



Neutral Citation Number: [2018] EWHC 1447 (Ch)

Case No: CH-2017-000286

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 14/06/2018

Before :

MR JUSTICE MORGAN

Between:

**THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF HOUNSLOW**

**Claimant/
Respondent**

- and -

- (1) DAVID FRANK DEVERE**
- (2) VERNON CARROLL ROBERTS**
- (3) ROGER MCGONAGLE**
- (4) PAUL MENDOZA**
- (5) STEPHEN ALEXANDER JAVOR**
- (6) PETER MCCRUDDEN**

**Defendants/
Appellants**

Mr Christopher Jacobs (instructed under the Bar Public Access Scheme) for the **Appellants**
(apart from Mr DeVere)

Mr DeVere appeared in person

Mr Gary Blaker QC (instructed by **K & L Gates LLP**) for the **Respondent**

Hearing dates: 30 April and 1 May 2018

Approved Judgment

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

.....

Approved Judgment**MR JUSTICE MORGAN:***Introduction*

1. This is an appeal, with permission granted by Marcus Smith J on 22 January 2018, on specified grounds of appeal only, against the order dated 17 November 2017 made by His Honour Judge Wulwik sitting in the County Court at Central London.
2. The Appellants are Mr DeVere, Mr Roberts, Mr McGonagle, Mr Mendoza, Mr Javor and Mr McCrudden. The Appellants were some of the Defendants in the proceedings in the County Court; the other Defendants have not appealed. Mr DeVere appeared in person in the County Court and on this appeal. The other appellants were represented on this appeal by Mr Jacobs who did not appear at the trial in the County Court.
3. The Respondent is the London Borough of Hounslow (“Hounslow”) which was the Claimant in the County Court. It was represented on this appeal by Mr Blaker QC who also did not appear at the trial.

The order under appeal

4. The order of 17 November 2017 referred to “the Claimant’s land” and to “the River Works”, both of these terms having been defined in the Particulars of Claim. I will continue to use these terms in this judgment. The Particulars of Claim defined “the Claimant’s land” as the freehold land on the south side of High Street, Brentford which was registered at the Land Registry under title number NGL163915 and defined “the River Works” as the works which were the subject of the River Works Licence of 20 August 1996 (“the Licence”).
5. By the order, the judge:
 - (1) ordered the Appellants within 21 days to remove certain vessels which were owned by them or under their control from their present moorings alongside the Claimant’s land and the River Works;
 - (2) ordered the Appellants within 21 days to remove certain cables, pipes, walkways, gangplanks, ladders and other means of access or services running from or connected to their vessels to the river embankment and adjoining land;
 - (3) ordered that the Appellants, after removal of their vessels be restrained from a number of activities in relation to the Claimant’s land and the River Works;
 - (4) declared that, if the Appellants failed to comply with the above orders, then the Claimant could remove the vessels and the other items referred to above left on the Claimant’s land and the River Works and dispose of them as it saw fit without incurring liability, civil or criminal, to the Appellants;
 - (5) ordered the Appellants to pay damages and/or mesne profits in the amounts specified in the order;
 - (6) made provision for the Appellants and the other Defendants to pay the Claimant’s costs.

Approved Judgment*The extent of the Claimant's land*

6. The Claimant's land is the land comprised in title number NGL163915, of which Hounslow is the registered proprietor. The registered title states that where the land abuts the River Thames the boundary of the land is the line of mean High Water of Medium Tides from time to time. In his judgment, the judge described the history of the use of this land. It had previously been used by Brentford Gas Works and the judge said at [11]:

“The Gas Works supplied town gas to Brentford, with raw materials arriving by boat on the River Thames. The Gas Works included crane staging with coal hoppers, gangways, staging, fender piles, ladders, conveyers and dolphins. The Gas Works were closed in 1965, the site was cleared on the landward side and was partially cleared in the river.”

7. Hounslow acquired the Claimant's land in 1971 and developed it as a public open space as to which the judge made the following findings at [13]:

“The freehold land in the Claimant's title number in NGL163915 was redeveloped to provide Watermans Park which opened on 26 March 1982 and which was intended by the Claimant to be a public open space for recreational use only. It is said by the Claimant to be an important recreational facility for local residents providing a number of walkways, areas of grass and a children's playground, maintained by the London Borough of Hounslow for public recreational use only, and with the local authority undertaking grass cutting, planting, cleaning and maintenance of the park. The local authority assert that users of the park have a bare licence to use the park as a public open space for recreational use only.”

8. The judge made specific findings as to the boundary of the Claimant's land in two respects. The first specific finding concerned the ownership of a river wall which he dealt with at [30]-[34]. He described the position of the river wall and held that it was included within Hounslow's registered title and was therefore part of the Claimant's land. The second specific finding related to the eastern boundary between Watermans Park and Victoria Steps which he held, at [35]-[36], was the subject of a boundary agreement between Hounslow and Victoria Steps Quay Ltd which was noted on Hounslow's registered title and which was effective to define the eastern boundary of the Claimant's land.

The application to adduce further evidence

9. Mr De Vere had contended before the judge that the river wall was not included in the Claimant's land. Mr De Vere's Appellant's Notice contained a ground of appeal seeking to challenge the judge's finding as to the ownership of the river wall. Mr De Vere's application for permission to appeal was considered by Marcus Smith J at an oral hearing on 22 January 2018. Mr De Vere was represented by counsel at that hearing. At the same hearing, Marcus Smith J dealt with the application by the other Appellants for permission to appeal. He gave a reasoned judgment dealing with the applications before

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him. His reasons addressed the grounds of appeal put forward by the other Appellants but did not specifically address the grounds of appeal put forward by Mr DeVere and, in particular, did not address the ground of appeal relating to the ownership of the river wall. However, the order which was drawn up to give effect to the decision made on 22 January 2018 was that Mr DeVere should be permitted to appeal on his grounds of appeal but only to the extent to which those grounds matched the grounds on which the other Appellants were given permission to appeal. Mr DeVere was refused permission to appeal on all other grounds and this refusal therefore extended to the ground of appeal relating to the river wall.

