

The Bournemouth-Swanage Motor Road

and Ferry Acts 1923 & 1986

Application by The Bournemouth-Swanage Motor Road and Ferry Company ('the Ferry Company') dated 9th March, 2020 for revision to the charges for use of the ferry between Sandbanks and South Haven Point

Objectors response to the legal note dated 6th January, 2021

regarding the ring-fencing or the establishment

of an escrow account for the Ferry Reserve

1. The legal note entitled '*Legal note as to whether the Ferry Reserve can lawfully be 'ringfenced' from the Ferry Company and, in the case of its insolvency, liquidators*' prepared by the Counsel for the Ferry Company, Paul Reynolds and dated 6th January, 2021, is duly noted. Within the timeframe and with the resources at their disposal, the Objectors are not in a position to undertake a detailed critique of the legal opinion, or to consider its relevance and scope. As such it is requested that the Inspector give it limited weight in the context of the Inquiry alongside other supplementary legal opinion presented a few hours before the Inquiry commenced.
2. On the question of there being a named beneficiary for any escrow account or trust arrangements, the Objectors would propose that this be the Secretary of State for Transport ('the Secretary of State'). This is for the following reasons: -
 - a. Through the provisions of the various legislation governing the activities of the Ferry Company, the Secretary of State is acting in the public interest and ensuring that interests of the public is protected. Indeed the 1923 Act included both the principal and detail for the creation of a Road Deposit fund to be repaid to others should the Ferry Company have not built the road within a certain timeframe. It seems reasonable that a similar, externally facilitated and controlled, approach should be secured for the commitment to another significant asset of the company – its new ferry.
 - b. Should a toll increase be justified in addition to the need to meet increased operating costs and, the additional revenue so raised is to be put aside for the purposes of purchasing a new ferry for entry into service in 13 years' time and either the new ferry not be purchased or for reasons set out below, the funds to purchase the ferry are not available, the public would have been deprived of the benefit and misled about the basis upon a major justification for which tolls had been increased. As their 'guardian', the Secretary of State would be the appropriate party to safeguard those funds.

3. The concerns of the Objectors regarding the safeguarding of the funds raised by means of the increased tolls relate to four matters: -

- a. The ineffectiveness of the Ferry Replacement Reserve ('FRR'). As indicated at the Inquiry, the Objectors consider that the FRR is an anachronistic bookkeeping concept. Bookkeeping entries do not buy new ferries – hard cash or debt does that. The FRR merely segregates the distributable funds of the Ferry Company but does not in any way inhibit the Directors of the Ferry Company, now or in future, from distributing these funds by means of a dividend. It is unclear what legal recourse there might be against the Ferry Company Directors should they distribute all or part of the FRR.

Whilst it is relevant to an applicant to make the replacement costs case under the scope of the statutory rights to increase the tolls, history shows that unless that commitment is legally binding and enforceable (against a private company where there is less scrutiny than a public body), then any commitment must be given limited weight in determining the application and in any recommendations made to the Secretary of State. The applicants made much of previous Inspectors findings as providing a guide to the current Inspectors conclusions, it is wondered that if those Inspectors had a chance to review how successful the FRR had been in securing sufficient funds when compared to the levels of dividends paid over similar periods they may have decided to give less weight to the reality of any FRR commitment made to justify previous increases that cannot be secured in law and enforceable by a third party.

- b. Use of Intercompany Loans. Funds could be distributed upstream to the Fairacres Group by means of inter-company loans with no certainty of the loans being repaid.
- c. Applied to meet bank guarantees or offset arrangements. The funds could be called by the Fairacres Group bankers under the terms of the cross-guarantees or under any Group offset arrangements. There is no clarity on the terms of the guarantee or upon any offset arrangements.
- d. Commitments to maintaining a minimum Net Asset Value of £15m. These are flawed given the clear evidence that the valuation of the Ferry Company includes the value of land which no reasonable purchaser would pay given that there was never any monetary investment made for the land rights in the first place and that statute would continue to allow a new owner continuing free right of use but also prevent the assets from being sold.

4. Should the Inspector determine that there can be no requirement for an escrow account or trust arrangement to be put in place, but reliance placed upon the Ferry Company FRR 'policy', for that is all that it is, the Objectors would press strongly for the following protections to be required by the Inspector as a minimum: -
 - a. A legally binding commitment by the Ferry Company Directors to always maintain unincumbered cash, not a commitment to a minimum Net Asset Value, within the Ferry Company equal to at least the balance on the FRR.
 - b. A legally binding commitment by the Ferry Company Directors not to distribute as dividends funds more than the distributable reserves of the Ferry Company other than those represented by the FRR.
 - c. Removal of the cross guarantees and any off-set arrangements with banks or any other parties and a legally binding commitment not to put such arrangements in place in the future.
 - d. A legally binding commitment not to make any loans or other forms of lending either to other members of the Fairacres Group or to any third parties.
 - e. The Ferry Company to publish on its public website within 9 months of its financial year-end the full audited financial statements of the Ferry Company containing a certification by the Ferry Company's directors that all these undertakings and obligations had and continue to be complied with and especially a clear statement that sufficient funds have been secured in the FRR with unencumbered cash at least equivalent to the FRR maintained at all times.
 - f. Any toll increase to be limited to a period of no more than four years and for there then to be another toll increase application to be made to the Secretary of State for Transport
5. Without these legally binding commitments in place, then any commitments are not secured beyond those offered to this Inquiry apart from those governed by the internal governance the private companies who have an interest in the Ferry Company and must be treated with caution. If they are not legally binding, then when the next application is made to increase fares we will be back to square one and it will most likely be the future users of the Ferry that will be called upon to find the cash required for whatever the next spending priority is such as protecting asset from Climate Change which has not been raised at all in this Inquiry.

6. We therefore strongly insist that unless an appropriate and reasonable legal mechanism can be established to secure and protect suitable funds in the FRR, that any such commitment is given limited weight against the requirement to raise sufficient income to keep the existing ferry in good repair in any recommendations made to the Secretary of State.

The Objectors

Nick Boulter.

Pippa Lightbown, Leaseholder, Bankes Arms.

Andrew Parsons.

Eric Stobart.

Malcom Tice.

14th January, 2021