particular challenges as a small local authority. He estimates that the capital expenditure required by the Claimant could mean payments of £1m per annum over 40 years and this would be entirely disproportionate to the Defendant's overall budget. This would in turn according to Mr Baden "*almost certainly mean cuts to other valuable public services provided by the Defendant and would probably result in redundancies*".

BACKGROUND FACTS

4. The Claimant is the statutory harbour authority ('SHA') for Littlehampton Harbour ('the harbour'). It is a 'trust port' i.e. an independent statutory body with responsibility to manage, maintain and improve the harbour. The two Councils are jointly responsible for paying relevant sums to the Claimant pursuant to ss.18 and 19 of the 1972 Act.

5. The Claimant has acknowledged its difficult financial position. In summary: for the last 23 years it has needed to request s.19 contributions from the two Councils; it is not reasonably practicable for the Claimant to generate sufficient revenue to service its long-term debt with the Public Works Loan Board; there has been a significant decline in commercial shipping calling at the harbour due to the trend towards operators using ships larger than the harbour can accommodate; the Claimant has been unable to accumulate money for infrastructure repairs in the reserve fund because this has been used to meet the annual deficiency in income.

6. In 2019 the Claimant applied for a Harbour Revision Order ('HRO') which would create an infrastructure fund allowing money to be saved for infrastructure works, but the application remains undetermined.

7. The Claimant maintains that it followed a similar budget setting process for the 2024/25 financial year as in previous years. It carried out a review of its charges, was unable to increase rents as no leases had break clauses and it identified very limited opportunities to generate additional income.

8. The Claimant has relied upon an Inspector's report dated 22 February 2022, which addressed objections to the level of harbour dues by yacht and marina clubs using the harbour. The Inspector noted the following: there were navigational challenges to using the harbour which required piloting; there was a significant decline in commercial shipping (down from 300-400 between 1984 and 1990 to 10 in 2019-2020) using the harbour; the Claimant had to undertake a conflicting and difficult balancing exercise which required considering competing interests of numerous stakeholders which were not always aligned; in setting harbour dues the Claimant was required to comply with its duty under s.21 of the 1972 Act and had to act consistently with policy aims that it should become more commercial and reduce reliance on public subsidy to raise enough resources to enable them to pay for the discharge of their statutory functions.

9. The Inspector concluded: the Claimant's general approach to setting harbour dues was sensible and prudent [7.13]; "*budget-setting process for 2018-2019 was logical and reasonable, carefully considering the needs of stakeholders and the consequences of increasing charges and dues on different stakeholder groups…*"[7.30]; and the Claimant "*provided a reasonable account of seeking to keep harbour dues competitive with judicious calls on the precept*". In a decision dated 31 March 2022, the Secretary of State for Transport agreed with these conclusions, and at [48] specifically "*supported the Inspector's observation that reducing public subsidy to establish and implement a strategy to put port operations on a commercial basis wherever possible is a current policy aim.*"

10. The Defendant has not disputed the evidence that there is a need for some infrastructure works at the harbour, albeit the nature and extent of the works required, as well as the viability of the operation, have been questioned. In an Asset Inspection report dated 22 January 2022, consultants found that most of the structures at the harbour entrance have clearly exceeded their design life and require regular maintenance to keep them operational. Further investigations and work were recommended.

11. Between September and December 2023 emergency works were carried out to replace a section of the harbour's west wall. That work was unbudgeted and the Claimant included the cost in its precept under s.18 of the 1972 Act during the 2023/24 financial year. Both the Defendant and the First Interested Party paid under that s.18 request.

12. It is against this background that when setting its 2024/25 budget the Claimant included its operation income, operational costs and operational deficit and in addition, costs under the heading 'Future Project Needs'. The Claimant's position is that the Future Project Needs costs are required to comply with its duties as SHA. The Claimant sent the Defendant a one page summary of its proposed 2024/25 budget in a November email. This included within it the harbour operational income and costs with a deficit of some £171,769, as well as total Future Project Needs costs of £836,883. The total sum the Claimant was seeking under s.19 of the 1972 Act was therefore £1,152,622, of which the Defendant would be required to pay

50%. Part of the shortfall relates to day-to-day operational expenditure, which the Defendant does not dispute, and the other part relates to in year expenditure on projects, which the Defendant does dispute.

13. In the decision under challenge letter dated 5 December 2023, the Defendant made it clear that the Future Project Needs costs did not come within the ambit of s.19 of the 1972 Act because, in its view: these relate to the "*cost of the construction, renewal, improvement or extension of*" the harbour, as part of the proposed HERS and, as such should be paid for out of either revenues or the reserve fund under ss. 20 and 22 of the 1972 Act; the Claimant could borrow money under Article 3(1) of the 1986 Order; s.19 is concerned with future *expenditure* estimated to exceed the Claimant's income for the next financial year, if any and only applies if the estimated sum cannot be met out of the reserve fund. The Defendant's position was summarised as follows:

> "S.19 is therefore confined merely to requesting payments to cover projected shortfalls in anticipated income. It cannot extend to requests for large capital sums in respect of "Future Project Needs.'"

