Neutral Citation Number: [2020] EWHC 12 (Ch)

Case No: HC-2017-001398

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building
Fetter Lane, London, WC2A 2LL

Date: 15/01/2020

Before :

HIS HONOUR JUDGE JARMAN QC

- -

Between :

SIMON HOWARD AND THE SCHEDULED CLAIMANTS	**Claimants**
- and -	
(1) CHELSEA YACHT AND BOAT COMPANY LIMITED	**Defendants**
(2) THE PORT OF LONDON AUTHORITY	

- -
- -

Mr Philip Rainey QC and Mr Timothy Polli QC (instructed by **Hamlins LLP**) for the **claimants**
Ms Zia Bhaloo QC and Mr Paul Jarvis (instructed by **Eversheds Sutherland LLP**) for the **first defendant**
Ms Geraldine Cumberbatch (Dispute Resolution & Public Law Solicitor) for the **second defendant**

Hearing dates: 10 and 11 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGE JARMAN QC:

1. By a licence dated 24 May 1989 (the licence) made expressly pursuant to section 66 of the Port of London Act 1968 (the 1968 Act), the second defendant (the authority) granted to the first defendant (the company) a licence to retain moorings at Chelsea Reach on the River Thames near Battersea Bridge for a term of 58 years. The claimants have been granted sub-licences by the company to moor residential boats there for an annual fee. In addition, the company charges a premium for long term sub-licences. The claimants say that the requirement to pay such premiums constitutes a breach of the licence and is contrary to section 70 of the 1968 Act and seek declarations to that effect.

2. The premiums are not passed on to the authority, who have taken a neutral stance in these proceedings. The issue was raised with the authority in 2016, after a substantial increase in the premiums. In a letter to the company dated 8 December 2016, the authority indicated that the allegations of breaches of the licence had been considered by its licencing committee, which considered that regard should be had to any premiums paid on review of the licence fee so that the authority would be able to ensure its statutory obligations were fulfilled. It also indicated that the committee was not satisfied that the historic taking of premiums was a substantive breach of the licence so as to entitle the authority to revoke the licence, as it is empowered to do under clause 5 upon breach. The company maintains that it is entitled to charge a premium.

3. To succeed, the claimants must show that the charging of a premium constitutes a breach of the licence, which involves issues of its correct interpretation. The principles of contractual interpretation were not in dispute before me. In *Wood v Capita Insurance Services Ltd* [2017] AC 1173 in paras 10–12 Lord Hodge stated as follows:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning …
>
> 11. … Interpretation is … a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest … Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated … To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

4. In *Arnold v Britton and others* [2015] A.C. 1619 at paragraph 15 Lord Neuberger stated as follows:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions"

5. The background to the licence is that Chelsea Reach lies in the tidal part of the Thames where there are public rights of navigation. The placing of such works as moorings there would constitute a public nuisance unless done lawfully.

6. The authority is a statutory corporation. Its history goes back to a dispute which arose between the Crown and the Corporation of London as to who owned and controlled the Thames and in particular who had the power to grant mooring rights. The history is fully set out in the judgment of Arnold J, as he then was, in *Couper and others v Albion Properties Ltd and others* [2013] EWHC 2993 (Ch).

7. For present purposes it suffices to say that the dispute was settled in the middle of the nineteenth century by the Corporation accepting that the Crown owned the bed and soil of the river and the Crown in turn conveying to the Corporation the bed and soil (except that in front of Crown land). By the Thames Conservancy Act 1857 the bed and soil and shores were vested in a new body, the Thames Conservators, and the Port of London Act 1908 established the authority as successor to the Conservators.

8. The statutory scheme in force at the time that the licence was entered into was the 1968 Act, and it is common ground that that act as then in force is part of the background to the licence. Under the 1968 Act, the primary purpose of the authority is to provide, maintain, operate and improve port and harbour services in the River Thames and its tributaries.

9. The main statutory duties of the authority are set out in section 5(1) as follows:

> "It shall be the duty of the Port Authority- (a) to provide, maintain, operate and improve such port and powers, harbour services and facilities in, or in the vicinity of, the Thames as they consider necessary or desirable and to take such action as they consider incidental to the provision of such services and facilities; (b) to take such action as they consider necessary or desirable for or incidental to the improvement and conservancy of the Thames."

