IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2004: 146

BETWEEN:

SEAN KELLY

Plaintiff

-and-

POINT PLEASANT DOCK CORPORATION LIMITED

Defendant

JUDGMENT

Date of trial: August 13-14, 2007
Date of Judgment: August 29, 2007

Mr. Kevin Taylor, Appleby, for the Plaintiff
Mr. Jeffrey Elkinson, Conyers Dill & Pearman, for the Defendant

Introductory

1. "*Everything must be like something, so what is this like?*", E.M. Forster once asked. This is a question which, at first blush, is difficult to answer in relation to the facts of the present case. The Plaintiff seeks damages of less than $500 for breach of contract and declaratory relief as the licensee of a berth owned by the Defendant adjacent to the premises of the Royal Bermuda Yacht Club ("RBYC"). In January, 2002, he alleges that the rear of his boat was damaged because it struck the rear of another vessel, the length of which exceeded that permitted by the Defendant's applicable berthing regulations and license conditions. The Defendant's failure to enforce these rules is said to have interfered with the Plaintiff's quiet enjoyment of his license rights because, on an ongoing basis, it is difficult to manoeuvre into his berth, particularly in a strong westerly wind.

2. The Defendant's case is that for various technical legal reasons, it cannot be held to be liable for the breaches of contract alleged. But, if the factual merits are to be taken into account, the Plaintiff's claim is grossly exaggerated, and his expectations that the precise letter of the berthing rules will be rigidly enforced in a club environment is unrealistic and, to use Mr. Elkinson's phrase, "*pernickety*". The damage he complains of was caused by his own negligence, and the suggestion that he has ongoing difficulty in berthing his boat, based on a "*one-off*" incident over five years ago, is simply not plausible.

3. The present claims were initially brought in the Magistrates' Court, and the Defendant unsuccessfully failed to strike-out the present application on *res judicata* grounds. Greaves J. dismissed the strike-out application on February 23, 2005 on the grounds that the summary proceedings had in substance merely been discontinued, even if it was formally dismissed. The Defendant appealed against this ruling to the Court of Appeal. The Court of Appeal on March 21, 2006 dismissed the appeal, concurring that as the Magistrates' Court was not competent to grant all of the relief sought by the Plaintiff, the dismissal without considering the merits did not bar the present claims: *Point Pleasant Dock Corporation Ltd.-v- Sean Kelly* [2006] Bda LR 40.

4. It is against this background that a Supreme Court claim filed on May 4, 2004 involving only two live witnesses and a damages claim for less than $500 came to be tried more than three years after the commencement of the action.

The pleadings

5. The Plaintiff's Statement of Claim makes a number of pleas which are not controversial. It is accepted that he lives on Hinson's Island and that the Defendant carries on business at RBYC. It is also not disputed that (a) in or about February 2000, the Plaintiff obtained a license for 15 years from August 1999 for the use of Berth EFE12 ("the Berth") for $17,690 ("the License"), and (b) that the licenses granted in respect of the marina, save for varying berth length and license fee provisions, are granted on identical terms. The express terms of the License are not in dispute.

6. The Plaintiff alleges that the following terms were implied in the License: "*(i) that the Defendant would not derogate from its grant to the Plaintiff; (ii) that the Defendant would exact and enforce such covenants as between the Defendant and those other licensees.*" Alternatively, it is alleged that the Plaintiff entered into the License on the basis that it formed part of a letting scheme and that the Defendant would enforce the restrictions common to all licensees. Paragraphs 10 to 13 (omitting the particulars) of the Statement of Claim provide as follows:

> "*10.In breach of the covenant or quiet enjoyment and/or derogation from its grant to the Plaintiff, the Defendant has permitted boats that are longer than the approved limits to moor in adjacent or nearby berths to the Plaintiff's Berth and despite acknowledging its obligation to do so, has failed to enforce the rule against the licensees of the said boats. The Plaintiff has experienced damage to his boat as a direct result of other boats in the marina, that are longer than approved limits, being improperly moored in adjacent or nearby berths, it being difficult or impossible for the Plaintiff to complete his turn into the Berth due to lack of space caused by longer boats protruding into the water.*
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> *11. In the alternative, the Defendant is in breach of contract and of its obligations under the "letting scheme" by failing to enforce the Rules against other licensees thereby ensuring the Plaintiff safe access to the Berth.*
>
> *12. In the further alternative, the Defendant is responsible for this damage because it was negligent in failing to enforce the Rules applicable to all licensees in the marina. Such Rules specifically prohibited this improper mooring.*
>
> *13. The Plaintiff has also been denied his rights to safely access his Berth as a result of the hazard of improper mooring of adjacent boats in the marina. The Plaintiff has exhausted all reasonable attempts to have the Defendant correct the problem*

> *despite the Defendant having acknowledged in writing on 14 May 2002 that it had not properly dealt with the situation and further having acknowledged in writing on 28 May 2002 that action was required of the adjacent boats in the marina to ensure that their boats did not exceed their respective berths.*"

7. The Defendant in its Defence denies (a) that the Plaintiff has suffered damage as a result of other boats being improperly moored, or has been prevented from safely accessing the Berth or being liable for any damage which has been suffered, (b) being negligent in failing to enforce the general rules, and (c) that the Plaintiff has any rights under the third party agreements. The Defence avers that any loss which the Plaintiff has suffered is attributable to his own negligence.

8. The Plaintiff claims $451 as damages for repairs done to his boat sustained when the stern of his boat collided with the tilted engine of the boat owned by Alex Anderson in a berth opposite to his own as he manoeuvred into the Berth in higher than normal wind. In respect of the continuing breach of his contractual rights, he seeks declaratory relief, which his counsel, Mr. Taylor, indicated was the main purpose of the present action.

