IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 430 (LC)
Case No: LP/9/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – Modification – Falmouth Dockyard – Application to modify restrictions so as to align covenants with those on adjoining land owned by the applicants and to allow work on commercial and military craft – potential for effect on objectors' businesses – whether objectors enjoy practical benefits of substantial value or advantage – application succeeding in part – Section 84(1)(aa) and (c) Law of Property Act 1925

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BETWEEN:

(1) PENDENNIS SHIPYARD (HOLDINGS) LIMITED
(2) PENDENNIS SHIPYARD LIMITED — **Applicants**

- and -

(1) A&P FALMOUTH LIMITED
(2) FALMOUTH DOCKS AND ENGINEERING LIMITED
(3) THE MERSEY DOCKS AND HARBOUR COMPANY LIMITED — **Objectors**

Re: Falmouth Dockyard

Hearing dates: 19 – 23 June 2017

His Honour Judge Bridge and Peter D McCrea FRICS

Royal Courts of Justice, London WC2A 2LL

- -

Gary Cowen, instructed by Stephens Scown, for the Applicants
Tom Weekes QC, instructed by Hill Dickinson, for the Objectors
The following cases are referred to in this Decision:

Re Bass Ltd's Application (1973) 26 P&CR 156

Shephard v Turner [2006] 2 P & CR 28

Clark v Perks [2000] STC 428

Perks v Clark [2001] EWCA Civ 1228

DECISION

Introduction

1. This is an unusual application. Section 84 of the Law of Property Act 1925 confers jurisdiction on the Tribunal to discharge or modify restrictions (usually restrictive covenants, as here) on specific statutory grounds being satisfied. Normally, an application under section 84 is opposed because of the effect of discharge or modification on the objectors' own *property*, in many cases a dwelling-house. Here, the application is opposed because of the potential effect on the *businesses* being conducted on the objectors' neighbouring land. The location is the historic dockyard situated in Falmouth, Cornwall. The applicants are a substantial group of companies whose principal activities are the building, repair, restoration and refitting of yachts, in particular superyachts, and other leisure craft. The objectors are those with commercial interests in building and repairing sea-going vessels, principally commercial and military vessels, and they submit that modification of the restrictive covenants would allow the applicants or their successors in title to compete with the objectors' businesses.

2. Falmouth is an historic sea-faring town, benefiting from the deepest natural harbour in Western Europe which allows large ocean-going vessels to enter and to moor. Its location, towards the extreme south-western promontory of the Cornish coast, gives it considerable strategic importance. Henry VIII built Pendennis Castle in order to protect the Carrick Roads estuary, and for 160 years, ships of the Packet Service carried mail across the empire, Falmouth being both their point of embarkation and final destination. The news of Lord Nelson's death at Trafalgar reached Falmouth before anywhere else on the British mainland, and some thirty years later, the *HMS Beagle* arrived at Falmouth in 1836 at the end of its famous second voyage. When the Packet Service was closed in 1851, Falmouth suffered something of a decline but within ten years, work had begun on the docks following the enactment of the Falmouth Docks Act 1859, and in 1863 the Cornwall railway arrived in the town.

3. Falmouth was bombed by the Luftwaffe, claiming 31 lives. Following the war, there was significant investment in the docks, including the construction of the Queen Elizabeth Dock in 1958, which at the time was one of the largest dry docks in the country. The Falmouth Docks Act 1959 consolidated the statutory powers of Falmouth Docks and Engineering Company ("FDEC") as the dock authority. In the 1980s, Falmouth became the venue for a concerted British attempt, funded by the entrepreneur Peter de Savary, to compete for the America's Cup, the most prestigious and fiercely contested of all yachting prizes, and it was in consequence of this ultimately unsuccessful venture that building and repairing luxury yachts became a notable feature of the docks.

4. At the present day, there are several occupiers of the docks through a complex and partly overlapping arrangement of freehold and leasehold interests. The applicants in this case are Pendennis Shipyard (Holdings) Limited (company number 02281468) and Pendennis Shipyard Limited (company number 02990094). Pendennis Shipyard Limited is the operating

arm of the business, and Pendennis Shipyard (Holdings) Ltd is the asset owning company. We will refer to the two applicant companies jointly as "Pendennis", who occupy nearly 10 acres of land towards the eastern end of the docks, where they primarily refit and build luxury yachts. There is a restriction over part of their land, and Pendennis apply to the Tribunal under grounds (aa) and (c) of section 84(1) of the 1925 Act for a modification of that restriction.

5. It is necessary to explain the evolution of the name of the applicant companies, which is as follows. Pendennis Shipyard (Holdings) Ltd was incorporated in July 1988 under the name Gashford Trading Ltd. It acquired Western Yachts in December 1988, and changed its name to Western Yachts Ltd. It underwent two further name changes - in January 1991 to Pendennis Shipyard Ltd, and in December 1995 to Pendennis Shipyard (Holdings) Ltd. A separate company, Pendennis Shipyard Ltd was incorporated in November 1994 under the name Cablechief Ltd. In December 1995, when Pendennis Shipyard Ltd was renamed Pendennis Shipyard (Holdings) Ltd, Cablechief Ltd was renamed Pendennis Shipyard Ltd.

6. The other occupiers of the docks include A&P Falmouth Limited ("A&P"), FDEC and the Mersey Docks and Harbour Company Limited ("MDHC"). A&P (part of A&P Group Limited), FDEC and MDHC are all part of the Peel Ports group, and each of them makes objection to Pendennis's application.

7. The hearing took place between 19 and 23 June 2017. Pendennis was represented by Mr Gary Cowen of counsel who called Mr Michael Carr, the joint managing director of Pendennis; Mr Ian Granville, its financial director and company secretary; and Mr Joshua White, a director of KPMG LLP who gave expert evidence on competition economics. Mary Ann Lutyens, a former employee of other occupiers of the docks, provided a witness statement on behalf of Pendennis which was not challenged by the objectors and so she was not required to attend the hearing.

8. The objectors were represented by Mr Tom Weekes QC who called Mr Andrew Martin, the group land and property director of Peel Ports Investments Limited; Mr Ian Carey, the group finance director of A&P Group Limited; Mr Ian Douglas, the commercial director of A&P Group Limited; Mr Drystan Jones, the port operations director of FDEC; and Dr Adrian Majumdar, a partner of RBB Economics, who gave expert evidence on competition economics.

9. Prior to the hearing, on 13 June 2017, the Tribunal inspected the Falmouth Docks, including what we shall refer to as the land occupied by the applicant (the 'Application Land' and the 'Existing Land' as we shall describe it below), the adjacent land of the objectors and the nearby Port Pendennis Marina, accompanied by Mr Granville, Mr Jones, and both counsel.

10. In this judgment, we shall first set out the factual background to the current application, in the course of doing so explaining the commercial relationships of the parties to each other and to the site of Falmouth Docks. We shall describe briefly the devolution of title which has led to the current litigation, and set out the relevant covenants of which modification is now sought and the statutory grounds being relied upon. We shall then turn to the evidence given at

the hearing and conclude with the parties' submissions, a discussion of the issues, and our determination of the case.

The factual background

Pendennis

11. Peter de Savary was responsible for the development of Falmouth Docks in the 1980s and the inception of the yacht building and repairing business which now trades as Pendennis. From a small concern with 16 tradesmen, it has grown over 30 years to a substantial business, with a turnover of £44.6 million in 2015. It now has a full-time work-force of 374 employees, including 36 apprentices. It is an important business both locally, as a major employer in a part of the country where businesses tend to be small, and internationally, 80 per cent of its turnover being export related.

12. As a business, Pendennis specialises in the building and refitting of large luxury yachts, some of which are sailing yachts and some of which are motor yachts. It offers a bespoke service to its clients, seeking to cater for all their yacht and leisure craft needs and it is able, perhaps uniquely in the UK, to provide a full range of in-house services to so-called 'superyachts'.

13. Attempting a precise definition of the various marine vessels which have been encountered in the course of this litigation is in our view an exercise which is hazardous, and one which may be ultimately fruitless. What is a 'ship', a 'boat', a 'craft', and a 'yacht' are questions which will surface from time to time in this judgment, but those who are looking for clear or comprehensive answers with any degree of expectation will be disappointed. For the purposes of exposition, let us say that a superyacht is a very large and luxurious yacht, principally if not exclusively propelled by motors rather than sails in view of its size, and as with all yachts, used primarily for recreational purposes.

14. Those who own or sail superyachts are (as described by Mr Carr, one of Pendennis's managing directors) 'ultra-high net worth individuals from all over the world who want to spend their wealth on an exquisite product where no expense is spared': these individuals can and will spend tens of millions of pounds on their vessels in order to have and to maintain something that will become a part of maritime history. As a consequence, 'Pendennis is selling a lifestyle, an aspiration, a dream' and its product 'exudes quality, beauty and expense'.

15. At Falmouth Docks, Pendennis has expanded its facilities over time. Its total landholding now comprises 9.8 acres, of which 2.3 acres are covered with water. It has a dry dock which is a single dock divided into two sections, one inner and one outer, a replacement outer gate having been fitted. The inner dry dock was covered in 1994, and the outer dry dock was covered in 2010. A 400 tonne travel hoist was installed, later upgraded to 640 tonnes. This latter installation was made possible by the acquisition of a small area of land on lease from A&P which allowed Pendennis to extend the piers of its dock. The dry dock and 640 tonne

hoist are unique amongst UK yacht builders. In addition, Pendennis has construction halls which incorporate satellite workshops, and an environmentally controlled on-site paint workshop which protects vessels from the elements (and, according to Pendennis, from the hazard of overspray from the adjacent land) as well as a paint booth, 80 metres in length, dedicated to the painting of masts. In terms of figures, 'on land' construction is possible up to a weight of 640 tonnes (that being the limit for the travel hoist), and for vessels up to 60 metres in length or to 19 metres in width, the maximum draught being 5.5 metres.

16. There are three main types of project conducted by Pendennis: 'new build', restoration or refit. To build a new 100 foot single mast yacht takes some 17 months; a 'refit' takes some 9 months, typically from September to June or July. Periodic 'class surveys' are required to be carried out on a five-year cycle, generating work for Pendennis. The vessel has to come out of the water for a proper inspection to take place, and it is often repainted, and additional works and upgrades undertaken, at the same time.

17. As a 'rough guide', Pendennis estimate that a new build of a 30 metre sailing yacht would cost around £10 million; for a motor yacht up to 50 metres, the cost would be approximately £700,000 per metre. Few projects generate turnover of less than £500,000 as lesser works would not justify the yacht travelling from its usual cruising grounds in the Mediterranean or the Caribbean. Pendennis has a small service centre in Palma, Mallorca, where smaller contracts can be carried out in the interests of maintaining client relationships while the yachts are in the Mediterranean.

18. The 640 tonne hoist is the largest on the Falmouth Docks estate, and it is occasionally used to provide 'haul out services' to local tugs and life boats. However, Pendennis does not carry out much by way of what is described as 'commercial' work, in other words work on vessels which are used for commercial, and not recreational, purposes. Nor does Pendennis carry out work on vessels used in the military. By contrast, and as will become clear, the workload of A&P is concentrated upon commercial and military vessels.

19. Between 2011 and 2016, Pendennis's total turnover from commercial work amounted to £746,999 (excluding VAT): in 2015 it was £318,000. Although this is (as Mr Carr puts it)

> 'a tiny proportion of Pendennis's business… it is important for Pendennis to undertake this work because these small work contracts can be trade specific such as fabrication of components and are used to maintain the workforce rather than lay off in particular trades between superyacht contracts.'

20. A notable feature of this application is a Wet Basin, which was constructed by Pendennis in 2015. It is an artificially confined area of water, 2.3 acres in area, in which vessels can be berthed. It is not susceptible to tidal movements, the level of the water remaining constant provided that the gates to the basin remain closed. Yachts or other vessels can be hoisted out of the basin or can remain there and work carried out 'alongside'. Access to the basin is by means of the gates being opened and closed, a process which takes about 90

minutes, requires some six men, and can only be effected at particular times of day when the tide is high. On average, the gates are opened and closed no more than six times a month.

21. Until the Wet Basin was built, Pendennis did not have an on-site facility to enable works to be carried out to vessels in the water. When such facilities were required, Pendennis would use the Port Pendennis Marina ('the Marina') which is owned by a third party (not involved in the current proceedings) and which is situated about half a mile from the Pendennis site. The Marina was (and still is) used by Pendennis as the arrival point for vessels where pre-work surveys can be carried out and the vessel 'de-stored' (that is, have its furnishings and other chattels removed prior to refit). Once the works in Pendennis's construction halls or dry dock has concluded, the vessel may then be returned to the Marina so that its mast can be fitted and other necessary final works (including rigging, commissioning, sea trials and re-storing carried out prior to its departure). The Marina has been an important adjunct to the Pendennis site, and between 2008 and 2015, Pendennis spent £245,000 by way of mooring or berthing fees with the Marina, working in total on 48 different vessels and projects.

