



Neutral Citation Number: [2025] EWHC 611 (KB)

Case No: QB-2021-004706

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14 March 2025

Before:

**MR JUSTICE SWEETING**

Between:

**North Yorkshire Council**

**Claimant**

- and -

(1) Susan Boyce  
(2) Mazars LLP

**Defendant's**

-----  
-----  
**Nigel Giffin KC and Leo Davidson** (instructed by **Bevan Brittan LLP** for the Claimant.  
**Richard Moules** (instructed by **Ashfords LLP**) for the 1<sup>st</sup> Defendant.  
**Mazars LLP** (not represented and did not attend the hearing) 2<sup>nd</sup> Defendant.

Hearing dates: 5 & 6 March 2024  
-----

**Judgment**

**Mr Justice Sweeting:**

**Introduction**

1. Whitby Harbour (“the Harbour”) is located at the mouth of the River Esk and serves the port town of Whitby and its hinterland. Historically, Whitby was a major trading port. In the 18th century, Whitby was home to whalers and Baltic traders. In 1706 it was the sixth-largest trading port in Britain, building around 130 ships per year. The railway arrived in 1836. The town is famous, amongst other things, for its association with Bram Stoker’s Dracula, English explorer Captain James Cook and a gemstone, Whitby Jet. Whilst use of the Harbour has changed over the centuries it remains a key part of the town's economy, which relies heavily on tourism.
2. The Harbour is protected by two masonry piers that narrow towards each other, with extensions completed around 1914. These provide a sheltered area for shipping and locations for vessels to moor, load, and unload. The piers also give protection to the town and estuary. The port is divided into an Upper and Lower Harbour by a mechanical swing bridge, built in 1908, which controls navigational access. The waters of the port are marine and dry out to varying degrees at low tide.
3. Since 1906 the Harbour authority has been the local council. Over time, various local government reorganisations have taken place. Whitby was incorporated into Scarborough Borough Council (“SBC”), and later, with further reorganisations, responsibility for the Harbour was passed to the unitary authority, North Yorkshire Council, the current Council.
4. The present dispute began with an objection to the 2015/2016 accounts of the North Yorkshire Council (“the Council”), or more precisely, the accounts of its predecessor, Scarborough Borough Council. The objection was made by the First Defendant, a local resident. She has made similar objections for later years, but the central issues remain the same.
5. The Second Defendant is the statutory external auditor. It concluded that the legal position in relation to the First Defendant’s objection was unclear and declined to make a public interest report or declare any items unlawful. Instead, the auditor recommended that the Council seek declarations from the court to determine the correct legal position. The auditor is not actively participating in the proceedings. Costs protection has been agreed in favour of the First Defendant. She will not be liable to pay any costs.
6. A significant portion of the Harbour area is used for car parking. There are several car parks in the Upper Harbour area, including Endeavour Wharf Car Park, Marina Front Car Park, Marina Back Car Park, Marina Reserve Car Park, Marina Users Car Park, and the Overflow Car Park.
7. The First Defendant's objection primarily concerned the Council’s treatment of income from the various car parking facilities located near the Harbour. The First Defendant contends that this income should have been credited entirely to the separate revenue account maintained by the Council as the Harbour authority. The Council has used a different accounting approach and argues that only income directly related to harbour

operations should be included in the Harbour account; other income can and has been placed in the Council's General Fund account ("the General Fund"). This involves an assessment of the relationship between the income and the operation of the Harbour.

8. Revenue from the Marina Users Car Park which is used by individuals who have boats docked in Whitby Harbour, has been viewed as directly connected to the Harbour's activities. At the Endeavour Wharf Car Park, income from permits purchased by "harbour users" for parking has also been credited to the Harbour account whilst pay and display income from the general public has been allocated to the General Fund.
9. The dispute centres on the interpretation of the *Whitby Urban District Council Act 1905* ("the 1905 Act") and related legislation; specifically, what constitutes the "harbour undertaking" and whether the income from the car parks is "from or in respect of the harbour undertaking" within the meaning of s.62 of the 1905 Act.
10. If the income and expenditure generated by the land used for car-parking should be treated as income and expenditure in respect of the harbour undertaking, then it is necessary to identify which land the Council holds for "harbour purposes" or as part of the harbour undertaking. The parties have, by agreement, narrowed the ambit of the dispute in relation to this aspect of the litigation so that there are now only five disputed plots.
11. The parties have also agreed and narrowed the issues which are:
  - i) Is all income and expenditure generated by land which is held by the council for the purposes of the Harbour to be treated as income and expenditure in respect of the undertaking purposes of section 62 of the Act 1095 Act? If, not to what is the correct test?

Which, if any, of the 5 disputed plots identified on the Scott Schedule are held by the Council for harbour purposes?

- ii) Does the 1905 Act require a segregation of the capital assets and liabilities pertaining to the Harbour?
- iii) If the Council's position as to the legal test is correct, is the application of that test to any particular income or expenditure a matter for the Council to decide, subject to normal public law principles, or is it a matter ultimately to be determined by the court itself in the event of a dispute?

### **The Historical and Legislative Background**

12. At common law the public has a right to navigate tidal harbours and waters, a right that can only be limited by Parliament or established historical use. This right includes anchoring, mooring, and grounding as part of normal navigation, but not permanent occupation of harbour areas or the foreshore. Crown ownership of navigable riverbeds and seas is subject to this public right.
13. Historically, ports were free and open to all with tolls and dues being the only restrictions. The Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Act" see

below) codified this "open port duty," requiring harbours, docks, and piers to be open to the public for shipping, unshipping, embarking, and landing upon payment of statutory rates. Although harbour facilities may be allocated for specific users, this is subordinate to the general duty to keep the harbour open.

14. Whilst the 1847 Act used the term "undertakers," that has become "Harbour authority" in modern usage. The 1847 Act typically applies only when incorporated into local legislation, where the term "undertakers" is defined as the specific Harbour authority for the harbour concerned. Accordingly, "undertakers" under the 1847 Act is synonymous with a "harbour authority" as defined by the Harbours Act 1964 ("the Harbours Act").
15. The Harbours Act defines a "harbour authority" as any entity with statutory powers or duties related to improving, maintaining, or managing a harbour. These powers can be vested by the Harbours Act itself, or other statutes.
16. A statutory "harbour undertaking" refers to a defined area and set of activities which a statutory body has been given the right and obligation to manage; in this case, the operation and maintenance of Whitby Harbour. These powers are granted through Acts of Parliament. The implications are significant because assets that are deemed to be within the undertaking may be subject to specific rules including those relating to income, expenses, accounting, and disposal. The undertaking is not just the physical harbour frontage itself but can include land and other assets reasonably used in connection with it. Thus, statutory harbour authorities operate within legally defined limits, set by statute. In the contemporary setting these limits can be changed by central government utilising "harbour revision orders".

#### *Whitby Piers and Harbours Act 1827*

17. The overall running of the Harbour was put on a firm statutory basis under the Whitby Piers and Harbours Act 1827 ("the 1827 Act"), when trustees were appointed to manage and improve the harbour, piers, and other related infrastructure. They were also responsible for levying charges to fund these activities. The trustees had powers related to dredging and other improvements, with financial obligations including the repayment of loans and guarantees.
18. The 1827 Act was designed to consolidate and amend earlier legislation. It stipulated how duties collected on goods and any borrowed money were to be applied. Specifically at section. XVIII, these funds were to be used "in executing such Works, Matters and Things as are necessary for the Repair, Support, Maintenance, Protection and Improvement of the said Piers and Harbour of the said Port of Whitby". Section XLII of the 1827 Act vested the ownership of all buildings, erections, materials, piers, works, quays, and other assets in the Trustees of the Harbour. There was a power to purchase premises not exceeding two acres in total. The Council characterised the statute as focusing on the physical maintenance of the fabric of the Harbour with a narrow land acquisition power.

#### *The Harbours, Docks and Piers Clauses Act 1847*

19. The Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Act") provided a standard framework of model clauses for harbour management and operation. The provisions of

the 1847 Act apply only to such harbours, docks, or piers as are authorised by a subsequent Act or delegated legislation. The subsequent Act is referred to as 'the special Act', which is defined, at section 2, to mean any Act passed after the 1847 Act authorising "the construction or improving" of a harbour, dock or pier and within which the 1847 Act is incorporated.

20. Section 20 of the 1847 Act provides a power to purchase land "adjoining or near to the undertaking" for "extraordinary purposes," which include making additional yards, wharfs, and places. In effect this section allows harbour authorities to expand their facilities by acquiring adjacent land. Its full terms are:

“20. Power to purchase additional land required for extraordinary purposes.  
The undertakers, in addition to the lands authorised to be compulsorily taken by them under the powers of the special Act, may contract with any party willing to sell the same for the purchase of any lands adjoining or near to the undertaking for extraordinary purposes; (that is to say,)  
For making and providing additional yards, wharfs, and places for receiving, depositing, and loading or unloading goods, and for the erection of weighing machines, toll houses, offices, warehouses, sheds, and other buildings and conveniences:  
For making convenient roads to the harbour, dock, or pier, or any other purpose which may be requisite or convenient for the formation or use thereof.”
21. The penultimate paragraph plainly anticipates landside traffic coming to and from a harbour. In *Glebe Sugar Refining Company, Limited v Trustees of Port and Harbours of Greenock* [1921] 2 AC 66 Lord Birkenhead, in considering the last paragraph of s.20, observed: “That, I think, must mean requisites or conveniences for the formation or use of the harbours, docks, or piers. The word “thereof” cannot be confined, I think, to the roads to be made.” Thus, in broad terms section 20 confers a power to acquire land when it is required for the use of a harbour.
22. Section 21 provides the power to construct warehouses, storehouses, sheds, and other buildings on lands acquired under the 1847 Act or a special act. This includes the power to erect cranes, weighing machines and other conveniences. The powers in sections 20 and 21 are set out with reference to “goods” and so are focused on the function of a harbour in handling ships’ cargo.
23. Section 23 allows the undertakers to lease wharfs, warehouses, buildings, yards, cranes, and other conveniences for terms of up to three years. In short it allows the harbour authority to generate income from its assets.
24. Section 33 is titled “Harbour, dock, and pier free to the public on payment of rate” and provides that “upon payment of the rates, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers”. This provision establishes a general right of access to a harbour for the stated purposes; the “open port” duty referred to above.
25. Section 83 specifies that ("the") undertakers may from time to time make such by-laws as they shall think fit for regulating the shipping and unshipping and removing of all goods within the limits of the...premises of the undertakers."

*The Whitby Port and Harbour Act 1879*

26. The 1827 Act (above) was succeeded by later acts, notably the *Whitby Port and Harbour Act 1879* (“the 1879 Act”) which introduced the model clauses of the 1847 Act and gave the, now incorporated, trustees wider general powers and increased the acreage which could be purchased to 20 acres. The Council argued that although there was some broadening of powers within the 1879 Act, the provisions of the Act were still specific, narrow, and related to the physical harbour and ancillary activities.
27. Section 6 of the 1879 Act defines the limits of the Harbour as including all parts of the port within and above the existing piers and works. The port itself is defined as including a defined stretch of seashore, extending two miles out to sea and includes areas where the sea flows and reflows within the limits, as well as the lands, buildings and works within or near those limits.

