Neutral Citation Number: [2013] EWHC 3084 (Ch)

Case No: HC11CO0165

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 14/10/2013

Before :

MR JUSTICE MANN

- -

Between :

The Port of London Authority	**Claimant**
- and -	
Tower Bridge Yacht & Boat Company Limited	**Defendant**

- -
- -

Mr Charles Harpum (instructed by **PLA**) for the **Claimant**
Mr David Holland QC (instructed by **Browne-Jacobson LLP**) for the **Defendant**

Hearing dates: 20th-24th May, 5th-7th June, 10th June 2013

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Judgment

Mr Justice Mann :

Introduction and geography

1. This case concerns the nature and extent of mooring rights on the Thames in an area known as Downings Roads. A short distance downstream from Tower Bridge, on the south bank, one finds St Saviour's dock, now a small inlet with a road at one end, the Thames at the other and lined by old buildings. A bridge crosses its mouth (designed, as it happens, by Mr Lacey, the man behind the defendant company). Immediately downstream of that entrance one finds a collection of substantial barges (currently 29 in number, but it can vary by one or two) which are lived on by a significant number of people (more than 100). They are moored a few yards offshore, but connected to the land by a pontoon or walkway coming from what is said to be a public passageway called Mill Stairs. Most of the barges are residential (houses on the water), but there are communal barges which provide shared facilities including semi-permanent "collar barges" to which the residential barges are directly or indirectly fixed, and one called the "Arts Ark", which holds a grand piano (apparently stored, wrapped up, in the open air, somewhat remarkably) and on which concerts and other events are also held. Some of the barges have substantial gardens on them - not just small plants, but some substantial shrubs and small trees. Another barge stores "black water" and one provides bicycle storage. The collar barges are owned by the defendant ("TBY"). The other barges are owned by individuals and they have licences from TBY which entitle them to moor at the moorings. As well as providing a site for moorings, TBY also provides facilities such as electricity, and arranges for waste removal. The barges now constitute a significant community of people living on the water in central London.

2. A large number of aspects of this dispute can only be understood by frequent reference to plans, both current and historic. The present physical arrangement can be best seen from the plan in Appendix 1. On that can be seen the various fixed barges and the pontoon/walkway arrangement. On the land side the pontoon leads from a passageway to "Mill Stairs". Those stairs were, until their removal, steps leading down to the river at a point at which ferrymen could be engaged to carry people across the Thames or to another destination along the Thames. There used to be a significant company of such watermen providing such services there. The steps down have long since disappeared, as has a stone walkway on the river bed which, at low tide, enabled customers to reach the boats. The pontoon now goes from what would have been the top of the stairs, accessed through a passageway (technically probably still a highway) through a building known as Reeds Wharf, owned by Mr Lacey. From there a visitor crosses a stretch of planking on to a permanently moored collar barge, then over another "bridge" of planking and on to one of several more collar barges. A collar barge is one which is permanently moored and to which other boats can, in turn, be moored. The arrangement in the current community is that there are some 8 collar (or otherwise permanent) barges permanently moored and the residential barges are each attached to those collar barges or moored to each other with the innermost barge being moored to the collar barges. The "Areas for berths" can be seen on Appendix 1; the actual arrangement of the residential barges can be seen on the photograph at Appendix 7.

3. The moorings of the collar barges (but not the residential barges) take the form of some form of fixing mechanism in the bed of the river (a "mooring root"), or in two cases to rings fixed to a wall on the land, to which heavy chains are attached. Those chains are then attached to the collar barges. It is moorings such as those which are the subject of this action. Mr Lacey, on behalf of the defendant company, claims to have the benefit of 25 such roots, though he currently uses only 10, and he claims that they are "ancient moorings", by which he means moorings which have been there since before 1857 (the significance of that date will become apparent). If he is right about that then he does not need a licence to have the moorings; there is a dispute as to his entitlement to replace them though. If and insofar as they date from a date after 1857 he claims to be entitled to them through estoppel or limitation. All but one of the roots are above the waterline at low water. At low water many of the barges rest on the bed of the river.

4. The claimant ("the PLA"), is the authority in whom the bed of the river is vested, and claims that the defendant company has no such entitlement. It says that the laying and maintenance of any such moorings requires a licence, which the defendant does not have. It accepts that any moorings which pre-date 1857 do not, as such, have to be licensed, but it disputes the factual assertion that the moorings pre-date 1857 and disputes the estoppel and limitation claims. There are about 23 to 25 roots which come into the historical picture, but at the trial the PLA confined its claim for a declaration to 10 roots on which work was actually done.

5. The case therefore primarily involves a determination of whether or not the defendant requires a licence. At the outset of the trial Mr Charles Harpum, who appeared for the PLA, made it clear that if it wins the PLA will not be requiring the removal of the barges. It will merely require a licence, through which it would be able, so far as necessary and appropriate, to control the moorings.

6. These proceedings take the form of a claim by the PLA to declaratory relief as to the nature of the rights, if any, of the defendant in relation to the moorings, which is said to require declarations as to the "true meaning and effect" of a key piece of legislation. There is also a claim for damages for trespass with an alternative claim for payment of all sums received by the defendant for authorising the mooring of vessels at the moorings. There was no material reference at the trial to the financial aspects of the claim, which will have to be dealt with later, so far as relevant, though by the same token there was no express abandonment of them. I shall not say anything about them in this judgment. The defendant counterclaims for a declaration that it is entitled to use all 23 moorings, a declaration that it is entitled to registered as proprietor of the moorings at HM Land Registry and that it is entitled to use the moorings as a right appurtenant to its title to an adjacent passageway called Mill Stairs. This last point no longer arises in the litigation.

7. The form of the pleadings is said to justify and require a further inquiry beyond that which turns on the existence or otherwise of these moorings in 1857, namely what the nature of the defendant's right to moor (if any) is. By the end of the trial the defendant was arguing for rights under a franchise, and rights under the Limitation Acts. These are points that I deal with relatively shortly at the end of this judgment.

8. I add one last introductory point. It is clear that what is now concerning the PLA in practical terms is not so much the actual presence, whereabouts and status of all the individual moorings. It is the overall use, and particularly the physical extent (footprint), of the moorings. That particular concern is, however, not directly in issue in these proceedings. It is the status of the moorings (which enables the extent) which is.

9. Mr Charles Harpum appeared for the PLA; Mr David Holland QC appeared for the defendant. Before the hearing started I had two views of the site of the dispute, one at low tide and one at high tide. Those views (and particularly the former) were of great assistance in understanding the surroundings and the case.

Some terminology, concepts and engineering

10. In order to understand some of the history and some of the evidence it will be useful to have the meaning of some important expressions and concepts established at this stage. The following points are drawn from the evidence of various witness who gave evidence before me.

(a) "Mooring root". As explained above, this is something that is placed in the bed of the river to which a mooring chain can be attached. Historically they might have been of wood or stone. Some of the wooden ones were very substantial because they had to be capable of holding large sea-going vessels. Some of them would be anchors - single fluke anchors, usually, because one would not want the upper fluke projecting from the river bed, particularly if boats grounded at low tide. In more modern times concrete has been used, as have engine blocks. In yet more modern times a screwed root would be deployed, but that requires more specialist equipment, and on the Thames such roots are only deployed by the PLA which has the specialist equipment. A mooring in the ground is called a "ground mooring" (appropriately enough).

(b) "Bridle chains" or "bridles". A boat may be moored directly to a chain emanating from a root, or it may be attached to another, perhaps lesser, chain, which is itself attached to a main mooring chain. These other chains are called "bridle chains".

(c) "Breasting chains". These are chains which are arranged so as to

prevent lateral, as opposed to fore and aft, movement.

(d) "Ebb chains" and "flood chains". These are expressions used in important historical documents. The experts agreed that they meant chains which were intended to restrain against the outgoing (ebb) and incoming (flood) tides respectively. They would therefore have to be placed upstream and downstream respectively of the boats to be restrained. They could (as I find) be single chains with a single root, or a chain with more than one root (in which case they would have to have bridle chains, or "risers") or a root with more than one chain.

(e) "Barge roads." These are a collection of barges held in one place and usually joined to form something said to look like a road. They might have a "road ashore" which would be a barge (or other boat) which joined the road and the shore, so that access could be gained to the various barges. The barges would come and go as their use required. They would often be attached to "collar barges" which would remain there as things to which the other barges could be moored.

11. The laying of a mooring root and chains in the foreshore (a site that is not permanently under water) is simple to describe but has some practical difficulties. One has at least to lay a sufficiently weighty object on or in the bed and connect some chains. Mr Beckett, a civil engineer with considerable experience in the area, says they should be dug in. Mr Levitt, a waterman with experience of these things, questioned that need, saying he had some that were not dug in. I find that the better course would be dig them in, though they might not be dug in in all cases. A barge owner with weighty barges to restrain would want the greater security of digging them in. One therefore has to access the foreshore with a weighty object and dig it in. Then one has chains to connect to it, and these are very weighty - they perform much of the restraining activity and could weigh tons. These exercises would have been all the more difficult without modern equipment. The point is that laying a mooring is not a trivial exercise. With modern equipment, involving a tug, pontoons and an excavator, Mr Beckett estimated the cost at in the region of £31,000, though that is probably the cost of the sort of proper exercise that would satisfy a modern civil engineer, and not everyone would incur that cost. Mr Levitt thought that this figure might be a bit light. I do not need to make findings about the likely cost; it is sufficient to note that this supports the non-trivial nature of the exercise.

12. By the same token, raising a mooring is not trivial either. If it has been there some time digging it out may be laborious, and the chains have to be dealt with even if they are not being physically removed from the site. As Mr Honey found, digging down to an established mooring just to try to find it is not easy, because water intrudes. A PLA memorandum of 24th January 1988 refers to photos taken of some of the mooring chains which existed on the site at the time, and observes:

> "It would appear that all the chains are all over the place and overground. It would require a salvage craft to find the main source of most ground fixings."

These are points that have to be borne in mind in considering the likelihood of

moorings being put in place or removed in any given period of time, an issue which arises in this case.

Further topography and related matters

13. Certain other geographical or topographical features, and related matters, should be understood at this point. The plan at Appendix 1 shows two adjoining properties - Reeds Wharf and Creeds Wharf. To the left of them (shown shaded) is China Wharf. By the 1970s they all formed typical run-down Thames riverside properties. Those are their current names. In 1972 they were purchased, as one lot (known then, as an entire plot, as Reeds Wharf) by Mr Lacey, Mr John Creed-Miles and Mr Andrew Walkden. Mr Walkden then left the consortium (as Mr Creed-Miles described it) leaving just the other two. The property was then partitioned, with Mr Creed-Miles taking what is now Creeds Wharf and Mr Lacey taking the rest. Mr Lacey then sold the part which became China Wharf, to Mr Andrew Wadsworth, retaining the part which is now Reeds Wharf. Each of the three properties was then developed or refurbished. Mr Creed-Miles built a modern house on his plot.

14. When Mr Creed-Miles discovered the circumstances in which Mr Lacey sold to Mr Wadsworth he took the view that he had been wrongly treated, and litigation resulted. The case ultimately settled but it left a lot of bad blood between the two men which has persisted to this day even though they have remained neighbours (Mr Lacey still occupies part of Reeds Wharf). This has doubtless contributed to Mr Creed-Miles's view of the barge development. It is partly right outside his window, and he obviously takes the view that it adversely affects his property and his view of the Thames, and it is probably all the worse in his eyes for being (as it is) the creation of Mr Lacey. He has carried his views into effect by drawing what he thinks are relevant adverse matters to the attention of the PLA, and by taking them into the planning arena. This is relevant because he was the PLA's principal factual witness in this case, and the only really relevant parts of his long witness statement were those in which he sought to set out the activities of Mr Lacey in respect of works to the moorings. I have to bear in mind his clear antipathy to Mr Lacey in assessing the weight of his evidence.

15. Mr Wadsworth, or rather a company in which he was involved, developed China Wharf. A customs barge (called The Harpy) was acquired and attached to China Wharf. Its position appears on the plan in Appendices 1 and 8 - it is the structure to the left of the pontoon leading from Mill Stairs. Mr Wadsworth's business partner, Mr Robert Ackland, gave some evidence of what works he saw being carried out from the Harpy in the mid-90s.

Witnesses

16. I heard the following witnesses of fact:

Mr Lacey. He prepared a long witness statement dealing with the modern history of the moorings and his involvement in them. He is an architect by profession and is clearly very keen on developing the Downings Road moorings. I do not think that he is a witness who was inclined to fabricate, but in relation to the important instructions he gave for works to be carried out to the moorings in 1997 I think he was probably not quite as meticulous as to the precise works as he would now like to give the impression that he was. I was also not impressed by some evidence that he gave which sought to give the impression that he had not had any financial gain from his company (the defendant) when it in fact turned out that he had in fact received a dividend and had had the benefit of loans from the company (he corrected the impression by putting in a further witness statement after he had left the witness box - the introduction of that statement was not opposed by Mr Harpum.) I consider that I have to consider with more care than I would have wished his precise evidence of what he has done to the moorings.

Mr Creed-Miles. I have already commented on his evidence and the likelihood that his antipathy to Mr Lacey presents the real danger that he will always put an adverse gloss on his evidence about the site. I therefore have to view with caution his account of what he thinks he saw Mr Lacey doing. I would add that his antipathy to the collection of the barges at Downings Roads was not his alone; others along the waterfront share his distaste.

Mr Ackland. Mr Ackland is also antipathetic to Mr Lacey. He gave evidence of what he saw Mr Lacey's contractors doing when he was on the Harpy, and he produced some photographs of the work. However, in his case I do not think that his antipathy of itself affected the quality of his evidence and I think that he was honest and straightforward in his account of what he believed he saw, without any glosses being superimposed.

17. I heard or received evidence from the following expert witnesses:

Mr Geoffrey Honey. He is a surveyor who was jointly instructed to carry out a survey of the present apparent moorings. He produced a report and plan and was not called to give oral evidence. The plan he produced is not reproducible in its complete form as a sensible Appendix to this judgment but I have reproduced as Appendix 2 part of it with two particular wall moorings ringed – their relevance will be apparent later. Mr Honey did not manage to survey the roots because of practical difficulties. In the end his plan charted the position of visible chains and an outline of the nearer barges, and a small number possible anchor points or terminals. It is not possible to use his work to ascertain the present position of all the roots, historic or otherwise.

Mr Richard Dean. He was called by the defendant to provide and interpret cartographical evidence about the history of the moorings and inferences to be drawn from maps. He had no formal qualifications in this field, having acquired a degree of expertise from having had to conduct such exercises in his normal job over the years. Nonetheless, I accept he had a degree of expertise which qualified him to give his evidence. He gave it in fair and moderate fashion.

Mr Jon Maynard. Mr Maynard is a land surveyor, called for the PLA, who considered various historic and other plans in order to relate them to each other and to various photographs that were in evidence. He was a careful and conscientious witness, albeit slightly inclined to be argumentative on factual matters which were not really matters for him.

Mr Neil Burton. He was called by the defendant to give evidence of the history of the part of the Thames in which Downings Roads are situated. His evidence was based on his historical knowledge and on documents which he produced and refers to. His evidence was not really contentious or challenged. In fact, much of it contained inferences from documents which the court itself would have been entitled to draw without a historical expert, but nonetheless his evidence provided a useful framework and summary of matters.

Dr Vanessa Taylor. She is an historian who dealt with the historical material which was found or adduced in order to ascertain, so far as relevant, what the historical facts were about this part of the Thames. Her report expresses itself as responding to Mr Burton's. She was a good, clear and fair witness. The result of her evidence, and of Mr Burton's, is that the parties were able to agree on the bulk of the relevant history.

Mr Christopher Livett. Mr Livett has been a Lighterman for many years, and has had a lot of experience of running and, more relevantly, mooring boats on the Thames. He gave evidence for the PLA and was able to assist in mooring techniques and terminology. He was an impressive, and impressively clear, witness. Although modern materials have changed such things as the strength of moorings, the basics have not changed over the centuries so his evidence was translatable into what will have happened in the 19th century.

Mr Alan Pratt. Mr Pratt has considerable experience of bringing barges and vessels in and out of the River Thames (and elsewhere) and gave evidence for TYB of the meaning of certain terminology in historic documents and, by extension, some mooring techniques. He was cross-examined a little more widely than that. He was clearly not a partisan witness, but some doubt was cast over the formulation of his written views by his assertion that he had not in fact seen a plan which is clearly referred to in his short report, which in turn led to the revelation that he had not written his report at all - he had spoken to the defendant's solicitors who had written it for him. All this causes me to view with a little care what he has put his signature to, but his oral evidence was clear and forthright and untainted by the same uncertainty.

Mr Timothy Beckett. Mr Beckett is a marine engineer of some eminence and considerable experience. His being called was the result of a late decision by TBY (taken during the trial) to call some technical evidence about how moorings were laid, maintained and (where necessary) raised. I confess to a little surprise that such evidence had not been in already, but the PLA did not object to his being presented late, and chose not to adduce its own evidence on the point. In the event his evidence can be treated as uncontroversial. It was clear and very helpful.

18. A very large part of the evidence turned out to be uncontroversial. The main area of dispute of primary fact was what Mr Lacey himself did in relation to the moorings in the 1990's, and the facts surrounding his estoppel claim. Apart from that the main evidential dispute was as to the inferences to be drawn about the historic existence of moorings from historical records and conveyancing documents.

The legislation and how the problem arises

19. The statutory question which arises in this case arises out of the Port of London Act 1968. A combination of sections has the effect that works to be carried out in or on the Thames have to be licensed by the PLA, but there is an exception for mooring chains placed in the Thames before 29th September 1857. Its preamble describes some of the preceding legislation (some of which is identified below) and states that it is expedient that the various Acts :

> "by which by reference to which the constitution, powers, rights, authorities, privileges, duties and obligations of the Port Authority are at present defined should be unified, consolidated and amended as in this Act provided:"

20. The relevant parts of the Act are as follows. Section 70 prevents works without a licence:

> "70(1) No person shall carry out, construct, place, alter, renew, maintain or retain works unless he is licensed to do so by a subsisting works licence and except upon the terms and conditions, if any, upon which the licence is granted and in accordance with the plans, sections and particulars approved in pursuance of section 66 (Licensing of works) of this Act."

21. Sub-section (2) provides for a criminal sanction:

"70(2) A person who contravenes the provisions of this section … shall be guilty of an offence …"

22. The expression "works" is defined in section 2 as:

> "Works of any nature whatever in, under or over the Thames or which involve cutting its banks other than those referred to in section 73 (Licensing of dredging, etc.) of this Act."

23. It is common ground that the placing of mooring roots where Mr Lacey has his roots would fall within the expression "works". There is a dispute as to whether two of his actual fixings and associated chains fall within the definition of "works" (because Mr Lacey says they are fixed to a wall and not placed in the Thames), and that is a question which I will have to deal with hereafter.

24. Section 66 provides for the conferring of licences:

> "66(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 the variation and revocation of the licence and re-assessment 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."

25. The defendant does not have such a licence for its mooring roots, but says that it does not need one by virtue of the exemption contained in section 63:

> "63(1) **Section 66 (Licensing of works) and section 70 (Works not to be constructed etc. without works licence) of this Act shall not apply to a mooring chain placed in the Thames before 29th September 1857**, but the Port Authority may 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."

The emphasis is mine; it delineates the key part of the provision on which most of this action is based.

26. Sub-section 2 provides for an arbitration mechanism to determine compensation and sub-section 3 provides:

> "(3) The Port Authority may recover the expenses incurred by them in removing a broken, dangerous or useless mooring chain under sub-section (1) of this section, from its owner as a debt in any court of competent jurisdiction."

It is this section, and in particular the emphasised words, which lies at the heart of this action. There is a cut-off date of 29th September 1857, but for ease of exposition I shall refer to the distinction as being between pre-1857 and post-1857 moorings.

27. So far as previous licences were concerned, section 68 preserved pre-1894 works (the significance of the date will become apparent):

> "68. The provisions of this Part of this Act relating to works licences shall not apply to works authorised, or powers to execute, alter or maintain works conferred, under or by virtue of an enactment which came into force before 17th August, 1894."

28. If there is disagreement as to the grant or terms of a licence, the person seeking to carry out works has a right of appeal under section 69, and Schedule 11(q) preserves the effect of instruments entered into under the 1920 Act which preceded it (see below).

29. Mr Lacey claims that the defendant's mooring roots fall within the expression "a mooring chain placed in the Thames before 29th September 1857." That involves a factual inquiry spanning over 150 years. However, certain points of construction may depend upon the legislative background to the 1968 Act, so it is necessary to deal with that, at least shortly. This involves going back to the creation of the PLA and its predecessors the Thames Conservators.

30. In the first half of the 19th Century there was an unresolved dispute between the Corporation of London and the Crown as to who owned the bed of the Thames and who was able to control mooring. This was resolved when management of the Thames was handed over to the new Thames Conservators by virtue of the Thames Conservancy Act 1857 (a private Act), which came into force on 29th September 1857 (which, it will be noted, is the same date as that appearing in section 66 of the 1968 Act). The Corporation of London acknowledged the Crown's title and the Crown

sold its interest in the bed of the Thames to the Corporation of London. Under the 1857 Act the Corporation of London's interest in the bed of the Thames was then vested in the Thames Conservators.

31. The Act contains various provisions which control the carrying out of works. Those provisions have to be understood against the background of the public right to navigate in tidal waters. This is a right to pass and re-pass over the whole of the surface of the water and to keep vessels stationary in the water for a reasonable time for navigational purposes in the course of a voyage (e.g. waiting for a tide) or for the purpose of loading, unloading or trans-shipping goods or passengers or waiting to do so – see *Tate & Lyle Industries Ltd v GLC* [1983] 2AC 509 at page 545. A riparian owner also has a private law right to gain access to his frontage by boat – *Lyon v Fishmongers' Company* (1876) 1 App Cas 662.

32. Against that background the 1857 Act introduced some controls in relation to mooring. Section 91 provided:

> "91(1) From and after the Commencement of this Act, no mooring chains shall be put down or placed in any part of the River without the permission of the Conservators previously obtained, and every such Mooring Chain which shall be put down or placed shall be continued only during the Pleasure of the Conservators; and the Conservators may at any Time by giving One Week's Notice in Writing, require such Mooring Chains to be removed; and in case Default shall be made in such Removal beyond the time to be mentioned in such notice, such Mooring Chain may be treated as a Nuisance and removed accordingly."

33. Section 90 made it lawful for the Conservators to agree for the purchase of "Mooring Chains" from the owner of such chains; section 92 gave the power to remove "any private Mooring Chain" on the payment of compensation and section 95 gave the power to remove "any broken, dangerous or useless Piles or Mooring Chains and other Nuisances".

34. It will be seen that the effect of that Act was to introduce a licensing regime, but nothing express was said about moorings ("Mooring Chains") which existed at the date of coming into force of the Act. There was no express requirement to obtain a licence for such things. In time, the shorthand phrase adopted for these moorings was "ancient moorings". The Act seems to have called them "private Mooring Chains". There was no criminal sanction for breach of section 91(1).

35. The 1857 Act was replaced by the Thames Conservancy Act 1894. Its provisions were substantially the same. Section 114 corresponded to section 91 of the 1857 Act – the Conservators' consent was required for any mooring chain that was put down or placed in the Thames "after the passing of this Act". Section 118 provided that:

> "118. The provisions of this Act relating to licences and permissions for works shall not apply to or affect any works or powers of executing altering or maintaining works before the passing of this Act authorised or conferred under or by virtue of any Act."

36. Thus the effect of previous licences was preserved. Nothing was said about pre-1857 moorings, but it did not need to be because they were not put down after the 1894 Act, and were not affected by the 1857 Act.