22. Pendennis concede that there is nothing they can now do in the Wet Basin which they could not do before (by using a combination of its on-site facilities and the Marina). There are however a number of advantages which caused them to invest £8 million in its construction. In particular, they can manage and control the working environment without being hampered by the state of the weather or the tide. Vessels can be hauled in and out more expeditiously from the wet basin, and it is no longer necessary to wait for the right conditions before alongside works, perhaps using heavy machinery, are carried out. This has benefits both in terms of cost efficiency and in terms of health and safety. Moreover, owning all the facilities enables Pendennis to provide clients with a single one-stop service without being 'at the mercy' of another entity for key parts of its processes.

23. The Wet Basin does not permit Pendennis to work on vessels of greater length than those it can accommodate in its dry dock. The maximum length of vessel for the dry dock is 115 metres (although due to the enclosed roof, no vessel over 86 metres has been accommodated); for the basin it is 96 metres. While theoretically, three vessels of 96 metres, 62.2 metres and 55 metres could fit, the problems of manoeuvring are such that, in reality, the maximum capacity in the basin is for one 96 metre vessel and two 55 metre vessels at any one time.

24. The work load of Pendennis focuses at any one time on a relatively small number of vessels. According to Mr Carr, it refurbishes between four and five yachts a year, each refurbishment costing in excess of £1 million, and when the construction sheds or dry dock are engaged, the work would cost up to £7 million. Since the completion of the Wet Basin in 2015, no 'new build' had been completed, but a contract for a new build worth £10 million has been recently signed, and the wet basin is intended to be used at the final stages of that project.

25. The use to which the Wet Basin can be put is the central issue in the application. The Application Land comprises the Wet Basin and its immediate surrounds. There are covenants

restricting the use of the Application Land which Pendennis now wishes to modify, their argument being that there should be no greater limitations on the use of the Application Land than apply to the remainder of its land.

26. The covenants of which modification is sought prohibit 'boat building' and Pendennis are concerned that on the assumption that at least some of the yachts they build are 'boats', they could be prevented from completing new build projects on the Application Land, in particular in or alongside the Wet Basin. Some extensive restoration projects, not amounting to 'new build' as such, are also thought to have the potential to break the covenants, in the sense that such projects might be properly characterised as 'boat building.'

27. The form of modification sought by Pendennis would result in the harmonisation of the covenants which currently bind different parts of their estate. This would be advantageous to Pendennis as they wish to be able to carry out the business operations they currently carry out on the remainder of their land on the Application Land. Modification by way of harmonisation would enable Pendennis (or any successor in title) to do commercial and military work in the Wet Basin and its immediate surrounds, something which they are not currently permitted to do.

A&P

28. A&P Group is a substantial marine business specialising in the repair, regeneration, refit, conversion, construction, mobilisation and demobilisation of vessels, as well as providing port operation and management services. The Group has operated in the ship building business for over one hundred years, A&P Falmouth Limited having been incorporated in 1909. The Group has a particular expertise in building and repairing military vessels, being a major provider of marine engineering services both to the Ministry of Defence and overseas navies. It is currently actively involved in a new-build project (MARS, being Military Afloat Reach and Sustainability) intended to replace the Royal Fleet Auxiliary's fleet of single-hulled tankers.

29. As Mr Douglas, the Group's Commercial Director, deposed, most of A&P's work involves carrying out work to commercial and military vessels. This includes building (the fabrication of a new structure with machinery and equipment), repairs (involving the removal of an existing structure or equipment for service, overhaul or repair) and conversion (changing or improving the existing structure or machinery of a vessel for a new or improved purpose). Within its Falmouth site, A&P has the expertise, resources and capability to undertake complex repairs to all kinds of vessels and marine engineering projects.

30. The Group has a complex structure. A&P Falmouth Limited is, through a number of subsidiary ownerships (in turn, A&P Ship Repairs Limited, A&P GH 2006 Limited, A&P Group Limited) wholly owned by Atlantic and Peninsula Marine Services Limited, itself 75% owned by Peel Ports Investments Limited. All the companies within the A&P Group are direct or indirect subsidiaries of Peel Ports Investments Limited.

31. A&P Group occupies 219 acres of Falmouth Docks, of which 181 acres are covered by water. It has three large graving docks (docks from which water can be pumped out so that vessels can be built or repaired below the water-line), deep-water craned berths, and engineering and fabrication workshops. Repairs can also be carried out on vessels afloat in Falmouth Bay.

32. Mr Douglas states that A&P 'do not specialise on work to pleasure craft', but he admits that they have carried out 'pure engineering' works on superyachts (citing by way of example work carried out in 2016 to the 62 metre *Baton Rouge*, an ocean going vessel available for charter hire). A&P do not currently intend to focus on pleasure craft as a prime market, but wish to keep options open, and if the opportunity presented itself to undertake profitable work on ocean-going vessels such as superyachts, it would seek to avail itself of that opportunity. It should be noted that in carrying out work on the *Baton Rouge*, A&P were acting in breach of covenant as they had covenanted not to carry out any of the 'Permitted Uses' on the land they retained: see paragraph [60] below.

FDEC

33. The Falmouth Docks and Engineering Company is a company within the A&P Group, and hence a subsidiary of Peel Ports Investments Ltd. It is incorporated by statute (the Falmouth Docks Acts 1859 to 1958) in order to construct and maintain the tidal harbour and docks at Falmouth, and it remains the statutory harbour company. As the original freehold owner of the Falmouth dock estate, it divested itself of most of its interests in the 1980s, but it retains title to some land within the harbour, all of which is covered with water.

34. Unlike Pendennis and A&P, FDEC does not build or repair vessels save and insofar as it carries out maintenance works on its own fleet of tugs and workboats which serve the incoming vessels. As the dock authority, FDEC occupies wharves (and land and buildings adjoining those wharves) and provides berthing, together with associated services, for a wide variety of commercial, military and leisure vessels.

35. FDEC derives its income from berthing fees for vessels moored alongside its wharves, mooring fees for the mooring up and unmooring of those vessels, gangway fees for the provision of access to vessels alongside, and fees for sundry services to berthed vessels such as the supply of electricity and fresh water, the hire of fenders, the disposal of garbage and slops, the provision of staff on board and of diving permits. These business activities generate a substantial annual turnover to FDEC of approximately £4 million.

MDHC

36. The Mersey Docks and Harbour Company, a wholly owned subsidiary of Peel Ports Investments Ltd (and therefore an associated company of A&P Falmouth Ltd and FDEC), became the registered proprietor of a number of freehold titles in Falmouth Docks following a

transfer by A&P A Property Ltd on 28 September 2012. On 26 May 2016, MDHC transferred part of one of these freehold titles to Middlepoint Developments Ltd.

37. MDHC is a long established company based in the port of Liverpool, with wide-ranging business interests and an annual turnover in excess of £160 million. Its freehold interest in the Falmouth Docks leads to the generation of substantial rental income totalling £1,673,571 per annum from A&P and FDEC. No rent is paid or payable from Pendennis to MDHC.

38. MDHC objected to Pendennis's application for planning permission to create the Wet Basin and has refused to consent to any modification of the restrictive covenants binding Pendennis on the basis that if the businesses of A&P and FDEC were to suffer financially from such modification that could endanger the rent payments to MDHC from those companies. That is the principal basis upon which it maintains its objection to the current application.

Freehold and leasehold titles

39. There are various freehold and leasehold interests affecting the Falmouth Docks, and their devolution over the course of the last 25 years or so is detailed and in consequence complicated to explain. However, there is no dispute as to the current legal position, and that is where we shall start.

The current position

40. The application under consideration is to modify restrictive covenants which bind certain land in the freehold ownership of Pendennis. To use the terminology of section 84, this is the Application Land. The Application Land is a discrete part of Pendennis's land at Falmouth Docks, and as has been already noted it contains the development known as the Wet Basin.

41. The Application Land is adjacent, on its western and southern borders, to other land occupied by Pendennis, almost all of which is in its freehold ownership. This land has been referred to (as it has been occupied by Pendennis longer than the Application Land) as the Existing Land. The Existing Land is subject to restrictive covenants, but not the same restrictive covenants as bind the Application Land.

42. The land immediately to the west of the Existing Land is currently occupied by A&P pursuant to a lease dated 16 August 2001. The land further to the west, and adjoining the A&P Land on its western boundary, is currently occupied by FDEC pursuant to a lease dated 10 October 2006. The freeholders of the A&P Land and the FDEC Land are in each case MDHC.

43. Further still to the west of the FDEC Land there is the Port Pendennis Marina. The ownership of this property is not relevant to the issues in the case. Its location is however important as it is used by Pendennis from time to time in connection with their business.

44. To the north of the docks is Falmouth Bay. The land below the water-line immediately adjacent to Pendennis's land is owned by MDHC, although FDEC as the harbour authority owns land below the water-line to the west.

45. In the early 1990s, Peter de Savary decided to divest FDEC, which he then controlled, of those parts of the Falmouth Docks which were not involved in ship repairing, docking, engineering or cargo handling. FDEC accordingly granted three long leases of specific areas of the Docks, two such areas being dedicated to oil storage and distribution, and one area being dedicated to yacht building and repair. The three leases were each for a term of 999 years from 22 May 1990, although only one of the leases was granted on that date.

46. The area dedicated to yachts was the subject of a lease dated 17 August 1990 granted to a company called Cuehold Ltd. On 21 May 1993, Cuehold Ltd assigned the lease to Pendennis Shipyard Ltd – now called Pendennis Shipyard (Holdings) Ltd. The areas dedicated to oil storage and distribution were subject to two leases, one in favour of Falmouth Tankers Ltd (granted 22 May 1990) and one in favour of Falmouth Oil Services Ltd (granted 26 May 1993).

47. Each of these three leases contained restrictive covenants. It is accepted that the purpose of these covenants was to prevent those businesses occupying the Docks, including A&P which was at the time occupying land owned by FDEC, from competing with each other.

48. In October 2014, Pendennis came to acquire the freehold of the land it had obtained on long lease in 1993. This land, which is subject to the restrictions contained in the Cuehold lease which we shall refer to as the Cuehold covenant (see paragraph [58] below), is the main part of what we refer to as the Existing Land.

49. The Application Land came into the freehold ownership of Pendennis as follows. On 24 June 2009, one part was assigned to Pendennis by Falmouth Oil Services Ltd, the lessees under the 999-year lease made on 26 May 1993 and granted by the freeholders, FDEC, with effect from 22 May 1990. On 7 August 2012, the other part was assigned to Pendennis by Falmouth Petroleum Ltd, the lessees by assignment under the 999-year lease granted by FDEC to Falmouth Tankers Ltd. Both leases contained options to purchase the freehold.

50. Having acquired the two leases, Pendennis sought and obtained planning consent to build the Wet Basin on the Application Land. It asked the freeholders, MDHC, for consent to modify the leasehold covenants which bound the land. Consent not being forthcoming, Pendennis, openly and on full notice to the freeholders, acquired the freeholds by exercising the options contained in the leases, and then as freeholders of the Application Land initiated the current application to modify the covenants. It was necessary for Pendennis to acquire the freehold in

order to invoke section 84 as they had not held the lease for a sufficient length of time to fall within its provisions as a leaseholder.

51. There are therefore different covenants which bind the Existing Land (hereafter 'the Cuehold covenants') and the Application Land. It is accepted that the three objectors are each entitled to enforce the covenants in question. The freehold of the land benefited by the covenants is vested for the most part in MDHC following a transfer by A&P A Property Ltd on 28 September 2012. FDEC retain one small area of freehold land some distance to the north east of the Application Land.

52. A&P do not own any relevant freehold. However, they occupy the land to the west of the Existing Land pursuant to a commercial lease granted on 16 August 2001 by FDEC and A&P A Property Ltd for a term of 25 years from that date at a yearly rent (initially £750,000, rising to £1,000,000, and currently, following reviews, £1,340,571 per annum). The lease contains a covenant to use the premises only for 'the Permitted Use', that being 'for the purpose of a ship repairing, conversion and marine engineering business together with offices and storage space ancillary thereto.'

The covenants

53. The restrictions which Pendennis seek to modify are those initially contained in the leases granted by FDEC to Falmouth Tankers Ltd and to Falmouth Oil Services Ltd (referred to in paragraph [47] above), and which, it is accepted, bind the Application Land. The relevant covenant, as now contained in the transfer of the freehold dated 31 October 2014, reads as follows:

> *Not to use permit or suffer to be used the Premises for the purposes of:*
>
> *(i) ship-repairs other than to the Transferee's Operational Ships or Vessels*
>
> *(ii) boat building or ship building*
>
> *(iii) handling cargo including coal but excepting crude oil fuel oils liquid petroleum products and ships stores*
>
> *(iv) the provision of towage services except that the provision of towage services to ships and vessels visiting the Premises and the Transferee's Operational Ships and Vessels shall not be construed as a breach of this covenant.*

54. When, following its acquisition of the freehold in the Application Land, Pendennis intimated its intention to make application under section 84, it proposed a single modification to the covenant, merely deleting the words 'boat building or' in (ii). This was on the basis that Pendennis wished to be able to build (and repair) boats (including all kinds of yacht) on or alongside the Wet Basin. In the response sent on behalf of MDHC, it was not accepted that

'boat building' was an authorised use of the land formerly demised under the Cuehold lease as the words of that lease permitted work on 'yachts and pleasure craft of any size' but not on boats as such.