10. Notwithstanding the refusal of permission to appeal in relation to the ownership of the river wall, on 3 April 2018, Mr DeVere applied for permission to adduce what he said was further evidence which he submitted showed that the river wall was not part of the Claimant's land. At the hearing of the appeal, Mr DeVere made submissions in support of his application to adduce this evidence. He did not address the issue of the court's jurisdiction to permit him to adduce this evidence and then, presumably, to advance a ground of appeal that the judge was wrong to hold that the river wall was part of the Claimant's land, even though he had earlier been refused permission to appeal on that ground.
11. As Mr DeVere had been refused permission to appeal in relation to the ownership of the river wall, he is not entitled to raise that issue on this appeal unless I am persuaded to re-open the earlier refusal of permission to appeal on this ground pursuant to CPR 52.30. I only have power to re-open the earlier refusal of permission to appeal under that rule if I take the view that it is necessary to do so in order to avoid real injustice and that the circumstances are exceptional and it is therefore appropriate to re-open the refusal of permission to appeal and that there is no other effective remedy.
12. The most recent authority on the jurisdiction conferred by CPR 52.30 is R (Goring on Thames Parish Council) v South Oxfordshire DC [2018] EWCA Civ 860 where the earlier authorities were reviewed. The jurisdiction can only properly be invoked where the integrity of the earlier decision to refuse permission to appeal was critically undermined and where there is a powerful probability that the decision on permission to appeal would have been different, if the integrity of the earlier decision had not been critically undermined: see at [12] and [15].
13. Mr DeVere did not make any submissions as to how the integrity of the decision to refuse him permission to appeal in relation to the ownership of the river wall had been undermined. As I have indicated, Mr DeVere was represented by counsel at the hearing on 22 January 2018 and I have no reason to think that anything untoward happened at that hearing.
14. The suggested further evidence related to endorsements which had been made on 25 February 1972 in respect of three licences granted to the Brentford Gas Company on 17 June 1878. Mr DeVere told me that the three licences (but without the endorsements) were before the judge at the trial. The judge did not specifically refer in his judgment to the three licences although he did say that Mr DeVere's "historical analysis has been rejected in previous proceedings". The judge did not explain in greater detail what he meant by this statement.

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15. Mr DeVere's ground of appeal in relation to the river wall referred to the licences. Mr DeVere did not tell me whether there was any reference to the three licences at the hearing on 22 January 2018 nor did he tell me whether he had seen the endorsements on the three licences prior to that hearing. Although it may not matter for the purposes of my decision in relation to CPR 52.30, I point out that Mr DeVere could have obtained the endorsements on the licences prior to the trial and prior to the hearing on 22 January 2018 in the same way as he eventually obtained them, whenever he did so.
16. Mr DeVere's submissions to me proceeded on the basis that the work which was the subject of the three licences was the construction of the river wall and he then submitted that the terms of the three licences showed that the river wall was constructed on land which was not owned by the Brentford Gas Company. For some reason, Mr DeVere wanted to submit that the land on which the river wall was constructed was owned by the Bishop of London as lord of the manor of Ealing (and now by the Church Commissioners) rather than by the Thames Conservators (and now the Port of London Authority).
17. If it were right to assume that the three licences related to the river wall, I can understand the submission that the terms of the licences support a possible finding that the river wall was built on land which had not previously been owned by the Brentford Gas Company but had previously been owned by whoever owned the bed of the river (which I understand was the Thames Conservators). However, the judge held that the river wall was part of the Claimant's land.
18. The further evidence which Mr DeVere now wishes to rely upon is to demonstrate a specific point, namely, that the three licences were endorsed on 25 February 1972 with statements by the Port of London Authority, as successor to the Thames Conservators, certifying that the work which was the subject of the licences had been constructed in accordance with the terms of the licences. I do not consider that these endorsements add anything to the argument which Mr DeVere wants to put forward, based on the terms of licences themselves. Accordingly, I do not regard the endorsements as evidence which changes the argument as to the effect of the licences, at any rate not in his favour.
19. Mr DeVere submits the contrary by relying on section 72 of the Port of London Act 1968 although he goes on to submit that section 72 does not strictly apply and instead the matter is governed by an earlier provision in section 55 of the Thames Conservancy Act 1857. Assuming that section 55 of the 1857 Act is in the same terms as section 72 of the 1968 Act (as Mr DeVere submits) and assuming that the 1872 licences related to the river wall and assuming that section 72 of the 1968 Act and section 55 of the 1857 Act only apply to the land behind the river wall and not the river wall itself, the effect of the statutory provision would be that the land on the landward side of the river wall would be owned by Hounslow. However, whatever the effect of these provisions might be in relation to the land behind the river wall, I do not see them as affecting the argument which was always available to Mr DeVere based on the terms of the 1872 licences which were available to the judge at the trial.
20. Accordingly, I am not able to hold that the integrity of the decision to refuse permission to appeal in relation to ownership of the river wall was critically undermined or that there is a powerful probability that that decision would have been different if the court

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had been shown the endorsements on the three licences. Accordingly, I will not reopen the earlier refusal of permission in relation to that ground of appeal.

21. It may be possible to go further. Although the point was not argued before me, I consider that it is strongly arguable that the land which vests pursuant to section 72 of the 1968 Act and section 55 of the 1857 Act would include the river wall itself. This appears to have been the assumption in Couper v Albion Properties Ltd [2013] EWHC 2993 (Ch) at [478]. If that were right then, instead of the endorsements being of assistance to Mr De Vere's case, they would actually be fatal to it.
22. I will proceed in this judgment on the basis of the judge's finding that Hounslow is the freehold owner of the river wall which is therefore part of the Claimant's land.

The River Works

23. As explained earlier, the River Works were defined as the works which were the subject of the Licence. This Licence was granted to Hounslow pursuant to section 66 of the Port of London Act 1968. The Licence replaced an earlier licence which had been granted in 1978. The judge said that previous licences had dated back to at least 1920.
24. Section 66(1) of the Port of London Act 1968 provides:

“66. Licensing of works

(1) (a) The Port Authority may for a consideration to be agreed or assessed in accordance with section 67 (Consideration for licence) of this Act and on such terms as they think fit, including conditions as to variation and revocation of the licence and reassessment of the consideration from time to time, grant to a person a licence to carry out, construct, place, alter, renew, maintain or retain works, notwithstanding that the works interfere with the public right of navigation or any other public right.

(b) A works licence granted under paragraph (a) of this subsection to carry out, construct, place, alter, renew, maintain or retain works in, under or over land belonging to the Port Authority shall be deemed to confer on the holder of the licence such rights in, under or over land as are necessary to enable the holder of the licence to enjoy the benefit of the licence.”

25. The works which were the subject of the Licence were briefly described in Schedule 2 to the Licence (referring to certain drawings attached to the Licence) as follows:

“SCHEDULE 2

The Works.

Location: Watermans Park, Brentford.

Brief Description

PLA No. for Drawing

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Staging (elevated roadway);	
remains of staging;	11507 A, B, C
7 frames; remains of coal hopper staging;	“
7 concrete piers ashore, with wooden fenders;	“
6 concrete piers midstream;	“
20 wooden fender piles, upper end of site;	7529, 1341B
3 wooden fender piles, lower end of site;	9532
3 fender units;	125.5449,
	125.6364
1 x 3 pile, 1 x 4 pile dolphins, upper end of coal hopper site;	
125.6222	
1 x 3 pile, 1 x 4 pile dolphins, lower end of coal hopper site;	
125.5621	
2 x 12” intake pipes (short lengths, disconnected);	
207A, 13270	
2 x 18” intake pipes with penstock;	
125.3120	
Electric cable under backwater (disconnected);	
125.4597	
Concrete retaining wall (over council sewer);	
125.6436”.	