*The Whitby Port and Harbour Order 1881*

28. The Whitby Port and Harbour Order 1881 set out the amounts to be charged by way of tolls, rates, and duties for vessels using the Harbour, quay, and other connected works and conveniences. The order stipulated that the income from these charges was to be used to cover the costs of maintaining the Harbour and fulfilling the objectives outlined in the relevant Acts. The context appears to be the abolition of what were called “passing tolls” in 1861 which were the main source of income for the Whitby Harbour Trustees. These tolls were levied on vessels that sailed by the port, even if they did not enter it. The removal of this source of revenue resulted in insufficient income to maintain the Harbour, creating financial difficulties for the Trustees and resulting, eventually, in the management of the Harbour passing to the local authority.

*Whitby Urban District Council Act 1905*

29. The 1879 Act was superseded by the Whitby Urban District Council Act 1905 (“the 1905 Act”). It transferred control from the Whitby Harbour Trustees to the Whitby Urban District Council (“WUDC”), defining the “harbour undertaking” to encompass all the trustees’ assets, rights, and responsibilities (excluding borrowing power). The 1905 Act mandated separate capital and revenue accounts for the Harbour, prioritising expenditure on operations, maintenance, and debt repayment, with any surplus earmarked for harbour improvements. Any shortfalls were to be covered by the council’s general funds. WUDC was granted broad powers regarding harbour lands and the ability to borrow for harbour-related projects. The 1905 Act also stipulated annual audits of the Harbour accounts, though audit practices have been updated by later legislation.
30. Following the 1905 Act, WUDC embarked on a major, decades-long program of harbour improvements, largely funded by local ratepayers. The responsibilities and powers granted to WUDC were later transferred to Scarborough Borough Council in 1974, and subsequently to the North Yorkshire Council in 2023. Essentially, the 1905 Act provided a new legal and financial foundation for the Harbour, enabling significant development and shaping its management structure for over a century.
31. Section 62 of the 1905 Act is central to the dispute and provides:

“The Council shall keep separate accounts of their receipts and expenditure from or in respect of the harbour undertaking on capital and revenue account and where any expenses are incurred in respect of the Harbour undertaking and any other account jointly they shall apportion such expenses between the Harbour undertaking and such other account and the harbour account shall be audited in each year in the same manner as the other accounts of the Council are audited and subject to the provisions relating thereto.”

32. The expression “harbour undertaking” is partially defined in section 5 by what is included. It provides:

“...the harbour undertaking of the trustees (which expression in this Act includes all property real and personal and things in action belonging to or vested in the trustees and all their powers (exclusive of powers of borrowing money) rights duties obligations authorities and jurisdiction) shall be transferred to and vested in the Council subject to the debts contracts and liabilities affecting the same.”

33. Section 16 of the 1905 Act relates to the application of revenue from the harbour undertaking and provides:

“All moneys in the nature of revenue received by the Council in respect of the harbour undertaking shall be applied by them as follows:- (1) In payment of the working and establishment expenses and cost of maintenance of the harbour undertaking; (2) In payment of the interest or dividends on any mortgages or other securities granted and issued in respect of money borrowed for the purposes of the harbour undertaking; (3) In payment of any sums required to be paid for any instalments or contributions to a sinking fund in respect of moneys borrowed for the purposes of the harbour undertaking; (4) In repayment to the district fund of the district of any sums paid out of that fund or the general district rates of the district for the purposes of the harbour; (5) In providing (if the Council think fit) a reserve fund by setting aside from time to time such moneys as they think reasonable and investing the same and the income thereof in statutory securities until the fund so formed amounts to a sum of five thousand pounds which fund shall be applicable to answer any deficiency at any time happening in the revenue of the Council from the harbour undertaking or to meet any extraordinary claim demand or liability at any time arising against the Council in respect thereof and so that if the fund is at any time reduced it may thereafter be again restored and so from time to time as often as such reduction happens. Any surplus revenue from the harbour undertaking in any year and the income of the reserve fund so long as that fund amounts to five thousand pounds shall be applied to the improvement of the harbour undertaking.”

34. Section 17 of the 1905 Act applies where there is a deficiency of revenue and underscores the Council's responsibility to ensure the Harbour's financial stability:

“If in any year the revenue of the harbour undertaking proves insufficient to meet the payments specified in paragraphs (1) (2) and (3) of the last preceding section the deficiency shall be made up out of the district fund and general district rates of the district.”

35. Giving “revenue” its conventional accounting meaning, it will comprise the gross sums of money generated from the normal activities of the harbour authority; that is, all moneys receivable in relation to the harbour undertaking other than borrowed moneys and moneys which ought to be allocated to a capital account.
36. Section 30 provides the Council with powers to manage and dispose of land acquired under the Act. It was common ground in argument that it amounts to a considerable broadening of the powers and is not, as the Council observed in argument, “harbour specific”:

“Notwithstanding anything in the Land Clauses Acts or in any other Act or Acts to the contrary the Council may retain hold and use for such time as they may think fit and may sell lease exchange or otherwise dispose of in such manner and for such consideration and purpose and on such terms and conditions as they may think fit . . . any lands acquired by them under this Act or any interest therein . . .”
37. Section 73 clarifies the relationship between powers granted under the 1905 Act and other powers:

“All powers rights and remedies given to the Council by this Act shall (except where otherwise expressly provided) be deemed to be in addition to and not in derogation of any powers rights and remedies of the Council or of any committee or officer appointed by them by any other Act.”

#### *Local Government Act 1972*

38. It was not in issue that in its capacity as a local authority the Council has wide powers. Section 111(1) of the Local Government Act 1972 (“the 1972 Act”) provides:

“(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”
39. Prior to the enactment of Section 111(1) of the 1972 Act it was recognised in *Dundee Harbour Trustees v D&J Nicol* [1915] AC 550 that whilst the powers of a statutory body, such as a local authority, are limited to those expressly authorised by statute they also extend to those activities that are fairly incidental to the express powers. In that case the Dundee Harbour Trustees were using ferry steamers, which they owned, for excursion trips beyond the defined limits of their ferry service. The Trustees argued that the excursion trips were ‘incidental’ to their main purpose and that the extra income would assist the harbour business. The House of Lords rejected this argument, holding that the excursions were a separate business activity, not incidental to the ferry operation. The principles established in the *Dundee Harbour Trustees* case have been applied to other harbour authorities and establish that a harbour authority’s functions must be tied to the explicit purposes in its governing legislation, focusing on the operation and maintenance of the harbour itself.



40. In *R (Looe Fuels Ltd) v Looe Harbour Commissioners* [2007] EWHC 1141 (Admin) the Commissioners' decision to operate a new fuel facility at Looe Harbour was challenged by Looe Fuels Limited. It was held that such an activity was neither incidental nor necessary to the Commissioners' primary function, as established by an Act of 1848 which had brought the Commissioners into existence and defined their statutory purpose as being "the proper maintenance and improvement of the Harbour of Looe". The court quashed the portion of the Commissioners' decision that enabled them to run the fuel facility. The First Defendant's argument in this case is that the provision of parking is in fact incidental to the main purpose of the Harbour. That is, in principle, accepted by the Council in respect of certain categories of car park users. The First Defendant drew attention to paragraph 22 of the judgment in *Looe Fuels*:

"In my judgment it would be wrong for the court to be unduly restrictive in determining what powers are incidental to or necessary for a statutory body to carry out its functions. The statute and the activities of the statutory body must be sensibly and practically considered; but one nonetheless must have regard to the statutory wording."

41. The wide powers given under section 111 of the 1972 Act are also subject to these same limitations. *R (Risk Management) v Brent LBC* [2009] EWCA Civ 490, extensively considered the application of section 111 in the context of a local authority becoming a member of a mutual insurance company. It clarified that while section 111 grants local authorities subsidiary powers to facilitate their functions, these powers are not unlimited. They must be truly incidental to the discharge of a function and cannot be used to justify actions that are merely convenient or profitable.
42. In contrast, the case of *Akumah v Hackney London Borough Council* [2005] 1 WLR 985 provides an example of a situation where an activity (regulating parking) was considered to be properly incidental to a local housing authority's function (managing housing). Lord Carswell, giving the leading opinion referred to the observation of Moses J. at first instance:

"It seems to me in this modern-day age when most residents will have cars which they wish to park near their homes, that it is inherent in and certainly conducive and incidental to a council's duty to manage, regulate and control their housing, that they should regulate and control the parking of cars on their housing estate. For my part, I regard such regulation and control as inherent in the function which it is the duty of the council to perform under 21(1). But even if that were wrong the council has subsidiary power to do anything which is conducive or incidental to the discharge of their functions. This power is contained in section 111 of the Local Government Act 1972."

### *Harbours Act 1964*

43. Section 40 of the Harbours Act provides harbour authorities with a broad discretion over the terms and conditions on which they make available the services and facilities provided at a harbour. There appears to be no reason why it would not apply to charges made for car parking provided as part of a harbour undertaking:

“40. Conditions as to use of harbour services and facilities provided by certain harbour authorities.

(1) A harbour authority shall have power to make the use of services and facilities provided by them at a harbour which, in the exercise and performance of statutory powers and duties, they are engaged in improving, maintaining or managing subject to such terms and conditions as they think fit except with respect to charges as to which their discretion is limited by a statutory provision (whether by specifying, or providing for specifying, charges to be made, or fixing or providing for fixing charges, or otherwise).”

*The Road Traffic Regulation Act 1984*

44. The Road Traffic Regulation Act 1984 (“RTRA 1984”) grants local authorities significant powers related to the provision and regulation of parking. Section 32 of the RTRA 1984 empowers local authorities to provide suitable parking places for vehicles within their area, when it appears necessary for the purpose of relieving or preventing traffic congestion. This power extends to both off-street parking places, the use of any part of a road as a parking place and adapting land for use as a parking place, including providing means of entrance and egress. The authority may also provide temporary off-street parking places on any land owned by the authority and associated facilities like public conveniences.
45. Local authorities have the power to regulate the use of parking places through orders made under section 35 of the RTRA 1984. This includes the authority to make provisions regarding the use of the parking place, including the types of vehicles permitted, the conditions under which the parking place may be used and the charges to be paid in connection with the use of off-street parking places. The Council points to The Borough of Scarborough (Off Street Parking Place) Order of 2012 as an example of such an order which designated parts of the Endeavour Wharf and Marina car parks as parking places, consistent, it is said, with the exercise of the local authority's powers under the RTRA 1984. The First Defendant counters that Off-Street Parking Orders have been in place at the Car Parks for decades, and the creation of these Orders has been repeatedly approved by the committees responsible for the harbour undertaking.
46. The RTRA 1984 also allows local authorities to use land they already own for parking purposes, even if that land was acquired for other purposes (in this respect the Council draws attention to the fact that the powers conferred on it as a harbour authority under section 73 of the 1905 Act are expressed to be additional to its other powers and not in derogation of them). The Council asserts that it has collected revenue from the public car parks in its capacity as a local authority, exercising its functions under the RTRA 1984, rather than in its capacity as a Harbour authority.
47. The First Defendant argues that the Council's powers under the RTRA 1984 cannot override the requirements of the 1905 Act, in so far as the land and revenues from car parks near the Harbour should be treated as part of the harbour undertaking, regardless of the use of RTRA 1984 powers. Those powers may in any event require a formal appropriation of the land so that it falls outside of the harbour undertaking.