55. It should be noted that it is accepted by the parties that for the purposes of the covenant yachts and other pleasure craft comprise 'boats' and do not comprise 'ships'.

56. Nevertheless, when Pendennis came to make its application to the Tribunal, the proposed modification was different from that which had earlier been intimated, Pendennis now offering to replicate the exact wording contained in the Cuehold lease where the uses permitted on the Application Land (the Permitted Uses) were described.

57. This covenant, which is complex, does not currently bind the Application Land. It commences as follows:

> *Not to use or permit or suffer to be used the Premises for the Prohibited Uses PROVIDED THAT in the event that the Landlord ceases to use the Retained Blue Land for any of the Prohibited Uses for a period of 12 months of more then such use or uses shall cease to be a Prohibited Use*

58. The Lease then goes on to define the Prohibited Uses as follows:

> *(a) Shipbuilding, ship repairing, ship maintenance, ship refitting and all related engineering services except that there shall be excluded from this category of Prohibited Uses the Permitted Uses*
>
> *(b) The provision of towage services except for the provision of towage services to vessels visiting or constructed at the Premises*
>
> *(c) The repair and maintenance of dredgers and marine dredging equipment*
>
> *(d) The repair and maintenance of hovercraft*
>
> *(e) The provision of shipyard management services except for small boat yards*
>
> *(f) Except insofar as the same relate to yacht-building and pleasure craft industries, the provision of marine consultancy services to the shipbuilding ship-repairing offshore fabrication and other marine industries*
>
> *(g) Except insofar as they relate to the yacht and pleasure craft industries the supply of ship management systems and relating services to the marine industry*

(h) Cargo handling the following commodities: coal; sand; aggregates; calcified seaweed; bulk and palletised fertilisers; grain including oats barley wheat and peas; stone; zinc and copper concentrates; bulk animal feeds; palletised grit and blasting grit; frozen fish; explosives in containers

(i) Moving of bulk cement from storage to distribution

(j) Packaging and distribution of fertilisers

59. The Permitted Uses are in turn defined as the following:

(a) Building fitting out refitting or repairing of yachts and pleasure craft of any size

(b) Building and/or fitting out of hulls of any commercial or military craft provided that in carrying out such operations the Tenant will not compete with such operations carried on by the Landlord's subsidiary company at its Aberdeen Yard

(c) Repairing of any craft built fitted out or re-fitted under Permitted Uses (i) and (ii)

(d) Repairing of any other craft with the prior written consent of the Landlord such consent not to be unreasonably withheld and such consent or refusal to be communicated to the Tenant within two working days of the request for such consent provided that the Landlord shall not be deemed to be unreasonably withholding its consent if the Landlord or any other Company within the same group of companies as the Landlord is desirous of carrying out the work in question and has been invited to tender for the same

(e) Repairing of vessels belonging and/or chartered to Falmouth Oil Services Limited and/or any subsidiary thereof.

60. The Landlord (FDEC) entered into a reciprocal obligation, covenanting:

Not to use or permit or suffer to be used the Retained Blue Land for the Permitted Uses provided that in the event that the Tenant ceases to use the Premises for any of the Permitted Uses for any period of twelve months or more then the Landlord shall no longer be subject to this restriction in respect of such use or uses.

61. In summary, the Cuehold covenant seeks to restrict what can be done on the Existing Land in the interests of protecting the landlord from competition by those occupying the tenanted land. At the same time, the tenant is protected from competition by the landlord. As a covenant, it focuses on the current use being made of the property. If either landlord or tenant

ceases to use the premises for its 'Prohibited' or 'Permitted' Use respectively for twelve months or more, the use in question will cease to be prohibited.

62. In the current application, Pendennis are seeking modification of the covenant on the Application Land so as to harmonise the permitted uses on the two different tracts of land (the Existing Land and the Application Land). The effect of such a modification would be to allow Pendennis to build or fit out the hulls of 'any commercial or military craft'. Although the covenant includes the proviso that in doing so the tenant must not compete with A&P Group's operations in Aberdeen, that proviso is no longer relevant, as the A&P yard in Aberdeen has ceased functioning. In consequence, should the covenant be modified as proposed, Pendennis would have greater scope to conduct commercial or military works on the Application Land than they currently have.

Statutory provisions

63. Insofar as it is relevant to the application, section 84 of the Law of Property Act 1925 as amended provides:

> (1) The Upper Tribunal shall … have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied –
>
> …
>
> (aa) that (in a case falling within sub-section (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or
>
> …
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
>
> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either –
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
>
> …

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition."

64. The interpretation of these provisions is not controversial. It is accepted that the restrictive covenants contained in the freehold transfer to the applicant, Pendennis, the freeholders of the Application Land, comprise a 'restriction' within section 84. The burden is on Pendennis to prove one of the statutory grounds for modification of the restriction and to satisfy the Tribunal that it should exercise its discretion to modify. In the event that the Tribunal decides that the restriction should be modified, it is not obliged to adopt the modification sought by the applicant but has the power to order some other modification.

65. The application is brought under grounds (aa) and (c), in the alternative. Acknowledging the difficulties in establishing ground (c) as a self-standing ground in its own right, the applicant has put its case largely upon ground (aa). In the event that, and insofar as, it does not succeed on (aa), it is accepted that it will fail on (c). We shall therefore reserve our comments to ground (aa).

66. In *Re Bass Ltd's Application* (1973) 26 P & CR 156 Mr J.S. Daniel Q.C., sitting in the Lands Tribunal, as it then was, adopted an approach to ground (aa) which has been followed ever since. In doing so, the Tribunal accepted the analogy, emphasised in this case by Mr Weekes, between Lord Cairns' Act (the Chancery Amendment Act 1858) which gave courts of equity the power to grant damages in lieu of an injunction, and section 84 of the Law of Property Act 1925. It then set out the questions to be asked by a Tribunal when faced with an application under ground (aa).

(1) Is the proposed user a reasonable user of the land for private purposes?

(2) Do the covenants impede that user?

(3) Does impeding the proposed user secure practical benefits to the objectors?

(4) If so, are those benefits of substantial value or advantage?

(5) Is impeding the proposed user contrary to the public interest?

(6) If the benefits are not of substantial value or advantage, would money be an adequate compensation?

(7) If impeding the proposed user is contrary to the public interest, would money be an adequate compensation?

67. In *Shephard v Turner* [2006] 2 P & CR 28 at [58], Carnwath LJ stated:

> 'In my view, account must be taken of the policy behind para (aa) in the amended statute. The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. "Reasonable user" in this context seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."

68. The objectors have asserted that any Tribunal exercising its jurisdiction under section 84 must proceed with due caution. To discharge or modify restrictions over the land inevitably engages the property rights of the applicant and the objectors, and due cognisance must be paid to Article 1 of the First Protocol to the ECHR in considering whether, and if so to what extent, the statutory jurisdiction should be exercised. While we accept that the ECHR is engaged, we consider that the legislation contains provisions which are not only compatible with but also further the objectives of the ECHR, and we do not consider that, assuming proper application of those provisions, it is necessary to give separate consideration to the ECHR. Nor do we accept that there is any requirement that the Tribunal proceeds 'cautiously' as submitted by the objectors, as we shall explain at [154] below.

69. A restrictive covenant which binds the freehold is not in any sense limited in time. On the contrary, it is (subject to any agreed or court-ordered discharge or modification) perpetual in duration, and it has the potential to impact upon the future use of the land for generations. It follows that in considering the application of the statutory grounds, as well as the exercise of

any discretion should the grounds be satisfied, the Tribunal must take into account likely future developments. The difficulty which the Tribunal faces in this case, and it is not an unusual one in applications of this kind, is to assess the relative likelihood of those future developments.

70. In this case, it is accepted by the objectors that *Bass* questions (1) and (2) are to be answered in the affirmative. On the assumption that the covenants do not exist (a necessary assumption 'otherwise the question is begged': see *Bass* at p.158), the proposed user is a reasonable user of the land for private purposes, and it follows (inexorably) that the covenants impede that user. The applicants do not contend that the existence of the covenants is contrary to any public interest. However, battle is joined on the remaining questions.

71. It is therefore necessary for us to resolve the following issues:

(1) Whether impeding the user of the land secures practical benefits to the objectors;

(2) Whether those benefits are of substantial value or advantage;

(3) If not, whether money would be adequate compensation to the objectors.

72. In resolving these issues, it became apparent over the course of the hearing that in terms of the current activities being conducted by Pendennis and (in particular) A&P, there is a significant distinction between work on yachts and pleasure crafts and work on commercial and military vessels. One specific concern of the objectors is that, if the covenants were to be modified as the applicant wishes, it would allow Pendennis, and therefore any successors in title, not only to build and repair superyachts and other pleasure craft but also (in what would be direct competition with A&P) to build and repair commercial and military vessels.

73. It became apparent over the course of the hearing that the cases being put by the three objectors were not by any means of equal strength or merit. The prime objector was A&P with FDEC and MHDC a somewhat distant second and third respectively.

The hearing

74. The site having been visited on 13 June 2017, the hearing convened the following week in London, and over the course of five days, the Tribunal heard from a number of witnesses.

75. The applicants called first Mr Michael Carr, the joint managing director of Pendennis Shipyard (Holdings) Ltd and managing director of Pendennis Shipyard Ltd. He is a qualified naval architect and is the immediate past chairman of Superyacht UK, an organisation which represents the superyacht industry at home and abroad.

The purpose of the application

76. Mr Carr explained the purpose of the application to the Tribunal. Pendennis sought to be allowed to carry out the same business operations on the Application Land as it currently carries out on its Existing Land. The effect of the modification sought would be to harmonise the permitted use across all of its estate.

77. Mr Carr explained the applicant's concern that the current restrictions may prevent the business from completing new-build or extensive restoration projects in the Wet Basin. These activities were currently undertaken either on the Existing Land or at the Marina, approximately half a mile away. Pendennis currently use the Marina as an arrival point for de-storing and carrying out pre-work surveys on vessels, which are then moved to the Existing Land for re-fitting to take place. Once a vessel has left Pendennis's construction halls or dry dock, the height of the mast is such that most vessels need to return to the Marina for the mast to be re-erected, and for commissioning, sea trials, finishing, and re-storing to take place, prior to the vessel's departure from Falmouth.

78. Although Pendennis currently has a good relationship with the Marina, as Mr Carr accepted it has, there is no guarantee that this will continue, or that the rates charged by the Marina will remain affordable. Should the Marina facility be unavailable for any reason, Pendennis would be severely restricted in the type of re-fit and new build contracts it could undertake.

79. Mr Carr therefore contended that, if Pendennis were unable to use the Wet Basin (for all aspects of boat-building), it would lose customers. While it is possible for yachts to be hauled out onto the Existing Land, and placed on the hard-standing or taken into the dry dock, clients will not pay the higher costs nor take the risk of their yachts being damaged unnecessarily, and in any event certain procedures can only be carried out while the yacht is in the water.

80. The creation of the Wet Basin has the potential to reduce the company's reliance on the Marina's facilities, provided that the current restrictions are modified so as to permit works to be carried out on the Application Land.

81. In cross-examination, Mr Carr accepted that, in addition to using the Marina, Pendennis used FDEC's facilities for alongside work, and had in fact paid out more to FDEC than the expenditure it had incurred at the Marina over the last ten years. He accepted that, should the Marina not be available, in respect of alongside work which involved boat-building, Pendennis could use FDEC's facilities if available. Mr Weekes put to Mr Carr that a substantial practical benefit that the covenant in its current form, compared with the modified covenant as proposed, conferred on FDEC was that it increased the prospect that in the future Pendennis would require the use of FDEC's facilities for alongside work for boat-building. Mr Carr said that this should only be the case if the Marina was unavailable, which he did not consider likely in the immediate future. He added that Pendennis preferred not to use the FDEC facilities because of the risk of overspray from A&P's operations.

82. The majority of work on vessels, whether new build, restoration or refit, is carried out on land and, owing to the unpredictable weather in Cornwall, usually carried out under cover. 90% of the work on a vessel is carried out inside one of the sheds, in the covered dry dock or on hard-standing. During the average 17-month duration for a 'new build' project, it was generally not until the last two months that the vessel was actually in the water, during which the work involved would be between 5% and 10% of the total man-hours. Similarly, during the average 9-month duration for a re-fit project, three to four weeks would be taken to de-store the vessel, following which it would be hauled out and worked on under cover for six to seven months. Finally, checks and sea trials would take place in the water. Accordingly, for both new build and re-fitting projects, only a small fraction of the work is undertaken to vessels out in the open.

83. Mr Carr described the work which Pendennis carried out to construct the Wet Basin and additional sheds (the latter in order to increase the company's facilities for doing work under cover). The construction project cost £27 million in total, the Wet Basin itself costing £8 million. The company was assisted by a grant of £7.5 million from the European Regional Development Fund towards the project, of which £2.4 million was spent on the Wet Basin. These works were carried out to attract more clients from the Mediterranean circuit, since they enabled the company to provide a "one stop shop".