The evidence

9. The Defendant's "General Rules and Reminders" most significantly provide as follows:

> "8. *All berths are of an assigned length. Please be advised that in all cases, the length of the finger pier is not equal to the length of the berth length. Boats may extend past the end of the finger pier, BUT NOT PAST THE BERTH LENGTH. All parts of the boat count towards the overall length, including bowsprits, stern platforms and tilted outboard engines. Please make sure that you are not exceeding your assignment.*"

10. Under Clause 3 (c) of the License, the Plaintiff covenanted to " *comply with all posted rules and regulations made by the Company and to perform and observe the provisions and stipulations set out in the Third Schedule hereto (the General Rules)*". Subject to compliance with the Licensee's obligations, the Company covenanted under clause 4 (b) that "*the Licensee shall be permitted to peaceably enjoy the berth during the term without any interruption from the Company…*" Paragraph 16 of the General Conditions (which under paragraph 24 may be unilaterally amended by the Company) provides in relevant part as follows:

> "*Vessels shall be berthed or moored by the Licensee in such a manner and position as the Company may reasonably require…No part of any boat or equipment shall overhang any dock or extend beyond the end of any dock.*"

11. Paragraph 6(2) of the License provides in relevant part as follows:

> "*The Licensee further indemnifies and shall keep indemnified the Company its servants or agents against any and all demands claims actions proceedings liabilities costs and expenses in any way arising out of the use of any berthing space or any handling of the vessel in connection therewith save for any proven negligent act or omission on the part of the Company and its servants and agents.*"

12. A plan of the marina was contained in an Addendum to the Second Schedule of the License. This shows that the marina contains berths of varying lengths, and that the Plaintiff's berth is entered from the waterway at the far eastern end of the marina. The Berth would clearly be approached by entering the marina through the north-western corner, travelling south, turning left and then travelling eastward, and then turning left again and travelling in a northerly direction. According to the design set out on the plan, the breadth of the waterway is 34 feet

13. On January 22, 2002, the Plaintiff sent an email to the Defendant stating as follows:

> *" Hi Kevin,*
>
> *Got an issue I'd like you to look into please.*
> *The boats in the East berths #18 and #19 are sticking out further than the 24' alotted* [sic] *size for those berths and I have found during a stiff E/SE wind that I don't have enough swing room as a make a turn to get into my berth.*
>
> *My new boat has suffered damage from the skeg of #19 engine protruding into this manoevering* [sic] *area, and a couple of times my fender has taken the hit- it is pretty tight in there.*
>
> *In light of the PPDC instructions that the full length of boats and sprits/engines etc should not exceed a berth's alotted* [sic] *size it would be helpful if this could be rearranged.*
>
> *Thanks…*"

14. A chasing email was sent on February 14, 2002, complaining that the boat in berth #18 was "*tied up this morning in such a way as to be protruding 3-4 feet further into the waterway than if it had been tied up properly!!*" In a May 14, 2002 email, the Plaintiff complained that he would have to resort to legal action if the Defendant would not enforce the applicable rules. That same day Kevin Blee responded as follows:

> *"Sean, I am sorry that this has not been properly dealt with. I passed this to PPDC for action, and obviously nothing has been done. I will once again pass on your complaints to the relevant Committee members and hope they take appropriate action.*"

15. The Defendant's Board met on May 20, 2002, and resolved to send a letter to Mr. Alex Cooper requesting him to leave his boat engine down and noting that Alec Anderson had complained that someone had put his engine down. It was common ground that the relevant berths were #18 and #19, respectively. The Board, according to its Minutes, agreed that letters should be sent to all berth holders whose boats were too long "*requesting that they conform to the terms of the licenses.*" On or about May 22, 2002, a letter was sent to both berth holders by Andrew Cox, who orally confirmed that the same terms contained in the letter to Alex Cooper were set out in the other letter. In both cases, a request was made that engines be "*trimmed down while berthed.*" The boats in question were named "*Aloma Light*" and "*Boondoggle*", respectively. By email dated May 28, 2002, Andrew Cox confirmed that he had written to Alex Cooper and spoken to "*the owner of the boat 'Boondoggle'*". However, the Plaintiff emailed him again on September 25, 2002 complaining that "*Boondoggle is still in breach of the berth rules.*" By email dated October 22, 2002, the Plaintiff complained that not only was the position unchanged, but other boats were offending.

16. The Agenda for a November 26, 2002 Meeting of the Defendant refers to the introduction of a new Dock Manager, Alison MacIntyre, but does not explicitly indicate that the Plaintiff's concerns were further discussed, although the "General Rules and Reminders" are attached to the version of the Agenda produced in evidence.

17. The Plaintiff in his oral evidence testified that around five boats, including those in berths 18 and 19, berthed opposite the Berth with engines up exceeded the 24'

berth limit[1]. These measurements he had carried out on the opening morning of the trial. Under cross-examination the Plaintiff agreed that not all of these boats were hazards to his navigating in the area in question. He also agreed that he did the repairs for the January, 2002 damage he complained of in September 2002, when he took his boat out of the water for other repairs as well. He did not recall requesting the supplier of certain materials to airfreight them to Bermuda six months prior to the repairs. He agreed that no collision incidents had occurred since January 2002. The Plaintiff denied that any difficulties of navigation were due to his poor seamanship and insisted that he had decades of experience and had taught people how to use boats at the Yacht Club over the years. He further denied that the present action was motivated by a falling out with Mr. Cooper. He also insisted, when it was suggested that there was ample space for him to safely berth his vessel, even if minor intrusions occurred, that the photographic evidence did not show how difficult it was to navigate in the available space.

18. Jennifer Kelly, the Plaintiff's wife, provided a witness statement which was taken as read. She confirms the truth of Paragraph 8 of the Plaintiff's Second Affidavit in which he describes a meeting with Mr. Cox and Mr. Justin Williams about his complaints. Mrs. Kelly deposes as follows:

> *"3. I can confirm…that both Mr. Cox and Mr. Williams made assurances that the problem with the offending boat owners would be rectified following Sean's explanation of the way in which several vessels were interfering with the navigation of the waterway. As a regular user of the Marina, I too find the waterway difficult to navigate due to the way in which some vessels are in breach of the Rules.*"

19. Andrew Cox, Commodore of RBYC, in his Witness Statement confirmed that "*licenses for use of the berths all follow the same wording and the same format. This is to ensure consistency*"(paragraph 3). He agreed that with engines up, both vessels in berths #18 and 19 were "*slightly over 24' "*(paragraph 7). Nevertheless he stated that it was difficult to understand how the Plaintiff could have struck Mr. Anderson's boat[2]. In paragraphs 9-12 of his Witness Statement, Mr. Cox deposed as follows:

> *"9. The Club and the Company do sometimes have difficulty in ensuring members always comply with the rules. We are a club, not a police state. Members are supposed to cooperate and help each other. I understand Mr Kelly's claim is that the Company or the Club should have forced Mr Cooper and Mr Anderson to remove his boat or forced him to buy a smaller one. It is of course extremely difficult for a membership club, with limited management resources, to manage the behaviour of its members or to take such drastic, some would say draconian, measures.*
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> *10. We did try to sort out the problem. We raised Mr Kelly's concerns with both Mr Cooper and Mr Anderson and we wrote to them both in May and August 2002 respectively asking that they keep their engines trimmed down. I attach these letters to this statement. We have also subsequently tried to arrange for Mr Kelly to have a different berth. I believe the Club and the Company did all it could reasonably have done. Members who have difficulties with other members are expected to sort things out between themselves.*

[1] Mr. Elkinson complained that these matters were extraneous to the Witness Statement. In my judgment a witness in a case such as the present ought to be permitted to testify, in effect, that the matters of which he complains are continuing concerns which have not abated.
[2] Under cross-examination, he corrected a mistaken reference in his Witness Statement to Mr. Cooper's boat.

> *11. I cannot see how the Company can oversee the behaviour of its members or be responsible for their actions. If Mr Kelly had asked me in 1999 whether, as part of his license, the Company had agreed to strictly enforce its rules against members – I would of course have said 'no'. This is not the function of the Company or the Club.*
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> *12. I also point out that Mr Kelly agreed as part of the license that the Company would not be liable for any loss to his boat, unless the Company was negligent. Clause 6(1) is quite clear. Mr Kelly also agreed to indemnify the Club fully in relation to all costs and expenses. Mr Kelly's actions in suing the Company have of course cost it money. Money, which should be spent on the membership as a whole."*

20. In his oral evidence, Mr. Cox confirmed that the waterway space was more than adequate for the Plaintiff's needs and that no other complaints had been received. Although some boats might be too long with engines up-and he did not have the time to verify the measurements taken by the Plaintiff on the first day of the trial, the Defendant's approach was to try and persuade all RBYC members to work together within the club environment.

21. Under cross-examination, Mr. Cox explained that Correia Construction installed the marina, and that the design was done by Technomarine. He agreed that rule 8 was important, but denied that it was more important than the Rules generally, despite the use of capitalized words. He confirmed that the unsigned minutes of the May 20, 2002 Board meeting were what they purported to be, and agreed that nothing was done in response to the Plaintiff's complaints between January and May 2002. He admitted attending a meeting with the Plaintiff at which he agreed that berths #18 and 19 were a problem, and sending an August 27, 2002 letter to Mr. Anderson in the same terms as the May letter to Mr. Cooper. He did not recall taking any further action after receiving the Plaintiff's October 22, 2002 email. He agreed that he had never told the Plaintiff that his complaints were unfounded or that the real problem was his poor seamanship. He further admitted that Mr. David Lines had complained about difficulties in reversing at the top end of the waterway because of a within-limits RBYC vessel opposite his berth. This vessel was moved within approximately 24 hours. Mr. Cox agreed that members were told to contact the new Dock Manager with berthing issues, but denied that she was inserted as a buffer between the Plaintiff and the Defendant. He stated that the Defendant did not consider the collision complained of to be serious: "*It was a one-off incident and we have to get people to work together.*" Mr. Cox agreed that general Condition 9 stated that a license would terminate when a breach occurred, but insisted that this could not sensibly be strictly enforced. Nevertheless, a proposal to relax the berth length restrictions had not been pursued because the existing regime was considered to be adequate.

22. Under re-examination, Mr. Cox admitted that although he may never have expressed offensive views about the Plaintiff's seamanship, such thoughts had crossed his mind.

Legal findings: effect of indemnity in clause 6(2) of License

23. Clause 6(2) of the License contains an indemnity which was implicitly relied upon in the Defence and explicitly relied upon in Andrew Cox's Witness Statement dated June 30, 2006. It purports to limit the Defendant's liability for claims in respect of the Plaintiff's use of the Berth to "*any proven negligent act or omission on the part of the Company and its servants and agents.*" There is no suggestion that such an "exclusion" clause is unenforceable by reason of statute or common law. Indeed, it does not in substance exclude liability, but affects the standard of care. The Defendant will not be strictly liable for any damage which a

licensee suffers while using their berth, but only where there has been a negligent breach of its contractual obligations on the Defendant's part.

24. It follows that an ordinary breach of contract will not suffice to render the Defendant liable in contract. '*Chitty on Contracts*', 29th edition, Volume 1, paragraph 1-126, states:

> "*Where a contract expressly limits a party's standard of care, it would seem that ordinary principles of construction apply, rather than construction contra proferentum which applies to exemption clauses proper, i.e those clauses which intend to restrict or exclude a party's liability.*"

25. The Plaintiff has essentially relied on a contractual claim, so the crucial factual question is whether he has proved that the Defendant has failed to exercise reasonable care in carrying out its contractual obligations under the License.

Legal findings: is there an express or implied obligation under the License for the Defendant to enforce the berthing rules as against third party licensees?

26. The Plaintiff's claim is fundamentally based on the legal proposition that the Defendant was contractually obliged to ensure that other licensees complied with their license obligations to such extent as may have been required to permit the Plaintiff to peaceably and/or safely enjoy his own berthing rights under the License. The Plaintiff firstly complained that failure to enforce its own rules and contractual rights as against third party licensees constituted a breach by the Defendant of its express quiet enjoyment covenant. This was secondly characterised as an implied obligation, applying traditional rules for the implication of contractual terms, either (a) not to derogate from the Company's grant or (b) not to breach the express peaceable enjoyment covenant. Alternatively, because the factual context was analogous to a letting scheme, there was an implied obligation to enforce the covenants of all licenses for their mutual benefit, which the Defendant was in breach of.