14. The Claimant's board members approved the 2024/25 proposed budget on 11 December 2023. At its meeting on 16 February 2024, the First Interested Party approved the amount requested by the Claimant in the November request in relation to its share.

15. In a letter dated 23 January 2024 Mr Monk on behalf of the Claimant confirmed that it had considered the scope of the 1972 Act before making the November request and was satisfied that everything requested was within the same. Nevertheless, as a way to resolve the Defendant's concerns, the Claimant was willing to reduce the sum requested under s.19 to cover only certain stages of the Future Project Needs relating to infrastructure. Following receipt of the initial reports required for that project, the Claimant would review progress and next steps. If further expenditure was required during the 2024/25 financial year, the Claimant proposed to then raise an additional request as permitted under s.18 of the 1972 Act.

16. At a meeting on 25 January 2024 the Claimant explained that it had re-programmed the recommended work, and that led to a revised reduced cost falling in the 2024/25 financial year. This reduced the total Future Project Needs or HERS (Mr Moules confirmed that these terms are used interchangeably) from £785,000 to £330,535.

17. The Defendant refused to pay the "*additional contribution sums*", whether in the amount in the November request or the lower sum communicated before or at the January meeting. Mr Baden says in his witness statement: "*we have always been clear that whilst we would fund the operational expenditure deficit, we would not fund capital expenditure works*".

18. The Claimant served a pre-action letter on 16 February 2024 challenging the decisions taken by the Defendant in the decision letter and at the January meeting. The Claimant invited the Defendant to confirm that it had not yet taken a final decision on whether to pay either the operational costs or the Future Project Needs costs sought at the January Meeting. The latter were referred to in the PAP letter as the "*additional contribution sums*".

19. The Defendant replied to the pre-action letter on 26 February 2024, confirming that "*it should not be expected to pay substantial capital sums in respect of harbour infrastructure costs as originally set out under the heading "Future Project Needs" on the Harbour Board's*

2024/25 Budget Summary". The letter outlines the Defendant's view, as a matter of statutory construction, that s.19 does not allow for the recovery of funds to pay for future maintenance projects "*requiring substantial capital expenditure*". The Defendant's view is summarised as follows: "*The short point is that the Harbour Board cannot under the terms of section 19 of the 1972 Act simply look to the Council to pay substantial capital costs to subsidise their proposed "Future Project Needs"*. Consequently, the Defendant re-iterated its refusal to pay the "*additional contribution sums*", on the basis that they do not fall within the terms of s.19.

20. The Claimant wrote to the Defendant on 27 February 2024 asking it to again confirm that a final decision was yet to be made on the issues set out in the decision letter. The Defendant replied on 1 March 2024, re-stating its PAP response that it would not pay the "*additional contribution sums*", and this reflected the final decision as contained in the decision letter.

PROCEDURAL HISTORY

21. In a claim filed on 5 March 2024, the Claimant challenged the Defendant's decision dated 5 December 2023 in which it refused to pay the sums requested by the Claimant pursuant to s.19, relating to Future Project Needs. In its statement of facts and grounds the Claimant contended that the Defendant misinterpreted the scope of the sums that can be requested under the 1972 Act. The Claimant relied upon the following witness statements:

    (i) Mr O'Callaghan, the Claimant's Chair, outlined the Claimant's core duties as a trust port, the relevant stakeholders, its role in approving the 2024/25 budget, the HRO application and the outcome of the 2022 public inquiry relating to the Claimant's charges.

    (ii) Mr Braby, the Claimant's Treasurer outlined his understanding of the 1972 Act and the Claimant's approach to setting its budgets. He understands that there is no overall cap on the amount of money the two Councils can be required to pay the Claimant in any financial year albeit the Claimant has an important statutory duty to secure that the revenues are so far as possible not less than sufficient to meet outgoings. Mr Braby also referred to the Claimant's duties as a trust port including the Ports Good Governance Guidance 2018 ('PGGG'). Mr Braby was candid in accepting that for the entirety of his 23 years as Treasurer, the Claimant has not been able to generate sufficient revenue to service its long term debt and has always required a s.19 contribution from the Defendant. This included sums relating to infrastructure expenses and loan repayments. An example during financial year 2023/24 related to the emergency works required to the west wall to prevent catastrophic failure. The Defendant paid sums totalling £982,209 under the s.18 precept provisions during the financial year 2024/25. Mr Braby explained that the Claimant believed that any attempt to generate sufficient revenue would have to include increasing dues and charges in the harbour which would not be viable as a number of users would stop using the harbour.

    (iii) Mr Monk, the Claimant's CEO from October 2023 explained his duty to comply with s.21 and keep the call on the two Councils for sums to a minimum, whilst also ensuring the Claimant does not breach its core duties as a SHA. He explained that after the emergency works to the west wall, consultants identified further urgent works to be done as part of Phase 2 of HERS. Mr Monk also outlined stark consequences if the Defendant succeeded in refusing to pay contributions: the

Claimant would become bankrupt as it would not have sufficient funds to meet its core duties.

(iv) My Hayes, the Claimant's Harbour Master explained inter alia the pilotage functions required at the harbour and how the preparatory and investigatory works related to HERS are connected to compliance with core duties.

22. The Defendant filed summary grounds of defence relying upon the reasoning in the decision under challenge. On 10 June 2024, James Strachan KC, sitting as a Deputy High Court Judge, granted permission for judicial review.