10. Section 5(2) gives certain powers to the authority, including the

> "…power…by arrangement between themselves and another person to take such action as [the authority] consider necessary or desirable…(a) for the purpose of discharging or facilitating the discharge of any of their duties, including the proper development or operation of the undertaking;…"

11. Section 5 (3) provides:

> "Particular powers conferred or particular duties laid upon the [authority] shall not be construed as derogating from each other or from the generality of subsections (1) and (2) of this section."

12. Section 11 deals with powers of the authority relating to land and subsection (3) provides:

> "…the [authority] may dispose of land belonging to them in such manner whether by way of sale, exchange, lease, the creation of any easement, right or privilege or otherwise, for such period, upon such conditions and for such consideration as they think fit."

13. Section 66 deals with licencing of works to render lawful what otherwise may be unlawful. Subsection (1)(a) provides:

> "The [authority] may for a consideration to be agreed or assessed in accordance with section 67 (Consideration for licence) of this Act and on such terms as [the authority] thinks fit …grant to a person a licence to carry out, construct, place, alter, renew, maintain or retain works, notwithstanding that the works interfere with the public right of navigation or any other public right."

14. Section 67(1) deals with the consideration for such a licence and provides;

> "The consideration for a works licence shall be such […] as may be agreed between the [authority] and the applicant or as shall, failing agreement, be assessed in accordance with subsection (2) of this section by an arbitrator…."

15. Section 67(2) provides:

> "The consideration shall be the best consideration in money or money's worth which, in the opinion of the arbitrator, can reasonably be obtained, having regard to all the circumstances of the case including the value of any rights in, under or over land of the [authority] deemed to be conferred by the licence, but excluding any element of monopoly value attributable to the extent of the [authority's] ownership of comparable land. "

16. Section 67(3) provides that the assessment of the consideration shall not be referred to an arbitrator until the other terms of the licence have been agreed or determined.

17. Works are defined in section 2(1) of the 1968 Act as follows: "'Works' where used in relation to the licensing of works by the [authority], means works of any nature whatever in, under or over the Thames or which involve cutting its banks other than those referred to in section 73 (Licensing of dredging, etc) of this Act and 'work' shall be construed accordingly;".

18. The moorings, piles, pontoons, ropes and chains which the claimants use to moor their houseboats come within that definition.

19. Section 69 provides, so far as material, that an applicant for a works licence who is aggrieved by the refusal of the authority to grant a licence or any term upon which it proposes to grant the licence "(other than the consideration for the licence or its reassessment)" may appeal to the Board of Trade.

20. Section 70 provides:

> "(1) No person shall carry out, construct, place, alter, renew, maintain or retain works unless he is licensed so to do by a subsisting works licence and except upon the terms and conditions, if any, upon which the licence is granted and in accordance with the plans, sections and particulars approved in pursuance of section 66 (Licensing of works) of this Act.
>
> (2) A person who contravenes the provisions of this section or who fails to comply with any term or condition upon which a works licence is granted by the Port Authority shall be guilty of an offence and liable to a fine not exceeding level 5 on the standard scale and to a daily fine not exceeding £50."

21. The licence is a short professionally drawn typewritten document, and on the backsheet has the name and address of the conveyancing solicitor of the authority. The licence

comprises nine clauses and three schedules. The licence fee is defined in the definition clause, clause 2, as "the sum of £15,666 per annum or such annual sum as may from time to time be substituted therefor in accordance with the provisions of the Third Schedule."

22. By clause 3, in consideration of that fee the authority granted to the company in accordance with section 66 of the 1968 Act a licence to "retain the Works" subject to the conditions and stipulations thereafter contained for the term. The works were defined as the structures described in the first schedule, which reads as follows:

> "Moorings pontoons entrance piers and gangways to accommodate residential craft drydock administrative and workshop barge campshedding vacuum sewage system and mooring piles in the position in accordance with [authority] drawings numbered…."

