

## PORT OF LONDON ACT 1968

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### **OPINION**

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#### **Introduction**

1. I am asked to advise in respect of river works licences (“RWLs”) affecting houseboats on the River Thames granted under Section 66 of the Port of London Authority Act 1968 (“the 1968 Act”). I am asked in particular to advise on specific questions set out in my Instructions. I advised in conference on the 21<sup>st</sup> February 2011. At the request of those Instructing me I have appended my analysis of the relevant provisions of the 1968 Act in an annex to this Opinion.

#### **Nature of Licence**

- (1) **“Is an RWL no more and no less than what it purports to be, namely a licence to construct etc. “works” on or into the river bed or does it acquire some additional or other characteristic by reason of the use to which those works are to be put? Some RWLs contain only a description of the actual piles and pontoons etc. that are to constitute the “works” whilst others refer to the purpose for which those piles and pontoons are being installed, for example a reference to “moorings” and/or the accommodation of residential craft.”**
2. I consider that the purpose for which works are placed in or on land can affect the character of the particular object as to whether or not it constitutes works. Insofar as it is constructed, it would be likely to comprise works for this purpose. However, insofar as it is placed on or moved onto the land, it would only be likely to comprise works if as a result it acquired some characteristic of permanence as opposed to mobility. It would seem to me that the intention with which it was so placed or moved on or onto the land as objectively assessed could well be relevant to the conclusion whether the

object had become a work for the purposes of sections 66 and 70 of the Act. In general I consider that houseboats would retain a characteristic of mobility, notwithstanding that for long periods they may remain moored at a single position, so that they would not constitute works for this purpose. On the other hand fixed moorings would tend to be permanent and would generally comprise works for this purpose.

**(2) “In addition to being a licence to install river works, is a RWL the grant of a right to moor a boat or boats and/or the grant of a means and/or facilities to moor them?”**

3. The RWL is the authorisation to construct or place the works, that is the physical structures or apparatus that comprise the mooring. It would however be implied in the grant of the right to install and maintain a mooring that it could be used for the purpose of mooring. The grant of the licence can be subject to condition as to its use. That could include restrictions on the size of vessel to be moored or the periods of that use. The extent to which the mooring is subject to condition as to its potential use will be directly relevant to the value of an RWL granted to maintain the mooring including any deemed right within section 66(1)(b) “to enable the holder of the licence to enjoy the benefit of the licence”. Thus the bidder in the market will pay more for a mooring which is licensed to permit its use for any vessel including residential houseboats at all times of the year than for one which is limited in the size of the vessel and if for example it is limited to the holiday season.

**(3) ““Bed” (i.e the river bed) and “land” are separately defined in section 2 of the 1968 Act. Are the two concepts mutually exclusive for the purposes of RWLs?”**

4. The Thames is defined for this purpose in Schedule 1 to the 1968 Act at paragraph 2 by reference to mean high water level and the relevant limits. The definition includes islands, docks and harbours. “Land” includes land covered by water as defined.

“Works”, when used in relation to the licensing of works by the PLA, is defined as works in, under or over the Thames as defined or which involve cutting its banks.

“Bed” is defined as the bed, shore and banks of the Thames below mean high water level. In view of the definition of the Thames and of land, I am of the view that the bed of the river would be included as land and as part of the Thames as defined. To that extent therefore the two concepts are not mutually exclusive.

**(4) “How does the RWL regime fit with the rights of riparian landowners? If the licensee is also the riparian landowner, does that make any difference? Also do the provisions of Part V and/or section 11 of the 1968 Act in some sense override the historical rights for riparian landowners to moor vessels alongside the river bank owned by them?”**

5. So far as the area above mean high water level is concerned, the rights of riparian owners would generally be left unaffected (save where the banks would be cut). However, within the Thames as defined, in my opinion the rights of a riparian owner would be subject to and to that extent superseded by the provisions within the 1968 Act including the requirement for a RWL under section 70. Although specific to the particular provisions in that case, the Court of Appeal decision in *Ipswich Borough Council v. Moore* 2001 EWCA Civ 1273<sup>1</sup> is supportive of that conclusion.

6. Vessels are subject to separate regulation under the 1968 Act and would not as such fall within section 70 of the Act. As I have indicated above, a fixed mooring, where it is placed or laid in, under or over the Thames, would be likely to comprise works for this purpose. In my opinion the provisions of the 1968 Act supersede the right of the bed owner to prevent or charge for the placing of works on the river bed. While there is the

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<sup>1</sup> The Borough Council as holder of a Crown franchise of the river bed sought to demand a fee for the laying and use of moorings laid under licence granted by the port authority pursuant to the relevant Docks orders. The court held that the statutory licensing regime under the Orders had superseded the franchise right of the Council to charge for use of the river bed for that purpose – see per Chadwick LJ at para 30.

right to anchor or moor a vessel as an incident of the right of navigation, in the absence of a customary or other right I do not consider that there would generally be a right of the owner of the river bed or bank to place permanent moorings in waters subject to the public right of navigation<sup>2</sup>. Any works in the Thames would in any event be subject to the regulatory provisions within the 1968 Act and in particular the need for a licence pursuant to sections 66 and 70.

- (5) **“Where the PLA is freeholder of the river bed, does it have the right of a landowner to give or withhold consent for use of its land (i.e a boat moored above it) and to charge for that use? If yes, how does that right to grant a consent and charge for it “fit” with river works licensing and charging?”**
7. A distinction needs to be made between the PLA’s rights as landowner of the river bed which would be subject to the public right of navigation and the powers associated with the port undertaking and otherwise and its position under the 1968 Act. There is no specific evidence before me to demonstrate that the PLA’s ownership of the river bed carried with it rights to charge for mooring or otherwise. In any event, as indicated above, in my opinion those rights would have been superseded by the provisions of the 1968 Act. In my opinion, accordingly, as a matter of general principle there would be no relevant basis for the PLA to require an additional consideration over and above that determined under sections 66 and 67 of the 1968 Act for any proposed works comprising a mooring so far as they constitute relevant works as defined (compare *Ipswich Borough Council v. Moore* discussed in paragraph 5 above).

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<sup>2</sup> *Fowley Marine (Emsworth) Limited v. Gafford* 1967 2 QB 808 (where the right to establish permanent moorings was rejected) and compare *AG v Wright ex parte Moore* 1897 2 QB 318 (where a customary right since time immemorial as found by the jury to fix permanent moorings was upheld); the public right of navigation includes the right in the ordinary course of navigation to anchor and remain for a convenient time and to moor but not in general (i.e. in the absence of a specific customary right) to fix permanent moorings – see *Coulson and Forbes on Waters* 6<sup>th</sup> ed p. 507; *Michael & Will on the Law relating to Water* 9<sup>th</sup> ed at pp. 214/5; *Halsbury’s Laws* 5<sup>th</sup> ed vol 101 para 691.

