Neutral Citation Number: [2024] EWHC 138 (Ch)

CH-2023-BHM-000001

IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (CH D)

ON APPEAL FROM THE LINCOLN COUNTY COURT
ORDER OF HER HONOUR JUDGE COE KC DATED 10 NOVEMBER 2022

29 January 2024

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

(1) CHARLES BOYD **Appellants**
(2) CAROL BOYD
(3) MICHAEL CASEY
(4) SHIRLEY CASEY
(5) MICHAEL CONNELL
(6) CAROL CONNELL

-- and –

BURTON WATERS MOORINGS LIMITED **Respondent**

- -

MS KERRY BRETHERTON KC (instructed by **Naylor Solicitors LLP)** appeared on behalf of the Appellants.

MR MICHAEL BOOTH KC and **MR JEFF HARDMAN** (instructed by **Schillings International LLP**) appeared on behalf of the Respondent.

Hearing dates: 14 and 15 December 2023

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APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30 am on 29th January 2024 by circulation by email to the parties or their legal representatives and by release to the National Archives.

Mr Justice Leech:

I. The Appeal

1. By Appellant's Notice dated 8 December 2022 the Appellants, Mr and Mrs Boyd, Mr and Mrs Casey and Mr and Mrs Connell, applied for permission to appeal against the Order dated 10 November 2022 (the "**Order**") made by Her Honour Judge Rosalind Coe KC (the "**Judge**") giving judgment for £1,441.31 (inclusive of interest) against each couple and directions for the resolution of a number of costs issues. The Judge gave these money judgments after a trial which took place on 7 to 9 March 2022 and on 6 June 2022 she handed down a reserved judgment (the "**Judgment**"). Where I refer to paragraphs below in square brackets, I intend to refer to paragraphs in the Judgment (unless otherwise stated or coupled with a citation from authority).

2. In the Grounds of Appeal dated 7 December 2022 which were filed with the Appellant's Notice the Appellants advanced two grounds of appeal. The first ground ("**Ground 1**") was that the Judge had erred in law in concluding that a standard form mooring licence was not part of a single, composite contract or transaction for the purposes of Directive 93/13 (the "**Directive**") and the Unfair Terms in Consumer Regulations 1999 (the "**Regulations**") and that its core terms were the provision of a mooring and the payment of a licence fee. The Appellants contend that she ought to have found that the mooring licence and the residential leases granted to each couple were part of a single contract or that the mooring licence was dependent on each lease and, therefore, that the terms of the licence (and, in particular, the obligation to pay a licence fee) were not core terms of the contract. The Appellants' second ground ("**Ground 2**") was that the Judge erred as a matter of law in concluding that the mooring licence was not unfair within the meaning of the Regulations and that she should have found that the terms of the licence were unfair.

3. By Respondent's Notice dated 28 July 2023 the Respondent, Burton Waters Moorings Ltd ("**Moorings**"), applied to uphold the Order on eight different or additional grounds. Mr Michael Booth KC, who appeared for Moorings with Mr Jeff Hardman, submitted that the additional grounds set out in the Respondent's Notice were implicit in the Judge's reasoning either as a matter of analysis or because the relevant evidence was never challenged and Moorings relied on the additional grounds in the Respondent's Notice

without prejudice to that contention. Mr Booth also submitted that it was unnecessary for Moorings to apply for an extension of time to file or serve the Respondent's Notice because it had not been served for the purposes of CPR Part 52.13(5). However, he also submitted that if it was necessary to do so, Moorings applied for an extension of time on the basis that the Appellants had suffered no prejudice.

II. The Proceedings Below

A. The Development

(1) The Section 106 Agreement

4. The Burton Waters Estate ("**Burton Waters**") is a 140 acre commercial and residential development constructed around a marina basin. It includes 361 residential dwellings, moorings for residents and third parties, a marina, a shop parade, a health club, three restaurants and a pub. By a section 106 agreement dated 12 January 1999 and made between the local planning authority, West Lindsey District Council (the "**Council**"), and Eastman Securities Ltd ("**Eastman**"), the Council agreed to grant planning permission for the development of Burton Waters and Eastman undertook to carry out the relevant works including the necessary engineering works to connect the marina basin to the Fossdyke Navigation Canal (the "**Canal**").

(2) The CRT Licence

5. By a licence dated 20 June 2000 and made between the Canal and River Trust (formerly the British Waterways Board) (the "**Trust**") and Eastman (the "**CRT Licence**"), the Trust granted a licence to construct retain maintain and use the connection between the Canal itself and the canal basin (defined as the "**Basin**") shown on plan LP/BW/01 (the "**Plan**") for a period of 60 years. The CRT Licence also defined the "**Marina**" as "the Basin and land used and occupied with it including the Residential Unit Moorings shown on the Plan edged purple".

6. The Plan itself provided me with the clearest layout of the Basin and Burton Waters as a whole and it showed that the eastern half of the Marina was split into four spurs or inlets around which residential units were to be built. The residential half of the Marina was coloured blue and edged in purple. The Plan did not identify individual moorings as such

but the CRT Licence defined the term "Residential Unit Moorings" as the "Moorings in that part of the Basin shown coloured blue on the Plan". The Plan also showed the western half of the Basin coloured orange and the CRT Licence defined the term "Commercial Marina Moorings" as "the moorings in that part of the Basin shown coloured orange on the Plan". The Plan suggests that the commercial part of the Basin and the residential part of the Basin are roughly the same size.

7. Clause 3 and Schedule 1 to the CRT Licence provided for the payment of separate licence fees for the commercial and residential elements of the licence. Schedule 1, Part 1 provided for the payment of £2,500 for the first year and thereafter a fee calculated by reference to 18.75% of the lowest charging rate per metre of the gross mooring capacity of the Commercial Marina Moorings. It also provided for any additional sum due to the increase in the gross mooring capacity to be paid at the end of each year. Schedule 1, Part 2 provided for a single, capital payment for each Residential Unit Mooring rather than a recurring, annual fee. Each payment for a Residential Unit Mooring was also calculated by reference to 18.75% of the lowest charging rate per metre for a 10 metre mooring and capitalised at the agreed rate of 10 years purchase. I will refer to the licence fees payable under the CRT Licence as the "CRT Licence Fees", the recurring fees payable for the Commercial Marina Moorings as the "**CRT Commercial Licence Fees**" and the one off fees payable for the Residential Unit Moorings as the "**CRT Residential Licence Fees**".

(3) The Marina Lease

8. Ms Kerry Bretherton KC appeared for the Appellants both at trial and on the appeal. For the trial she prepared a useful schedule of the relevant titles headed "Defendant's Position Regarding the Title of the Land". It showed that on 18 February 1992 and 1 March 1994 Eastman was registered as the freehold proprietor of land at Burton Fen under title no. LL53620 and title no. LL104074. It also showed that on 19 February 2014 Eastman was registered as the proprietor of additional land at Burton Fen under title no. LL208305. For the purposes of the appeal it was sufficient for me to focus on the register of title no. LL53620.

9. By a lease dated 18 January 2001 and made between Eastman (1) Burton Waters Management Ltd ("**Management**") (2) and five individuals who were then trading in partnership as Burton Water Moorings (the "**Partners**") Eastman granted a 999 year

lease of the premises described in the First Schedule in consideration for the payment of a premium of £300,000. The First Schedule described the Premises as "the Marina Basin and Boat Yard" together with certain other rights shown edged red on the plan annexed to the Marina Lease.

10. By a deed of variation dated 12 June 2003 made between the same parties the Marina Lease was varied and by a deed of variation and surrender dated 30 September 2003 also made between the same parties the Marina Lease was varied again and part of the demised premises was surrendered. By a number of other leases dated 12 June 2003, January 2015 and 20 May 2015 the Marina was extended. I was not taken to the plans annexed to these deeds of variation but there was no dispute between the parties that the premises demised by the original lease dated 18 January 2001 (or as amended and extended) included the Basin and the Marina (as I have defined them above).

11. Moorings' solicitors, Schillings International LLP ("**Schillings**"), helpfully produced a composite version of the Marina Lease which showed the amendments coloured red and green by reference to the deeds of variation and the dates on which the new terms were incorporated into the lease. Where I refer to the "**Marina Lease**" below I intend to refer to this composite version (as varied and amended). Clause 1 of the Marina Lease contained the following definitions:

> "(4) "the Premises" means the premises described in the First Schedule hereto and any part or parts thereof
>
> (5) "the Development" means Burton Waters Lincoln being the land comprised in Title Numbers LL53620 and LL104074 and LL208305 and any part or parts thereof
>
> (6) "the Other Premises" means all premises demised out of the Development and any part or parts thereof but does not include the Common Parts or any part or parts thereof
>
> (7) "the Other Lessees" means the owners lessees and occupiers as the case may require for the time being of the Other Premises
>
> (10) "the Common Parts" means the roads footpaths cycleways car parking areas service installations landscaped areas and all other such amenities in under or upon the Development used in common by the occupants of each part of the Development"

12. Clause 2 contained the demise. In consideration for the sum of £300,000 Eastman granted a lease for 999 years together with the rights set out in the Second Schedule but reserving

the rights in the Third Schedule and together with the benefit (but subject to the burden) of the CRT Licence. In clause 3 the Lessee covenanted to observe and perform the covenants in the Fourth Schedule and in clause 4 Management covenanted to observe and perform the covenants in the Fifth Schedule. The Third Schedule contained the following reservation for the benefit of the Lessor, Management and importantly also for third parties:

> "1. There are excepted and reserved out of the demise to the Lessor and the Other Lessees and the Management Company and those authorised by the Lessor the Other Lessees and the Management Company…
>
> 4. The right to enter upon and construct on the Premises moorings (and/or boathouses) for residential units using the Marina Basin on the Premises…
>
> 10. The right for all those who have the benefit of a mooring licence granted by the Lessor and for those using the park and sail facilities to pass and re-pass by boat over those parts of the Premises covered by water to obtain access to the Foss Dyke Water Way…"

13. The Fourth Schedule imposed a number of covenants upon the Lessee. For present purposes, it is sufficient to note that paragraph 2 contained the standard form covenant to pay all rates, taxes, charges, impositions and outgoings imposed on the Premises. Paragraph 6(i) expressly permitted the Lessee to grant residential mooring licences provided that they were in the standard approved form. Paragraph 14 imposed an obligation to maintain the Marina and paragraph 20 reserved a right of re-entry to the Lessor:

> "6…(vi) the Lessee may without consent grant Mooring Licences to the leasehold owners of any residential unit with a mooring in the Marina Basin on the Premises or enter into Commercial Mooring Licences in respect of the Commercial Moorings provided further always that in respect of the Mooring Licences granted to the leasehold owner of any residential unit the licence fee payable pursuant to the terms thereof shall be identical to that payable per metre pursuant to those Mooring Licences already granted to existing leasehold owners of residential units at the time of grant of the licence and such licence shall contain the same provisions for the increase of the licence fee as that contained in the existing Mooring Licences…
>
> 14. To maintain and keep the Premises including the Marina Basin and its banks walls lining and all other parts thereof and all outfalls overflows pumps pump houses surface water pipes culverts whether upon the Premises or upon adjoining or neighbouring property in a good state of repair and condition and when necessary by way of repair only to renew and rebuild the Premises including all such matters aforesaid and for the

> avoidance of doubt keep the water taxi jetty and pontoon and its fixing and moorings to the banks of the Marina Basin in good repair and condition and when necessary to renew and build the water taxi jetty and pontoon…
>
> 20. To permit the Lessor at all reasonable times upon the giving of reasonable written notice (save in emergency) to enter upon and examine the state of repair and condition of the Premises and if pursuant to such examination the Lessor serves on the Lessee written notice of any defects and wants of repair replacement or renewal for which the Lessee is responsible then within twenty-one days after the giving of the notice (or sooner if reasonably required) the Lessee shall commence and proceed diligently with the carrying out of the works referred to in such notice and shall complete the works within three months or as soon as practicable thereafter after the giving of the notice provided always that if the Lessee makes default in the performance of this covenant to permit the Lessor to enter the Premises and carry out the works and the cost of the works shall be paid by the Lessee on demand and in default be forthwith recoverable as a debt due from the Lessee together with Interest from the date of completion of the work to the date of payment by the Lessee…"

14. The Fifth Schedule also imposed a number of covenants upon Management. These included the obligation to pay outgoings in respect of any part of the Development including the Common Parts but not in respect of the Premises or Other Premises. It also imposed an obligation to maintain and repair the Common Parts and to maintain a site office on the Marina:

> "2. To pay all rates (including water rates) taxes and outgoings if any payable in respect of any part of the Development (other than those payable solely in respect of the Premises and the Other Premises) and the Common Parts
>
> 3. To maintain and keep the Common Parts in a good state of repair and condition PROVIDED that nothing herein contained shall prejudice the respective rights of the Lessor or the Management Company's to recover from the Lessee or any other person the amount or value of any loss or damage suffered by or caused to the Lessor or the Management Company or the Common Parts by the negligence or other wrongful or wilful act or default of the Lessee or such other person…
>
> 5. To maintain and keep a site office on the Development with such employees for such purposes (including but not limited to the general security of the Development) as the Management Company shall reasonably consider to be desirable and suitable…"

15. On 31 January 2001 the Marina Lease was registered under title no. LL195117. By the date on which Mr and Mrs Boyd acquired Plot 28 (below) the property register also recorded the deeds of variation dated 12 June 2003 and 30 September 2003. The

proprietorship register also recorded that on 17 October 2003 Moorings had become the registered proprietor. The Marina Lease and the two deeds of variation were also registered in the schedule of notice of leases in title no. LL53620.