*Municipal Ports Review 2006*

48. The 2006 Municipal Ports Review (“MPR”) was a comprehensive assessment of 61 municipal ports across the UK. Its primary goal was to evaluate the effectiveness of these ports and understand their contribution to the local and regional economies. The review also sought to identify potential future options for the ports concerned, considering their unique challenges and opportunities.
49. One of the key findings of the MPR was the prevalence of a lack of financial ring-fencing among the surveyed ports; that is to say isolating funds generated by a port and ensuring that those funds were exclusively used for the port’s operations and development. The MPR revealed that the majority of municipal ports did not have fully ring-fenced accounts, meaning their finances were intertwined with those of the local authority. The report acknowledged the risk that local authorities might divert funds generated by the port to support other local services, potentially leaving insufficient resources for essential port maintenance, upgrades, and future development. The MPR indicated that only 19% of the surveyed ports had fully ring-fenced accounts, highlighting the widespread nature of the issue but also that the position between ports varied so that some ports did have a financial separation of funds derived from the operation of the port.
50. The report suggested that clearer guidelines and stricter regulations were necessary to ensure that port revenues were used for their intended purpose, safeguarding their long-term sustainability and economic contribution.

#### *Ports Good Governance Guidance*

51. The MPR was followed in 2018 by the Department for Transport’s Ports Good Governance Guidance (“PGGG”). Part C of the PGGG, concerning local authority-owned ports, noted that local legislation often restricts how harbour income can be used, sometimes requiring it to be exclusively for Harbour related purposes. The report observed that such restrictions can operate to prevent local authorities from transferring these funds to other services.
52. The PGGG provided a framework for the operation and management of ports, with a particular focus on those owned by local authorities. A central theme of the PGGG is the recognition that ports serve a broad spectrum of stakeholders, extending beyond those who directly utilise the port’s facilities. The PGGG explicitly defines stakeholders to include:
  - i) local communities, recognising a port’s role as a vital local asset;
  - ii) harbour users, encompassing both commercial operators and leisure craft, along with their representative organisations;
  - iii) the local economy, acknowledging a port’s contribution to local businesses, suppliers, and employment;
  - iv) local and central government, reflecting the regulatory and oversight roles and;
  - v) other key stakeholders such as employees.

#### *Accounting Practice at Whitby*

53. Historically, income from activities on harbour land at Whitby was generally treated as revenue received in respect of the 'harbour undertaking' and various types of income were included in the harbour account including:
- i) *Short-term lets*: The Harbour Trustees granted permission and received income for short-term lets of sites on harbour land. These included market stalls selling refreshments and souvenirs. Typically, these lets or leases were for a period of three years or less.
  - ii) *Rents*: Rents from storage/cargo sheds used for marine activities were included, as were rents activities on harbour land, such as sites for fairground rides, retail stalls, and cafes.
  - iii) *Car parking*: Income from car parking was historically treated as part of the harbour undertaking's revenue. This included income from both user permit parking and public parking and reflected the general approach to the management of the Harbour. A report from 1990 (see further below), for example, identified the provision of car parking for users and visitors as an objective of the Harbour Committee.
  - iv) *Other activities*: Other sources of income included rent for telescope sites and wayleaves.
54. The Whitby Harbour minutes for 1990/1991 show that 98 % of the income arising from parking came from pay and display car parking facilities within the Upper Harbour whilst 20% of the overall income was derived from rentals.
55. At some point between 2001 and 2005, the practice of allocating all income from harbour land to the harbour account changed. Notably, income from public car parks on the Upper Harbour began to be credited to the General Fund instead of the harbour account.

#### *Local Authority Policy and Strategy*

56. A document titled "Ports Strategy-2008 Onwards 'charting a course for the future' was produced by Scarborough Borough Council, Technical Services. Although the document itself does not have a specific publication date, it indicates that the timescale for adoption of the strategy was by April 2008.
57. The strategy was developed recognising the importance of the ports controlled by the Scarborough Borough Council (Scarborough, Filey and Whitby), not only in terms of their heritage, but also as vital for the future economic well-being and regeneration of the area. There are differences between the three ports; notably, Scarborough and Filey have coastal harbours, and neither is situated on a significant river in the way that Whitby is on the River Esk. The strategy recognised that the ports were a major draw for tourists, with an estimated 4 million people visiting the three ports annually, describing them as "magnets to tourists visiting the area, be this by sea or land". The strategy was intended to "guide the future of the Borough Council's ports undertakings". Its overall view of what that future held was described as follows:

“The vision for the Ports is based upon a future where tourism and leisure opportunities will be key drivers so far as investment opportunities are concerned. The fishing industry locally continues to strive against a background of ever demanding constraints. Its future seems to be based upon consolidation and diversification rather than expansion. Ports settings and lands are desirable development opportunities and these must be carefully exploited but without prejudice to the status of the Ports or their users.”

58. The strategy aimed to create “centres of excellence where economic sustainability and viability are important aspects within a tourism setting of high environmental quality.”
59. As far as car parking is concerned the strategy aimed to encourage people, including those with disabilities, “to have access to appropriate areas of the ports, including car parking where appropriate”. The document also mentions that seven acres of tidal flood plain land had been reclaimed on the western side of the Upper Harbour at Whitby for car parking and marine-oriented business.

## **The Arguments in Summary**

### *The Council*

60. The Council argues that the "harbour undertaking" is defined by the activities and usage authorised by harbour legislation and is essentially economic in nature. It is not simply synonymous with physical land acquired for harbour purposes; it is more akin to a business or a going concern. The income and expenditure that should be included in the separate harbour account is that arising from activities and usage of a kind authorised by the harbour legislation, historically in the form of harbour dues and charges. This was referred to in argument as the “functional” approach. The consequence of this approach is that not all income from land acquired for harbour purposes is automatically to be considered as revenue of the harbour undertaking. Income and expenditure should be included in the harbour account only when it arises from the operation of the Harbour itself, or activities closely connected with it.
61. The practical application of the Council’s interpretation of the relevant legislation is that car parking provided for the general public, and some commercial rental income, has not been regarded (at least in recent times) as falling into the category of harbour income. As far as car parking is concerned the Council’s submission was that there could be no power for a harbour authority to provide parking for the general public, that being a power that could only be exercised by the local authority under road traffic legislation. It rejected the First Defendant’s argument that there was power under the 1905 and 1972 Acts to provide car parking for members of the general public who were visiting the Harbour. However, the Council acknowledged that parking provided specifically for some harbour users could be included. Hence the accounting treatment of income from the Marina Users car park and from permits purchased by harbour users for parking at Endeavour Wharf. The Council argues that in cases where the categorisation of a particular use is a matter of factual judgment, the decision as to the treatment of that use is for the Council, subject to challenge on *Wednesbury* principles.
62. The Council characterises the First Defendant’s approach (see below) as looking at the application of section 16 of the 1905 Act through the prism of harbour assets rather than

harbour purposes which accorded little value to the concept of an “undertaking” defined by statutory limits.

63. As far as the statutory scheme of the 1905 Act is concerned, the Council argues that section 5, defining what was transferred from the Trustees, was “spent” once the transfer had taken place. Whilst section 16 and section 31 involve the ring-fencing of income and capital receipts respectively, that does not apply to section 62 which is an accounting provision and is predicated upon the identification of receipts and expenditure “from” the harbour undertaking. It further submitted that section 62 of the 1905 Act does not therefore require a separate capital account in the sense of a segregation of assets and liabilities pertaining to the Harbour.

#### *The First Defendant*

64. The First Defendant contends that if land was acquired by the Council or its predecessors as a harbour authority for harbour purposes and has not ceased to be held for that purpose, then any revenue generated from activities on that land should be credited to the harbour account. This approach focuses on the original purpose for which the land was acquired. It is only necessary to consider whether the Council is acting *intra vires* as the statutory harbour authority and so lawfully carrying on the use of the land as authorised by statute or in a way which is incidental to its use; the income generated is then necessarily from the harbour undertaking. The First Defendant rejected any broader functional enquiry into whether the use or activity is a “core” harbour activity or results directly from the “operation of the harbour itself” arguing that the legislation does not require or permit any such enquiry and that the Council’s attempt to operate such a distinction in practice was arbitrary and inconsistent. The consequence of these arguments is that the Council has no discretion to allocate income from car parks or occupational interests to its General Fund. The First Defendant argues that this is in keeping with the overall scheme of the 1905 Act which is designed to ensure that the harbour undertaking covers its costs, and that revenue is directed to maintaining and improving the physical structure given the reference to improvement in section 16. This reflects the requirement in the earlier 1881 Order that the Harbour should, in effect, “break even”.
65. Further or alternatively the First Defendant argued that providing public car parking is a use that is fairly incidental to the operation of the Harbour, *intra vires* for the Harbour authority and so should be considered part of the harbour undertaking. Equally the income derived from leases and licences (granted *intra vires* the Council as a harbour authority) on harbour land is also revenue from the harbour undertaking; the nature of the use of the land by a tenant or licensee being irrelevant for this purpose. Insofar as the First Defendant sought to rely on incidental powers, she argued that these all derived from express powers including those allowing the harbour authority to charge dues and mooring fees to sell and lease land and, as was accepted by the Council, to provide parking for harbour users (see *Piggins & Rix Ltd v Montrose Port Authority* 1995 SLT 418).

#### **The Case Law**

66. The Council relied on a number of authorities in support of its contention that a functional approach was required and as demonstrating the limits of activities that may be regarded as incidental to express statutory powers.