37. The Port of London Act 1908 created the PLA and substituted it for the Thames Conservators.

38. The Port of London (Consolidation) Act 1920 consolidated various provisions including the 1894 Act. Section 252 prevented the installation of mooring chains without permission:

> "252 No mooring chain shall be put down or placed in the Thames without the permission of the Port Authority and every mooring chain which shall be put down or placed in the Thames shall be so continued only during the pleasure of the Port Authority and the Port Authority may at any time by giving one week's notice in writing require such mooring chain to be removed…Any person who contravenes or fails or neglects to comply with any provisions of this [or other licensing provision] shall be liable on summary conviction to a penalty…"

39. Section 253 referred to the removal of private moorings:

> "253 The Port Authority may remove any private mooring chain within the tideway of the Thames making compensation to the owner thereof for any loss or damage…"

And section 250 allowed the Port Authority to purchase by agreement "any private mooring chains". Section 256 preserved previous grants:

> "256. The provisions of this Act relating to licences and permissions for works shall not apply to or affect any works or powers of executing altering or maintaining works authorised or conferred before the seventeenth day of August 1894 and/or by virtue of any Act."

40. Like the Acts which went before it, this Act was silent as to pre-1857 moorings, but again it did not need to say anything in relation to them because the prohibitions in the Act applied only to chains put down after the Act.

41. It was against that legislative background that the 1968 Act was passed as an amending and consolidating Act. Like the preceding Acts it was a private Act, not a public general Act. The preceding Acts had not contained an express exemption for Acts done before 1857, but what they did was apply to the periods after they respectively came into force. An unlicensed mooring placed before each Act came into force would not have been in breach of that particular Act, but might have been a breach of the previous Act, and actionable in that way. That effectively takes one back to 1857. A mooring placed before 1857 without a licence would not contravene any of the Acts, and thus not have been actionable as an unlicensed work.

42. The 1968 Act introduced the concept of maintaining or retaining works without a licence, and so had to deal with works which were already in existence at the time. That would apply to pre-Act works (unlike the preceding Acts). That made it necessary to deal with works that had not previously been treated as breach of any of the preceding legislation. An exemption for pre-1857 mooring chains would be lost without an express exemption, so one was provided.

43. This legislative history is of significance when considering the burden of proof in this case.

The history of the usage of this part of the Thames to 1857

44. In order to form a view of what moorings there were in 1857 it is necessary to piece together the history of the use of this part of the Thames, which is known as Bermondsey Wall. This is because the likelihood of moorings, and perhaps their quantity, at any given point in time, are capable of going to the determination of their

existence. As will appear (and as is perhaps not surprising) there are virtually no documents which go directly to the point, but the likelihood of moorings can to a degree be ascertained by considering records of land usage along Bermondsey Wall. There are a number of documents which record relevant matters, all of which go to build up a useful picture. A lot of those documents, and their analysis, is the fruit of the efforts of the historian witnesses. At my direction the parties agreed a history of the relevant matters. What appears in this section is largely a recitation of parts of those agreed matters. In a later section I deal with some of the documents which deal more directly with the question of mooring at this point of the river.

45. Various areas of Bermondsey Wall have had various names at various points of time. In order to make the following narrative intelligible, and to relate it to the plan in Appendix 1 and the historical plans, the following table will be useful:

Today	**1937**	**1872**	1. **1826**
New Concordia Wharf	Meriton's Wharf	Meriton's Wharf	2. Not known
China Wharf	"A" Reed's Wharf	Reed's Wharf	3. Not known
"B" Reed's Wharf	"B" Reed's Wharf	Reed's Wharf	4. Hayter Reed's Warehouse, owned by James Taggart
Creed's Wharf	"C" Reed's Wharf	Public passageway to the Thames (2) Reed's Wharf	(1) Public passageway to the Thames (2) Brown & Young's Warehouse, owned by James Taggart
Public Open Space	Uveco Wharf Deverell's Wharf Downing's Wharf	Newbald's Wharf Not known Not specifically identified, on the map but referred to in documents as early as 1847 as Downing's Wharf	5. Brindley and Crisp's Timber Yard 6. Shed warehouses occupied by Thomas Downing 7. (3) Yard and Shed occupied by Crisp and Shand
Providence Tower	Reed's Lower Wharf	Reed's Lower Wharf	Four dwelling houses
Springall's Wharf	Redman's Wharf Springall's Wharf	Shown as Springall's Wharf, but known from other sources to comprise	Empty warehouse owned by Thomas Lechmere Other buildings, occupation not identified

		Downing's Granary Springall's Wharf	

46. In 1082, the Cluniac Priory of St Saviour was founded a little inland from where the River Neckinger flowed into the River Thames. The Neckinger was widened to allow access to the Priory and it was that widened part of the Neckinger that became St Saviour's Dock (later called Savory's Dock). A tide-mill was constructed nearby and there were probably moorings for vessels serving the mill.

47. By the middle of the 17th century, the area around St Saviours' Dock was already built up with what was probably a mix of commercial and residential property. Mill Stairs were in existence before 1683. Their location was moved slightly to the west in 1751 and in 1757, the then owner of Mill Stairs, a merchant, Sir Peter Thompson, made a gift of the stairs to the Watermen of Mill Stairs.

48. The Corporation of London exercised conservation powers over the Thames pursuant to royal charters dating back to King Richard I. In 1770, the Corporation established the Navigation Committee.

49. From the late 17th century onwards, the Crown, which claimed ownership of the bed of the tidal Thames (as did the Corporation) granted letters patent to individuals, charging them with the duty of repairing existing mooring chains and laying new ones, where existing chains had decayed, between London Bridge and Bugsby's Hole (an area now called New Charlton). It lies south east of the Millennium Dome and is near the Thames Flood Barrier. The patentees included Sir Peter Burrell, who later became Lord Gwydir.

50. The increase in trade in the Thames in the late 18th century led to overcrowding. There was also a lack of warehouse security. The Corporation realised that unless improvements were made, London would lose trade to other ports. This eventually led to the construction of a series of docks between 1799 and 1815. The first of the new docks was the West India Docks constructed pursuant to an Act of 1799.

51. The 1799 Act also contained provisions to regulate ship moorings: see ss 35 – 37. Under those provisions, Lord Gwydir's chains (whether managed by him or rented by him) were to be bought out and to revert to the Crown. The moorings were thereafter to be managed by the Corporation and made available for public use. In fact the compensation provisions were repealed and replaced and a wider class of persons who owned ship mooring chains, including persons who owned private moorings and

did not pay rent to any patentee, were bought out under the Port of London Improvement Act 1800 (39 & 40 Geo 3, c xlvii).[1] This shows the real value of moorings. One person who was bought out was William Surflen, who had a mooring chain "on the ways Mill Stairs".

52. A report on mooring chains prepared by R Dodd in 1799 records the presence of a number of larger mooring chains in this area. They would probably have impeded the existence of barge roads. These chains were removed pursuant to the 1799 Act, so cannot be pre-1857 chains for the purposes of the defence in this case, and Mr Holland did not suggest otherwise. His case depends on other mooring chains having been put down prior to 1857.

53. In the early years of the 19th century, the waterfront at Bermondsey Wall was developed with a mix of granaries, warehouses and yards (both timber and boatbuilding).

54. The area around Mill Stairs was evidently congested with vessels. In 1811, the Navigation Committee considered a petition by the Mill Stairs Watermen in relation to an obstruction caused by craft moored off the premises of Messrs Moffatt and Liddiard (and it appears owned by them). The Navigation Committee resolved to recommend their removal to the Grand Committee.

55. On 16 October 1813, a petition was referred to the Special Navigation Committee of the Corporation from the Lightermen of Horsleydown,[2] complaining about the lack of proper moorings for their craft, and in particular the lack of free roads, and the fact that existing lighter roads were being bought and sold as private property**.** In response to this petition, a surveyor, James Montagu, laid before the Special Navigation Committee a large plan of the River Thames from London Bridge to Blackwall "on which all the different mooring Chains are laid down". This plan shows a number of chains opposite the relevant part of Bermondsey wall, all of them below the low water mark and not sufficiently close to the shore to correspond in any way to the disputed moorings in the present case. Along the relevant part of Bermondsey wall no moorings are shown. There are some chains marked "East Lane Mud Chains" by East Lane Stairs, which are the next set of stairs downstream of Mill Stairs; and there are some mud chains shown yet further downstream on the northern side of the river. So there was some attempt to plot mud chains. There was also an attempt to plot at least one set of lighter roads, downstream of East Lane Stairs and opposite the mouth of St Saviour's dock (below low water mark). While it may be that this plan was not intended to be exhaustive of every single mooring of this nature, I think that the absence of any reference at all probably signifies that if there were moorings at

[1] The full amount of compensation paid by the Exchequer was £142,136.

[2] Horsleydown lies immediately to the west of St Saviour's Dock.

Downings Roads at this time, they were not as great in number as those now claimed. It should also be noted that the other roads have names with them (indecipherable on my copy of the map, but obviously there). If there were similar roads at Downings Roads at the time, and if they were significant, one might have expected a name to be attributed to them. The name by which they are now known was not given to them until later (at this point it is not apparent that any Downing had any involvement with that sort of business).

56. It appears that the 1799 Act did not apply to lighter roads. The Navigation Committee had a continuing concern both about the lack of available moorings which the existence of private lighter roads exacerbated and the interference with regular moorings.

57. At a meeting on 2 June 1836, "an account of the Private Moorings or Barge Roads located on the south side of the River Thames and outside Low Water Mark with the Names of the Original owners and the present occupiers and where the same are situate" was presented to the Navigation Committee. That listed twelve such moorings, none of which includes what became known as Downings Roads. The matter was referred to the Subcommittee to report their opinions thereon.

58. On 7 July 1836, the matter was referred to the City Solicitor to consider and ascertain by what right or authority parties claimed the exclusive use of the private roads and moorings belonging to different parties in the Port of London, by whom granted, and all the circumstances relating thereto. Both a draft of the City Solicitor's opinion and the final version that was presented to the Subcommittee were in evidence.

59. The version of the Solicitor's report that found its way into the minutes of the Navigation Committee of 10 January 1837 was less extensive than the earlier manuscript version. The moorings listed in the minutes of 10 January 1837 appear to be the same ones as those listed in July 1836, though some of details differ. Again, the list does not include the moorings in dispute. When both the existence and location of the Moorings became known at the end of the 19th century, they were located above the low water mark.

60. Following the Solicitor's report, the Navigation Committee agreed to recommend to the Grand Committee that the Town Clerk should write to the owners of the private lighter roads in the stream informing them that greater facilities of navigation were imperatively required by the public and that their lighter roads should be removed. However, the Committee was to afford "every facility to the owners of the adjoining wharfs for the conduct of their Business", and a plan was to be devised that would least obstruct the business of those accustomed to use the lighter roads in question.

61. The view of the City Solicitor was that, in a case of possession of lighter roads for a good many years, the Corporation might not be authorised to remove the chains unless they constituted an obstruction to navigation. The Corporation could always remove such roads if they constituted an obstruction.

62. A similar view was expressed by the City Solicitor in relation to the Water Bailiff's report to the Navigation Committee on 3 July 1840 in relation to some moorings at Wapping:

> "The report does not state the origin of the Title of the parties claiming the right nor the length of time it has been exercised but as Mr Water Bailiff when before the Committee reported orally to me that the oldest men in the vicinity recollected the existence of these Moorings on the same spot from their childhood and their Fathers before them I am of opinion that in the absence of contrary evidence this will be sufficient to found a prescriptive claim and the Courts will presume an early grant from the Crown or some other competent authority."

63. There is some evidence as to the user of lighter roads in a monthly return for September to October 1847, which recorded the number of days that colliers were moored at lighter roads in the Pool of London. 9 or 10 days was the norm (183 and 102 vessels respectively). Only 3 vessels occupied such roads for more than 15 days. In 1849 a writer in the Morning Chronicle (in an article depressingly entitled "A Visit to the Cholera Districts of Bermondsey") remarked on the tiers of colliers at the mouth of St Saviour's dock. These will not have been moored at Downings Roads (which is downstream from the mouth) but it does give an impression of the active mooring that was going on in the area.

64. Various members of the Downing family conducted business at or near Bermondsey Wall. The report of Mr Burton set out a well researched family history with a lot of detail. The Downings had a connection with the river from the mid-18th century, when they started as fishermen and then produced generations of watermen or lightermen (as well as the odd clergyman and cabinet-maker). They also had a strong connection with the Bermondsey area. The most significant for present purposes is William, born c1794. There are at least four recorded instances in which William Downing or his estate applied to either the Navigation Committee or (after 1857) to the Thames Conservators for consent to carry out works on the foreshore.

65. The first was in 1827, when Messrs Downing & Walton of East Lane Bermondsey successfully petitioned the Navigation Committee to lay gravel in front of their premises. The member of the family in question was William Downing (1794 – 1876). It was not suggested that these premises corresponded to any of the premises owned by Mr Lacey (or Mr Creed-Miles). However, what is of significance is that the business of Downing & Walton, carried on close by, was a ship-building partnership.

66. Secondly, in 1838, William Downing, who was described in the minutes of the Navigation Committee as a shipwright and barge builder of Bermondsey Wall, sought retrospective consent for the construction of a temporary platform, not knowing that it had been necessary to apply for permission before it was built. It was apparently granted, because there were later records of it in both the Corporations' 1853 Schedule of Rents for Ordinary Accommodations (no rent actually recorded) and in the Certified Schedule of Rents of 29 July 1857 (a rent of £1 1s recorded).

67. Thirdly, on 3 December 1847, the minutes of the Navigation Committee recorded that it had granted William Downing consent to embank what was explicitly called Downing's Wharf at Bermondsey Wall. The precise position is not recorded in the minutes.

68. Fourthly, on 11 September 1876, following William Downing's death, the Thames Conservators granted his Trustees a licence to embank the frontage of Downing's Granary, which was located between Reed's Lower Wharf and Springall's Wharf, and later became known as Redman's Wharf.

69. William Downing, together with his eldest son, William George, set up the business of W G Downing & Sons. Both father and son were recorded as having owned substantial numbers of barges. The Watermens' Company's Register of Lighter Numbers registered 43 barges, 99 open barges, 6 lugboats, 7 decked barges and 1 "sails barge" to William during the period 1847 to 1859, though they did not necessarily own them all at any one time - some may have been replacements for others. Large numbers of barges were recorded as having been acquired between 1860 and 1868 in the Register of Barge Owners. By 1885 William George had acquired 66 barges. The business of barge building and barge ownership appears to have become based at Downing's Wharf, but that may not have happened by 1857. A map called *Loveday's London Waterside Survey* shows that at date "Downing Sail and Tarpaulin Maker" occupied just the eastern side of Downing's Wharf (the present "open space"). The remainder of what was already called Downing's Wharf was occupied by J Crisp & Co, shipwrights, and the plan recorded a slipway immediately to the west of the Downing business. However, William George had registered his first barge on 18th July 1843 and had registered eleven further barges in 1845, 1850

and 1859. Loveday's Waterside Surveys were concerned only with built structures which might catch fire. They are not necessarily evidence of property ownership.

70. From other evidence it appears likely the Downing business of barge-building had started by this time. In 1933 (see below) the widow of the grandson of William (pere) stated that her memory went back to 1857 and she remembered barges at Downings Roads. She was 91 at the date of her recollection and was therefore remembering back to when she was 15. I would be cautious about attributions of events to such a specific year, but the 1841 census lists Downing as a "bargebuilder", the 1861 census lists him as "barge owner" and earlier directories listed him as "boat and barge builder". Coupled with the register of his ownership of boats, it seems likely (and I find) that he was carrying out barge-building, and operating barges, by 1857. There is also a return from 1855 which supports this - see below. The scale, however, is something else, as to which I will have to make a finding later.

71. W G Downing & Sons was trading as such by 1881. It was eventually incorporated in 1908. It involved both William and William George. The firm's business was that of barge builders and barge owners, and this was reflected in the firm's incorporation.

72. In September 1852, the Watermen of Mills Stairs made a complaint to the Navigation Committee of the Corporation of London about a shoal off Mill Stairs, it "being a source of very great annoyance, inconvenience and danger to the navigation of that part of the Thames".

73. On 27 February 1855, the Navigation Committee obtained from the harbourmaster and water bailiff a return of lighter roads under various headings. Under the heading "South Side Below London Bridge within Low Water Mark" a number of listings are made in three columns. Amongst them is the following:

"Downings Roads Off St Saviour's Dock Downing"

To the left of the entry there is the addition of "Pr", in pencil, in an unknown hand. It was suggested at the trial that this meant "Private". That is probably correct - that word is written in full, in pencil, to the left of the first column of an earlier entry.

74. The return included moorings that were "in the Stream" as well as "within Low Water". The return also listed moorings that were to be removed and replaced, and moorings that were to be removed and not replaced. It therefore gives the impression of being a thorough document.

75. In 1856–1857, the Corporation of London employed its dredger "*Simpson*" to dredge, including off Mill Stairs. The minutes of the Navigation Committee for 5 February 1857 recorded that the *Simpson* was sent to work at the shoal off St Saviour's Dock. I record this because the suggestion was made by one of the experts that this dredging may well have resulted in some of the moorings at Downings Roads being dredged up. I make findings about this below, but for the moment it is sufficient to record that I regard this as unlikely.

76. There is no further useful documentary evidence about the moorings until the 1890's though it is apparent that the same mixed use of boatyards, river industries, granaries and the like continued throughout the rest of the century. The Downing family continued to have an interest through personal businesses and then the company.

77. I make the following findings about the evidence thus far.

78. I find on the balance of probabilities that some moorings, in a significant number, existed in the region of the present Downings Roads in 1857. The most important pointer is the 1855 register, which seems clearly to point that way, and refers to the Downings roads as then existing roads, and indeed at the trial the presence of moorings was not disputed by Mr Harpum. That there must have been some moorings is supported by the fact that the usage history demonstrates some likely need for those moorings. Downings were operating a business there which is likely to have required some moorings. However, I do not consider that one should necessarily draw the inference from this material that there were as many moorings and in precisely the same positions as one can now see, or as were apparently there by the 1920's. The 1813 map suggests that there were no moorings then, and that would be consistent with the fact that there is no evidence of a particular business there that would need them. The Downings did not come on the scene until later. They will have required some moorings by 1857, but it does not necessarily follow that all the present moorings will have been required, or even that they are the same moorings. I will have to revisit these uncertainties when I consider the later evidence.

79. I return to the dredging point made above. In her report Dr Taylor suggested that the dredging apparently took place between 1855 and 1857 might have dredged up such moorings as existed at that point. She bases the suggestion on the fact that there is a reference to moorings at Downings in the 1855 document, but in a "Schedule and Rental of All Grants of Accommodation on the River Thames" of 1856 there is no such reference. This period coincided with the dredging around St Saviour's Dock, apparently at the behest of the watermen at Mill Stairs. She infers that dredging up moorings might explain the absence of a reference in the Schedule. To be fair, she only suggests it as a possibility. I think it is unlikely. The shoal is more likely to be

below the low watermark, because otherwise the customers would have walked over it to get to boats when the tide was out, and the skiffs of the watermen would pass over it when it was in. It is no more than a matter of speculation whether or not relevant moorings (which would have to have been downstream of the stairs) would have been dredged up, and the explanation of an absence of a reference to Downings moorings in the 1856 schedule is that probably no rents were being paid for them. There has never been any suggestion that rents were being paid, and the schedule is a schedule of rents, as its title and inner explanation (which I have not set out) make clear. Accordingly, I find that there was no dredging up of moorings between 1855 and 1857.

Subsequent history up the acquisition of Mr Lacey

80. The history of the moorings thereafter is important both for what it shows about what happened to those moorings, and because it is said to shed light on what the position was in 1857. There is nothing particularly relevant until one gets to the 1890s. In this section I shall set out some basic facts, largely undisputed, covering the period to the present day before returning to draw some conclusions about differences (if any) in the position and number of moorings over time.

81. The first relevant point can be said to be absence. I have found that there were moorings at Downings Roads in 1857 (and before) and as will become apparent shortly they persisted to the end of the century and beyond. There is no record of any challenge to those moorings in that period.

82. The first relevant document in this era is actually an apparent plan of moorings. Its precise date is unknown but is thought to date from the 1890s. The assumption throughout the trial was that that is the dating for this plan, and for the same of convenience I shall refer to it as the 1890 plan or tracing (though two entries on it refer to post 1890 events). It is apparently a tracing of another plan, which was drawn to scale (it expresses itself as having a scale of 1/16th of an inch to the foot) and was produced to Mr Lacey recently by the Talbot family. It shows various properties on shore, including one attributed to Downings. Various apparent mooring roots and chains are shown, though there is no key. At two points it identifies a "Pile cut down", one in March 1895 and the other in April 1897. At one point, and against a blob that suggests a mooring root, the word "Downing" has been written by hand. The plan is reproduced at Appendix 3. Various observations can be made about that plan.

(a) It demonstrates that there were moorings in the area in the 1890s.

(b) The original of which the copy appears to have been a tracing was apparently a conscientious effort to plot the position of moorings and

chains. That can be seen from the contents of the document itself, and from the attempt to produce a scale drawing. If it was not intended to show the real position of moorings and roots it is not possible to identify another purpose. The fact that someone bothered to trace it, and keep the tracing, demonstrates its significance.

(c) With some caveats, it is possible to compare the roots shown on this plan with later plans to try to assess the correlation of this plan with later and present apparent positions. The fruits of such an exercise (so far as it was done for the trial) are set out below.

83. On 17 January 1898, a book, containing a "List of old accommodations before 1897 for which no rent was paid", was put before the Conservators' Sub-Committee on Assessments and approved by the Board of the Conservators. The document contains the following:

> "Committee had before them a list of old accommodations for which no rent was paid which existed before 1897, and having taken Council's [sic] opinion they recommended that no further action be taken in the matter. This was agreed to by the Board 17/1/1898."

The list of entries starts at Teddington and works its way down the Thames. In the section "London Bridge to Greenwich, South side" in contains the following entry:

"W G Downing & Sons	Mill Stairs, Bermondsey	2 Store barges, 1 Flood mooring, 1 Ebb mooring"

84. A study of the whole of the list shows it to be an apparently thorough and detailed document. There are entries for single overhanging galleries, single "lookums" (overhanging features) and single campsheds (beds for a boat to rest on when the tide is out). In one entry one single anchor is recorded, and even a "storm outlet" and individual grain hoists are also recorded. It is common ground in this case that it purports to describe the area in dispute, and if it is an accurate description of what there was at the time in terms of moorings then what was there might be said to be limited. Mr Harpum also points out that while the report describes some localities as being "barge roads", it does not use that description here.

85. Schedules of rents for accommodations for 1901 and 1908 contain no reference to Downings paying a rent for any moorings. This is not surprising - the 1897 document said Downings were not paying rent.

86. According to an internal memorandum by Mr Wrightson of the PLA, dated 11 May 1935, the Harbour Master's List of 1901 (now lost) apparently showed the moorings owned by W G Downing & Sons as 2 flood and 3 ebb moorings, "5 chains in all":

87. On 10th September 1908 WG Downing Sons Ltd was incorporated and acquired the business of W G Downing and Sons.

88. The first proper chart to show moorings was a 1924 PLA chart whose title refers to soundings taken under the supervision of a (presumably retired) Rear-Admiral. It is plainly based on an accurate map of the area, and is covered in detailed soundings of the Thames (including the depth of St Saviour's dock) from London Bridge to Cherry Garden Pier. It also contains details of a large number of apparent moorings. There is a key under the heading "Foreshore Moorings" which includes the following entries: A - Anchor; S - Sinker; PA - Position Approximate; PD - Position Doubtful; ED - Existence Doubtful". One can see examples of some of those abbreviations on the plan. Both foreshore moorings and moorings in the stream are shown, and "tiers" (lines of moorings in the stream) are also shown. The original print of the map is in black, but the version made available by the PLA shows a considerable number of amendments shown in red, the latest of which appears to be 1930. The amendments often denote the removal of tiers or in-stream moorings, or their adjustment. There seem to be no adjustments of the foreshore moorings. Moorings are shown as circles. Those in the stream usually have lines which would seem to denote the direction of the chains attached. On the foreshore they have short lines (one or more) which one might infer shows the direction of chains, but that is not made clear by the key. In the part with which this action is concerned the plan shows 22 apparent moorings, with 3 of them marked "PD".