23. The Defendant filed detailed grounds of defence together with witness statements from Mr Slade, the Defendant's head of technical services and Mr Baden, the Defendant's head of finance. These statements commented on the Claimant's four witness statements. In summary the Defendant outlined inter alia: the Claimant's inability to comply with the PGGG to operate the harbour on a commercial basis in circumstances of operating a deficit for many years and the absence of any costed strategy to put the operations of the harbour on a commercial basis; the absence of particularity concerning the reserve fund; a concern as to how vital the HERS works are; whether the core duties relied upon by the Claimant are as inflexible or likely to result in legal action as alleged; its concern that it could not be expected to meet continuing, open-ended demands for substantial sums in respect of future infrastructure works when the impact upon the Defendant's limited funds are disproportionate in the light of its duties to provide important public services; the Claimant's failure to consider other ways of avoiding budget deficit, including closure of the harbour if it cannot be used safely without disproportionate expenditure.

24. On 9 October 2024, Deputy High Court Judge Karen Ridge permitted the Claimant to rely on the second witness statements from Mr O'Callaghan and Mr Hayes, who both responded to the points made in the Defendant's witness statements. Mr O' Callaghan reconfirms the Defendant's position on important issues including:

- a significantly reduced revised contribution for HERS costs had been put to the Defendant (£165,267.50 representing 50% of the costs);
- the contribution is required to carry out the investigations and preliminary work required to create a business case to maximise the prospect of obtaining funding. Mr O'Callaghan confirms that "*at no time has the Claimant ever indicated that it intends to request half of the total HERS 2 costs from the Defendant. It has been clear that sums requested for the 2024/2025 financial year are to enable assessments to take place to ascertain the detailed scope of the required works and to provide the supporting information required to seek alternative means of funding or the majority of them.*"
- The Claimant is very open to discussing the potential for a Harbour Closure Order and the Defendant's role in it given its interests in the harbour, such as the ongoing use of 500 leisure vessels on moorings authorised by the Defendant under long leases.

LEGAL FRAMEWORK

1972 Act

25. Ss. 18-20 and 22 of the 1972 Act provide the statutory framework within which the Claimant manages its finances to carry out its duties as the SHA for the harbour and the financial

relationship between the Claimant and the two Councils. It is necessary to set these provisions out in full.

"17. (1) All receipts of the harbour board shall be carried to a common fund and all expenses incurred by the harbour board shall be defrayed out of that fund.
(2) The harbour board shall make safe and efficient arrangements for the receipt of monies paid to them and the issue of moneys payable by them and those arrangements shall be carried out under the supervision of the treasurer of the harbour board.

18. (1) Any deficiency (after taking into account any contributions made under section 19 (Contributions to expenses of harbour board) of this Act) in the revenues of the harbour board in any financial year shall be made good in the first instance out of the reserve fund and if the reserve fund shall be insufficient for the purpose of meeting the deficiency the harbour board shall apportion the residue of the deficiency equally between the two Councils;
Provided that no part of any such deficiency shall be made good out of the reserve fund so as to reduce the said fund below thirty-five thousand pounds and in regard to such part the reserve fund for the purposes of this subsection shall be deemed to be insufficient for the purpose of meeting the deficiency.
(2) The harbour board shall issue to each of the two Councils a precept for a sum equal to the sum apportioned to that council in pursuance of this section and each of the two Councils shall within two months after the receipt of the said precept pay to the harbour board the sum stated in the precept.
(3) Any sum mentioned in a precept issued under this section by the harbour board to each of the two Councils shall be a debt due from that council and may be recovered accordingly.

19. (1) The harbour board shall not later than the 31st December in each year estimate the amount of money (if any) required by them for expenditure in excess of their income in the next ensuing financial year.
(2) Each of the two Councils shall contribute and pay to the harbour board, if so required by the harbour board, one-half of so much of the amount so estimated as cannot be met out of the reserve fund by virtue of paragraph (a) of subsection (2) of section 22 (Reserve Fund) of this Act by instalments as may be demanded by the treasurer of the harbour board.
(3) The harbour board shall as soon as practicable after the end of each financial year repay to the two Councils the amount (if any) by which the contributions made under this section in respect of that year exceed the actual deficiency in the income of the harbour board during that year.

20. The harbour board shall apply the revenues of the harbour board except borrowed money in manner following:-
First, in payment of the working and establishment expenses and cost of maintenance of the undertaking;
Second, in payment of the interest on moneys borrowed by the harbour board under any statutory power;
Thirdly, in providing the requisite appropriations, instalments or sinking fund payments in respect of moneys borrowed as aforesaid;
Fourthly, in payment of all other expenses of the harbour board properly chargeable to revenue;
Fifthly, in payment of credit balances on the revenue account into the reserve fund
Sixthly, in the payment of the two Councils in equal shares of any surplus in the revenues which would otherwise cause the prescribed maximum amount of the reserve fund to be exceeded.