27. I accept Mr. Elkinson's submission that a "*term will not be implied if it would be inconsistent with the express wording of a contract*": '*Chitty on Contracts*', Volume 1, paragraph 13-009. It is also correct, based on the same authority, that the implied term contended for must be reasonable, although the "*touchstone is always necessity, and not merely reasonableness.*" Under clause 4(b) of the License, the Company covenants as follows:

> "*Subject to the terms and conditions hereof and the Licensee paying the license fees cam expenses and performing the obligations on the part of the licensee contained herein and the conditions forming part hereof the Licensee shall be permitted to peaceably enjoy the berth during the term without any interruption from the Company or any person rightfully claiming under or in trust from it.*"

28. This express provision defines the scope of the Defendant's obligations to the Plaintiff as regards peaceful enjoyment of the Berth, so no additional obligations can be implied into this express provision without conflicting with what the parties expressly agreed: *Chitty*, paragraph 13-009. Indeed, assuming the principles of construction applicable to deeds conveying an interest in land are applicable to licenses for the use of berths on the sea, as the Defendant's counsel seemed prepared for these purposes to concede, the exclusionary rule for the implication of terms is broad indeed:

> "*Then, it is said, even if it is not within the express covenant, there was an implied covenant for quiet enjoyment. I pass that by at once by saying that when in a deed you find an express covenant dealing with a particular matter as to the demised premises there is no room for an implied covenant covering the same ground or any part of it. That is very old law.*

> *An expression of doubt upon that would be a fatal thing to the whole law of covenants both express and implied.*"[3]

29. I find that the Plaintiff is only entitled to rely on a breach of the express quiet enjoyment provisions of the contract. In essence, the Plaintiff must prove either (a) that the Defendant's negligent acts and/or omissions interfered with his clause 3(c) rights, or that (b) the Defendant's negligent failure to enforce its own rules and contractual rights against third parties constituted a breach of an implied obligation to enforce such rights, whether as an incident of the general obligation not to derogate from its grant, or otherwise. I reject Mr. Elkinson's submission that the obligation not to derogate from one's grant applies solely in the context of real property-related contractual relations. I find to be highly persuasive the following dicta in the judgment of Keene LJ in *Fleet Mobile Tyres Ltd.-v-Stone* [2006] EWCA 1209:

> *"53. For my part, I bear in mind that we are here concerned with a commercial contract, albeit one which granted certain rights to the franchisee. The fact that it was a commercial agreement does not in itself mean that the principle of non-derogation from grant has no application. The principle may have evolved principally in the field of real property but it is one of wider application. As Nicholls LJ said in the Johnston case (ante), it is*
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> > *'not based on some ancient technicality of real property. As Younger LJ observed in Harmer v Jumbil (Nigeria) Tin Areas Ltd [1921] Ch 200 at pp 225, it is a principle which merely embodies in a legal maxim a rule of common honesty. It was imposed in the interest of fair dealing.'*
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> *Indeed, it is a principle which has been applied in the case of the sale of a car, where the House of Lords has held that the purchaser obtained a right to repair which prevented the manufacturer (not the vendor) from enforcing its copyright in the design of exhausts, because that would detract from the car owner's right: British Leyland Motor Corporation Ltd v. Armstrong Patents Co. Ltd [1986] AC 577. It seems to reflect, therefore, a broad principle of fair dealing, to use Younger LJ's words.*
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> *54. Nonetheless, the task in the present case is to construe a contract in writing which contains detailed provisions as to the rights of the parties, and it seems to me that the proper approach is that which was described by Moore-Bick J when dealing with licence agreements in respect of petrol stations in the case of Esso Petroleum Company Limited v. Addison [2003] EWHC 1730 (Comm):*
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> > *'even accepting that the principle of derogation from grant is, as Lord Denning suggested, one of general application, the nature and scope of the licensee's obligation is a matter to be determined by reference to the contract as a whole having due regard to its commercial context. Accordingly, I do not think that the doctrine has any direct application to the present case, though it is no doubt a useful reminder that in the absence of clear words, parties to a contract are unlikely to have intended to make significant derogations through the operation of a subsidiary clause from the primary benefits intended to be conferred under it.'*
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> *55. As a matter of construction, it cannot be that this agreement gave to the claimant an unfettered power to instruct a franchisee to change the livery on vehicles to whatever the claimant chose, however detrimental to the business, nor does Mr Jones advance any such proposition. Clause 8.5.7 must therefore be seen as subject to a limitation such as that described by Moore-Bick J in the Esso case, namely that it would not be exercised so as to impede substantially the exercise of the franchisee's right*

[3] Lord Cozens-Hardy M.R. in *Malzy-v-Eicholz* [1916] 2 K.B. 308 at 313-314.

> *'to operate and promote the Business under the Trade Name and the Trade Marks.' (clause 7.1).*"

30. Mr. Taylor for the Plaintiff referred to two legal concepts, connected with leases of land, as potential bases for the implied term he contended for. This was a novel argument not supported by any direct authority[4]. In a scheme of development where there is a clear intention to impose restrictive covenants for the mutual benefit of all owners of a subdivided estate, such covenants (despite an absence of privity of contract) can be enforced by the various owners against each other: '*Woodfall's Law Of Landlord and Tenant*', Volume 1 (Sweet and Maxwell/Stevens and Sons: London, 2007), paragraphs 11.071-11.072. Similar principles apply to a letting scheme, but an action against a landlord will only lie in favour of one tenant in respect of breaches of covenant by third party tenants "*where there is conduct on the part of the landlord amounting to an authorisation of the breach.*"[5] What amounts to authorisation where a landlord fails to enforce quiet enjoyment covenants appears to be far narrower than other covenants, the breach of which entitles the landlord to terminate the tenancy concerned. This view is supported by the authority cited on the question of when a landlord may be liable to tenant A for failing to enforce a breach of restrictive covenants by tenant B, in the 2007 edition of '*Woodfall's Landlord and Tenant*'.