## **“Reasonable”**

### **Section 72(2) of the 1968 Act**

- (6) “What is meant by the phrase “the best consideration ... that can reasonably be obtained”? Do the same terms/definition of best consideration apply at the time of each review? If it is to be applied continuously, should it relate to changes in external factors?”
8. Under section 67 the terms of the licence, including its period, renewal or any review of the consideration, must first be determined. Then the consideration for the grant of that licence should be agreed if that is possible. Failing agreement, the question of consideration is referred to arbitration and the consideration is to be determined by the arbitrator in accordance with the provisions of sub-section 2. In summary, those provisions require that the consideration is to be:
- a. the best consideration in money or money’s worth which
  - b. in the opinion of the arbitrator can reasonably be obtained, having regard to:
  - c. all the circumstances of the case, including
  - d. the value of any rights in, under or over land of the PLA deemed to be conferred by the licence but
  - e. excluding any element of monopoly value attributable to the extent of the PLA’s ownership of comparable land.
9. The expression “best consideration” is similar to the statutory provision in section 123 of the Local Government Act 1972 (“the 1972 Act”) providing for the disposal of local authority land, which in substance re-enacted the provisions of sections 164 and 165 of the Local Government Act 1933 and section 26 of the Town and Country Planning Act 1959.
10. Section 123 of the 1972 Act provides, so far as relevant, as follows,

*“(1) So far as relevant, subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.*

*(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy for a consideration less than the best that can reasonably be obtained.”*

11. In *R v Middlesbrough BC ex p Frostree* 1988 16<sup>th</sup> Dec per Roch J<sup>3</sup>, *R v. Pembrokeshire County Council* 1999 4 All ER 1007 at para 13<sup>4</sup> and in *R (oao Lemon Land Limited) v. London Borough of Hackney* 2001 EWHC Admin 336 at paras 9-11 per Lightman J<sup>5</sup> the High Court held that best consideration should be based on commercial or monetary value. As guidance as to what constituted “reasonably obtained” for the purposes of that provision, the court has likened the obligation to the duty of a trustee, as explained in *Buttle v. Saunders* 1952 2 All ER 193<sup>6</sup> (see *R v. Commission for New Towns ex parte Tomkin* 1988 87 LGR 207<sup>7</sup> and *R v SSE ex parte Manchester City Council* 1987 54 PCR 212<sup>8</sup>).

12. While plainly the provisions in section 67(2) of the 1968 Act must be construed in their own context and subject to their own provisions, I am of the opinion that best consideration in money or money’s worth should be applied as the best consideration

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<sup>3</sup> Referred to in the *Pembrokeshire* case where Roch J held that consideration meant the price paid for the land and did not include elements that were not of commercial or monetary value to the vending Council.

<sup>4</sup> In this case the Council had decided to grant a lease to a rival bidder because it would provide additional employment opportunities. The court held that best consideration was limited to monetary or commercial value and did not include the creation of employment opportunity.

<sup>5</sup> This case involved the sale by the London Borough of Hackney to the LDA, which the Borough sought to justify as the best consideration because of the prospect of job creation. The court held that best consideration related to monetary value and that that did not include aspirational social objectives such as for the creation of employment opportunities.

<sup>6</sup> Trustees of a will failed to explore a higher offer, feeling honour-bound to accept an earlier offer; held to be in breach of trust; per Wynn-Parry J at p 195 “They have an overriding duty to obtain the best price which they can for their beneficiaries. ... For myself I think that trustees have such discretion in the matter as will allow them to act with proper prudence.”

<sup>7</sup> Kennedy J held that the land would have to be put for sale by tender to satisfy the requirement; the case was a challenge by the previous owners of the land who were claiming that it should have been offered back to them; the duty to obtain the best consideration was held to prevail.

<sup>8</sup> The duty to obtain the best price did not involve delaying sale in the expectation of an increase in prices; it was the best price at the time the sale was authorised or directed.

in terms of its monetary or commercial value. I also take the view that the qualification “reasonably be obtained” is a qualification as to what the arbitrator considers<sup>9</sup> could reasonably be obtained so far as what would be the best monetary or commercial value for the grant of the licence, having regard to all the factors set out under sub-section 2.

13. Thus in my view the best consideration means best in terms of monetary or commercial value and what can reasonably be obtained relates to what is reasonable in the circumstances but without detracting from the obligation that the consideration should remain the best in monetary or commercial value. In coming to a view as to what could reasonably be obtained, regard would have to be had to all the circumstances with the exception of any premium arising from the monopoly ownership of the PLA as specified in the section. The relevant circumstances would be required to be considered at the time of each review, subject to the express provisions of the licence as granted. That would equally apply if it was on the basis of regular annual review.

14. In my opinion, therefore, the arbitrator is required:

- a. to exclude any premium element that would be attributable to the extent of the PLA’s ownership of comparable land;
- b. to identify all the circumstances of the case relevant to obtaining the best consideration in money or money’s worth (in terms of monetary or

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<sup>9</sup> By section 67(1) the consideration for the licence shall be such as may be agreed or failing agreement as shall be assessed in accordance with subsection (2) of the section. Thus there is no restriction on the consideration which may be agreed (unless it is manifestly unreasonable such as to constitute an abuse of power). But if agreement cannot be reached, then the consideration must be assessed in accordance with subsection (2), which requires that the consideration shall be the best consideration which in the opinion of the arbitrator can reasonably be obtained. Hence the question of what is the best consideration for this purpose only arises under the section where agreement has not otherwise been reached as to the consideration.

commercial value) for the grant of the licence, including any deemed rights;

and

- c. then to determine what is the best consideration (as described above) that could reasonably be obtained having regard to all of those circumstances.

15. So far as the exclusion under (a) above is concerned, in the context of a RWL for a houseboat mooring comparable land (which includes land covered by water) would in my opinion generally relate to those parts of the river in the ownership of the PLA suitable for the positioning or mooring of a houseboat. The consideration should not have regard to any premium value due to the dominant ownership of the PLA, but can take into account the locational extent of the physical opportunities for that provision. The reference to premium value is to the monopoly position of the PLA which might enable it to demand an inflated price, notwithstanding the availability of other opportunities for the mooring. The starting point should in my opinion be the general market value of the right, assuming that the riverbed was in a variety of ownerships and thus free of any monopoly control.