21. It shall be the duty of the harbour board so to exercise and perform their functions under the Act of 1927 and this Act as to secure that, taking one year with another, the revenues of the harbour board are, so far as is reasonably practicable, not less than sufficient to meet their outgoings properly chargeable to revenue account (other than expenditure incurred in respect of any such works area referred to in paragraph (b) of the proviso to section 16 (Transfer of functions under Land Drainage Acts) of this Act.

22. (1) The harbour board shall provide a reserve fund in respect of the undertaking by setting aside such an amount as they may from time to time think reasonable and (unless the amounts so set aside are applied in any other manner authorised by any enactment) investing the same until the fund so provided amounts to the maximum reserve fund for the time being prescribed by the harbour board.
(2) The reserve fund shall be applicable –
(a) to answer any deficiency at any time happening in the revenues of the harbour board, but not so as to reduce the reserve fund to an amount less than thirty-five thousand pounds;
(b) in or towards the payment of the cost of the construction, renewal, improvement or extension of any works, building, machinery, plant or conveniences forming part of the undertaking (but not in making any annual payment required to be made in respect of loans);
(c) in meeting any extraordinary claim or demand at any time arising against the harbour board;
and so that if the reserve fund be at any time reduced it may thereafter be again restored to the prescribed maximum and so from time to time as often as such reduction occurs.
(3) Resort may be had to the reserve fund although such fund may not at the time have reached or may have been reduced below the prescribed maximum."

Bromley principles

26. Bromley LBC v Greater London Council [1983] 1 AC 768 contains two principles the parties accept are relevant to the application of s.21 of the 1972 Act:

    (i) The wording of s.21 requires the Claimant to run the harbour on 'ordinary business principles'. This requirement is also derived from the common law - see Prescott v Birmingham Corp [1955] Ch 210.
    (ii) A local authority owes a fiduciary duty to its taxpayers, which includes the duty to use the full resources available to it to the best advantage. As Lord Diplock put it at [829G] of Bromley: "*a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available…*"

27. That the two Councils owe a "fiduciary duty" to ratepayers, now council taxpayers is well established. In deciding to spend money, a local authority must take account of the interests of the council taxpayers who have contributed to the authority's income and balance those interests against those who benefit from the expenditure. Where a local authority owes a duty to another class of persons, such as transport users, it has to balance the duties to each fairly against each other. A failure to do so can amount to a breach of fiduciary duty. Bodies with precepting or levying powers owe a fiduciary duty to ratepayers and must balance their interests against those of service users to ensure that a disproportionate burden is not cast on the ratepayers.

28. This duty arises in addition to the need for proper and cost-effective use of resources, where there is a requirement to conduct a transport system on business principles. As Lord Wilberforce highlighted in Bromley at [819], there must be a flexible approach to business principles so as not to impose a rigid obligation to balance accounts every year. Lord Keith relied on Prescott (supra) to support this proposition at [832H]: "*a public transport undertaking may be carried on in accordance with ordinary business principles even though it does not and cannot make a profit and some degree of loss may be inevitable, so that if it were a company engaged in a commercial enterprise it would be obliged to close down*". Lord Scarman explained at [839B] that the transport authority may not go out of their way to make losses but "*must do its best to reduce the burden falling upon ratepayers; in other words, loss may have to be accepted as a necessity, but may not be sought as an object of policy*". Similarly, Lord Brandon also relying on Prescott said this at [851E]: "*the general principle governing statutory transport undertakings, in the absence in the relevant statute of any provisions to the contrary, is that they should be operated on ordinary business lines: Prescott v. Birmingham Corporation [1955] Ch. 210. This does not mean that they should be run so as to make the maximum, or any, profit. But it does mean that they should not be deliberately, or inadvertently, run in such a way as to make a loss, or, if it is not practicable to avoid a loss, in such a way as to make a loss greater than it is practicable to avoid*".

Claimant's statutory duties as SHA

29. As SHA the Claimant emphasises that it is subject to both statutory and common law duties that directly or indirectly require maintenance of harbour infrastructure. This includes the open port duty in s.33 of the Harbours, Docks and Piers Clauses Act 1847, which is incorporated in relation to the harbour by s.8 of the Littlehampton Harbour and Arun Drainage Outfall Act 1927. This statutory right of access to a harbour covers both ships wishing to use the harbour and members of the public wishing to use the quays and jetties for the purposes specified in s.33. The open port duty can only be removed or restricted by a Harbour Revision Order made under s.14 of the Harbours Act 1964. Under s.31 HA 1964 written objection to ship, passenger and goods dues imposed by a harbour authority may be lodged.

30. The Claimant is under a common law duty to conserve the harbour so that it is reasonably fit for use as a port, and a duty to take reasonable care to see that the harbour is in a fit condition for a vessel to use safely. It must also comply with the Port Marine Safety Code, and non-compliance can be evidence of a failure to provide a safe system of work and thus a breach of s.3 of the Health and Safety at Work Act 1974. The Claimant is the Competent Harbour Authority under the Pilotage Act 1987 and it has a duty under s.2 to consider whether pilotage services are required to help ships navigate in, or in the approaches to, the Harbour, whether pilotage should be compulsory, and to provide such pilotage services as are needed.