B. Plot 28

(1) The Lease

16. By a lease dated 2 July 2009 and made between Eastman (1) Management (2) and Mr and Mrs Boyd (3) (the "**Lease**") Eastman granted a 999 year lease of Plot 28 the Landings 15 Ellisons Quay Burton Waters ("**Plot 28**") from and including 1 January 1999 for a premium of £199,995 at a peppercorn rent. Plot 28 was shown on the plan annexed in red and it shows that Mr and Mrs Boyd had the benefit of parking and access to the Marina. Clause 1 contained definitions which are either identical with or similar to definitions in the Marina Lease. In particular, the definitions of the Premises, the Development, the Other Premises and the Other Lessees were the same and the definition of the Common Parts was very similar:

> ""the Common Parts" means the roads footpaths cycleways car parking areas Service installations the Service Strip (if any) landscaped areas tree planting belts and public open spaces (including gazebos and street/ parkland furniture) boundary structures/features and all other amenities (including but not limited to lighting and security installations) in under or upon the Development used in common by the occupants of each part of the Development"

17. Clause 1 also contained two other definitions which are relevant to the issues which the Judge had to determine:

> "1.10 "the Service Charge" means such proportion of the costs charges and expenses referred to in the Fourth Schedule hereto as the Management Company (or its managing agent for the time being) in each case acting reasonably shall consider to be attributable to the Premises and payable by the Lessee pursuant to the Fifth Schedule hereto…
>
> 1.15 "the Mooring Licence means the licence to moor a boat in the marina basin on the Development made on the date hereof between Burton Waters Moorings Limited (1) the Management Company (2) and the Lessee (3)"

18. For the purposes of this judgment I also adopt the term "**Service Charge**" used in clause 1.10. Clause 3 and the Third Schedule imposed a number of covenants and other obligations upon Mr and Mrs Boyd as lessees. They included the following:

> "1. To pay to the Lessor the yearly ground rent hereby reserved during the said term at the times and in manner aforesaid and without any deduction and to pay to the Management Company the Service Charge at the times and in the manner aforesaid and without any deduction
>
> 2. To pay all rates taxes assessments charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the Premises or on the owner or occupier thereof and in the event of any such rates taxes assessments charges impositions and outgoings being assessed charged or imposed in respect of the Development to pay the proper proportion of such rates taxes assessments charges impositions and outgoings attributable to the Premises (except only (in either case) such as the Lessor may be liable to pay in respect of any dealing with any reversionary interest in the premises)…
>
> 4. To observe and perform all reasonable regulations which may from time to time be made by the Management Company for the proper management of the Development and of which written notice shall have been given to the Lessee and to take all reasonable steps to ensure that all occupants of and visitors to the Premises observe and perform the same
>
> 5.1. Not to assign transfer charge underlet or part with or share occupation of part only of the Premises 5.2 Not to underlet the Premises as a whole (except for a term not exceeding five (5) years) 5.3 Not to assign or transfer the Premises as a whole without effecting a simultaneous assignment or transfer of the Mooring Licence to the same assignee or transferee
>
> 6. Immediately upon any assignment or transfer of the Premises as a whole to procure that the assignee or transferee (as the case may be) executes a Deed in the form set out in the Sixth Schedule hereto and delivers the same duly stamped to the Management Company (or its solicitors) together with certified copies of the executed Deed of Assignment or Transfer (and the assignment or transfer of the Mooring Licence pursuant to Clause 5.3)…
>
> 16. Not to swim or permit or suffer any swimming from or to any part of the Premises in the marina basin forming part of the Development"

19. Clause 4 and the Fourth Schedule imposed a number of covenants and obligations upon Management. Paragraphs 2, 3 and 5 were in almost identical form to paragraphs 2, 3 and 5 (above) of the Fifth Schedule to the Marina Lease (and for this reason I will not repeat them). The Fifth Schedule also identified the individual items for which Management was entitled to charge Mr and Mrs Boyd:

> "1. The costs charges expenses and outgoings incurred by the Management Company in carrying out its obligations pursuant to Clause 4 of this Lease
>
> 2. All other sums incurred by the Management Company in and about the maintenance and proper convenient management and running of the Development including in particular but not limited to 2.1 Any interest paid on any money borrowed by the Management Company to defray any expenses incurred by it as specified in this Schedule 2.2 Any legal or other

> costs incurred by the Management Company and where there shall be a benefit of the same to the Lessee in taking or defending proceedings (including any arbitration) arising out of any Lease of any part of the Development or any claim by or against the Lessee or tenant thereof or by any third party against the Lessor the Management Company or occupiers of any part of the Development
>
> 2.3 Such reasonable sum as shall be estimated by the Management Company to provide a reserve fund to meet part or all of the costs charges expenses outgoings and matters for which the Management Company is responsible under this Lease provided that neither the Lessee nor any Other Lessee shall be entitled to be repaid any part of the reserve fund and upon any transfer of this Lease the amount standing to the credit of the Lessee at the date of the transfer shall enure for the benefit and credit of the transferee and provided further that such reserve fund shall be held at all times by the Management Company upon trust in a separate designated account"

20. Paragraph 3 provided for the preparation of accounts and paragraph 4 permitted Management to employ contractors to carry out any of its obligations under the Lease and to charge for administration costs. Schedule 6 contained form of deed which required any purchaser to enter into direct covenants with Eastman and Management to pay the ground rent and Service Charge and to observe and perform the covenants in the Lease. Finally, the execution page shows that Eastman and Management had the same registered office and that the Lease had been executed by the same director and secretary on behalf of both companies.

(2) The Licence

21. By a mooring licence also dated 2 July 2009 and made between Moorings (1) Management (2) and Mr and Mrs Boyd (3) (the "**Licence**") Moorings authorised Mr and Mrs Boyd to moor one boat alongside the berth or mooring pontoon shown coloured red on the attached plan. The particulars provided for an "Initial Yearly Licence Fee" of £779.57 plus £59.97 per metre by which the length of the boat moored under the Licence exceeded 6.5 metres (plus VAT). Clause 1.8 defined the "**Licence Fee**" as the Initial Yearly Licence Fee subject to an annual increase by reference to the RPI published each December (and I adopt the same defined term for the purposes of this judgment). Clause 2, clause 3 and clause 4 then provided as follows:

> "2.1 The Licensor authorises the Licensee to moor one (1) boat not exceeding the length from time to time approved and registered in accordance with clause 5.3.3 at the Mooring for a term commencing on

the date of this Licence expiring on the 18th day of June 2060 PROVIDED THAT

2.1.1 The Licensor may terminate this Licence (without affecting any other of its rights against the Licensee) forthwith upon written notice to such effect if

2.1.1.1 Any sum payable under this Licence is unpaid for a period of twenty-one (21) days after becoming due

2.1.1.2 The Licensee remains in breach of any provision in this Licence at the end of a period of twenty-one (21) days commencing on the date on which written notice of such breach is delivered by the Licensor or the Management Company to the Licensee

And upon such termination the Licensor shall be entitled to remove the boat at the cost of the Licensee

2.1.2 In the event of the Marina Basin being permanently closed dewatered or ceasing to be navigable (otherwise than temporarily) then either party may determine this Licence by giving to the other not less than six (6) months' previous notice in writing expiring at any time.

2.2 If the Licensor gives to the Licensee not less than three (3) months written notice of the Licensor's requirement to grant a further Licence for a period beginning immediately on the expiry of this Licence and in accordance with the terms of this Licence (except for this Clause) the Licensee shall enter into a further Licence for such period not exceeding sixty (60) years as may be agreed between the Licensor and the Licensee or in case of disagreement such period not exceeding sixty (60) years which accords with the Licensor's practice and policy regarding the renewal of long term mooring licences at the time of renewal having regard to the permanent nature of the Premises and the Mooring and the terms of the Licence available to the Licensor from the British Waterways Board (or similar competent Authority)

3. This Licence is subservient to the use of the Marina Basin by the Licensor and the Management Company for the purposes of their undertaking and shall be exercised at the Licensee's own risk and for the avoidance of doubt it is hereby agreed and declared that this Licence does not authorise:-

3.1 The discharge or running off into the Marina Basin from any boat moored at the Moorings of anything other than unpolluted surface water draining naturally and such engine cooling water and sink and shower waste as may be permitted from time to time by law and by the British Waterways Board (or similar competent Authority)

3.2 The taking of water from the Marina Basin

3.3 Fishing in the Marina Basin (except from the Premises or the Mooring) and it is hereby further agreed and declared that:-

3.4 This Licence is granted subject to any deficiency in the quantity and quality of the water in the Marina Basin howsoever occasioned and whether or not occasioned by the acts or default of the Licensor or the

> Management Company or their respective agents or licensees so that no compensation shall be payable to the Licensee for any deficiency in the quantity or quality of the water howsoever caused
>
> 3.5 The Licensor and the Management Company shall not be responsible for maintaining the level of the water in the Marina Basin and nothing herein contained shall prevent the Licensor or the Management Company from diverting diminishing interfering with or cutting off the supply of water to the Marina Basin or otherwise affect the right of the Licensor or the Management Company from time to time to alter vary or adjust the level of the water in the Marina Basin or to draw down the water from time to time as often as occasion may require for any purpose whatsoever provided that in the event the Licensor or the Management Company shall give to the Licensee as much notice as reasonably practicable (except in case of emergency) where the water level in the Marina Basin is to be materially altered"

22. Clause 3.6 also provided that the Licensee was not entitled to compensation for any damage or loss suffered as a consequence of the diversion, interference or cutting off of the supply of water to the Basin and clause 3.7 reserved the right to the Licensor and Management to dewater or stop up the connection between the Basin and the Canal for operational purposes. Clause 4 expressly provided that the Licensee agreed to pay the Licence Fee "whether or not a boat was moored at the Mooring" and clause 4.1 provided that it was to be paid in advance on 25 March in each year together with VAT and that arrears would carry interest at 5% above base.

23. Clause 5 of the Licence imposed a number of covenants and other obligations upon Mr and Mrs Boyd as licensees to both Moorings and Management. They included the following obligations:

> "5.8 Not to do or cause suffer or permit anything which may interfere with the carrying on of the undertaking of the Licensor and the Management Company or which may devalue the Marina Basin or cause nuisance damage grievance or annoyance to the Licensor or the Management Company or to any other licensee or to the British Waterways Board…
>
> 5.11 At all times to comply with the rules and regulations of the Licensor and the Management Company in respect of the Mooring and the Marina Basin as notified in writing from time to time to the Licensee (including but not limited to the joint Yacht Harbour Association and British Marine Industries Federation General Conditions of Berthing Mooring and Storage Ashore attached hereto or any modification or replacement thereof insofar as the same do not conflict with any specific terms in this Licence or in such rules and regulations (and in case of any such conflict the terms of this Licence will prevail)"

24. In clause 6 Moorings agreed to maintain the Basin and their mooring in good repair and condition and clause 7 contained the following covenants prohibiting the alienation of the Licence except on limited terms:

> "7.1 The benefit of this Licence shall not be capable of assignment by the Licensee except as a whole to an assignee or transferee of the Lease of the Premises simultaneously with such assignment or transfer or pursuant to Clause 7.2
>
> 7.2 If the Mooring is used by someone other than the current owner and occupier of the Premises such use shall be only by way of a licence for a period which does not exceed one year at a fee which is calculated at a rate per metre length for the boat not less than the rate per metre length charged in the commercial section of the Marina Basin for private pleasure craft moorings and the use by and licence to someone other than the current owner and occupier of the Premises shall only be arranged through the operator from time to time of the commercial section of the Marina Basin who shall be entitled to a commission of twenty per cent (20%) of the mooring fee"

25. Finally, clause 10 provided that the Contract (Rights of Third Parties) Act 1999 did not apply to the Licence and clause 11 contained a provision for arbitration in accordance with Arbitration Act 1996. I should record that neither party relied on this provision or applied for a stay of proceedings either before the Judge herself or before me.

C. The Evidence

26. The Judge heard oral evidence from five witnesses: Mr Richard Costall and Mr James Hazel, both directors of Moorings, and Mr Boyd, Mr Casey and Mr Connell. She considered it to be of limited value given the nature of the arguments which were advanced before her: see the Judgment, [12]. As a consequence, I was not taken to many passages in the evidence although I now set out briefly the evidence to which I was taken.

(1) Mr Costall

27. Mr Costall was the moving force behind Burton Waters and one of the five Partners. In his witness statement dated 27 May 2021 he explained that in 1985 he bought four derelict cottages and converted them into a hotel and restaurant. He also explained how his architect's firm prepared plans for the Marina and shortly after the grant of planning permission and the S106 Agreement work began. Mr Costall then gave the following evidence about the creation of Moorings:

> "6. During 1985/86 I started to develop initial plans for a more ambitious development centred around a marina. I established a company called Eastman Securities Limited ("**Eastman**") with four other business partners. I was the Company's Managing Director. I was the architect and my firm at the time, Costall Alan Design ("**CAD**"), came up with the initial sketches and visuals. Around that time, we also met, for the first time, with the planning department of West Lindsey District Council ("**WLDC**") and British Waterways ("**BW**"). Following extensive discussions and further meetings with both parties (where we ironed out key issues like "development in the open countryside"), and despite there being some political objection, we received a tentative indication of support from WLDC and BW. This gave us sufficient confidence to move forward with more detailed concept drawings and illustrations."
>
> "20. When work commenced on site, Burton Waters Moorings Limited ("**Moorings**") did not exist. To keep Eastman (a house builder) separate from the moorings operation, we had formed a partnership, comprising myself and my business partners at the time (the "**Partnership**"). The Partnership let the marina basin from Eastman pursuant to a 999-year lease dated 18 January 2001. Under this lease, Eastman also assigned the burden and the benefit of the CRT Licence to the Partnership. In 2010, the CRT Licence was varied to incorporate Ellison Quay; the variation was with Moorings directly.
>
> 21. The initial cost outlay of digging out the marina basin – something in the region of £1.5 million – was covered by Eastman. This was funded by our personal money and lending facilities through Svenska Handelsbanken. The flood gate alone cost circa £300,000, and had to be designed to specification agreed with BW and EA for flood control purposes. On top of this there were significant other costs, such as the construction of the floating pontoons and jetties."
>
> 22. Following extensive negotiations, we sold the share capital in Eastman and the Partnership to Beals. At the same time, I incorporated Burton Waters Moorings Limited ("**Moorings**") and purchased the Partnership (being, essentially, the benefit and burden of the CRT Licence) for £1.74 million from Beals. As part of the deal, I agreed to stay on with Beals as their Land Director. I initially agreed to stay for one year, but I ended up staying until December 2018. I was a director of the Management Company and ran this with managing agent, Banks Long & Co ("**Banks Long**")."