16. All the circumstances of the case would in my opinion require the arbitrator to take into account all the relevant considerations that go towards assessing the particular consideration, including any special value affecting the grant of the licence. It was pointed out by the member in *PLA v. TfL* 2007 WL 4610534<sup>10</sup> at paragraph 37 (confirming the submission of TfL at paragraph 33) that the assessment of consideration for a RWL under section 67 did not require disregard of the licensing

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<sup>10</sup> This case concerned the valuation of PLA land taken for the purposes of the A13 widening and a particular issue was the valuation of the right to grant RWLs.

scheme, as might arise under rule 3 of section 5 of the Land Compensation Act 1961<sup>11</sup>.

The Court of Appeal decisions in *Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd* 2002 EWCA Civ 720 per Mance LJ at paras 7-10 confirming the approach in *Mercury Communications Limited v. London & Indian Dock Investments* 1993 69 PCR 135 and *Geo Networks Limited v. Bridgewater Canal Company Limited* 2010 EWCA Civ 1348 under the Telecommunications Code (whose provisions are different from those under sections 66 and 67) provide further support for account being taken of general market value as part of the overall assessment<sup>12</sup>.

17. The value of any rights deemed to be conferred by the licence is a reference to rights deemed to be conferred on the licensee which are necessary to enable the licensee to enjoy the benefit of the licence. The deeming provision only arises where the works are in, on or over land owned by the PLA. Rights that are necessary to enable the licensee to enjoy the benefit of the licence would in my opinion be restricted to rights that are necessary to the construction or placing and/or retaining of the works. That would include the necessary rights to support the works and for their initial construction or subsequent retention and maintenance.
18. I do not consider that it would include access across adjoining land to a houseboat moored on the mooring. Access from the river by boat would be pursuant to the public right of navigation. The extent of the necessary rights to be deemed where the works

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<sup>11</sup> Section 5 of the 1961 Act provides rules for the assessment of compensation including in rule 3 that the special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers.

<sup>12</sup> The telecommunications code provides for the award of compensation on the basis of what would be “fair and reasonable” for the grant of the right. In *Cabletel* Mance LJ at para 7 confirmed the approach of the trial judge in *Mercury Communications* that market value was a relevant consideration in determining what would have been fair and reasonable if agreement to the rights had been given willingly.

are on PLA owned land (whether riverbed or bank) would generally need to be determined in the first place to enable any value to be taken into account as one of the relevant circumstances in determining the best consideration reasonably obtainable. The market value would then take into account the potentiality of the mooring for use for the mooring of a houseboat. What the market would pay would be influenced no doubt by its location and whether there is convenient land access directly to it.

19. The underlying objective of the provisions in section 67 is to ensure that the PLA is required to charge what is the best consideration on the defined basis, albeit that that is subject to the qualification that it is to be limited to that which in the opinion of the arbitrator can reasonably be obtained. The arbitrator's opinion as to what can reasonably be obtained should in my opinion be based on a consideration of what in the circumstances of a commercial negotiation between river conservator and licence applicant could reasonably be obtained. Hence the limit on what can be obtained would be what is reasonable in all the circumstances but with the overriding objective of achieving what is the best monetary or commercial value that could in all the circumstances be reasonably obtained.
20. This would in my opinion allow consideration of particular circumstances of the case which might temper the level of consideration to be determined because in all the circumstances of the case it would not be reasonable to obtain it. It is impossible to lay down precise guidance in this respect. However, matters such as the substantial investment in the works by a licensee or the scale of increase as a result of, for example, the absence of any regular review might give rise to circumstances that could make it unreasonable to require the full increase to be paid immediately following

review on the principles set out above.<sup>13</sup> This would support an approach deferring or phasing in the increases so far as was reasonable within the scope of the arbitrator's duty to determine the best consideration reasonably obtainable.

21. I should add that for the purposes of Article 1 of the First Protocol to the European Convention of Human Rights, the form of statutory regulation under sections 66 and 70 of the 1968 Act would in my opinion constitute control rather than deprivation of any proprietary right or possessions. Having regard to the public importance of the protection of the Thames balanced against the proportionate regulation of works and the related proprietary interests, the provisions for the grant of licences and the assessment of the consideration seem to me proportionate and would not, in principle, involve any breach of the relevant rights in that respect.
22. If the exercise of the powers is such as to lead to the loss of a person's home through the loss of the use of the mooring, it would be necessary to demonstrate that the interference with the person's rights under article 8 was in accordance with law and necessary in a democratic society in the interest of the economic well-being of the country and/or for the protection of the rights and freedoms of others. In this respect there will be deference to the judgement of the member state of what is proportionate by way of control though regulation, subject to its particular application in the specific case. Overall I would again consider that the determination though arbitration of the best consideration reasonably obtainable would be regarded as proportionate in the context of the overall statutory regime, although respect for a person's private and

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<sup>13</sup> This would appear relevant to the element of work described at paragraph 6(b) of the Terms of Reference at enclosure L with my Instructions.

family life and home would be likely to support some flexibility in cases of hardship through phasing of the increases as indicated above.

23. Article 14 would preclude the exercise of the powers in a discriminatory fashion.
  24. Under the Arbitration Act 1996 the arbitrator's award would be open to challenge in the Courts on a question of law or serious irregularity.
- (7) **"Should it take account of major changes occurring after the date of the grant, for example a boom in houseboat sale prices, or a large increase in the mooring fees granted by the licensee to the resident boaters? Upon a review, is there a constraint imposed by the Act's wording in relation to reasonableness and "all the circumstances of the case"?"**
25. Unless excluded as part of the review, major changes occurring after the date of grant, but before the review date, would comprise part of the circumstances to which regard would be required to be had in determining what was the best consideration that could reasonably be obtained. However, as I have advised above, "reasonably obtained" could in my opinion entitle the arbitrator to take account of particular circumstances where a very substantial increase in consideration would make the charging of the full increase immediately following the review unreasonable, if that was what, when considered objectively, would be reasonably agreed as the best consideration. The increase could in these circumstances reasonably in my opinion be phased in.
  26. It would also properly preclude oppressive charging, for example, seeking to exploit the particular position of a particular licensee, having regard to the implications of the loss of the licence or otherwise. In general I would regard the assessment of what is the best consideration that can reasonably be obtained as one generally reflecting the

market value for the mooring in the particular location in which it is situated. The consideration is for the grant of the licence and will reflect the value of that grant, whether in the form of a single payment or, more usually, periodic payment.