84. With the increased facilities provided by the Wet Basin, Mr Carr hoped that in time the business would be able to maintain around 33,000 man-hours of alongside works, purely on repair and refit work to yachts, increasing annual turnover by around £1.32 million. Although the company had not had a 'new build' yacht contract for some time, it did have a new commission which was due to complete in 2018. Alongside work kept skilled staff better employed.

85. Mr Carr said that Pendennis had not carried out any military work to date, and had no intention to do so in the future. As regards commercial work, from 2011 to 2016, the aggregate turnover generated was just less than £750,000. Mr Carr was adamant that Pendennis and A&P were not in competition: they provided different services to very different customers. In contrast with Pendennis's business, A&P operated a ship repair facility for the heavy commercial sector. Pendennis's much smaller facilities could not physically accommodate the size of vessels that A&P cater for. The creation of the Wet Basin had not changed that - its realistic capacity was considerably less than that envisaged by the original lease of the 150 m dry dock. He stressed more than once that it was not Pendennis's intention to undertake significant commercial work.

86. Mr Carr gave an overview of the facilities currently provided by Pendennis, including its environmentally-controlled on-site paint workshop which protects vessels from overspray from A&P's operations, and a state-of-the-art 80m long paint booth for painting masts. Whilst Pendennis could work on commercial or military craft on the Existing Land, Mr Carr thought it unlikely that commercial or military customers would be prepared to pay the premium for the facilities which Pendennis provided; indeed, many of those facilities would become redundant if Pendennis were changed to building or re-fitting commercial or military craft. Mr Carr did

however concede, in cross-examination, that some of these facilities might be of value to a commercial operator, or could be re-located if Pendennis moved site. However, Pendennis had no intention to do so, Mr Carr believing that the current site could accommodate an increase in production of up to 50%.

87. Mr Carr said that the company had no desire to build or repair ships and therefore no intention to stray into A&P's line of business. If the focus of its business shifted to commercial work, many of the skills of the workforce would not be required, resulting in a reduction of approximately 100 direct staff and 12 support staff. Additionally, the covering of the dry dock would require removal to accommodate the greater height of commercial vessels.

88. Responding to a series of questions from Mr Weekes, Mr Carr emphasised that neither the company nor its premises were for sale. There had been some relatively recent interest from overseas shipyards which did not lead to anything, and some customers had expressed an interest in acquiring minority shareholdings in the business, but nothing had come of these expressions of interest.

89. In summary, Pendennis contends that it has no intention, current or future, to expand into the commercial or military sector. Its current business is thriving, it intends to maintain its current business in Falmouth for the foreseeable future, and it has no intention whatsoever to sell its business, or its land, to a third party. It is a buoyant company which wishes to continue as a major international business based in Cornwall. It has made a substantial investment in its business which it intends to honour.

90. A&P does not contest much of what Pendennis has said about the use made of its land in the past and present. However, it challenges Pendennis on its stated intentions. Underlying their objection lies the question why it is, if Pendennis has no intention either to change its business plan and carry out work on commercial vessels itself or to sell its Falmouth site to the highest bidder, the applicants are seeking to expand the use to which the wet basin can be put. In our judgment, this is an important question, and we shall return to it in due course.

The future use of the Application Land

91. The objectors challenge the applicant's future intentions in a number of respects. First, they contend that, in the event of the covenants being modified, the applicant or a successor in title may diversify the use of the Application Land. This may involve converting entirely from working on yachts and leisure craft to working on commercial vessels or it may involve combining work on yachts and leisure craft with work on commercial vessels. Secondly, they contend that, if that were to occur, the objectors would be put at risk of financial loss as a result of competition from the neighbouring premises. The very purpose of the covenants being extracted in the first place would thereby be negated.

92. In putting their case forward, the objectors referred to comparable experience in other locations, where there has been competition between neighbouring shipyards, and where changes of use have occurred. In addition, the objectors (specifically A&P) provided the Tribunal with a list of vessels which have been worked on in recent years and which they contend would be 'at risk' from a rival shipyard on the adjacent land in the sense that, in the absence of any restrictions such as currently exist, the rival could carry out the work itself. This was referred to during the hearing as the 'At Risk Register'.

93. The applicant does not accept that any of the evidence adduced by the objectors has persuasive weight. It contends, based on the reasoning of its expert witness Mr White, that the applicant has no incentive currently to diversify, and that there would need to be a significant change in market conditions for it to contemplate diversification or sale of the business or the land. It contends further that, even if the applicant did diversify, or sell its business or land to a successor which diversified, this would not materially affect the objectors (in particular A&P). The applicant submits that the grounds invoked have been made out and that the Tribunal should exercise its discretion to modify the covenants pursuant to the application being made.

94. We shall consider the evidence adduced in relation to these matters in due course, but first we propose to summarise the position of the objectors as far as the applicant's use of the Application Land to carry out works on yachts and leisure craft. This is, in our judgment, the more straightforward aspect of the application to deal with.

Yachts and leisure craft

95. As regards the part of the application concerning yachts and leisure craft, Mr Douglas agreed with Mr Carr that Pendennis and A&P currently operate in different markets. Assuming that A&P continued to operate in the commercial and military market, and that the Pendennis site was used only to build and repair leisure vessels, Mr Douglas accepted that A&P's business would not be harmed by this part of the proposed modification. Mr Weekes accepted that A&P and Pendennis were not in competition so far as yachts and leisure craft were concerned..

96. However, Mr Weekes submitted that the position of FDEC was different. He contended that if the restriction were modified to allow yachts and leisure craft to be built on the Application Land, Pendennis (or a successor in title) would be likely to carry out alongside works in the Wet Basin, works which otherwise would have been carried out on FDEC's wharves.

97. It was accepted by Mr Jones, the Port Operations Director, that FDEC does not carry out any work to vessels and that although FDEC has engineers on its payroll, they are assigned to A&P in order to carry out any such works. FDEC occupies wharves and adjoining land and buildings, and provides berthing for a variety of commercial, leisure and military vessels.

98. Mr Jones explained that FDEC's objection to the modification being sought had two strands. The first was that FDEC would lose money if A&P's business were adversely affected by Pendennis being able to compete by using its Wet Basin. He accepted in cross-examination that this element of FDEC's claim was therefore largely parasitic on A&P's objection. He conceded that the towage services provided by FDEC would not be affected, since Pendennis are prohibited by covenant from towing vessels other than their own (see paragraph [54] above).

99. The second strand concerned FDEC losing income from Pendennis. Mr Jones said that between 2011 and 2016, Pendennis spent nearly £400,000 in return for FDEC providing alongside facilities for ten different vessels. In the event that Pendennis used the Wet Basin for alongside works, income from this source would be lost to FDEC.

100. Mr Jones accepted that the majority of these costs were in respect of two vessels – the *Mirabella V* and the *Malahne.* As regards the *Mirabella V*, the evidence of Mr Granville (on behalf of Pendennis) was that the owner of the vessel wished his own crew to repaint her mast, which was taller than Truro Cathedral. The only area which was large enough to accommodate it was on A&P's land, upon which the mast was tented and painted. Mr Granville said that should the situation arise in the future, Pendennis would seek to use those facilities again. He accepted that the mast might fit in Pendennis's mast shed, but would probably be too long and require extra tenting.

101. As regards *Malahne*, Mr Granville stated that she was a classic vessel that had been all but abandoned. As she was unseaworthy, she was delivered to Falmouth on a semi-submersible dock-delivery vessel. The likelihood was that, should similar circumstances arise in the future, Pendennis would still use the services of FDEC. Mr Jones subsequently accepted this.

102. Mr Cowen submitted that if the costs of *Malahne* and *Mirabella V* were stripped out, the remaining income that FDEC might lose was *de minimis*, or at any rate insufficient to show a practical benefit of substantial value.

103. We agree with Mr Cowen. It seems to us that the position of FDEC is weak, and on consideration, the position of MDHC, the third objector, is even weaker.

104. Mr Andrew Martin, director of Peel Ports Investments Limited (the controlling company of MDHC), explained that MDHC is a long established company, based in the Port of Liverpool, with wide ranging interests. As a result of its freehold ownership of property within Falmouth Docks, it receives rent of £1,673,571 comprising £1,340,571 from A&P and £333,000 from FDEC. Mr Martin said that any modification of the current restrictions would create a business risk for A&P and FDEC, it could affect the rent that MDHC receives, and any dilution of the covenant strength of those companies could have a detrimental effect on MDHC's freehold estate.

105. Mr Cowen took Mr Martin to the last set of accounts for MDHC, for the year ending 31 March 2015, and which showed that the company's turnover was £162.6 million, resulting in a profit of £70.9 million. The rent from A&P and FDEC therefore represented around 1% of the turnover of MDHC. In the same period, A&P had a turnover of £40.4 million, and a profit of £3.89 million, which Mr Martin agreed would have been after paying rent to MDHC.

106. Mr Martin was unable to quantify the impact on MDHC's rental income of a modification of the covenant. He accepted that A&P, with a turnover of £40.4 million, would have to have had a significant problem to find itself in the position of not being able to pay any part of its £1.3 million rental obligation. And that even if the position of A&P and FDEC was so cataclysmic as not to be able to pay any rent at all, the loss of income to MDHC would be around 1% of its turnover. He did, however, stress that the rental income from the two companies was a significant sum.

107. The objectors' expert, Dr Majumdar, said that the loss of value to the objectors was unquantifiable. That being the case, MDHC is unable to show how much of the rental income would be in jeopardy, but in the unlikely event that all of it was, that loss of income, which we accept would be a sizeable amount, would represent such a small percentage of MDHC's turnover that any loss of value to MDHC would not in our judgment be substantial.

108. Mr Weekes, rightly in our judgment, did not press MDHC's objection with any force in his skeleton argument or in his closing remarks. We are of the view that protection from an unquantifiable risk of future loss of income, itself contingent upon an improbable change of circumstances, is not a practical benefit of substantial value or advantage.

Commercial and military vessels

109. Use of the Application Land for work on yachts, including superyachts, and other leisure craft, is one thing; its use for work on commercial or military vessels is quite another, and it is here that clear lines were drawn between the parties. It is not surprising that that is the case, as A&P do not relish the prospect of competition on its doorstep. We note that the original application to the Tribunal did not accommodate commercial or military use, and it was only when the application was amended in an attempt to modify the covenants on the Application Land so as to harmonise with those binding the Existing Land that the prospect of commercial or military use of the Application Land became a real one.

110. In the course of his evidence, Mr Jones contended that the addition of the Wet Basin to the existing Pendennis facility created an entirely different proposition as a shipyard – with an enhanced capacity to build and repair commercial and military craft, which fundamentally changed the attractiveness of the facility and its ability to compete head-to-head with A&P. It permitted a 'full-service' offer from a facility that (with the additional asset of the Wet Basin) was likely to be more efficient and attractive than the facilities available to A&P.

111. Mr Carr said that Pendennis had no desire to enter into the commercial market, and had only carried out a handful of commercial jobs – amounting to 0.32% of its turnover between 2013 and 2015. He said that the only commercial work carried out in the Wet Basin or using the Marina was the creation of the Marlowe Lounge (a floating lounge to be moored on the Thames) which was launched into the Wet Basin and collected three days later by its owner. However, whilst commercial work represented a tiny proportion of Pendennis's business, it enabled the company to maintain its workforce rather than laying off personnel between superyacht contracts. In addition, the business had the only 640-tonne hoist in the docks estate and therefore provided a local haul-out service. But, in view of the company's focus on yachts and leisure craft, Mr Carr claimed that, assuming the existing blend of work continued, the benefit to Pendennis of modifying the covenant would be trivial or insignificant.

112. The objectors however contended that Pendennis, or a successor in title, might exploit the opportunity afforded by modification of the covenants binding the Application Land to move entirely from work on yachts and leisure craft to work on commercial (and possibly military) vessels. Mr Jones said that whilst there was no evidence that Pendennis were currently considering a sale of its site, he believed that it was important to recognise that the application was based upon a clear drive by Pendennis to have the capacity to enter the markets of building and repairing commercial and military vessels, and that, in the event of covenant modification, it would be able to use the Wet Basin to competitive advantage in relation to those markets.

Diversification of use

113. In putting their case forward, the objectors adduced evidence, through Mr Jones, of diversification in shipyards which had operated either completely or partially in the leisure sector but had then diversified into commercial and/or military work.

114. Mr Jones's first example was Babcock Marine, which used a dry dock at Appledore in Devon to build superyacht hulls, trading as Devonport Yachts. Mr Jones said that Babcock made the decision to exit the leisure sector in 2008 to concentrate on naval and military contracts. He considered this to be a good example of a shipyard moving out of the leisure sector into the commercial or military sectors due to prevailing market conditions and commercial benefit. Mr Granville said that Pendennis bought Devonport Yachts, with its managing director being employed by Pendennis to this day. Babcock's reason for selling Devonport was to focus on its core support services business, which it did in part by acquiring the services element of VT Group plc ("VT" - formerly Vosper Thornycroft). In any event, the yacht building division represented 3% of the Babcock's turnover – a point which Mr Jones accepted in cross examination.