28. The full name of the company to which Mr Costall and his partners sold the shares in Eastman and Moorings was Beal Developments Ltd and I will refer to it in this judgment as "**Beal**". Mr Costall also dealt with the terms of the Licence itself. He explained that the document was drafted by Mr Stuart Welsh of Wilkin Chapman LLP ("**Wilkin Chapman**") and that its terms were not based on a standard precedent but "entirely bespoke". He also explained that Wilkin Chapman were retained to act in relation to the

individual residential sales and he then gave the following evidence:

> "25. Wilkin Chapman were retained by Moorings (and Beals) to handle the sales of properties at Burton Waters and the execution or subsequent assignment of the Licence. When you buy a property at Burton Waters with a mooring, you take an assignment of the Licence. The assignment document is very simple [122-128]. Again, this structure is dictated by the CRT Licence. It is true that the Licence is already drafted when it is presented to the incoming purchaser – there is no other way to do it. However, we have never adopted a position of refusing to negotiate on the terms, subject only to those terms that we have to include by virtue of the CRT Licence. Indeed, Moorings has always taken a very pragmatic approach to how it operates the Licence terms. Every year, without fail, we have a handful of people that are late paying, or unable to pay – we saw a lot of them in 2020 who were struggling with job loss as a result of the pandemic. Where we can be, we are flexible, and often allow Licensees who might have financial difficulties to pay either on a payment plan or a deferred basis.
>
> 26. I note that, in the Defence, the Defendants aver that they had to sign the Licence as a condition of buying their properties. That is correct. That is because they bought homes with a mooring situate around a marina basin. Indeed, until recently, all but one of the Defendants have moored boats on their moorings, so presumably that was the point of buying a home with a mooring in the first place."

29. Mr Costall then moved on to deal with the ongoing costs incurred by Moorings in relation to the Marina:

> 31. On 18 November 2020, my son-in-law, James Hazel, wrote to the court in anticipation of a Case Management Conference in this case [282-289], wherein a number of comments are made about the importance of this case to Moorings, the financial value to Moorings and the Defendants and the fact that the mooring licence fees are not costs that just go straight into our pockets; they go to the upkeep of the marina in order for us to discharge our obligations to CRT. I confirm that the details set out in that letter are true to the best of my knowledge, information and belief."
>
> "35. Importantly, the cost of maintaining the banks, is a cost for Moorings to bear under the CRT Licence, assigned to Moorings from Eastman as mentioned above.
>
> 36. We knew that the soft edge would require maintenance in the future and our appointed structural engineers (SGH) came up with a design solution that still maintains the integrity of the sloping banks but requires attention from time to time to maintain the visual aspects. During the last 20 years, we have experienced several high water events. More recently in 2020/21 there were three such events in close succession which has taken top soil away from the top of the gabion baskets. Instead of just replacing top soil again, we have commissioned the original structural engineers

> (SGH) to prepare a report on the banks and come up with a more robust longer term solution. I held a meeting with SGH in March 2021. The likely cost is projected at £100,000 - £130,000 and will have initially a more engineered appearance until such time as reeds, marginal aquatic planting and coir rolls take hold. This will be a cost for Moorings to bear. It is paid for through the mooring licence fees, as are other on-going maintenance costs. Indeed, the annual maintenance costs for weeds, reeds, banks, etc, is presently running at approximately £45,000 per annum, depending on the climate. For the residential moorings alone, our annual programme for the replacement of the hardwood timber decking can be up to £10,000 per year.
>
> 37. The Marina basin goes to the very heart of the planning permission. It is the most important asset at Burton Waters. Putting it more bluntly, there is no Burton Waters without the marina basin. It is Moorings' obligation to continue to pay the annual connection licence to the CRT. Last year's connection licence fee alone was £22,344.64. If the mooring licence fees are not paid, we cannot pay for the continuing maintenance of the marina, connection fees and other costs; the Defendants, and everybody else living at Burton Waters for that matter, would be left looking out over a stagnant swamp from a property that would be practically worthless."

30. Ms Bretherton did not challenge Mr Costall's evidence that the Appellants had to sign the Licence as a condition of buying their properties (and understandably so). Moreover, I was not taken by either counsel to any specific passages in his cross-examination although I note that Ms Bretherton clearly put it to him that the ongoing maintenance of the Marina could have been recovered through the Service Charge.

(2) Mr Hazel

31. Mr Hazel gave evidence immediately after Mr Costall. He is a solicitor and non-executive director of Moorings as well as Mr Costall's son-in-law. I was taken to a particular passage in his cross-examination to which both counsel drew my attention. In that passage, Ms Bretherton asked Mr Hazel about the amount which Moorings would lose if it were unable to recover the Licence Fee under each of the mooring licenses granted to residential owners on the Marina. She also asked him about the legal position:

> "Q. You're talking about the amount that was being potentially lost in these proceedings of some, potentially, £13 million. A. Yes. Q. And what proportion of those sums are used for payment to the CRT licence? A. I have absolutely no idea. Q. And in terms of the cost of maintenance, why is it not something which can be claimed through the lease – the only drawbacks, so far as you are concerned, commercially, being that it could be subject to a challenge on the basis of reasonableness? A. The management company can't maintain the marina basin; it has no right,

> legally, to enter into that because the management company and the moorings company are entirely separate entities- Q. But- A. - so, the obligation to maintain the marina basin flows from the CRT licence to the moorings company. Q. But the management company carry out works on the development on behalf of the freehold owners which – and the development, actually, includes the marina basin itself. A. I have to take your word for that, to the extent that you'd have to take me to a lease and a plan to show- Q. Well, I think, maybe, it's a matter for legal argument but I just wanted to give you a chance to comment on that proposition. A. What? The proposition that the management company has the legal right to maintain the marina basin? I'm sorry; I can't comment on that without sight of a lease and a plan. Q. I'm not going to pursue that point further."

(3) Mr Boyd

32. Mr Boyd then gave evidence. In his witness statement dated 28 May 2021 he explained that Mrs Boyd and he had never owned a boat but that he was told that the purchase of Unit 28 depended on them taking a mooring:

> "5. On the last morning of a flying visit from Northern Ireland (during March 2009), my wife and I visited Burton Waters, with the intention of renting an apartment for my son to take up residence in. 6. As the apartments shown to us, which were available for rent, were unsatisfactory, it was suggested by Beal Homes' Sales Staff that I might like to look at a half-completed property for sale. 7. An hour later, we had signed an initial sales agreement to purchase our present home (Plot 28), later designated 15 Ellisons Quay during that initial meeting. 8. Though not directly facing the Ellisons Quay water basin, during that initial meeting I was informed by the Sales Staff that the house purchase would include a moorings licence for a specific moorings birth, some 45 metres away from the front boundary of the property. No other options were provided. 9. Never intending to own a boat, or a mooring, I asked if we had to take on such a licence. We were told that the sale of the property to us was dependent on us doing so. Though having fallen in love with the property and having begun the purchase process, I was not enthusiastic about paying for a mooring licence. As a result, I asked whether such mooring licence could be negotiated. We were informed that it was tied into the Lease of the property and as such could not be negotiated at all. Consequently, if my wife and I wished to continue with the purchase, we had no choice but to accept the mooring licence. 10. There was no direct negotiation with the Claimant, Burton Waters Moorings Ltd ("BWM"), the company who would release the moorings licence. I was led to believe that this was the same situation for everyone purchasing a property. 11. Many years later I discovered that Beal Developments Ltd, the company which had constructed my property and sold it to me as a new build, had a Mr John Beal as director. At the time of my property purchase he was also, unknown to me on purchase, the main director of BWM. 12. None of the apartments to the immediate left of my property appear to be tied into a

> moorings licence contract unlike other apartments on Ellisons Quay, which face directly onto to the basin. It appears that it was potluck, or rather bad luck, if one ended up having to 'own' a mooring, in that Beal Homes initially offered options of mooring licences to new purchasers from 2003 to 2008. From 2009 onwards, possibly due to a lack of uptake, they began adding such vacant basin moorings as a condition of sale on new phases of build, hence mine being 45 meters away from my property, and some properties on the same row as mine, having no moorings."

33. Mr Boyd also gave evidence that Wilkin Chapman had acted for him and Mrs Boyd in relation to the purchase of Plot 28 and that many years later they had admitted that they acted in breach of the relevant conduct rules and that they had destroyed the relevant conveyancing documents. He also stated that Mrs Boyd and he visited Wilkin Chapman's offices on 2 July 2009 to sign both the Lease and the Licence. In cross-examination Mr Boyd accepted that he only looked at Plot 28 and no other properties. He also accepted that the sales staff informed him that the property would include a mooring:

> "Q. And at paragraph eight, though, you do say, 'Right at the outset, I was informed by the sales staff was – will include a mooring licence for a specific mooring, some 45 metres away from the front boundary'. So, you told, you know, pretty quickly, that you would be involved with a mooring licence. A. The phrase they actually used was, 'It comes with a mooring'. It's only subsequent questioning that I find out that it's a separate contract that had to be signed. Original, in the originally plans, actually, the mooring designated to my house was directly outside my property but by the time I had arrived and made an inquiry about this one, a neighbour had objected about where their mooring was. They had taken mine and mine was assigned some 45 metres away. So, I was told that this mooring, not in front of my property, was part of the purchase of my property, yes. Q. Now, I think you say you fell in love with the property- A. A nice design, yes. Q. And you weren't shown any other houses? A. I wasn't. Q. And you didn't ask to see any other houses? A. There were none to see. Q. Well, that's not what you say in your witness statement; that's not what you just said just now. A. No, I'm saying it now; there were no more houses built on Ellisons Quay. Q. No, no, well, you're saying that now – I understand – and that's for the first time, you accept that's the first time you're saying that now? A. Yes. There were no other houses to see on Ellisons Quay. Yes. Q. And, it's right that you were shown one house; you fell in love with it and you didn't particularly care if it included a mooring licence or not at that time, that's right, isn't it? A. At that stage, I didn't really know what that meant. I asked the sales team, 'Do you have to take this mooring with the house?' and they said, 'Oh, yes, you can't buy the house without taking the mooring licence'. So, I assumed that the mooring licence was so tied in to the house some way that they came as a package- Q. Yes- A. And because I loved the property, I had not read the mooring licence at that stage, I said, fair enough, yes. Q. But the moorings company have got

> nothing to do with Beal's, have they? A. Well, Mr Costall, at that time, when I purchased my house, was the land director or Beal Developments as well as being the director of the management company who have to sign off the purchase of the house. So, I think Mr Costall, as a director, as an individual, was actually involved in this process. Q. Well, okay – okay – well, I know, but in- A. The moorings company weren't – no. Q. The moorings company aren't – okay. A. Basically, the developer- Q. I know Mr Costall has hands in different pots at this stage- A. Many pies, yes. Q. - but you understand the difference of corporate identity and they are separate entities at that stage? Yes? A. Yes, they seemed – their responsibilities seemed to cross over one another; it's quite a complex situation, yes. Q. But even Beals were not hiding from you the point that you had to enter into a licence? It wasn't hidden from you? A. No, no, it came with the house. Q. Okay. It came with the house. And, if you say at paragraph 12, 'None of the apartments to the immediate left of my property appeared to be tied into mooring licence contracts, unlike other apartments at Ellisons Quay which face directly onto the basin. It appears to me it was potluck or, rather, bad luck if one ended up having to own a mooring in that Beal Homes initially offered options of mooring licences to new purchasers from 2003 to 2008. From 2000 onwards, possibly due to lack of uptake, they began such vacant basin moorings as a condition of sale'. A. Correct."

(4) Mr Connell

34. Mr Connell also gave evidence about the purchase of his property. His unchallenged evidence was that the Licence was only mentioned when he received the property report from his solicitors:

> "6. We made an offer to the vendor which, after the usual haggling, was accepted. We then instructed Pygott & Crone Conveyancing ("P&C") to act on our behalf in respect of the conveyancing. Draft papers were sent to us on 13 July 2013. 7. We received the final property report from P&C on 22 August 2013, which now mentioned the mooring licence, and they attached a letter from the Claimant, Burton Waters Moorings Ltd ("BWM"), which stated that it was a requirement of the lease that we must sign the mooring licence as the sale would not proceed without this. At this point no option was given to negotiate or discuss the licence. P&C had not identified the Trading Standards judgment of 2011 that the licence was unfair and unenforceable, as it had not been disclosed to them by any party. 8. This was very frustrating; my wife and I were tied into the process of buying the property, had incurred considerable legal costs, time, and energy and now we had been advised that an unnegotiable mooring licence was attached to the property, which we had to accept, with no form of negotiation whatsoever with BWM or the other parties to the lease (i.e. the Landlord and Burton Waters Management Ltd ("BWML")). We were put in a difficult position in the conveyancing process due to our personal circumstances in that we had already sold our house, so we had no choice

> but to complete and have the licence forced upon us. 9. At the start of the purchase process, we were not notified that the mooring licence was a requirement for the purchase to proceed. We only received a copy of the licence when contracts were due to be signed (which I recall was in August 2013), at which point we were notified that unless the licence transfer was signed, Richard Costal [sic] ("RC"), a director of both BWM and BWML, would not approve the sale completion."

(5) Mr Casey

35. Mr Casey also gave evidence to the same effect as Mr Boyd and Mr Connell. I was not taken by either counsel to his witness statement and for the most part both counsel focussed on the evidence of Mr Boyd (as will I).