- (8) **“Can the PLA make more than one charge, for example, one fee for the works themselves, e.g. one fee for the works themselves, e.g. piles and pontoons, and one for the use to which the works are put e.g. the mooring of a boat? If Counsel is of the view that the charge for an RWL can be based on the value of the use, should there be separate charges for (a) the works (b) the value of the use or just one charge?”**
27. The consideration under sections 66 and 67 is for the RWL for the works and therefore in my view, the consideration could not be directly for the use as such; however the consideration for the RWL can be assessed as the sum of different elements making up the whole, reflecting the basic cost for the mooring or other works and a variable element for the use permitted to be made of the mooring forming the river work as licensed; however the consideration would in the final analysis remain the best consideration reasonably obtainable for the licence as granted including the potentiality of the use to which the mooring could be put.
- (9) **“Section 11 of the 1968 Act in particular sub-section (3) confers powers on the PLA to “dispose of land belonging to them in such manner whether by way of sale exchange, lease, creation of any easement, right, privilege or otherwise for such period upon such conditions and for such consideration as they think fit. Could the PLA apply its powers under this section to require payments (for example under a lease or licence) from holders of an RWL in respect of the same piece of river bed (and/or adjoining land where the PLA is the riparian owner) as is the subject of the RWL or would the existence of the RWL preclude the PLA from so doing? Does the fact that Part V of the 1968 Act has been specifically enacted to govern the RWL regime imply that in this context the scope of section 11 is not as wide as might appear on the face of it?”**
28. I have advised above on the position in respect of land ownership of the river bed and regulation under Part V and that there would, in my view, be no basis on which an additional charge could be made for the grant of a works licence as an RWL beyond

that consideration under sections 66 and 67. The ownership of the bank would give rise to separate considerations, so far as it is above mean high water level. The PLA would *prima facie* have the right to charge, for example, for access across its land above mean high water level, as any other landowner. That charge would be, in principle, in addition to and separate from the consideration under sections 66 and 67, but any monopoly value arising from the ownership of comparable land by PLA would be excluded from consideration under section 67, so far as assessment was by arbitration. Moreover, as I have indicated above, the fact that additional payment would be required for land access to a mooring might well form one of the relevant circumstances to be taken into account in determining the consideration under the section. In other words in the market the offer for the mooring would be reduced because the bidder would take account of the fact that he would have to allow an element for securing land access to the mooring and to any houseboat that might be moored to it.

#### **“Monopoly” - Section 67(2) of the 1968 Act**

- (10) **“What is meant by the phrase “excluding any element of monopoly value attributable to the extent of (the PLA’s) ownership of comparable land?” Counsel will note that “land” is defined in section 2(1) of the 1968 Act, non-exclusively, to include “land covered by water and any interest in land”.**
29. I have advised on this aspect above. In my opinion, comparable land would mean comparable in the context of the particular licence application; accordingly for a mooring for use for a houseboat or houseboats, it would mean that part of the Thames generally which would be suitable for the purpose of placing a mooring for a houseboat or houseboats as proposed; thus any premium element attached to the PLA’s ownership

of that land as a whole<sup>14</sup> would be excluded, leaving the value to be assessed, having regard to general market value for the mooring rights in that respect.

30. The market value of the licence to place or maintain the mooring can be assessed by the valuer in the light of comparable rentals elsewhere and the supply of and demand for opportunities for mooring opportunities. It may well be that negotiated or assessed rentals with the PLA are evidentially relevant if they have not in fact sought artificially to inflate the consideration or been otherwise affected by extraneous factors such as the financial resources of the parties and the cost or other implications of arbitration. As my Instructing Solicitor points out, there is only one Thames and the opportunities for moorings are limited.

(11) **“What does “comparable land” mean in the context of an RWL for residential use? Is it only river bed in the context of RWLs or does land adjoining or close to the river also qualify?”**

31. In my opinion comparable land should be construed as set out above. Thus it would not generally include adjoining land above mean high water level.

#### **“Value” – Section 67(2) of the 1968 Act**

(12) **“What is meant by the phrase “the value of any rights in under or over land of the PLA deemed to be conferred by the licence?”**

32. As I have advised above, in my opinion the rights deemed to be conferred are those under section 66(1)(b) where the works would be in, under or over PLA owned land. This would include such rights in, under or over land as are necessary to enable the

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<sup>14</sup> In other words, as I have indicated above, it excludes a premium value that PLA might seek to extract based on the fact that it is in a position through its ownership effectively to force the level of consideration up because of the absence of any other provider. As I have said, in my view the consideration should be assessed as if the relevant stretch of the river is in multiple ownership so that the consideration will reflect the overall demand and supply of mooring opportunities without distortion through the PLA’s ownership.

enjoyment of the benefit of the licence for the maintenance of the works including the mooring as such. Thus this would include any necessary rights to ensure the mooring can be kept in place, but would not in my opinion necessarily deem a right of access over other land, for example above mean high water level.

- (13) **“Please confirm that the rights deemed to be conferred by the licence are the rights referred to in section 66(1)(b) namely “such rights in, under or over land as are necessary to enable the holder of the licence to enjoy the benefit of the licence.””**

33. I confirm that that is my opinion.

- (14) **“Does the reference to “land” here imply that it is necessary to take into account more than just the basic value of the works themselves, i.e the piles and pontoons, etc or is it that such works themselves are to be regarded as “land” for this purpose? Does value extend only to such things as the value of the river bed in which the works are placed, or can it extend to the value of the use which the works facilitate?”**

34. I have addressed this aspect earlier. The reference to land in section 66(1)(b) and in section 67(2) is to the land (including the river bed) in, under or over which the works are to be constructed, placed or maintained or the additional rights are to be conferred. The value to be taken into account is the value of the additional rights as part of the overall determination of the best consideration reasonably obtainable, which would only indirectly reflect the value of the land affected<sup>15</sup>. The value can take into account the potential use to which the works can be put, such as in the instant case the mooring of a houseboat or houseboats.

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<sup>15</sup> In other words the consideration is directly for the grant of the licence, not as compensation for injurious affection to the land on which it is to be placed or maintained, although in particular circumstances this might be a factor to be taken into account in the overall value of the RWL.