115. Mr Jones's second example was VT, which he said had a long history of building destroyers and similar craft. In 2001 it diversified into the leisure market when it started the construction of the *Mirabella V*. At the time of its completion in 2004, this was the world's largest single-masted sailing vessel, but following completion the company reverted to commercial and military ship and boat repairs. He said that this was an example of a shipyard

moving to and from the leisure market dependent on market conditions. Mr Granville's evidence concerning *Mirabella V* was rather different. He said that VT was in the process of closing its yard in Southampton, and in order to lessen the impact on the workforce it took on the build of *Mirabella V* as a one-off project, which it completed at a substantial loss as part of its exit strategy. VT's turnover during the period was in excess of £640m, and the build cost, at US$ 55m, represented less than 3% of that turnover.

116. Mr Jones referred to other examples from overseas. First, Blohm & Voss's 2016 acquisition by Lűrssen Maritime ("LM"). B&V was a substantial shipbuilding group that had diversified into commercial and leisure markets, including merchant vessels, passenger ships and yachts. He quoted the managing director of LM, Peter Lűrssen, who said that the company intended using the competence and experience of the B&V Hamburg shipyard for the new build of complex naval ships but that the construction of yachts "will depend on the overall market situation [which was] difficult to judge at this time". Mr Jones said that this acquisition showed that facilities which can work in the leisure markets are attractive for acquisition and that shipbuilding companies will diversify between markets. Mr Granville's evidence was that LM separates its work, to enable yacht-work and commercial craft – a point which Mr Jones accepted in cross examination. Mr Granville said that LM was therefore able to avoid cross-contamination from dirty to clean work, for example a yacht's hull could be built at a commercial yard, and then moved to another location for painting and finishing off. He contrasted this with Pendennis's 10-acre site.

117. As an example of a diversified business, Mr Jones referred to the Dutch conglomerate Damen, which builds and repairs every type of vessel across commercial, military and leisure sectors. He considered that these examples showed that where there was a commercial incentive to do so a shipyard will diversify, and there was no reason why Pendennis or any successor would not do so.

118. Mr Granville's evidence on this issue, upon which he was not challenged in cross-examination, was that all of the examples in the UK that Mr Jones had cited were either commercial or military yards that had unsuccessfully entered the leisure market, or commercial yards that were closing down and had secured one-off leisure projects to keep the workforce employed for as long as possible. As far as the overseas examples were concerned, they were large multi-site businesses, and that unless a company has sufficient space to control its environment so as to be able to separate "dirty" (i.e. commercial or military) and "clean" (i.e. yacht and leisure) work, they could not be undertaken together.

119. Mr Granville explained that Pendennis had spent considerable sums in creating a clean environment in which to build and refit vessels. Their facilities are cleaned regularly, at a cost in excess of £600,000 a year – a figure that would rise significantly should the company combine clean and dirty work. Rust from cleaning commercial ships and salt from the air could cause problems with the aluminium structures of Pendennis's sheds. The company has an arrangement with A&P to be informed in advance when A&P are using anti-foul spray, which may damage the paint finish if Pendennis is spraying a yacht's hull at the same time.

120. Were work on superyachts and work on commercial vessels to be conducted together on the same site, Mr Granville believed that it would be impossible to avoid cross-contamination without incurring costs which would be prohibitive. It is possible to wrap a commercial vessel in a tent, but to do so is time-consuming and expensive. As a result, it is only done when a yacht was being sprayed or rubbed down. It took three weeks to carry out, and had an average cost of £75,000 for a 50m vessel. Mr Granville said that commercial clients, whose work was generally quicker and of lower value than that of superyachts, were unlikely to wait an additional five weeks, or pay for it. If the vessel were not wrapped, Mr Granville said that it would cost £20,000 to clean the inside of a shed, and £50,000 for the full dock distance of 150m. For all of these reasons, Mr Granville said that it would make no sense for Pendennis to combine its "clean" work on yacht and leisure craft with "dirty" work on commercial or military vessels.

Effect of competition 'next-door': A&P Tees

121. The objectors contended that were the restrictions to be modified so that the applicants or their successors in title could work on commercial or military vessels, and following such modification the Application Land was so used, the business of A&P would be put at risk by competition from its neighbouring shipyard.

122. In support of this, A&P pointed to the opening of a rival operation to its own business in Teesside. Mr Douglas, the commercial director of A&P Falmouth, previously worked at A&P's dockyard in Middlesbrough ("A&P Tees"), during which time the company's landlord let adjoining land to UK Docks, a competitor. UK Docks opened a dry dock in October 2014, and a second one in July 2016. Mr Douglas said that this had an adverse effect on A&P Tees, as some of its customers moved their business to the new UK Docks Teesport. He calculated that A&P's trade from a range of such customers reduced from £2.8 million (37% of the yard's turnover) in 2013/14 to £132,056 in 2015/16. Overall revenue dropped by £1.5m to £6m in 2015/16, which he put down to the loss of vessels to UK Docks. There was also a detrimental effect on morale. Mr Carey, the Group finance director, acknowledged that 2011 to 2013 had seen difficult market conditions for A&P Tees, but it was the introduction of the competitor "next door" which affected profitability. He concurred with Mr Douglas's analysis.

123. In cross-examination, Mr Douglas agreed that the A&P Tees site was around 5 acres, including two dry docks, and the UK Docks site was about the same size. There were no restrictive covenants in the way that there are on the application land. Mr Douglas accepted that turnover and net profit at A&P Tees were already falling in the years prior to UK Docks opening, and that the turnover was inflated in 2011 owing to a one-off project for Cable Enterprise. He also accepted that growth can bounce back, and that some of the customers which tried the new UK Docks operation later came back to A&P Tees.

124. Mr White, the applicant's expert, did not consider that Mr Douglas and Mr Carey had provided sufficiently robust evidence to show that it was the arrival of UK Docks in late 2014 that had caused a substantial decline in A&P's business on Teesside. He had carried out an

analysis of A&P Tees' turnover, which showed that both the company's turnover and net profit had been in decline for the previous three years, and that it had made a loss in 2013/14, prior to the arrival of UK Docks. Mr White considered that this suggested there might be other reasons behind the decline. He also noted that, despite UK Docks remaining on the adjacent site, A&P Tees had reported a strong first six months in 2015/16 (during which time UK Docks opened its second dry dock).

125. Dr Majumdar, the objectors' expert, had analysed the reduction in turnover and contribution from the following customers that appeared to transfer business from A&P Tees to UK Docks as follows: Briggs Marine 61% turnover, 60% contribution; Gulfmark – 93%, 94% respectively; Hanson 78%, 85% (although he conceded there may have been other factors in play); P D Ports – 100%; Svitzer nearly 100%. On the basis of that analysis, Dr Majumdar considered it most likely that the arrival of UK Docks had had an adverse effect on A&P Tees.

126. Dr Majumdar acknowledged that whilst there may have been other factors that may have affected A&P *in addition* to the arrival of UK Docks, an important set of customers clearly switched to the new docks after it opened. Since those customers had produced profitable business for A&P Tees in the past, the company would have continued to trade with them, and had the capacity to do so. The fact that turnover or profit was falling before the opening of UK Docks opening, and increased afterwards, did not undermine that view.

127. Both Dr Majumdar and Mr White recognised that the magnitude of this adverse impact was difficult to calculate. Dr Majumdar's best estimate was that the opening of the rival dock caused a fall in annual turnover of between £1.4 and £2.6 million, and a loss in annual contribution of £0.3 – 0.7 million, depending upon the assumption of how much of the loss could be reliably attributed to the opening of UK Docks. These figures were subject to the caveat of a 'large margin of error', and it was accepted that the actual impact could be substantially higher or lower.

128. Mr White's evidence was that, even if it could be shown that the arrival of UK Docks had had a negative effect on A&P Tees, there was no evidence to show that this was illustrative of the likely impact on A&P of the modification of the covenant at Falmouth. At Tees, the two adjacent facilities were of similar size, each with two dry docks on sites of around five acres. At Falmouth, Pendennis has 7.5 acres of land, 2.3 acres of water, one dry dock and no deep-water berthing. In contrast, A&P has 38 acres of land, 181 acres of water, three large dry docks, and 'extensive' deep-water berthing. Such discrepancies cast doubt on the reliability of the Tees comparable to show the potential effect of modification of the covenant.

129. Dr Majumdar agreed that the magnitude of the effect of a competitor opening on an adjacent site will differ depending on the size and capabilities of the new entrant. Whilst he considered it common sense that when a competing firm enters 'next door', an incumbent is likely to suffer a degree of harm, his evidence was that he would not use the A&P Tees example to predict the magnitude of the impact that competition from the Application Land

would cause. However, in his view it did show that competitors were willing to open in close proximity, and where they do, an adverse impact on the incumbent is to be expected.

130. We do not derive a great deal of assistance from the A&P Tees example. There is no evidence as to what the long term impact, if any, was. But the fundamental difficulty, it seems to us, is that both experts were of the view that it was of little relevance to gauging the potential effect of modifying the subject restrictions. We agree that it seems to be common sense that a competitor opening "next door" is likely to have some impact, but do not feel we can take anything further from it than that.

The 'At Risk' Register

131. The 'At Risk' Register is a list of vessels which have been worked on by A&P in recent years and which the objectors contend a competitor, operating from the Pendennis shipyard and using the Application Land, could work upon in future were the current restrictions to be modified to allow work on commercial or military craft.

132. Mr Carey and Mr Douglas jointly analysed those elements of A&P's turnover that related to vessels they said could, in future, be accommodated on the Application Land and the Existing Land. Mr Carey's initial finding was that £7.2 - £8.1 million of annual turnover, or a contribution to profits of some £2.1-2.3 million, might be at risk should the restriction be relaxed to allow Pendennis to compete with A&P's operations. In the year ending March 2014, that would have caused the company to make a loss. Using a multiple of 3.2 (which he derived from a share transaction of Peel Port Investments), he arrived at a potential loss of £6.7-£7.4 million. Mr Douglas noted that for the purposes of the calculation, Pendennis's dry dock could accommodate vessels 150m long and 19.2 wide, and the Wet Basin, 90m and 19.2m respectively.

133. Mr Granville disputed these figures. His evidence was that the capacity of the dry dock was limited to a length of 115m, allowing for equipment storage and workshop space. As regards the Wet Basin, the safe maximum width of a vessel was 17.5m, allowing for clearance at the gate and, owing to the time it takes to open the gates to the Wet Basin given that they can only be used 1.5 hours either side of high water, a vessel having a draft of more than 5m could only be moved in or out of the Wet Basin once every fortnight.

134. Mr Granville said that much of the work on 'boats' was repair – a point which the objectors largely accepted. There was no evidence in the objectors' witness statements that any of the work was in respect of building boats.

135. During examination in chief, Mr Douglas said that during the two-year period ending March 2015 and 2016 A&P had quoted to build a small fishing vessel at around £500,000, and the replacement of around 15-20m of steelwork in a barge. In the future, he said that the company was expecting an enquiry for the upgrading and repair of four off-shore patrol vessels,

a contract having a value 'in the millions', which the Ministry of Defence was expected to dispose of. But there was no documentary evidence in support of this (very lately served) oral evidence and we derive little assistance from it. Mr Douglas accepted in cross-examination that for larger boat building jobs, it would require covered facilities that A&P currently did not have.

136. The 'At Risk' Register was the subject of evidence from the two expert economists: Mr White for the applicant, and Dr Majumdar for the objectors. Mr White embraced Mr Granville's point about capacity. Whilst Mr Douglas's evidence was that the clearance which Mr Granville had identified was more applicable to superyachts than commercial vessels, Dr Majumdar recast the Register to encompass only those vessels that could be accommodated in the Wet Basin based on the applicant's criteria of size (96 m long, 17.5m wide, and 5.5m draft). Dr Majumdar also considered a five-year period, from 2012 to 2017, to test the findings of Messrs Carey and Douglas. The result of this was that the value of work that was at risk was reduced from Mr Carey's turnover of £7.2 - £8.1 million to a figure of £3.87 million, and of contribution to profit, Mr Carey's annual £2.1 - £2.3 was reduced to £1.185 million.

137. Several criticisms can be levelled at the 'At Risk' Register, even on its amended basis. The first is that Dr Majumdar's analysis showed that 63% of the annual contribution 'at risk" was in respect of 'ships', and 37% in respect of 'boats'. It is only the element relating to boats that is relevant, if we assume a modification which permits boat-building in the future. Secondly, we are satisfied that the large majority of the work was classified as 'repair', rather than building. Mr Cowen observed that none of the applicants' witnesses were cross-examined on this topic, and the only evidence that could be relied upon was that of Mr White, whose view was that the 'at risk' sum was zero. We are satisfied that, if not zero the relevant amount is very small. We consider that the at risk register does little to advance the objectors' case, and Mr Weekes, understandably, did not rely upon it to any degree.

The experts' findings

138. Mr White, for the applicants, concluded, on the basis of the evidence, that it would be impractical for Pendennis to combine work on yachts and other leisure craft with work on commercial or military vessels. He then considered whether Pendennis would have any incentive to transform itself entirely, replacing its work on yachts and leisure craft with work on commercial or military vessels.