26. The presence of the River Works was explained by the previous use of the Claimant’s land as a gas works. When that use ceased, the River Works were not removed although they were no longer needed in connection with any subsequent use of the Claimant’s land. The River Works simply remained where they had previously been, I assume because it was thought that their removal would involve expense.

The Licence

27. The Licence provided, *inter alia* as follows:

“Grant

1. The Port of London Authority (‘PLA’) permit the person named in Schedule 1 of this Licence to maintain and retain the Works described in Schedule 2 of this Licence (‘the Works’) from the date hereof (subject as set out hereafter).

Consideration

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2. (1) The consideration for this Licence shall be the annual sum (payable from the starting date set out in Schedule 2) agreed from time to time between the parties or assessed in accordance with Section 67 Port of London Act 1968 ('the Act').

...

Licensee's Covenant

3. The Licensee agrees to observe and perform the obligations set out in Schedule 3 of this Licence and procure that its servants, agents and contractors observe and perform these obligations.

Revocation

4. Subject to Section 69 of the Act (Appeal to the Board of Trade (now Department of Transport)) the PLA may in any of the following circumstances revoke this Licence by giving to the Licensee not less than the period of notice mentioned in Schedule 2 [*the period mentioned in Schedule 2 was 3 months*] to expire at any time provided always that such revocation shall be without prejudice to any right or remedy of either party in respect of any antecedent breach of the provisions of this Licence:

(i) if the Licensee ... shall be in breach of any of the terms of the Licence ... and the Licensee shall fail to remedy such breach within such reasonable period as the PLA shall require

(ii) if any person (other than the Licensee its servants agents or contractors) shall carry out any activity in relation to the Works in breach of Section 70(1) of the Act

(iii) if the PLA shall require revocation of the Licence for navigational or river regime reasons connected with their statutory duties

(iv) ...

(v) if the Licensee parts with the ownership of the Works and this Licence is not terminated under the provisions of clause 5(1) below.

Sale/Removal of Works by Licensee

5. (1) Where the Works are sold by the Licensee to a third party ('the transferee') and the transferee applies for and is granted a new licence for the Works this Licence shall terminate with effect from the date of the new licence such termination to be without prejudice to any right or remedy of either party in respect of any antecedent breach of the provisions of this Licence.

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5. (2) The Licensee may end this Licence by giving to the PLA notice expiring at any time after the Works have been removed from the River Thames and the riverbed has been reinstated to the PLA's reasonable satisfaction.

Removal/alteration of Works by PLA

6. If the Licensee does not alter or remove the Works in accordance with the Licensee's obligations hereunder the PLA may at its option remove or alter the Works and recover from the Licensee on demand any reasonable expenses incurred by the PLA in so doing.

Alienation

7. (1) This Licence is personal to the Licensee (save that the rights granted by this Licence may be exercised by the Licensee's servants, agents and contractors subject to the terms and conditions of this Licence and under the Licensee's supervision and control) and is not assignable.

...

Limitation of Rights Granted

8. This Licence does not confer on the Licensee any right which would or might obstruct private rights appurtenant to any riparian land.

Section 66 Grant

9. This Licence is issued under Section 66 of the Act and does not constitute consent under any other provisions of that Act or under any other Private or General Act of Parliament and nothing in this Licence shall imply or warrant that the Works may be used for any of the purposes herein authorised.

... ”

28. Schedule 3 to the Licence set out the Obligations of the Licensee as referred to in clause 3 of the Licence. Schedule 3 was in these terms:

“SCHEDULE 3

Obligations of the Licensee

Consideration

1. To pay the consideration promptly as it falls due and not exercise or seek to exercise any right or claim to withhold the consideration or any right or claim to legal or equitable set-off and also to pay the PLA's reasonable charges and

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costs in connection with the grant of this Licence and the initial negotiation of the consideration...

...

Outgoings

5. To pay all outgoings including (without prejudice to the generality of the foregoing) any rates in respect of the Works.

Execution and Maintenance of Works

6. To execute and maintain the Works to the PLA's reasonable satisfaction.

Alteration of Works

7. Where alteration of the Works is at the sole discretion of the PLA required for navigational and/or river regime reasons, to alter the Works from time to time to such extent and within such time as the PLA may by notice reasonably require.

Removal of Works

8. Before expiration of any notice of revocation or on expiry of this Licence, should the PLA so require by notice in writing, to remove the Works from the River Thames and to reinstate the riverbed to the PLA's reasonable satisfaction.

Indemnity

9. To indemnify the PLA against all actions, proceedings, claims, demands, damages, expenses, costs and losses arising out of the Works, the use of the Works or the grant of this Licence including without prejudice to the foregoing any claims by either holders of licences under Section 66 of the Port of London Act 1968.

Release of PLA liability

10. Not to make any claim against the PLA in respect of any loss or damage to the Works arising out of the proper exercise by the PLA of their statutory duties or powers.

Siltation and Erosion

11. To accept responsibility for any siltation or erosion caused by the Works.

Marking, Lighting and Fendering

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12. To mark, light and fender the Works as the PLA's harbour-master may from time to time direct if he considers such marking, lighting or fendering necessary for navigational or river regime reasons.

Use

13. Not without the written consent of the PLA which so far as is lawful shall not be unreasonably withheld, to use the Works other than the staging as a public walkway.

Nuisance

14. Not to do or allow to remain upon in, under or at the Works anything which may constitute a nuisance or which may cause damage or inconvenience to the PLA or anyone on the Thames or to the riverbed or anything in or on the river and not to use the Works or anything moored thereto for any illegal or immoral purpose.

Statutory Obligations

15. To comply with the lawful requirements of any government department, local or public authority regarding the Works and to indemnify the PLA against any expenses reasonably incurred by the PLA in complying with such requirements as may be imposed on the PLA.

...

Entry by PLA

17. To permit the PLA to enter on the Works without notice in the case of an emergency or at reasonable times on 48 hours' notice to inspect the Works."