31. In *Jaeger-v-Mansions Consolidated Ltd.*[1900-1903] All ER 533, Buckley J. dismissed a strike-out action brought by a landlord being sued by a tenant for failing to prevent another tenant from disturbing his enjoyment of the demised premises, in part on the following grounds:

> "*No doubt that is an authority for the proposition that - but for what I am going to mention - the plaintiff cannot sue these defendants unless they have authorised or done some act to enable the offending tenants to do the acts complained of. But it seems to me that there are two grounds upon which the plaintiff may succeed under this head. In the first place, as I said before, the court at the trial may come to the conclusion that the defendants' acts, by receipt of rent and so on, infer or lead to the inference that they are authorising the offences committed, in which case the action could be maintained on that ground. Then there is another ground upon which, as it seems to me, the plaintiff might succeed. There being here a general scheme under which the covenant by each tenant enures for the benefit of all, the plaintiff is in a position to say that the acts complained of amounted to a breach of the covenant not to use the flats for immoral purposes, and gave rise to a right in the defendants to re-enter for the breach, granted that he could not call upon the defendants at their own expense to bring an action to assert that right - in other words, to bring an action for eviction. At the same time it is true that each time the defendants accept the rent, as they have done here, they waive the breach which upon a general scheme gives one tenant as against another tenant a right to say that there must be a re-entry under the agreement between him and his landlords. Each acceptance of rent is an act which is an affirmance or waiver of a breach for which under the general scheme a remedy is by a circuitous course provided for the other lessees. It seems to me that it is possible that an injunction might be granted to restrain the defendants from so receiving rent as to affirm and waive a breach which gave rights to the other lessees.*"[6]

32. The Court of Appeal unanimously affirmed the first instance decision that the Statement of Claim disclosed a reasonable cause of action. It is true that the Plaintiff in this case conceded that to hold the landlord liable for the other tenants' use of their premises for immoral purposes, the landlord had to be shown to have been virtually a party to the operation of the brothels in question. But the

[4] Until shortly before the trial of this matter, Mr. Michael Fahy appeared as counsel, and was seemingly the original author of this argument.
[5] Woodfall, paragraph 11.072.
[6] At 537I-538C.

> "*In Hudson v Cripps (6) a lady was the owner of a flat in a large building the scheme of which was that it should be let out in residential flats. The lady claimed against the lessor an injunction because in such a scheme as that he contemplated turning a considerable portion of the premises into a club. There was no express covenant by him that he would not turn it into a club, but the inference was drawn that it was part of the scheme that all the premises should be used for residential flats and nothing else. The lady brought an action to restrain the lessor from using the rest of the premises as a club, and NORTH, J says this ([1896] 1 Ch at p 268):*
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> > *'But I think the plaintiff is entitled to relief to a limited extent in this case by reason of an obligation arising out of the signed agreement between the parties. The agreement shows on its face that it was made with respect to a certain flat forming part of a large building all used for this particular purpose, subject, however, to an exception which I will mention presently. No one can read those provisions without seeing that there was a scheme for the general management of this building composed of several flats, in such a way as to be suitable to the convenience of all the persons who should be tenants of the respective flats. It would be idle to suppose that these requirements were made except for the purpose of the convenience of all the tenants; and where the landlord enters into such an arrangement with each tenant, it is obviously intended to be, and is as a matter of fact, for the benefit of all the tenants.'*
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> *Having arrived at that conclusion with respect to the scheme itself, he proceeds to restrain the landlord from acting in a manner incompatible with that scheme by using a part of the premises for purposes other than those comprised in the scheme. That is clear authority that the landlord under such circumstances is liable. However you frame it, he is clearly liable to the same extent as he would be if he had directly covenanted not to do the thing which he is here doing and can be restrained by injunction from continuing to do.*"[7]

33. These principles, enunciated over 100 years ago, were affirmed by the English Court of Appeal only ten years ago in *Chartered Trust plc-v-Davies* [1997] 2 EGLR 83. Firstly, Henry LJ's judgment is instructive in demonstrating that the traditional view that positive participation by the landlord was required to support a breach of quiet enjoyment or similar covenant, on which the Defendant relied, has been rejected in the context of a letting scheme:

> "*An illustration of a case where the landlords were obliged to take positive action is seen in another decision of this court (Lord Scarman, Ormerod and Eveleigh LJJ) in Hilton v James Smith & Sons (Norwood) Ltd (supra). There, a row of shops was owned and leased out by the defendant landlord. The plaintiff, an antique dealer, took one of these. The shops were served by a private way at the back, on which all tenants had a right of way and a parking place. However, other tenants so obstructed that right of way with their own vehicles that the plaintiff was unable to use either his parking place or that access when it came to the delivery and unloading of furniture. Ormerod LJ said, at p 45H:*
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> > *'What in ordinary human terms the plaintiffs are asking the court to do is to require the defendant landlords to enforce the covenants which they themselves have taken from all the tenants in this row of shops, so that the roadway is available for use by all of them."*

[7] At 540D-H.

> *That argument was met by the plaintiff's "highly technical" response based on:*
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> > *'the old common law proposition that the grantor of a right-of-way owes no duty to the grantee of the right of way to preserve the way open, to repair the way or to do anything other than allow him to pass and repass over it in accordance with the right of way which has been granted . . . In this case the plaintiffs, Mr Prior concedes, would have a clear cause of action if the defendants had themselves obstructed the right-of-way, but he argues that the fact that the tenants, and their licensees and visitors, and friends, leave their cars in this private road, so obstructing it, is something for which the defendants themselves are not liable.'*
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> *The proposition is startling in these days because it seems, if it is right, that it is possible to grant a right of way, to grant a tenancy of a specific area that is designated as a parking space, and then do nothing to enable the tenant to get to it, no matter how greatly the access is obstructed and obstructed by people who, in the last analysis, are subject to the control of these landlord defendants.*
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> *There are echoes there of the old, now discredited, view that a landlord's acts of omission are not capable of founding a breach of the covenant for quiet enjoyment, or a derogation from grant. Thus, though there is no indication that Malzy was referred to, old authorities to similar effect were. The court held, at p 45J, that there would come a time:*
>
> > *'when an occupier of land, who is well aware that his tenants . . . are behaving in such a way as to obstruct a private road and thus interfere with the rights-of-way that he has granted, or to interfere with other rights which he has granted to other tenants, when the occupier of the roadway comes under a duty to act in the matter.'…"*[8]

34. Henry LJ (with whom Staughton LJ agreed) then proceeded to articulate the principles governing when a landlord could be required to act by a tenant in a development context:

> *"I accept that in order to succeed (whether on derogation from grant or quiet enjoyment or nuisance) on the basis of a landlord's failure to act, the tenant must show that the landlord has a duty to act. So Hilton's case decided, and clearly rightly. If a landlord was never required to take action to protect what he had granted to his tenant, he could render valueless the protection of his tenant's business seemingly built-in to the letting scheme he was marketing. That would offend the principle of fair dealing. There must come a point where the landlord becomes legally obliged to take action to protect that which he has granted to his tenant: subject perhaps to the landlord's ability to take the necessary action -- see the analogous situation in nuisance: Goldman v Hargrave [1967] 1 AC 645, at pp 663A-664C.*
>
> *Where a landlord is granting leases in his shopping mall, over which he has maintained control, and charged a service charge therefor, it is simply no answer to say that a tenant's sole protection is his own ability and willingness to bring his individual action. Litigation is too expensive, too uncertain and offers no proper protection against, say, trespassing and threatening members of the public. The duty to act should lie with the landlord.*
>
> *Here it is plain, as the pawnbroker's lease makes clear, that the landlords must have consented to the sign placed as it was, dominating the entrance to the arcade. Though the pawnbroker was not permitted to obstruct his windows without the landlords' consent, I do not think that that consent can safely be inferred: it seems to me just as likely that the pawnbroker simply did it. But neither of those points are central. What is clear is that the landlords could*

[8] Transcript, pages 8-9.