139. Mr White's analysis was in several stages. First, he concluded that as long as there was work on yachts and leisure craft available, there would be no incentive to switch to commercial or military. In support of this, Mr White compared the financial performance of Pendennis with that of A&P Tees, a shipyard of comparable size. In their financial years ending 31 December 2015 (Pendennis) and 31 March 2016 (A&P Tees), Pendennis made a net profit of £2.26 million, while A&P Tees made a loss. Over a six-year period between 2010 and 2015, the net profit of Pendennis was 6.6 times higher than that of A&P Tees. For the period prior to

the opening of UK Docks in October 2014, Pendennis's net profit was 3.8 times higher than that of A&P Tees.

140. Mr White then sought to compare Pendennis with A&P Falmouth, reflecting its larger size by making the comparison on a per acre basis. He first based this on Pendennis's 7.1 acres (9.8 acres after the acquisition of the Application Land), comparing it with A&P Falmouth's 219 acres. We did not find this an especially useful exercise, not least because 181 of A&P's acres are below the water line. Of greater merit, perhaps, although we remain sceptical, was his second analysis, which only used A&P's 38 acres above the water line. This comparison gave rise to a ratio of 2.7 in net profit between Pendennis and A&P in 2015/16, or 3.7 over the six-year period mentioned above, in each case in favour of Pendennis.

141. Mr White concluded that Pendennis or a successor would not therefore have any incentive to switch its business from leisure to commercial or military unless there was a significant change in market conditions.

142. Mr White then considered whether any such significant change was likely. He said that the performance of the British superyacht industry was strong, growing by 11% in 2015/16, an increase for the fourth successive year. He relied upon a range of other sources, including press releases and media reports, to conclude that there was no evidence in the foreseeable future that Pendennis or any successor in title would have any incentive to diversify in competition with A&P.

143. Finally, he analysed the competition which A&P was already facing. He had procured the ship's "movement logs" for four of the vessels that Mr Carey and Mr Douglas had included in the "At Risk" register. By reference to the locations of those vessels which appeared to be operating in the Eastern Mediterranean, he contended that there was available to those vessels a substantially wider range of competing shipyards than Mr Douglas and Mr Jones had suggested and, by inference, the possibility of the owners of those vessels seeking to use another Falmouth shipyard in place of A&P was remote.

144. Having carried out that exercise in respect of the repair of commercial/military vessels, Mr White then performed a similar exercise as regards the building or fitting out of commercial or military vessels. In doing so, he noted that A&P had not carried out "new build" works to smaller commercial or military vessels for at least 20 years. The work which had been carried out on such vessels was minor, as Mr Carr and Mr Granville's evidence showed. Pendennis itself had a strong pipeline of work through to 2018, including a new-build project and four yacht re-fits.

145. Mr White analysed the market for building commercial and military vessels, and concluded that its geographic scope was wide. In forming this view, he noted, drawing in part upon evidence from the objectors concerning shipyards elsewhere in Europe and in part from trade publications that the market was in fact a global one. He referred to the recent procurement by the Ministry of Defence of 'new build' contracts from South Korea. In

summary, given the highly competitive global market, even if Pendennis were to carry out any significant amount of commercial or military vessel building – which was itself highly unlikely – this would not have any material incremental effect on A&P.

146. In the case of both repair and build/refit, Mr White was of the view that the restrictions did not therefore secure to the objectors 'practical benefits of substantial value or advantage'.

147. Dr Majumdar's evidence was that it was important to appreciate that the proposed modification was in perpetuity, and not just for the foreseeable future – a point emphasised by Mr Weekes in closing. Dr Majumdar contended that the covenants were not valuable simply because they limit the scope for competition from the Application Land for the foreseeable future. Whilst he noted Mr White's evidence that competition from Pendennis was highly unlikely to materialise, Dr Majumdar said that it was difficult to predict what trends will occur over the long term, and how they will impact on incentives to use the Application Land for three reasons.

148. First, there were a number of reasons why Pendennis might suffer a decline in its business, for instance industry over-capacity – which had been identified in the company's financial statements. Secondly, Mr White's analysis assumed that a successor would continue with the same mix of work as Pendennis does. Thirdly, Dr Majumdar did not find Mr White's comparison of the profitability of Pendennis versus A&P to be persuasive, and took issue with some of the assumptions made, for instance as regards usable acreage. Fourthly, he was aware of a number of yacht manufacturers entering, or on the brink of, bankruptcy. The superyacht industry was more volatile than the applicants were prepared to accept.

149. The underlying problem which neither expert addressed in detail was the likelihood of a change of circumstances. We accept that in the economic conditions currently prevailing, Pendennis are unlikely to wish to sell the business or the land, and assuming that there is a steady flow of work to be done on superyachts or other leisure craft, Pendennis are unlikely to diversify. But we doubt that the current economic conditions are likely to persist, taking account in particular of the effect on the economy of the UK leaving the EU, and we do not consider that it is safe to assume that superyachts will continue to fill Pendennis's order book into the foreseeable future.

Submissions of counsel

150. In his closing submissions on behalf of the applicant, Mr Cowen sought to underplay the significance of the modification being sought. It was important, he submitted, for the Tribunal not to lose sight of the relatively marginal change to the parties' legal relationship that modification would effect. The applicants are currently permitted to repair boats on the Application Land. The modification sought would enable the applicants to build boats on the Application Land, and that would have the desired effect of allowing them to complete new builds (and also extensive re-fits insofar as such work is properly described as building) which had been commenced on the Existing Land. This would be on the basis, which the parties

agree, that yachts including superyachts are boats and are not ships. Mr Cowen made the point that the objectors (specifically A&P) do not themselves build boats, they build ships, and so by permitting boats to be built on the Application Land there would be no risk of competition, at least so long as current circumstances prevail.

151. Mr Cowen argued the case for harmonisation of the covenants binding the applicants' land. It would make it easier for the applicants if there was no risk of work over-spilling from the Existing Land onto the Application Land and thereby breaking the terms of different covenants. Such work comprised the building or repair of commercial vessels, which in any event was carried out relatively rarely, in order to ensure that the shipyard operated at optimum capacity and that workers were not laid off between superyacht projects and was largely conducted on the Existing Land. In simple terms, the practical advantages to the applicants of a common code of covenants applying across their estate were substantial, and any prejudice to the objectors non-existent.

152. Mr Cowen conceded that the effect of harmonisation would be to impose across the applicants' estate provisions which he referred to as a 'Frankenstein's monster', and when in due course we analyse those provisions, as we do below, we accept his concession without any qualification. But Mr Cowen submitted that that was not a reason to reject the application being made. The provisions were workable, and the parties could reasonably understand what was, and what was not, prohibited or permitted as the case may be.

153. Mr Cowen adopted the conclusions of the applicant's expert Mr White: that under current conditions, and taking into account the foreseeable future, the applicant has no incentive to diversify or indeed to sell its land or its business; and that even if diversification occurred either by the applicant or a successor in title, this would not be to the objectors' commercial disadvantage. Mr Cowen contended that the applicant had made out its case. Accepting that the applicant had to prove a negative, he submitted that it had done so: that impeding the proposed user did not secure any practical benefits to the objectors, and that insofar as they did, those benefits were so insubstantial and their loss so unquantifiable that compensation should not be awarded.

154. In his closing submissions, Mr Weekes emphasised the importance of caution when considering applications under section 84. We recognise that it is for the applicant to make out its case. But if the applicant proves that the statutory grounds are satisfied (that is, to the usual civil standard on the balance of probabilities), the Tribunal has jurisdiction to discharge or modify the restriction. The jurisdiction is a discretionary one, and it must be exercised judicially. However, there is nothing in the statute which states that the power is to be exercised cautiously or sparingly, or for that matter recklessly or generously. We do not therefore accept that it is right in principle to adopt a particularly cautious approach in determining the matters which may be relevant to the exercise of judicial discretion. Mr Weekes contended that the modification being sought was too wide and that the only modification that should be allowed is to permit work to be carried out on yachts (and we assume other leisure craft) on the Application Land. He submitted that the application to modify should be considered in the light of the applicant's stated intentions, those being to carry out work, including building, on yachts

and leisure craft. It was wrong as a matter of principle to relax the covenants more than was necessary to facilitate the applicant's intended definite use.

155. Mr Weekes accordingly argued that a line should be drawn at commercial or military vessels. The applicant had no intention to carry out work on military vessels, and the proportion of its current work on commercial vessels was minimal: it was work that could easily be accommodated, without transgressing any covenants, on the Existing Land, as long as the vessels were not ships.

156. More significantly, however, Mr Weekes claimed, the covenant as unmodified does secure to the objectors (in particular A&P) practical benefits of substantial value, in that it protects them from competition in its two major areas of business activity. The Pendennis shipyard, with its relatively new facility of the Wet Basin, was now perfectly equipped and adequately staffed to compete with A&P's business next door.

157. Mr Weekes contended that there was a real possibility that Pendennis would cease to occupy its site at Falmouth in the future: it was in the wrong location, a significant distance away from the cruising waters of superyachts in the Mediterranean and the Caribbean; Pendennis was therefore labouring under a major competitive disadvantage in relation to its commercial rivals; and the superyacht market was itself volatile. On one reading, Pendennis might, as a result of its success, outgrow Falmouth and seek to move elsewhere, perhaps to the Mediterranean where it already has an outlet in Mallorca; on another, Pendennis, which has a full order book until 2018 but no further, might fail to prosper and sell its business and its land to a rival. If it did so, there was a real possibility that the purchaser would set up a commercial shipyard in direct competition to A&P, and that would have adverse consequences for A&P.

Discussion

158. In deciding this application, we propose to deal first with matters of substance, identifying where the real issues are between the parties, resolving those issues, and then considering how that resolution can best be advanced in terms of a modified covenant.

159. We are in no doubt that the application to modify should succeed. Indeed, by the end of the hearing, there seemed a tacit, if not overt, acceptance on the part of the objectors that the applicants should be permitted to build as well as repair yachts and other leisure craft on the Application Land. The real issue between the parties is the extent of any modification that is to be made. Acknowledging that there are real differences with the terms of the modification sought by the applicants (in that it would permit building certain commercial or military vessels), and therefore the extent of the modification we should order, we shall deal with the relatively uncontroversial aspect of the application first.

Yachts and leisure craft

160. Pendennis and A&P each accept that they currently operate in different markets. As Mr Carr, on behalf of Pendennis, states [89]:

> "It is absolutely clear to me that Pendennis and A&P are not in competition with each other. They are completely different businesses providing different services to very different customers using different skills. Pendennis are dealing with the creation of luxury products using highly skilled and trained craftsmen to produce bespoke products for extremely wealthy individuals. A&P's business is ship repair for the heavy commercial sector. A&P does not involve itself in Pendennis's business and Pendennis does not involve itself in A&P's business. Relevant competition could only be said to exist where there is overlap between the two companies. There could be no overlap in terms of superyachts as A&P are subject to restrictive covenants that prevent it from undertaking works that would compete with Pendennis."

161. A&P concede that, assuming no change from the present positions they each occupy (A&P operating in the commercial and military markets, and Pendennis in the leisure craft market), the business of A&P would not be harmed by a modification of the covenants to reflect this. Mr Douglas, the commercial director of A&P Falmouth, accepted this very point: see paragraph [96] above.

162. The original purpose of the application to the Tribunal was to ensure that completing new build projects on superyachts on the Application Land (that is, in the Wet Basin or alongside), projects which had commenced elsewhere on the applicants' land, would not fall foul of the restriction prohibiting 'boat building'. It is not a real problem at present as A&P does not object to work, of whatever kind (building, re-fit or repair) being carried out on superyachts on the Application Land.

163. The fact that it is not a current problem is not itself decisive. The restriction is not limited in time, and the right to enforce it is of potential benefit not only to the objectors but also to their successors in title. However, it must be said that A&P have no discernible future intention as a business to compete with Pendennis as far as vessels used for pleasure or recreational purposes are concerned. Moreover, there are restrictions over their own land which limit the extent to which A&P can do such works.

164. We have already dealt above with the objections made by FDEC and MDHC at paragraphs [97] to [109] above. In our view, neither of these objectors has advanced a strong case against modification to allow use of the Application Land for works on yachts and other leisure craft.

165. Addressing the *Bass* questions, we find, having considered all the evidence, that the restrictive covenants do not secure to the objectors practical benefits of substantial value or of substantial advantage insofar as yachts and leisure craft are concerned. We are satisfied that

Pendennis has made out its case for modification of the restrictions to this extent. We consider below the form that modification should take.

Commercial and military vessels

166. This is the aspect of the application which has been most seriously disputed. Immediately following the passage cited at paragraph [161] above, Mr Carr states (at [90]):

> "The only potential competition might be in terms of commercial and military craft which Pendennis cannot currently undertake in the Wet Basin, but can carry out on the Existing Land…"

167. It is this aspect of the application upon which the expert evidence has concentrated, although we should say that we do not consider that that evidence has illuminated the issues between the parties as clearly as we might have hoped.

168. The case for the applicants is that the covenant should be modified so as to harmonise the covenants which restrict the use to which Pendennis can put its estate. That is an estate which has gradually increased over the last 30 years. In seeking to expand its operations, Pendennis acquired, initially on long lease, what in due course became the Application Land. It sought and duly obtained planning permission, despite objections from A&P and others, for the construction of the Wet Basin, a facility which is unique in the Falmouth Docks and which has the potential to be used for a range of vessels, not limited to yachts and leisure craft.