*London & North Eastern Railway Co v British Trawlers Ltd*

67. In *London & North Eastern Railway Co v British Trawlers Ltd* [1934] AC 279 a railway company which owned a harbour and docks, operated fish markets on their quays. While rail transport of fish from the markets was historically the normal method of onward shipment, buyers increasingly used their own vehicles. The railway company then tried to restrict the use of road haulage by issuing licences, effectively preventing the transport of fish by road beyond a 12-mile radius. The court held that the fish markets were part of the dock, the 1847 Act applied and the right to use the dock for unshipping goods included the right to remove those goods as part of the “open ports” duty under section 33:

“Now I have already pointed out that the appellants' proprietary rights are qualified by their statutory obligations. The harbour is to be open to all for the purpose of unshipping goods. It is manifest that this must include the consequential purpose of removing the goods unshipped, and such removal necessitates the employment of the appropriate vehicles” (Lord Macmillan at page 301)

68. This turned on the initial question of whether section 33 applied because the fish market was either reasonably incidental to the harbour enterprise or part of the statutory undertaking authorised by Parliament in the various special acts under which the railway company's quays, piers and jetties had been constructed. The railway company argued that the fish market was an activity it conducted simply in its capacity as landowner, not as part of its statutory harbour undertaking. As a private landowner it was entitled to impose such conditions as it thought fit on access to its land. The case therefore involved what might be thought to be a conventional exercise in identifying the source of the powers of a statutory corporation:

“The Legislature has recognized that the provision and carrying on of such markets is reasonably incidental to the conduct of the harbour enterprise, as is evidenced by the quotations which my noble and learned friend Lord Tomlin has made from the harbour statutes.” (Lord Macmillan page 300)

“The answer is that the right of access conferred by s. 33 of the Harbours, Docks and Piers Clauses Act includes, by virtue of the definition in s. 2, access to the authorized works connected with the harbour, and the fish markets are among the harbour works which Parliament has authorized. Indeed, if the fish markets were not either incidental to the Harbour undertaking or specially authorized, it would have been ultra vires of the appellants and their predecessors to have expended their funds in providing them. Accordingly, so long as the appellants carry on these fish markets as part of their harbour undertaking they have no more power to restrict the access of appropriate vehicles to these markets for the removal of fish purchased there than they have to restrict the access of appropriate vehicles to the ship's side for the removal of goods unloaded; always subject, of course, but subject only, to the rights of regulation by by-law which they possess.” (Lord Macmillan page 302)

69. Presciently perhaps, Lord Macmillan referred to the impact of changes in modes of carriage in construing section 33:

“There has been little occasion in the past to construe these wide words, for hitherto harbour undertakers have been more disposed to welcome than to restrict the access of persons desirous of doing business at their harbours. But the advent of the commercial motor vehicle with its extended range and its large carrying capacity has been responsible for the raising of the present, as of so many other problems.”

70. Although the speeches are not uniform in their analysis, the Law Lords were primarily focused on the interpretation of a specific statutory requirement concerning access to facilities for shipping and unshipping goods. The reasoning differed, some Law Lords focusing on the definition of "harbour, dock, or pier" as including connected works, and others concluding that operating the fish market was either part of, or incidental to, the harbour undertaking. However, they were not attempting to establish general principles for defining an “undertaking” beyond the particular statutory provisions they were considering. It does not appear to me that this case provides a basis for a more general interpretation, of, or test for, what constitutes part of a harbour undertaking; nor does it support an overall functional test.

*Shell-Mex and BP Limited v Clayton*

71. The case of *Shell-Mex and BP Limited v Clayton* [1956] 1WLR 1198 was concerned with whether land used for oil storage tanks at Hull Docks qualified for rating relief. The British Transport Commission (“BTC”), which was the dock authority (analogous for present purposes to a Harbour authority), leased land adjacent to Hull Docks to Shell-Mex and BP Ltd. The oil company then built storage tanks on this land and used jetties owned by BTC to unload oil from tankers. The oil was then pumped through pipelines to the storage tanks. The central issue was whether this arrangement qualified for rating relief under the Rating and Valuation (Apportionment) Act 1928 as a "freight-transport hereditament".

72. The relevant statutory definition was as follows:

“" Freight-transport hereditament " is defined by section 5 (1) of the Act of 1928 to mean (inter alia) "(c) A hereditament " occupied and used wholly or partly for dock purposes as part of "a dock undertaking being an undertaking whereof a substantial " proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or " intended for the use of the undertakers. "

73. The central question was therefore whether the land was “occupied and used wholly or partly for dock purposes as part of a dock undertaking”. To answer the question in the affirmative involved satisfying three conditions:

- i) Was the land used for dock purposes?
- ii) Was it used as part of a dock undertaking?
- iii) Was the undertaking concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers?

74. It was accepted that the land was used for dock purposes, that issue having been determined by the Court of Appeal and not re-argued on the appeal in the House of



Lords. The majority of the House of Lords held that the oil storage facility was not part of the BTC's dock undertaking, because it considered the oil company's business to be separate. The Law Lords rejected the argument that oil storage was part of a dock undertaking carried on by the oil company itself, at a barge berth, because the oil company's business at the barge berth was not "carried on at and in connection with that dock". They also found that the oil, once unloaded, belonged to the oil company or was intended for its use so that the third condition was not satisfied.

75. Viscount Simonds noted that the court had been asked to consider the use and occupation of the land in both its "physical and functional aspects". However, he observed that he found those distinctions difficult to follow. Ultimately, his reasoning focused on the separate nature of the oil company's business from that of the dock undertaking carried on by BTC:

“The point is a narrow one, but I have come to the conclusion that the decision of the Court of Appeal should be affirmed. The present interest of the commission in the hereditament is to receive the rent reserved by the leases and to enforce, so far as necessary, the lessees' obligations therein contained. I do not think that it can fairly be said that it is the consequence or corollary of this that the appellants occupy and use the hereditament as part of a dock undertaking carried on by the commission. It might well be otherwise if the appellants could themselves be said to be dock undertakers in the sense that they provided docking facilities for others, but it is clear that they do not do so. Their undertaking is the importation and distribution of oil, and for its purposes they need docking facilities. The use of those facilities does not appear to me to convert their undertaking into part of a dock undertaking carried on by the Transport Commission.” (Viscount Simonds at page 1205)

76. The majority of the House of Lords drew attention to the fact that the oil company's business was physically and commercially separate from BTC's dock undertaking because of the grant of a lease, without any further involvement by BTC or the incorporation of the business carried on by Shell-Mex and BP Ltd into BTC's dock undertaking.

“I think the decision turns largely upon the particular facts of each case. It is quite possible for a dock authority to let off part of their premises on terms and in circumstances in which the demised premises will remain part of the dock undertaking subject to the regulations of the authority with regard to user and so forth. But in the present case the authority merely granted long leases of vacant land adjacent to their undertaking to the appellants for their own purposes and free from any regulation or supervision by the authority. There is nothing which, to my mind, would justify a finding that by the grant of these leases the dock authority had incorporated in their existing undertaking the new installations and equipment which the appellants were to erect for the purposes of their business.” (Lord Tucker at page 1211)

77. The analysis therefore turned on the grant of leases and the fact that the oil company did not itself operate the demised land as a dock open to use by others. The question of whether BTC itself could have operated a similar business to that of the oil company

within the terms of the statutory power was not in fact determined even if it was doubted:

“I should require clear evidence, which is entirely lacking here, that the Hull dock authority had statutory power to carry on the business of an oil depot as carried on by the appellants, that is, as oil merchants and distributors, before I could regard an hereditament occupied and used for such a business as part of their undertaking. If the authority cannot so use their land, the appellants cannot be occupying and using the oil depot as part of a dock undertaking. A further difficulty is this. The land leased to the appellants or their predecessors in title belonged to the Hull dock undertaking and, I will assume, was part of the dock undertaking though it may not have been used at all for dock purposes. But when it was let out it would, according to ordinary conceptions, cease to be part of the dock undertaking. It would be put, for the time being, beyond the operations and control of the dock undertakers.” (Lord Keith at page 1213)

78. While the court was invited to consider the functional aspects of the land's use, the majority's reasoning does not provide any clear guidance on how to apply a functional test in practice and the case was not determined solely, if at all, on the basis of such an approach. It is true that Lord Keith considered that:

“...such an undertaking includes much more than the mere physical structure of the dock. The dock is only part of the undertaking, just as a railway is part of a railway undertaking and a canal a part of a canal undertaking as stated in terms by the Act when referring to these types of freight-transport hereditament under section 5 (1) (a) and (b). A dock undertaking includes the whole business and activities of a dock authority.”

79. However, I do not consider that this is essentially in dispute in this case. Lord Keith was addressing the argument that because the land let out was physically part of the dock it continued to be part of the dock undertaking notwithstanding the lease and its complete separation from the activities of the dock authority.
80. Similar observations were made in *Baytrust Holdings Ltd v Inland Revenue Commissioners* [1971] 1 WLR 1333, where the court considered the meaning of "undertaking" in the context of stamp duty and company reconstruction rejecting the argument that "undertaking" was equivalent to "gross assets" rather than the business or enterprise undertaken by a company. Again I do not think this is directly relevant to the issues before me.
81. There are other reasons why the *Shell-Mex* case does not, in my view, throw much light on the issues raised in the present litigation or provide assistance as to the proper accounting treatment of income generated at Whitby Harbour: The *Shell-Mex* case concerned the interpretation of the Rating and Valuation (Apportionment) Act 1928, specifically whether certain land used for oil storage tanks qualified for rating relief as a "freight-transport hereditament". The House of Lords was not addressing the issue of how to define the scope of a dock undertaking for the purposes of the accounting treatment of revenues arising from that undertaking. The legal principles and reasoning in *Shell-Mex* were accordingly closely tied to the precise wording and context of specific rating legislation.

82. The modern approach in rating law to determining what constitutes a single hereditament or a part of an undertaking for rating purposes is broadly geographical rather than functional (see *Woolway (Valuation Officer) v Mazars LLP* [2015] AC 1862).
83. The issue before the House of Lords in *Shell-Mex* was not analogous to the present dispute. The court was not considering whether rent received from the use of land let to *Shell-Mex* should be treated as income from a dock undertaking. The land leased to *Shell-Mex* was in fact found to be held for dock purposes. There was no suggestion that granting a lease was ultra vires or that it altered the purpose for which the land was held by BTC. The more analogous question would be whether BTC was receiving payments under the lease as part of the dock undertaking. As far as the car parks at Whitby are concerned the Council is itself in occupation so that the factual scenario is crucially different to that considered in *Shell-Mex*.

*Greenock Harbour Trustees v Assessor for Greenock*

84. In the Scottish case of *Greenock Harbour Trustees v Assessor for Greenock* ‘1950 SLT 184’ 184 the court held that graving docks, despite being leased to ship repair firms, remained part of the Harbour undertaking because they continued to serve the essential function of ship repair for vessels using the Harbour. The leases stipulated that the docks were to be used solely for ship repairs, but they were to be made generally available to vessels using the harbour. The Greenock Harbour Trustees (the lessors) argued in relation to their rating valuation that the graving docks should continue to be classified as "docks", a category that allowed for a 20 percent deduction under Class 8 of the First Schedule to the Rating (Scotland) Act 1926. The assessor sought to classify the graving docks as "premises used wholly or mainly for industrial purposes," which fell under Class 2 and which would have resulted in a lower deduction from the gross annual value.
85. There was no change in the function of the docks nor any argument that they were not part of the dock undertaking when operated by the Trustees; the issue was as to their classification after they had been let. The court considered that if the trustees had retained the graving docks, and simply allowed repairers to use them the docks would have been assessed as a single entity with the rest of the harbour undertaking. The lease to the repair companies was a business arrangement and had not altered the character of the land, or its relationship to the harbour. Lord Jamieson observed that the lease did not change the fact that the trustees owned the docks as part of their harbour undertaking and they had an interest in ensuring that dry docking facilities were available to vessels using the harbour.
86. The fact of the lease, and the associated revenue stream, did not alter the fundamental nature of the docks or their function as part of the broader harbour infrastructure. This conclusion echoed the observation of Viscount Simonds in *Shell-Mex* that the decision in that case might have been different if the lessees had carried on a business which offered dock facilities. Whilst the case did undoubtedly involve a functional analysis in the sense that the court explored the question of whether the use of a property changes its character as part of the harbour undertaking when it is leased to a third party, that question arose in the context of the classification of the graving docks for rating purposes.