D. The Judgment

(1) Evidence

36. The Judge set out the background to the claim and recorded the evidence which she had heard. She stated that the arguments which she had heard were essentially legal in nature and that the lay evidence was of limited value: see [12] and [13]. She also stated that it was agreed that the three key documents for her consideration were the CRT Licence, the Lease and the Licence: see [14]. She did not refer to the Marina Lease at this point in the Judgment (and I return to its production below). The Judge did, however, record the following evidence from Mr Costall:

> "20. In cross examination, he told me that the sums claimed by way of mooring licence fee relates to the mooring company only and there is no correlation between the mooring fee and the management of the Estate, which is run by the management company. He told me that the fee received for the mooring licences is for the CRT payments, maintaining the water and its quality and the other details/requirements set out in the CRT licence. There is also the cost of reed and weed cutting and there is a "sinking fund" for items such as dredging over time. He said that the costs could not be recouped through the service charge; the burden of the CRT licence is granted to the moorings company and is completely separate. Unlike the mooring licence fee, the service charge is charged to all the leaseholders of Burton Waters Village whether or not they have a mooring. Mr Costall referred me to the history as set out above, in particular the obligation there was to have the free passage of water prior to any development and the ongoing obligations under s.106 of the CRT licence. He said that that is the way in which claimant has operated for 20 years and it has never been an issue. Mr Costall was not challenged in cross-examination in respect of any other costs of maintaining the marina.

> 21. Mr Costall told me by reference to CB p.247 that the annual variation in the rate of the mooring licence fee is calculated by reference to the retail price index ("RPI") so that the mooring fee is calculated by reference to the current RPI and the RPI for the previous year. Mr Costall said as a mathematical exercise it involves one multiplication and one division. The date for calculation was changed from March to December each year because the March RPI figures are not published until April whereas the fee is payable in March. He acknowledged that the change in the month could produce a difference in the fee, but he said it would be a matter of pence. He confirmed his awareness of the fact that the RPI is on the website for every year and that the figure could be exactly checked. He said one of the defendants is a finance director, and one a lecturer in mathematics. In any event, he denied that there was any difficulty in calculating the figure."

(2) Legal Arguments

37. The Judge recorded that Mr Welsh of Wilkin Chapman had drafted both the Lease and Licence and that they were bespoke documents: see [38]. She also recorded that the terms of the Licence which were alleged to be unfair were clause 2.1.1, clause 4 and clause 7.1 (all of which I have either set out or summarised above) and that it was the Appellants' case that it was not possible to divorce the Lease and Licence and that since the Licence was incidental to the grant of the Lease its terms could not be treated as core terms. She also recorded that it was the Appellants' case that clause 4 was neither plain nor intelligible: see [39] to [41]. Finally, she recorded that it was Moorings' case that the language of clause 4 was plain and intelligible but that even if the terms were unfair, it would not constitute a defence to the money claim and that if the Licence were found to be unenforceable it would undermine the entire business model of Burton Waters: see [44] and [45].

(3) Core Terms

38. The Judge held at [46] to [51] that the Regulations applied to the Licence subject to the exclusion for core terms in Regulation 6(2) (which I set out below). She then went on to consider the Appellants' submission that she should consider what the main subject matter of the contract between the parties was by considering the terms of the Lease and Licence together. She rejected that submission and set out her conclusions in relation to the question whether the disputed terms were core terms at [59] to [64]:

> "59. As set out the defendants' primary contention is that I should look at

> the leasehold contract and the mooring licence contract together. I reject that argument. Firstly, of course, the parties involved are not the same. The claimant here and one of the contracting parties to the mooring licence fee is Burton Waters Moorings Limited. The defendants entered into contracts with it. The defendants also entered into separate contracts with Beal Developments Ltd. Secondly, the subject matter of the contract with which I am concerned is the mooring licence. Not all the residential owners have a mooring licence. They have a separate contract in respect of the lease. The fact that one contract may be dependent on another, or the fact that the defendants had to enter into the mooring licence agreement as part of the agreement in respect of the property does not in my opinion automatically make the licence contract ancillary to the leasehold contract. That must be especially so where, as I say, there are different contracting parties.
>
> 60. The core terms of the mooring licence are the provision of the mooring and the payment of the fee. Clause 2.1.1 provides that the licensor may terminate the licence forthwith upon written notice of breach by the licensee, i.e. not paying any sum payable under the licence or any other breach. The claimant does not, as I understand it, argue that this is a core term. In any event, it does not seem to me that it would amount to such given as I have identified that the core terms are the provision of the mooring and the payment there for.
>
> 61. Similarly, clause 7.1, which provides that the "benefit of the licence shall not be capable of assignment except as a whole to an assignee or transferee of the lease of the premises" is not again argued by the claimant to be in core term nor would I find it to be so, in any event for the same reasons I have found in respect of clause 2.1.1.
>
> 62.The claimant does argue that clause 4, by which the licensee agrees to pay the licence fee, whether or not a boat is moored at the mooring is a core term since it relates to payment for the mooring itself. I find that this is a core term within regulation 6(2) "relating to the definition of the main subject matter of the contract, or to the adequacy of the price or remuneration, as against the goods or services supplied in exchange". I find that clause 4 clearly refers to the price within the exclusion of regulation 6(2).
>
> 63. I do not find that 4.1 is similarly a core term even though it relates to the sum to be paid for the licence stating that the licence fee is to be paid "without any deduction whatsoever". It is in my view an ancillary term to the sum to be paid.
>
> 64. Pursuant to the Regulations, therefore, I find that clause 4 is excluded from their application."

39. Having held that the obligation to pay the Licence Fee in clause 4 was an excluded term the Judge turned to consider next whether that clause was in plain and intelligible language: see [64] to [70]. She held that it was and there is no appeal against that decision. It is unnecessary, therefore, for me to consider that part of the Judgment any further.

(4) Unfairness

40. The Judge then went on to consider whether clauses 2.1.1, 4.1 and 7.1 were unfair given her conclusion that they were not excluded by the core terms exemption. She referred to the Directive and directed herself by reference to *Director General of Fair Trading v First National Bank* [2002] 1 AC 481 that the test for unfairness is a composite test covering both the making of the contract and its substance. She also referred to Regulation 5(1) and stated that a term is unfair when it causes a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer and that such an imbalance occurs when a term is so weighted in favour of the supplier as to tilt contractual rights and obligations in their favour. Finally, she stated that such an imbalance was to be assessed by reference to the contract as a whole and the position of typical parties at the time of the bargain: see [73] to [76]. She later repeated the test at [81] (and Mr Booth relied on this paragraph in submitting that the Judge set out clearly and then applied the relevant test):

> "81. The claimant emphasises the nature and description of the test of fairness in the Regulations so that a term, is regarded as unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. In summary, the requirement of good faith is one of fair and open dealing. Openness requires that the term should be expressed fully, clearly and legibly containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer."

41. At trial Ms Bretherton advanced the argument that the CRT Licence Fees and the costs of maintaining the Marina and Basin were unfair because they could have been collected under the Service Charge provisions in the Lease rather than made the subject of a separate agreement. The Judge recorded how this argument developed at [78] to [80]. Ms Bretherton advanced the case that the Development included both the Marina and the Basin and fell within the Common Parts in clause 1.1 of the Lease. She submitted, therefore, that the CRT Licence Fees could have been recovered by Management under the Fifth Schedule as outgoings payable in respect of any part of the Development or the Common Parts. To meet this argument Mr Hardman produced the Marina Lease to demonstrate that the Marina and Basin were Other Premises for the purposes of the Lease and that the licence fees were not recoverable under the Service Charge: see [78] to [80].

42. The Judge also recorded various subsidiary submissions in relation to this argument and, in particular, Mr Hardman's submission that Moorings was a separate legal entity from Management: see [82] to [85]. However, she dealt with the argument quite shortly at [86] to [90] and [98] to [99]:

> "86. I can deal with the argument about the service charge quite straightforwardly. Apart from the defendants' suspicion of the claimant's motivation, there is nothing to suggest that the claimant is using the mooring licence fee as a method of circumventing the statutory protection afforded to leaseholders in respect of service charges. There is no evidence to support it and I reject the suggestion completely.
>
> 87. As an aside to the issue of whether or not the charging of the mooring licence fee is a device I note that one resident of the Estate, Mr Joshua Fernie, pursued what seems to have been a nine-day hearing (including a site visit) in the First-Tier Tribunal at huge expense, challenging many aspects of the management company's service charge pursuant to the statute and recovering the sum of £10.44 in respect of unreasonable charges.
>
> 88. The three defendants who gave evidence themselves said that they would have paid the fee by way of service charge and that they were willing and able to do so. In those circumstances, it does not seem to me that there can be any relevant unfairness or imbalance.
>
> 89. I accept the evidence that the licence fee model used for the Burton Waters marina is entirely in line with the standard industry practice.
>
> 90. Any suggestion that this feeds into the court's consideration of unfairness for the purposes of the Regulations in a general sense is not made out on the facts here."
>
> "98. The fifth point relates to the service charge point I have already covered. I have rejected any suggestion that this is a device to avoid statutory scrutiny.
>
> 99. The charging of a mooring licence fee represents the claimant's business model. Whether or not the mooring licence fee could also have been charged as part of the service charge is not, as I find relevant to my decision in these matters. I have found that this is not some sort of device to avoid any statutory review."

43. The Judge also held that it was not unfair for Eastman to require the Appellants to enter into a Licence and to pay the Licence Fee whether or not they owned a boat or moored it at the Marina. She drew an analogy with buying a house and garage where the purchaser did not own a car or paying for a lift under the service charge of a building even though the tenant chose to take the stairs. But she also pointed out that two of the Appellants had boats and rejected the evidence of Mr Boyd at [95]:

> "94. Importantly, as I find, on the basis of the advice they received at the time the defendants were fully aware of the fact that the property came with the mooring and the requirement to enter into the licence with the claimant and pay the fee. The defendants did so without complaint. Even those defendants who have never owned a boat, despite the length of time they have lived there, have made no complaint about the fact that they have to pay for mooring despite not having a boat.
>
> 95. In this respect, I reject the evidence of Mr Boyd that he specifically asked if he could negotiate the terms of the mooring licence and that he was not happy about paying the fee. I completely reject his evidence that he would not even have bought the property if he knew then what he says has been told now about the fairness of the licence. That is inconsistent with him saying that he would pay the fees through the service charge, and with him having paid the fees up until 2020. He was clearly attracted to the property itself. Similarly, I reject Mr Connell's evidence that he and his wife felt they were in a difficult position due to the lack of negotiation of the mooring licence. I find that Mr Casey did indeed make no attempt to negotiate the terms of the mooring licence, but that does not mean that he could not have attempted to do so."

44. There is no appeal against these findings of fact. The Judge turned next to consider the overall bargain between the parties. She reached the conclusion that it was not unfair for the following reasons at [103] to [104]:

> "103. The claimant summarises the types of terms which might be unfair, as identified in paragraph 1 of Schedule 2 as those that in effect are trying to achieve the following: make a consumer pay an unfair penalty; mislead the consumer about his legal rights, or mislead about the contract; deny a consumer full redress; tie a consumer to a contract unfairly; allow a seller to not perform its obligations; not allow a consumer to recover his prepayments on cancellation; allow a seller to vary the terms after the contract has been agreed.
>
> 104. Against the background of those principles, I agree with the claimant's emphasis on the need to look at the overall bargain contained in the agreement as a whole. At page 24 (d – l) of the skeleton argument, the claimant relies on: the age, character and locality of the Estate; the moorings requiring access through a private property; the security on the Estate; the express reference to the mooring licence; the existence of the commercial moorings; the CRT licence and the obligations thereunder; the fact that the defendants were legally advised and the character and likely financial position of the defendants; and the fact that the residential mooring rates are cheaper than the commercial moorings."

45. The Judge then examined each of the individual terms which the Appellants had challenged and having regard to her overall assessment of the bargain itself she reached the conclusion that they had not established any unfairness: see [105] to [114]. In

particular, she reached the conclusion that the Licence Fee was not unfair for the following reasons at [108]:

> "108. In consideration of the licence fee, the claimant provides significant services for the benefit of the residents with a mooring licence and in that respect, as identified by the claimant, I find that there is no significant imbalance in the parties' relationship. There are considerable annual costs of maintenance which I accept. It is apparent that there are real benefits due to the fact of the existence of the marina itself. In fact, it is at the heart of the Estate. I have already found that the increase by reference to the RPI does not of itself create any unfairness. I accept the analogy provided by the claimant with the payment of a licence or service charge, for example, for a communal garden, which one does not use. Although if someone bought a property with the mooring, they were obliged to accept the licence for the mooring and pay the fee, they were not obliged to buy the property in the first place and there are properties without moorings. Again, insofar as the defendant's evidence suggested a lack of free choice in this regard, I reject it. I find that they wanted to buy a property on this Estate with its marina."

46. Finally, the Judge addressed the question of abuse of process which she had raised herself. She stated that she had a concern that the Appellants had an ulterior motive for defending the claims and that this action was one of several pieces of litigation which appeared to have the objective of ousting Mr Costall and his family from their involvement in Burton Waters. She reluctantly reached the conclusion that there would have to be another hearing to resolve that issue: see [117] to [123]. Ms Bretherton argued before me that in one set of those proceedings Management had accepted that there was a very complex service charge structure and submitted that it had presented arguments which were inconsistent with the position which it adopted both before the Judge and on this appeal. I, therefore, gave permission to Ms Bretherton to submit a note together with a transcript of the relevant decision: see *Fernie v Burton Waters Management Co Ltd*, a decision of Judge CP Tonge dated 21 July 2021 and sitting in the FTT (Property Chamber).

47. After the hearing I was also informed that this question of abuse of process had been raised with the Judge and that the Appellants had indicated that there was no jurisdiction to supplement the Judgment once the Appeal Court had become seized of the matter. I was also informed that although she made no ruling on that submission, the Judge appears to have accepted that no purpose was served by listing a further hearing once the appeal was proceeding. Finally, I add that the Respondent did not take the point that the

proceedings were an abuse of process in the Respondent's Notice. It was, therefore, unnecessary for me to consider the point further.