89. Part of the evidential inquiry in this case involves a comparison between this chart and later charts and a current survey. The accuracy of this plan is important to that exercise. Mr Holland suggested that this plan should not be taken as being too accurate so far as the position of moorings is concerned. It was primarily concerned with soundings, and the position of roots was difficult to ascertain anyway (as Mr Honey found when inspecting the property himself). The exercise would be made more difficult by the presence of barges.

90. While accepting the potential difficulties in surveying moorings, I do not think that this plan can be dismissed in that way. It is a carefully drawn chart, and there are a considerable number of moorings shown on it. While the precise positioning of foreshore moorings might not have been as important as the depth of the river at any given point, it was still important enough to make them worth surveying, to have a detailed key describing detail and in some cases to note the type of mooring

("Anchor"). Provision is made for those whose position is "doubtful", the inference being that the position of others is not doubtful. I consider that there was nothing casual about the rendering of the position of the foreshore moorings. They appeared where a surveying exercise seemed to put them. However, I consider it unlikely that the precise position of each root was plotted. As other evidence showed, ascertaining precisely where a root is not an easy exercise, even with modern technology. In 1924 it would probably have involved digging down to be sure where the root was. The surveyor is most unlikely to have done that with all the moorings shown. It is more likely to have proceeded either by treating the root as where the chain emerged from the mud, or by an assessment of where the root was likely to be looking at the chain. In fact I think the former is more likely. There are so many of them that I doubt that that was done with the precision of a modern Ordnance Survey map, but there will have been a fair attempt at precision.

91. On the other hand I do consider it unlikely that any alterations in the moorings carried out between 1924 and 1930 will have been marked as red as other alterations were marked. This was relevant to part of the evidence of Mr Maynard. Such an exercise would have required a detailed re-survey, or the reporting of a change of moorings. There is no evidence the former was done, and it is unlikely that anyone did the latter. The alterations marked in red all seem to be much more significant alterations than the removal or moving of a foreshore mooring, and probably show activities in which the PLA would have had some involvement either in carrying them out (the adjustment of soundings) or by supervision, or would at least have expected some reporting or very obvious change (the removal of some in-stream moorings). There is no significance in the absence of alterations to foreshore moorings. I would not expect any alterations to have been noted.

92. On 27th February 1927 there was a resolution to wind up W G Downing and Sons Ltd, and on 1st March 1927 the company purported to sell and convey for £5,250 the barge roads it claimed to have at Downings Roads to Humphery & Grey (Lighterage) Ltd pursuant to an earlier sale agreement. The conveyance recited:

> "Whereas the Vendors and their predecessors in title have been in undisturbed possession and enjoyment of the Barge Roads comprising Three ebb and Two flood chains situated in the River Thames off Bermondsey Wall and known as Downings Roads for upwards of Eighty years And whereas [the parties have agreed to sell and purchase] (a) the 12 iron and five wooden barges belonging to the Vendors particularly described in the Schedule [to the preceding agreement] and (b) the said ground moorings with the four dummy barges "Dolly" "Dora" "Annie" and "James" used in connection therewith for the total sum of [£5250] of which [£4750] was apportioned as the value of the said twelve iron and five wooden barges and [£500] for the said moorings and dummies...

> Now this Conveyance witnesseth ... The Vendors... Hereby convey and assign to the Purchasers All the estate interest right and title of the Vendors in and to the said ground moorings and the said dummies used in connection there with To Hold the same and to the purchasers absolutely ..."

93. The following are the significant points about that conveyance:

(a) It conveys 3 ebb and 2 flood chains. This is the same description as the missing 1901 list, but contrast the 1897 document (which referred to one of each, assuming that moorings is the same as chains for these purposes).

(b) The moorings are sold with dummy barges "used in connection therewith". This demonstrates that the moorings are being sold as barge roads. The dummy barges will have been used to tie other (moving) barges up to.

(c) The moorings have now become separated from the land interest of the Downing company. It is not known who purchased the land from which the land side of the business was carried out (presumably someone did).

(d) There is a recital that the mooring chains have been enjoyed for upwards of 80 years (which, as a matter of calculation, takes one back to 1847).

(e) The number of dummy barges apparently used at this time, were fewer than the defendant's present number. I infer and find that it is likely that the footprint of the whole road was therefore likely to be much less than the defendant's footprint, and this is supported by a 1922 photograph (see below.

94. 8 months later, on 11th November 1927, the purchasers under that conveyance sold the moorings and dummy barges on to Talbot Bros for £1000 (with £500 being apportioned to the moorings).

95. Across this period (1924 to 1928) the PLA was assembling some sort of moorings register. It recorded Talbot Bros as having 25 "chain[s] in ground" with Storage Barges, and described them as "Unlicensed moorings". They are all given numbers which look as though they are capable of corresponding to numbers appearing on a plan to which I refer shortly.

96. On 14 November 1929, at a meeting of the PLA's General Purposes Committee, the Board Minutes (dated 21 November), item 777, recorded that, arising out of representations as to the inadequate accommodation in the River for the discharging and loading of cargo vessels, the Committee had under consideration a comprehensive report from the General Manager on the general question of the mooring of vessels in the River. The Committee made seven recommendations of which recommendation (v) was that, "a complete list of unlicensed moorings be made and that such as are not in use be removed if possible". The task was not completed until 1936.

97. In 1931 Talbot Bros drew, or procured the drawing of, a schematic survey of the moorings for Talbot Bros in blueprint form. It showed how barges were moored around dumb barges. A copy is in Appendix 4 to this judgment. One can see root numbers written on the 1931 plan. They come from the plan next referred to (or a similar document) - they were clearly written in afterwards. A manuscript addition to the plan suggests the markings may have been done by "Richards and Defrates", who apparently surveyed the site in 1934.

98. Whether in connection with that listing of unlicensed moorings or not, in about 1932 a plan was prepared by the PLA. The original has not survived but it formed the basis of later documents, and in particular a statutory declaration of 1936. An extract of some form of copy of it is annexed to this judgment at Appendix 5. Its numbering pattern has strong resonances with later numbering on similar plans.

99. It was probably in the context of the inquiries of the PLA about unlicensed moorings that Caroline Downing, who had married a grandson of the William Downing referred to above, provided a statutory declaration on 7th March 1933 (already referred to in this judgment). In it she records who she was, and her date of birth as being in 1842 (making her 91). She declares:

> "4. My knowledge of the Downing Family and of the [barge owners] business [carried on by WG Downing and Sons] extends back to the year 1857 and I can quite well remember that barges belonging to the said business were from time to time moored at the Moorings in the River abreast of the said

premises, 12 Bermondsey Wall aforesaid, which Moorings were known as Downing's Roads."

100. 12 Bermondsey Wall had also been known as Downings Wharf.

101. On 11th May 1935 a Mr Wrightson of the PLA wrote an internal memorandum containing the following:

> "Talbot Brothers
>
> 19 Moorings (73/75 and 77/92) - Bermondsey
>
> These moorings are shewn on sketch herewith and are generally known as Downing's Roads.
>
> The Harbour Master's list of 1901 shews the moorings owned by WG Downing and Sons as 2 flood and 3 ebb moorings, 5 chains in all.
>
> This number has apparently increased considerably but all the moorings as now existing might be regarded as part of Downing's Roads.
>
> It is suggested that the firm be asked to check the plan and confirm the claim to moorings as shewn, by the submission of the Declaration made by Mrs C H Downing. They might then be given Letter "A" in respect thereof."

102. On 16th June 1936 Francis John Talbot, sole proprietor of Talbot Bros, made a statutory declaration about the moorings. He recites his position as being a marine surveyor, barge builder and repairer and says he has been acquainted with all the moorings in the Rotherhithe District for the previous 49 years (which takes his familiarity back to 1887). Then he refers to his firm's purchase of "the Ground Moorings known as Downings Roads" and the preceding purchase from WG Downing and Sons Ltd. He goes on:

> "5. There are Twenty five of the said Ground Moorings and the positions thereof are shown on the plan attached hereto. Six of them are unnumbered and the others are numbered 73 to 75 (both inclusive) and 77 to 92 (both inclusive).

> 6. I have known the Ground Moorings known as "Downings Roads" and from my own knowledge I know that during that time no further Moorings have been laid down nor has the position of any of them been altered."

103. The plan annexed to this declaration seems to derive from the 1932 PLA plan referred to above. It is not an identical copy, but the land detail is the same and the positioning of the moorings is similar where not identical A line of "Talbots Barges" is shown in the same position.

104. Mr Holland invited me to take this statutory declaration at face value and rely on it as evidence that nothing material had changed in the moorings since 1887. I consider that more care has to be taken in relation to this document than that. While Mr Talbot may have been involved in business in that area, it is not likely that he would at all times have had a familiarity with the detail of these moorings to be able to say that nothing had changed since 1887. These were busy barge roads, with lots of comings and goings and active management. They were not the only moorings in the Rotherhithe District, and he cannot have been so familiar with all of them that he would know whether any of them had been changed in that period. While I am prepared to treat this as good evidence that nothing changed in the time of his firm's ownership, I am not prepared to give it much weight for the period before then.

105. The two statutory declarations were referred to in contemporaneous PLA documents. That appears from an internal memorandum of the PLA dated 15th July 1936, which records the PLA view of history (in short form):

> "Following the survey of the upper pool for the purpose of the new mooring register, I wrote to Messrs Talbot Brothers with regard to the numerous moorings below Mill Stairs, Bermondsey known as Downings Roads which it was understood the firm had acquired.
>
> Messrs Talbot referred the matter to the Association of Master Lightermen and as a result Mr Wrightson has handed me on the firm's behalf the attached copies of statutory declarations:
>
> By Mrs C H Downing, who was born in 1843, to the effect that by her own knowledge the moorings have been in existence and in the Downing family since 1857.

By Mr F J Talbot, present proprietor of Talbot Brothers, stating that his firm acquired the moorings in 1927 but that he has known the district for 49 years and can state that during that time no additions or alterations have been made to the moorings in question.

A plan of the moorings is attached to Mr Talbots declaration. There are 25 roots in all and these are now numbered in the register as 67/70 and 72/92. Our records have been searched and several references have been found to Downings Roads but none which would determine the number of positions of the moorings at the date of the reference. There is, however, no doubt that the four dummies shown on the plan attached to Mr Talbot's declaration and the majority of the roots have been in existence for many years and I accordingly submit that Mr Talbot be given, in respect of the 25 roots numbered above, a letter in similar terms to that written to the Claimants to other unlicensed moorings".

106. The letter that was written was sent on 23rd July:

"River Moorings

With reference to the recent correspondence between Yourselves and the River superintendent regarding the moorings in the River Thames below Mill Stairs, Bermondsey, Nod 67/70 and 72/92 on the Authority's Chart ... And to my recent interviews with Mr Wrightson representing you on behalf of the Association of Master Lightermen, who submitted certain evidence in support of your claim that the moorings are ancient and not therefore subject to the licensing powers of the Authority, I am directed to inform you that whilst the evidence produced cannot be accepted as conclusive as to the existence of the moorings in question prior to the year 1857, it is undoubtedly the case that the moorings have been in use for a very long period of time and in these circumstances the Authority will not now require you to apply for a License in respect of the moorings but proposed to record in their Register of River Moorings particulars identifying the moorings in question as "unlicensed moorings" with a summary of the facts now submitted.

> This will not debar you from furnishing other evidence of ownership prior to 1857 which you may wish to produce at any time."

107. Thus the attitude of the PLA was not to recognise the moorings as being ancient moorings in the sense of moorings that existed before 1857, but it was not going to take any action, at least for the time being. The qualification "at least for the time being" is not one which is explicit, but it is what the letter really means. If the mooring owner wished to have the greater security that a pre-1857 mooring would give him then it was open to him to establish those facts. Absent that, he would not have the security that the Act gave, which means that the unlicensed status might be reconsidered by the PLA in the future.

108. It appears that a moorings register was created in 1936. Of the Downings Road moorings only 2 are referred to and their position identified in a manner which enabled Mr Dean to plot their position. They are numbers 91 and 92. Mr Dean's evidence was they appear to be in the same position as two moorings shown on the 1924 chart, but it is somewhat downstream of where it appears in the 1936 statutory declaration plan.

109. In 1949 the then owners of Downings Wharf sought to embank their frontage. That would have affected roots 87 and 90. The owners asked the PLA to remove them, to which the PLA responded that the owners would have to deal with the owners of the moorings which it described in a letter as "'ancient' moorings and unlicensed". It would seem that the negotiations were successful, and proposals were made and apparently accepted by Talbots for their replacement with concrete blocks for roots. An internal memo of 9th March 1949 records that Talbots gave permission for concrete blocks "in the same position". That cannot have been right - the whole point of the embankment was that moorings could not go there because that bit of the bed had become embanked (as is reflected in some PLA correspondence). The PLA recorded that it would raise no objection to the proposals. The embankment then proceeded, and the moorings must have been moved accordingly. It is to be assumed that they were placed close to the bank, as the old ones were. The agreed history states that the PLA agreed to this course. The correspondence does not actually record such an agreement, but since the point is agreed I will accept that it was. It follows from this that these two roots were no longer "ancient" because they were in new positions. However, that point was not taken in these proceedings, perhaps because, if the PLA agreed to allow them to be replaced, it should be taken as agreeing that the new moorings have the same status. Whether for that reason or not, since the movement of their position did not figure in the proceedings, I shall treat them as if they remained as ancient, or non-ancient, as the originals.

110. In 1965 Talbots were minded to sell the moorings and wrote to the PLA asking if the PLA would be interested in buying them to extinguish them. By this time the nature of lighterage business carried out in the pool of London had very significantly declined, and presumably Talbots had little or no use for them. This resulted in a meeting on 17th February 1965 in which Mr Dugard of the PLA disputed that the 1936 Talbot statutory declaration vested the freehold of the sites in Talbots, and that the PLA had not accepted the pre-1857 existence of these moorings. It had merely agreed not to require a licence. The PLA in fact had power to call for their removal in 7 days. This shows that, at this time, the PLA was not accepting some form of perpetual and irrevocable (save on the payment of compensation) licence existed in respect of these moorings.

111. At this time, and probably in connection with these dealings, the PLA prepared a plan of the moorings, showing the position of the 25 moorings and giving numbers to all of them. It looks as though it may be a tracing of a pre-1949 plan, because it does not show the 1949 embankment (and therefore shows numbers 87 and 90 in the wrong place). It rather looks as though it is a reproduction of a plan rather than a plan based on an actual survey.

112. In April and May 1966 the PLA's hydrographic staff produced a hydrographic survey of the Thames from Tower Bridge to the Thames Tunnel. This marked the position of the moorings as "Small Boat Moorings". It showed what seem to be the disputed moorings as small "tadpoles", with tails all facing in a downstream direction. The same is true of a navigational chart produced in November 1968.

113. By the 1970s Talbots apparently had even less use for the moorings. The barge and lighterage trade in this part of the Thames had fallen away. A sailing club which was connected to the trade union Nalgo was interested in a purchase of moorings and correspondence with solicitors took place. Talbots' solicitors said the moorings were regarded as freehold. Nalgo noted that it was said that "these are extremely old moorings", and asked the PLA for confirmation that the moorings were freehold and without the necessity of any licence from the PLA. On 7th September 1973 the PLA responded that the moorings were known as "ancient moorings" and noted a claim that they had been in existence since 1857. Its letter went on to say that although the PLA had not insisted on licences being obtained,

> "The legal position has been kept open and should occasion arise it may be necessary to test the issue."

The letter went on:

> "It is not unusual for ancient moorings to be lost since over the long period of their life the material has deteriorated to the

> point of uselessness. As far as the PLA is concerned renewal of the materials would necessitate formal application in accordance with the provisions of the Port of London Act 1968."

114. In September 1973 the PLA sent Nalgo a copy of the 1965 plan, intended to show the position of the moorings. However, when Nalgo's representative inspected the site shortly before 15th November 1973 he could see a certain amount of chain but only about two were fixed to a root. In a letter to the PLA dated 21st January 1974 Nalgo proposed laying new roots so as form "trots" for yachts. This presumably reflected its concern about the absence of other suitable moorings.

115. However, Nalgo apparently did not lay new moorings, and purchased the existing ones in July 1974, together with 2 lighters. A year later, in June 1975, the PLA repeated in correspondence its reference to the moorings as "ancient moorings" (without the inverted commas) and repeated its view that renewal of the materials at the moorings would require a PLA licence.

116. In March 1983 Nalgo sold the moorings to Mr Lacey for £1,500. I deal in the next section with Mr Lacey's involvement in the site.

The acquisition of the moorings by Mr Lacey and his activities in relation to them

117. Although he purchased the moorings in 1983, Mr Lacey had been engaged in the area for some years before then, as the above history demonstrates (he had jointly purchased the land-side property and then entered into a partition with Mr Creed-Miles). However, his interest in the moorings started before then and his estoppel case needs to be put in that context.

118. In 1971 Mr Lacey was contemplating some form of land reclamation as part of his plans for Reeds Wharf and over the next 2 or 3 years had meetings with PLA officials about that. In the course of those discussions the PLA sent him a copy of a chart showing the lines for embankment that the PLA might be minded to accept. The chart that was sent seems to have been an extract from the 1966 or 1968 PLA chart, showing the "Small Boat Moorings" with small "tadpoles" apparently showing mooring positions. In its context, of course, that map is not sent with a view to identifying those moorings. The chart as sent had a different purpose.

119. Part of Mr Lacey's plans involved a landing stage. At this stage Nalgo was contemplating buying the moorings. Cmdr Satow of the PLA suggested that Mr

Lacey contact Nalgo in that context (because of the plans for a landing stage). His letter to Mr Lacey said:

> "I have been approached by the National and Local Government Officers Association concerning their possible purchase and re-organisation of 25 small boat moorings (ancient) owned by Talbot Bros and sited immediately downstream of your project. It occurs to me that it would be to advantage for discussions to take place between your clients and Nalgo."

120. I quote this because it is the start of Mr Holland's chain of dealings which is said to amount to representations to Mr Lacey about the quality of the moorings, upon which Mr Lacey's estoppel case is based. Bearing in mind the context in which the statement about the quality of the moorings was made, it is a flimsy start.

121. Mr Lacey contacted Nalgo, but did not get a response. Shortly thereafter Nalgo purchased the moorings.

122. At the time Mr Lacey was living at Reeds Wharf and he was able to observe the use that Nalgo was making of the moorings. It had ambitious plans to lay down yacht trots (lines of chains running in the direction of the stream, parallel to the bank, at which yachts could be moored) gaining access from East Lane Stairs (downstream of Mill Stairs) but they did not pursue them. It occasionally moored a Thames lighter there. In around 1982 Mr Lacey approached Nalgo to see if it might consider disposing of the moorings. He claimed to be aware that the PLA regarded the moorings as "private", that is to say "ancient", as a result of his dealings with Cmdr Satow, but I do not consider that at this time the PLA should be taken to be making any representation to the effect that moorings were pre-1857 moorings. The dealings were too casual and contextually different for that.

123. As a result of his negotiations, Mr Lacey purchased Nalgo's interest in the moorings on 7th of March 1983 for the sum of £1500. His witness statement says that when he purchased he believed that he was buying "some 25 ground anchors or 'roots' embedded into the river bed to which chains were attacked." He claims that he knew this because the chart attached to the Talbot statutory declaration of 1936 was within the epitome of title. He claims that from the documentation provided to him when he purchased the moorings he believes that they were "ancient/private" and were not required to be licensed by the PLA. Mr Lacey did not employ a solicitor in this transaction, and I find that such views as he formed as to the nature and duration of what he was buying were views that he himself formed and were not as a result of anything that the PLA had said at this time. He had informed himself of the terms of

the 1968 Act and such beliefs as he had did not stem from anything the PLA had said to him. Such contacts as he had had were too casual for that and were in the context of discussions about something else.

124. On 25th October Mr Lacey had a conversation with a Captain Bull of the PLA. Mr Lacey's note of this conversation survives. In it Capt Bull is quoted as saying that the moorings were "older than PLA".

125. In November 1983 an officer of the PLA spotted a mooring boy near Reeds Wharf and a Mr Milford of the PLA rang Mr Lacey's office. The note of the telephone conversation records Mr Milford as saying that Nalgo never had a mooring and that there were no ancient moorings there. Mr Lacey claimed that he called Mr Milford back the following day, on 8th November. The latter was apologetic and said he had done some further investigation and confirmed that, having now carried out his further investigations, he was able to confirm that there were indeed unlicensed ancient moorings in the vicinity of Reeds Wharf, and gave the numbers as 67 – 70 and 72 – 92 inclusive. He is said to have asked Mr Lacey to confirm that he had purchased Nalgo's moorings, and the next day Mr Lacey wrote to confirm that he had purchased "the unlicensed ancient freehold moorings known as Downings Roads which were at one time the property of Talbot Brothers Ltd." Bearing in mind the context of this conversation, I think it likely that the conversation was more about Mr Lacey's ownership of the moorings than about their "ancient" (in Mr Lacey's parlance) quality.

126. Having purchased the moorings Mr Lacey set about trying to identify where they were. Like anyone else, he could only do most of this at low tide. All he had to work on was the statutory declaration plan. It was not easy identifying the roots (or where they appeared to be) because there were so many chains criss-crossing the foreshore and it was difficult to trace those back.

127. Over a period of time he acquired some lighters and attached them to the mooring chains. During this period he did not seek to lay, remove or replace any roots. He just used what he had found. The first residential vessel arrived in 1985. Others followed.

128. During this period (in the 1980s) work was carried out to China Wharf. In order to construct a new building, part of which projected over the foreshore on piles, contractors installed a sheet piling coffer dam to which (with the agreement of contractors) Mr Lacey secured a "mooring line". It was secured to the bottom of the sheet piling and remained there when most of the piling (above this point) was cut down and taken away. At this point Mr Lacey attached mooring ropes to the hole; he

did not attach a chain at this point in time. In due course (in 1997) he went on to connect this connection point by a chain and went on to connect, via a further chain, to a further point on the wall of his building. Although the configuration has changed, one can see the area involved around chains 21, 22 and 23 on Mr Honey's plan (Appendix 2) . Whether or not this, and a later addition here, amount to a new mooring chain in the river is something that I shall have to decide in this judgment.

129. During this period there was occasional contact between Mr Lacey and the PLA - about buoys and the like. By the early 1990's he had got about 10 vessels berthed at the moorings, and was beginning to attract complaints from those onshore.

130. Between 1987 and 1989 Mr Lacey had a dispute with Bovis Homes about the moorings. Bovis had bought Springalls Wharf (a short distance downstream from Reeds Wharf) and had plans to build out over the river. Mr Lacey took the view that that would deprive him of the use of some of his moorings, and to stop them doing this he moored a barge up against Springalls Wharf. Bovis brought proceedings to require its removal. At first instance HHJ Finlay QC refused an interim injunction, but the Court of Appeal reversed that decision and granted the injunction. The case then settled on 10th May 1989, with Bovis purchasing the two most directly threatened moorings (nos. 77 and 88) for the sum of £45,000, and in return Mr Lacey granted an exclusion zone in front of Springalls Wharf in which he would not station barges. In the end Bovis did not carry out the particular works which had triggered this dispute. Other developers took over the site and developed without building out into the river. During the course of the dispute Mr Lacey asserted his rights (to Bovis) in terms which demonstrated that he believed he had "ancient moorings". I find that he himself had that belief. It was impliedly referred to in a letter to the PLA from his solicitors, dated 30th April 1987 in which his solicitors asserted Mr Lacey's intention to "protect his ancient moorings".

131. There was a certain amount of correspondence between representatives of Mr Lacey and the PLA in this period of the Bovis dispute. On 7th October 1986 Mr Lacey wrote to the PLA with the heading: "Downings Roads: Ancient Freehold Moorings" (a description which reflected Mr Lacey's views of what he had), recording his objection to what Bovis proposed. The PLA's short response on 13th October (repeating Mr Lacey's heading) was a holding one. PLA documents show that officers carried out inspections of the area, expressing differing views as to the state of the chains that were in view. A PLA note of a conversation with Mr Lacey dated 10th March 1987 records the PLA as stating the view that on renewal of its chains a mooring lost its claim to be an "ancient mooring". Mr Lacey is recorded as disagreeing. The record does not show any challenge to the "ancient" characteristics of the moorings. Solicitors for Mr Lacey wrote a few days later, on 19th March 1987 saying (amongst other things) that Mr Lacey owned the moorings, claiming that they were "private moorings" which the PLA had power to remove under section 64 but which it had never sought to do. A letter of 26th March asked for confirmation that in considering another application the PLA would have "regard" to Mr Lacey's rights.