More detail as to the River Works

29. I will now give a more detailed description of the River Works. The Licence refers to "Staging (elevated roadway)". This is a reference to part of a walkway which forms part of Watermans Park. That park is situated between Brentford High Street and the river. Alongside the river is a walkway. For part of the length of the walkway, the edge of the walkway is marked by a wall. For another part of the length of the walkway, its edge is marked by railings. In places, the walkway surface is a hard surface (not wood). In other places, there is a difference in the surface of the walkway in that the surface nearest to the river is wood and the surface alongside the wood is a hard surface (not wood). Part of the walkway is on the Claimant's land but part of the walkway nearest to the river overhangs the river. On the judge's findings, the Claimant's land includes the river wall and the riverside of the river wall is the boundary between the Claimant's land and the River Works. The parties did not agree on a form of words or on a plan which showed how much of the walkway overhangs the river. It is not necessary for

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me to attempt to describe that matter in further detail. It is sufficient to say that part of the width of the walkway is on the Claimant's land and part overhangs the river and is part of the River Works. At surface level there is no line of demarcation between the Claimant's land the River Works.

30. Where the walkway overhangs the river the outer edge of the walkway is supported by concrete posts set into the river bed.
31. The Licence refers to pile dolphins. In this context, a "dolphin" is another word for a pile. The dolphins take the form of a pile made up of different pieces of wood with a square cross-section. The dolphins are sunk into the river bed.
32. The Licence includes in the description of the River Works certain concrete piers or piles which are also sunk into the river bed.

The legal character of the River Works

33. It seems to have been accepted at the trial in the County Court that the River Works were fixtures and not chattels and that legal title to the River Works was vested in the owner of the river bed, namely, the PLA and not in Hounslow. However, after reading the skeleton arguments in this case, I was less clear as to whether the Appellants accepted, for the purposes of the appeal, that all of the River Works were fixtures. For example, in his skeleton argument, Mr Jacobs referred more than once to some (at least) of the River Works being chattels. I therefore asked the parties to clarify their positions as to the legal character of the River Works and whether they were chattels or fixtures. Further, in view of what was said by Lord Templeman in Tate & Lyle v GLC [1983] 2 AC 509 at 534D-H, as to the jetties in that case being chattels, I invited submissions as to the correct legal position in the present case.
34. In the event, all parties submitted to me that the River Works were fixtures and not chattels. I have concluded that the parties were correct so to submit. However, I consider that I ought to explain briefly why I have reached that conclusion notwithstanding what appears to be authority to the contrary.
35. Before considering the decision in Tate & Lyle, I can say that if one applied the established principles which distinguish chattels from fixtures by reference to the nature and purpose of the annexation of the items in question, it is clear that the River Works would be held to be fixtures and not chattels.
36. In Tate & Lyle, a riparian owner (Tate & Lyle) had constructed jetties in the bed of the River Thames pursuant to a licence granted by the PLA pursuant to the Port of London (Consolidation) Act 1920 which was the predecessor of the Port of London Act 1968. Thereafter, the local authority had erected ferry terminals in the river which caused siltation in the river causing Tate & Lyle to incur dredging costs to enable it to use the jetties. It sued the local authority and the PLA for damages, claiming in negligence and nuisance. In the House of Lords, the principal speech was that of Lord Templeman with whom three other members of the House agreed. The fifth member of the House, Lord Diplock, disagreed with a part of the speech of Lord Templeman but not the part which is now material.

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37. In Tate & Lyle, the riparian owner alleged that it had riparian rights in relation to its jetties. As to that, Lord Templeman said at 534D-H:

“I do not consider that riparian rights attach to the jetties.

The jetties were constructed pursuant to a licence granted by the P.L.A. under section 243 of the Act of 1920. That section, to which reference has already been made, authorised the P.L.A. to grant to any owner or occupier of any land adjoining the Thames a licence to make a jetty immediately in front of his land and into the body of the Thames. In the case of the raw sugar jetty (and we are informed in the case also of the refined sugar jetty), the relevant licence authorised Tate & Lyle to construct a specified jetty in the river Thames off the refinery premises of Tate & Lyle subject to the express condition that Tate & Lyle would remove the jetty on seven days' notice. **It seems to me that a jetty thus erected on the foreshore of the Thames vested in the P.L.A. was only a chattel and not realty forming part of the bank of the river belonging to Tate & Lyle, and that such a jetty is not capable of attracting riparian rights.** The Court of Appeal (1982) 80 L.G.R. 753, 787, reversing Forbes J., said, and I agree, that the jetties

"are not part of the riparian tenement, although they are connected to it. They are artificial structures put into the stream under licence and built, not upon the land of the riparian owner, but upon that of the P.L.A. Riparian rights are rights attaching to the fee simple of the land ex jure naturae and it is not easy to see how, at common law, they can become attached to something which is not part of the fee simple and of which the riparian owner has nothing but a permissive and revocable enjoyment." "

[Emphasis added]

38. I have an initial difficulty with Lord Templeman's reasoning. He referred to the jetties as chattels but he also approved the reasoning of the Court of Appeal, which he quoted. The Court of Appeal held that Tate & Lyle only had a permissive enjoyment of the jetties. If the jetties had been fixtures, then title to them would have vested in the PLA as the owner of the bed of the river and it may then have been appropriate to say that Tate & Lyle only had permissive enjoyment of the jetties under the licence from the PLA. However, if the jetties had been chattels, then Tate & Lyle would have had title to the jetties as chattels and that would have been more than permissive enjoyment of the jetties.
39. Lord Templeman did not discuss the principles which apply to distinguish chattels from fixtures and did not explain, by reference to the facts as to the construction of the jetties, how those principles produced the result that the jetties were chattels. It is therefore difficult to see how his comments can be taken as a statement of principle which differs from the usual principles as to the nature and purpose of the annexation of the item in question.

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40. Lord Templeman did refer to the Port of London (Consolidation) Act 1920 and then referred to “a jetty thus erected” as if the terms of the 1920 Act and/or the terms of the licence granted in accordance with the 1920 Act produced the result that the jetties retained their status as chattels notwithstanding their annexation to the river bed. There does not seem to me to be anything in the 1920 Act or the Port of London Act 1968 which changes the general law as to the test to distinguish fixtures from chattels. If Lord Templeman had been proceeding on the basis that the terms of the licence produced the result that the jetties did not become fixtures, that approach is inconsistent with the later decision of the House of Lords in Mellhuish v BMI (No. 3) Ltd [1996] AC 454 at 473B-G, following Hobson v Gorringe [1897] 1 Ch 182 and disapproving part of the reasoning in Simmons v Midford [1969] 2 Ch 415. The law as declared in Mellhuish was recently applied in The Manchester Ship Canal Co v Vauxhall Motors Ltd [2018] EWCA Civ 1100 at [57]. I conclude that Lord Templeman’s remarks in Tate & Lyle can no longer be taken as identifying any special principle relevant to a licence granted under the Port of London Act 1968. In the case of works annexed to the river bed under such a licence, the general law as to fixtures and chattels should apply.
41. In the course of argument, I also mentioned the earlier decision in Lancaster v Eve (1859) 5 CB (NS) 717 which concerned a pile driven into the bed of the Thames. That case was treated in Simmons v Midford as supporting an approach whereby the question whether an item was a fixture or a chattel could be answered by reference to the intention of the parties as disclosed in an agreement between them. If that was what Lancaster v Eve decided then that decision also is contrary to the law as declared in Mellhuish.
42. Accordingly, I hold that the River Works were fixtures and not chattels. Title to the River Works was vested in the owner of the river bed, the PLA, and was not vested in Hounslow.
43. Although title to the River Works was vested in the PLA, it may be relevant to ask whether the terms of the Licence conferred on Hounslow an equitable right in relation to the River Works. The Licence is drafted on the basis that Hounslow has the right to sever the River Works from the river bed whereupon the items so severed will regain their chattel status and be owned by Hounslow. Indeed, the Licence obliges Hounslow to sever the River Works from the river bed in certain circumstances. The provisions which appear to recognise that Hounslow has the right to sever the River Works are clauses 4(v) and 5(1) and the provisions which oblige Hounslow to sever the River Works are clause 6 and paragraphs 7 and 8 of Schedule 3. In accordance with the authorities considered in Mellhuish at 475D-F, Hounslow had an equitable right to enter on the River Works to sever them from the river bed and so that the severed items would again be chattels owned by Hounslow.