III. The Law

E. The Regulations

48. The Regulations were made to give effect to the Directive in English law. One of the recitals in the English language version of the preamble to the Directive (upon which Ms Bretherton relied) states that "the consumer must receive equal protection under contracts concluded by word of mouth and written contacts regardless, in the latter case, of whether the terms of the contract are contained in one or more documents". Articles 3 and 4 of the English language version of the Directive provide as follows:

"*Article 3*

> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
>
> The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
>
> Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
>
> 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> *Article 4*
>
> 1 . Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of

> the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language."

49. Regulation 5 and Regulation 6 give effect to Articles 3 and 4 of the Directive. Regulation 8 also provides that if the unfairness test in Regulation 5 is satisfied in relation to a contractual term, then that term is not binding on the consumer but the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term. Regulations 5 and 6 provide as follows:

> "**5.— Unfair Terms**
>
> (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.
>
> (5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> **6.— Assessment of unfair terms**
>
> (1)Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate– (a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

50. Schedule 2 to the Regulations contains an indicative and non-exhaustive list of terms which may be regarded as unfair. That list contained terms which had the following object or effect (in the version which was in force when the parties entered into the Lease and Licence):

"(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to

> compliance with a particular formality;
>
> (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
>
> (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
>
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."

51. It was common ground that this list was indicative only and that the test to be applied in deciding whether any term is unfair within the meaning of the Regulations was authoritatively set out in *Director General of Fair Trading v First National Bank plc* (above). In that case, the House of Lords considered an earlier version of the Regulations but in *Office of Fair Trading v Abbey National PLC* [2010] 1 AC 696 the Supreme Court confirmed that this test continues to apply to the Regulations in their amended form.

(1) Regulation 6(2): The core terms exemption

52. In *First National Bank* the first issue was whether the rate of interest charged to consumers under regulated credit agreements and fell, therefore, within the second limb of Regulation 6(2) which I will call the "core terms exemption". Lord Bingham approached this question in the following way at [12]:

> "In agreement with the judge and the Court of Appeal, I do not accept the bank's submission on this issue. The Regulations, as Professor Sir Guenter Treitel QC has aptly observed (*Treitel The Law of Contract*, 10th ed (1999), p. 248), "are not intended to operate as a mechanism of quality or price control" and regulation 3(2) is of "crucial importance in recognising the parties' freedom of contract with respect to the essential features of their bargain": p 249. But there is an important "distinction between the term or terms which express the substance of the bargain and 'incidental' if important) terms which surround them": *Chitty on Contracts*, 28th ed (1999), vol 1, ch 15 "Unfair Terms in Consumer Contracts", p 747, para 15-025. The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 32)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default,

> plainly does not fall within it. It does not concern the adequacy of the interest earned by the bank as its remuneration but is designed to ensure that the bank's entitlement to interest does not come to an end on the entry of judgment. I do not think the bank's argument on merger advances its case. It appears that some judges in the past have been readier than I would be to infer that a borrower's covenant to pay interest was not intended to extend beyond the entry of judgment. But even if a borrower's obligation were ordinarily understood to extend beyond judgment even in the absence of an independent covenant, it would not alter my view of the term as an ancillary provision and not one concerned with the adequacy of the bank's remuneration as against the services supplied. It is therefore necessary to address the second question."

53. Lord Bingham also stated that in judging the fairness of the relevant term it was necessary to consider the position of the typical parties in which the contract is made. He stated this at [30]:

> "In judging the fairness of the term it is necessary to consider the position of typical parties when the contract is made. The borrower wants E to borrow a sum of money, often quite a modest sum, often for purposes of improving his home. He discloses an income sufficient to finance repayment by instalments over the contract term. If he cannot do that, the bank will be unwilling to lend. The essential bargain is that the bank will make funds available to the borrower which the borrower will repay, over a period, with interest. Neither party could suppose that the bank would willingly forgo any part of its principal or interest. If the bank thought that outcome at all likely, it would not lend. If there were any room for doubt about the borrower's obligation to repay the principal in full with interest, that obligation is very clearly and unambiguously expressed in the conditions of contract. There is nothing unbalanced or detrimental to the consumer in that obligation; the absence of such a term would unbalance the contract to the detriment of the lender."

54. Lord Steyn agreed with Lord Bingham that the interest rate was not a core term and did not fall within the second limb of Regulation 6(2). He considered that this paragraph of the regulation should be given a restrictive interpretation because otherwise the overall purpose of the Regulations could be frustrated. He stated this at [34]:

> "Under the Regulations, a term in a standard form contract that is unfair is not binding on the consumer. But certain provisions, sometimes called core terms, have been excepted from the regulatory regime. Regulation 3(2) so provides:
>
> > "In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which—(a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied."

> Clause 8 of the contract, the only provision in dispute, is a default provision. It prescribes remedies which only become available to the lender upon the default of the consumer. For this reason the escape route of regulation 3 (2) is not available to the bank. So far as the description of terms covered by regulation 3(2) as core terms is helpful at all, I would say that clause 8 of the contract is a subsidiary term. In any event, regulation 3(2) must be given a restrictive interpretation. Unless that is done regulation 3(2)(a) will enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision. Similarly, regulation 3(2)(b) dealing with "the adequacy of the price or remuneration" must be given a restrictive interpretation. After all, in a broad sense all terms of the contract are in some way related to the price E or remuneration. That is not what is intended. Even price escalation clauses have been treated by the Director as subject to the fairness provision: see Susan Bright 20 LS 331, 345 and 349. It would be a gaping hole in the system if such clauses were not subject to the fairness requirement. For these further reasons I would reject the argument of the bank that regulation 3(2), and in particular 3(2)(b), take clause 8 outside the scope of the Regulations."

55. *Abbey National plc* was also concerned with the second limb of Regulation 6(2) and whether charges payable by current account holders for an unauthorised overdraft formed part of the price or remuneration for the services supplied. Sir Anthony Clarke MR giving the judgment of the Court of Appeal gave the following guidance on that issue at [90]:

> "The above analysis suggests that the following considerations are relevant to this broad question, together no doubt with many others, depending upon the facts of the particular case. (i) The nature of the services provided as a whole and the manner and terms in which the standard term documentation is provided to consumers. (ii) The quantum of the particular payment, the goods or services to which it is said to relate and the other payments required under the contract. (iii) In order to be "price or remuneration" within the meaning of article 4(2) the payment provision must not be ancillary to the central bargain between the consumer and supplier. Along this sliding scale: (a) if the payment obligations are directly negotiated between the consumer and supplier they will not be subject to assessment for fairness under the Directive; (b) the more closely related the payment term is to the essential bargain between the parties, the more likely it is to fall within the exception in article 4(2); but (c) the more ancillary the payment term is and the less likely it is to come to the direct attention of the consumer at the time the contract is entered into, the less likely it is to be within the concept of "price or remuneration" within the meaning of the Directive."

56. In the Supreme Court Lord Walker considered that the construction of Article 4(2) was an important one but gave rise to essentially quite a short point: see [38]. He continued as follows at [39] to [42]:

> "39 I start with the language of article 4(2) and regulation 6(2) (I can see no significant difference between them, although for no obvious reason article 4(2) refers to assessing the unfair nature of a term whereas regulation 6(2) refers to assessment of fairness of a term). Paragraphs (a) (a) and (b) are, as I have said, concerned with the two sides of the quid pro quo inherent in any consumer contract. The main subject matter may be goods or services. If it is goods, it may be a single item (a car or a dishwasher) or a multiplicity of items. If for instance a consumer orders a variety of goods from a mail-order catalogue – say clothing, blinds, kitchen utensils and toys – there is no possible basis on which the court can decide that some items are more essential to the contract than others. The main subject matter is simply consumer goods ordered from a catalogue. I think that the Court of Appeal, ante p 720, para 55, was wrong to dismiss the difficulties raised by the banks on this point as something that the court could decide as a question of fact in the circumstances of the particular case.
>
> 40 Similarly, a supply of services may be simple (an entertainer booked to perform for an hour at a children's party) or composite (a week's stay at a five-star hotel offering a wide variety of services). Again, there is no principled basis on which the court could decide that some services are more essential to the contract than others and again the main subject matter must be described in general terms – hotel services. The services that banks offer to their current account customers are a comparable package of services. These include the collection and payment of cheques, other money transmission services, facilities for cash distribution (mainly by ATM machines either at manned branches or elsewhere) and the provision of statements in printed or electronic form.
>
> 41 When one turns to the other part of the quid pro quo of a consumer contract, the price or remuneration, the difficulty of deciding which prices are essential is just the same, and regulation 6(2)(b) contains no indication that only an "essential" price or remuneration is relevant. Any monetary price or remuneration payable under the contract would naturally fall within the language of paragraph (b) (I discount the absence of a reference to part of the price or remuneration for reasons already mentioned).
>
> 42 In the case of banking services supplied to a current account customer under the "free-if-in-credit" regime, the principal monetary consideration received by the bank consists of interest and charges on authorised and unauthorised overdrafts, and specific charges for particular non-routine services (such as expedited or foreign money transmission services). The most important element of the consideration, however, consists of the interest foregone by customers whose current accounts are in credit, since whether their credit balance is large or small they will be receiving a relatively low rate of interest on it (sometimes a very low rate or no interest at all). The scale of this benefit is indicated by the figure for 2006 already mentioned. Mr Sumption was wary about committing himself as to whether interest foregone constituted part of the bank's price or remuneration for the purposes of regulation 6(2)(b). Whatever view is taken as to that, it is clear that just as banking services to current account customers can aptly be described as a package, so can the consideration

> that moves from the customer to the bank. Interest foregone is an important part of that package for customers whose accounts are in credit, and overdraft interest and charges are the most important element for those customers who are not in credit. Lawyers are very used to speaking of a package (or bundle) of rights and obligations, and in that sense every obligation which a consumer undertakes by a consumer contract could be seen as part of the price or remuneration received by the supplier. But non-monetary obligations undertaken by a consumer contract (for instance, to take proper care of goods on hire-purchase, or to treat material supplied for a distance-learning course as available only to the customer personally) are not part of the "price or remuneration" within the regulation. That is the point of Lord Steyn's observation in the *First National Bank* case [2002] 1 AC 481, para 34, that "in a broad sense all terms of the contract are in some way related to the price or remuneration".
>
> 43 The House of Lords' decision in the First National Bank case shows that not every term that is in some way linked to monetary consideration falls within regulation 6(2)(b). Paragraphs (d), (e), (f) and (l) of the "grey List" in Schedule 2 to the 1999Regulations are an illustration of that. But the relevant term in the *First National Bank* case was a default provision. Traders ought not to be able to outflank consumers by "drafting themselves" into a position where they can take advantage of a default provision. But *Bairstow Eves London Central Ltd v Smith* [2004] 2 EGLR 25 shows that the court can and will be astute to prevent that. In the *First National Bank* case Lord Steyn, at para 34, indicated that what is now regulation 6(2) should be construed restrictively, and Lord Bingham said, at para 12, that it should be limited to terms "falling squarely within it". I respectfully agree. But in my opinion the relevant terms and the relevant charges do fall squarely within regulation 6(2)(b)."

57. Lord Walker also added a postscript cautioning against the use of labels such as "ancillary", "subordinate", "incidental", "non-core" and "collateral" and drew attention to the similar issue which arises in VAT cases where the court has to determine whether there is a single supply of goods and services: see [46]. I have this point well in mind when using the shorthand expression "core terms exemption".

(2) Regulation 5: Fairness

58. In *First National Bank* Lord Bingham pointed out that one objective of the Directive was to harmonise the law in Member States and laid down a test which was to be applied whatever the pre-existing law. He continued at [17]:

> "But the language used in expressing the test, so far as applicable in this case, is in my opinion clear and not reasonably capable of differing interpretations. A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations

> under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote."

59. Ms Bretherton submitted that in considering whether the Licence Fee was unfair the Court was entitled to take into account the provisions of the Landlord and Tenant Act 1985 (the "**LTA 1985**"). I consider the relevant law below but she submitted that the LTA 1985 formed part of the background to their terms and if their effect was to exclude its operation, then the Court was entitled to find that the relevant terms were unfair. In support of these submissions she relied on the decision of the ECJ in *Aziz v Caiza D'Estalvis De Catalunya, Tarragona I Manresa* [2013] 3 CMLR 89 at [66] to [71]:

> "66 In that regard, according to settled case-law, the relevant jurisdiction of the Court extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of the directive and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the

circumstances of the case. It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair (see Case C-472/10 *Invitel* [2012] ECR, paragraph 22 and case-law cited).

67 That being so, it should be noted that, in referring to concepts of good faith and significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of the directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (see Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19, and *Pannon GSM*, paragraph 37).

68 As stated by the Advocate General in point 71 of her Opinion, in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.

69 With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive and as stated in essence by the Advocate General in point 74 of her Opinion, the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.

70 In that regard, it should be recalled that the annex, to which Article 3(3) of the directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see *Invitel*, paragraph 25 and case-law cited).

71 Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it (*Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42). It follows that, in that respect, the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system (*Freiburger Kommunalbauten*, précité, paragraph 21, and the order in Case C-76/10 *Pohotovosť* [2010] ECR I-11557, paragraph 59)."

(3) Appeals

60. Mr Booth submitted that the question whether the terms of the Licence were fair was an evaluative decision and that this Court should only interfere with the Judge's decision on that issue if satisfied that it exceeded the generous ambit within which reasonable disagreement was possible. He also submitted that the Judge considered all the relevant documents and saw the witnesses and that appeal judges should "resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself": see *Piglowski v Piglowski* [1999] 1360 at 1372B-H (Lord Hoffmann).