In internal PLA document of 22nd April considers the position of “ancient moorings” (pre-1857 moorings) which Mr Lacey claimed to have and observed that it was impossible to reconcile the moorings which one could see with the mooring roots shown on the plan relied on by Mr Lacey. It recommended that any licence granted to Bovis should be subject to an indemnity. It is not clear how much of this was communicated to Mr Lacey, but on 17th November 1987 the PLA wrote to Mr Lacey’s solicitors, in response to a query about gaps in the numbering of moorings, as follows:

> “The mooring numbers on our chart relate to numbers allocated to moorings in our old mooring registers. These registers go back many many years and are no longer in use. It is accepted that long ago the moorings claimed by Mr Lacey existed in the area known as Downings Roads and the gap in numbering reflects this. The position today is quite different of course in that the majority of Mr Lacey's moorings no longer exist."

132. Mr Lacey was refused an inspection of the old mooring register (which fell into disuse in the 1970’s), though later on copies of extracts were provided.

133. During the course of all this a PLA official made some sort of survey of the moorings and produced a plan dated 3rd June 1987 and reflecting a survey on 29th May. It is titled “Private moorings located 29th May 1987”. The technique adopted is unknown, but the marking of the plan suggests it was done by a hydrographic surveyor. It shows just 12 apparent roots (and no chains).

134. Towards the end of the 1980s Mr Lacey was bringing the moorings into more active use. He decided to set up a company to own and manage them, and the claimant company was set up for that purpose. On 16th November 1988 the moorings were conveyed to the company, and that company started to grant licences to boat-owners to moor their boats at the moorings. Also at around this time Mr Lacey started to buy chain to replace some of the chains that existed at these moorings. He attached chains to existing roots in the sense that he attached them to sound chain emerging from the mud. In only two cases did he attach chain to what he though was an actual root, as opposed to attaching a chain to another chain at the point at which it emerged from the mud. One such root was root 92, which seemed to be a concrete root stones lying on top. I find that such chains as were bought and laid in this period were not bought and laid in reliance on an representation made by the PLA as to the pre-1857 of the moorings. They had not made any clear representation about this, and so far as they had said anything Mr Lacey was relying on his own views far more than anything said by the PLA. During this period (during the Bovis litigation) Mr Lacey’s researches had revealed other charts - he came across the 1980’s document, the 1924 chart and the 1966 and 1968 PLA charts as well. Once he had discovered the two latter charts

he relied on those as determining the position of the roots from then on, according to his evidence in cross-examination.

135. In April 1989 the PLA was considering the creation of a deep water berth opposite the entrance to St Saviour's Dock. On 26th April Mr Lacey wrote indicating that he would like to be consulted on the proposal (as the owner of Reeds Wharf and on behalf of the company as owner of moorings). Internal documents show that his letter was noted, but in due course the berth was created without consulting Mr Lacey.

136. By 1990 the company had introduced 10 new vessels to moor at the moorings. The technique was to moor them to the more permanent lighters that were already there. It was the lighters that were moored to the ground moorings. Initially they were attached to the chains nearer the shore, but as time went on Mr Lacey was able to identify more chains farther offshore, and bring those into use as well. An internal report of the PLA dated 18th August 1990 observes that Mr Lacey was "claiming more and more of the foreshore", and one dated 20th August says that they were "looking closely" at Mr Lacey's works. It also observed that they would have to "tread warily with this guy".

137. On 18th August 1993 the PLA notified the claimant that it appeared that there were two sunken barges "at the ancient moorings" which were capable of becoming a hazard to navigation and requiring some action. Mr Lacey's notes on the letter indicates that he appreciated that that had to be done.

138. In 1996 Wiltshier Construction's nearby works at Springall's Wharf seemed to be capable of affecting one or more of Mr Lacey's moorings. The PLA gave permission for works in the river recorded that assurances had been given by Wiltshiers to restore a particular mooring. A letter to Wiltshier's solicitors dated 23rd January 1996, copied to Mr Lacey, went on:

> "The mooring in question is one of many located in the area of foreshore off Jacobs Island which are deemed to be "ancient moorings" as defined in Section 63 of the Port of London Act 1968 (as amended) and thus not subject to the PLA's powers to licence river works set out in Sections 66-70 of that Act.
>
> These ancient moorings are known to exist and ownership is claimed by the Tower Bridge Yacht and Boat Co Ltd, whose director is Mr Nicholas Lacy. The company has craft berthed at some of these moorings, including, apparently, the mooring

number 90 which was disturbed by the driving of the temporary sheet-piling.

The PLA has in the past acknowledged Mr Lacey's claim to ownership of these ancient moorings when considering the grant of other river works licences in this area. We do not have documentary proof of his ownership, and even if we had, it would of course be improper for us to disclose it to 3rd parties without the permission of the owner. You must therefore apply to Mr Lacey for proof of ownership."

139. The debate with Wiltshiers rumbled on (the details do not matter), and on 10th December 1996 Mr Woodward, Chief Harbourmaster of the PLA, wrote a letter to Mr Lacey commenting that having looked at "the plan showing the locations of your ancient moorings, I do not think that any of them would be affected".

140. In response to a later letter from Mr Woodward, Mr Lacey wrote on 7th January 1997:

"We are in fact going to be carrying out some repair and maintenance work very shortly to [a particular mooring] and some of the other moorings – you may know that the Company recently bought four lighters from the Authority for use as additional collar barges, and we do not want to take any risks with them!"

141. What in fact happened was more than "repair and maintenance" work. In letter dated 8th January 1997 Mr Lacey instructed Downtown Marine Ltd ("Downtown") to carry out:

"Repair and maintenance work to the Company's moorings at Downings Road as shown on the attached drawing and schedule of work.

I can confirm that Downings Roads are recognised by the PLA as private moorings (ancient moorings), to which section 63 of the Port of London Act 1968 refers. As stated in the Act, sections of 66 (Licensing of works) and 70 (Works not to be constructed etc without works licence) therefore do not apply."

142. The schedule of works and drawing have not survived. Downtown has gone into liquidation, and whether for that reason or some other reason, no documents relating to these works has come from them. In fact, there seem to be no other documents relating to these works at all.

143. This is unfortunate because the scope of these works was in issue in these proceedings, though that dispute narrowed during the hearing. Originally it seemed that it was going to be said that a new root was placed in the stream upstream of any of the existing roots, and that that was evidenced by some photographic evidence of Downtown's barge carrying out works close to the Harpy. However, by the end of the hearing the PLA was no longer asserting that that had happened. What I find, on he basis of the evidence, was that the following works were done:

(a) 5 of the moorings were refurbished in the sense that new roots, with new chains attached, were put down. They were roots 73, 86, 89, 91 and 92.

(b) All of these refurbishments were done by placing newly acquired pick anchors (weighing between 2 and 6 tons) in place.

(c) The anchors had all been purchased in the previous year (1996), apparently in anticipation of these works.

(d) No existing roots were dug up and replaced by the anchors. The anchors were placed as near as practicable to the position of the old roots, leaving those roots in place. Mr Lacey's witness statement suggested that root 92 was different, being found downstream of where the charts showed it to be. Because it was impractical to disturb the concrete which seemed to be the root, a pick anchor was placed slightly downstream of it. It is not clear why this process was described in slightly different terms from the process in relation to other roots, where anchors were put as close as practical to the existing root (but not in precisely the same place); it may be a matter of degree.

(e) Root 86 acquired 2 anchors - one pointing each way, so that one was a flood mooring and one was an ebb mooring. On any footing that was apparently a significant improvement over the old 86, which did not have that feature.

(f) To position most of the new anchors Downtown worked from the 1966 and 1968 PLA charts, but in relation to the ones above the low waterline they also had some visual clues from seeing where the chains disappeared into the mud. However, that cannot have been the case with root 86, which Mr Lacey had not been able to find physically (according to his evidence at Day 5 page 86) and which does not appear on the 1966/1968 plans. He must have worked from something else to find a position for that – presumably something like the 1932 plan (but he did not say so).

(g) Some new chains were laid, but not throughout. Some new chains had already been laid in the first half of the 1990s. There was no evidence of the extent of new chain laying at this point, apart from the point made in the next sub-paragraph.

(h) A new chain (both in terms of its newness as a chain and in terms of the route that it took) was laid between between root 73 and the mooring point in the old piling of China Wharf. A further link was later laid from there to the wall of Reeds Wharf. Mr Lacey says that this two stage journey probably came about because they did not have quite enough chain to get there in one go. I do not accept that evidence. If there was such a problem (which itself would be surprising) I do not see why that problem required an intermediate fixing in the old pile. It could have been achieved by linking two bits of chain with a shackle, if necessary. Mr Lacey had other reasons for doing this - he probably believed he had a better chance of establishing that a mooring attached to his building did not require a licence than one incorporated into old piling in the river bed.

144. There is little evidence of the cost of this exercise, which is surprising because carrying out this exercise and its cost is a central part of an estoppel claim - it is said to be a key act of reliance. There was no disclosure of any documents going to cost. Mr Lacey had not retained any. Nor was there any disclosure of the historic accounts of the company (which ought to have reflected it). Even more surprising is the fact that Mr Lacey's witness statement does not attempt to deal with it, other than to say: "The total costs have been significant" (para 217). When asked about amounts in the witness box in cross-examination he could not answer the question because, apparently, he had not thought about it - that is the impression he gave. Eventually, when he was asked again, in re-examination, he attempted a quick calculation which he carried out there and then on a piece of paper that he was provided with. He put the Downtown contract at about £25,000, but said that he had purchased most of the equipment (by which he must have meant the anchors and chains) before the contract. He put the purchase of anchors back into 1995. The cost of his own works was estimated at £15,000, and the biggest item was the purchase and refurbishment of collar barges at over £600,000. It was not clear when these latter items were actually

bought - some collar barges were purchased before 1997 (he had bought them from the PLA - see above).

145. As evidence in support of an estoppel claim this evidence is very unsatisfactory. I am not prepared to find that there was expenditure at this level at this time. If the expenditure had been incurred at this sort of level at this stage, with the obvious significance that that has to an estoppel claim, I would have expected some clearer and more reliable evidence. The Defence promised particulars in due course. None were provided, and the fact that the evidence emerged in a quarter-hearted fashion in the course of re-examination (with an opportunity to give it earlier having been effectively declined) says much for the strength (or lack of it) of the evidence of reliance expenditure. In the light of the evidence of Mr Beckett I am prepared to find that the company did spend significant sums, but beyond that I do not make a finding. I consider the significance of this below when ruling on the question of estoppel.

146. Mr Lacey continued to have dealings with the PLA during this period. Shortly after the works had started they were apparently noticed by the PLA. Mr Woodward of the PLA wrote to Mr Lacey on 10th March noting the commencement of work and stating that he could not trace the PLA having had notification of the works - apparently he had overlooked the January letter. His letter went on:

> "Please advise details of the moorings which are being placed and for what purpose they are intended. Please supply a plan accurately showing the position of the moorings.
>
> Are these replacements for your ancient moorings or new ones?"

147. Mr Lacey responded by a fax the same day stating that he was working on moorings 73, 86 and 92, with some work to 91. He went on:

> "The reason for the work is that certain of the moorings have been loosened and in some cases pulled out because of an apparent lowering of the levels of the foreshore… As you know, the company recently bought some lighters from the authority for use as additional collar barges, and with the gradual reintroduction of heavier loads to the moorings it is important to ensure that all craft are properly secured. I know that the PLA will not want to see the risk of vessels breaking away from their moorings any more than we do.

> In my letter to you of 7 January I told you that we were very shortly going to be carrying out repair and maintenance work to the moorings. We have been advised that, in accordance with section 63 of the Port of London act 1968, Sections 66 (Licensing of works) and 70 (Works not to be constructed etc without works licence) do not apply, and this notification was therefore given to you as a matter of courtesy.
>
> The company is employing experienced contractors to carry out the work on its behalf. They have mobilised appropriate plant, equipment and labour to expedite it safely and efficiently. Any delay in such work is expensive, and I'm sure you will understand that if the Authority causes delay to the Company's contractors in carrying out this work with which it is fully entitled to proceed, and which is necessary for the continuing secure use of the moorings, we will be obliged to look to the PLA for reimbursement of any additional costs involved."

148. He accompanied this fax with a diagram showing the moorings worked on, ringed on two plans or charts.

149. This exchange of correspondence was followed by a meeting the next day (11th March) between Mr Lacey on the one hand and Capt Cartlidge, Mr Woodward and a Capt Dickens of the PLA. Mr Lacey took a note of that meeting. It records Mr Woodward as saying that they had taken legal advice and "she says" ancient moorings are a right to lay moorings in a particular location. They were not ownership of the existing route and chain… "Agreed impracticable etc". Capt Cartlidge is recorded as having said:

> "So issue is to ensure that they are laid in right place or 'within Waterman's piss'".

Then the note reads:

> “Capt S: (to BW) so happy with licensing aspect? (BW) yes, they are unlicensed".

The note then records concerns about use as swing moorings because the PLA was worried that craft would swing out too much.

150. There is something odd about this note. It has aspects which suggest both a note taken at the meeting and a note made afterwards. It contains the apparently verbatim quotes attributed, by initials, to the maker of the remark. It is hard to do that at a normal business meeting and it reads and looks more like a note made afterwards, although amendments to the quotes look odd in that context. Furthermore, the text of the note surrounds 2 other blocks of text which are apparently notes of something entirely different. However, the substance of the note is confirmed by a letter of 13th March from the PLA, so I do not think that it is a fabrication. On that date the PLA wrote:

> "Historic Moorings – Bermondsey Wall West
>
> Thank you for attending the meeting on Tuesday and helping to clear up the misunderstanding with respect to your overhaul of the above moorings. For the sake of clarity I thought it might be useful to set out the Authority's position as was discussed.
>
> There is no dispute concerning your right, indeed if the moorings are to be used your obligation, to maintain the moorings in good repair. However in order to ensure that safety of navigation is not impaired the Authority requires notification of such work be kept informed, in detail, of such maintenance work before it is commenced. We also reserve the right to assure ourselves that replacement moorings are put into the correct position within the bounds of reasonable tolerance.
>
> Although we "missed" the earlier intimation in your letter of 7 January, for which I apologise, this in itself did not give sufficient information for our purposes."

151. It appears from these exchanges that the PLA was not asserting its right to impose controls over these moorings by imposing a licensing regime and was apparently treating them as "ancient moorings". It was also not challenging Mr Lacey's claim of right to be able to replace mooring roots; nor was the PLA insisting that any replacements had to go down in precisely the same place if they were close enough. It does not, however, suggest that it was consenting to leaving the old roots in place and putting new ones in an attempted close position, determined by reference to a chart and not by reference to the root itself, which is what Mr Lacey was doing.

152. Mr Lacey's witness statement says that misunderstandings between the parties were thus resolved and "Downtown Marine were able to recommence operations". It appears from a letter from Mr Lacey of 10th of March that the contractors had temporarily halted work, but any cessation must have been extremely short.

153. The PLA was not entirely happy with the arrangement which resulted, because on 14 August 1997 Capt Cartlidge wrote to Mr Lacey complaining that the craft on the moorings appeared to extend considerably beyond the western limit of the mooring grounds and secured in a manner such that passage inside them to other frontages was obstructed; craft were secured to Mill Stairs and obstructed the stairs which were a public access; and that a locked gate had been placed in the stairs entrance. He asked to be told of Mr Lacey's plans to re-moor the craft so that they would remain within the boundary of the "ancient moorings" and cease to constitute an obstruction to navigation. He also asked for clarification of the position in relation to Mill Stairs. Mr Lacey responded on 4th September, pointing out that there was no access to the foreshore from Mill Stairs and confirming that the company was responsible for the craft secured to the "Ancient Moorings" and suggesting how he would deal with access questions.

154. In the next year Mr Lacey acquired his own crane to facilitate the refurbishment of moorings. He then refurbished 2 more (Nos. 75 and 83) which he did by making a concrete block with a ring in the top, excavating a hole to put it in, dropping it in and attaching chains. The position of the hole was fixed by measurement and triangulation from known points in the river wall. He did not say against what the measurements were done, but I infer that it was against the 1966 and 1968 charts again. He does not seem to have looked to see where the existing roots were and tried to get as close as possible by eye.

155. Mr Lacey’s witness statement says that had he been informed that the moorings were required to be licensed he would not have spent his time or money in carrying out the works. The extent to which that is true is something I deal with hereafter when considering estoppel and legitimate expectation.

156. Throughout this period Mr Creed-Miles had been complaining about various aspects of the mooring. In July 1998 his solicitors complained again, apparently about the obstruction of access to his part of the bank. In response Mr Woodward wrote:

> "The barges moored in the river off Reeds Wharf secured to what are termed "ancient moorings". Under Section 63 of the Port of London act 1968 (as amended) the PLA's powers to

licence River works under S.70 of that Act do not apply to mooring chains placed in the terms before 29 September, 1857. Thus the moorings in question are not licensed by the PLA."

157. In line with its previous attitude, the PLA was demonstrating that it was not concerned to assert licensing control over these moorings. It also appears that it was viewing Downings Roads as moorings which were in place before 1857. The expression of view to this effect was, however, to Mr Creed-Miles and not to Mr Lacey. Mr Lacey did not see a copy of this letter until disclosure in this action.

158. On 22 February 1999 Mr Lacey notified the PLA in writing that he proposed to undertake work to moorings numbered 75, 78, 83, 87 and 90 (relaying heavy chain to match the chain used elsewhere). The PLA's response of 3rd March was to express concern about the position of number 90 (on the footing that it was on land now embanked) and that some groundwork had been laid to the west of number 73, 75 and 78 which did not form part of what the letter described as "ancient moorings". Mr Lacey's riposte was to explain that the works to root 90 were to a mooring root which had been disturbed by developers and which Mr Lacey was reinstating, and that no moorings had been laid to the west of the other three identified. He did accept that a chain had been run from 73 to Reeds Wharf as a "holding-out chain" to stop craft causing an impact against the building. He maintained that the chain lay within the frontage of Reeds Wharf and was a perfectly proper use of the mooring root.

159. The PLA's case is that the chain that was laid was of a heavier quality than that laid before. Mr Lacey did not say this in his witness statement. The following exchange occurred, which is what Mr Harpum relied on in this respect (Evidence Day 7 p32-3):

" Q. Can I take you next to green 4, 812. That's a letter"

21 dated 22nd February 1999 to Captain Cartlidge. You

22 indicate that you're going to carry out some further --

23 what you call "refurbishment work" in relation to the

24 mooring numbers there specified, five of them: 75, 78,

25 83, 87 and 90.

A. That is correct, yes.

Q. And you state, do you not:

"We will be re-laying heavy chain to match that used elsewhere on the moorings."

A. Yes.

Q. What I inferred from that -- I put to you that the inference from that is that you are seeking or in the process of replacing all the chains in the moorings with a heavier chain than had been there before; is that right?

A. Well we're certainly replacing all the chain, because in the event, none of the chain that we found about the foreshore was in usable condition, mostly, as I think I already explained, because of wear rather than corrosion.

Q. By replacing the chain, certainly if it was a heavier chain, you would be able to moor larger vessels and more vessels, wouldn't you?

A. Clearly, the heavier the tackle the greater the capacity of the moorings, yes. I wouldn't disagree with that.

Q. And you wanted to maximise that capacity?

A. Well, I wanted the -- both the ground tackle and chains

23 to be adequate for the loads to be put on them, for

24 clear pragmatic and safety reasons.

25 Q. Can I take you --

1 A. Sorry, if I just can add: as Mr Beckett, I think,

2 pointed out, in the design of moorings, one tends to

3 over-design, to build in a large factor of safety, and

4 I think that is a wise thing to do in the case of all

5 moorings, because clearly the one risk is of barges

6 breaking loose

160. This passage, in terms, does not quite say that they were heavier chains than the original. Mr Lacey seems to have been saying that they were better chains than then existed, bearing in mind the state the chains had got into over the years. The reference to being able to take greater loads is likely to be a comparison with what he (not the historical owners) had used it for before. It was not put to him that he was improving the moorings over their original state (so far as that could be ascertained) and I do not find that he did.

161. Nothing much happened as between the PLA and Mr Lacey for the next 2 years or so. Mr Lacey continued to do some work on his moorings, but not much relevant to these proceedings. Mr Creed-Miles, however, was more active. He was seeking access to his river frontage, which he considered Mr Lacey to be obstructing, and he wanted to install a pontoon and to dredge along his river frontage. This gave rise to some acrimonious correspondence between Mr Creed-Miles and the PLA (who did not consider they could do much as against Mr Lacey) and Mr Creed-Miles and Mr Lacey. Nothing much turns on this, but it does demonstrate the bad blood which still existed as between the two individuals.

162. During the course of the correspondence Mr Creed-Miles' solicitors asked the PLA what it meant by "ancient moorings". In a reply dated 4th June 2001 the PLA responded:

> ""
>
> "7. "Ancient moorings" is a shorthand term used to indicate the kind of moorings referred to in Section 63 of the Port of London Act 1968."

163. During this period (in 2001) Mr Creed-Miles witnessed the arrival of a lorry-load of chains. I find that such chains were delivered. He also claimed to have witnessed the rooting of a chain in the river bed against Reeds Wharf. Mr Lacey admits the placing of a new chain attachment (to use a neutral phrase) in that area, but says it was attached to the river wall, and was not rooted in the bed of the river. This dispute matters because, while this attachment is not claimed by Mr Lacey as a pre-1857 mooring, he says that the licensing regime does not apply to attachments to the wall as opposed to being roots in the river bed. .

164. The photographic evidence on this point is inconclusive. I have seen a photograph which appears to show a shackle at the surface of the river bed, which Mr Creed-Miles says is a shackle which fixes the chain to a root embedded in the soil. Mr Lacey maintains that the chain goes on and fixes to his new wall fixing. Nobody has sought to expose the root of the chain to see who is right. On the assumption that a finding on this point is material I find that the root is not in the bed, so it must be in the wall. I reach this conclusion, somewhat unusually, by applying the burden of proof. The PLA complains about the chains and the roots. If it is a necessary part of their case that the root is in the Thames bed, rather than in the wall, then that is something that they must demonstrate - he who asserts must prove (as a general rule). This must particularly be the case where there is a criminal sanction arising out of the same provisions (as in the case of the 1968 Act). The burden of proof is therefore on the PLA, and I find they have not fulfilled it. I do not find that one witness or the other is more credible on the point. The result is that the PLA has failed to fulfil its burden of proof. Whether the position of the root matters or not depends on the true construction of the Act, to which I turn later in this judgment.

165. During this period (in 2001) Mr Lacey also added some additional chains to root 92, and he also ran another chain from the old piling and wall , apparently to one of the barges.

166. On 7th March and 26th April 2001 the PLA carried out a survey of the mooring site and produced a plan. It took 2 hours, and was obviously only a survey of what could be seen on the surface. The Report stated:

> "Most of the ground tackle has been upgraded with a discarded older chain in various positions on the riverbed. It was not possible to discern whether the roots/anchoring points have been moved as many of them are buried."

167. The report observes that vessels had been added to the moorings between the two survey dates. This is consistent with what Mr Lacey was doing throughout the whole

of this period - he was adding vessels and extending the footprint of the mooring (in terms of the area occupied by vessels). This is one of the things that vexed Mr Creed-Miles and the occupiers of the Harpy (including Mr Ackland). Mr Creed-Miles' solicitors continued to press the PLA on the point. Mr Creed-Miles also complained about loss of amenity from old barges which were moored alongside his frontage, a short distance away, and which created noise and smells.