The judgment

44. The judge conducted a trial which lasted 7 ½ days in August 2017 and handed down a reserved judgment on 17 November 2017. The judgment is lengthy and not of all of it needs to be referred to for the purposes of this appeal. So far as is now material, the judgment (in what follows, references to numbers are to the numbered paragraphs of the judge’s judgment):
- (1) described Hounslow’s claim as a claim in trespass; [1];

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- (2) described the Claimant's land and the River Works: [10]-[17];
- (3) made findings as to the extent of the Claimant's land: [30]-[36];
- (4) discussed the effect of the Licence and held:

“[39] The Claimant the London Borough of Hounslow is the party that is to retain the River Works under the Licence. It has possession and control of the River Works under the Licence subject only to the terms of the Licence.

[40] The restrictive user clause in Schedule 3, paragraph 13, means that the Claimant can only use the River Works for the staging as a public walkway, subject to obtaining the PLA's written consent for any use which so far as is lawful should not be unreasonably withheld. However, the fact that the use of the River Works is restricted in this way does not detract from the retention of the River Works by the Claimant under the Licence. The Claimant the London Borough of Hounslow has the exclusive right to use the River Works subject only to the terms of the Licence and to obtaining the PLA's written consent for any other use of the River Works, such consent not to be unreasonably withheld.

[41] The River Works Licence regulates the use of the River Works by the Claimant and is not confined to the public walkway. Pursuant to Section 66(1)(b) of the Port of London Act 1968, the rights deemed to have been conferred by the River Works Licence on the Claimant the London Borough of Hounslow include ‘...such rights in, under or over the land as necessary to enable the holder of the licence to enjoy the benefit of the licence’.

[42] As the Claimant says, it has the right by virtue of the River Works Licence to retain possession of the River Works against all persons other than the PLA exercising a right of entry under Schedule 3, paragraph 17, of the Licence. It does not matter that the Claimant is currently making only limited use of the River Works with the PLA's consent.

[43] This is underlined by the letter from the PLA to the London Borough of Hounslow dated 8 August 2017, the letter at D1135 stating:

‘It is the PLA's understanding that the licence granted to the council enables the council to retain the river works as defined in the licence on the PLA's land and to occupy that land exclusively, to the extent necessary to enjoy the benefit of the licensed works. The river works belong to the council who must maintain them while the licence continues and remove them from the PLA's land when it comes to an end’.”

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- (5) described in detail the nature and extent of the moorings for the Appellants' vessels: [44]-[46];
- (6) described in detail the position in relation to electricity cables and water pipes servicing the Appellants' vessels: [47];
- (7) stated that Hounslow as riparian owner had a private law right to gain access to its frontage by boat and that the mooring by the Defendants interfered with that right and also prevented Hounslow surveying and maintaining the river wall: [49];
- (8) held that as Hounslow was in possession of the Claimant's land including the river wall, it was not open to the Defendants to claim that someone else owned that land including the river wall: [52];
- (9) noted that Hounslow claimed that it was in possession of the River Works and for Hounslow (if not in possession of the River Works) to be able to obtain relief in trespass, it only needed to demonstrate an interference with its rights under the Licence, citing Manchester Airport plc v Dutton [2000] QB 133: [52]-[54];
- (10) held that the running of electricity cables and water pipes over the Claimant's land amounted to trespass to that land: [55];
- (11) held that the mooring to the river wall and to the River Works was a trespass as was the running of electricity cables and water pipes across the Claimant's land and attached to the River Works: [56];
- (12) held that the Defendants were entitled to use Watermans Park for recreational purposes but this did not permit them to cross Watermans Park to access their vessels or for other purposes ancillary to the unlawful mooring of their vessels: [58]-[60];
- (13) held that when the Defendants climbed on or stepped over the railings at the edge of the walkway to get to their vessels, they contravened Byelaw 6 of the Byelaws made by Hounslow which applied to Watermans Park; Byelaw 6 stated that "no person shall without reasonable excuse climb any wall or fence ... or any barrier, railing post or other structure": [61]-[64];
- (14) held that although the Thames Path ran through Watermans Park, the ability of the public to walk along the Thames Path through Watermans Park was with the permission of Hounslow and was not pursuant to a public right of way: [66]-[73];
- (15) held that the entitlement of the Defendants to use Watermans Park was for recreational purposes only: [73];
- (16) held that Hounslow had not acquiesced for more than 20 years in the mooring of the Defendants' vessels and the running of electricity cables and water pipes: [74]-[86];

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- (17) discussed whether the Defendants could establish a defence based on adverse possession of the river bed although Hounslow did not claim to own the river bed and the PLA were not a party to these proceedings: [87]-[92];
- (18) held that the Defendants did not have a defence under Article 8 of Article 1 of the First Protocol in Schedule 1 to the Human Rights Act 1998: [93]-[103];
- (19) held that Hounslow was entitled to injunctions to prevent trespass and unlawful interference with the Claimant's land and the River Works; [104]-[106];
- (20) noted that Hounslow had abandoned its claim for damages in respect of damage to property on the ground that it could not identify the individuals responsible for the damage: [109];
- (21) held that the Defendants were liable for damages for trespass/mesne profits: [110]-[123]; the amount of the damages awarded against each Defendant was determined following judgment being handed down on 17 November 2017.

The grounds of appeal

- 45. The Appellants already have permission to appeal on five grounds. At the hearing of the appeal, the Appellants applied for permission to appeal on a sixth ground. That application was not opposed by Hounslow and I will grant permission to appeal on this sixth ground of appeal.