23. By clause 4 the company covenanted with the authority to observe and perform the obligations set out in the second schedule. Those include the obligations in paragraph 1(13) to do the following:

> (a) "grant mooring licences and charge mooring fees for the use of the moorings forming part of the Works
>
> (b) provide in the mooring licences for periodic reviews of the mooring licence fees one year before each Review Date (as defined in the paragraph 1(1) of the Third Schedule) and implementation of such mooring licence review from such periodic review date
>
> (c) keep proper and up to date records of all the mooring fees but not maintenance charges derived from vessels whilst they are moored at the Works
>
> (d) appoint a Chartered Accountant…approved by the [authority] (such approval not to be reasonably withheld) to audit the aforesaid records
>
> (e) upon reasonable notice permit the [authority's] Chief Finance Officer to inspect the aforesaid records but not more often than once in any one calendar year."

24. It is not in dispute that the company is thus under a positive duty pursuant to the licence to grant mooring licenses and charge mooring fees for use of the moorings in question. Mooring fees are defined in clause 2 thus:

> "….annual mooring fees subject to periodic review at which the moorings forming part of the Works might reasonably be expected to be licensed in the open market by a willing licensor to a willing licensee with vacant possession for occupation as full time residential moorings and on the assumption that the Licensees have complied with all their covenants under their

> mooring licences whether or not this be the case and with regard being had not only to licence fees rents and other charges being paid at the Boatyard but also to open market licence fees rents and other similar charges being paid for other residential moorings."

25. The third schedule provides that the licence fee shall be in the sum of £15,666 per annum up to and including 31 August 1990 and in the sum of £19,570 per annum from 1 September 1990 up to and including the 31 August 1997. Thereafter the same was to be reviewed every six years to a revised licence fee, defined in paragraph 1(3) as:

> "…a sum which is equal to twenty per cent of the total mooring fees payable to the [company] by vessels moored at the Works during the year immediately preceding the Review Date."

26. There is no evidence before me as to how any of those figures were arrived at. However, it is common ground that at the date of the licence there was no practice of charging a premium at Chelsea Reach for sub-licences which lasted for more than one year. That practice first began several years later.

27. At present there are some 60 permanent residential berths at Chelsea Reach and the claimants constitute the vast majority of the owners. The basis on which the claimants are entitled to moor their houseboats there varies. Some have formal written sub-licences granting a licence to do so for a term of years, commonly five or ten years with an option to renew for a further such term. Others have no written sub-licence but have been resident there for many years paying the annual mooring fee.

28. The practice of charging a premium, and the effect on mooring fees at present, is dealt with in the witness statement of the current managing director of the company, Andrew Moffat. For the sake of completeness, I set out the relevant passage below, but remind myself that as this practice arose well after the date of the licence, it does not inform the correct interpretation of the licence.

> "It is correct that [the company] charges higher fees for those who have not bought a licence…Those rates were fixed by the previous directors approximately 3 years ago. The practice of charging increased fees for those without a licence started before that. As I understand it…the previous directors decided to increase fees for those who refused to buy a licence in part in response to complaints from boat owners who had bought a licence and who resented the fact that some occupiers were refusing to do so and yet were being allowed to moor their boats for the same rates as those who had paid a premium. This was considered unfair and the previous directors then decided to increase fees for those who refused to buy a licence. They pay the higher rates but for over a year now some of the unlicensed boat owners have expressed the payment to be divided into three categories i.e. maintenance fee, mooring fee and what they term a "security fee"."

29. The claimants submit that the practice of demanding a premium for a mooring licence that is granted for a number of years as well as requiring payment of a mooring fee, defeats the purpose of the scheme of the licence. A premium capitalises part of the mooring fees, which is thus not taken into account in determining the revised licence fee which becomes payable on each six-yearly review of the licence fee. The authority is consequently deprived of at least part of the consideration for which it has contracted and which section 67 obliges it to recover. It is accepted that no further relationship is shown in the evidence between the calculation of a premium and the calculation of the mooring fee, other than the fact that in cases where both are charged, the mooring fee is less than in cases where no premium is charged.

30. Moreover, the claimants submit, the requirement under clause 2 to charge "annual …fees subject to periodic review" and the definition of mooring fees as the open market annual fee is incompatible with the taking a premium and constitutes a breach of paragraph 1(13)(a) of the second schedule. The audit and inspection of records relating to such fees, which do not refer to premiums, is a further indication that the licence does not contemplate the taking of such a premium.

31. Alternatively, the claimants submit that it is an implied term of the licence, necessary to give it business efficacy, that the sub-licences required to be granted may not reserve or charge a fine or premium or other capital payment.