**(15) “Can some account be taken of the rental value of a mooring that is facilitated by an RWL, or of a boat itself; in other words is the PLA entitled to assess RWL fees by reference to mooring rent or houseboat rent received in the particular case?”**

35. The prevailing level of market rents for mooring in the particular case, or generally, would potentially be part of the relevant evidence as indicating the potentiality of the mooring and the income it could derive through its use for mooring and which the arbitrator would be required to take into account. In particular, it could be relevant to the particular characteristics of the works to be licensed, for example if they were suitable as part of a commercial mooring enterprise with capacity to moor a number of houseboats as opposed to a mooring suitable for a single houseboat. Thus the circumstances would include consideration of the potential mooring rents which could be achieved as a result of the works to be licensed.

**(16) “If the PLA can take account of rental value is there any reason why it should be by reference to net value (i.e the net income received after all outgoings) rather than gross income receivable?”**

36. In seeking to determine the best consideration in money or money's worth, the monetary or commercial value would generally be the net value, having taken account of the likely outgoings or cost of achieving that value.

**(17) “If the PLA can consider the value to which the works are put, how should the PLA take account of the licensee's “contribution” for the value e.g. by securing planning permission, investing in works etc? Counsel is referred to Attachment G.”**

37. Taking in turn the factors set out on page 6 of Attachment G to my Instructions comprising the Paper 4 V4 Current River Works Licences and Licensees:

**“The value of the ability to moor a boat for residential purposes on the tidal Thames is created from a combination of factors listed below one of which is the PLA's river works licence.**

**“(1) The PLA's grant of the River Works Licence”**

38 The value of this is at the heart of the questions which I am asked to consider and is the subject of the Opinion as a whole.

**“(2) The licensee securing planning permission and any other necessary consent”**

39 Planning permission would generally run with the land (including where relevant, as here, land covered by water). The obtaining of planning permission and the cost involved would be one of the circumstances to be taken into account. In my view that could potentially be relevant in assessing the best consideration that can reasonably be obtained where the costs have been or are to be met by the licensee. However, when the permission has been obtained and the works are in place, any review of the consideration could, in my opinion, reasonably take into account as one of the circumstances the fact that that permission has been granted, notwithstanding the expense that has already been incurred, which ought already to have been taken into account as part of the initial consideration. Thus planning permission on land not directly affected by the river works may be relevant to the assessment of what is the best consideration that may reasonably be obtained for the grant of the licence. Equally, if planning permission has been obtained for the residential use of a vessel moored at a mooring, that would potentially be a use facilitated by the river works comprised in the mooring and would accordingly be a factor affecting the value of the licence for the works to be taken into account in assessing the best consideration which could be reasonably be obtained . However, where on the example that I am asked to consider the licence holder has purchased an adjoining marina, I would not have thought that it would generally be reasonable for the consideration to include a premium because of any special value to that licence holder (who would be akin to a special purchaser). The consideration would in my opinion be that which could

reasonably be obtained for a licence with potential access to the marina facilities, irrespective of the particular applicant.

**“(3) The licensee’s land access arrangements (owned or leased/licensed – the terms of tenure and any costs will affect the overall value along with the size and use of land e.g. garden and storage or simply a point at which to cross the river wall or attach works)”**

- 40 The particular access arrangements or any ancillary storage may be relevant to the assessment of the value of the works as a mooring; however the fact that the licence holder holds the only direct access does not eliminate the value in the grant of the licence to that licensee nor would it generally support a premium because of any special value to that licence holder. In my view the arbitrator could properly conclude that it would not be reasonable in these circumstances to include in the consideration a premium value in respect of that particular licensee in excess of the consideration which could be obtained generally where the mooring was to be used for the same purpose but by a licensee who did not also own the adjoining land.

**“(4) The licensee installing the river works plus any necessary infrastructure in the river wall or on land plus ongoing maintenance. The level and quality of infrastructure and services will also affect the overall value.”**

- 41 In my opinion the associated costs of the installation of river works and other necessary infrastructure, together with its maintenance, would be directly relevant in determining the best consideration having regard to the relevant costs. As is pointed out as part of this factor, the availability of infrastructure and services could also have a bearing on the overall value provided. I should make clear that it is the availability of the facilities as part of the surrounding circumstances that is relevant. That would not generally include the particular standard of maintenance by an individual licence holder nor would it in my opinion generally justify the imposition of a premium element

where the licence has a special value to the particular licence holder because of his investment in the adjoining facilities.

**“(5) In addition to the above, the value is also influenced by the location (e.g. desirability, proximity to transport and services, river conditions, any nuisance factors etc)”**

- 42 In my opinion, the locational aspects are also relevant to the determination of the consideration in that what may be reasonably obtainable as the best consideration, for example, in a Central London location may be greater than that what could be achieved at positions lower down or elsewhere on the Thames.
  - 43 The other indicators of value may be relevant as evidence of value; however generally, an advertised sale or rental price will be of less evidential value than one that has been agreed or achieved through a completed sale. Any comparable transaction would have to be considered on its particular facts, including whether it was at a full or discounted price or as a result of a non-arm's length negotiation.
- (18) “If Counsel is of the opinion that the PLA can take account of the value of the use, can the PLA’s charge be based on the potential value, for example if the works are unoccupied or the licensee is not charging competitive/maximum rental fees, (e.g. for the mooring or the houseboat on the mooring) or the PLA is not given details of the agreed sale/rental prices?”**
- 44 Generally, in my opinion, it is the potential use or value that will be relevant so long as that is reflective of what is reasonably obtainable as a best consideration. The potential use will be governed in the first place by any conditions imposed by the licence on the use of the mooring or river work. It would then be appropriate to assess what would be the realistic range of use of the mooring or work and what is the general market demand and value for the right to maintain the mooring or work for that purpose. I consider that normally that would be the principal influence on the best consideration

which is reasonably obtainable. It would not generally be dictated by the particular use which the licence holder chooses to make of the mooring or work.

- 45 It will be for the arbitrator to assess the relevance of the evidence in the light of what is provided or withheld as part of the arbitration proceedings, including whether it represents what is a market rental or consideration for the mooring or river work, the subject of the RWL. Subject to agreement between the parties, the arbitration procedures allow for disclosure of documents<sup>16</sup>.