> *have acted to stop the pawnbroker's clientele queuing in the access and, if necessary, could have cleared the tables and chairs obstructing that access. Then the back shops might have had a chance. This could have been done either directly under the lease, enforcing the covenant against causing a nuisance, or by making rules ensuring that the passageway was kept clear. This might have involved the pawnbroker rearranging the interior of her premises, but that was her problem. Instead, the landlords prevaricated and did nothing. They could have acted effectively and they should have done so. Instead they chose to do nothing, and thereby made the premises materially less fit for the purpose for which they were let. In failing to act to stop the nuisance, in my judgment, the landlords continued the nuisance and derogated from their grant.*"

35. In a letting context, a landlord has been held obliged to act to restrain breaches of covenant by other tenants in circumstances where (a) he retains control of the premises, and charges a service charge for managing the same, (b) effective action could be taken because the third party tenants were in breach of their contractual obligations to the landlord, and (c) their failure to act made the claimant's premises "*materially less fit for the purpose for which they were let.*" The principal legal question which remains to consider is whether these letting scheme principles can be applied to the facts of the present case in circumstances where no authority was produced by the Plaintiff illustrating their application outside of the real property context.

36. In my judgment there is no magic about the fact that the development scheme and letting scheme principles have arisen in relation to the purchase or rental of real property. As stated in Woodfall at paragraph 11.-071: "*The essential is a finding of 'a clearly proved intention that the purchasers were to have rights inter se to enforce provisions of the common law.*" These principles are derived from a purely contractual analysis in similar factual situations, with no judicial pronouncements being made which would justify limiting such rules of construction to contracts dealing with real as opposed to personal property. The Defendant's submission that this argument should be rejected purely because there was no precedent for these principles being applied in the context of personal property must be rejected. The submission advanced was, in effect, that this Court should not do anything for the first time. As New Zealand's Justice E.W. Thomas, writing extra-judicially has observed, "*never doing anything for a first time becomes a recipe for injustice in the individual case and stagnancy in the law generally*": '*The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (Cambridge University Press: Cambridge 2005), page 140.

37. The Defendant's witness explained that in addition to the license fees paid by licensees of berths, a "*Common Area Maintenance*" fee is paid to the Defendant, as referenced in clause 3(b). The Defendant clearly owns and keeps control of the marina as a whole, and all relevant license terms are identical. Clause 1 of the License provides that the licensee must be a member of RBYC. On the face of the License, it is clear that the Plaintiff is required to abide by the Defendant's General Rules (which implicitly apply to all licensees), and that the General Conditions of Berthing in the Third Schedule are not obligations imposed on the Plaintiff alone. The power to unilaterally amend the General Conditions (paragraph 41) emphasises the responsibility assumed by the Defendant as owner of the marina for regulating how it is used by the various licensees. Attached to the License supplied to the Plaintiff (and presumably other licensees) was a plan of the marina as a whole. The General Rules and Reminders, incorporated into the contract by clause 3(c) of the License, are clearly rules applicable to all licensees. It is common ground that all licenses are issued in substantially identical terms.

38. The marina operates under what may aptly be described as a common licensing scheme. The licensing scheme's rules, which are incorporated into the various separate license agreements, are clearly intended to be for the common benefit of

all licensees. The observations of North J in *Hudson-v-Cripps*[1896] 1 Ch 265 at p 268[9] in my judgment apply with equal force to the licensed use of berths in a marina as it does to the letting of residential or commercial property :

> "*No one can read those provisions without seeing that there was a scheme for the general management of this building* [marina] *composed of several flats* [berths], *in such a way as to be suitable to the convenience of all the persons who should be tenants*[licensees] *of the respective flats*[berths]. *It would be idle to suppose that these requirements were made except for the purpose of the convenience of all the tenants[licensees]; and where the landlord* [Company] *enters into such an arrangement with each tenant*[licensee], *it is obviously intended to be, and is as a matter of fact, for the benefit of all the tenants* [licensees]."

39. For the above reasons, I find that the Defendant was subject to a contractual obligation under the License to exercise reasonable care to prevent other licensees from breaching their obligations in circumstances which either (a) made the Berth materially unfit for the purpose for which the Plaintiff acquired its use (implied duty not to derogate from its grant), (b) interfered with the Plaintiff's right to peaceably use the Berth (express obligation not to breach clause 3(c) of the License by act or omission) and/or (c) prevented the Plaintiff from being able to safely use the Berth. Whether these obligations were breached are matters of fact to which attention must now be given.

40. In my judgment it is not open to the Court to find that the Plaintiff has proved that the Defendant's negligence caused the January, 2002 collision resulting in damage to the rear of the Plaintiff's boat. No evidence was adduced to support the conclusion that, assuming the collision took place because '*Boondoggle*' was moored in breach of the applicable rules, the Defendant in or before January 2002 (a) knew or ought to have known that the breach of the rules constituted a hazard to the Plaintiff when berthing his own boat, and (b) failed to take reasonable steps to bring the hazardous situation to an end. There is no evidence that the Defendant actively or passively authorised the interference with the Plaintiff's right to peaceably use the Berth on or before the date of the collision. This aspect of his claim is dismissed. Nor can any findings be made that the January 2002 collision was caused by the Plaintiff's own negligence.

41. The Plaintiff's claim falls to be considered with respect to the Defendant's conduct after he complained about the collision and the fact that the way in which boats in berths #E18 and 19 were moored constituted a breach of rules which the Defendant was obliged to enforce.