HEARING

Issues

31. Counsel agreed that the main issue for me to determine is whether the Claimant's Future Project Needs or HERS costs fall outside the scope of s.19 of the 1972 Act, as contended by the Defendant. If yes, the Claimant's claim falls to be dismissed. If not and the Defendant has erred in law in adopting that construction of the 1972 Act, the Claimant invites me to quash the decision under challenge and declare that sums sought in respect of infrastructure projects necessary in order for the Claimant to comply with statutory duties, such as the

Future Project Needs costs, do as a matter of statutory construction fall within scope of sums which the Claimant can lawfully require the Defendant to contribute to under ss.18 and 19 of the 1972 Act.

Evidence

32. In their written evidence, both parties relied upon detailed post-decision evidence in the form of witness statements summarised above. I observed, and both Counsel agreed, that the points made in these witness statements played a peripheral role to the central legal issue in dispute as contained in the impugned decision.

Submissions – Claimant

33. Mr Moules made three overarching submissions. First, there is no express or implicit limitation within the 1972 Act preventing the Claimant from requesting sums for maintenance or capital expenditure and in deciding otherwise, the Defendant misconstrued the statute and erred in law. Mr Moules developed that submission by reference to the wording of the 1972 Act as follows:
    - where the Claimant's revenue and reserve fund are insufficient to cover its expenditure in a given financial year, the two Councils are responsible for covering the shortfall;
    - that shortfall can either be recovered by the Claimant prospectively, via a s.19 contribution, or, where a further shortfall occurs during the financial year, via a s.18 precept;
    - the Claimant was therefore entitled to make the request for a contribution by the two Councils under s.19(2) of the 1972 Act;
    - contrary to the Defendant's stated reason for refusal, a s.19(2) request may cover sums needed for the maintenance of harbour infrastructure.

34. Mr Moules submitted that the Claimant *must* incur this expenditure in order to comply with its duties as SHA: such expenditure is not merely desirable, but necessary and without it the Claimant would be in breach of the open port and other statutory duties. In other words, the Claimant submits that the Defendant must make contributions under s.19(2) for capital projects that are necessary for the proper performance of the Claimant's statutory duties.

35. Second, whilst s.19 does not limit the nature of the expenditure or amount of sums that can be requested when the relevant conditions are met, s.21 together with the two Bromley principles summarised above provide practical and important limitations. This is because the Claimant is obliged to avoid losses so far as practicable and must operate in accordance with business principles whilst also taking account the interests of ratepayers. However, Mr Moules drew attention to the passages in Bromley that support flexibility in the words "*so far as practicable*". Mr Moules therefore submitted that the Claimant was entitled to a degree of flexibility in operating in accordance with business principles, particularly bearing in mind the range of stakeholders involved (as accepted by the Inspector and the Secretary of State for Transport in 2022). Bromley makes it clear that arbitrary reductions (per Lord Keith at [835D] and "*expending moneys thriftlessly*" (per Lord Diplock at [829G]) were not consistent with acting in accordance with business principles.

36. Third, the first time the Defendant alleged that the Claimant had breached its s.21 duty came in its skeleton argument at [45]. The impugned decision and detailed grounds of defence do not rely upon this reason to support its refusal to contribute under s.19. In so far as the Defendant is permitted to rely upon this, Mr Moules submitted that the Claimant has not

infringed s.21 in any way. Mr Moules relied upon the conclusions of the Inspector summarised above to support the evidence provided in the Claimant's witness statements that whilst the Claimant operated at a loss, it has been acting consistently with commercial business operations and in compliance with its s.21 duty. In support of this, Mr Moules referred to the letter dated 27 January 2023 to the Department of Transport, copied to the two Councils, in which the scale of the repairs being beyond the Claimant's means was made clear together with requests for assistance from the government.

37. Mr Moules highlighted that the revised request made and refused at the January meeting was considerably less than the November request and focussed upon the costs of investigatory work as to what could be rebuilt and in order to support a business case to request further funding. He acknowledged that closure might be the only viable option but that this would have to be costed because it would need to be done safely and in accordance with the relevant guidance.

Submissions – Defendant

38. Mr Lewis described s.19 as a 'budgeting provision' which is confined to requesting payments to cover projected shortfalls in anticipated income. He submitted that the purpose of ss.18 and 19 are to assist the Claimant in balancing their budget in order to avoid a deficit. In other words, as he put it – the duty on the part of the two Councils to pay is limited to 'top ups' or to 'deal with modest shortfalls'. Mr Lewis based these submissions on the wording used in the statute, and in particular, specific isolated words and the focus upon receipts / revenues / income from harbour dues. Mr Lewis drew my attention to the 1986 Order to support his submission that in the first instance, large capital sums should come out of the reserved fund pursuant to s.22(2) or borrowing under Article 3.

39. Mr Lewis therefore submitted that the 1972 Act should be construed narrowly such that in the absence of sufficient revenues or reserves the Claimant cannot simply call upon the Defendant to fund finance projects like HERS. He relied upon the restrictive approach to be taken to private Acts and where economic interests are involved, as set out in Bennion, Bailey and Norbury on Statutory Interpretation at 2.14 and 27.6.

40. Mr Lewis underlined the Defendant's position that the Bromley principles together with s.21 apply to the appropriate construction of s.19 and submitted that it could not be right that there could be no cap on the funds requested. He submitted that if the 1972 Act is interpreted so as to include capital investment or funds that go beyond merely balancing the budget, this would place the Claimant in an impossible position on the basis that they will be expected to make payments with no ceiling, 'come what may'.