87. As was argued on behalf of the First Defendant the general approach in relation to rating involves consideration of occupancy and then, if necessary, the use to which property is put. In *Aberdeen Harbour Board v Assessor for Aberdeen* 1973 SC 76 a fish market adjacent to the Harbour was considered not to be part of the "freight-transport" land when occupied by the town council but was included when the harbour board itself took occupancy. Conversely, when a single entity occupies a property (meeting the geographical unity test), the key to determining subdivision for rating purposes is whether part of that property is used for a "wholly different purpose." The case of *North Eastern Railway v York Union* [1900] 1 Q.B. 733 illustrates this approach. A hotel within a railway station, both operated by the railway company, was considered to be a separate rateable unit due to its "wholly different purpose" compared to the station itself.
88. Again, it does not seem to me that the *Greenock Harbour* case, rooted as it was in an argument about the treatment of graving docks as part of an exercise in ratings valuation, offers much guidance as to the issues which arise in the present case. It does not, in my view, support or mandate a functional inquiry in addressing those issues.

*R v Ealing LBC ex p Lewis*

89. The Council relied upon *R v Ealing LBC ex p Lewis* (1992) 24 HLR 484 in support of its contention that it had a discretion as to how income was allocated.
90. The Local Government and Housing Act 1989 requires local housing authorities to maintain a Housing Revenue Account ("HRA") and balance it so as to avoid deficits. Schedule 4 of the Act details what can be credited (e.g., rents) and debited (e.g., repairs, maintenance, and management). "Management" is broadly construed, encompassing activities such as tenant selection.
91. In the *Lewis* case, the local authority increased rents, justifying that course by including certain expenditure in their HRA debits under "management." These expenditures were: (1) staff salaries in the Homeless Persons Unit related to housing application assessments, (2) salaries of Housing Advisory Service staff, and (3) a portion of sheltered accommodation wardens' salaries related to tenant welfare. A tenant challenged the rent increase, arguing that these salary expenditures should not be debited to the HRA. The first instance court rejected the challenge, but the tenant appealed.
92. The Court of Appeal allowed the appeal, holding that local housing authorities cannot debit items to the Housing Revenue Account (HRA) that fall outside the statutory language of Schedule 4. While borderline items allow for some discretion (subject to Secretary of State direction), this discretion was limited. Whether an item can be included was a question of law; whether it should be was a question of fact.
93. *Lewis* concerned the allocation of expenditure under the Local Government and Housing Act 1989. The present case concerns the allocation of income derived from the Harbour undertaking under the 1905 Act. The principles governing the allocation of expenditure which were relevant in *Lewis* do not appear to me to be directly transferable to the present case, so that *Lewis* is distinguishable on this fundamental basis. The 1989 Act contained specific provisions regarding expenditure and the Secretary of State's powers. The 1905 Act, in contrast, lacks analogous provisions

concerning income and ministerial oversight, which preclude any ready implication of a similar discretionary power. The 1989 Act's provisions for ministerial guidance and direction in relation to expenditure are simply not present in the 1905 Act with respect to income.

94. Moreover, as the First Defendant submitted if *Lewis* establishes a general principle it is that whether a particular head of expenditure falls within the scope of the relevant statutory definition is a question of law for the court to determine. By parity of reasoning, the determination of what income falls within the scope of section 62 of the 1905 Act must also be a question of law, not a matter for the Council's discretion.

*The Manydown Company Limited v Basingstoke and Deane Borough Council*

95. The Council referred to *The Manydown Company Limited v Basingstoke and Deane Borough Council* [2012] EWHC 977 to illustrate the principle that a local authority must not act in a manner which is inconsistent with the purpose for which it holds land. The case involved a claim for judicial review by The Manydown Company against two decisions of Basingstoke and Deane Borough Council regarding the development of a large area of farmland owned by the Council. The claimant argued that the Council's refusal to reconsider its position on developing the site, and subsequent decisions, were unlawful. The claimant argued that the decisions were inconsistent with the purpose for which the Manydown land was acquired and amounted to a fetter on the proper exercise of the council's functions. The court found that the council's decision was contrary to the purpose for which the land was acquired and held and was not calculated to promote the policy and objectives of the statutory provisions underpinning the acquisition of the site. The *Council* had unlawfully sought to use its control to delay development.
96. The decision turned upon the fact that the council had acquired the site under the Town and Country Planning Act 1990 to promote a high-quality, comprehensive housing development. The fundamental objective of the Council's acquisition was to promote housing development on the land, and it remained the purpose for which the land was held. The land had never been appropriated by the Council for any other purpose.
97. Subject to the dispute as to limited number of plots there is no argument but the Council acquired land under the 1905 Act as a harbour authority and that there has been no appropriation of the land for any other purpose. The case suggests that a relevant inquiry in the present case would be as to the objectives of the 1905 Act.

## **Discussion & Conclusions**

### *Car Parks*

98. There is no dispute that a harbour authority may lawfully provide car parking. I bear in mind that this is a dispute about the proper accounting treatment of income and expenditure. It is not a judicial review challenge to a decision of the Council to use or permit land to be used for certain purposes other than those for which that land is held. No such challenge has been made and any attempt at a challenge now would be out of time.
99. In relation to what might be described as the starting position the Council's skeleton observed: "Where the body carrying on a harbour undertaking has the conduct of that

undertaking as its sole function, then any income from or expenditure upon intra vires activity will by definition be from or in respect of the undertaking, and indeed anything lawfully done by the undertaker will inevitably be done as part of the undertaking. That is reflected in the manner by which [the 1905 Act at section 5] defined and transferred the harbour undertaking in this case.”

100. In short and uncontroversially, income received by the harbour authority prior to the 1906 transfer was necessarily from or in respect of the harbour undertaking unless it arose from some ultra vires activity. After that date the Council’s argument is not that a functional test based upon the “economic nature” of a harbour undertaking should be used to answer the question of whether an activity is intra vires but that income arising from a lawful use of harbour land by the harbour authority is not necessarily to be regarded as revenue from the harbour undertaking; indeed, it is argued, the activity generating the income might itself not be part of the harbour undertaking because the Council could itself carry on the activity as a local authority rather than as a harbour authority.
101. Thus, the Council submitted: “But where, as has since 1906 been the case here, the harbour undertaking is being carried on by a local authority with additional, broader functions, an intra vires activity carried on within or near to the Harbour limits will not necessarily be part of the harbour undertaking.”
102. This followed from the council's wider argument as to the interpretation of the 1905 Act. The Council’s argument is that this distinction in the allocation of income can be implemented in practice without a harbour revision order or the formal appropriation of land to a different purpose (see below) by applying a test which, in effect, distinguishes between classes of users. It would be fair to say that this approach narrowly defines "harbour users" as those with boats in the Harbour and a limited class of other persons.
103. The question of whether there was some unifying characteristic which applied to all of those identified by the council as “harbour users”, or whether this was simply a subjective test of the Council’s own devising, was explored in oral submissions, without, to my mind at least, any satisfactory conclusion. It was inherent that vehicles parked next to each other in the same car park might incur a charge that would, in principle, be dealt with differently in the Council’s accounts.
104. The suggestion that the nexus with harbour use is established by viewing the harbour undertaking as essentially economic in nature is not, in my view borne out by the evidence or the legal setting in which harbours are operated. A statutory harbour, such as Whitby, is significantly more than an economic enterprise.
105. The harbour authority is bound by the "Open Port Duty" established historically and under the Harbours, Docks, and Piers Clauses Act 1847, requiring it to remain accessible to all for shipping and passenger transport. This duty demonstrably prioritises public access and cannot be subordinated to purely financial objectives. The common law also imposes a duty to conserve the Harbour, and maintain it for safe and accessible use as a port. This includes maintaining navigable channels, navigation aids, and relevant records, all of which set safety and operational integrity over profitability. Its duty of reasonable care equally requires the harbour authority to ensure the Harbour's physical infrastructure is maintained in a safe condition for vessels.

106. The statutory framework also supports this conclusion. Section 16 of the 1905 Act requires that harbour revenue is used specifically for harbour maintenance, improvement, and operation and is coupled with the requirement for separate accounting under section 62. The Harbours Act, which governs harbour revision orders, emphasises a harbour's role in serving transport, recreational use, and the public interest. Whilst economic activities are undoubtedly part of the Harbour's function, its governance is fundamentally shaped by statutory duties and responsibilities that prioritise maintenance, safety, and public benefit. A statutory harbour is not simply an economic activity, but a public asset which serves broader public purposes.
107. The Council's approach to car park use immediately raises the possibility of other activities by those using the Harbour having to be considered within the "harbour user" framework which it argues can distinguish between categories of users and thus of revenue. However, it is not immediately obvious why, for example, those using the shelter of the Harbour for paddle boarding, canoeing or open water swimming would not be harbour users for whom car parking could be provided as being fairly incidental to the harbour undertaking and purposes. These uses are at least analogous to the purposes for which the Council accepts that it is already providing car parking as a harbour authority; uses which include leisure-based water activities.
108. Even if a functional and economic approach is taken, I do not consider that the distinctions between users drawn by the Council can withstand analysis on the central issue of whether the provision of car parking generally by the Council is incidental to the main purposes of the Harbour.
109. The Harbour hosts businesses, such as fishing trip boats and sightseeing vessels, which rely on visitors who are likely to arrive by car. The provision of parking facilities directly supports these businesses, which in turn generates revenue for the harbour authority through passenger and ship dues, as well as licensing fees. In these cases, there is a clear and direct link between parking and the Harbour's core economic activities. If the Harbour is to be open to all for these purposes, then, as the House of Lords observed in the *London and North Eastern Railway* case, that must include "consequential purposes" encompassing the anticipated use of vehicles coming to and from the Harbour.
110. The Council exercises the power as harbour authority to lease and license retail and leisure premises. It is reasonable, and indeed logical, to conclude that providing parking for customers of these businesses is incidental to this power. Without adequate parking, the viability of these leased premises, and hence the ability to let them commercially, would be significantly diminished.
111. The working harbour is itself a tourist attraction. Providing parking facilities (an intra vires activity) encourages visits, which in turn stimulates economic activity within the Harbour, benefiting both businesses and the harbour authority. This directly contributes to the Harbour's financial viability, a factor explicitly recognised in the Council's own Ports Strategy. This is conceptually different from undertaking an ultra vires activity simply because it generates useful income (see *Dundee Harbour Trustees* – above).
112. The provision of parking serves a public benefit by facilitating access to the Harbour for both existing and potential users, including those with disabilities. This accords with

the wider role of harbour authorities in serving the community, as recognised by the Department for Transport guidance.