#### **“All the circumstances of the case” – Section 67(2) of the 1968 Act**

##### **(19) “What is meant by the phrase “all the circumstances of the case”?”**

- 46 All the circumstances of the case means what it says, that it is all the circumstances of the case with the exclusion of the element of monopoly value attributable to the extent of the PLA’s ownership of comparable land. Thus the arbitrator would be duty bound to have regard to all the circumstances of the case so far as relevant to determine the best consideration reasonably obtainable. The fact that I have indicated that generally a premium value attached to the special value of the licence to a particular licence holder should not be included is not because it is not part of the circumstances to be considered but because in my opinion it would not be reasonable to obtain that element as part of the best consideration.
- 47 My Instructing Solicitors have helpfully set out a number of factors to which reference has been made. All of them would be included as the circumstances of the case save for any monopoly value arising from the PLA’s ownership of comparable land which is expressly excluded. Those which would be generally relevant to assessing the best consideration reasonably obtainable would include:
- a. the extent of the necessary rights to be deemed where the works are on PLA owned land;

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<sup>16</sup> Arbitration Act 1996 s 34

- b. major changes occurring after the date of grant, but before the review date;
- c. the cost of any required works and any maintenance required;
- d. the potential use of the work to be licensed, including its actual and historic use;
- e. the availability or absence of convenient land access to a mooring;
- f. the prevailing level of comparable market rents/consideration;
- g. the need for and cost of obtaining planning permission;
- h. locational aspects; and
- i. site specific factors.

48 Circumstances which I would not generally regard as being reasonable as a basis for obtaining an increment in the best consideration reasonably obtainable include:

- a. the licensee's ownership of adjoining land;
- b. the period of occupation by a particular licensee;
- c. the PLA's costs of administration;
- d. the licensee's personal circumstances;
- e. the actual use made by the licence holder where that does not reasonably reflect its potential; and
- f. the particular quality or fittings of, for example, the actual houseboat moored or proposed to be moored.

I have however made clear that it would be open to the arbitrator to conclude that with a large increase in the consideration on review it would not be reasonable to impose the whole increase immediately and to phase the increase in over a period which would be reasonable while remaining consistent with the duty to obtain the best consideration reasonably obtainable.

**(20) “Should this include various site specific factors, e.g. desirability, outlook, proximity to transport and services, tidal river conditions (e.g. grounding, wash) any nuisance factors etc?”**

49 Yes.

**(21) “If the licence holder is responsible for maintenance costs, river bank access costs, etc should these factors also be included in the assessment exercise?”**

50 Yes.

**(22) “Should the number of years the licence holder has held the licence to be a relevant circumstance to consider?”**

51 In my opinion the period of occupation by a particular licensee will generally not be a relevant consideration save so far as in the particular circumstances it affects what is the best consideration reasonably obtainable on the basis that I have discussed earlier in this Opinion. However, while I appreciate that a long term licensee would potentially be faced with particular hardship if because of the level of the proposed consideration he is not able to renew his licence for mooring a particular houseboat, in my opinion it would be unusual that the best consideration reasonably obtainable would not reflect that which would be reasonably obtainable, having regard to the market as a whole. As indicated above, there may be scope for phasing in the increase, which would in my opinion generally reflect a proportionate approach in these circumstances with regard to article 8 of the HRA and otherwise.

**(23) “Do improvements carried out by the licence holder or tenant himself to the river works (or the vessel occupying the works) have an impact bearing in mind that the PLA are merely granting rights to place and use the works?”**

52 The consideration to be paid is for the grant of the licence for the works and is required to be the best consideration in all the circumstances reasonably obtainable. While the value can properly have regard to the potential in the light of the particular works proposed for the purpose of the licence, I would not anticipate that the consideration

would have regard to the specific quality and fittings of the houseboat proposed to be moored.

**(24) “Should the PLA be entitled to claim a portion of the sale price received by a boat owner upon the sale of a boat with its RWL?”**

53 In my opinion a share of the price achieved for the sale of a houseboat with the benefit of the RWL would not generally be a relevant basis for determination of the consideration. However it may be that it is possible to determine from the sale price the element that was paid for the benefit of the RWL. If this can be done, it could form part of the comparable market evidence to determine what would be the best consideration reasonably obtainable for the grant of the licence. Section 67 does not entitle the arbitrator to determine the consideration on any other basis.

**(25) “Should “all the circumstances of the case” take account of the PLA’s broader costs of administering the river (in its entirety or a particular location)? Or, for example, should “circumstances” simply reflect its costs in administering the river works licensing regime?”**

54 The consideration to be assessed is the consideration for the grant of the licence and is to be the best consideration reasonably obtained. In these circumstances, the cost of administration would not, in my opinion, act as a limit or control on the best consideration that could be reasonably obtained for works which potentially have a higher value, having regard to their prospective use or otherwise.

**(26) “Historically the amount charged was calculated by reference to the length of the moored boat. The PLA have in recent years suggested it would prefer to include breadth in the calculation process, so achieving a charging basis by reference to area. A charge based on “volume” i.e taking into account the number of storeys or usable living space is also an option for consideration. Does the PLA have any right to change the method of assessment basis for existing RWLs? Is there any reason why the PLA should be restricted from adopting some different basis for**

**assessment for future RWLs, given that any such future licensee will know the position and will be able to negotiate and decide accordingly?”**

55 Plainly it is not open to the PLA to change the basis of consideration under a licence which has been granted otherwise than in accordance with the particular provisions for review that have been agreed or determined as part of that licence. In respect of new licences or unrestricted reviews any assessment through arbitration would be required to have regard to all the circumstances as they exist at the time and what would be the best consideration which can then reasonably be obtained. The basis for assessing that consideration would take into account the current potential of the works to be licensed having regard to whatever the arbitrator would consider is the relevant measure of that potential, including length, breadth or volume. In my opinion it would not generally be open to the arbitrator to exclude from his assessment any basis for valuation which is in his view relevant to assessing what is the best consideration reasonably obtainable. As a result the arbitrator would not be restricted from adopting a different basis for the assessment of that consideration from the basis used when the licence was first granted. That could include a change from an assessment based on length to one that included area or volume, so long as in the arbitrator’s view it provides an appropriate basis for determining the best consideration reasonably obtainable.

(27) **“When considering the fee, should the PLA take account of the fact it has to grant a licence to the applicant to the exclusion of all others? (See sections 66 and 69 of the 1968 Act)”.**

56 The relevant question to be asked is what is the best consideration reasonably to be obtained for the licence to be granted for the works. While it is of the essence of the licence that the right granted is personal and effectively for the exclusive right to construct, place or maintain the works in the specified part of the river, I am doubtful whether the level of consideration would be directly influenced by the fact that the

works are to be the subject of a personal licence to the particular applicant or proposed licensee.

**(28) “Should reference to “all the circumstances” include consideration of a licensee’s personal circumstances”?**

57 In my opinion, personal circumstances would generally not be relevant to what is reasonably obtainable as the best consideration.