169. It is the acquisition of the Application Land following the exercise of the option to purchase the freehold (in the lease it purchased earlier) which has led to the current proceedings. It should be said that Pendennis has throughout been aware of the existence of the restrictions, that it knew of the covenants when it purchased the lease, and that it exercised the option with the clear, and indeed expressed, intention of invoking the Tribunal's jurisdiction to modify. There has been nothing underhand about the applicants' actions or its strategy in relation to the covenants.

170. The covenant sought to be modified is relatively recent, and its purpose, at the time it was entered into, was clear. The Falmouth Docks was being sub-divided into three distinct plots, each of which would carry out a particular line of business, and competition between the businesses was regulated in order to protect and promote each entity's commercial interests. It was evident, throughout the time when Pendennis was seeking to expand, that A&P (in particular) was concerned about the possibility of competition from its immediate neighbour. It was the risk of competition which led to the covenants being extracted when the docks estate was initially laid out.

171. Since then, Pendennis has run a successful shipyard specialising in superyachts but also carrying out works on smaller yachts and other leisure craft. It has expanded both in terms of its land-holding and in terms of the range of its business activities. Its neighbour, A&P, has also run a successful shipyard specialising in commercial and military vessels, some of which can be described as ships and some as boats (and some, no doubt, as both).

172. It is important, as urged upon us by Mr Cowen, that we consider what it is that the applicant can already do on the Application Land. It can repair boats, but it cannot build or repair ships, nor can it build boats. It is accepted by the objectors, at least for the purposes of this application (and we shall address this point in due course when we consider the appropriate wording of modified covenants), that yachts, even superyachts, are boats and not ships. The applicant can therefore repair superyachts on the Application Land. However, it cannot build superyachts (as to do so would involve boat building). We have decided above that the covenants should be modified so as to allow superyachts to be built on the Application Land.

173. If, however, the covenants were modified in the manner sought, the applicant would be able to 'build and or fit out the hulls of commercial or military craft' without seeking consent from any of its neighbours. The express proviso that the applicant must not in so doing compete with the Aberdeen shipyard is now redundant as A&P no longer have a shipyard in Aberdeen. In the absence of any qualification, permitting the applicant to act in this way causes the objectors particular concern, as it would, they say, allow Pendennis, or any successor in title, to build commercial or military vessels on the Application Land, thereby using the facility of the Wet Basin to compete with A&P Falmouth.

174. The applicant says that it does not intend to expand into the commercial or military market. On the contrary, it intends to carry on with its current business on that site. It has no intention to combine works on yachts and other pleasure craft with works on commercial or military vessels. It has no intention to sell the site or its business. The applicant further contends that, even if it were to sell at any future date, it cannot be assumed that the purchaser would compete with A&P in working on commercial or military vessels, or that if it did it would thereby cause A&P financial loss.

175. But the applicant contends that it is desirable that the same covenants bind the entirety of its estate, in the interests of harmonisation. The applicant submits that modification of the covenants would not confer on the applicant any greater legal ability to carry out works to commercial or military vessels, that it would not give rise to any increased prospect or likelihood of competition from Pendennis, and that, even if competition were to occur, it would not be harmful to A&P or the other objectors.

176. The objectors are sceptical. The covenants have no limit in time. Pendennis may seek to compete itself with A&P in the commercial or military spheres. Pendennis is likely to sell its business, or its site, at some time in the future, even if it has no current discernible intention to do so. When it does so, a purchaser could seek to take advantage of the covenants being

modified by either combining work on commercial vessels with work on yachts and pleasure craft or by setting up a commercial shipyard in direct competition with A&P.

177. In considering the merits, it is important that we direct ourselves with clarity on the principles which we are required to apply. It is for the applicant to satisfy us not only that the continued existence of the restriction would impede some reasonable user of the land (and that much is conceded by the objectors) but also that the restriction does not secure to the objectors a practical benefit of substantial value or advantage. This requires the applicant to prove, on the balance of probabilities, a negative: to prove that it is more likely than not that the restriction does not secure to the objectors such a benefit. If the applicant fails to prove this, then the covenant should not be modified.

178. We consider it relevant to consider the likelihood of future events. The covenant, as we have emphasised, is unlimited in time. We agree with Mr Weekes that there are a number of uncertainties regarding the future, by which we mean the foreseeable future.

179. We note that Pendennis has capacity to work on a relatively small number of projects at any one time and that currently its order book is full until 2018.

180. We accept that the geographical location of Pendennis, a distance from the usual cruising grounds frequented by superyachts (typically the Mediterranean and the Caribbean), puts it at a commercial disadvantage. Mr Carr was compelled to concede this point. In recent years, the company has been refitting or repairing existing superyachts rather than building new ones. It is less convenient, and more expensive, for customers to travel to Cornwall than to remain in the Mediterranean where there are competitors available to provide the services offered by Pendennis.

181. The business of Pendennis is dependent on the ready availability of highly skilled labour, a proportion of which is imported from other nations in the EU. It has relied upon ready access to the single market, and has in the past obtained significant financial support from the EU. The result in the EU Referendum is likely to lead to such funding ceasing to be available and may impact upon the availability of labour. In broader terms, it has caused uncertainty for businesses as they plan for the future and there is no immediate sign of that uncertainty being dissipated.

182. The business of Pendennis is heavily reliant upon export, 80 per cent of its trade being outside the UK. It makes the business vulnerable not only to the likely changes to the commercial relations between the UK and other countries consequent upon the cessation of its membership of the EU but also to currency fluctuations. To date, the fall in the pound has been of assistance to a company such as Pendennis as its services can be obtained at a lower rate by foreign customers. Whether that position will remain it is impossible to say.

183. Should the business of Pendennis thrive, and continue its growth, the objectors claim that there is a risk that it will outgrow its Falmouth site, sell up, and move elsewhere, whether in the

UK or elsewhere in Europe. Should the business of Pendennis fail to thrive, the same risk, of the company leaving the site and selling its freehold, exists.

184. We accept these submissions made on behalf of the objectors.

185. There is no legal impediment to Pendennis selling its shipyard and taking its business elsewhere. The objectors contend that the Pendennis shipyard could then fall into the hands of a competitor to A&P which, in the event of the covenant being modified, would be able to use the Wet Basin in order to build and repair commercial and military vessels. If that were to happen, it would fly in the face of the intentions of those who carefully designed a regime to curtail competition between neighbouring businesses on the Falmouth Docks.

186. We are of the view, having considered all the evidence before us, that there is real substance in the concerns articulated by Mr Jones in his statement of 9 June 2017 that Pendennis are:

> "…on the one hand painting the picture that they are only in the market of building pleasure craft and yachts and then on the other hand persisting with an application for a radical modification to the existing covenants that currently affect the Application Land, land which now has the advantages of a large wet basin which if used for the purposes of competition with the existing business would change the long standing dynamic of the port."

187. Taking all these matters into account, and weighing the expert evidence as we have, we have reached the view that the restrictions as they apply to commercial and military vessels do secure practical benefits of substantial value to the objectors. The applicants have failed therefore to satisfy us of either of the two grounds relied upon as far as permitting them to build commercial or military vessels are concerned. The application therefore fails insofar as it seeks modification of the covenant in relation to the use of commercial or military vessels.

Modification of the covenants

188. In the course of his final submissions to the Tribunal, Mr Weekes made a number of criticisms of the terminology of the applicants' proposed modification, describing it as a 'dog's breakfast'. His earlier skeleton argument, composed in response to the applicants' opening submissions, made the point that it was an 'unsatisfactory feature of Pendennis's application that it invites the Tribunal to supplement an already imprecise covenant with a cumbersomely-drafted exception.' Mr Weekes then proceeded to expand and elaborate upon his criticisms of the modification proposed.

189. Mr Cowen conceded, in response to Mr Weekes' final submissions, that the proposed modification was unwieldy (it was 'a Frankenstein's monster'), but continued to press for its

adoption as it would result in harmonisation of the covenants applicable to the totality of Pendennis's land-holding. However, in the course of his final submissions, Mr Cowen suggested, on behalf of the applicants, a possible amendment to the drafting of the modification proposed in its Statement of Case, and this proposed further amendment was reduced to writing in a document entitled 'Applicants' Further Submissions' and dated 26 June 2017. Mr Weekes took the opportunity to respond in a commendably brief document of the same date, and entitled 'Objectors' Further Submissions in Response'.

190. The further amendment to the proposed modification takes as its basis the covenant in the Falmouth Tankers and Falmouth Oil Services leases (see paragraph [54] above). It then carves out an exception to the prohibition on 'Ship-repairs (other than to the Tenant's Operational Ships or Vessels), boat building or ship building' which is derived from the Permitted Uses contained in the Cuehold covenant (see paragraph [60] above) but which is different in two respects.

191. Accordingly, the terms 'Ship repair, boat building or ship building' shall not include, in addition to those matters listed at sub-clauses (c), (d) and (e):

> (a) building fitting out refitting or repairing of yachts and pleasure craft of any size **and used for any purpose**;
>
> (b) building and/or fitting out of hulls of any commercial or military **boats** provided that in carrying out such operations the Tenant will not compete with such operations carried on by the Landlord's subsidiary company at its Aberdeen Yard.

192. The applicant's written submissions explain that the proposed amended text clarifies that the general prohibition on the land applies to ship repair, ship building and boat building, and further that if it were ever to be argued in the future that a yacht was a ship or a commercial vessel (whether because of its size or because it was being used for charters) the specific exception in (a) of 'yachts and pleasure craft of any size and used for any purpose' would provide a clear answer that 'a yacht is a yacht whatever its size or purpose'. The amendment at (b) expressly limits the 'commercial or military' exception to 'boats', emphasising that the applicants have no desire to, and wish to have no capability to, carry out commercial works to ships.

193. The objectors take the same point in relation to these proposed further amendments that they made in relation to the modification proposed in the Statement of Case: imprecision, and cumbersome, unwieldy drafting such that future difficulties of construction would inevitably arise. They contend that the addition of the words 'used for any purpose' in (a) are unnecessary and would create a further source of drafting confusion: as the distinguishing feature of yachts and pleasure craft is their use for recreational purposes, what other purposes could the applicant have in mind? The objectors suspect this to be another attempt to extend the modification to allow work to be carried out on commercial craft. They further contend that the removal of

'craft' in (b) and its replacement with 'boats' fails to achieve the objective of excluding work on 'ships'. This is because (i) some big superyachts are ships; and (ii) sub-clause (d) authorises undertaking work to ships because ships are a type of 'craft'.

194. We do not consider that the applicant has made out its case for harmonisation of the covenants. That being so, we do not believe there is anything to be gained by seeking to amend the terms of the initial proposal. We consider that the current restriction is, as Mr Weekes has contended, hopelessly vague in its terminology and chronically uncertain in the scope of its application. There seems to us, therefore, nothing to be gained in using the current restriction as the template for modification.

195. We should set out briefly the particular concerns we have which have led to our forming the view that the current restriction is unsatisfactory.

196. We have already referred to the definitional difficulties which are inherent in the use of terms such as 'ship' and 'boat'. We take the view that 'vessel' is a useful composite term which includes all the others.

197. Mr Weekes has referred the Tribunal to the Merchant Shipping Acts which contains a definition of 'ship', albeit, as noted by Ferris J in *Clark v Perks* [2000] STC 428, not an exhaustive one. We agree with Mr Weekes that, in interpreting the restrictions, 'ship' must bear its ordinary meaning, such as that is, the lease in which the term appears not having imported the statutory definition. The words of Ferris J may be of some, albeit limited, assistance:

> '…it is impossible to give a general definition of what is meant by a 'ship'. Even the Merchant Shipping Act does not purport to do this, for its definition is not exhaustive. Insofar as any one characteristic may be said to be required for something to be a ship it is, I think, that of being capable of being used, and in fact used for the purpose of navigation. Beyond this the exercise must, I think, be to examine the particular features of the vessel in question and to reach a conclusion whether such a vessel is properly and reasonably described as a 'ship'.'

198. The decision of Ferris J was the subject of an appeal (*Perks v Clark* [2001] EWCA Civ 1228), the Court of Appeal holding that the learned judge was wrong to treat the meaning of 'ship' as a matter of law. In the words of Carnwath J at [33], 'ship' was 'as ordinary an English word as one could imagine', and whether a particular vessel was so defined was a question of fact for the determination of the fact finding tribunal, in this case the General Commissioners of the Inland Revenue.

199. It is not disputed by the parties that the term 'ship' is an ordinary word of the English language, and that whether a particular vessel was a ship would be a question to be asked as and when it arose. There is, however, no authority to which we have been referred which seeks

to distinguish between ‘ship’ and ‘boat’ or, for that matter, which assists in any way with the definition of the term ‘boat’.

200. We note that the term ‘boat’ is used sparingly by those who drafted the relevant provisions. It does not appear at all in the Cuehold covenant, the provisions of which are the basis for the proposed modification (save for a passing reference to ‘boat yards’). It does appear in some of the other leases (those granted to Falmouth Tankers and Falmouth Oil Services), as a result of which it appears, in the single reference to ‘boat building’ in the covenant of which modification is sought.