The first ground of appeal

- 46. The first ground of appeal challenges the inclusion in the order of a declaration that, if the Appellants failed to comply with the other parts of the order, then Hounslow could remove the vessels and the other items referred to above left on the Claimant's land and the River Works and dispose of them as it saw fit without incurring liability, civil or criminal, to the Appellants.
- 47. Hounslow has conceded the appeal in relation to this declaration and I need not therefore consider the first ground of appeal.

The second ground of appeal

- 48. The second ground of appeal was that the judge was wrong to hold that Hounslow had effective control over the River Works to enable it to bring an action in trespass. It was also said that the judge had impermissibly extended the ambit of the decision in Manchester Airport plc v Dutton [2000] QB 133 and had failed to apply the decision in Countryside Residential (North Thames) Ltd v T (2000) 81 P&CR 2. The second ground also challenged the award of damages for trespass.
- 49. As I understand the submissions made for the Appellants, they accept that Hounslow is in possession of the Claimant's land. Accordingly, the Appellants must accept that Hounslow can sue in trespass for any entry by an Appellant on the Claimant's land, which entry is without the licence or consent of Hounslow. It follows that to the extent that the Appellants are responsible for the presence of electricity cables and water pipes running across the Claimant's land, they are liable for the resulting trespass to the Claimant's land. The Appellants do not have the licence or consent of Hounslow to the

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presence of those electricity cables or water pipes. The same applies to any boards or ladders placed on the Claimant's land. There is a separate issue raised by a later ground of appeal as to whether the Appellants are entitled to cross the Claimant's land to gain access to their vessels.

50. The second ground of appeal is therefore confined to the River Works. The River Works include the surface of the walkway in so far as the walkway is within the River Works and is not part of the Claimant's land. The second ground of appeal therefore requires me to consider Hounslow's position in relation to the surface of that part of the walkway. There is also a separate point raised by the later ground of appeal (which applies to Watermans Park generally) as to whether the Appellants are entitled to cross the part of the walkway which is part of the River Works to gain access to their vessels. However, as I understand it, the main thrust of the second ground of appeal is directed at the judge's conclusion that the Appellants are liable in trespass when they tie up their vessels (and do similar things) to other parts of the River Works, whether that is to the posts set in the river bed holding up the walkway or to the posts or piles or dolphins which are in other places sunk into the river bed.
51. As to the various posts, piles and dolphins, the Appellants contend that Hounslow is not in possession of these items and so cannot sue in trespass in relation to them. However, the Appellants appear to accept, on the authority of Manchester Airport plc v Dutton, that Hounslow could sue in trespass even if it were not in possession of the posts, piles or dolphins if it could show that it had sufficient rights in relation to those posts, piles or dolphins under the Licence and that the Appellants were interfering with those rights. The Appellants develop that submission by saying that Hounslow does not have sufficient rights in relation to the posts, piles or dolphins and, anyway, the Appellants are not interfering with those rights.
52. Hounslow responds to the second ground of appeal in two ways. The first way is to submit that it is in possession of all of the River Works, including the posts holding up the walkway and also the posts, piles or dolphins elsewhere in the bed of the river. The second way, relying on Manchester Airport plc v Dutton [2000] QB 133, is to submit that Hounslow is entitled to remedies for the interference with its rights in relation to the River Works.
53. I will begin my discussion of this ground of appeal by considering what the judge decided as to Hounslow's ability to sue in trespass. He plainly held that Hounslow was in possession of the Claimant's land and had title to sue for any trespass to that land. When the judge analysed the effect of the Licence, he appears to have held that Hounslow was in possession of the River Works: see paragraphs [39]-[42] of the judgment. However, when the judge considered the title to sue in trespass in relation to the River Works, he noted Hounslow's contention that it was in possession of the River Works but he then immediately proceeded to identify the test laid down in Manchester Airport plc v Dutton and then sought to apply that test.
54. I consider that the appropriate course for me to adopt in this case is, first, to consider whether Hounslow was in possession of the River Works. If so, it will follow that Hounslow will be able to sue in trespass for any entry by the Appellants on the River Works and I would hold, in that context, that the tying of a rope to a post or pile or dolphin to moor a vessel would be a trespassory entry upon the River Works. The same would apply to the placing of any board or ladder on the River Works. If, conversely, I

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held that Hounslow was not in possession of a relevant part of the River Works, then I would need to consider what was decided in Manchester Airport plc v Dutton and later cases which have considered it.

55. Hounslow's case is that the Licence gave it a right to possession of the River Works and that it exercised that right resulting in it being in possession of the River Works. At the hearing of the appeal, there was no dispute as to the meaning of possession in law. The relevant principles in that respect were restated by the House of Lords in J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419. As it happens, following the hearing, the Court of Appeal gave judgment in a case where it had to consider whether a licence (to use a drainage system) amounted to a grant to the licensee of possession of the drainage system: see The Manchester Ship Canal Co v Vauxhall Motors Ltd [2018] EWCA Civ 1100. At [59], Lewison LJ summarised the principles to be applied to that question in this way:

“59 So we need to consider whether the rights conferred by the Licence were possessory. There are two elements to the concept of possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What amounts to a sufficient degree of physical custody and control will depend on the nature of the relevant subject matter and the manner in which that subject matter is commonly enjoyed. The existence of the intention to possess is to be objectively ascertained and will usually be deduced from the acts carried out by the putative possessor: *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 .”

56. This summary of the principles did not lay down any new principle and was not different from the submissions made to me at the hearing. So, whilst it is convenient to cite this summary in the present judgment, it was not necessary to invite further submissions from the parties as to that case.
57. I will first consider whether Hounslow is in possession of the surface of the walkway in so far as a part of the walkway is within the River Works. All of the walkway is laid out to be used and enjoyed as part of Watermans Park. There is no doubt that Hounslow is in possession of the part of Watermans Park which is within the Claimants' land. It is in possession in law not just because possession is easily attributed to the person with the legal title but because its use and control of the Claimant's land involves significant acts of possession by it. These include:
- (1) Hounslow has laid out Watermans Park as a public open space under its statutory powers;
 - (2) Hounslow has made Byelaws which control the use of Watermans Park;
 - (3) the public enter upon Watermans Park as the licensees of Hounslow;
 - (4) Hounslow maintains Watermans Park; the judge specifically referred to acts of grass cutting, planting, cleaning and maintenance.