168. The March 2001 plan seems mainly concerned to show the position of boats, though it does contain some lines presumably intended to show chains, and some circled dots which might be intended to show apparent roots (or where chains disappear into the mud). The methodology of the plan is not apparent.

169. On 2nd July 2001 the PLA sent a letter which is the first move towards a position of not accepting that Mr Lacey had any rights in respect of his "ancient moorings". The letter was headed "Barge moorings - Downings Road", and the relevant part reads:

> "A recent hydrographic survey and visual site inspection indicates that a number of barges and other craft has been placed in the vicinity of, but not actually on, the moorings to which you claim exemption from the PLA River Works licence at the former Downings Road, in front of Reeds Wharf, SE1.
>
> Without prejudice to the PLA's position as to the validity or otherwise of your claim to exemption in respect of the former Downings Road moorings, the PLA considers that the craft numbered 1, 4, 5 and 6 on the attached plan and other vessels attached to them are moored to works other than those moorings.
>
> Accordingly you are asked to remove these works within 28 days or to apply under section 66 of the Port of London Act for a licence for such of these works as you may wish to retain."

170. In his reply Mr Lacey said:

> "Turning now to the other craft to which you refer and which have been numbered "4, 5 and 6" on your plan: I can confirm that these are moored to the Company's moorings including Nos. 73, 75 and 78 and their associated ground chains. This also is a perfectly proper use of those mooring roots, and we

would have to resist firmly any suggestion that this use of the moorings should cease. In the interests of securing them safely in all conditions of wind and tide, and avoiding their swinging as described above, the craft are also attached to one another by means of warps. This is normal seaman-like practice to which I trust you have no objection. With the exception of these warps, it is not correct to say that the craft are moored to works other than those [Ancient] moorings. The issue of removing works therefore does not arise."

The square brackets were Mr Lacey's.

171. The response of the PLA came on 7th of September 2001:

"My reading of the correspondence is that the PLA has repeatedly questioned your extensions to the original ("ancient") moorings and has not received wholly satisfactory answers. That remains the position, in my view.

…

Whereas it could be argued that replacement of original moorings dating from before 29 September 1857 in the course of maintenance would not alter their exempt status, subsidiary or totally new moorings would not be exempt. It is my contention, therefore, that any additional chains, boys, floats or bedding material etc laid at Downings Roads are river works as defined in section 66 of the Port of London Act. Moreover, since they lie below mean high water, these works are subject to a consideration for licence under section 67 of the said Act. Further, the use of the original moorings is probably limited to the type of craft for which they were designed.

I have carefully considered the arguments put forward in your letter and have inspected the site both from the river and from the landside, with the Harbour Master. I cannot agree with your contention that the 'flotilla' of craft that are now clustered around craft attached to the original ("ancient") moorings are simply more vessels and are similar in nature to the original craft which would have more to their prior to 1857. To my mind, they are undoubtedly works. Also, I do not accept that a craft stationed but held off a riparian frontage solely to give access to other craft at moorings is a craft at a mooring. To my

> mind, it is being used as a pontoon and, as such, requires a River Works Licence."

172. Thus the expressed view of the PLA did not yet challenge the extent to which any of the moorings were "ancient", but the letter firmly takes the point that the extent of the mooring activity was now being objected to. In his reply dated 13th of September 2001 Mr Lacey challenged the assertion that different types of craft were now being moored, and he did so by reference to photographic evidence.

173. The attitude of the PLA is set out in a letter to the solicitors to Mr Creed-Miles dated 10th of October 2001. Those solicitors had challenged the apparent proposition that Mr Lacey had some moorings dating back to 1857. In response to that the PLA said:

> "You raise the question of the authenticity of the Downings Roads Moorings and whether this has ever been established. The view we have taken up to now is that there is no dispute that the Moorings were in existence well before 1894. It is reasonable to assume, therefore, that they were licensed or approved by the relevant authority of the day. It would be extremely difficult, we believe, to make a case that Mr Lacey should now be required to produce documentary evidence of approval of the moorings, prior to 1894. It could be argued that their very existence, and licensed for over a century, is sufficient evidence of their authenticity. We do not think it would be fruitful to pursue that approach to the problem. (Incidentally, there are dozens of so-called "ancient moorings" in the tidal Thames)."

174. This attitude continued in later correspondence in the year, in which the PLA indicated they would challenge what they regarded as additional works or the physical extent of the moorings, but there was no indication that it challenged the "ancient" quality of a lot of the moorings.

175. However, there was more movement away from this position in a letter of 9th April 2002, in which the PLA said:

> "We remain of the view that, even assuming that the original Downings Roads Moorings may qualify for exemption from PLA licensing and savings in the Port of London Act, and this is still being researched, any works which extend the original moorings, do not. We believe that extending original moorings

by adding stern moorings and/or running chain over the riverbed is outside the scope of any exemption that might exist. All such extension works, along with any vessels which are permanently moored and gangways and service apparatus, are, in our view, riverworks requiring riverworks licences.

...

In conclusion, I would refute that the PLA has confirmed that all your craft are properly moored to "ancient moorings". We have, and do, maintained that a number of craft are outside of the moorings known as Downings Roads and identified on a plan of which we each have copies. The provenance of that kind is uncertain. The photograph of Downings Roads circa 1922 is interesting, but not relevant since the savings (exemptions) in the Port of London Act apply to moorings in existence pre-1857. Even then, the PLA has powers to remove such works on payment of compensation (and then, only if the works are sound). A further saving exists for works authorised by any enactment coming into force before 17 August 1894, but we have found no evidence that Downings Roads was so authorised.

This disagreement has been going on for a number of years during which time you have failed to produce tangible evidence to support your assertions regarding exemption from licensing. If you can produce any evidence that Downings Roads falls under either Sections 63 or 68 of the Port of London act 1968, we shall be pleased to consider it."

176. The reference to research plainly indicates that the PLA is no longer necessarily proceeding on the assumption that the moorings date from 1857, and the last quoted paragraph makes that clearer. I find that from the date of this letter, at the latest, Mr Lacey understood, ought to have understood, that's the "ancient" quality of his moorings was no longer accepted, assumed, or a given. Mr Lacey's response of 16th of April suggests that he began to appreciate that because it points out that certain previous correspondence confirmed that Downings Roads were "private ('ancient') moorings. In cross-examination he was minded to accept that the PLA had, by its letter, suggested that he (Mr Lacey) did not have such a mooring; he said it was the first time that the PLA had suggested that.

177. This part of the correspondence coincides with what seems to be a shift in the internal attitude of the PLA to the private or ancient moorings. Mr Lacey's witness statement seeks to chart the historic and more recent attitudes, but I do not need to set out the details of this. What is important, for the purposes of these proceedings, is what was being conveyed to Mr Lacey.

178. Complaints from local residents continue to be made, and this seems to have resulted in a decision of the local authority to serve an enforcement notice in July 2003. It was served on the PLA as well as the claimant (and boat occupiers). At this time there were 9 collar barges and about 30 navigable vessels. The enforcement notice sought to reverse what was said to be a change of use from (in essence) commercial use by a few barges to residential use by a lot of barges. On 14th July 2003, in the context of that enforcement notice, the PLA served a notice stating an intention to serve another notice if Mr Lacey and TYB did not remove all works at the moorings which were not licensed under section 66 of the 1968 Act (which in practice meant all the moorings). Mr Holland's case in his final speech is that this was the first time there was an overt resiling from the PLA's previous treatment of the moorings as "ancient" so far as Mr Lacey was concerned.

179. I do not need to deal with the history thereafter in any detail. There was an appeal from the enforcement notice and the inspector allowed the appeal after a public inquiry and granted consent for residential and mixed uses, subject to certain conditions. He laid down guidelines within which the local authority could grant detailed consent. The local authority sought to impose certain conditions, some of which were the subject of a further (successful) appeal. The relevance of these facts lies mainly in the cost of the public inquiries. Mr Lacey claims that these costs were sums paid in relation to the first public inquiry in reliance on representations about the quality of his moorings, as part of his estoppel claim. In his back-of-an-envelope exercise he put them at £110,000. Again, there had been no attempt to substantiate these costs with any documents.

180. The only other factual matters to which it is necessary to allude in this section of this judgment is some financial material. The narrative so far has referred to expenditure by the company on works to the moorings (which includes the creation of a brow to link the barges to Mill Stairs, for access purposes). The company did, of course, have an income. The accounts for the company for the period from 2007 (whose accounts also have the 2006 figures in them) to 2010 were in evidence. They show a profitable business. The turnover went up from £110,000 in 2006 to £290,000 in 2010 (with a downward blip to £48,000 in 2007), and profits in each year ranging from £14,000 to £54,000 (though with a loss of £133,000 in 2007, which seems to have been an odd year for reasons that were not explained). This is not a company that has been struggling. From time to time there have been large amounts of spare cash which Mr Lacey was able to borrow, and while he claimed not to have taken any directors remuneration, he did take a dividend of £30,000 in 2006.

The current extent of the moorings and comparisons

181. One of the points that has been made historically in this case by those who oppose these moorings is the increase in the physical space occupied by the boats. There were a number of historic photographs in evidence in this case (including, interestingly, one which formed a jigsaw - the photograph came from the jigsaw box), and I do not need to describe all of them. However, the effect of one of them may be of interest. An aerial survey of the area was apparently undertaken in 1922, and two photographs were available. It shows a number of boats. Mr Dean has plotted their position on to a modern Ordnance Survey map, and the results are in Appendix 6.

182. The current position of TYB's own boats and facilities appears in the plan shown at Appendix 1.

183. The other potentially significant comparison is between the contemporary layout and the moorings shown on the 1931 plan. Mr Maynard carried out the exercise of plotting that plan on to a 2010 aerial photograph. Its effects can be seen from the document at Appendix 7.

184. These documents show that the footprint of boats moored is apparently greater than it was previously. That is of significance to neighbours who do not like it. However, the actual footprint of the boats is not the issue in this litigation, though it is capable of being relevant if it is capable of being translated into the whereabouts of mooring chains (which is the central issue in the case), and it is capable of going to the estoppel point.

What moorings were present in 1857?

185. In the absence of clear contemporaneous records, this has to be a matter of inference, working with historical records which are capable of going to the point and working back from later matters when possible. Because this becomes a matter of inference from pieces of evidence which are quite disparate, the question of the burden of proof assumes a greater significance. There was no agreement on where the burden of proof lay, and I have to consider the point.

Burden of proof

186. As will appear, it is sufficiently clearly established that there were some moorings there in 1857, but there still remains the question of where they were and how many

of them there were, and which of them occupied the same position at the start of the litigation. That being the case the question arises: Is it for the PLA to show that any given mooring used by the defendant and which it challenges to show that it was not there in 1857; or, assuming them to be works that would otherwise require a licence, is it for Mr Lacey to show that it was not there?

187. Mr Harpum's case on this relies on the maxim that "he who asserts must prove". He says that Mr Lacey is relying on an exemption from a licensing obligation, and he does so by saying that his moorings are pre-1857 moorings. Therefore Mr Lacey must prove that. He did not have an answer to the question as to how that worked with the criminal side - if there had been a prosecution, would Mr Lacey have to prove that his moorings were there since 1857? Logically his answer would have to be the same.

188. Mr Holland submits that the answer to the question lies in the construction of the statue - see *R v Hunt* [1987] AC 352. In particular one looked to see who would be likely to have the greater knowledge of the facts underlying the point. In this case the PLA was more likely to know - it would have to be a corporate knowledge, but that would be more than a mooring-holder would be likely to have. Alternatively, he submitted that it was open to Mr Lacey to raise some evidence of pre-1857 moorings, at which point it became for the PLA to prove that his assertion was not correct.

189. The question in *Hunt* was who bore the burden of proving that a concentration of a given substance in prohibited drugs did, or did not, achieve the level banned by legislation. It was a criminal case. Lord Griffiths, with whom the other Law Lords agreed, held that where the burden of proving or disproving an exception lay depended on the proper construction of the statute which created it - p374. Thus far Mr Holland is right, assuming that the 1857 point in the present case is an exception or defence for these purposes. However, the real difficulty, as Lord Griffiths went on to point out, is to determine the position when the statute does not expressly deal with the point, which the 1968 Act does not.

190. A useful starting point in this case is the fact that the Act creates a criminal offence. The question of burden would arise in a prosecution, and it would be odd if the burden were different in a criminal and a civil case - see *Nimmo v Alexander Cowan* [1968] AC at p 115E per Lord Reid and p 134 C-D per Lord Pearson. It is true that that case involved a statute which created a criminal liability, with the civil remedy arising only by implication, but I do not consider that that makes a difference. So it is useful to consider where the burden would be were this a prosecution.

191. One of things to which the court is to have regard in this respect is the difficulty that one party or the other would have in making the relevant case. As Lord Griffiths said in *Hunt* (at page 374):

> "However, their Lordships were in agreement that if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never likely to be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case and a court should be very slow to draw any such inference from the language of a statute."

192. In that context the licensing cases have to be considered. Lord Griffiths went on to consider cases in which the offence was doing something without licence, or similar pre-condition, and contrasted a case where there was a burden on the defendant to prove he had a licence, and one where the burden was on the prosecution to prove a sale without the surrender of rationing coupons. He concluded:

> "The real distinction between these two cases lies in the comparative difficulty which would face a defendant in discharging the burden of proof."

193. That point may be thought to have a resonance with the present case because what is wrongful is the carrying out or maintenance of works without a licence. In the first of Lord Griffiths' cases the burden was on the defendant because he could be expected to know, and to prove, that he had been given a licence. It is tempting to suppose that that reasoning applies in the present case, because the bar on carrying out works is removed not only in the case of pre-1857 mooring chains; it is also removed in respect of licensed works. It might therefore be thought that the defendant in a prosecution ought to know whether he has got a licence, so the burden should be on him, and by the same token ought to know whether he has got a pre-1857 chain, thereby having to shoulder the burden on that issue as well.

194. However, I do not think that that reasoning has such force in the present case. The justification for maintaining some works may be somewhat old as time goes on, and the person with the benefit of the works may well be significantly removed in time (and perhaps in personality) from an original licensee. While one can expect some

sort of chain of title, it might not go back to an original licence. In the case of pre-1857 mooring chains, it is even less likely that a present holder will be able to demonstrate clearly that everything they currently use was in existence in 1857. On the other hand the PLA is more likely to have records of what happened - it has been a consistently constituted body throughout the period (first the Thames Conservators, then the PLA) and Parliament would have expected it to have had some material. (Both sides would, technically speaking, have the same opportunity to get some "forensic" evidence by trying to see whether at least some of the roots and chains were physically capable of being 1857 roots or chains, though neither side in the present case sought to get any such evidence.) In the circumstances I would expect the burden of proof of all issues to be in the PLA. That is not to say that it has to produce hard evidence in every case. If there is no reason to suppose that a given mooring is that old then it will discharge the burden easily. If, however, there is reason to suppose that it is that old, and that that reason is not dispelled, then the defendant would (in a criminal trial) be entitled to be acquitted.

195. I consider that by parity of reasoning, and to produce sensible consistency, the PLA has the burden of proof in a civil action such as this.

196. This conclusion also ties in sensibly with what the historic position must have been. As a result of the 1857 Act, new mooring chains were not permitted without a licence. If there were an action in, say, 1860 in which the Conservators complained about a chain, one would expect them to have to plead and prove that the chain they were complaining about was put down after 1857, because it is only a chain with that quality that would be actionable. If there were an issue about that, it would have the burden of proof. That would have continued to be the case for under the successive Acts thereafter, leading up to the 1968 Act. A complaint about acts done since the passing of each Act would have required proof either that the work was done after the commencement of that particular Act, or that it was done after the commencement of some previous Act. The position should be no different under that latest Act. While the 1968 Act expresses itself to be both an amending and consolidating Act, in this instance I consider it much more likely to have been intended to be a consolidation.

197. The burden of proof is therefore on the PLA in civil proceedings. It must show (if the issue is made to arise in a meaningful way) that mooring chains were not in existence in 1857, though of course the standard is the balance of probabilities.

What mooring chains were at Downings Roads in 1857?

198. Based on the above material Mr Holland's case is that all the roots currently used (excluding attachments to buildings rather than the bed of the river) should be found to have been present in 1857. It is clear enough that there were <u>some</u> chains there in that year. The history of area demonstrates that it is likely that there were, in order to

cater for the business being carried on in that area. It is plain that there were roots there in the 1920's and 1930's. Mr Lacey has not put down any new roots or deployed any new chains (in a meaningful sense). It is therefore likely that what he using now is what was there in the 1930's; and it is likely that what was there in the 1930s is the same was what was there in the 1850s, both in terms of the numbers of roots and their positions - see the probabilities and the terms of the statutory declarations. Historically speaking it has obviously been the PLA's view that roots and chains have been there for a very long time.

199. Mr Harpum's case is that there were some moorings in the area in 1855 but it cannot be said that they correspond to the other moorings. They may have been dredged up in about 1857 (I theory that I have dismissed - see above) but in any event moorings are not static. The listings of ebb and flow chains show some sort of increase, and he noted that the PLA's view in 1935 was that the number of Talbot moorings had increased considerably over the preceding years. It is inherently improbable that there had been no change between 1857 and 1935 or 1936, and on the evidence there is likely to have been, and in particular there is likely to have been an increase (see the earlier descriptions of chains). He seemed to have no submissions to make as to what, if any, changes there might have been between 1936 and Mr Lacey's ownership, but (contrary to the case foreshadowed in opening and in some of the evidence) he did not seek to suggest that Mr Lacey put down any new roots other than the root features which Mr Lacey says he put down as replacements and the chains connected to the walls. He also did not seek to suggest that there was any process of refurbishment other than the process described by Mr Lacey - the replacement of chains with newer and/or better chains. His case was that on that footing Mr Lacey laid 7 new moorings (2 done by him, 5 by Downtown) and they cannot be regarded as replacements because they were not strict replacements and 5 of the 7 cannot be found anyway.

200. The inquiry into which, if any, of the present mooring chains were present in 1857 is a difficult one in the circumstances. I shall address it on the footing that for these purposes the concept of a mooring chain is the root and any attached chains, as a unit. I shall treat chains, as just chains, separately and in due course so far as relevant.

201. I have already made some findings about the position in 1857. There is a record of some mooring roots, and therefore some mooring chains, in 1855 and I have found that they are likely to have been there, and not dredged up, in 1857. Thereafter it is clear enough from the history that the area was used as barge roads, so moorings will have been maintained in that limited locality until that use ceased in the 20th century. It is plain from the various documents recording mooring chains that some remained there and the 1930s documentation is plain as to what it said the position was then. So there has been a continuity of presence of moorings, generally speaking, between 1857 and now. However, since there is no document which records actually positions or numbers in 1855 (and therefore 1857), and no document which in terms records the development of the number and position or moorings, it is necessary to reconstruct history by starting from known positions (or apparently known positions) at particular

later points in time, and consider other evidence to indicate whether it shows prior changes or lack of changes. That evidence is cartographical (including plans), photographic and documentary.

Cartographical and associated evidence

202. Theoretically this case involves a comparison between the position of the roots today and the position of the roots in 1857. One of the great difficulties in this case comes from the fact that there is no evidence of either. As will appear, there is no evidence of what roots there were in 1857, and nothing at all clear until the 1890s. Nor is there anything which shows the position of most of the roots today – Mr Honey did not manage to achieve that. Accordingly neither half of the comparison can be at all easily established. Accordingly, the exercise has to be conducted on a different basis – doing the best one can to establish where roots were at some other point or points in time when the position is clearer, and then working outwards (backwards or forwards) to see what is likely to have changed in relation to some other reference point. This is hardly satisfactory, and gives an enhanced importance to the burden of proof, but it is all that can be done. I shall go about the exercise by and large by working backwards in history, using the evidence of maps and plans with some associated documentary evidence to try to establish what they say about the presence of particular roots at various points in time, to consider whether they show any changes and then to work further back and consider the probabilities of change between the last recorded positions and numbers on the one hand and preceding verbal records, and 1857, on the other.

203. The modern survey carried out by Mr Honey does not show many roots; it certainly does not claim to show the principal ones used by Mr Lacey at the moment. It tends to show chains (though there are one or two anchor points shown). There is no other modern survey from which one can compare the present position of roots to some earlier survey

204. One factor must be borne in mind in considering all maps and plans which might seem to show roots. Mr Honey identified the difficulty in actually identifying an actual root in most cases. That is likely to have been the case at all times because of the medium in which the roots are buried. It is unlikely that any of the creators of the charts and plans showing roots dug down and found the roots. It is much more likely that they treated the root as being where the chain disappeared into the mud, or perhaps sometimes the water, at time of the map/drawing, as Mr Harpum conceded. That is capable of changing over time, and may account for a degree of disparity between apparent positions on different charts/drawings. I bear that in mind in considering them. However, for ease of exposition I shall generally refer to the plans as showing the position of roots rather than chain disappearance points.

205. The 2001 plan is of doubtful value in working out the presence or movement of moorings. It does not appear that its focus is on roots, and it does not show many.

206. The 1987 plan shows more roots, but only shows 12. It seems to omit landward moorings that are apparently there now. Either they were not plotted, or they were not apparent, or they are new. The last can be ruled out (I find that Mr Lacey did not place any new ones there during his ownership), leaving the first two as possibilities. Whichever is correct, the failure to record some moorings means that the plan is again of doubtful accuracy and value.

207. The next oldest relevant documents are the 1966 and 1968 PLA surveys which purport to show some moorings. They are plainly maps constructed with an eye to detail, unless they took the detail of moorings from older documents and are likely to be more accurate than the 2001 and 1987 plans. 1968 was towards the end of the use of this area as barge roads. The charts show 25 moorings. Within a few years the moorings had been sold to Nalgo, by whom they were not really used and then subsequently they were sold to Mr Lacey. It is very unlikely that Nalgo laid or removed any roots. In the end Mr Lacey was not challenged on the basis that he laid down any new roots save in the sense that he described his works, and I find that there were no material works (at least in terms of removal or addition) carried out to roots between 1966 and Mr Lacey's time. Accordingly, so far as the two 1960's charts were accurate depictions of the roots, they can (save for Mr Lacey's alterations) be taken as describing the roots which existed up to the time that Mr Lacey acquired his ownership, and as existing now (unless decayed beyond existence, as to which there is no evidence). There is not a particularly high level of correlation between the moorings shown on the 1966/1968 plans and the 1987 and 2001 plans, which again casts doubt on the latter's accuracy.

208. Working back in time, the next plan is the 1936 statutory declaration plan. This, and the 1932 plan on which it is clearly based, is apparently a conscientious attempt to show numbers and positions of roots. There are 25 roots shown. It is likely to reflect what was apparently there at the time. Mr Maynard has created some overlays which enable one to compare the positions of the roots shown on that plan with the positions shown on the 1968 plan. Looking at that overlay, most of the later positions have 1932 positions which are fairly closely aligned with each other, so as to lead one to conclude that they could well be in the same position. However, no. 86 on the 1932/1936 plan does not seem to have an apparent equivalent in 1968, and one of the 1968 markings shown between nos. 83 and 82 has no 1932 equivalent. There is also a question-mark as to how close no.89 is to its closest 1968 potential equivalent.

209. This comparison leads to the conclusion that there was probably no change in the position of most of the moorings between 1932 and 1968, save for those two points.

210. Next is the 1931 plan. By my count this shows 24 roots (not 22, as suggested by Mr Dean in his report). It does not show roots 87 and 90 as part of the original plan (their position was handwritten later). Mr Dean has carried out an overlay exercise enabling one to compare the roots shown on this plan with the roots shown on the 1932 plan. It shows between 8 and 10 with a close or very close correspondence, and most of the rest close enough to be treated as being intended to show the same thing. Bearing in mind the activities involved in raising and laying roots, and the contents of the 1936 statutory declaration, I do not think it likely that there was any material removal or adding of roots in the period between the 1931 and 1932 plans. Any discrepancy between them is likely to be because the 1931 plan is more diagrammatic than the 1932 plan. The omission of roots 87 and 90 (close to the wall) is puzzling, but since a root was shown in roughly the same position as 90 in the 1924 plan (to which I am about to come) I do not think it likely that that is because they were introduced in the year between the two plans currently under comparison.