41. Mr Lewis then turned to an alternative submission based upon his contention that the Claimant breached their s.21 duty and the Bromley principles by: (i) going out of their way over an extended period of time to make losses such that it could be said that the operation was conducted thriftlessly and contrary to business purposes and the PGGG (ii) failing to consider the impact of increasing costs on ratepayers. Mr Lewis pointed out that the Claimant is not under an overriding duty to maintain the infrastructure and is instead able simply to close the harbour or adjust its expenditure. Mr Lewis relied upon the Defendant's witness statements to support the following: the Claimant should not have decided that it is unable to remove its pilotage functions; the operation was run contrary to business principles and the PGGG for many years; any renewal of the harbour at substantial cost would not result in an

economically viable operation; there was a failure to build the requisite reserve fund; the Claimant should charge more to its harbour users; the Claimant should obtain alternative sources of funding.

42. I invited Mr Lewis to take me to the part of the Defendant's reasoning process under challenge, which relied upon a breach of s.21 and / or a breach of the Bromley principles. He was only able to point to the penultimate paragraph in the decision letter.

Submissions – Claimant's reply

43. Mr Moules submitted that the decision letter makes no reference to the Defendant's alternative submission that there had been a breach of s.21 and the Bromley principles on the part of the Claimant – the decision letter focusses solely on the statutory construction point. It follows that the court should not permit the Defendant to rely upon the further reasoning at this late stage, but should the court be minded to do so, there was ample evidence that the Claimant's discharged their s.21 duty.

44. Mr Moules re-emphasised that the Claimant is under a duty to maintain the infrastructure and cannot simply close the harbour without following the appropriate guidance. He referred to the evidence that the need for renewal of infrastructure is not lessened because commercial shipping volumes are low as the open port duty applies to all navigable vessels and there are 500 leisure vessels that use the harbour. If the infrastructure is left to collapse that would pose a safety risk to harbour users, including the Royal National Lifeboat Institute which has a lifeboat station at the harbour. In the circumstances, the Claimant must incur the contested revised expenditure, either to repair/renew the infrastructure or to justify removing it. Mr Moules also pointed out that the suggestion that harbour dues should be increased overlooks the fact that the Claimant's charges were recently the subject of an inquiry into a complaint and the Inspector and Secretary of State concluded that the Claimant's approach to setting harbour dues was "*fair and equitable*" and that its general approach to budgeting was sensible and prudent.

DISCUSSION

Statutory construction issue

45. It is important to focus upon the decision under challenge. The Defendant's clearly articulated position as at the time of the impugned decision in December 2023 and shortly after on January 2024, and continuing throughout its pleadings and at the hearing was that the Claimant's capital expenditure, whether categorised as future project needs or HERS, cannot come within the ambit of s.19 of the 1972 Act.

46. The 1972 Act sets out a clear legal regime governing the financial relationship between the Claimant and Defendant, including the financial discipline required of the Claimant. It is uncontroversial that the starting point is that an objective assessment of the meaning of the words used is required (see R v Secretary of State for Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] AC 349 and the speech of Lord Nicholls at 396E to 397A).

47. In order to address the central issues of construction relevant to s.19 it is necessary to consider each of the relevant ss.18 to 24, as well as the regime holistically. It is important to consider 'internal context' i.e. "*how the provision in question relates to other provisions in the same*

statute and to construe the statute as a whole" – see R (CXF) Central Bedfordshire Council [2018] EWCA Civ 2852, [2019] 1 WLR 1862 at [20].

48. I begin with s.21 because this is an important duty and an appropriate starting point. There was also a degree of consensus between Mr Moules and Lewis concerning s.21. There was no dispute that s.21 imposes an overarching duty on the Claimant, qualified by the phrase "*so far as practicable*", to ensure that its revenues are not less than sufficient to meet its outgoings properly chargeable to revenue. This reflects the broader Bromley principles, as summarised above, and is consistent with the clear expectation of financial discipline to be found elsewhere in the statute and in other guidance relevant to the Claimant's status as an open port, such as the PCGG (see in particular [3.33] to [3.40]).

49. Mr Moules acknowledged, and I accept, that the wording of the statute supports the proposition that the Claimant is expected "*to secure that, taking one year with another*", its "*revenues*" "*are, so far as practicable not less than sufficient to meet their outgoings properly chargeable to revenue account*". This reflects the exact wording of s.21. The s.21 duty requires business organisation within the Claimant's means but as set out at ss.18 and 19 it will not always be reasonably practicable for it to generate sufficient income to meet its expenditure. The statute clearly expects the Claimant to operate its business commercially, and to only request precepts and contributions where other relevant steps and options have been exhausted, and subject to the Bromley principles closely connected to s.21. I now turn to the other provisions, aside from s.21, which support this proposition.