Factual findings: has the Defendant negligently derogated from the grant made in the form of the License or authorised an interference with the Plaintiff's peaceful enjoyment rights under the License?

42. I accept the Plaintiff's evidence that when the wind is blowing strongly from the west and the boats in berths #18 and 19 are moored in such a way that their engines protrude beyond the limits of their respective berths, he or his wife will find it somewhat difficult to enter the Berth without any collision occurring than might otherwise be the case. There is no credible suggestion, however, that this same risk exists on a daily basis when winds are calm or not likely to blow the Plaintiff's craft towards the opposite berths in question. The Plaintiff's wife claims to be nervous all the time, but there is no suggestion that she is an experienced sailor or that she navigates the boat all the time. The License was granted to the Plaintiff, not his wife. Moreover, after one collision over 5 ½ years ago, no further collisions involving the Plaintiff or other licensees have occurred.

[9] This passage was quoted in the Court of Appeal case of *Jaegar*, which was referred to in argument at the present trial.

43. The Plaintiff has proved that the Defendant has failed to take reasonable steps to strictly enforce the covenants entered into by the other licensees. After receiving the complaint in January 2002, it took until May 2002 to write to Mr. Cooper and until August to write to Mr. Anderson. The Defendant by its conduct effectively admitted that the berthing rules were being infringed when the engines were raised out of the water, but were unwilling to follow-up the letters with more rigid enforcement action which they were clearly legally entitled to take. The Defendant's disposition reflected the judicially popular poetic phrase:

> *"Willing to wound, and yet afraid to strike,*
> *Just hint a fault and hesitate dislike."*[10]

44. This said, in the Plaintiff's favour, the facts which I find proved are a far cry away from a situation where the failure of the Defendant to take further enforcement action against those breaching the berthing length rules can be said to constitute a derogation from the grant made by way of the License, an authorisation of an interference with the Plaintiff's right to peaceably enjoy the use of his License berthing rights or an interference with the Plaintiff's ability to safely use the Berth. Occasional berthing difficulties, when adequate space exists for safe berthing most of the time, neither (a) made the Berth materially unfit for the purpose for which the Plaintiff acquired it under the License, nor (b) constituted an interference with the Plaintiff's right to peacefully use the Berth. An occasional irritation and/or inconvenience do not constitute an actionable breach of a quiet enjoyment covenant, even if the technical breach of the rules is an ongoing course of conduct, as it appears to be.

45. Based on the evidence of Mr. Cox, I am satisfied that the Defendant's failure to take further action after initially promising to deal with the Plaintiffs' grievances was not based on a bad faith decision to ignore a serious infringement of the Plaintiff's rights and the marina scheme. Mr. Cox's failure to bluntly explain why the Defendant was not taking the matter further was due more to his reluctance to cause the Plaintiff offence than a desire to collude in a serious breach of covenant on the part of the licensees in question. The Plaintiff might harbour suspicions of favouritism coming into play. Mr. Cox admitted that when a prominent member of the community, Mr. David Lines, complained about difficulties in reversing caused by a boat parked in a RBYC berth which was well within the permitted length, that boat was moved within 24 hours. It may well be that the licensees whom the Defendant was "*willing to wound, and yet afraid to strike*", both partners in the prominent law firm which represents the Defendant in the present action, have somewhat more "clout" in the corridors of power at RBYC than the Plaintiff does. Suspicions of bias and favouritism will inevitably arise when rules which are drafted in a strict way are enforced in a loose and flexible manner. But these suspicions are no substitute for credible evidence that the Defendant is negligently ignoring breaches of the marina scheme rules which are materially interfering with the Plaintiff's contractual rights. Moreover, the Plaintiff's own evidence about the extent to which the berthing rules are currently being departed from is inconsistent with any suggestion that one or two favoured club members are being permitted to depart from the rules which all right-thinking licensees believe ought to be strictly enforced.

46. The position would be different if the Plaintiff was complaining of the Defendant's failure to prevent unauthorized use of the Berth by third parties or a substantial obstruction of his right of access to and egress from the Berth by other licensees. But the Plaintiff's berth is in the middle of the waterway, affording him possibly 40 feet (as estimated by Mr. Cox and supported by both photographic evidence and the marina plan) within which to make his approach. The breadth of the waterway appears to be as much as 30 feet, even after the encroachment of no more than approximately two feet is taken into account. The Plaintiff's own

[10] Alexander Pope, '*Epistles and Satires of Horace Imitated, Prologue, Epistle to Dr. Arbuthnot*'. This couplet is perhaps most eminently judicially quoted by Lord Diplock in the *Abidin Daver* [1984] A.C. 398 at 411, a case which involved a collision at sea.

measurements on the first day of the trial suggest that the 34‘5” waterway width contemplated by the plan is routinely reduced in the crucial area by as little as 2 ½ feet. In a distinctly unromantic St. Valentine’s Day communication in 2002, the Plaintiff complained about an encroachment, due to the manner in which the offending boat was moored, of no more than “*3-4 feet*”.

47. Having regard to these factors combined with the apparent absence of complaints from other licensees and any repetition of the January 2002 collision, it is impossible to properly find that the Plaintiff’s contractual rights under the License are being compromised to any material extent by the Defendant’s failure to strictly enforce the Rules. It is, ultimately, a matter of judgment for the Defendant to determine how strictly the applicable berthing rules should be enforced. If the Plaintiff, having put the Defendant on notice of the breaches of the rules by other licensees, were to suffer further physical damage loss attributable to such breaches, the Defendant would perhaps have no valid defence. But the breaches of covenant complained of are simply not sufficiently serious to support the breach of contract claims advanced by the Plaintiff essentially based on non-financial loss.

48. And in my judgment it was implicit in the marina scheme which the Plaintiff bought into that the various licensees would exercise their respective rights reasonably, and waive comparatively trivial breaches of the rules, or indeed breaches of the rules which are trivial most of the time and only occasionally have any greater significance. In paying management fees, all licensees would obviously have expected that the Company’s management effort would be rationally focussed on matters of greater rather than lesser concern. The licensee of a marina berth, no less than the owner of a condominium development, enters into a bargain which subjects their individual contractual rights, to some extent at least, to the collective interests of all participants in the scheme. The managers will ordinarily only be compelled to act to punish misconduct which most reasonable members of the scheme consider unacceptable. They should not be compelled to punish actions which most view to be acceptable but a highly sensitive or “pernickety” minority take exception to, provided the management is not corruptly sanctioning obvious criminality or serious breaches of covenant which demonstrably interfere with the claimant’s rights in a significant manner. After all, it will be open to the licensees to seek to enforce each others covenants directly in any case where the manager is unwilling or unable to take action in this regard.