211. The 1924 chart is the earliest official chart which purports to show the position of the moorings. However, in my view it does not provide any safe indication. If one compares it with the 1932 plan it has very marked discrepancies - on the earlier map there are "bunchings" of roots which are not reflected in the later plan, and a low level of apparent correspondence. The fact that the 1932 plan is likely to have reflected reality at the time is demonstrated by its close(ish) correspondence with the 1968 survey plan. So either the 1924 plan was inaccurate, or there were wholesale changes between 1924 and 1931. The former is much more likely on the evidence than the latter, and I so find. I can place little reliance on the 1924 plan in determining whether moorings appeared in the course of the 20th century, though as I have indicated already I place some reliance on the fact that is shows a root in roughly the position of root 90.

212. The conclusion thus far, based on the cartographical evidence, is that there was no material change between the 1930s (and probably the 1920s) and the current time, apart from Mr Lacey's activities. If that is right then the focus of the relevant comparison can therefore be made to shift to a comparison between 1857 and (say) 1932. Were any mooring roots added in that time?

213. Working back, it is appropriate to take the next three matters together - the 1890s plan, the 1898 list of accommodations (one flood and one ebb mooring, two storage barges) and the harbourmaster's list of 1901 (two flood and three ebb moorings). If one assumes that the plan does come from the 1890s then those three elements are all describing the state of affairs at about the same time. That makes it necessary to consider why the 1898 list describes 2 moorings and the harbourmaster's list 5. There are two possibilities - either they are two different views of the same thing, or 3 extra roots were put down between 1897 and 1901. I do not consider that to have been likely. Each description sets out the author's view of the complicated mooring system

which can be taken to be shown, at least roughly, in the plan. In other words, I do not think that the difference between those two verbal descriptions is significant.

214. What might be of more significance is the number of chains imported by those verbal descriptions. The lost 1901 list refers to "5 chains". That could either have arisen from physical observation, or could simply be the mathematical effect of adding 2 chains plus 3 chains. If one assumed there were only 5 chains (roots) there in 1901 then a lot must have been added by 1924. That, however, seems to be unlikely. Assuming the 1890 plan does indeed date from the 1890s (which was the assumption throughout the trial), and reflects the position at the time, it shows a lot more than 5 chains. No-one sought to suggest which of the chains shown on that plan might be ebb chains and which flood chains. Since (as I find) the plan is an attempt at reflecting the chains there at the time, it is a better guide as to what was there than the bald descriptions in the 1898 and 1901 documents. I also bear in mind that the evidence of the expert watermen was that if one had ebb and flood chains one might well have additional chains (with roots) as "breasting" chains to help steady the moored craft. Accordingly, those latter documents do not, by their terminology, demonstrate that a lot of chains were added between 1901 and 1924.

215. It is therefore sensible to work from the 1890 plan and see what conclusions can be drawn as to what happened between then and the 1930s. Mr Dean asserts in his report that the 1890 plan roots "include" roots 72, 74, 76, 78, 79, 80, 83, 84, 87, 90 and 91 ("as far as can be judged"). It is not clear how he has done this other than by a rough and ready comparison by eye. Mr Maynard has been more scientific and has overlaid the positions of apparent roots (assuming that is what the dots are) on the positions extracted from the 1924 and 1932 plans. That comparison reveals:

(a) There are about a dozen of the 1924 roots which are close or fairly close (within 5 metres) of the 1890 apparent roots. Others are some way off, and over half a dozen of the 1890 roots are not really anywhere near an apparent 1924 root. Of these latter roots, several are close to the shoreline.

(b) The correlation between the 1932 roots and the 1890 roots seems to be less strong. There are a number of roots which are within about 5 metres of each other, but others which are not and fewer which are as well "centred" on each other as is the case with the 1924 roots.

216. The genesis of the 1890 plan is not known. It does not have any professional attribution given to it, and looks more likely to have been a lay, albeit conscientious, attempt to portray the chains and roots which were apparent at the time. Its creation will have been beset with all the difficulties that will have affected all later attempts to plot roots and chains. It is likely to have plotted where chains disappeared into the mud or perhaps water at the time rather than where the roots actually were. At least

some of the differences between that plan and the 1924 and 1932 plans will be likely to be attributable to variations in the "surveys" on which each are based. I do not think it likely that all the variations are attributable to changes in roots between the 1890s and 1924 (or 1932). Nonetheless where there is no close correlation that is, in my view, a pointer to the fact that some of the moorings changed in that period. It is impossible to be anything like clear as to all those which were, but I think that this plan demonstrates that some things, at least, changed by the time one gets to 1924 (or 1932). I return later in this judgment to final conclusions which I draw from this plan.

217. There is no other cartographical or documentary evidence until one gets back to the short reference to barge roads in 1855.

218. Thus studies of the maps and plans does not enable an immediately clear conclusion to be drawn as to what happened between 1890 and 1932, much less between 1855 (or 1857) and 1890. Mrs Downing's statutory declaration does not assist - it merely provides evidence that moorings in the area are likely to have been there and to have been used. I have already found that Mr Talbot's statutory declaration does not fill the gap.

Photographic evidence

219. The photographic evidence does not assist directly in this inquiry. The earliest photograph is an aerial photograph of 1922, which shows barges but not moorings. What the photographic evidence shows is that the footprint of the current barges is probably greater than the footprint of the barges from the period when there was a commercial operation being carried on there, Mr Livett expressed the view that, looking at the configuration of the barges in that photograph, there would have to be one plus "numerous" ebb chains, and "numerous" flood chain. His answers suggested that three would count as numerous. If one does the maths, his interpretation would give rise to there being at least 4 flood and perhaps 3 ebb chains to support the configuration of barges shown in the photograph. Mr Pratt's evidence was less clear, but supported the notion that the configuration in that photograph required more than 3 flood and 2 ebb chains.

220. One needs to be careful about this sort of evidence, being evidence which draws inferences from a photograph and where mooring arrangements might differ. Against it one has the 1927 conveyance which conveys 3 ebb and 2 flood chains, so that was someone's view at the time of what was being conveyed. However, if one assumes that the 1901 description was accurate, and accepts the evidence of the two experts, then it would be consistent with some additional points having been added since then, and adds a little weight to the case that things had changed since 1890.

221. The only other point to make about such historical photographs as there were is that there is no photograph which demonstrates a footprint of barges of the same size as Mr Lacey's current footprint.

Expert evidence on the physical persistence of moorings

222. Mooring chains of the kind under consideration are subject to the corrosive influence of water, the strains of usage and general wear and tear. Mr Holland's case invites a finding that the roots that were there in 1932 were the same as those claimed by Mr Lacey now (albeit Mr Lacey is now using other roots and chains put in by him) and were the same as those which were in place in 1855. It is germane to consider the probabilities of that being the case on the facts.

223. Mr Beckett's evidence (which I accept) is that the design life of the chains themselves would be about 40 years. They might last longer, but that gives an idea of how long they would be planned to last (though he knew of a chain which had lasted 90). Areas of high wear might require earlier replacement (depending on the quality of the steel). Mr Livett's evidence is that moorings required frequent maintenance. Again, I accept that, though that does not necessarily involve removing the roots. It is likely that, since 1857, large parts of the chains, if not the whole of the chains (over time) at the Downings Road moorings will have been replaced, if the original roots are still there. There was evidence from the experts that if a chain broke close to a root, the owner might find it easier to put another root in rather than try to affix a chain to what was left.

224. Nobody addressed in terms the likelihood of roots having to be abandoned or re-laid. No expert dealt with the likelihood of 1857 moorings still being in the same place in 1936 of 1968, either on basis of their being likely to decline physically in that time or on the basis that an active mooring area is (or is not) likely to generate a given level of moorings being put down and taken up. The closest the evidence came was from Mr Beckett, who said that if the root took the form of concrete with an iron ring coming out of it, the iron ring would be vulnerable, but he did not expressly indicate over what period the ring would be likely to degenerate. I infer from that absence of evidence that it is physically possible for a pre-1857 mooring root to have been in effective use in 1936 (and 1968), so that those roots could still have been available to Mr Lacey in 1997. However, on the basis of the expert, against the background of the historical evidence, I find it is unlikely that the mooring chain pattern in 1857 was the same as it was in 1936, 1968 or when Mr Lacey started his works. If a mooring lost its effectiveness, or its usefulness, the evidence of Mr Livett was that the mooring owner would be likely simply to put down another one, and not take the old one out and replace it. Similarly, a roads operator who found that he wanted an additional mooring would simply put one down. Such roads were flexible and varying things. In my view over time (and since 1857) the normal operation of Downings Roads was likely to be such that additional roots will have been put down and at least some

abandoned. The expert evidence does not enable one to determine the fate, or history, of any given root.

Overall conclusions as to whether the individual Downings Road moorings roots (before Mr Lacey's replacements) were in place before 1857

225. On the basis of all that evidence I draw the strands together and make the following findings:

(a) There were some mooring roots in place in the area in 1857.

(b) They were not dredged up as part of dredging in that decade.

(c) The need for mooring roots persisted for the next 100 years, in the light of the use of the river there as barge roads, and in the light of the use of adjacent land for barge building and ancillary activities. The need is likely to have increased as time went on.

(d) There were a considerable number (over 20) mooring roots by the 1890s. The number of roots shown on the 1890 plan corresponds roughly with the number shown on all relevant later plans.

(e) There remained more than 20 roots by the 1930s, and no additional roots were put down until the 1990s when Mr Lacey conducted his activities, save for one between roots 82 and 83. It is unlikely that any were physically removed in that period but root 86 was probably abandoned.

(f) It is unlikely that all the roots existing in the 1930s (and therefore today) existed in 1857; but some may have persisted and it is not possible to identify with clarity which those are. On the balance of probabilities I think it likely that roots will have been added since 1857, and some may have been abandoned and replaced, but it is not completely possible to say which, and it is not probable that they are all "new" in either sense (addition or replacement).

(g) It is unlikely that all, or indeed any, of the actual chains (as opposed to the roots) which existed in 1857 still existed by the 1990s. They are all likely to have been replaced over time, in the period prior to Mr Lacey's works in 1997.

226. That deals with the general picture. However, in his final speech Mr Harpum at one point confined his claim to those 10 moorings which Mr Lacey carried out works to and which he is now using (though other aspects of his claim, particularly limitation, extended to all roots). These are (to summarise):

Work done by Downtown Marine – root 73, 86, 89, 91 and 92.

Replacements by Mr Lacey himself – roots 75 and 83.

Other work done by Mr Lacey – renewal of chains, probably – 78, 87 and 90, with some new chains being added to root 92, and connection of chains to the river wall.

227. It becomes pertinent to consider if anything can be determined in relation to any of those. In my view a greater degree of clarity can be obtained here by reference to the 1890 plan. One has to be careful about vesting this plan with too much significance, but it does apparently attempt to show roots. It is right to allow a significant margin of error, but one can do this be using Mr Maynard's overlay. I have pointed out that somewhat different results are obtained in the comparisons with the 1924 and 1932 plans, but there are some common elements. On each plan there are a number of later roots which are not even within a wide margin of error when compared with the earliest plan of the three. Taking Mr Maynard's two comparisons and allowing a wide margin of error it is hard to see any 1890 equivalent in either of the later plans of roots 73, 86 or 89. There is an arguable equivalent of either 76 or 92, but one cannot see which it is to be so I will not count either of those. There is an arguable equivalent of the other roots (though it is pretty marginal in the case of 75 – I give Mr Lacey the benefit of the doubt on that).

228. I bear in mind the burden of proof as I have found it to be. It lies on the PLA. The overall position is that it is highly probable that there were some moorings in the area in 1857, quite possible that some have survived into what is said to be their current positions, improbable that they have <u>all</u> survived into their current apparent positions, and impossible as a matter of deduction from the evidence to produce a complete list of survivors. So one logically has to take each mooring separately. In respect of roots 73, 86 and 89 it can be said that it is probable that they did not exist in 1857, and I so find. In respect of each of the others it is not possible so to find, so the PLA fails in respect of each of them because it cannot fulfil the burden of proof placed upon it.

229. I acknowledge that it is rare to decide cases on the basis of the burden of proof in the manner in which I have had to decide this point, but in this case the evidence does not allow a more usual form of reasoning.

230. It follows that, in respect of those three moorings, the PLA has established that they are not pre-1857. In respect of the others it has not, so to that extent, and to that point, the defendant succeeds.

Has Mr Lacey gone beyond the scope of what is permitted to a pre-1857 ancient moorings owner?

231. The PLA's case is that even if TBY had ancient moorings, the works it has done go beyond its entitlement because:

(a) It has replaced and not merely repaired chains in putting new roots down (and new chains).

(b) It has put new roots down in a different position to the old roots.

(c) By attaching chains to the wall TYB has been carrying out "works" which cannot be justified by reference to any ancient mooring.

(d) It has engaged in excessive user in attaching additional chains to such ancient moorings as it might have had.

(e) It has improved existing chains by putting in better ones than were there originally.

232. TBY's defence is that it was entitled to replace moorings in the manner in which it did and that such replacement is within the rights of an ancient moorings owner; that attaching a mooring chain to a building is not "works" requiring a licence; and there has been no excessive user.

233. At the heart of the first of the PLA's two points is the question of what an ancient moorings holder is entitled to do. By the time of final submissions the PLA had accepted that a "mooring chain" within the meaning of the 1968 Act was a mooring chain with its root (which I am sure is a correct view), so the questions of entitlement have to be considered in relation to such a feature as a unit. One is not considering merely the chains themselves devoid of their affixing mechanism.

234. Mr Harpum raised the question of a pre-1857 mooring root which had lost its chain, and submitted that as a matter of legislative policy such a root should no longer be regarded as a mooring chain which was placed in the Thames before 29th September 1857. It is not apparent that that particular question arises on the facts of this case, so I will not address it.

235. That leads one to a question that does arise, which is the extent to which a pre-1857 chain can be repaired or replaced without requiring a licence under the 1968 Act. Mr Harpum submits that a repair to such a chain can be thus carried out, but the renewal of a chain cannot; and a renewal, by replacement, of a root can certainly not be carried out without a licence. He argues this as a matter of the statutory wording coupled with the apparent legislative policy of requiring licensing to enable the PLA (and formerly the Conservators) to carry out their conservation and navigational

functions. The protection of "vested" rights must be balanced against the need to protect and control navigation.

236. I do not accept Mr Harpum's analysis. His reasoning drives him to the illogical conclusion that chains can be replaced bit by bit, until the whole chain has been replaced, but it cannot be replaced in one go. It also fails to give effect to what I consider the purpose of the ancient moorings exception to have been. In 1857 statute intervened to control the Thames for the future. Section 91 barred the putting down of mooring chains without a licence. It does not seem to me that that wording would have prevented renewing the whole of a chain (excluding the root) of a pre-1857 mooring. There was apparently an intention not to affect pre-1857 features. I cannot identify the policy which would allow chains to remain, repaired from time to time, providing that they were not replaced, but then to bring the right to have chains there to an end if a replacement was required. The ability and right to moor was obviously a valuable and important right, and Parliament was doubtless concerned not to divest an existing holder of moorings of his ability to moor, by a regulating statute which, furthermore, was a private Act. Furthermore, Parliament should be taken to have known that moorings would require attention from time to time because of wear, tear and corrosion. It is unlikely that the exemption from licensing should apply only for so long as the original chain was workable. That would introduce a random and precarious element into the right which is inconsistent with the likely intention to preserve existing "rights". It is not likely that it can have been Parliament's intention to change that in 1968. Indeed, the wording of the 1968 Act is even more inconsistent with that intention than the wording of the 1857 Act, because it provides that the licensing requirements should not apply to a pre-1857 mooring chain. So if replacing the chain would otherwise be "works", section 3 of the 1968 Act makes it quite clear, in its terms, that the licensing regime shall not apply to a pre-1857 mooring.

237. There must be, however, the qualification of a like for like replacement. A pre-1857 mooring chain will have certain qualities in terms of its construction and quality, in the same way as the grant of an easement accommodates a dominant tenement with given characteristics. Improving that mooring would, in my view have been treated as laying a new mooring for the purposes of the 1857 Act. If an 1857 mooring chain was capable of holding no more than a small yacht, replacing it with something capable of holding an ocean liner would not be a replacement of an existing feature. It would be improving the existing feature, and would amount to putting down a new chain (section 91 of the 1857 Act) and "works" within the 1968 Act which would not be works involving the same chain as is referred to in section 63 of the 1968 Act. The analogy is with an easement which is used excessively when the use of the dominant tenement changes. It cannot have been the intention of Parliament to have preserved the concept of mooring root (with whatever qualities the owner chooses to give it) as opposed to preserving what was actually there when the 1857 Act was passed.

238. Accordingly, replacement of chains on a like for like basis would not require a licence today. Next one has to consider the replacement of the root itself. In my view the

same position obtains. The effect of the 1857 Act, and the likely underlying policy, was not to disturb valuable rights which had been enjoyed hitherto. While pulling up a root and replacing it would, literally speaking, be "putting down" a mooring chain within section 91 of the 1857 Act, it would not be a new chain. It would be replacing the old chain. In this context the expression "mooring chain" is referring as much to the facility afforded by the chain as to the physical chain itself. I consider that the Act was aimed at new chains in the "new facility " sense, that is to say either a chain going down where none had existed before, or replacing an old chain with one of a higher quality able to support a greater load than the previous one. The 1968 Act has not changed that policy or objective. A like for like replacement of the root should be treated in the same way as a like for like replacement of the chain.

239. Therefore, if Mr Lacey had replaced roots on a like for like basis he would have carried out works not requiring a licence. However, he did not do that so far as concerns his works in the 1990s. He wished, in substance, to replace roots, but did not actually take roots up. He put new roots down in positions which he judged to be close to the roots he wished to refurbish. For his first 5 roots he worked from the 1966 and 1968 charts and, where possible, judged by eye, apart from root 86 where he had only charts to go from because he did not have any chains for this root. For his last 2 roots he worked off the charts only.

240. That, in my view, is not the same as refurbishing or replacing existing roots. There may be sound practical reasons for doing what he did rather than going down to the original roots, digging them out and replacing them, but it is nonetheless putting down a substitute root and not working on, or in relation to, the existing root ("mooring chain"). Each root and chain is a new chain in a new position. He was not carrying out works on "a mooring chain placed in the Thames before 29th September 1857" (in the wording of the 1968 Act). The works are within neither the letter nor the spirit of the statute.

241. In relation to at least one of the roots (root 86) there is another reason why Mr Lacey was going beyond what he would have been entitled to do in relation to an ancient mooring. This was the root in respect of which he put down 2 pick anchors, one facing each way, so that it could be both a good flood and a good ebb mooring. It is not known what the old root 86 was, but it is not likely that it had that quality. Mr Lacey was putting down a better root than he had before, so it was, in that sense too, a new root and not the pre-1857 root.

242. Then there are the chains that were fastened to the walls (one of them making an intermediate stop in the old piling of China Wharf). These cannot be, and are not, claimed as ancient moorings - in his final oral submissions Mr Holland conceded that they were not ancient moorings. In his written submissions Mr Holland claimed that they "form an integral part of the unlicensed 'ancient moorings'". I am not sure what

this means, but it is not a significant statement in any event. The first question is whether they are chains put in the Thames before 1857, and plainly they are not. Mr Holland also sought to justify them as somehow being a continuation of the "roads ashore" (a barge in barge roads tied to the land so as to provide a means of accessing the outer barges). This is hard to follow. There are indications that at some historical points there were roads ashore, but that was via barges moored to the land at a different point. If there is an equivalent now it is the pontoon from Mill Stairs, not these chains designed to secure boats. The chains cannot be justified on that basis.

243. So there is nothing in the ancient moorings exemption which would save these chains if they are "works" within the 1968 Act. I consider that they are "works". The definition of "works" appears above. I do not consider that the mere affixing of plates on wall with rings for mooring would necessarily be "works" for these purposes (they are not in, under or over the Thames; nor do they amount to "cutting of [its] banks" as suggested by Mr Harpum). But running chains to it must involve something "over" (or "under", if they are below the water or the silt) the river, and in my view they would be works. Mooring chains as such can be "works" (that is implicit in section 63), and laying an unfixed chain for mooring to (if sensible) would amount to "works" for these purposes., So running one to a fixing on the wall amounts to "works". Such a chain would plainly be capable of having as much effect on navigation and the operation of the Thames as a chain fixed to the river bed, so it is within the mischief of the Act. Accordingly, I hold that the running and fixing of those chains and their attachment to the wall are "works" requiring a licence under the Act.

244. As I have observed, one of those chains is actually fixed to the river bed via the old China Wharf piling. That is even more clearly "works". Even if it is not attached to a mass purpose-laid for moorings, it is still attached to a sunken object for mooring purposes. It would not be saved even if the short run from there to the wall (created, as I have observed, to try to deprive the first run from being deemed attached to the bed of the river) were not also "works" within the Act.

245. It follows that all of Mr Lacey's relatively newly installed mooring roots and mooring points, and their associated chains, are works requiring a licence under the Act, unless some other defence operates.

246. The same is not true of his replacement chains where he has <u>replaced</u> chains without affecting roots. He has the right to replace chains as a whole, and there is no evidence that he has not replaced on a like for like basis. I therefore find that where he has just replaced chains he has not carried out "works" requiring a licence if he was attaching them to a root which he was allowed to maintain. On the other hand, where he has added chains to roots, so that more chains are now there than were there originally, then he has added an improvement which is not within the scope of the exemption –

he has laid down a new chain. This was the case with root 92, to which Mr Lacey admitted adding chains in 2001. It was not clear on the evidence that the same was true in relation to any root, but if it did then that, too, was not permitted.

Estoppel and legitimate expectation

247. Mr Holland had a fallback position in the event that it were found that the moorings were not "ancient moorings" in the form of an estoppel argument, or alternatively an argument based on the principles of legitimate expectation. His estoppel case was based on representations by the PLA to the effect that moorings were ancient (i.e. pre-1857), or alternatively acquiescence in Mr Lacey's belief to that effect, coupled with Mr Lacey's reliance on those representations (and acquiescence) in acquiring the moorings from Nalgo and thereafter carrying out the works of improvement identified above (principally the works in the 1990s). The substance of his estoppel claim probably has 2 elements – that the PLA is estopped from denying that the moorings are ancient moorings, or from disputing Mr Lacey's entitlement to do the work he did. Mr Harpum maintained that the doctrine of estoppel did not apply to the claim against the PLA because it was a public authority carrying out statutory discretionary activities, but in any event said that it could not be established on the facts. He did, however, accept that if estoppel did not apply then the principles of legitimate expectation would be capable applying to the PLA, and if the facts justified it then Mr Holland would be able to get an equivalent benefit under that doctrine.

248. The distinction only becomes relevant if the two doctrines would yield different results on the facts. Since I have come to the conclusion that they do not I will not spend time and space considering the authorities on the applicability of estoppel to public authorities. I shall consider each of doctrines (if that is the right word) in turn on the footing that each is capable of applying.

249. I can set out the requirements of each doctrine briefly.

250. Estoppel can be treated as having three elements – "a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) belief" (*Thorner v Major* [2009] 1 WLR 776 at para 29, per Lord Walker of Gestingthorpe). If those elements are sufficiently established then the court can give a remedy which has been described as "the minimum equity to do justice" (*Crabb v Arun DC* [1976] Ch 79 at 198). The doctrine is sufficiently flexible that levels of communication short of representations can be sufficient – for example, manifestations of shared assumptions.