201. It does not seem to us that ‘ship’ and ‘boat’ are, either in general usage or in the terms of these covenants, mutually exclusive terms. A ship may be described by some as a boat, and vice versa. We imagine that those drafting the covenant wished to ensure that the building of vessels which could fairly be described as ships or boats (or both) was captured so as to make clear that all ‘building’ operations on vessels generally were within the terms of the prohibition.

202. We find the prohibition of ‘ship-repairs other than to the Tenant’s Operational Ships or Vessels’ a somewhat unhappy provision, as it appears, at first sight, to indicate that ‘ship-repairs’ (hyphenated, giving rise to an inference that it is a composite term) can apparently be carried out on ‘Vessels’ which are not themselves ‘Ships’. Making such sense of the provision as we can, ‘or’ must be read conjunctively (as ‘and/or’) rather than disjunctively, the intention of the draftsperson being to ensure that all repairs, fairly described as ‘ship-repairs’ were captured, whether or not the object of the repair was a ‘ship’. It begs the question, which we do not find necessary to answer, whether there can be a ‘ship-repair’ of a ‘boat’.

203. Difficulties of interpretation do not end there. The tenant covenant in the Cuehold lease (the basis of the proposed modification) is not to use (or permit or suffer to be used) the Premises for ‘the Prohibited Uses’, there being then excluded from the category of Prohibited Uses ‘the Permitted Uses’. Those Permitted Uses, which are set out in full at paragraph [60] above, include five categories.

204. Category (a) is the *‘building fitting out refitting or repairing of yachts and pleasure craft of any size’*. Mr Weekes has submitted, and we accept these submissions, that the distinction between ‘fitting out’ and ‘refitting’ depends primarily upon the context of the works in question. If the yacht is in the process of construction (that is, a new build), then it will be ‘fitted out’ as part and parcel of that process. If the yacht has been to sea, and is in the process of being repaired or serviced, then it may be ‘refitted’.

205. There does not seem to be any particular difficulty in defining ‘yacht’. The word ‘yacht’ is derived from the Dutch ‘jacht’ (meaning ‘hunt’), the first yachts being light and fast vessels used by the Dutch navy in the pursuit and apprehension of pirates in the shallow waters of the North Sea. It has come to be used to describe vessels used for purely recreational purposes, with or without sails, and currently ranges enormously in scale from relatively small single-masted sailing vessels accommodating one or two persons to the superyachts. We agree with

Mr Weekes that the primary purpose of a yacht is recreational, and we consider that if a yacht is chartered for commercial gain it remains a yacht being used, by the charterer, for recreational purposes.

206. Category (b) refers to the *'building and/or fitting out of hulls of any commercial or military craft'* subject to the proviso that 'in carrying out such operations the Tenant will not compete with such operations carried on by the Landlord's subsidiary company at its Aberdeen Yard.' The provision is on its face ambiguous. The object of 'building' could be 'hulls', or it could be 'commercial or military craft'. It is the only reference to 'hulls', and hulls can be both 'built' and 'fitted out'. Whatever its true construction, the proviso is accepted to be redundant. Although at the time that the lease was granted the freeholder landlord had a subsidiary company owning a shipyard in Aberdeen, that yard has now been sold.

207. Category (c) (*'repairing of any craft built fitted out or re-fitted under Permitted Uses (i) and (ii)'*) is likewise problematic, even if one assumes (as one must) that by (i) and (ii) the draftsman is referring to paragraphs (our categories) (a) and (b). There does not seem to be any need for (c) as far as use (i) (that is, craft falling within category (a)) is concerned, because the repair of such craft is already captured by (a) itself as 'repairing of yachts and pleasure craft of any size'. It would appear, then, that category (c) is only relevant in relation to commercial or military craft built or fitted out within (b).

208. Category (d) (*'repairing of any other craft* (that is, craft that does not fall within (c)) *with the prior written consent of the Landlord such consent not to be unreasonably withheld and such consent or refusal to be communicated to the Tenant within two working days of the request for such consent provided that the Landlord shall not be deemed to be unreasonably withholding its consent if the Landlord or any other company within the same group of companies as the Landlord is desirous of carrying out the work in question and has been invited to tender for the same.'*) The references to Landlord and Tenant are to be read as referring to the Transferor and the Transferee respectively.

209. Category (e) (*'repairing of vessels belonging to and/or chartered to Falmouth Oil Services Limited and/or any subsidiary thereof*) is the clearest of the Permitted Uses.

210. For the purposes of this application, the parties have accepted that yachts, including superyachts, can be described as 'boats', although it must be the case that in view of their size many such vessels can also, or perhaps even exclusively, be described as 'ships'. Indeed, this only goes to emphasise the problems in relying on any distinction between ships and boats.

211. We consider that, in order to promote clarity, it is necessary for any modification to depart from the terms of the Cuehold covenants. We understand the applicant's objection to this course, namely that it will mean that different obligations will bind different parts of their land. However, that is the current position, and unless we accept the applicant's case in its entirety, and modify the restrictions binding the Application Land in such a way as to lead to harmonisation, it will continue to be the position as it is not open to us to modify the

restrictions which bind the applicant's other land. Further, we take the view that the applicant has over-emphasised the practical difficulties of its land being bound by diverse obligations. Having viewed the site, it is in our judgment perfectly clear that it is the Wet Basin and its immediate surrounds (where alongside work would be carried out) which comprise the Application Land, and we do not envisage any real practical difficulties in distinguishing which land is which.

212. We therefore consider that the covenant should be modified to the following effect.

213. The covenant shall prohibit the Premises (that is, the Application Land) to be used (or permitted or suffered to be used)

(1) for the purposes of building or repairing ships or building boats other than

(a) repairing the Transferee's Operational Vessels

(b) building or repairing (to include fitting out and refitting) yachts and pleasure craft of any size

(2) for the purposes of handling cargo including coal, but excepting crude oil, fuel oils, liquid petroleum products and ships stores

(3) for the purposes of providing towage services except that the provision of towage services to vessels visiting the Premises and the Transferee's Operational Vessels shall not be construed as a breach of this covenant.

214. In our judgment, the modification set out above is clear, and the relevant parties (and their successors in title) should be able to identify without undue difficulty when the covenantor is in breach.

215. The objectors did not claim any compensation in the event that the restriction is modified, and we make no award of compensation. In any event, in our view the modification would not result in any injury to the objectors.

Determination

216. The application succeeds in part under ground (1)(aa). We add that the Tribunal is satisfied that the modification we direct would cause no injury to the objectors for the reasons we have explained above. To that extent, the application succeeds also under ground (c).

217. An Order shall be made by the Tribunal on the terms above, provided within three months of the date of this substantive decision, the applicant has notified the Tribunal in writing of its acceptance of the terms of the proposed modification.

218. This decision is final on all matters other than the costs of the application. The parties may now make submissions on such costs, and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Direction dated 29 November 2010.

Dated: 24 November 2017

His Honour Judge Stuart Bridge

Peter D McCrea FRICS

ADDENDUM ON COSTS

219. We have now received submissions on costs. Each side claims its costs in full from the other, and requests the payment of a substantial sum on account. Having considered the submissions, we have decided that we should make no order as to costs and that the parties should in consequence bear their own costs liabilities. Our reasons are as follows.

220. The Upper Tribunal Lands Chamber Practice Direction contains the relevant guidance. Paragraph 12.2 provides that costs are in the discretion of the Tribunal, such discretion to be usually exercised in accordance with the principles applied in the High Court and county courts. It continues:

> Accordingly, the Tribunal will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded in part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct of a party will include conduct during and before the proceedings; whether a party

> has acted reasonably in pursuing or contesting an issue; the manner in which a party has conducted their case; whether or not they have exaggerated their claim; and the matters stated in paragraphs 2.2, 8.3(2), 8.4 and 10 above.

221. Paragraph 12.5, which is concerned specifically with applications under section 84 of the Law of Property Act 1925, provides (so far as is relevant):

> With regard to the costs of the substantive proceedings, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant's costs. And successful objectors will usually be awarded their costs unless they have acted unreasonably.

222. The effect of these principles can be summarised by saying that where a claim to discharge or modify restrictions succeeds, the objector will not 'normally' be ordered to pay the applicant's costs; and that where such a claim fails, the objector will 'usually' be awarded their costs. In other words, when an applicant succeeds, the usual order will be no order as to costs; and when an applicant fails, the usual order will be that the applicant pays the objector's costs. These principles may however be dis-applied where an objector has acted unreasonably.

223. Mr Cowen on behalf of the applicants has submitted that, as this is not a 'usual' or 'normal' case involving the preservation of amenity but litigation between two commercial entities seeking to advance their respective commercial interests, the Tribunal should dis-apply the costs principles set out in Paragraph 12.5 and exercise its discretion in accordance with the costs principles applied in the High Court and county courts. We do not agree. It is clear from the wording of Paragraph 12.5 itself that the underlying reason for the costs principles there set out is that any section 84 application involves an attempt to interfere with the objector's existing rights of property. While we described the current application as 'unusual', in the sense of being out of the ordinary, it remains the case that the applicants were seeking to deprive the objectors of their property rights, rights which had been created relatively recently and which were of substantial value in themselves. There is nothing therefore in our view which would justify the dis-application of Paragraph 12.5 and the invocation of the general costs principles applicable in other civil litigation.

224. Mr Cowen submits further that the objectors have in any case acted unreasonably. First, he contends that the objectors adduced evidence before the Tribunal which added significantly to the length of the trial (and hence the parties' legal costs) yet which failed to have any material effect upon the Tribunal's final decision. Secondly, he contends that the objectors failed to engage sufficiently in attempts to settle the claim without resort to a hearing before the Tribunal and that they betrayed 'an unhelpful lack of engagement' throughout the process. More specifically, the applicants made an offer (without prejudice save as to costs) prior to the hearing which, had it been accepted by the objectors, would have given them a better result than that which they achieved following the trial.

225. We do not accept that the objectors have acted unreasonably in any of these respects. It is true to say, as Mr Weekes on behalf of the objectors accepts, that evidence was adduced before the Tribunal which did not have a material bearing on the final decision, but the objectors were nevertheless within their rights, and responding as any reasonable objector would, to conduct the litigation as they did. Mr Weekes in turn, with some justification, points to the complexities caused by the way in which the applicants complicated matters by seeking rationalisation of the covenants across their land-holding, and as a result produced an unnecessarily complex proposal for modification of the covenants.

226. Mr Cowen is right when he says that the proposal to modify was met initially with a certain lack of engagement, as the objectors resisted the applicants' early attempts to negotiate a compromise. It is however important, in considering the extent to which objectors are prepared to engage with an application such as this, to have regard to the fact that any order will diminish the objectors' property rights and that the objectors are not obliged to come to terms. In our judgment, an unwillingness to bargain away property rights is not, without more, evidence of unreasonable conduct.

227. We have had the opportunity to read the correspondence between the parties from 3 October 2016 onwards, that correspondence containing offers by the applicants headed 'Without prejudice save as to costs'. Specific reference has been made by Mr Cowen to an offer dated 5 May 2017 which gave rise to a counter-offer by the objectors dated 11 May 2017 and further correspondence in which attempts were made to settle which continued up to and indeed beyond the commencement of the hearing on 19 June 2017.

228. The offer of 5 May 2017 proposed (as explained in the letter annexed to which was the text of the modification proposed) that the applicants would not use the Wet Basin for any works to any commercial craft unless that craft fell within the category of yachts or pleasure craft or the objectors gave their consent, such consent not to be unreasonably withheld. The offer did not however propose any modification to the covenants in so far as they related to the remainder of the Application Land. Mr Cowen concedes that the effect of the Tribunal decision was that the objectors 'beat the applicants' offer' but submits that acceptance of the offer would have given rise to 'a better result for the objectors than that which they achieved at trial.'

229. Modification of complex covenants is itself a complex process, as our ruling itself may indicate, and we take the view that Mr Cowen's argument highlights the real difficulties in formulating an offer of this kind in section 84 proceedings. We agree with him that the Tribunal, in considering the impact of admissible offers on costs liabilities, should have regard to the substance of such offers rather than their form. That said, however, we are not convinced by his submissions that the objectors would have been better off by accepting the applicants' offer of 5 May 2017 than by pressing on with their objections and requiring the Tribunal to make a ruling. Both parties, in our judgment, used their best efforts to achieve a compromise. Blame for the failure to reach a compromise cannot fairly be laid at the door of either of them.

230. For his part, Mr Weekes contends that the applicants should pay the objectors' costs. We do not agree. The application to modify succeeded, although it did not succeed in its entirety. It is the nature of an application to modify, as opposed to an application to discharge, that where the claim succeeds partial rather than total success is the likely outcome. The objectors' initial approach to the application, and indeed the hearing, albeit one that mollified as matters proceeded, was to oppose any modification at all. We do not consider, in the circumstances, that it would be just to order the applicants to pay any of the objectors' costs.

Dated: 14 February 2018

His Honour Judge Stuart Bridge

Peter D McCrea FRICS