49. It is true that a point may come when the existing rules are so much honoured in the breach that consideration should be given to amending them. The Defendant is able to unilaterally change the berthing length rules contained in General Conditions and Reminders, paragraph 8. Mr. Cox suggested that the Board took the view that the existing rules were sufficiently flexible to meet the conditions out of which the Plaintiff’s complaint sprang. But the use of capital letters in paragraph 8 to state “*BUT NOT PAST THE BERTH LENGTH*”, combined with the fact that the Defendant did not initially dismiss the Plaintiff’s complaint out of hand, strongly indicates that (a) the Plaintiff’s complaints are not wholly trivial, (b) the Company initially took the view that strict compliance with paragraph 8 was desirable, and (c) only after it became clear that Messrs. Cooper and Anderson were not willing to comply with an initial letter request for compliance did the Company eventually determine that the gravity of the complaints was not sufficient to justify higher level punitive action against the offending licensees.

50. This change of position no doubt left the Plaintiff with an understandable sense of grievance, because the Defendant’s initial response gave credence to the two key premises underlying his present claims. Firstly, that he was entitled to insist upon strict compliance with the berthing rules, and secondly, that his contention that the infringements impermissibly interfered with his contractual rights was substantially meritorious.

51. It remains to consider whether the Plaintiff is entitled to any relief in light of the above findings.

Declaratory relief sought

52. Mr. Taylor, astutely appreciating the weakness of his client's damages claim, pointed out that the principal relief sought was with respect to future conduct. However, in light of the factual findings set out above, the claim for specific performance to compel the Defendant to remove any vessel which does not comply with its allocated berth length fails.

53. Two declarations are sought, the first of which seems not to be required because no dispute was ever clearly joined on the following proposition:

> "*The Plaintiff is entitled to the use of his assigned berth and to safe and unimpeded access to his assigned berth in accordance with the rights of access contained in his license with the Defendant.*"

54. The second declaration sought is not supported by the factual findings:

> "*The Plaintiff's rights of access have been infringed and the License breached by the Defendant in failing to enforce its rules to ensure that the Plaintiff has safe and unimpeded rights of access in that the Defendant has wrongfully permitted and allowed boats in other berths to exceed the assigned berth length for those berths.*"

55. The only contested legal points which have been resolved in the Plaintiff's favour would entitle him to a declaration in the following or similar terms:

> "*The common contractual rights and obligations under the berthing licenses granted by the Defendant in respect to its marina adjacent to RBYC are adopted for the common benefit of all licensees and are enforceable by such licensees against each other. Under the terms of the License between the Plaintiff and the Defendant, the Defendant is contractually obliged to enforce any breaches of the common berthing rules which would materially impair the Plaintiff's ability to obtain access to and egress from his assigned berth.*"

56. The uncertainty about the scope of the Defendant's obligations to enforce the berthing rules going forward flows from (a) its "*willing to wound, and yet afraid to strike*" response to the Plaintiff's initial complaint, and (b) the inconsistency between the apparently inflexible express terms of the berthing rules themselves, and the Defendant's current approach as to how they are to be interpreted in practice. The Defendant's modified view of the way in which the rules should be enforced was ultimately accepted by the Court as legally justified, in the particular context of the present action. Until the berthing rules are modified to make it explicit that the Company in its discretion may waive minor breaches not considered to materially threaten the rights of any other person, it will always be potentially unclear what the true legal position is.

57. In addition, the Plaintiff has succeeded (albeit in the context of a case in which no fellow licensee has participated) in establishing that he is entitled to enforce the covenants entered into by his fellow licensees, assuming they interfere with his legal rights to an actionable extent, both (a) against the Defendant and (b) against the third party licensees concerned. Some form of declaratory relief therefore appears to be justified, in the exercise of my discretion, having regard to the principles set out in *Supreme Court Practice 1999*, Volume 1, paragraph 15/16/1-2, upon which Mr. Taylor relied.

58. The rights and obligations of the parties in respect of future breaches of the berthing rules is not, in my judgment, hypothetical, merely because no actionable breaches have been proved in the present action. Technical breaches of the rules by other licensees have undoubtedly occurred; the breaches were simply not

sufficiently serious to make the Defendant's decision to take no further enforcement action actionable at the suit of the Plaintiff.

Conclusion

59. The Plaintiff's damages claim is dismissed, as is his claim for specific performance and for declaratory relief in a form inconsistent with the rejection of those claims.

60. The Plaintiff's claim for damages in respect of a minor collision which occurred in the middle of January 2002 fails principally because under the License the Plaintiff agreed to limit the Defendant's liability to negligent breaches of contract, and the Plaintiff has failed to prove that any such negligence occurred.

61. The Plaintiff's claim for specific performance of the License and related declaratory relief also failed because as a matter of law it was insufficient for the Plaintiff to prove that the berthing rules had not in certain cases been complied with or strictly enforced. The Plaintiff failed to demonstrate that the Defendant had failed to exercise reasonable care in declining to strictly enforce the berthing rules after the Plaintiff's initial complaints were made. In any event, the evidence accepted by this Court did not support a finding that the technical breaches of the berthing rules which were established either (a) made access to the Berth unsafe, or (b) substantially impaired his enjoyment of his rights under the License.

62. The Plaintiff is entitled to a narrower declaration, which in effect acknowledges that the marina operates under the equivalent of a letting or development scheme, under common rules for the benefit of all licensees. It is important for the parties to be aware that material breaches of the rules may be enforced by licensees against each other, the absence of privity of contract notwithstanding. Equally, as this point was disputed and this issue is obviously of more than merely hypothetical concern, it is desirable to formally establish that the Defendant is legally required to take enforcement action against licensees whose contractual breaches substantially impair the ability of fellow licensees to enjoy their contractual rights.

63. I will hear counsel as to costs.

Dated this 29th day of August 2007

_____
KAWALEY J.