**“Works” – Section 2(1) of the 1968 Act**

**(29) “Does the definition of “works” extend beyond such things as piles and pontoons, to include, for example, ropes, power cables and removable gang planks? If a boat is permanent or regularly moored by a rope and there are no piles, etc can there be anything that requires an RWL?”**

58 I have set out the definition of “works” and the related provisions in the Annex. While every case will turn on its own particular facts and circumstances, I consider that the following points would generally be relevant as guidance:

- a. works would normally require a degree of permanence in being constructed or placed in, under or over the Thames;
- b. hence it would generally exclude a vessel or other mobile object;
- c. it need not be constructed on site; it can be placed in the river or could be attached so as to be partially or intermittently buoyant (i.e. a buoy or pontoon permanently attached to the riverbed or piles would rise and fall with the tide but would in my opinion be capable on a purposive construction of forming part of the works for these purposes);

- d. a houseboat would not generally constitute “works” unless it loses its mobile character and takes on the character of a permanent fixture or work as described above; and
- e. a mooring generally would comprise works including the floating element on the basis set out above.

59 Ropes, power cables and removable gang planks which are part of the house boat and would be connected or disconnected as and when required for mooring would not form part of the works for this purpose. On the other hand a rope which was permanently attached to a pontoon to provide part of that facility for mooring could constitute part of the works. The same would apply to a power cable or to a gang plank where it is fixed to the pontoon or jetty and can be slid out or adjusted to connect to a boat mooring alongside the pontoon or jetty.

### **Comparables**

**(30) “Is the PLA entitled to look at such matters as local land rental values for the purpose of assessing the proper fees to charge under an RWL? What other comparables might be permissible?”**

60 In my opinion, local land rentals could potentially be relevant as part of the market context. However, I would anticipate that the prime comparators would be licence fees for houseboat moorings in the locality. Other evidence in the market would include any settlements in the open market, relevant houseboat or other mooring tariffs and potentially the tone (i.e. level or trend) of settlements under section 67 of the Act (but subject to what is said in answer to question 31 below).

**(31) “Should the PLA be restricted from placing undue reliance on what might be called “self serving comparables”? These can be explained as comparables derived from fee negotiations between the PLA and other licensees.”**

61 In my opinion, any weight to be attached to comparators based on negotiations or settlements under section 67 of the Act would have to have regard to their particular context and the relationship to what otherwise would be reasonably obtainable insofar as any weight is to be attached to them. The level of settlement agreed might be influenced by the threat of arbitration costs if settlement is not achieved.

**(32) “Can the PLA apply comparisons of the fees charged by other agencies? If so, is it entitled, given the provisions of section 124 of the 1968 Act, to take account of the impact on navigation fees which it could not otherwise charge?”**

62 As I have advised above, vessels generally within the river will require to be licensed under Part VII of the 1968 Act<sup>17</sup>. That will be part of the context within which the best consideration reasonably obtainable is to be assessed on arbitration, but Part VII licence fees would generally not be directly relevant to determination of the consideration for a RWL.

63 As to charges by other agencies, examples indicated in conference included charges made for houseboats on canals by the British Waterways Boards and in the upper reaches of the Thames by the Environment Agency. Insofar as they are in respect of moorings provided for houseboats, they would have potential evidential value, but would necessarily be subject to adjustment, having regard to locational and other relevant factors. Those factors could include the particular relationship in the fee charging regime that applied and whether licence fees are also charged for the use of

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<sup>17</sup> 1968 s 124(2)(d) would generally exclude houseboats where they are used primarily as a place of habitation.

the house boat on the water and whether that affected the consideration paid for the mooring as such.

## **Conclusion**

64 In conclusion, therefore, my specific advice on the questions set out in my Instructions is set out above.

**ROBIN PURCHAS Q.C  
Francis Taylor Buildings  
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7<sup>th</sup> July 2011**

## **Annex**

### **The 1968 Act**

1. The Port of London Authority (“the PLA”) has powers as port authority and river conservator for the River Thames under the 1968 Act as well as having extensive ownership of the riverbed. By Section 15 of the 1968 Act

*“The powers, authorities, rights and privileges which were vested in the conservators of the River Thames by section 52 ... of the Thames Conservancy Act 1857 and which were immediately before the commencement of this Act vested in the port authority shall continue to be so vested and shall, so far as they are not inconsistent with the provisions of this Act, be exercisable by the port authority in the same manner as they were exercisable and subject to any restrictions to which they were subject immediately before the commencement of this Act.”*

2. The powers include making port charges under Part IV of the Act and the licensing of vessels under Part VII of the Act. Part V provides for conservancy powers in respect of the Thames, which provide a range of operational powers and duties, including the control of works under Sections 66-75.
3. By section 70 of the Act:

*“(l) No person shall carry out, construct, place, alter, renew, maintain or retain works unless he is licensed so to do by a subsisting works licence and except upon the terms and conditions, if any, upon which the licence is granted and in accordance with the plans, sections and particulars approved in pursuance of Section 66 ... of this Act.”*
4. The section goes on to create a criminal offence contravening the provisions of the section and to provide powers of abatement.
5. “Works” as defined by section 2(1)

*“Where used in relation to the licensing of works by the port authority means works of any nature whatever in, under or over the Thames or which*

*involve cutting its banks other than those referred to in section 73 ... of this Act and “work” shall be construed accordingly.”*

6. The Thames is defined by the same sub-section as

*“So much of the River Thames, the Thames Estuary, rivers, streams, creeks, water courses and the sea as is within the limits.”*

7. The limits are also defined in the same sub-section as the limits described in paragraph 2 of Schedule 1 to the Act. Paragraph 2 of Schedule 1 defines the limits as commencing

*“At the landward limit as defined and extending down the sides of the Thames at mean high water level to the seaward limit to include all islands, rivers, streams, creeks, water, water courses, channels, harbours, docks and places with certain specified exceptions.”*

8. By Section 66(4):

*“For the avoidance of doubt it is hereby declared that works above mean high water level which do not*

- a. constitute or form part of an embankment;*
- b. project over the Thames; or*
- c. involve cutting its banks*

*are not subject to the provisions of this Act relating to works licences.”*

9. In conference I was asked to consider the meaning of “cutting” the banks of the Thames for this purpose. In my opinion, as I then advised, it means any form of physical interference with the banks. I note that works for this purpose is defined as excluding cutting the river banks other than those referred to in section 73 of the Act. That section enables the PLA to grant a licence “... to cleanse, scour, cut, deepen, widen, dredge or take up or remove material from the bed and banks of the Thames”. That seems to me consistent with a broad approach to the construction of the expression “cutting” so as to include in its scope any form of physical interference, which would also seem to me to be principled and consistent with the objective of the provision to

provide physical protection for the river and its banks. Subject to that, however, it would remain a matter of fact and degree in each case whether the works in question involve cutting in the sense of physically interfering with the surface of the banks at that point.