61. Mr Booth also relied on the decision of the Court of Appeal in *Re Sprintroom Ltd* [2019] BCC 1031 by analogy. In that case both parties appealed the judge's findings of unfair prejudice in a claim under section 994 of the Companies Act 2006. In giving their combined judgment McCombe LJ, Leggatt LJ and Rose LJ characterised the issues on the appeal at [71] and after considering all of the relevant authorities provided guidance at [76]. I set out both paragraphs below:

> "71. It seems to us that the argument in this case is directed to the judge's "evaluative" decision as to whether Dr Potamianos's conduct justified his exclusion from the management of the Company and so whether there had been "unfair prejudice" in the conduct of the company's affairs on the basis of the primary facts as he found them to be. While there were disputes below as to the primary facts, his findings on those disputes are not now challenged. We are concerned to assess the judge's "evaluation" of those primary facts leading to his decision that there had been "unfair prejudice" in this case."
>
> 76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

F. The Service Charge

(1) Construction

62. There was no real dispute between the parties about the general principles which the Court should apply in construing the Lease and Licence. Ms Bretherton relied on *Arnold v Britton* [2015] AC 1619 which is of general application but also concerned with similar provisions. For present purposes it is sufficient for me to adopt the distillation of the

relevant principles set out by Carr LJ (as she then was) in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17] to [19]:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) 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. 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 contract, (iii) the overall purpose of the clause and the contract, (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;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;
>
> iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;
>
> iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

> v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;
>
> vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.
>
> 19. Thus 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. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; 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. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

63. The principal issues between the parties were whether it was permissible to construe the Lease and Licence together and also to rely on the Marina Lease as an aid to construction. In general terms, the register of title will usually form part of the available background to construe a document which creates or transfers an interest in registered land. Moreover, section 66(2) of the Land Registration Act permits any person to inspect and make copies of any documents kept by the registrar which relates to an application by him. As the editors of *Ruoff & Roper Registered Conveyancing* (2023 ed.) point out in Vol 1 at 1.041 this section involved a change in the law for two reasons: first, because it now permits the inspection of leases and charges and, secondly, because the right of inspection is not subject to the Registrar's discretion.

64. It follows, therefore, that documents of title referred to in the register will also form part of the background available to both parties if they are available for inspection under section 66. In *R (HCP (Hendon) Ltd v Chief Land Registrar* [2020] 1 WLR 4240 Martin Spencer J approved a passage in the current edition of *Ruoff & Roper Registered Conveyancing* to that effect at [19]:

> "Although Mr Hurndall did not refer to it specifically, it seems to me that a further important para is 4.004 relating to the property register and leasehold estates in land. There Ruoff & Roper states:
>
> > "In the case of a registered leasehold estate, the property register will contain (as well as a description of the demised premises) sufficient particulars of the lease to enable it to be identified … The lease and these other documents remain essential parts of the title notwithstanding registration. So, for example, regard must be had to the lease itself, rather than what appears on the face of the register, in deciding questions relating to the covenants, provisions and conditions of the lease."
>
> It seems to me that the words "The lease and these other documents remain essential parts of the title notwithstanding registration" are significant."

65. *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305 illustrates the importance of documents of title being mentioned in the register. In that case, borrower and lender executed a facility agreement and legal charge on the same day. However, the parties left the amount to be repaid and the dates due blank in the legal charge and made no reference to the facility agreement which was never registered at HM Land Registry. One issue for the Court of Appeal to determine was whether it was possible to read both documents together to enable the lender to exercise the power of sale. Lewison LJ (with whom Longmore LJ agreed) held that it was not possible to do so and that a claim for rectification of the charge was necessary. He stated this at [99] and [130]:

> "99. The question, then, is what does the registered charge mean? Whatever it means, it has always meant what it means. A contract cannot mean one thing when it is made and another thing following court proceedings. Nor, in my judgment, can it mean one thing to some people (eg the parties to it) and another thing to others who might be affected by it. As Arden LJ herself has said a contract has only one meaning: *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429 . Thus I do not consider that the question is as posed by Arden LJ at para 63. We are not, in my judgment, seeking to ascertain "what the parties intended to agree" but what the instrument means."
>
> "130. In my judgment this is the key to the present case. The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain

> and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. There is, in my judgment, a real difference between allowing the physical features of the land in question to influence the interpretation of a transfer or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not). Land is (almost) invariably registered with general boundaries only, so the register is not conclusive about the precise boundaries of what is transferred. Moreover, physical features are, after all, capable of being seen by anyone contemplating dealing with the land and who takes the trouble to inspect. But a third party contemplating dealing with the land has no access to collateral documents."

66. More generally, however, two agreements can and should be read together where they form part of a composite transaction made between the same parties. In *Kwei Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132 Lewison LJ again stated the general principle at [13]:

> "One question, then, is whether the two agreements can or should be read together. The KGL agreement was made some 10 days after the PCL agreement. The general rule is that the subsequent conduct of the parties to an agreement cannot affect the true interpretation of the agreement. Still less can subsequent conduct of strangers to the agreement. Where there are contemporaneous contracts made between the same parties, which form part of a single composite transaction between the same parties, then the several documents can be read together: *Smith v Chadwick* (1882) 20 Ch D 27, 62."

(2) The LTA 1985

67. Sections 18 and 19 of the LTA 1985 limit the service charges which a landlord may recover from a residential tenant under the contractual provisions of a long lease. They provide as follows:

> "**18.— Meaning of "service charge" and "relevant costs"** .
>
> (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent— (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and (b) the whole or part of which varies or may vary according to the relevant costs.
>
> (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
>
> (3) For this purpose— (a) "costs" includes overheads, and (b) costs are

> relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.
>
> **19.— Limitation of service charges: reasonableness**.
>
> (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period— (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
>
> (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.
>
> (5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs."

68. There was no dispute between the parties that to fall within section 18 a service charge had to be variable: see section 18(1)(b). There was no dispute either that an increase by reference to a change in the RPI does not make a fixed charge variable for the purposes of that provision: see *Coventry CC v Cole* (1993) 25 HLR 555 (CA) and *Anchor Trust v Waby* [2019] L&TR 2. However, the fact that the landlord pays fixed sums to third parties in respect of the demised premises (e.g. rates or other outgoings) does not prevent those sums from being recovered under a variable service charge provision. In *The Gateway (Leeds) Management Ltd v Naghash* [2015] L&TR 36 Mr Martin Rodger QC, the Deputy President of the Lands Chamber who gave the decision in *Anchor Trust* (above), stated this at [27]:

> "The second strand of Mr Bates argument was that, even if they were service charges, the rent and CCTV costs were fixed, rather than variable according to the costs incurred by or on behalf of the appellant in connection with the provision of the service. That seems to me to be an impossible argument. A service charge is an amount payable by a tenant which may vary according to the costs incurred by the landlord; it matters not that for the time being the costs incurred by the landlord are fixed. All that matters is that the cost to the tenant may vary in accordance with the cost to the landlord. Not only are the costs of providing the office accommodation and the gym subject to review under the terms of the gym and office leases, but those leases themselves are for only a relatively short period of the total term of the respondents' leases. If in 2017, when the gym lease expires, the appellant proposes to renew the lease, no doubt a new

> rent will be negotiated, and will be recoverable (subject to reasonableness) under the terms of the respondents' leases. The cost of providing the gym is a variable cost and the amount payable by the lessees varies in accordance with it. Nor is the fact that the charges for the provision of the CCTV equipment are fixed for the duration of the five year agreement sufficient to prevent them from forming a component of a variable service charge. The cost of providing the CCTV service plainly may vary from time to time during the term of the lease as the cost to the landlord of hiring or purchasing the equipment varies, so the fact that for any particular period the payments which the landlord is required to make for the equipment are fixed is nothing to the point."

69. In construing a service charge provision, there is also a presumption against double recovery. Thus, where a landlord is able to recover a particular expense from a third party, the presumption is that the same expenses will not be recoverable again from the tenant through the service charge. In *Oliver v Sheffield CC* [2017] 1 WLR 4473 Briggs LJ (as he then was) stated the general principle at [42] to [45]:

> "42 Although Mr Baker criticised it as assuming that which needed to be proved, in my judgment Mr Fieldsend identified the correct starting point, namely that a construction of the Lease would produce a result which reasonable parties in the position of the Council and Ms Oliver could not sensibly have intended, if its service charge provisions permitted the Council to make double recovery.
>
> 43 The prospect of double recovery (if service charge proportions are determined without giving credit for third party funding) is by no means limited to payments under the CESP Scheme. The exterior of the Property or of the Block might be seriously damaged by an insured risk the repair of which would fall both within the Council's repairing obligations (and therefore the confines of the service charge provisions) and within the cover provided by an insurance policy taken out pursuant to clause 4(4)(i) of the Lease, at the Lessees' joint expense.
>
> 44 The Council might receive payment against the carrying out of works falling within its repairing covenant from an original builder of the Block under a guarantee, from the employers or insurers of the driver of a heavy goods vehicle which crashed into it, or by way of damages from someone committing malicious damage. All those sources would be third party contributions to the cost of carrying out the requisite works, and double recovery would occur if the Council did not have to give credit for the receipt of them when determining the service charge liabilities of the long lessees within the Block.
>
> 45 It is in my view no answer to say, as Mr Baker submitted, that the statutory prohibition of double recovery in relation to some forms of grant in section 20A of the Landlord and Tenant Act 1985 point to a mutual understanding, under the Lease, that double recovery is in principle permissible, save where specifically prohibited. The statutory provision

> may equally, and in my view more, sensibly be regarded as a form of belt and braces where a particular Lease made no sufficient provision for the avoidance of double recovery in relation to such grants."

70. In *Avon Ground Rents Ltd v Cowley* [2020] 1 WLR 1337 the Court of Appeal applied *Sheffield CC v Cowley* to payments received by the landlord from the NHBC: see [29] and [30]. Finally, the reasonableness test in section 19 may apply to charges payable by the tenant to the landlord even though the liability to pay those charges does not arise pursuant to obligations in the lease. Costs incurred "by or on behalf of the landlord" are wide enough to extend to charges independent of the lease itself. For example, in *K Group Holdings Inc v Chuan-Hui* [2021] 1 WLR 5981 Henderson LJ considered that service charges payable under a management order fell within section 18: see [56].

IV. The Appeal

71. I begin with a preliminary point. Mr Booth submitted that it was not open to Ms Bretherton to argue that the CRT Licence Fees were recoverable under the Service Charge provisions because she had not put her case on this important issue to Moorings' witnesses: see *W Nagel v Pluczenik Diamond Co NV* [2019] Bus LR 692 at [21] (Leggatt LJ). Ms Bretherton submitted that since the issue involved the true construction of the Lease this was not an issue on which the evidence of Mr Costall or Mr Hazel was admissible or relevant. But she also submitted that she had put her case sufficiently to Mr Hazel.

72. I accept Mr Bretherton's submissions. In my judgment, it was only necessary for Ms Bretherton to put her case formally to the witnesses (if at all) and she clearly did so both to Mr Costall and Mr Hazel. But in any event, I would not have held that this was a reason for refusing to permit her to pursue the point on appeal because Mr Hardman only produced the Marina Lease on the third day of the trial and after she had completed her cross-examination. It might be suggested that Ms Bretherton could have asked to recall the witnesses to deal with the Marina Lease but in my judgment she was right not to do so and for the reason which she gave. The question was not one on which their evidence was admissible. I therefore turn to the substantive grounds of appeal.

G. Ground 1

73. The Appellants' case is that the Judge ought to have found that the Licence and the Lease

were part of a single contract or transaction for the purposes of the Directive and the Regulations. This ground gives rise to a point of statutory interpretation on which the parties were unable to identify any authority either before the Judge or before me. The issue both for the Judge and for me was whether the "main subject matter of the contract" in Regulation 6(2)(a) can be interpreted to include the terms of "another contract on which it is dependent" under Regulation 6(1).

74. In her Skeleton Argument and orally Ms Bretherton advanced six reasons in support of Ground 1. Four of those submissions related to the meaning or effect of the Lease and Licence and two related to the statutory interpretation of Regulation 6. I find it easier and more convenient to separate her points on the documents from her legal points in the analysis which follows. In relation to the Lease and Licence Ms Bretherton argued that they were inextricably interlinked and formed part of a single transaction for the following four reasons:

    (1) It was not possible for the Appellants to enter into the Lease without at the same time entering into the Licence. The choice which they were offered was to acquire both or neither (Reason 1).

    (2) The Lease and Licence contained mirror obligations prohibiting the assignment of the Lease without the assignment of the Licence: see the Third Schedule, paragraph 5.3 (Reason 2).

    (3) The Lease and Licence were drafted by the same solicitors, Wilkin Chapman, who acted for both Eastman and Moorings. They also acted for Mr and Mrs Boyd. The inference which Ms Bretherton invited me to draw was that the contracts were drafted and designed to operate together (Reason 3).

    (4) On the true construction of the Lease, the Licence Fee duplicated monies which were already recoverable as Service Charge under the Lease. The Licence was, therefore, entirely unnecessary as a source of income to maintain the Marina because the Appellants (and other leaseholders) were required to pay all of these costs whether for maintenance of the Marina or charges under the CRT Licence under the terms of the Lease (Reason 6).

75. For these reasons, Ms Bretherton argued that when the Lease and the Licence are

considered together it is clear that the terms which the Appellants challenged were not core terms of the contract but ancillary to the terms of the Lease. In relation to the interpretation of Regulation 6(2) Ms Bretherton argued that:

(1) It is necessary to consider Regulation 6 as a whole. Regulation 6(1) requires the Court to assess the fairness of a contractual term by reference not only to the terms of the individual contract but the terms of any separate contract upon which it is dependent. Regulation 6(2) provides a limited exception to Regulation 6(1) but must be read by reference to it and consistently with its overall purpose (Reason 4).

(2) There is no requirement to disregard a second contract merely because it is made between different parties. The test is one of dependence. Moreover, if that is sufficient, it would be easy to devise a structure to avoid the consequences of Regulation 6 (Reason 5).