251. It was common ground that the basis of the legitimate expectation rules can be found in *Rowland v Environment Agency* [2005] Ch 67, where Peter Gibson LJ adopted the formulation of the judge below. The relevant parts of that formulation are:

> "By a representation, a term which embraces a regular practice and a course of dealing, a public body does not give rise to an estoppel but may create an expectation in another, 'the citizen', from which it would be an abuse of power to resile … The relevant representation must be unequivocal and lack any relevant qualification … The citizen must place all his cards on the table, making full disclosure and his expectation must be objectively reasonable … The expectation may be substantive or procedural and the categories of legitimate expectation are not closed … Once the claimant has established the legitimate expectation, he must show that it would be unfair of the public body to resile from giving effect to the legitimate expectation … Lord Woolf MR … identified three kinds of and fairness, namely … (3) and fairness consisting in a failure by a public body to give effect to a substantive benefit which is the subject matter of a legitimate expectation in failure circumstances where there is no overriding interest which would justify the public body in resigning from his representation at such a benefit would be forthcoming. Where the court is satisfied that the public body made the representation by mistake, the court should be slow to fix the public body permanently with the consequences of that mistake … The court must also consider whether and how far, going beyond the immediate parties, the wider interests of the public may be affected by giving rights to the expectation, for the wider interests may require that the public body resile is in order properly to protect those wider interests … At the end of the day the court must decide whether having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests of the citizen and the public and considerations of proportionality for the public body to resile would in all the circumstance is and applying the criteria referred to be so unfair as to constitute an abuse of power."

252. Of course, so far as the status of the moorings is concerned, these matters arise only in relation to the three moorings which I have held to be non-ancient, though they arise in relation to all the works that he did which I have held to be beyond his rights.

253. I make the following findings, relevant to both estoppel and legitimate expectation:

(a) Up to the 1930s, and in the 1930s themselves, the Conservators did not accept the Downings Road moorings were ancient moorings. The correspondence and other documents demonstrates that they did not require the moorings to be licensed, but did not accept they were pre-1857 moorings.

(b) However, from the 1970s onwards, and up to the end of the century, the PLA seems to have referred to the moorings, both internally and externally, as ancient moorings in a pre-1857 sense.

(c) The contexts in which they referred to them in that way are generally not contexts in which the status mattered - the description as ancient moorings is more in the nature of an adjectival description.

(d) Mr Lacey believed they were probably ancient moorings when he purchased them, but he did not arrive at that belief as a result of statements made by the PLA. He had formed his own view, and such references by the PLA that he had seen were rather incidental. At the date of his purchase from Nalgo there is no evidence which would demonstrate that an estoppel was already operating in favour of Nalgo (as Mr Holland accepted in his final submissions).

(e) At the time that Mr Lacey did his works (1997-9) he and the PLA apparently shared the same beliefs, but his own belief had not been encouraged by the PLA. There was more of an apparent shared assumption. He had remained steadfast to his own views. It is more a case of an assumption being shared by the PLA. One cannot readily identify representations about ancient moorings made by the PLA upon which Mr Lacey relied in deciding to do his works. He was relying more on the apparent shared assumption. It will have appeared to Mr Lacey, with justification, that that the PLA seemed to treat the moorings as he treated them, that is to say as pre-1857 moorings.

(f) Having said that, it is apparent that the PLA were making positive statements about the status of the moorings, albeit again usually in a context in which the status did not matter and which showed that the reference was more adjectival than substantive. Examples of this are the letters of 18th August 1993, 23rd January 1996 and 10th December 1996, all identified above. Nonetheless, on 10th March 1987 (see above) the PLA had expressed its view that renewal of materials would cause an ancient mooring to lose that quality. That is an important qualification.

(g) Mr Lacey embarked on his work in the belief that his moorings were pre-1857, and implicitly in reliance on the apparent shared assumption, which had been communicated via the correspondence referred to above, at least to the extent that those references did not say anything different to his understanding.

(h) The PLA had no advance warning that any extensive work, and in particular any renewals, were being done to the moorings.

(i) The PLA only found out some details about the scope of the work after the work started, and even then it did not know the details.

(j) It is not possible to work out the cost of the work with any degree of clarity. It was significant but not necessarily as expensive as Mr Lacey sought to suggest in re-examination.

(k) The work was done at a time when Mr Lacey believed that his moorings were ancient moorings. I am sure he would not have done them if he thought that he had, or might well have had, a precarious or short term, licence. On the evidence I heard it is not possible to find whether he would have done the works had he had the security of a licence of some significant period (as opposed to a general right to do them without a licence).

(l) In deciding on his works, Mr Lacey did so on the basis of what he described as "a great deal of research" about private moorings conducted by him and his advisers at the time of the Bovis proceedings (Evidence Day 6 page 20).

(m) By the time that Mr Lacey had his meeting with Captain Cartlidge and Mr Woodward, the works had started, he had purchased 6 anchors the year before, he had purchased 4 collar barges and entered into his contract with Downtown Marine. While these things might have happened while there was a shared assumption, they did not happen as a result of anything that happened at that meeting.

(n) By the time that Mr Lacey started spending money on planning inquiries it was clear that the stance of the PLA had changed, so money spent on those inquiries (the amount of which, again, was not proved) could no longer be treated as money spent on the basis of a belief acquiesced in by the PLA.

(o) At no relevant stage was it clear to the PLA that the works done by Mr Lacey would enable him (as he has done) to extend the footprint of the moorings to an area which is more permanent than anything done before, and greater than was apparently the case before (because some of the moorings and were more robust and heavier duty than those previously in place, and he added chains connected to the walls and at least one new chain to root 92). Had that been apparent I consider it likely that the PLA would have reviewed its position.

(p) The defendant has not been saddled with a loss-making, valueless business. Mr Harpum sought to present it as a good, consistently profitable business, of which the defendant has had the benefit over the years since the moorings were acquired and since the expansion of the moorings. Again, this is not an aspect of the case which was investigated with any degree of thoroughness, but Mr Harpum's analysis is only partly right. He aggregates the gross profit over the last 5 years from 2006 to 2012 (the only periods for which the accounts were available at the trial) and points out that there was a profit of over £250,000 across those years. That is true as a matter of mathematics, but it ignores the somewhat roller-coaster state of the profit and losses, with significant losses in some years and very significant profits in others. The shareholders' funds for 2010 are shown at £218,000. Recently it had sufficient funds to be able to loan Mr Lacey £410,000, which suggests a degree of prosperity. It seems likely that over the years since the major works were done in 1997 the company has had considerable benefits from the business, but more than that cannot accurately be concluded.

254. In reliance on those matters I find the following in relation to the estoppel claim as to the nature of the moorings (i.e. as to whether the PLA is estopped from denying their status as "ancient"):

(a) There was no relevant act of reliance by Mr Lacey on the shared assumption until he started his works on the moorings in 1997.

(b) At that point he was relying on the shared assumption, reflected in the reference in correspondence to "ancient moorings", at least in the sense that if the position had been disputed he would not simply have gone ahead with the works. However, had the PLA not said anything about the "ancientness" of the moorings in correspondence I consider it likely that he would have gone ahead with his works anyway, because he had his own beliefs on the point. To that extent his reliance was limited.

(c) The conveyed assumption was nonetheless, in the circumstances, capable of supporting an estoppel claim if the other facts justified it.

(d) Mr Lacey had committed himself to a very large part of his expenditure on his moorings before his meeting with Capt Cartlidge and Mr Woodward. He therefore cannot rely on this as expenditure which flows from anything which was said, or not said, at this meeting.

(e) His continuing to do his works will, however, have been done in reliance on what was said at the meeting and the subsequent letter which did not challenge his right to do it.

(f) Accordingly there is an element of reliance on the communicated assumption in the initial costs, and then the non-avoidance of such costs as could have been avoided had he stopped work on the project after the meeting. There is further reliance when he did his later works.

(g) The expenditure on planning inquiries cannot be reliance expenditure for these purposes.

(h) While such reliance might entitle the defendant to the benefit of some lesser form of estoppel, for some limited period of time (as to which I make no finding), it would be vastly excessive to say that it now entitles him to have the moorings treated as pre-1857 moorings had I found them to be post-1857 moorings. That would be far more than the minimum necessary to satisfy the estoppel. The expenditure was not that great, and in any event the company has already had some real financial benefit from the moorings. It might have been appropriate to prevent the PLA from turning round the next day and requiring their immediate removal, but that did not happen. Where the line would be drawn it is not necessary to say. I am not asked to draw it. All this applies to the limited number of moorings to which this is relevant (those which I have found to be post-1857).

255. The lesser estoppel claim has wider implications. It is a claim that the PLA is estopped from complaining about the nature of the works done on the moorings, and it is relevant because I have found them to go beyond that which Mr Lacey was entitled to carry out to an ancient mooring. As to that claim I find:

(a) The shared assumption as to the ancient quality of the moorings is not relevant to this part of the case.

(b) Any such estoppel would have to arise out of the dealings between Mr Lacey and the PLA in relation to these works.

(c) While the PLA officials did not raise an objection to the works, their conduct cannot be construed as a representation as to the acceptability of, or acquiescence in the scope of, the works because they did not know the

nature and scope of the works. They were described in inaccurate terms in the January letter from Mr Lacey, and I find that he did not make that scope clear in his conversation with the officials. Furthermore, while the officials apparently thought that Mr Lacey was replacing roots, there is nothing to suggest that they thought he was doing something other than taking up existing roots and putting down new roots (let alone roots that might be improved). The letter from the PLA dated 13th March 1997 refers to moorings going down in "the correct position within the bounds of reasonable tolerance". That suggests that they were contemplating actual replacements, put in as near as possible to the position of the original, not something which would, on Mr Lacey's case, be no better than within a reasonable tolerance in the first place. The same applies, in my view, to the "waterman's piss" reference.

(d) In the circumstances it would be wrong to treat the PLA as making representations about the acceptability of what it did not know about.

(e) In the circumstances it cannot be estopped from complaining about what it was ignorant of.

256. In the circumstances the estoppel case fails.

257. All the same factors also cause any legitimate expectation claim to fail as well. As to that claim:

(a) It would probably be appropriate to treat the communicated shared assumption as being a representation as to the ancient quality of the moorings, and it probably has the necessary clarity to qualify as a representation for these purposes.

(b) Mr Lacey did not put his cards on the table in terms of making it clear what work he was doing. He also did not indicate (if he knew) what extensive use he intended to make of the moorings.

(c) So far as the claim seeks to prevent the PLA from resiling from its apparent position as to the "ancient" quality of the moorings, it would not be unfair to allow the PLA to resile from its position now, bearing in mind it is only seeking to control the moorings and not to require their removal, and bearing in mind the benefit that has been had in the meantime.

(d) So far as the claim seeks to prevent the PLA from resiling from its apparent non-objection to the 1997 works, the same applies, for the further added reason that the full scope of the works, and the intention behind them, was not made clear.

(e) The interests of the public favour that, in the present circumstances, the PLA be allowed to control the moorings by licensing. The concerns of the PLA in respect of this mooring are capable of being legitimate. The present footprint of the mooring is such that it is extended by one extra row of boats extending out from the bank towards the stream at each end of the footprint when compared with the statutory declaration plan, and while the pattern is different from that shown on the 1922 photograph, the density of user is much greater. I am satisfied that the physical extent and permanence of boats is very much greater now than it is likely to have been at any stage in the past, and that is a legitimate concern of the PLA. It was not foreseeable by the PLA at the time that Mr Lacey was doing his works, and in the public interest it is right that the PLA should have the opportunity to consider the point now. I am not saying that the extent is actually undesirable and needs controlling. That was not in issue in these proceedings. I am saying that that possibility is a legitimate concern for the PLA, acting in the public interest, and it would not be an abuse of position to wish to consider it and, if necessary take action about it, now, through the licensing regime.

(f) Accordingly such a claim fails.

258. In all this debate I take into account that the fact that the PLA does not seek to remove the moorings. Its concern is to be able to assert controls through licensing. If there are "equities" arising out of the dealings that have gone on in the past then they can be addressed in the terms of the licence. If those terms cannot be agreed then the appeal mechanism can, and in my view should, address the issues.

The nature of the defendant's rights

259. The bulk of the evidence and debate at trial was about the works done, and whether the moorings were in existence in 1857. However, both parties seek a determination of the nature of the rights, in property law terms, which the defendant has.

260. Mr Holland's stance by the end of the trial was that for his part he only required such a determination if and insofar as it was held that he did not have moorings dating back to 1857. If he had such moorings he did not seek a further inquiry as to what the nature of his rights was. He was content to rely on some sort of prior licence which has not been determined. However, if he did not have such moorings he did seek a declaration that he had proprietary rights to his moorings because he submitted that that gave him an alternative route to the right to operate the moorings. He claimed such rights pursuant to a franchise, or alternatively under the Limitation Act. For my part I do not see how establishing either of those things would help him. The point only arises insofar as the moorings post-date 1857. If they post-date 1857 then any works done to them will be works for the purposes of the 1968 Act and I do not see how an underlying proprietary right would trump the clear statutory provisions, and it was not made clear to me how it could.

261. Mr Harpum's stance was that his clients wanted to know how its registered title to the bed was affected by adverse rights, so he wanted the point determined too. For the same reasons I am far from satisfied that there is much point in that exercise. The real significance of the point may be reflected in the fact that in terms of trial time and effort the point took up a relatively (indeed, if it is important, a surprisingly small amount of time). Most of the litigation and trial effort was devoted to the inquiries as to history. However, the point does technically arise, and I shall consider it, albeit at shorter length than might otherwise have been the case.

262. Two possible ways of acquiring mooring rights, which clearly exist as a matter of law, can be dismissed as not arising on the facts of this case. The first is a lease. There is no question of this on the facts. The second is an easement. This is more interesting. It is not inconceivable that at one stage mooring rights were enjoyed as ancillary to use of part of the adjacent bank. An easement of mooring can exist, and there may have been such an easement at least in respect of part of the moorings. However, an easement of mooring would have to be enjoyed for the purposes of a dominant tenement on land, and it is common ground that whatever the position might have been historically speaking, it is not the position now. It cannot have been the position since the 1927 sale of the moorings, which is when they became divorced from the land. Accordingly there can be no claim to an easement in this case. Mr Holland's claim to attach the easement to Mill Stairs was not pursued (rightly, in my view).

Franchise

263. It is common ground that a right of mooring can exist as a franchise – see *Negus v Coulter* (1759) Ambler 467; 27 ER 244. It was also not disputed that such a franchise (an incorporeal hereditament) can be acquired by prescription. (This sort of mooring right is to be distinguished from the sort of mooring rights which are incidental to the public right of navigation, or customary mooring rights incidental to navigation of the kind referred to in *Attorney-General v Wright* [1897] 2 QB 318.) Mr Holland submitted that his clients could claim a right to moor by long user.

264. There are several reasons why this claim fails. Prescription cases can only succeed by virtue of a deemed grant, which requires a competent grantor. In the case of this particular right only the Crown can grant it. So the relevant user has to be pushed back before 1857, because since that time it has been the Thames Conservators (and then the PLA) that has owned the bed out of which the grant must come. Since those bodies are not the Crown, they cannot grant a franchise of mooring, so there can be no competent grantor in those periods. Assuming for the moment that the Crown was the owner of the bed before 1857, user back into that period must be demonstrated.

265. At this point Mr Lacey runs into the same difficulties experienced by the PLA in terms of the burden of proof. It is clear that the person claiming prescriptive rights has the burden of proving the relevant user. The actual rights claimed under this head are rights to particular roots. For the reasons given above in relation to the ancient moorings point, it is not possible for Mr Lacey to prove that any particular root had its origins before 1857, so he cannot prove a prescriptive title to any particular root. I have already found that it cannot be the case that all 1857 roots are represented in their current positions, and he cannot identify which are. Even if the claim were a claim to moor in that whole area, usage of that particular area, going back to 1857, cannot be established either. (I am assuming for these purposes that any prescription period can be started before 1857 and completed afterwards. If that assumption is wrong then Mr Lacey has even greater difficulties – he would have to demonstrate user for the prescription period before 1857, and that is impossible).

266. There is also a problem with the notional grantor. Prescription requires a competent grantor. The 1857 Act was passed as part of the resolution of a dispute between the Crown and the Corporation of London as to who had rights to the bed of the river. It is not plain that the Crown had a relevant title even before 1857. I was not shown the details of the dispute, but it seems to me that a prescriptive claim could only succeed if it were possible to resolve the dispute that the parties did not resolve in litigation in 1857.

267. For all those reasons the franchise claim fails. Part of Mr Holland's submissions seemed to rely on some other right of mooring in gross but it was not clearly articulated. He placed reliance on *Attorney-General v Wright*, from which it might be inferred that he was relying on some other right of mooring which was not the same as that which was found in *Negus*. If that is what he is relying on then that fails too. The sort of rights referred to in the former case are customary rights which are part of the right of navigation – see the judgment of Lord Esher MR at page 321-2. The rights claimed in this case are not of that sort. They are permanent rights of mooring. In the absence of a lease, franchise or easement, I do not consider there is any other basis on which such rights can be claimed.

Limitation and adverse possession

268. Last, as an alternative to franchise, Mr Holland seeks to rely on a limitation claim. He says that the defendant and its predecessors have been in adverse possession of the bit of the Thames occupied by the roots, for upwards of 12 years, and to have acquired a limitation title thereby. He relies on *PLA v Ashmore* [2010] EWCA Civ 30, *Moore v British Waterways Board* [2013] 3 WLR 43, *Roberts v Swangrove Estates Ltd* [2007] 2 P&CR 17, *Cory v Bristow* (1877) 2 App Cas 262 and *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618 as demonstrating that such a claim is legally justifiable. On the facts he says that the placing and use of the roots amounts to adverse possession.

269. Mr Harpum's main answer seemed to be that Mr Lacey and the defendant did not have the relevant *animus possidendi* in relation to the mooring root, or in relation to an anchor. He relied on a specific answer of Mr Lacey in which Mr Lacey indicated puzzlement in answering a question as to whether he intended to retain ownership of the anchors he was putting down, and could not really answer the question. He also said that, save in relation to 2 roots which have been identified, Mr Lacey could not know or define what he had taken possession of, which was a bar to the claim, relying on *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyds Rep 472 at 478.

270. If this claim is good it is a somewhat striking one. The defendant does not claim to have a limitation title to anything other than the space occupied by the roots, whether they be blocks or anchors. In the case of the former the shape of the land would be the 3D shape of the block. In the case of the anchors it would be an anchor-shaped space. He does not claim title to the column of water above, or to the earth below. The land registry plan of these titles would look very interesting – a series of very small blocks on the map. These points make the claim an oddity, and indicate that it must be particularly carefully considered, but they do not, of themselves, rule out the claim.

271. The submissions made to me on this point assume that all the mooring roots fall into the same category and can be considered together. That is not entirely the case. While common factors might be said to arise in relation to all of them, the following distinctions may fall to be made:

(a) In respect of those roots which were "replaced" by Mr Lacey in the late 1990s, those original roots were no longer used. They were effectively abandoned. The defendant has not been in possession of those roots since that time. There was no consideration of the effect of this.

(b) In respect of the new roots, time has to start running again, if it is to run at all. They occupy new spaces, and their occupation cannot (on the way the case was put) be treated as part of occupying the old spaces. However, the limitation period for these new roots had not expired by 13th October 2003, when the provisions of the Land Registration Act 2002 profoundly affected limitation and registered land. The PLA has a registered title, as I understand it, so those provisions ought to come into play. I was given no assistance at all in relation to the impact, or possible impact, of this. I was not even shown the PLA's title.

272. I must therefore tread carefully in this area. However, there are some general considerations which apply in any event, because the element of adverse possession is common to both regimes (pre-and post- 2002) and it is in that area that the principal debate took place. I can make some proper findings in relation to that which may be capable of disposing of the claim. I find that the claim to a limitation title fails for the following reasons.

273. The first is a general reason which is more procedural than substantive. The defendant claims a limitation title to very small defined areas. Yet it has not proved where those areas are, with sufficient clarity for these purposes. Someone claiming a possessory title (as I shall call it, for the sake of convenience) should be able to point to the physical extent of the land to which possession is claimed. The defendant cannot do that. All it can do is to point to approximate positions in which a root can be found (save for 2 roots where the position is apparent). The position is approximate because it is not possible (or, if possible, it has not been done) to define precisely where the roots are. Mr Honey could not do it, and (as I have observed before in this judgment) all the previous charts and plans probably do no more than show where chains go into the mud (or water), not where the roots are. Furthermore, even if the position could be shown, the physical extent of the space cannot be identified. The root may be stones of various shapes; or a concrete block; or an engine block; or an oddly shaped piece of wood; or something which has decayed over time so that it now has a different shape. In the case of the new roots it is the shape of an anchor, but that shape has not been specified. While resolving some of these uncertainties might just about make it appropriate to make a finding (or register a title) in terms which achieve sufficient clarity and certainty (as to which I make no determination), cumulatively they present a picture in which the position and extent of the land claimed has not been proved sufficiently.

274. This is not the same point as that taken by Mr Harpum and referred to above, namely that Mr Lacey cannot intend to possess something he does not know the position of. The point in the case relied on (*Thomas Ward v Bruce*) is a different one. It appears in that case that the area of land to which title was claimed varied according to the state of the business (shipbreaking) and the nature and scope of the work being done from time to time. At page 478 Harman LJ said:

> "In order to acquire a title by adverse possession and any Limitation Act, 1939, it seems to us at least necessary that the claimants should be able to define the area adversely possessed by them. In the present case, the area has extended and may, by the action of the tide, or, indeed, of the appellants', be curtailed, and it seems to us that there is no room here for this claim."

That is an observation about the inability to define the scope of the land affected by the claim because it varied from time to time. That is not the point in the present case. In theory, and with enough effort, the position occupied by each block and anchor could be ascertained. The fact that Mr Lacey may not know at the moment precisely where each one is, and the physical shape of it, is not a substantive part of the claim. The position and shape are what they are, and do not fluctuate as apparently the area involved in *Thomas Ward v Bruce*. The point that I make is a more procedural one. As a matter of procedure and description, if you cannot point out what land you are claiming adverse possession of, you cannot get a declaration that you are entitled to anything in particular. If the problem of the identification of the space occupied by each mooning feature were fixed, then this problem would go away.

275. I now move on to more substantive problems. Both the Limitation Act 1980 and the Land Registration Act 2002 require possession which is "adverse possession" for a possessory title to be established. I consider that it has not been demonstrated that such possession exists in this case.

276. First, in relation to the moorings that were "replaced", I consider that if there ever was adverse possession then that possession has been abandoned, and the PLA is back in possession as part of its possession of the river bed. By the time this action was bought (in 2011), it had been back in possession for 12 years and would have reacquired title to those spaces. I was not addressed on this point, but it seems to me to be right.

277. Next, in relation to all moorings, I do not consider that the acts of the defendant and its predecessors amounted to taking adverse possession of the space occupied by the roots, for the following reasons. For these purposes I shall treat adverse possession as requiring to two elements described by Lord Browne-Wilkinson in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 435A-G:

> "(1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession."

278. I start by acknowledging three things.

(a) It seems that possession can be taken of the river bed by activities amounting to mooring. In *PLA v Ashmore* (supra) the claim was to the area of river bed on which a boat rested at low tide. On some assumed facts it

was held that adverse possession of the bed could be acquired of the area represented by the footprint of the boat. It is true that the actual decision to that effect in the case was overturned by the Court of Appeal as being one which was procedurally unsound, but Mr Harpum did not really challenge the principle on which the first instance decision proceeded. In *Moore v BWB* Lewison LJ seemed to accept that one could acquire title by adverse possession of a part of the river bed by mooring a vessel in the waters above it – see para 57.

(b) It is possible adversely to possess, and then acquire a possessory title of, a space which does not include the land below or the airspace above. Thus in that way one can acquire a possessory title of a tunnel (*Bevan v London Portland Cement Co Ltd* (1892) 67 LT 615 or horizontal part of a building such as a flat (*Ramroop v Ishmael* [2010] UKPC 14). There is therefore nothing inherently legally impossible in a claim for adverse possession for a very limited part of the subsoil.

(c) Possessory title can be obtained of a very small piece of land. This not infrequently happens where there is a minor encroachment by a small part of foundations.

279. There is thus nothing inherently impossible about the adverse possession claim in this case based purely on the position of the claimed land or its size.