- 10 I have referred to the definition of “works” in section 2(1) above. The locational definition for the works is described with reasonable precision and subject to that works will include “... works of any nature whatever in, under or over the Thames as defined.” There is no further direct explanation of what would constitute works for the purposes of the Act. However, section 66(2) provides:

*“Application for a works licence shall be made in writing to the Port Authority and shall be accompanied by plans, sections and full particulars of the works to which the application relates, and in granting any such licence the Port Authority may require modifications in the plans, sections and particulars so submitted.”*

The application requirements would appear to contemplate that works for this purpose would comprise physical works of some description that could be defined by plans and sections as required.

- 11 The expression “works” is used elsewhere within Part V of the Act, including the following:
- a. Section 62(1) provides that “the Port Authority may lay down, maintain and operate in and over the Thames such works and equipment as are required for or in connection with the exercise by them of any of their functions”. In that context it might be assumed that works at least include physical structures with an operational character but excluding equipment as such.

- b. Section 71 refers to “So much of any work constructed or placed in accordance with the licence granted under section 66 ...”, thus envisaging something which is capable of being either “constructed” or “placed” in, under or over the river within the context of that provision.
- c. A similar expression is used in section 76 in respect of works being placed or constructed on the bed of the Thames under the direction or licence of the Port Authority.
- d. Section 63(1) provides

*“That section 66 ... and section 70 ... of this Act shall not apply to a mooring chain placed on The Thames before the 29<sup>th</sup> September 1857 but the Port Authority remove any such mooring chain provided that unless it is broken, dangerous or useless they pay compensation to the owner for any loss or damage which he may sustain by the removal.”*

That envisages that a mooring chain would be capable of constituting works for the purpose of these provisions.

- 12 The context of the provision is also relevant in that it forms part of the powers for the protection of the Thames and its navigation and that accordingly a construction that would support and be consistent with that objective would be more likely to reflect the intention of the statutory provisions and be principled to that extent.
- 13 While every case will turn on its own particular facts and circumstances, I consider that the following points would generally be relevant as guidance:
  - a. works would generally require a degree of permanence in being constructed or placed in, under or over the Thames;
  - b. hence it would generally exclude a vessel or other mobile object;

- c. it need not be constructed on site; it can be placed in the river or could be attached so as to be partially or intermittently buoyant (i.e. a buoy or pontoon permanently attached to the riverbed or piles would rise and fall with the tide but would in my opinion be capable on a purposive construction of forming part of the works for these purposes);
  - d. a houseboat would not generally constitute “works” unless it loses its mobile character and takes on the character of a permanent fixture or work as described above; and
  - e. a mooring generally would comprise works including the floating element on the basis set out above.
- 14 If what is proposed would constitute works as described above, a licence would generally be required in accordance with section 66, which provides as follows:
- “(1)(a) *The Port Authority may for a consideration to be agreed or assessed in accordance with section 67 ... 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 sub section 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.”*

- 15 In summary therefore the section 66 licence:
- (a) Is to be for a consideration to be agreed or assessed in accordance with section 67;
  - (b) Is to be on such terms as the PLA thinks fit; and
  - (c) May include terms as to variation and revocation; as well as

(d) Terms as to reassessment of the consideration from time to time.

- 16 The nature of a licence under section 66 was considered by the House of Lords in *Tate & Lyle Industries Limited v. GLC* 1983 2 AC 509. Lord Templeman, with whom the rest of the Committee agreed on this point, considered the effect of the licence at pages 535A and following, concluding at page 535G:

*“But the jetty licences only granted authority for Tate & Lyle to erect and maintain the structures in the River Thames now known as the refined sugar jetty and the raw sugar jetty. For the purposes of erecting and maintaining the jetties Tate & Lyle are entitled by virtue of section 66(1)(b) to exercise such rights over the bed and water of the river as are necessary to ensure that the jetties are installed and kept in good repair. In my view section 66(1)(b) did not confer on Tate & Lyle any rights to the maintenance of any particular depth or water near or leading to the jetties.”*

- 17 On that basis he rejected the claim by Tate & Lyle that the licences implied a right to any particular depth of water for river access to allow use of the jetties for their intended purpose. While that case was concerned with commercial licences, it would appear high authority for the proposition that the licences are directly concerned with the construction or placing and maintenance of the works. However the consideration to be paid for the grant of the licence can properly reflect the use that can be made of the works.
- 18 As appears above, section 66 provides for two determination processes, first a decision whether a licence should be granted and, if so, its terms and, second, the determination of the consideration to be paid for the grant of the licence. By section 69 there is a right of appeal to the Secretary of State, in respect of a refusal of the licence and the terms subject to which it is granted.
- 19 As to the consideration, Section 67 provides:

*“(1) The consideration for a works licence shall be such ... as may be agreed between the Port Authority and the applicant or as shall, failing agreement, be assessed in accordance with sub-section (2) of this section by an arbitrator appointed on the application by either party after notice to the other by the President of the Royal Institution of Chartered Surveyors.*

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

*(3) The assessment of the consideration ... for a works licence should not be referred to an arbitrator under this section until the other terms of the licence or, in the case of variation, the other terms that are proposed to be varied have been determined.”*

20 On that basis, therefore, first the terms of the licence, including its period, renewal or any review of the consideration, must be determined. Then the consideration for the grant of the licence should be agreed if that is possible. Failing agreement, the question of consideration is referred to arbitration and the consideration is to be determined by the arbitrator in accordance with the provisions of sub-section 2 as set out above. In summary, those provisions require that the consideration is to be:

- a. the best consideration in money or money's worth which
- b. in the opinion of the arbitrator can reasonably be obtained, having regard to:
- c. all the circumstances of the case, including
- d. the value of any rights in, under or over land of the PLA deemed to be conferred by the licence but
- e. excluding any element of monopoly value attributable to the extent of the PLA's ownership of comparable land.

I should make clear that the requirements under section 67(2) for the best consideration that can reasonably be obtained apply where it has not been possible to reach agreement

and the consideration is required to be assessed through arbitration. It does not directly apply as the basis for agreement.