113. Finally, the statutory powers under s.20 of the 1847 Act authorise the purchase of land for purposes "requisite or convenient for the formation or use" of a harbour. This provision has been interpreted widely and coupled with the 1905 Act and other governing legislation, principally section 111(1) of the Local Government Act 1972, supports the argument that the provision of parking is incidental to the Harbour's operation.
114. The First Defendant's approach is, in my view, more closely aligned with the statutory purpose of the 1905 Act which aims to ensure that income generated on harbour land within or near the Harbour area is properly accounted for and used for harbour purposes. That approach recognises that income from activities on land acquired for the Harbour must be treated in accordance with the 1905 Act, and that there should be a clear, consistent and transparent approach to accounting for it.
115. The 1905 Act explicitly requires apportionment of expenses incurred jointly between the harbour undertaking and any other account, as per section 62. Whilst it is true that it does not prescribe a particular method for apportionment it does refer expressly to an annual audit requirement. This implies that whilst the Council has some discretion in how to apportion costs, there is an identified control mechanism in the form of auditor scrutiny. It was plainly necessary to provide for apportionment in relation to expenditure given that the operation of the Harbour was now to be managed within the context of the wider activities of, and services provided locally by, the Council. The Council came to the contract as a body with multiple functions which might overlap with areas of expenditure previously incurred by the harbour trustees but there were not, axiomatically, overlapping areas of income.
116. In contrast to the position in relation to expenditure, the 1905 Act does not explicitly provide for, or contemplate, an apportionment of revenue but contains detailed provisions as to how revenue is to be applied. It does not allow the Council to simply absorb any surplus into its general funds. Instead, it mandates that surplus revenue is to be used primarily to improve the Harbour. It sets out a clear order of priority for the application of funds, first covering expenses, and then using any surplus for the benefit of the Harbour.
117. Whilst the Council characterises the First Defendant's approach as concentrating on harbour assets rather than harbour purposes, that criticism does not appear to me to reflect the statutory language. Although the phrase "purposes of the harbour" (rather than "harbour purposes") appears in section 16 it does so in relation to sums which have been advanced or borrowed. The revenue referred to in section 16 is in respect of the harbour undertaking. The harbour undertaking is defined in Section 5 as including real and personal property (as well as things in action). The 1905 Act transferred and expressly conferred on the Council the powers which it needed to meet its obligations as a harbour authority. Occupying the land as a harbour authority is part of the harbour undertaking. The lawful exploitation of the harbour authority's land either by charging for car parking incidental to the use of the Harbour, or by leasing premises would appear to fall squarely within the terms of section 16: "All money in the nature of revenue received by the Council in respect of the harbour undertaking." I note in this regard that



there is no reference to any test of “harbour activity” or the use of land for “harbour purposes” in the 1905 Act.

118. In summary therefore, I accept the First Defendant's argument that the provision of public car parking is not a separate, unrelated activity, but an integral part of the Harbour's function and operations. It supports the Harbour's commercial, tourist, and operational functions, meeting the harbour authority's stated strategic goals and contributing to its overall viability.
119. I conclude that the provision of car parking on harbour land is fairly incidental to the main purposes of the Harbour and that the First Defendant is correct in submitting that all income from car parking facilities on harbour land should be credited to the separate revenue account. I therefore reject the Council's argument that car parking revenue can be split into categories, with some considered to be received for “harbour purposes” and other revenue not.

### *Segregation*

120. The core disagreement between the parties in relation to segregation revolves around whether the 1905 Act mandates a complete separation of the Harbour's assets and liabilities, or simply requires separate accounting of income and expenditure.
121. The Council contends that while section 62 of the 1905 Act requires a separate account of the Harbour's income and expenditure, including capital expenditure and receipts, it does not require a segregation of the assets and liabilities. The Council argues that the requirement for separate accounting is to allow for analysis of income and expenditure, not to create a distinct entity with segregated funds. It argues that where a segregation of funds is intended, it is explicitly provided for, citing examples of statutory provisions relating to Local Government Pension Scheme funds. The Council also points to case law which suggests that a requirement for separate accounting does not in itself import a segregation of funds. This principle, it was argued, could be illustrated by the decisions and dicta in: *Allchin v Coulthard* [1942] 2 KB 228, *North Eastern Gas Board v Leeds Corporation* [1952] 2 All ER 326 and *East Midlands Gas Board v Doncaster Corporation* [1953] 1 WLR 54. For my part, I did not find these authorities particularly illuminating in relation to the issue which arises in the present case.
122. *Allchin* turned on the application of the South Shields Corporation Act 1935 which in fact permitted the corporation to pool all money into a general rate fund, effectively removing previous restrictions on using surplus revenues from specific undertakings to pay interest on general-purpose loans. The obligation to keep separate accounts for each undertaking imposed no restriction on how the corporation dealt with the profits of the undertakings. The judgments do not explicitly discuss the need to keep separate accounts as opposed to a segregation of funds.
123. *North-Eastern Gas Board* concerned the gas board's claim to sums that the Leeds Corporation transferred to their general rate fund. The Leeds Corporation (Consolidation) Act, 1905, at section 54 stipulated that receipts from the corporation's gas undertaking were to be paid into the general rate fund, and expenses were to be paid out of that fund. The corporation was to keep a separate account as part of their accounts. Section 337 required the corporation to keep accounts to show, under a separate heading or division, specific matters for each of five named undertakings,

including the gas undertaking. The court referred to *Allchin* and the passage in Lord Greene's judgment, which it found helpful, where Lord Greene stated that all receipts and expenditure must be paid into and out of the general rate fund, but for the purpose of the internal accounts of the borough, separate accounts showing specified particulars had to be kept in respect of each undertaking notwithstanding that this imposed no restriction on the corporation as to how it dealt with the profits of the undertakings. The court reasoned that nothing in the Leeds Corporation (Consolidation) Act, 1905, prevented the corporation from transferring funds from the gas undertaking to the general rate fund. The requirement to keep separate accounts was primarily to ascertain the financial position of the undertakings, not to restrict the corporation's ability to manage its funds. This is materially different from the present case where there are explicit restrictions on the use of revenue set out in the section 16 of the 1905 Act.

124. *East Midlands Gas Board* also involved specific statutory provisions. Prior to the Doncaster Corporation Act, 1926, the corporation was obligated to carry any balance remaining from the gas undertaking's income to the borough fund (now the general rate fund) if it was not required for the undertaking. However, section 71 of the 1926 Act stipulated that all money received by the corporation on account of the revenue of undertakings including gas would be carried to the borough fund, and all payments would be made out of that fund. Even though the corporation argued that all funds were part of the general rate fund, the court emphasised that separate accounts were maintained and that the debits and credits made by the council violated section 37(1) of the Gas Act. This section, which gave rise to the litigation, provided that if a local authority debited any amount in the accounts of its gas undertaking and credited such amounts in any other of its accounts without the Minister of Health's approval after February 10, 1948, the local authority would be liable to pay that amount to the appropriate gas board. Whilst the court referred to *Allchin* and *North-Eastern Gas Board*, noting that the purpose of keeping separate accounts in those cases was to ascertain the financial position of the undertakings, that was in the context of the overarching statutory framework. Again this case seems to me to be at some considerable remove from the issues and statutory provisions which arise for consideration in relation to Whitby Harbour.
125. The First Defendant argues that the 1905 Act does require a segregation of capital assets and liabilities. She contends that the purpose of section 62 is to "ringfence" the finances of the harbour undertaking from the Council's other accounts. That requires that the harbour undertaking should be treated as a wholly distinct entity for capital and revenue accounting purposes and that the statutory language and purpose of the 1905 Act imports such a segregation.
126. The First Defendant interprets the phrase "separate accounts...on capital and revenue account" in section 62 to mean a separate account for the capital position of the Harbour undertaking, including the value of land, property, and reserves. She contends that Section 62 provides for a general segregation of funds, while section 16 sets out specific instructions on how those ring-fenced funds are to be utilised. She points to the side note to section 62, which reads "separate accounts and audit in respect of harbour undertaking", as further evidence of the intention of the act to segregate the finances of the Harbour. Side notes may of course be used as an aid to interpretation particularly when seeking to identify the overall purpose of a section, but they cannot override or change the clear meaning of the words used within the section itself.

127. Whilst this is not a straightforward issue I prefer the First Defendant's analysis of the legislation. Section 30 of the 1905 Act empowers the Council, as harbour authority, to retain, hold, use, sell, lease, exchange, or dispose of lands acquired under the Act, providing flexibility in managing its assets. It would be incongruous if Parliament had imposed strict controls on revenue application (under sections 16 and 62) but allowed capital from the sale of harbour land to be treated as a capital receipt which could be used by the Council for its general purposes. The statutory purpose is, in my view, to promote the Harbour itself, implying a segregation of funds and their use for the Harbour. This is plainly the case in relation to the specific capital receipts from the disposal of surplus lands which are referred to at section 31 of the 1905 Act. Section 50 of the 1905 Act gives the Council the power to borrow for the improvement of the Harbour by reference to the purposes set out at section 36 of the 1879 Act "to which capital is properly applicable". Whilst there are detailed provisions for the establishment of a sinking fund, section 59 of the 1905 Act contemplates the repayment of loans out of the proceeds of the sale of land or "other monies received on capital account". Section 62 refers expressly to "the harbour account" and not simply a practice of separate accounting. That must, I conclude, relate to capital receipts shown in an account which reflects the harbour undertaking's capital position and includes the value of harbour land, property, and fixed assets as well accumulated reserves allocated for the repair, replacement, or improvement of these assets.

#### *Occupational Interests*

128. The First Defendant's argument is that income from intra vires uses of Harbour land is necessarily income "in respect of the harbour undertaking". The difference between the Council's and First Defendant's positions arises in relation to various "occupational interests" that the Council accounts for in its General Fund. The Council's position is that the particular uses/activities carried on by the tenants and licensees in relation to these interests are not, on a functional approach, part of the harbour undertaking and are uses/activities that are not fairly incidental to the operation of the Harbour even if they take place on harbour land.
129. The occupational interests that the Council does not consider to be part of the harbour undertaking include:
- i) Storage units
  - ii) Seafood wholesaling
  - iii) Holiday accommodation
  - iv) Deck chairs and outdoor tables
  - v) A restaurant
  - vi) Fairground rides
  - vii) Retail stalls
  - viii) The Café on Battery Parade