50. S.19(1) requires the Claimant, by 31st December every year, to "*estimate the amount of money (if any) required by them for expenditure in excess of their income in the next ensuing financial year*". The inclusion of "*if any*" in s.19(1) sets a clear marker that it is not generally expected that the Claimant will require money for expenditure in excess of income. Once the Claimant has arrived at an estimate under s.19(1), s.19(2) requires it to deduct from that figure any amount in its reserve fund that exceeds £35,000. This is because s.22(2)(a) allows the reserve fund to be used to answer any deficiency in the Claimant's revenues "*but not so as to reduce the reserve fund to an amount less than £35,000*". The reserved fund may be used amongst other things for "*payment of the cost of the construction, renewal, improvement or extension of any works... forming part of the undertaking"* -s.22(2(b).

51. It is therefore only after the Claimant has accessed any relevant reserve fund that it is then entitled to require each of the two Councils to contribute and pay to it one half of any outstanding sum under s.19(2). Mr Lewis sought to argue that this Claimant did not keep an adequate reserve fund. Mr Moules pointed out that best efforts were made in the context of falling revenues. However, the factual matrix of this case does not help with the proper construction of the Act. The Act clearly provides for the necessity of a reserve fund, and a requirement to use it before seeking a contribution from the two Councils.

52. S.19(3) provides a further indication of the financial discipline and business organisation required of the Claimant. If the contributions made by the two Councils under s.19(2) exceed the actual deficiency in the income of the Claimant during the financial year to which the payment relates, then s.19(3) requires the Claimant to repay that amount to the two Councils as soon as practicable after the end of the relevant financial year.

53. Finally, s.24(1) and (2) underscore the close custodial relationship the Claimant is expected to have in relation to the reserve fund. S.24(2) states that the Claimant shall approach the

reserve fund "*as if they constituted a trust fund and the harbour board were the trustees of that fund*".

54. It follows that the overall structure of the Act requires the Claimant to exercise financial discipline, avoid any deficit and operate consistently with business principles. It therefore cannot be properly said that s.19(2) permits no discretion or flexibility regarding the obligation of the two Councils to pay their share of any contribution sought. S.19(2) must be read as subject to the constraints within s.19 itself, as well as the s.21 duty and the Bromley principles. This also applies to the precept – see the similar wording of ss.18(2) and (3).

55. Mr Lewis sought to derive assistance from the use of specific isolated words within the 1972 Act. However, a word or phrase in a statute must always be construed in the light of the surrounding text. As Lord Simmonds said in A-G v HRH Prince Ernest Augustus of Hanover [1957] AC 436 at [461]: "*words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context*". Mr Lewis submitted that the use of "*receipts*" in s.17, "*revenues*" and "*residue*" in s.18(1), "*income*" in s.19 and "*outgoings*" in s.21 indicates that capital expenditure or sums has not been envisaged by the Act. Rather, he submitted, the focus is upon receipts / revenues / income from harbour dues. I disagree. S.17 provides in general terms for a common fund for "*all receipts*" and "*all expenses*" (my emphasis). S.18(1) provides for a precept where there is "any deficiency…in the revenues" (my emphasis). All expenses and any deficiency are therefore clearly included for those purposes. Expenditure in excess of income in s.19(1) has not been narrowed or limited in any way. S.20 specifies the wide range of things the Claimant may spend its revenue on including "*working and establishment expenses and cost of maintenance of the undertaking*". S.21 has limited "*outgoings*" only to expenditure incurred in matters unrelated to these proceedings. I therefore do not accept that the use of specific words supports the Defendant's limited construction of expenditure in s.19(1).

56. I prefer Mr Moules' submission that the wording of s.19 clearly includes requests for expenditure in excess of income. Expenditure is not defined and there is no implicit or express limitation on the term. When the 1972 Act is read as a whole, including the financial discipline requirements, it would be inappropriate to exclude capital expenditure. Expenditure for the purposes of the Act must include any lawful expenditure for the Claimant's statutory purposes such as the cost of maintaining the undertaking.

57. In principle expenditure including capital expenditure should come out of the reserved fund pursuant to s.22(2) and where possible from borrowing under Article 3. It is uncontroversial that ss.19(2), 20 and 22 make it clear that the reserve fund must be the first port of call for expenditure, including capital expenditure. Article 3 deals with the Claimant's borrowing powers and provides that monies borrowed pursuant to the Order, applies to capital monies. That does not obviate expenditure including capital monies, subject of course to this being consistent with s.21 and the Bromley principles. In addition, as Mr Moules pointed out, in circumstances where the Claimant is unable to afford capital expenditure this, may well extend to the re-payment of loans for capital expenditure.

58. I now turn to Mr Lewis's submission that if the Act is interpreted so as to include capital investment or funds that go beyond merely balancing the budget, this would place the Defendant in an impossible position on the basis that they will be expected to make payments with no ceiling, 'come what may'. In my judgment, the 1972 Act provides appropriate flexibility and safeguards in relation to any precept or contribution sought. Whilst s.19(2) states that the two Councils "*shall contribute and pay*" (my emphasis) if so required by the

Claimant, this must be read subject to the s.21 duty. This means that the two Councils are not required to make the relevant payments irrespective of the relevant Council's countervailing obligations and duties. As Mr Moules acknowledged, ss.18 and 19 are to be read as subject to s.21 and the Bromley principles. This includes conducting operations on business principles which require them to avoid making a deficit, so that creating a situation where others had to make a substantial contribution to their funds was not within their powers. Whilst Bromley sets the marker of an absence of business organisation relatively high – arbitrariness or thriftlessness, the overriding need to balance requested expenditure with the fiduciary duty to ratepayers to ensure that a disproportionate burden is not cast, remains. S.21 and these principles provide the necessary safeguards or as Mr Moules put it 'guard rails'. There is no lack of clarity or absurdity that requires any gloss to be placed on the ordinary wording of the statute.