76. The Judge rejected the argument that the Lease and Licence should be read together for two reasons: first, the parties were not the same. Moorings was a party to the Licence and Eastman (which was now owned by Beal) was a party to the Lease. Secondly, the fact that the Licence was dependent upon the Lease did not "automatically make the licence ancillary to the leasehold contract": see [59]. It is also important to note that the Judge also found that the core terms exemption in <u>both</u> Regulation 6(2)(a) and also Regulation 6(2)(b) applied: see [62]. Mr Booth submitted that these paragraphs encapsulated the Judge's reasoning and that she was right.

77. The Judge did not address the question whether the CRT Licence Fees and the cost of maintaining the Marina and Basin were recoverable under the Service Charge provisions in the Lease in the context of the core terms exemption. One issue which I will have to consider is whether it was necessary to decide this issue at all and, if so, whether her failure to do so provides a basis for allowing the appeal. It is more convenient to address that question once I have considered the substantive issue itself.

(1) The Lease and Licence: meaning and effect

<u>(i) Was the Lease conditional on the grant of the Licence?</u>

78. The grant of the Licence was not expressed to be conditional upon the grant of the Lease or vice versa. However, in deciding whether the Licence was dependent upon the Lease for the purposes of Regulation 6(1) it is permissible, in my judgment, to have regard to the evidence of the witnesses about the circumstances in which the transaction took place. In *First National Bank* Lord Bingham stated that it was necessary to consider the position of the typical parties: see [30] (above). Mr Booth did not suggest that the Appellants were atypical and Mr Costall accepted in terms that all purchasers had to sign the Licence as a condition of buying their properties. I therefore accept Ms Bretherton's submission that it was not possible for the Appellants to enter into the Lease without at the same time entering into the Licence.

(ii) Did the Lease prohibit assignment without the assignment of the Licence?

79. As Ms Bretherton submitted, the Lease also contained an absolute prohibition on assignment unless Mr and Mrs Boyd also assigned the benefit of the Licence. The Licence did not contain a mirror provision but rather prohibited assignment except to an assignee of the Lease. It also qualified the opportunity to sub-licence the mooring. I accept, therefore, that as a matter of law the Appellants could not assign the Lease without assigning the Licence and that in practice it was only possible to sell the Licence to a purchaser of Plot 28.

(iii) Were the Lease and Licence drafted and designed to operate together?

80. Mr Costall gave evidence that Wilkin Chapman were retained by both Beal and Moorings and drafted both the Lease and the Licence. Moorings did not call Mr Welsh of Wilkin Chapman to give evidence but given Mr Costall's unchallenged evidence that when a purchaser buys a property at Burton Waters, he or she has to take an assignment of the relevant moorings licence and that the Appellants had to sign the Licence as a condition of buying their properties, I am prepared to draw the inference that the contracts were drafted and designed by Wilkin Chapman to operate together. I also take into account the fact that Mr and Mrs Boyd were unable to produce their conveyancing file because Wilkin Chapman had destroyed it.

(iv) Were the CRT Licence Fees recoverable under the Lease as Service Charges?

81. Finally, I turn to consider whether the costs of maintaining the Marina and the Basin and,

in particular, the CRT Licence Fees were recoverable under the Service Charge provisions of the Lease. Ms Bretherton focussed on this issue in her oral submissions both at the hearing of the renewal application before Zacaroli J and also at the hearing of the appeal before me. Unsurprisingly, Mr Booth also devoted a large part of his oral submissions to this issue.

82. It is, therefore, something of a surprise that the Judge did not consider it necessary to decide this issue at all. However, it is likely that she considered it unnecessary to do so given that it had only arisen (or, perhaps better, that it had only taken shape) at a very late stage of the trial and on the very last day. Further, it is also likely that the issues of construction did not feature so prominently in the parties' written and oral submissions because the significance of the Marina Lease only became apparent at that stage of the proceedings.

83. I deal first with the approach which I should adopt to the construction of the Lease. Ms Bretherton and Mr Booth were both agreed that the Lease and the Licence could be construed together (although they differed about their meaning and effect). After some hesitation, I agree with that position even though the parties are not identical. The Licence was not a "collateral document" in the same way as the facility agreement in *Cherry Tree Investments Ltd v Landmain Ltd* (above). The Lease and Licence expressly referred to each other and any reasonable solicitor searching the register of title could have been expected to ask for a copy. But what satisfies me that the documents can and should be read together is that no assignment of Plot 28 can take effect or be registered unless Eastman has certified compliance with the Third Schedule, paragraph 6. This requires the vendor to produce a deed of assignment or transfer of the Licence in accordance with clause 5.3 (above).

84. The parties differed, however, on the question whether the Marina Lease was admissible as an aid to the construction of the Lease. Ms Bretherton submitted that the Marina Lease and the other three leases granted by Eastman to Moorings were not admissible because their existence was not known to the Appellants at the time when the Lease and the Licence were executed. Mr Booth submitted that it was admissible as an aid to construction because a potential purchaser could inspect a copy on the register of title and it therefore formed part of the background available to both parties.

85. The Appellants did not give any positive evidence on this issue and they were not cross-examined about it. Again, this is not surprising since the relevance of the Marina Lease did not surface until the third day of the trial. Moreover, since Moorings did not call Mr Welsh of Wilkin Chapman and Mr and Mrs Boyd were unable to put their solicitor's file before the Court, it is not possible to be certain whether the individual solicitors who acted for the Appellants were aware of the Marina Lease. Given the way in which the issue developed, the Appellants should not be penalised for this and I will assume in their favour both that none of them were aware of the Marina Lease and also that their solicitors did not obtain a copy from the Land Registry and give advice about its contents.

86. Despite making this assumption in the Appellants' favour, I am satisfied that the Marina Lease was available to the Appellants and their solicitors and is admissible as an aid to construction. *Cherry Tree Investments Ltd v Landmain Ltd* (above) provides clear authority for the proposition that the background to the construction of a registered disposition includes any document which is registered in a publicly accessible register and available for inspection. Moreover, *R (HCP (Hendon) Ltd v Chief Land Registrar* provides authority (if it were needed) that a lease noted in a schedule of notice of leases is available for inspection under section 66 of the Land Registration Act 2002.

87. On 31 January 2001 the Marina Lease was registered at HM Land Registry under title no. LL195117 and the first entry in the property register describes the land comprised within the title as "Marina Basin and Boatyard, Burton Waters, Burton, Lincoln". The schedule of notice of leases to the register of title no. LL53620 also records the Marina Lease as the second entry and, as I have set out above, the schedule contained notice of the three other leases and the deeds of variation. Finally, since the Lease and all of the other residential leases of properties on the Marina were registered in the very same schedule, any solicitor investigating title to Plot 28 might be expected to have checked the register of title no. LL53620. I, therefore, reject Ms Bretherton's submission that the Marina Lease is not admissible as an aid to the construction of the Lease.

88. The Lease contains three definitions which are key to the present dispute. The Development includes all of the land comprised within title no. LL53620: see clause 1.6. The Common Parts are defined by reference to the Development and include a number of physical features such as roads, footpaths and car parking areas. However, they also include "all other amenities in under or upon the Development used in common by the

occupants of each part of the Development": see clause 1.11. Finally, the Other Premises are defined by reference to all premises demised out of the Development but exclude the Common Parts: see clause 1.7.

89. Management owes an obligation to pay all outgoings in respect of the Common Parts and any part of the Development other than those payable solely in respect of the Premises and the Other Premises and to maintain and keep the Common Parts in repair: see the Fourth Schedule, paragraphs 2 and 3. It is also entitled to recover the costs and expenses of performing those obligations: see the Fifth Schedule, paragraph 1. If the Basin and Marina are not Other Premises but fall within the Common Parts, then Management owes an obligation to pay the CRT Licence Fees and to maintain them as Common Parts. It is also entitled to recover those costs under the Fifth Schedule. Moreover, the CRT Licence Fees are recoverable whether or not they are fixed fees: see *The Gateway (Leeds) Management Ltd v Naghash* (above). This is the case because they are owed to a third party and the Service Charge provisions in the Lease are variable.

90. Ms Bretherton submitted that the obvious and natural meaning of the Common Parts was that it included the Marina and Basin. She pointed to the definition of "Mooring Licence" which included the description "the marina basin on the Development" and she relied on the Third Schedule, paragraph 16 which imposed an obligation not to swim "from or to any part of the Premises in the marina basin forming part of the Development". She submitted that the natural and obvious conclusion was that the Basin and Marina were amenities used in common by the occupants of each part of the Development and were, therefore, included in the Common Parts. Finally, Ms Bretherton relied on the fact that the Lease imposed an obligation to maintain a site office on the Development from which the reasonable reader would have understood that it had access to all parts of the Development.

91. Attractively though Ms Bretherton presented her submissions, I am unable to accept them. Once it is accepted that the register of title no. LL53620 and the Marina Lease are admissible to construe the Lease, it is clear, in my judgment, that the Basin and Marina do not fall within the Common Parts and that the CRT Licence Fees and the costs of maintaining them are not recoverable under the Fifth Schedule. This conclusion is obvious when one considers how a typical solicitor might have gone about investigating title to Plot 28:

(1) Clause 1.6 defines the Development by reference to three separate titles and clause 1.7 defines the Other Premises as all premises demised out of the Development but excluding the Common Parts. The Lease itself contains no other way of identifying the Other Premises.

(2) To identify the Other Premises, therefore, it would have been necessary for the reader to search each of the three titles. A solicitor could also have been expected to search title no. LL53620 to check Eastman's title to the Development, to confirm that it had not already granted a long lease of Plot 28 and to establish (at least at a general level) what parts of the Development were included in the Common Parts to assess the likely scope of the Service Charge.

(3) A solicitor undertaking this exercise would have noticed that the Marina and Boat Yard had been demised to the Partners for a term of 999 years (and assigned to Moorings) and would have reached the immediate conclusion that these were Other Premises for the purposes of the Lease. A solicitor could also have been expected to search title no. LL53620 and inspect the Marina Lease and to check the Plan in order to advise on the likely liabilities of a purchaser under the Service Charge provisions.

(4) A solicitor who had read the Marina Lease would have noticed the definition of the Premises in the First Schedule and that the Marina Lease contained the same or substantially the same definitions as the Lease (or draft of the Lease), that it imposed an obligation to maintain and repair the Basin and Marina on Moorings not Management and that it reserved a right of entry to the landlord, Eastman, and not to Management. A reasonably competent solicitor could also have been expected to notice that the benefit and burden of the CRT Licence had been assigned to Moorings not Management.

(5) A solicitor armed with this information who had gone back to consider the terms of the Lease would have been satisfied that there was no inconsistency between the two documents. He or she would have noted that the definition of the Common Parts in the Lease did not include the Marina and the Basin but was exclusively directed either to land itself or to services and amenities on dry land. He or she would also have noticed that the prohibition on swimming in the Third Schedule,

> paragraph 16 does not in fact refer to the "marina basin forming part of the Common Parts" but "from or to any part of the Premises in the marina basin forming part of the Development". The conclusion which he or she would have drawn is that this formulation was used precisely because the Marina and Basin did not fall within the Common Parts.

92. During Ms Bretherton's reply, I raised a new point with both counsel, namely, that the Licence conferred no right on Mr and Mrs Boyd to use the Basin or Marina. It seemed to me that it would have been meaningless to grant a mooring licence if the licensee had no right to use the Basin to access the Canal and that the Basin must, therefore, form one of the amenities included in the Common Parts. When put on the spot, Mr Booth submitted that this point went nowhere because such a right must be implied into the Licence. Having had the luxury of time to reflect on this point myself, I agree with him although for a slightly different reason. Because I set this hare running myself, I briefly explain why I have reached this conclusion.

93. In the Marina Lease (as amended by the deed of variation dated 10 June 2003) Eastman reserved an express right for all those who have the benefit of a mooring Licence to pass and re-pass by boat over the Basin to obtain access to the Canal: see the Third Schedule, paragraph 10. For reasons which are not explained, the Lease did not provide for the benefit of that right to be transferred to the Appellants although it was clearly reserved by Eastman for their benefit. However, even though the Lease did not make express provision for the transmission of this right, it would have passed to Mr and Mrs Boyd under the general words implied into the grant of the Lease by section 62(1) of the Law of Property Act 1925:

> "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

94. A conveyance of land includes a lease of more than three years and the right to pass and re-pass over the Basin was an easement appertaining to the Marina and Basin and demised with part of the land, namely, Plot 28. For this reason, therefore, the residential

leaseholders of Burton Waters were (and are) entitled to use the Marina and Basin by virtue of the right reserved for their benefit in the Marina Lease rather than because it was included in the Common Parts of the Development.

95. I add that I gained little assistance from *Fernie v BWML* (above) in relation to the construction of the Lease and whether the CRT Licence Fees were recoverable under the Service Charge provisions. The Tribunal rejected the submission that the costs of maintaining the footbridge over the entrance to the canal were recoverable: see [272] to [275]. I fully accept that Management had argued that these costs were recoverable and also successfully argued that repairs to a pump and drain also fell within the Service Charge provisions: see [190]. I also accept that the Tribunal was told that Moorings owned the Marina: see [85]. But without investigating the underlying issues in far greater detail, it is impossible for me to determine whether Management and Beal were adopting a position which was inconsistent with the position which Moorings adopted on this appeal. Moreover, as Ms Bretherton accepted, the decision does not give rise to an issue estoppel and is not binding on me.

96. I am satisfied, therefore, that on the true construction of the Lease the CRT Licence Fees and the costs of maintaining the Basin and the Marina are not recoverable as Service Charge. This makes it unnecessary for me to address the question of double recovery. There was a certain amount of shadow boxing between the parties in relation to that issue. Mr Booth submitted that Ms Bretherton's whole case depended on the Court finding that there was double recovery of the same costs but that the presumption against double recovery would prevent that conclusion. Ms Bretherton hotly contested this submission on the basis that Mr Booth was setting up a straw man only to knock it down again. In the event, it is unnecessary for me to consider or decide who had the better of this argument.