130. Income from these occupational interests is accordingly passed to the Council's General Fund whereas in most cases, income from occupational interests such as leases and licences is credited to the harbour account, and its status is not in dispute. The precise basis upon which this distinction was being drawn was explored in the course of argument which, in my view, ultimately served to demonstrate that it was tenuous in nature.
131. Whilst the income from certain retail kiosks and concessions, was deemed to be "sufficiently closely related," to the harbour undertaking the application of this test excluded other ostensibly similar ventures. It was difficult to identify any objective criteria for determining what constitutes a "sufficiently close" relationship, giving the impression that a subjective and unpredictable approach had been taken. Equally, I found the Council's reliance on a distinction between "direct" and "indirect" relationships with harbour operations to be vague and ill-defined.
132. The Council was obliged to fall back on the argument that being at the waterfront was a reasonable proxy for use as part of the harbour undertaking. This implied that if a property is located directly adjacent to waterfront, it is more likely that the income generated from it should be considered part of the harbour undertaking's revenue. However, it is not clear how this aligns with the functional approach which the Council contends can be used to differentiate between occupational interests. Reliance on physical proximity, instead of an activity's identified functional connection to harbour operations, suggests a pragmatic, rather than principled, decision-making process and not one based upon a functional assessment. It follows that the argument that income must directly stem from harbour operations or closely related activities, falters in its practical application relying, as it does, on subjective factual judgements rather than clear legal reasoning. The basis for the exclusion of certain income streams is at best opaque. There is clearly no unfettered discretion within the legislation as to the use which may be made of revenue. Seeking to intercept revenue from harbour land at source by defining it as falling outside of the 1905 Act would require an express legal justification, grounded in the statute, not an arbitrary factual test.
133. The Council has express powers to lease or license land held for harbour purposes, as provided by Section 23 of the 1847 Act and Section 30 of the 1905 Act. Even without explicit powers, harbour authorities probably have implied powers to grant leases and licenses for efficient harbour management (see *Douglas & Geen on The Law of Harbours, Coasts and Pilotage*, 5th edition, 1997 at paragraph 3.14).
134. The 1905 Act encompasses income generated by the use of land held by the harbour authority and does not require that the use/activity must be for "core" harbour purposes or any purpose at all. There is no explicit requirement within the 1905 Act for a functional assessment to determine whether a tenant or licensee's use is itself incidental to the operation of the Harbour. Money derived from the lawful exploitation of a harbour asset is harbour revenue that Parliament intended to be accounted for in the harbour account.
135. I conclude that revenue from lawfully exploiting a harbour asset (such as leasing land or granting a licence) is inherently harbour revenue. The revenue comes from the act of leasing or licensing itself, not the tenant's activities. Section 62 of the 1905 Act does not require a detailed analysis of how the tenant uses the land. The revenue is generated

whether the tenant uses the land for core harbour activities, non-harbour activities, or even if they leave it unused.

### **The Disputed Plots**

136. “Appropriation” is the mechanism by which a local authority, having acquired land for one purpose, is enabled to use it for a different purpose. So, for example, land acquired for harbour purposes might be appropriated for car parking or other purposes. However, that requires more than a decision that land held for one purpose will henceforth be held for another. In *R (Adamson) v Kirklees MBC* [2020] 2 P&CR 9, the court determined that appropriation required a formal decision following a “conscious and deliberative process.” Whilst the Council’s position as to the correctness of *Adamson* is reserved should this litigation proceed further, for the purposes of the hearing it was accepted in the light of that authority that, to the extent that any land in issue here was originally acquired for harbour purposes, it cannot be shown to have been appropriated for other purposes.
137. Whilst both parties agree on the legal principle established in *Adamson* that a formal, deliberate act of appropriation is required to change the designated purpose of land, the parties differ in their interpretation of the facts surrounding the land in question and whether it was ever officially acquired for harbour purposes in the first place. The First Defendant relies on *Adamson* to support the argument that if land was acquired for harbour purposes and has not been formally appropriated for another use it should be treated as part of the harbour undertaking.
138. The First Defendant, conducted extensive historical research to seek to establish which land was acquired for the harbour undertaking. Her work involved examining numerous archive sources, including land registry documents, title deeds, council minutes (WUDC and SBC), and other historical records. Some records were incomplete or lost. She summarised her findings in her witness statements based upon a detailed analysis of specific land plots, using deeds, conveyances, plans, and supporting records. She also utilised historical maps, such as the 1913 OS map, to understand the effect of land reclamation within the Harbour area.
139. There is a large measure of agreement between the parties as to which plots of land are held as part of the harbour undertaking and which are not. The overall position is, in fact, that most plots are held for a harbour purpose (that is to say they form part of the harbour undertaking).
140. Several plots of land remain in dispute. “Plot 30,” consists of four separate plots acquired at different times, designated as Plot 30 Part1, Part 2, Part 3, and Part 4. The other disputed plots are numbered 31, 32, 33, and 34.

### **Discussion and Conclusions in relation to the Disputed Plots**

141. The Council argued that since there has been no formal appropriation that satisfies the *Adamson* test, the land’s current purpose is tied to its original acquisition. The Council argued that there are essentially two possibilities regarding the purpose for which a plot of land was acquired.

142. One possibility is that the land was acquired for the purposes of some specific statutory function. If so, the land will be held for harbour purposes if, and only if, the acquisition was for purposes which fall within the 1905 Act.
143. The other possibility is that the land was acquired for the Council's general purposes and is not tied to any particular statutory function. This type of land was previously referred to as "corporate land". If land was acquired after 1974 without any specified statutory purpose, it is to be inferred that it was acquired for purposes under section 120(1)(b) of the Local Government Act 1972. This section provides that a council may acquire land for the "benefit, improvement or development" of its area.
144. The Council submitted that the purpose for which the land was originally acquired is an objective question. If direct evidence of the original purpose is missing, it may be necessary to infer the purpose from other evidence, such as the Council's "thinking" before the acquisition or what was done with the land immediately after the acquisition. However, the Council also argued that intentions formed years after the acquisition, or indeed the way the Council accounted for income and expenditure, are not in themselves "strong" evidence of the original purpose. The Council no doubt had in mind that its predecessor accounted for revenue from car parking sites on harbour land in its harbour account, until the practice changed.

#### *Overview*

145. The acquisition of plots of land was often strategic, aimed at addressing specific needs, such as access to Endeavour Wharf, and resolving concerns about traffic flow and the railway crossing at Bog Hall. A number of the plots involved land reclamation, turning areas previously under water into usable space for the Harbour. The development of these plots was intended to benefit the cargo trade, fishing industry, and yachting marina, and provide public car parking. Car parking was an important element in the development of the Upper Harbour, with areas designated for public parking and parking for marina users, with car parks also being used for the winter storage of boats.
146. The evidence suggests that the disputed plots and adjoining plots of land have been consistently administered by the Whitby Harbour Committee. I note that:
  - i) The Harbour Committee minutes between 1964 and 1973 demonstrate the Harbour Board's involvement in and management of the land.
  - ii) The Harbour Committee led the extension of Endeavour Wharf and reclamation of Bell Shoal land.
  - iii) The Harbour Committee endorsed a lease for a boat storage yard in 1998.
  - iv) The Harbour Committee approved development plans for the Upper Harbour.
  - v) The Harbour Committee approved the rearrangement of the layout of the Marina Back Car Park to increase spaces, and approved expenditure related to machines, realignment and advertisement of parking orders. The Whitby Harbour Board minutes from 13 October 2014 make it clear that 28 car parking spaces would be provided along the access road to Coates Marine, which is the

same location as the Overflow car park. The costs of the parking order and the pay and display machine and signage were paid from the Harbour reserves.

- vi) The Harbour Committee was involved in commissioning engineers for preliminary investigation work and a feasibility report on the extension of Endeavour Wharf and the reclamation of Bell Shoal.
- vii) The Harbour Committee approved the principles of proposals for future development of the reclaimed land.
- viii) The Harbour Committee approved a motion that any land reclaimed from the Harbour should be used for marine purposes only.
- ix) The Harbour Committee authorised negotiations with the BRB to extend the cargo wharf and rationalise land ownership of the Goods Yard.
- x) Planning permission was granted to the Whitby Harbour Committee in relation to the Marina Reserve Car Park and the Marina Back Car Park.
- xi) The Harbour Committee has been involved in the management of the land, including the Marina pay and display car park, as demonstrated by the fact that the boundary fence between the railway line and the Marina pay & display car park was confirmed to be on Harbour land.
- xii) A report to the Planning & Development Committee, when considering planning permission for new on-shore facilities for Whitby Marina, confirmed that the site lies within the designated Harbour area.

### *The Individual Plots*

147. I turn then to each of the disputed plots.

### *Plot 30 Land at Endeavour Wharf*

- 148. The four parcels of land which make up Plot 30 were acquired as follows:
- 149. Part 3 of Plot 30 was purchased from the London and North Eastern Railway Company (LNER) on 9 August 1928. The conveyance required land reclamation works. This part of Plot 30 is coloured blue on the title plan. The acquisition was financed by borrowing under the Public Health Act 1875.
- 150. Part 4 of Plot 30 was purchased from LNER in November 1937 by way of a land swap. This plot is a small parcel of land near the Dock End Car Park and Basin. This part is coloured yellow on the title plan.
- 151. Part 2 of Plot 30 was purchased from LNER on 11 May 1938, with a conveyance dated 17 August 1938. This land was described as "land near the Dock End". This part is coloured pink on the title plan.
- 152. Part 1 of Plot 30 was acquired from the British Railway Board ("BRB") on 29 May 1969. This part of Plot 30 is coloured brown on the title plan. The Council has agreed that it is held for Harbour purposes.

153. Collectively, these parts make up Endeavour Wharf which is a registered cargo wharf, used for larger commercial shipping, and includes temporary car parking when the wharf is not required for port purposes. It also houses the Harbour Master's Office and Tourist Information Bureau.
154. The Council does not accept that Parts 2, 3 and 4 of Plot 30 are held for Harbour purposes. However, I note that the Council accepts that a portion of the land at Endeavour Wharf acquired in 1969 from the BRB is held for harbour purposes, demonstrating the area's historical connection to the Harbour. The fact that Plot 30 is a single title, and the Council has conceded that Part 1 is held for harbour purposes, and Part of Plot 27 within Part 3, is also for harbour purposes, lends weight to the argument that all of Plot 30 is also likely to be for harbour purposes.
155. The First Defendant's case is that these plots were historically acquired and utilised for harbour-related purposes, particularly within the context of the Upper Harbour Development Scheme.
156. Plot 30, under Title No. NYK322675, is divided into four parcels, with Part 1 (coloured brown) already agreed to be held by the Council for harbour purposes. Part 2 (coloured pink) extends across both Plot 30 and Plot 28. The Council has conceded that Plot 28 is held for harbour purposes. The First Defendant argues that there is no evidence which justifies treating Plot 30 differently from Plot 28. Part 3 (coloured blue) extends across both Plot 30 and Plot 27, with the Council conceding that the part of the blue land shown on the Plot Plan as Plot 27 is held for harbour purposes.
157. The Council seeks to distinguish the position of Plot 30 on the basis that the blue and pink land on Plot 30 has been reclaimed, whereas Plots 27 & 28 have not been. The documentary material suggests that the disputed plots were reclaimed as part of the Council's engagement in a scheme, supported by a central government grant, for the construction of a new jetty at Dock End and associated dredging works. Correspondence between the Ministry of Transport, MAF, and Board of Trade demonstrates approval of the amended scheme for the Dock End Jetty works. A 23 September 1938 letter from the Board of Trade encloses plans for the amended scheme, showing planned works located on Plot 30 Part 2, Part 3 and Part 4 land, as well as potentially part of Plot 29 (which the Council has already conceded is held for harbour purposes). A 15 October 1938 letter from the Ministry of Transport Engineer to MAF confirms that the Ministry of Transport is content with the amended scheme. A 17 October 1938 letter from MAF to the Board of Trade refers to the 23 September 1938 letter (which included plans of the works) and confirms that the Minister agreed with the amended proposals and that the proposed grant should be made from the Development Fund. The Development and Road Improvement Funds Act 1909 contains the power to make grants for the purpose of the construction or improvement of harbours; Specifically, section 1(e) of the 1909 Act authorised the making of grants for this purpose. This appears to be the power under which the grant was made in this case.
158. Following the purchase of Part 1 of Plot 30 in 1969, WUDC (the Council's predecessor) intended to reclaim land to extend Endeavour Wharf and start the reclamation of unregistered land known as Bell Shoals (Plot 32).