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58. All of the acts of possession by Hounslow in relation to the Claimant's land apply equally to the part of the walkway which is within the River Works. I consider that it is clear that Hounslow is in possession under the Licence of the surface of that part of the Walkway.
59. I next consider the posts which hold up the walkway and which are set into the river bed. These posts are essential to support the structure of the walkway. Under the Licence, Hounslow is responsible for the maintenance of these posts. I consider that it would be wholly artificial to hold that Hounslow is in possession of the surface of the walkway but is not in possession of the posts which hold up the walkway. The realistic view is that Hounslow is in possession of the whole of the structure of the walkway including these posts.
60. The position in relation to the posts, piles and dolphins elsewhere in the river bed is more difficult. Their position can be assessed by reference to the following considerations:
- (1) these items had been in use as part of the Gas Works but that use ceased in 1965;
 - (2) these items were not removed when the use of the Gas Works ceased; the inference would seem to be that they were left in situ because they were doing no harm to the PLA, who were prepared to permit them to remain, and leaving them in situ avoided having to pay for their removal;
 - (3) the Licence refers to these items because Hounslow needs the permission of the PLA for these items to remain in situ;
 - (4) Hounslow does not have any need to use these items; when it applied for the Licence it proposed that it would not make any use of them;
 - (5) paragraph 13 of Schedule 3 to the Licence at the present time only permits the River Works to be used as the staging of a public walkway; thus, there is no current permitted use of these items;
 - (6) Hounslow has responsibility for these items under the Licence;
 - (7) Hounslow has the power to take these items away and, in certain circumstances, can be required by the PLA to take these items away;
 - (8) the judge did not make any specific findings as to any activities carried out by Hounslow in relation to these items;
 - (9) the judge did not make any finding as to whether Hounslow paid rates for these items;
 - (10) whilst these items are affixed to the river bed, title to them is vested in the PLA and not in Hounslow;
 - (11) paragraph 17 of Schedule 3 to the Licence obliges Hounslow to permit the PLA to enter on the River Works on giving notice, or without notice in the event of an emergency; this paragraph suggests that the PLA is not otherwise entitled to

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enter on the River Works; the reference to the River Works includes the items now being considered.

61. Putting the possible significance of paragraph 17 of Schedule 3 to the Licence on one side for the moment, I consider that the other considerations referred to above point strongly to the conclusion that Hounslow is not in possession of the posts, piles and dolphins sunk into the river bed. I now need to consider the significance of paragraph 17 of Schedule 3 to the Licence. That paragraph applies to all of the River Works. Certainly, as regards the walkway and the posts holding it up, that paragraph supports the conclusion which is otherwise appropriate which is that Hounslow, and not the PLA, is in possession of the walkway and its supporting posts. The question then is whether the wording of that paragraph means that Hounslow, and not the PLA, is also in possession of the other posts, piles and dolphins. I do not consider that the paragraph has that legal effect. The paragraph can take effect so as to require the PLA to give notice to Hounslow of the PLA's intention to inspect the items or otherwise to enter upon them even though Hounslow is not in possession of them. Accordingly, my overall conclusion is that Hounslow was not and is not in possession of the other posts, piles and dolphins sunk into the river bed.
62. As I have held that Hounslow was not and is not in possession of these posts, piles and dolphins, a conventional view might be that the Appellants cannot be held to have interfered with Hounslow's possession in the past and ought not to be restrained from interfering with Hounslow's possession in the future. However, Hounslow submits that this so-called conventional view no longer holds sway. It submits that the decision in Manchester Airport plc v Dutton, and the cases which have followed it, lay down a wider principle which allows the court to grant both an injunction and an award of damages for interference with a contract which provides for the occupation or use of land.
63. The cases to which I was referred on this part of the case, and the further cases cited in them, include Manchester Airport plc v Dutton, Countryside Residential (North Thames) Ltd v T (2000) 81 P&CR 2, Monsanto plc v Tilly [2000] Env LR 313, Alamo Housing Co-operative v Meredith [2003] HLR 62, Mayor of London v Hall [2011] 1 WLR 504 and Vehicle Control Services Ltd v Revenue and Customs Commissioners [2013] RTR 24.
64. These cases are not without their difficulties. It is not clear precisely what principle was being laid down by Laws and Kennedy LJ who formed the majority in Manchester Airport plc v Dutton. Were they deciding that a licence which conferred a right to possession entitled the licensee to sue for possession even if he had not been in possession? Were they treating possession and occupation as the same thing for practical purposes? Or were they saying that where there was a contractual right to occupy or use land and that right was interfered with, the licensee could obtain an injunction to restrain that interference and in some circumstances an order for possession of the land would be a more appropriate remedy than an injunction? Is there a special rule in relation to interference with a contract as to the use of land so that the court will restrain an interference with that contract even where the tort of unlawful interference with contractual relations had not been committed?
65. The most recent discussion of the principles is in Vehicle Control Services Ltd v Revenue and Customs Commissioners, although the court in that case did not appear to

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find the position as problematical as I would have done. At [34], Lewison LJ said that the principles which emerged from Manchester Airport plc v Dutton were:

“(i) the court has power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence; and

(ii) in every case the question must be, what is the reach of the right, and whether it is shown that the defendant’s acts violate its enjoyment.”

66. I consider that I ought to adopt and seek to apply the principles identified in the Vehicle Control Services case. I therefore need to assess the reach of the rights conferred by the Licence on Hounslow in relation to the posts, piers in dolphins sunk into the river bed. The principal right conferred on Hounslow in relation to those items is the right granted under section 66 of the Port of London Act 1968 to retain those items in the river bed even though they do (or might) interfere with the right of navigation. Because Hounslow had an obligation to maintain these items, it had a right to carry out such works of maintenance. Further, as explained above, Hounslow has an equitable right to sever the items and take them away as chattels. At present, Hounslow does not have a right to use those items while they are sunk into the river bed. Hounslow does have a right under the Licence to ask the PLA for its consent to a future use of those items and such consent is not to be unreasonably withheld by the PLA.
67. The next stage is to ask whether the Appellants’ use of these items violated Hounslow’s enjoyment of the above rights in the past. I cannot see that anything which the Appellants did in relation to these items had that effect. As I understand it, what the Appellants have done is to tie up their vessels to some of these items. That did not prevent Hounslow exercising its right to retain the items sunk into the bed of the river. There was no evidence that the mooring of vessels to these items on any occasion prevented Hounslow carrying out works of maintenance. In the past, Hounslow has not wished to exercise its right to sever these items and take them away so the Appellants’ mooring of vessels has not interfered with that right. Further, Hounslow has not applied to the PLA for consent to use these items in a way which was then prevented by the Appellants.
68. As to the possibility that the Appellants’ use of these items for mooring might prevent Hounslow removing these items, I was not told of any specific evidence before the judge as to when and how that possibility might come about. Conversely, I am aware of the general evidence to the effect that Hounslow and the PLA had plans for the use of this part of the river and the bank. The judge did not make his order in relation to these items on the basis that the Appellants’ conduct was preventing Hounslow from exercising a right of removal of specific posts, piers or dolphins.
69. The result of the above reasoning is that the judge was right to hold that the Appellants had trespassed on the Claimant’s land, including the posts holding up the walkway, by running electricity cables and water pipes over the Claimant’s land and mooring to the posts holding up the walkway. However, the judge was not right to hold that the Appellants had interfered in the past with Hounslow’s rights in relation to the other posts, piles and dolphins sunk into the river bed.