59. For the reasons I have set out above, s.19(2) clearly includes any lawful expenditure for statutory purposes, subject to the s.21 duty and the Bromley principles. There is no ambiguity and therefore no reason to interpret expenditure more narrowly as contended by the Defendant. I acknowledge there is a principle of legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law. As such, legislation will be construed as interfering with those rights no more than the statutory language and purpose require. In addition, Mr Lewis appeared to submit that the 1972 is a private Act and should therefore be construed against the promoters. There is no indication that the 1972 Act resulted from a private Bill or was obtained by the Claimant for their own benefit. Rather, the Act has a public purpose as was the position in National Trust for Places of Historic Interest or Natural Beauty v Ashbrook [1997] 4 All ER 76 at [349G]. For the reasons I have provided, the relevant statutory language is clear and the passages Mr Lewis referred to in Bennion therefore do not assist the Defendant.

60. It follows that in determining that s.19 cannot apply to any capital expenditure and is solely a 'budgetary balancing provision', the Defendant erred in law.

Alternative submission – failure to comply with Bromley principles

61. In the decision under challenge, the Defendant firmly based its reasoning for refusing to pay the requested s.19 contribution upon as I have found it to be, an erroneous construction of the 1972 Act. This is apparent from the decision letter itself. Nevertheless, Mr Lewis relied upon an alternative submission in his skeleton argument and at the hearing. He submitted that the Claimant breached the s.21 duty and the Bromley principles by: (i) conducting the operation thriftlessly and (ii) failing to consider the impact of increasing costs on ratepayers. When asked where in the decision under challenge or in any other document the Defendant relied on this reasoning in support of its refusal to pay the contribution, Mr Lewis relied solely on the penultimate paragraph in the decision letter, which says this:

> "Equally as a matter of general principle bodies with precepting or levying powers owe a fiduciary duty to ratepayers and must balance their interests against those of service users to ensure that a disproportionate burden is not cast on the rate payers (now Council taxpayers) see the decision of the House of Lords in Bromley LBC v GLC [1983] 1 AC 768. Also, such bodies have to conduct their operations on business principles which require them to avoid making a deficit, so that creating a situation where others had to make a substantial contribution to their funds was not within their powers."

62. This paragraph comes after a short paragraph dealing with two general principles of statutory construction said to reinforce the Defendant's interpretation of s.19. It is clear that in the passage following "*Equally*", the Defendant is merely relying upon the Bromley principles to support its interpretation of the statute, in a similar way to relying upon the statutory construction principles. The Defendant has not relied upon the allegation that the Claimant breached s.21 as a reason for not paying the s.19 request in this letter or any other letter to the Claimant. It follows that the Defendant has at no stage in its decision-making process reasoned that it is unwilling to pay the requested contribution toward capital investigatory costs based upon a breach of s.21 and / or the Bromley principles.

63. In these circumstances it is difficult to see why the Claimant needed to include the detail it did in the witness statements that accompanied the statement of facts and grounds, which then prompted the Defendant to rely upon its own witness statements to accompany the detailed grounds of defence. This then led to further witness statements from the Claimant. Fundamentally, a judicial review focuses the spotlight upon the reasons given at the time of the decision and not on ex post facto reasons. Whilst the Defendant has commented adversely upon the Claimant's business operations and regard for ratepayers, this is not a case in which the Defendant has said in any decision that it is not obliged to make the contribution requested on the basis of a breach of the s.21 duty. As Mr Moules submitted, if that was the case that was now being put at the substantive hearing, it was too late to raise it and to do so would involve the utilisation of ex-post facto reasoning that has not been articulated in any decision.

64. In any event, as summarised above, the Claimant's original request was replaced by a more modest revised request as summarised at [25] above. The Defendant has offered no clear reasoning why *this revised request*, focusing upon investigatory works to inform next steps, breaches s.21 and / or pays no regard to ratepayers and the other obligations of the Defendant, particularly bearing in mind the Claimant's continuing statutory and common law duties.

65. In all the circumstances the Defendant's belated argument that s.21 duty has not been complied with has not been the subject of any decision and cannot avail the Defendant at this late stage. In any event, the submission does not address the more recent revised request.

REMEDY

66. In my judgment the unlawfulness in the decision challenged in these proceedings can and should be addressed by quashing the impugned decision. In practice and in accordance with the 1972 Act, this will lead to the Claimant providing an up to date request, which the Defendant will be required to respond to.

67. I will hear submissions from Counsel on whether any other remedy is appropriate but my provisional view is that a declaration is unnecessary. My judgment makes it clear that s.19 expenditure under the 1972 Act is not limited save through the proper application of s.21 and the relevant Bromley principles.

CONCLUSION

68. For the reasons I have given, the claim succeeds. I shall hear counsel on the appropriate form of the order.