159. On the balance of probabilities, the evidence suggests that Parts 2, 3, and 4 of Plot 30 were acquired for harbour purposes. The historical context indicates that the disputed plots were purchased for harbour purposes as the final part of the Upper Harbour Development Scheme. The location of Part 3 within the harbour limits and the lack of any specific alternative purpose documented for Parts 2, 3 and 4 and that Plot 30 is on one title and has a history of being used for harbour purposes all strongly indicate that the land was intended to be, and is, part of the harbour undertaking. The Council has not provided any evidence to suggest that the land was acquired for any alternative purpose. Therefore, I conclude that Plot 30 is held for harbour purposes.

*Plots 31, 32, 33 and 34*

160. These plots were acquired in the following order and circumstances:
161. *Plot 32:* This plot is unregistered land that was transferred to the Whitby Urban District Council (“WUBC”) in 1906 as part of the harbour undertaking under the 1906 Conveyance. It is described as land adjacent to Bell Shoals and Langbourne Road and was below the mean high-water springs. The land was subsequently reclaimed as part of a larger scheme in the late 1970's and early 1980's. The Council agrees that parts of this land are used for harbour purposes, including the Marina Users carpark. The Council does not accept that Plot 32 is held for harbour purposes.
162. The First Defendant argues that:
- i) the land was situated below the mean high-water springs, and was transferred under the 1906 Act, which specified the property comprising the Statutory Harbour Undertaking of Whitby;
  - ii) the land was reclaimed by the Council's predecessors, who relied on the Harbours Acts to authorise the interference with public rights of navigation;
  - iii) on 12 April 1979 the Harbour Committee resolved to approve the layout of the reclaimed land which included Plot 32;
  - iv) similar to Plot 34, Plot 32 was reclaimed under the Harbours Acts, which indicates it was acquired for harbour purposes; and
  - v) the land was transferred under the 1905 Act, and therefore must be considered part of the statutory harbour undertaking.
163. On the balance of probabilities, the evidence suggests that Plot 32 was acquired for harbour purposes. The transfer of the land under the 1905 Act, its location below the mean high-water springs, the fact that it was reclaimed under the Harbours Act, and that the Harbour Committee approved the layout of the reclaimed land including plot 32, all strongly indicate that the land was intended to be, and is, part of the harbour undertaking. The lack of specific documentation to the contrary, and the lack of any alternative explanation for the transfer of the land, means that the First Defendant's arguments are more persuasive. I conclude that Plot 32 is held for harbour purposes.
164. *Plot 34:* The land was purchased from the British Railway Board (“BRB”) following long-running discussions with the BRB that included the purchase of Plot 34 in 1976.

The conveyance for Plot 34 is dated 10 August 1976. Plot 34 was situated below mean high water springs until the mid to late 1970's. It was reclaimed by the Council, it appears, as part of the same scheme as the land adjacent to Bell Shoals (Plot 32). The Council also acquired plot 33 in order to provide access to other land, and it appears that plot 33 was acquired to provide access to reclaimed land. A report in the Whitby Gazette on 9 January 1981 stated that Plot 33 had been purchased to provide access to new reclaimed land and a new marina. The First Defendant argues that the land was reclaimed by the Council's predecessors who relied on the Harbours Acts to authorise the resulting interference with the public rights of navigation.

165. The Council does not accept that Plot 34 is held for Harbour purposes. The Council maintains that the conveyance does not refer to any particular statutory purpose. The First Defendant contends that the reference to land between Endeavour Wharf and the Bog Hall Crossing in the 19 November 1968 Harbour Committee minutes, must refer to Plot 34, because that was the only land fitting that description in the ownership of the BRB, other than Part 1 of Plot 30, which was purchased in May 1969. The First Defendant also points to the fact that, as with Plot 32, on 12 April 1979 the Harbour Committee resolved to approve the layout of the reclaimed land.
166. The central issue is again whether the land was acquired for Harbour purposes. The Council points out that the conveyance does not specify that Plot 34 was acquired for harbour purposes, and suggests it was simply for access to reclaimed land. However, the First Defendant relies on minutes and other documents that show the land was linked to the harbour development.
167. The First Defendant's central contention is that the land was reclaimed as part of the same scheme as plot 32, and that the Council relied on the Harbours Acts. This strikes me as a strong argument, because the reclamation of land below the high-water mark would usually need to be justified by the need to improve or develop a harbour. The evidence shows that the Council was indeed actively developing the Harbour at the time of the purchase of Plot 34.
168. On the balance of probabilities, the evidence suggests that Plot 34 was acquired for Harbour purposes. The lack of explicit mention of harbour purposes in the conveyance is not sufficient to displace the evidence provided by the First Defendant, that indicates the land was purchased as part of the Harbour development scheme and reclaimed under the Harbours Act, bearing in mind that the land was situated below mean high water springs. The First Defendant's arguments by reference to the minutes of the Harbour Committee and the connection to the Harbour development are convincing and show that Plot 34 was intended to be part of the Harbour undertaking. I conclude that it was.
169. *Plot 33*: This is a small strip of land situated between two larger plots of land used for car parking. The land was conveyed to the Council by the BRB in February 1981. The transaction followed long-running discussions with the BRB, including discussions for the purchase of Plot 34 in 1976. It appears that Plot 33 was acquired by the Council in order to afford access to other land. Specifically, the land was acquired to provide the Council with access to 6 acres of reclaimed land. The report (referred to above) in the Whitby Gazette on 9 January 1981 stated that this land had been purchased to provide access to the new reclaimed land and the new marina. Plot 33 comprises two distinct but geographically close areas of land. The northern part is situated between Plots 34 and 31 and the southern part between Plots 32 and 31. At the time of purchase of the

land on 13 February 1981, the BRB's concerns relating to the level crossing at Bog Hall persisted. The 1979 proposals for the future development of the reclaimed land included this plot. The land that was being retained by the BRB was subsequently included in the conveyance in 1981 and shown on the conveyance plan. On 22 January 1991, planning permission was granted in relation to Marina Back Car Park on Plot 33 to Whitby Harbour Committee.

170. On the balance of probabilities, the evidence suggests that Plot 33 was acquired for Harbour purposes. The lack of explicit mention of harbour purposes in the conveyance is not persuasive given the 1979 proposals, the subsequent planning permission granted to the Harbour Committee, and the land's geographical situation between car parks used for harbour purposes, which all strongly indicate that the land was intended to be part of the harbour undertaking. I conclude that it was.
171. *Plot 31*: This plot was acquired by the Scarborough Borough Council ("SBC") from the BRB. The land was originally part of a goods yard, railway siding and coal store. Plot 31 is made up of two geographically distinct parts. The North Eastern part is situated on Endeavour Wharf, and the other part is situated on either side of the Bog Hall vehicular crossing. Since at least 1969, the WUDC had a license to use this land for access for lorries to Endeavour Wharf. It remains an important vehicle access to Endeavour Wharf with security fencing and gates. Discussions to purchase this land from the BRB started in the late 1960s, and the purchase was completed in 1990. The acquisition appears to have been part of the Upper Harbour Development Scheme. Planning permission was granted to the Whitby Harbour Committee for the Marina Reserve Car Park and the Marina Back Car Park, partly situated on Plot 31. The southernmost part of this plot has been leased as a boat storage yard since 1998.
172. The Council does not accept that Plot 31 is held for harbour purposes and argues that for the purposes of the proceedings, what matters is the purpose for which the Council purchased the land in 1990 and not its original use as part of a railway siding. The First Defendant contends that Plot 31 is part of the harbour undertaking and argues that the land was originally part of a goods yard, railway siding and coal store, which, given their location, were likely used in connection with the Harbour. The land is situated adjacent to the Harbour and was acquired from the BRB, like other plots that are used for harbour purposes.
173. On the balance of probabilities, the evidence suggests that Plot 31 was acquired for harbour purposes. The land's original use as a goods yard and coal store, whilst not in itself conclusive, points to a historical connection with the Harbour whilst its location adjacent to the Harbour, and its acquisition from the BRB, all strongly suggest that the land was intended to be, and is, part of the harbour undertaking. I conclude that it is.

### **Overall Conclusions**

174. On the totality of the evidence, I conclude that the disputed plots are all connected to the harbour development scheme, which aimed to expand and modernise the harbour facilities. They were integral to the expansion and development of the Harbour, particularly the Upper Harbour area, with their acquisition and reclamation occurring over decades. They were acquired to facilitate various aspects of the Harbour's operations including public access.

175. Specifically Plots 30, 31, 32, 33, and 34 were acquired and developed to enhance the functionality and capacity of the Harbour, supporting various marine-related activities and public access. These developments, particularly in the Upper Harbour, were often undertaken with specific plans for land reclamation, cargo handling, fishing support, and public amenities including car parking.
176. The Harbour Committee has consistently been involved with the management of car parking within the Harbour area, making decisions relating to pay and display, parking orders, and even realigning spaces. The Harbour Committee has made decisions with the goal of improving income for the Harbour, such as the changes to the Marina Back Car Park.
177. In answer to agreed issues and for the reasons given above:
  - i) Is all income and expenditure generated by land which is held by the Council for the purposes of the Harbour to be treated as income and expenditure in respect of the harbour undertaking for the purposes of section 62 of the 1905 Act? If not, what is the correct test? *Yes, it is to be so treated. Further the provision of car parking on harbour land is fairly incidental to the main purposes of the Harbour and the First Defendant is correct in submitting that all income from car parking facilities on harbour land should be credited to the separate harbour revenue account. Revenue from lawfully exploiting a harbour asset (such as leasing land or granting a licence) is inherently harbour revenue and should be credited to the separate harbour revenue account.*
  - ii) Which, if any, of the 5 disputed plots identified on the Scott Schedule are held by the Council for Harbour purposes? *All five of the disputed plots are held for harbour purposes; that is they are part of the harbour undertaking.*
  - iii) Does the 1905 Act require a segregation of the capital assets and liabilities pertaining to the Harbour? *Yes, it does.*
  - iv) If the Council's position as to the legal test is correct, is the application of that test to any particular income or expenditure a matter for the Council to decide, subject to normal public law principles, or is a matter ultimately to be determined by the court itself in the event of a dispute? *This question does not arise since I have concluded that the Council's position as to the legal test is not correct.*
178. I am grateful to all Counsel and their Instructing Solicitors for the quality of their written and oral submissions and to the First Defendant for her thorough historical research.

END