32. The company submits that the reference to "best consideration" in section 67(2) cannot derogate from the powers granted to the authority to determine the consideration for which it is prepared to grant a licence. It is a protection for third parties, not a fetter on the authority. The consideration for a licence is what the authority and the applicant may agree pursuant to section 67(1). The reference to best consideration in section 67(2) is a refence to the determination of an arbitrator where the authority and the applicant cannot agree upon the consideration.

33. Moreover, the consideration does not have to be a sum of money but can be in money's worth. Section 67(1) and (3) of the 1968 Act as originally drafted referred to such consideration as a "sum" "payable", but each of those words were deleted by amendment by section 7 and the second schedule of the Port of London Act 1982.

34. Accordingly, the company submits, even if there were an obligation to obtain best consideration as defined, the lack of reference to the charging of a premium does not mean that such a charge breaches the obligation to obtain best consideration. There is no evidence as to what was taken into account and it cannot be determined what value was attributed by the authority to the obligations under the licence.

35. The company further submits that there is nothing in the licence to state that the company cannot charge a premium. Such a charge was not imposed by the sub-licences at Chelsea Reach at the time that the licence was entered into and so the lack of reference to a premium in the licence is not surprising. That does not mean that a premium cannot be charged, only that the company takes the benefit.

36. Given that the licence was expressly granted pursuant to section 66 and that it is agreed that the 1968 Act is part of the background to that grant, it seems appropriate to begin the approach to the correct interpretation of the licence by determining issues between the parties as to the correct interpretation of section 66 and 67. The claimants'

submission that the authority has a statutory duty to obtain the best consideration for a licence fee is an important part of their case on the correct interpretation of the licence.

37. Mr Rainey QC, for the claimants, submits that the requirement for best consideration referred to in section 67(2) applies not just to an assessment by an arbitrator but also to any agreement between the authority and an applicant for a licence as to the amount of consideration. Why, he asks rhetorically, would the authority not want to obtain the best consideration? He submits that the sections must be construed in context. Sections 66 to 70 provide a scheme whereby anyone can apply for a licence, and the authority has to consider whether or not to grant a licence, and if it does, upon what terms. Such terms must be either agreed or determined on appeal before the consideration is agreed or assessed. If the requirement of best consideration applied only to assessment and not to agreement, then the logical place in the 1968 Act to find that provision would be following section 69.

38. He accepts that the phrase "in the opinion of the arbitrator" in section 67(2) can only apply to assessment, but submits that it is clear from the phrase "consideration to be agreed or assessed in accordance with section 67" in section 66 (1)(a) that the consideration must accord with section 67 whether agreed or assessed.

39. The provision in section 11(3), that the authority may, for example, dispose of land for whatever consideration it sees fit, does not, he submits assist the interpretation of section 66 and 67. Section 11 deals with another matter, namely the alienation of land and he submits that it is inconceivable that the authority as a statutory body having duties who affect members of the public, would simply give land away.

40. Ms Bhaloo QC, for the company, submits that it is clear that the requirement for best consideration applies only to assessment. The main duty of the authority is to conserve and improve the River Thames and it can set whatever consideration it sees fit for a licence under section 66, just as it can for the disposal of land under section 11. If it asks too much, the applicant can refer the issue of consideration to an arbitrator, and it is in this way that the mechanism acts to protect applicants. It is unlikely in the extreme that if the authority asked too little there would be a reference to arbitration. Upon such a reference, the arbitrator would need to know the basis of the assessment, which is why it is set out in section 67(2) and refers to the opinion of the arbitrator. The use of the word "may" in section 66(1)(a) makes it clear that the grant of a licence is a power and not duty.

41. In my judgment, each of these positions is a respectable one to take upon the correct interpretation of sections 66 and 67 of the 1968 Act, a local act, which are not altogether clear in this regard. If the intention was that the authority could agree such consideration for a licence as it saw fit, it would have been a simple matter to say so, as was provided for expressly in section 11(3). On the other hand, if it was intended to impose a duty on the authority to obtain the best consideration reasonably obtainable in money or money's worth, that also could easily have been made clear as it was in the case of an arbitrator's opinion.