(2) The Regulations

(i) Does Regulation 6(1) apply?

97. Although I have held that the CRT Licence Fees are not recoverable under the Service Charge provisions in the Lease, I would have been prepared to hold that the Lease and the Licence were so closely interlinked for the other reasons given by Ms Bretherton that the Licence should be regarded as dependent upon the Lease for the purposes of

Regulation 6(1) even though Eastman granted the Lease and Moorings granted the Licence and even though Eastman and Moorings are no longer in common ownership. In the absence of authority, I see no reason why Regulation 6(1) should only apply where there is complete identity of parties and I agree with Ms Bretherton that this would enable a supplier to circumvent the Regulations easily.

98. However, it is clear that the Judge was prepared to assume in the Appellants' favour (without deciding) that the Licence was dependent on the Lease in considering the core terms exemption: see the penultimate and final sentences of [59]. She stated that the fact that one contract is dependent on another and that the Appellants were required to enter into the Licence to acquire their properties did not mean that the Licence was ancillary to the Lease for the purposes of the core terms exemption (and especially so where the parties were different). I agree for the reasons which I now explain.

(ii) How does the core terms exemption apply?

99. Where I part company with Ms Bretherton is in the application of Regulation 6(2). I accept that it provides a limited exception to Regulation 6(1) and that it must be applied restrictively. But in my judgment, this does not permit the Court to treat the Lease and the Licence as a single contract for the purposes of Regulation 6(2)(b). I have reached this conclusion for the following reasons:

(1) There are no words in regulation 6(1) which permit the Court to treat the Lease and the Licence as a single contract. The provision uses the words "the contract" in both the second and fourth lines. It also contrasts these words with the words "another contract on which it [the contract] is dependent". When applied to the facts of this case, the first contract is the Licence and the second contract is the Lease.

(2) There are no words in Regulation 6(2)(a) which permit the Court to treat the Lease and the Licence as a single contract either. The words "the contract" plainly refer back to the same contract as Regulation 6(1), namely, the Licence. It would create confusion if the words meant different things in different limbs of the provision.

(3) If Regulation 6(2)(a) had been intended to apply not only to the individual contract but also to any other contract with which it was linked, one would have expected

the author to use a standard deeming provision such as "and for these purposes the contract and any dependent contract shall be deemed to be a single contract". However, no device of that nature was used.

(4) Moreover, Ms Bretherton's interpretation leads to uncertainty in the application of Regulation 6(2)(b). If she is right and the Lease and the Licence should be treated as a single contract, what is the "price or remuneration" and what are "the goods or services" for the purpose of Regulation 6(2)(b)? Does the price or remuneration extend only to the price paid for Plot 28 or does it include the Licence Fee paid for the mooring? It would be illogical and inconsistent if the Court did not apply the same interpretation to both limbs of Regulation 6(2).

(5) In my judgment, there is no real mystery about the way in which Regulation 6 was intended to apply in the present case. As Mr Booth submitted, the Court must first consider the core terms exemption by reference to the terms of the Licence in isolation. In doing so, it must adopt a restrictive interpretation of what is "core" and what is "ancillary" for the purposes of both limbs of Regulation 6(2). But once satisfied that the relevant terms do not fall within Regulation 6(2)(b) the Court should have regard to the Lease upon which the first contract depends.

100. I am satisfied, therefore, that as a matter of both literal and purposive interpretation the Judge was right to consider the core terms exemption by reference to the terms of the Licence alone. Moreover, even if she should have considered the main subject matter of the contract by reference to both the Lease and the Licence, she was entitled to take the same approach to the price or remuneration. In my judgment, the Licence Fee formed part of the price payable under the (notional) single, composite contract and the Judge was entitled to reach the conclusion that the core terms exemption applied for that reason also. Indeed, I am entirely satisfied that she did: see [62].

101. In my judgment, therefore, the appeal on Ground 1 fails. I am also satisfied that it was unnecessary for the Judge to decide whether the CRT Licence Fees and the costs of maintaining the Basin and Marina were recoverable under the Service Charge provisions and that the Judge's conclusion on the core terms exemption cannot be challenged on that basis. Indeed, I accept Mr Booth's submission that the Judge set out fully adequate reasons in reaching her decision (and far more succinctly than I have so far achieved).

H. Ground 2

102. Ms Bretherton submitted that there was a significant imbalance between the parties' rights and obligations under the Licence and that the Judge should have found that clauses 2.1.1, 4, 4.1 and 7.1 were unfair within the meaning of Regulation 5 for the following reasons (which were substantially the same reasons which she advanced in her Skeleton Argument before the Judge):

(1) Clause 4 imposes a payment obligation for a right which the Appellants do not wish to exercise, namely, the right to moor a boat.

(2) Clause 4 imposes an obligation to pay the Licence Fee whether or not the Appellants moor a boat. This is intrinsically unfair in circumstances where the charges which the Licence was designed to cover were duplicated in the Lease.

(3) Clause 2.2 contains a put option entitling Moorings to take a further 60 year licence of the mooring on 3 months' notice. This falls within the Regulations, Schedule 2, paragraph 1, sub-paragraphs (h) and (i).

(4) Clause 4.1 imposes a payment obligation which increases annually without any corresponding right to cancel the Licence and falls within sub-paragraph (l).

(5) Clauses 4.1 and clauses 3.4 to 3.7 fall within sub-paragraph (b) and inappropriately exclude or limit the Appellants' legal rights in the event of total or partial non-performance or inadequate performance of Moorings' own obligations under the Licence.

(6) The prohibition on assignment except on terms that the Appellants assign the Licence restricts the rights of the Appellants to dispose of it in circumstances where they have to pay a commission of 20% and an additional fee to sublet or sub-licence their moorings: see clauses 7.2 and 7.3.

(1) Clause 4

103. The Judge dealt with Ms Bretherton's submissions (1) and (2) (above) together on the basis that they overlapped. She drew the analogy with a purchaser who chooses to buy a house with a garage even though he or she had no car. But she also found that contrary

to Ms Bretherton's submissions, some of the Appellants had in fact made use of their moorings and kept boats there. The Judge also found the Appellants were fully aware that they would have to enter into the Licence and pay the Licence Fee and made an informed choice to do so rejecting Mr Boyd's evidence that he attempted to negotiate the terms of the Licence Fee and that he would not have acquired Plot 28 if he had been fully informed. She also rejected Mr Connell's evidence to a similar effect and found as a fact that Mr and Mrs Casey made no attempt to negotiate. Having made these observations and findings the Judge concluded that clause 4 was not unfair: see [93] to [95].

104. There is no appeal against the Judge's decision on the basis that she applied the wrong test. Indeed, I am satisfied that she applied the right test at [76] and [81]. There is no appeal either against her findings of fact. Her decision that the overall package of rights and obligations in the Licence was not unfair was, therefore, a classic evaluative decision based on her assessment of the witnesses and the overall evidence and I am fully satisfied that I should not interfere with it in the absence of some identifiable flaw in the reasoning: see *Re Sprintroom Ltd* (above) at [76].

105. Ms Bretherton submitted that there was such a flaw in the Judge's decision. She submitted that the Judge had failed to consider the Lease and the Licence together and, in particular, to take into account the fact that the Licence Fees duplicated the charges which the Appellants were required to pay under the Service Charge provisions in the Lease. I reject that submission for the following reasons:

    (1) The Judge accepted Mr Costall's evidence that the Licence Fees were used to pay the CRT Licence Fees and the costs of maintaining the Basin and the Marina and that his understanding was that these costs could not be recouped through the Service Charge provisions in the Lease. As she pointed out, this evidence was not challenged in cross-examination: see [20]. The Judge was therefore entitled to accept it and Ms Bretherton did not suggest otherwise.

    (2) In any event, I have also found that on the true construction of the Lease these fees and costs were not recoverable under the Service Charge provisions. This provides clear support for Mr Costall's evidence (if any further support were needed) and fully justifies the Judge's acceptance of that evidence.

    (3) It is possible that Mr Costall and his partners might have inserted the Marina Lease

into the structure of landholdings at Burton Waters in order to avoid regulation under sections 18 and 19 of the LTA and, if they had done so, this might have provided a reason for finding that clause 4 was unfair. But the Judge found that there was no evidence to support such a conclusion: see [86] and [99]. Again, that finding was not challenged.

(4) Finally, the Judge accepted that the model which Moorings adopted for Burton Waters was entirely in line with standard industry practice: see [89]. Again, that finding was not challenged on this appeal either.

(5) I would myself have been prepared to find that the Licence was dependent upon the Lease for the purposes of Regulation 6(1): see paragraph 97 (above). But in the absence of any challenge to the Judge's findings of fact and my own conclusions on the construction of the Lease, I cannot see how reading the two documents together would have made a difference to the outcome. I am satisfied that there was no flaw in the Judge's reasoning, that she was entitled to come to the conclusion which she did and that she would have reached the same conclusion even if she had taken a different view about the application of Regulation 6(1).

(6) But in any event the Judge did look at the overall bargain between the parties when considering the fairness of the Licence: see [104]. Ms Bretherton did not suggest that she failed to have regard to any specific provisions of the Lease other than the Service Charge provisions.

(2) Clause 2.2

106. The Judge rejected Ms Bretherton's submission that the put option in clause 2.2 was unfair because it fell within Schedule 2, paragraph 1, sub-paragraphs (h) and (i): see [104]. Again, this was an evaluative decision and she was entitled to reach that conclusion on the basis of the evidence before her. In any event, Ms Bretherton did not persuade me that clause 2.2 fell within the ambit sub-paragraph (h) which is intended to capture standard terms which extend a consumer contract indefinitely if the consumer fails to exercise a right of termination.

107. So far as sub-paragraph (i) is concerned, the Judge held that all of the Appellants had a full opportunity to consider the Licence and to take legal advice on its terms: see [106].

Indeed, Mr Boyd's evidence was that he and his wife signed the Licence almost three months after they had first visited Plot 28. I might have been prepared to draw an inference that they were not properly advised by Wilkin Chapman given their conflict of interest. But the Judge firmly rejected Mr Boyd's evidence that he would not have bought Plot 28 if he had been advised then about the fairness of the licence: see [95]. As I have stated, that finding of fact was not challenged and it was fully open to the Judge.

(3) Clause 4.1

108. The Judge also rejected Ms Bretherton's submission that the RPI increase in the Licence Fee in clause 4.1 was unfair because it fell within sub-paragraph (l) and there was no corresponding right to cancel the Licence: see [104]. In my judgment, there is no basis for interfering with that decision either. The Judge held that the Licence was entirely in line with standard industry practice: see [89]. By contrast, Ms Bretherton did not draw my attention to any evidence or authority to show that increases in consumer contracts by reference to the RPI have generally been treated or held to be unfair and if she were correct, this would have far-reaching consequences.

109. Ms Bretherton also challenged clause 4.1 and clauses 3.4 to 3.7 of the Licence under sub-paragraph (b) on the basis that clause 4.1 inappropriately excluded the right of set off and that clauses 3.4 to 3.6 excluded compensation. The Judge rejected the submission that clause 4.1 was unfair either because it did not clearly exclude the right of set off but even if it did it did not prevent the Appellants from bringing a counterclaim: see [109] and [110]. Ms Bretherton did not seek to challenge these conclusions either orally or in her Skeleton Argument and I am satisfied that there is no basis for interfering with her decision.

110. The Judge did not address clauses 3.4 to 3.6 of the Licence in the Judgment. But this appears to be because it was not a point which the Appellants were entitled to take below. Mr Booth and Mr Hardman pointed out that these terms were not pleaded as unfair and Ms Bretherton accepted this in her replacement Skeleton Argument for the appeal. Although she trailed these provisions in her Skeleton Argument before the Judge, there was no application to amend and in my judgment the Judge was perfectly entitled to decide the case by reference to the pleaded issues. But in any event, even if the Judge should have found that clauses 3.4 to 3.6 were unfair, clause 3.6 only excludes a claim

for compensation as a consequence of the interference with the water supply to the Basin. The Appellants did not suggest that this had ever occurred or that they would have a valid defence to the claim for the Licence Fee if those clauses were not binding on them.

(4) Clause 7.1

111. Finally, the Judge rejected Ms Bretherton's submission in relation to clause 7.1 for a range of reasons at [112]: first, the prohibition on assignment was a requirement of the CRT Licence; secondly, the moorings were an amenity which they enjoyed with their homes and it was artificial to suggest that they could have assigned them to a stranger; thirdly, the terms on which they were entitled to sub-licence were not unfair (because they could grant repeat licences and recoup the commission by charging a commercial rate); and fourthly, there was no evidence that the Appellants wished to sub-licence their moorings (and she rejected the evidence which Mr Boyd had given on this issue). Again, this decision was a classic evaluative decision based on her assessment of the witnesses and the overall evidence and I am fully satisfied that I should not interfere with it.

V. The Respondent's Notice

112. For these reasons I dismiss both Ground 1 and Ground 2. As I analysed the Judgment following the parties' submissions, I became more and more convinced not only that the Judge was correct but also that her reasoning fully justified her decision. Indeed, I could easily have dismissed the appeal on the basis that the Judge was right for the reasons which she gave. But out of deference to the quality of the submissions of both counsel, I have addressed them in considerable detail. It also follows from this conclusion that it is unnecessary for me to consider the additional reasons which Mr Booth and Mr Hardman advanced in the Respondent's Notice for upholding the Judge's decision. Moreover, it is better that I should not do because it raises a general point about the interpretation of CPR Part 52.13(5) which I do not need to decide on this appeal.

VI. Disposal

113. For the reasons which I have given I dismiss the appeal on both grounds and I make no order on the Respondent's Notice. I will adjourn the question of costs to be heard on a date to be fixed by the Birmingham District Registry. I will also adjourn Moorings' Application Notice dated 8 December 2023 to be heard at the same time with a combined

time estimate of half a day.