280. However, what rules it out, in this case, is the quality, nature and purpose of acts of alleged occupation, all of which are affected by the position and size of the land claimed, coupled with the nature of its use. When the original depositor of a mooring block puts down the block it is being done not so much as to take possession of the land in question but to facilitate the activity of the mooring above. It is then forgotten (except for the purposes of maintenance), and can be safely buried more and more under silt so that its position becomes hard to identify, if it degrades to as to become less than useful it is usually not dredged up so that the same "plot" of land can be occupied, but another root is put down. If it drags, or otherwise shifts position, the moorer does not assiduously put it back. He either lives with it, or he puts down another one. The same is true of an anchor, save that the moorer is more likely to want to retrieve the anchor, if he can, for re-use.

281. All this means, in my view, that there is no real possession of the land. As Neuberger LJ pointed out in *Tower Hamlets LBC v Barrett* [2006 1 P&CR 9 at 54):

> "Factual possession involves some sort of physical presence or at least being in physical control in some real way."

282. He was considering a different situation there, namely whether the presence of a supporting structure on squatted land meant that possession had been retained, but his

statement is still useful. In the case of a mooring with the qualities referred to above, I do not consider that those criteria are present. It is more in the nature of user, which is not sufficient to amount to possession; or it is conceivably occupation. The distinction between those concepts and possession in any given case may be a fine one, and differences hard to articulate, but it exists.

> "The line between acts of user and acts of possession is too fine for words" – per Lord Denning MR in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex* [1975] QB 94 at 103
>
> "The difference between possession and occupation is rather technical and, even to those experienced in property law, often rather elusive and hard to grasp. None the less, it is very well established , and is particularly important, and, indeed, well known, in the field of landlord and tenant …" (per Neuberger LJ in *Akici v LR Butlin Ltd* [2006] 1 EGLR 34 at page 23.)

283. In any given case (and this is one of them) deciding which concept applies is a judgment which looks at all the facts and assesses the quality of the acts and the quality of the intention in the relation to the activities. Doing that in this case I find that those acts were more in the nature of user (or mere occupation, though I prefer user) and not the taking of possession necessary to constitute adverse possession. Indeed, I think that the moorer (who did not know that perceptions of his title depended on this sort of discussion) would be unlikely to think of himself as possessing any land down there at all; contrast the more familiar squatter who would have no difficulty in immediately grasping and accepting the concept in relation to what he was occupying.

284. I therefore consider that the quality of the acts involved never amounted to the taking of adverse possession in any event. In the circumstances, Mr Lacey does not have the benefit of a possessory title to the site of any of his mooring roots.

285. I do not consider any of the more refined questions that might arise had I not come to that conclusion, or had I been convinced that the point mattered much in any event.

What is the defendant's interest in pre-1857 moorings?

286. In the light of my findings of what the interest is not, this matters less. However, the last possibility which each counsel accepted could be the case, in the absence of any other candidates, is that the defendant has succeeded to some form of licence to moor which was granted at some point in the history. Each accepted this was a possibility,

and since the PLA did not suggest some sort of pre-1857 unlawfulness, if moorings existed before 1857, then I agree that that, in respect of those moorings, that is the relevant interest. I do not need to consider further the qualities of that licence.

Disposition

287. I therefore find:

(a) The PLA has not established that the moorings claimed by the defendant as "ancient" moorings were not present in 1857, save for three of them. It is therefore not entitled to require them, as such, to be licensed under the 1968 (save for the three to which I have referred).

(b) The PLA is entitled to require licensing for the 7 moorings which Mr Lacey laid down.

(c) The PLA is entitled to require licensing for and to the extent that the other moorings were improved in quality beyond the quality of the original mooring chains.

(d) The defendant is not entitled to maintain mooring chains connected to the wall of the river bank or to the piling adjacent to Reeds Wharf without a licence from the PLA.

(e) The defendant does not have a right of franchise in respect of any of its moorings.

(f) The defendant has not acquired any Limitation Act title in relation to any of its moorings, whether ancient or modern

288. The relief which should be granted pursuant to this judgment should be agreed by the parties or, if necessary, the subject of further argument.

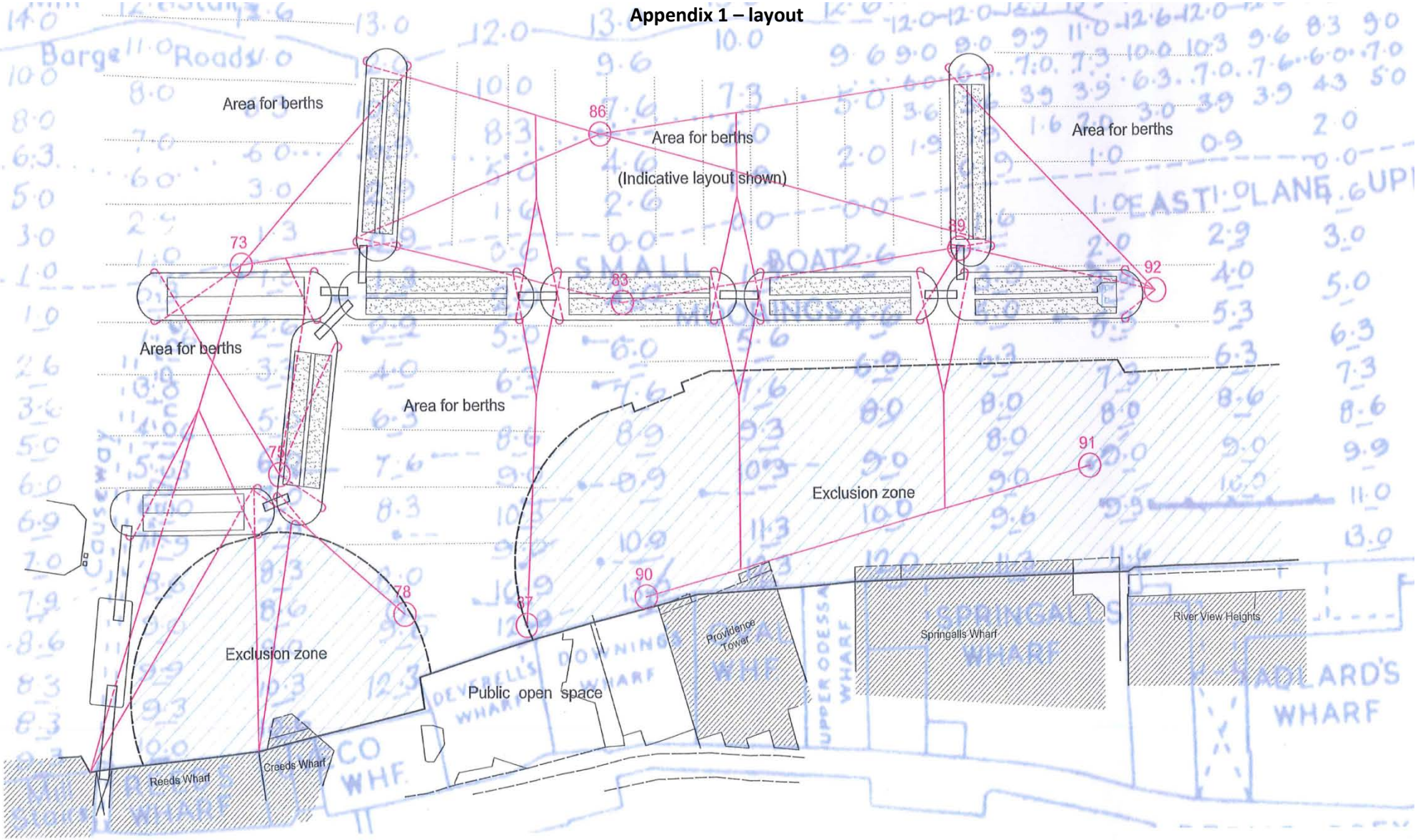
289. In finalising this judgment I have had the benefit of being able to read the judgment of Arnold J in the case of *Couper Ltd and others v Albion Properties Ltd, The PLA and others*. He has been able to consider my draft judgment. That case raises, or is capable or raising, some of the same issues as arise in the present case. When I became aware of its existence, in the course of the hearing of the present case, I called in the parties in *Couper* so that I could consider whether the possibility of conflicting decisions on matters of principle, or case management considerations, meant that the hearing of that case should in some manner be combined with the hearing of the present case. It appears that most of the parties in both cases were proceeding in ignorance of the other case, apart from the PLA who must have known of both of them. The issues in that case, as presented to me, indicated that there was not such a

compelling case for dealing with the two cases together as would have required any form of special arrangements to be made, particularly bearing in mind the late point at which the point was being dealt with, so I made no directions about it. As Arnold J's judgment demonstrates, there are common issues of principle in the two cases, and as it happens we have come to different decisions on some of them. That includes burden of proof which, as a real issue, let alone a common issue, was not perceived at the time as arising in a significant way (at least, not as the matter was presented to me). Having had the benefit of having considered the views of Arnold J, I have not been persuaded to change my views, where they are different. He has not been persuaded to change his.

Appendices

Appendix

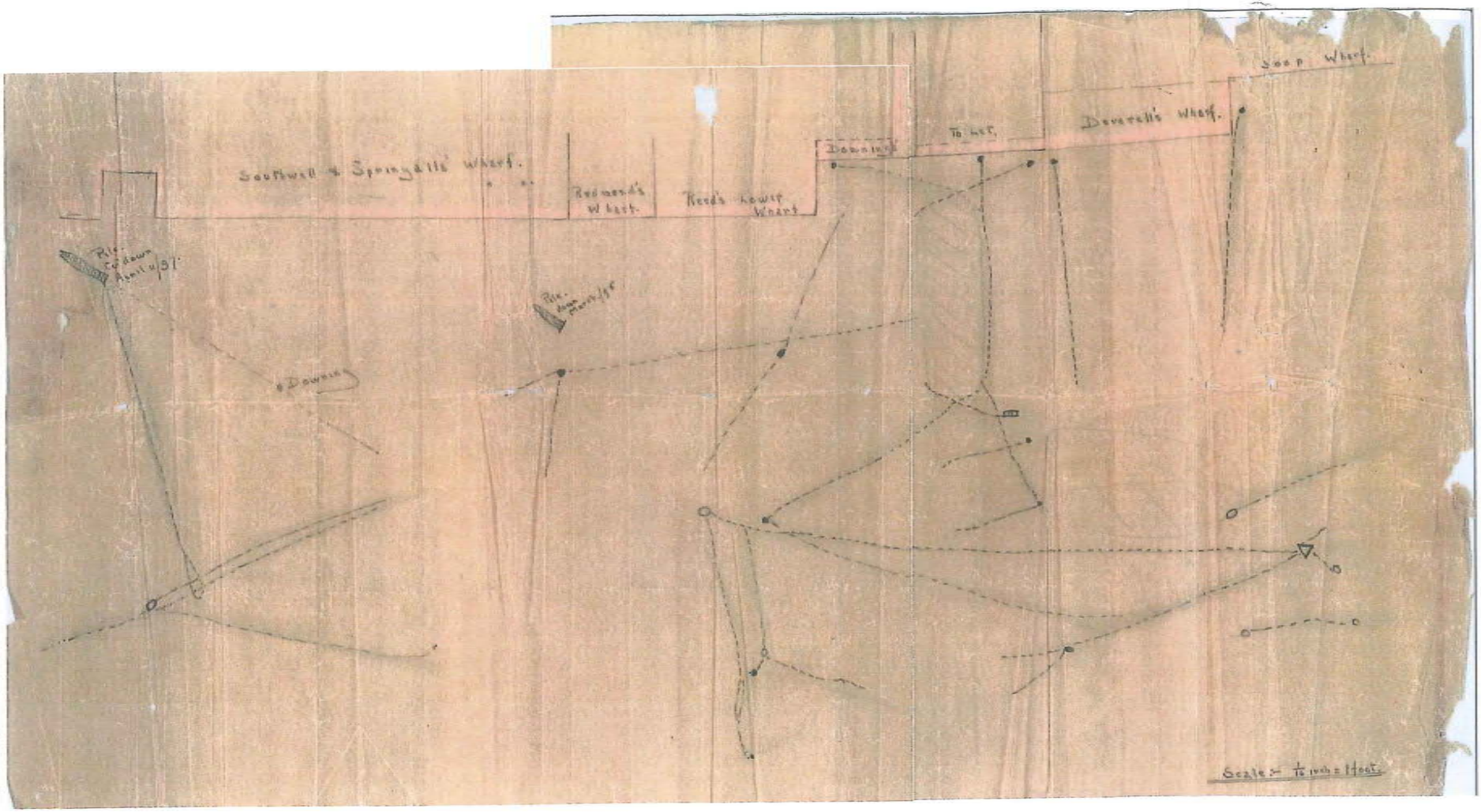
Appendix 1 – layout



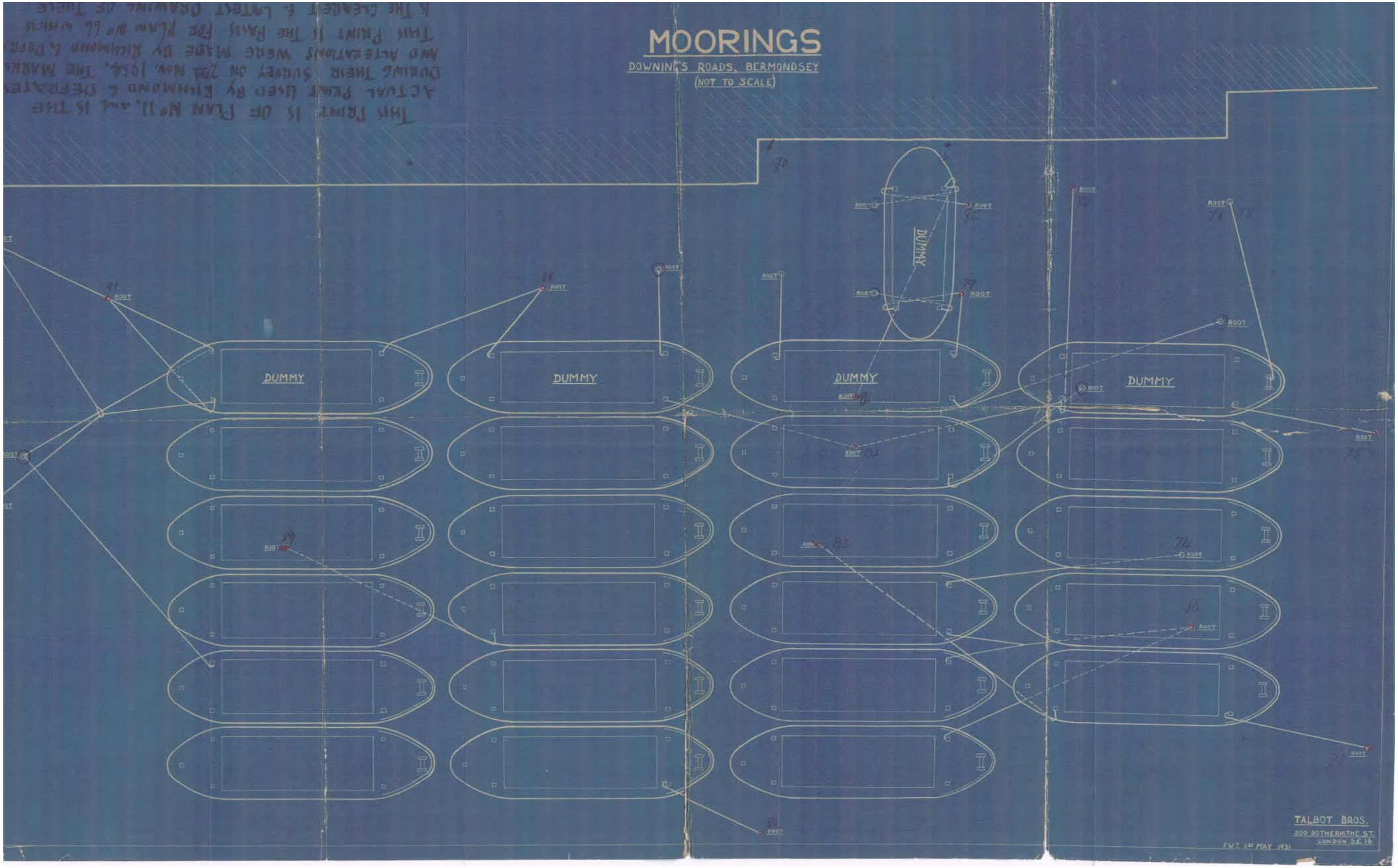
Appendi x 2 Pt 1 – Honey plan

Appendix 2 pt 2 – Honey plan

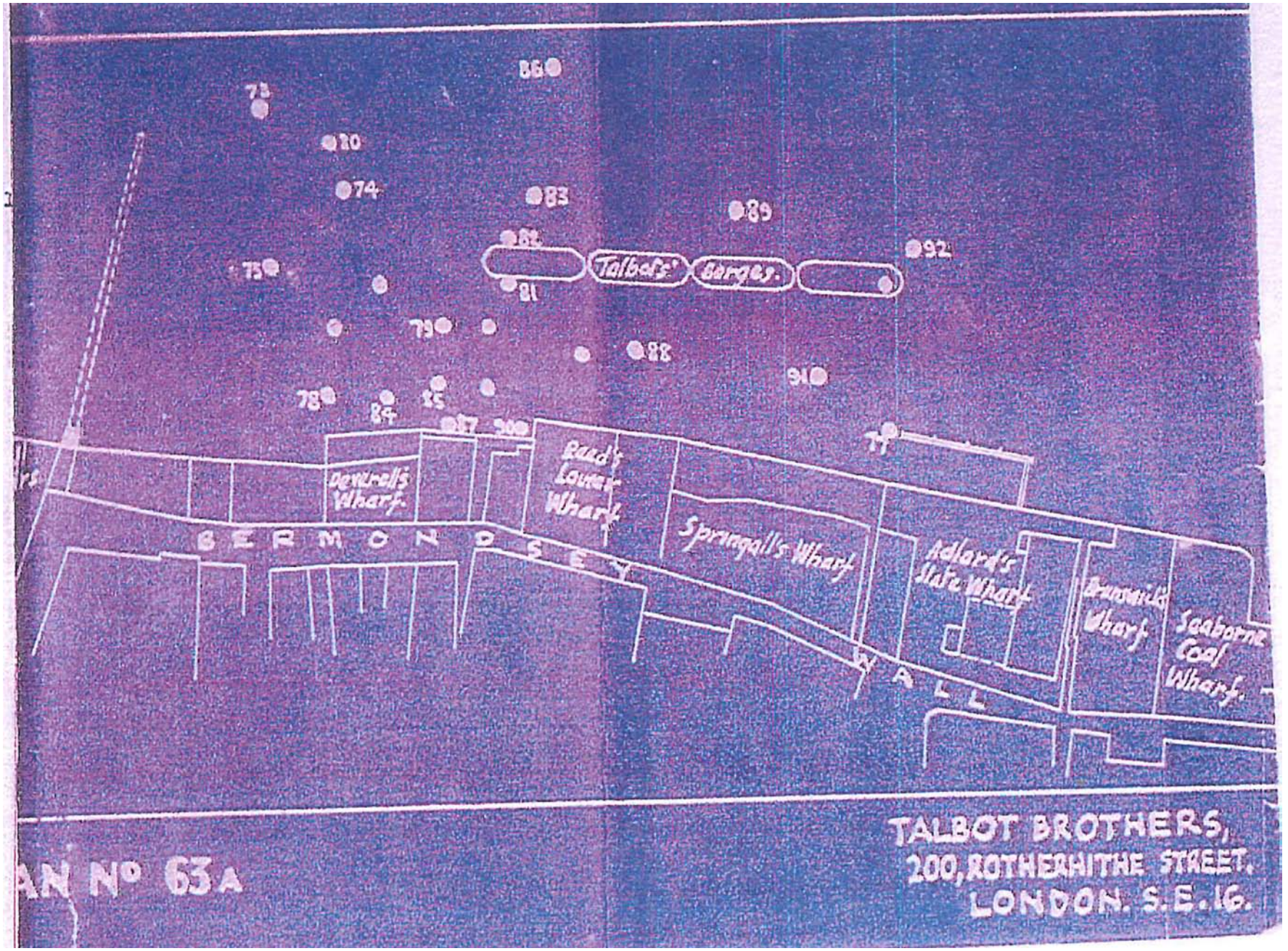
Appendix 3 – 1890 plan



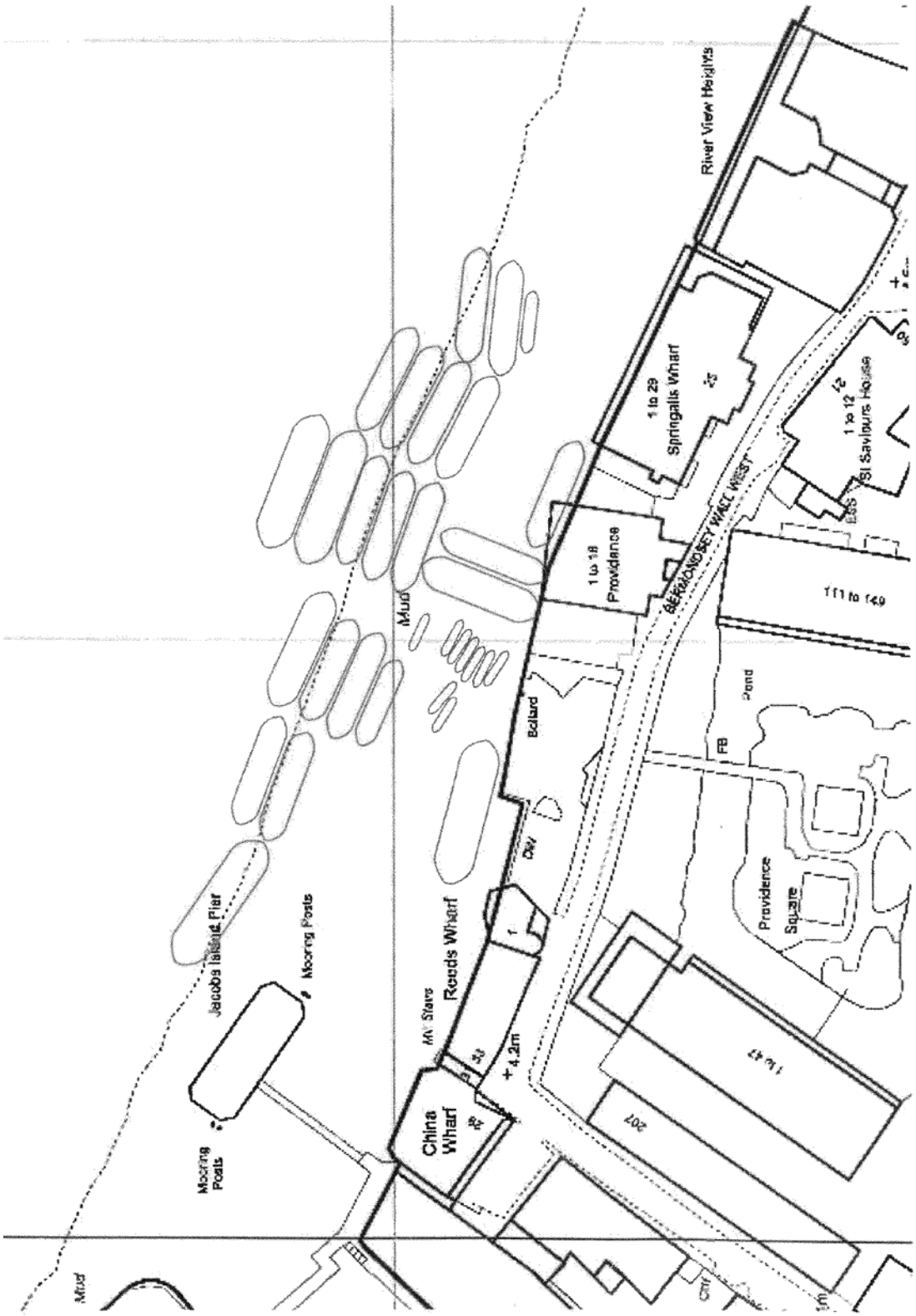
Appendix 4 – 1931 drawing



Appendix 5 – 1936 drawing



Appendix 6 –Mr Dean's plot of the 1922 photograph



Appendix 7 –

Current barges with the 1931 drawing superimposed