42. In my judgment, the respective consequences of the two rival interpretations do not provide a great deal of assistance in arriving at the intention of Parliament in passing

the 1968 Act. The intention might have been for the authority to have a discretion as to the consideration for a licence as it does as to whether or not to grant one. I do not accept Mr Rainey's submission that the word "may" in this context should be read as "must." On the other hand, the intention might have been that the authority was required to obtain best consideration as defined.

43. Nor does the overall purpose of the 1968 Act point clearly in one direction rather than the other. Requiring the best consideration reasonably obtainable would in general terms promote the financing of the carrying out of the authority's duties and as Mr Rainey submits, in ordinary circumstances it might be expected that the authority would require such consideration. However, the duty is a wide one, including the improvement and conservancy of the Thames, and it is conceivable that such a duty may need to be carried out without having to ensure that the exercise contemplated in section 67(2) is undertaken, for example in an emergency.

44. In these circumstances, it is the wording of the provisions themselves which give the strongest indication as to their correct interpretation. The reference to the opinion of an arbitrator does not sit easily with an interpretation that requires the authority to agree a consideration which constitutes best consideration within the terms of section 67(2). Moreover, the words in subsection (1) "…as may be agreed...or as shall, failing agreement, be assessed in accordance with subsection (2)…" strongly suggest that it is the assessment only which is to be in accordance with subsection (2) and only when agreement has failed. It may be expected that if the intention was to impose a duty on the authority to agree best consideration as defined, rather than to allow discretion, then clearer language should have been used.

45. On balance I have come to the conclusion that the company's interpretation on this point is to be preferred to that of the claimants. The former does justice to the relevant words used in sections 66 and 67, whereas the latter involves unacceptable straining of the language. Accordingly, I conclude that the authority in agreeing the fee for the licence was not constrained to arrive at best consideration.

46. The matter does not end there however, and issues of the proper interpretation of the licence remain. I have regard to the principles of contractual interpretation above and shall consider in turn the application in this case of the principles set out by Lord Neuberger.

47. The first is the natural and ordinary meaning of the words used in paragraph 1(13) of the second schedule. That meaning in my judgment is that the company will grant residential mooring licences and charge mooring fees as defined, namely annual mooring fees subject to periodic review at which the moorings might reasonably be expected to be licenced by a willing licensor to a willing licensee on the assumptions and having regard to the matters set out.

48. The second is to have regard to other relevant provisions of the licence. The first set of relevant provisions are in the remainder of paragraph 1(13) in my judgment, namely

the obligation of the company to keep proper records of the mooring fees and to appoint an accountant to audit them and allow the authority to inspect them. The second set are in the third schedule and relate to the calculation of the revised licence fee as twenty per cent of the total mooring fees payable during the previous year. The absence of any reference to a premium is of little assistance one way or the other given that the practice of charging such a premium had not then began at Chelsea Reach. On the other hand, in my judgment it is going too far to say that the potential for the charging of a premium could not reasonably be foreseen. It might reasonably have been foreseen that houseboat owners might be willing to pay a premium, above the annual mooring fee, for the assurance of a fixed term licence when otherwise they might have no security of tenure.

49. The third matter is the overall purpose of paragraph 1(13) and of the licence. In my judgment that is to ensure that residential moorings are made available at Chelsea Reach and that they are let and that such letting is at an annual mooring fee at market rates subject to periodic review.

50. Fourthly, regard must be had to the facts and circumstances known or assumed by the parties at the time of entering into the licence. So far as relevant to the charging of premium, this must be taken to include the fact that there was no practice of charging a premium at Chelsea Reach at the time.

51. Fifthly, so far as commercial common sense is concerned, there is little if any evidence before me as to the commercial factors in play at the time of the licence, and so it is not clear whether this factor points more one way than the other.

52. I ignore what little evidence there is before me of the subjective intentions of the parties to the licence at the time, to comply with Lord Neuberger's sixth point.

53. Mr Rainey submits that the practice of charging a premium for a mooring licence that is granted for a number of years, as well as requiring a mooring fee, defeats the whole purpose of the obligation in paragraph 1(13), because a premium capitalises part of the mooring fee, which in turn takes this capitalised portion out of consideration in the determining the revised licence fee. Moreover the definition in clause 2 of "annual...fees subject to periodic review" is incompatible with the reservation of a premium. The revised licence fee constitutes an equity sharing arrangement between the company and the authority and it is a breach to cause these positive obligations to become impossible to fulfil. Charging a premium will necessarily supress the mooring fees payable.