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70. As to the part of the second ground of appeal which challenged the judge's ruling that the Appellants were liable to pay damages for trespass, the judge was right to find that there had been trespass to the Claimant's land and to the posts holding up the walkway but was wrong to find that the Appellants had infringed Hounslow's rights in relation to the other posts, piles and dolphins sunk into the river bed.

The third ground of appeal

71. The third ground of appeal related to the judge's reference in paragraph [43] of his judgment to the letter dated 8 August 2017 from the PLA to Hounslow. The judge's reference to that letter followed the expression of his conclusion, in paragraph [42] of his judgment, that Hounslow had the right to retain possession of the River Works. The judge then said that this conclusion was "underlined" by the terms of the letter. If I had held that the judge's conclusion as to possession had been correct in all respects, then I would not have reversed his conclusion because he expressed the view that his conclusion was supported by the letter. However, as I have held that the judge's conclusion as to possession was incorrect in part, I will give effect to that holding and I need not consider the terms of the letter. It was not submitted to me that I would derive any assistance from the terms of the letter and I do not do so. The letter states the PLA's understanding as to the legal effect of the Licence and that understanding does not assist when the court has to come to its own view as to the legal effect of the Licence having heard detailed submissions from the parties to this appeal.

The fourth ground of appeal

72. The fourth ground of appeal relates to the judge's order that the Appellants do pay damages/mesne profits to Hounslow. This ground of appeal raises a number of points. The first contention was that the restrictions on use contained in the Licence meant that no damages were payable; this contention appeared to relate only to the posts, piers and dolphins sunk into the river bed. As to that contention, I have already held that the mooring by the Appellants to these items did not amount to a trespass upon these items or otherwise infringe any right of Hounslow and did not cause any damage to Hounslow. For that reason, it follows that the Appellants were not liable to pay damages for mooring to these items.
73. Conversely, I have held that the Appellants did trespass on the Claimant's land and on the walkway and on the posts holding up the walkway and, in principle, are liable to pay damages for such trespass.
74. This ground of appeal also put forward the contention that Hounslow's alleged delay in seeking to remove the Appellants from their moorings meant that damages should not be based on the ordinary market value of the moorings. I did not hear any submissions in support of this contention and I am not persuaded by it.
75. The ground of appeal also contended that the special circumstances of this case made it inappropriate to award damages by reference to the market value of the moorings. However, as developed in the argument on the appeal, this contention appeared to be confined to the point that Hounslow did not have a right to use the posts, piers and dolphins and I have already dealt with that subject.

The fifth ground of appeal

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76. The fifth ground of appeal challenged the judge's finding that the Appellants were committing a trespass on the Claimant's land and on the walkway when they crossed it to gain access to their vessels.
77. This ground of appeal contained the contention that there was a public right of way over the Claimant's land and the walkway. For the reasons given by the judge, that contention cannot be sustained, at any rate if what is claimed is a right of way which is otherwise than with the permission of Hounslow. The position is that the Hounslow has laid out the Claimant's land and the walkway as a public open space and it permits the public to have access to that land subject to the controls contained in its Byelaws.
78. The judge held that members of the public were entitled to enter and remain in the park for recreational purposes only and that when the Appellants used the park to gain access to their vessels they were exceeding the permission to use the park for recreational purposes and were therefore trespassing. I do not agree with the judge's conclusion. I consider that members of the public are entitled to use the park for the purposes of obtaining access to an area adjoining the park. Members of the public are entitled to use the park as a short cut to get from land on one side of the park to land on the other side of the park. They are so entitled even though their sole object in using the park is as a means of access in that way. If that is right, I cannot see a difference between a member of the public using the park in that way and the Appellants using the park as a means of access to their vessels. If the mooring of the vessels results in a trespass to the posts holding up the walkway that is one thing but I am not persuaded that there is a separate act of trespass when an Appellant is walking across the park on his way to or from his vessel.
79. The judge also held that the Appellants would commit a breach of Byelaw 6 when they crossed over the railings which ran along the edge of the walkway. That byelaw provides that no person should, without reasonable excuse, "climb any wall or fence in or enclosing the ground". The railings in question are a fence within the byelaw. However, I do not consider that stepping over the railings without putting a foot on the railings amounts to "climbing the railings" and so would not be a breach of the byelaw. However, the meaning of the byelaw is not strictly raised by the fifth ground of appeal.

The sixth ground of appeal

80. The sixth ground of appeal is the new ground of appeal for which I have given permission. This ground challenged the way in which the injunctions were expressed in the judge's order. The point is made that, in so far as the judge found that the Appellants had trespassed or had infringed Hounslow's rights, then it would be appropriate to grant an injunction to restrain the trespass or the infringement but not to order the Appellants to take their vessels away. The Appellants submitted that they should be free, at any rate so far as the rights of Hounslow are concerned, to remove any thing which was a trespass or an infringement but remain nearby using anchors to moor their vessels and using generators on board their vessels to provide electricity.
81. In principle, the Appellants are correct that the order of the court to give effect to the result of this appeal should order the Appellants to stop the acts of trespass or other infringements which have been found, and to prevent them committing such acts in the future, but should leave the Appellants to use their vessels in a way which does not infringe Hounslow's rights. Even though anchoring their vessels to the river bed might

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be a trespass as against the owner of the river bed, that owner is not a party to these proceedings.

82. I wish to comment on one other matter. The judge held that Hounslow, as riparian owner, had a private law right to gain access to its frontage by boat. The judge relied on Lyon v Fishmongers' Company (1876) 1 App. Cas. 662 for that proposition. The judge also held that the mooring of the boats interfered with that right and, in particular, prevented Hounslow gaining access to the river wall to survey it and carry out works of maintenance of it. Those findings were not challenged by any ground of appeal. In the course of argument, I was told that Hounslow wished to gain access to the river wall to carry out repairs to it and that the Appellants' vessels were preventing Hounslow accessing the river wall for that purpose. In so far as the vessels do interfere with the right of access to the river wall, then there should be an order preventing that interference.

The result

83. I have upheld the judge's decision in many respects but not in all respects. It will therefore be necessary to review the orders which he made in the light of my conclusions. It will be appropriate for me to hear submissions on how the orders should now be expressed. Following the handing down of this judgment, I will therefore hear submissions as to the appropriate order to make to give effect to my decision.