54. In this regard, he relies upon *King v Earl Cadogan* [1915] 3 KB 485 (CA), in which the Court of Appeal considered whether a sum which the lessee spent on rebuilding the demised premises amounted to a premium within the meaning of section 2 of the Finance Act 1912. The Court found that it did not. Warrington LJ at page 492 said this:

> "I need not say anything about the meaning of the word rent, but "premium," as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is a very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease."

55. Mr Rainey does not accept that the additional payments in question are payments for security of tenure. He says that some of the claimants without fixed term sub-licences claim collateral contracts entitle them to moor their boats on a rolling basis. He accepts however that this issue is not for determination in the present proceedings.

56. I remind myself that what is under consideration here is the correct interpretation of the licence granted in 1989. A suppression such as referred to by Mr Rainey may be the result of charging a premium, but not necessarily so. If this means that the annual mooring fee is not at a market rate as defined, then that may amount to a breach of the licence. However, the charging of an additional sum in principle for a fixed term licence is not such a breach. One may be charged solely to reflect the security which a fixed term licence provides and may be separate from an annual mooring fee at a market rate. Such an arrangement would not amount to a breach of the licence. The authority of *King* is not of great assistance to this case, where the word premium is not used in the licence, and where there is a positive obligation on the company to charge an annual mooring fee at a market rate as defined. The issue is whether on its correct interpretation the licence prohibits an additional payment in addition to the annual mooring fee.

57. The proper focus in this regard therefore, in my judgment, is whether the mooring fee is set at a market rate as defined. Once it is emphasised that the company is under an obligation to set the mooring fee at that rate, then the charging of a premium or additional payment does not defeat the purpose of the obligation in paragraph 1(13).

58. Taking all these matters into account, in my judgment the correct interpretation of the licence is that it does not prohibit the taking of a premium from houseboat owners who are prepared to pay such a premium over and above the annual mooring fee for the assurance of a fixed term licence.

59. Mr Rainey submits, in the alternative, that a term is implied into the licence that the company must not charge a premium, in order to give the licence business efficacy. It was common ground that the principles governing the implication of contractual terms have been authoritatively stated by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72. A term may only be implied into a detailed commercial contract if it is necessary to give the contract business efficacy or so obvious that it goes without saying. Such implication is concerned not with proof of intention but with what notional reasonable people, in the position of the parties at the time when they had been contracting, would have

agreed. It is a necessary but not sufficient condition that the term to be implied appears fair or the court considers that the parties would have agreed it if it had been suggested to them.

60. For essentially the same reasons which I have set out in the determination of the correct interpretation of the licence, in my judgment none of the requirements set out above have been made out in respect of an implied term prohibiting the charging of a premium.

61. The claimants in these proceedings seek declarations in respect of the civil and criminal law but do so by reference to the charging of a premium and not the charging of a mooring fee at other than a market rate as defined. Two declarations are sought in the following terms:

> "[The company's] practice of charging a premium when granting a mooring licence for a number of years, and of charging a premium upon the exercise of an option to renew a mooring licence for a number of years, constitutes a breach by [the company] of the [licence]; and
>
> By reason thereof, charging a premium in such circumstances constitutes a criminal offence contrary to s.70 of the 1968 Act; or would, if continued, constitute a criminal offence contrary to s.70 of the 1968 Act and hence is or would if continued, be illegal."

62. Mr Rainey, Ms Bhaloo and (in respect of the criminal declaration) Mr Jarvis each made detailed and skilful submissions in relation to the grant of such declarations and as to the correct interpretation of section 70. I intend no disrespect in not dealing with these submissions, but on my finding that the charging of such a premium does not amount to a breach of the licence, neither declaration is appropriate.

63. I will hand down this judgment in writing. If consequential matters cannot be agreed but can be dealt with on the basis of written submissions, then I invite counsel to file such submissions within 14 days of hand down. If they take the view that a further hearing is necessary to deal with such matters, then I invite them to request such a hearing within the same time frame.

64. I end by repeating my thanks to each counsel for the focussed and skilful way in which he or she presented their respective cases.