Neutral Citation Number: [2017] EWHC 1491 (Admin)

Case No: CO/2968/2016

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2017

**Before** :

**THE HON. MR JUSTICE HOLGATE**

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**Between :**

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| | **ROBERT POWELL** | **Claimant** |
| | **- and -** | |
| | **THE MARINE MANAGEMENT ORGANISATION** | **Defendant** |
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| | **(1) BRIGHTON MARINA COMPANY LTD**<br>**(2) THE OUTER HARBOUR DEVELOPMENT PARTNERSHIP LTD** | **Interested Parties** |

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**George Laurence QC** (instructed by **Richard Buxton**) for the **Claimant**
**Sasha Blackmore** (instructed by **Browne Jacobson LLP**) for the **Defendant**
**Richard Drabble QC** (instructed by **Addleshaw Goddard**) for the **Interested Parties**

Hearing dates: 22nd and 23rd March 2017

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# Judgment Approved

**Mr Justice Holgate:**

## Introduction

1. The Claimant, Mr. Robert Powell, challenges the grant by the Defendant, the Marine Management Organisation ("the MMO"), of a marine licence under Section 71 of the Marine and Coastal Access Act 2009 ("MCAA 2009") on 24 February 2016. The licence was granted to the First Interested Party, the Brighton Marina Company Limited ("BMCL"). BMCL is the harbour authority for Brighton Marina. The Second Interested Party, The Outer Harbour Development Company Partnership LLP ("OHDC") is a subsidiary of BMCL and is the developer of phase 2 of a scheme for additional development at Brighton Marina. The marine licence relates to works comprised in

phase 2.

2. The Brighton Marina covers an area of about 127 acres. It is one of the largest marinas in Europe and is the largest in the United Kingdom. It provides some 1500 berths in the outer harbour. Access is gained via a lock to an inner harbour. The development already carried out includes flats and dwellings, a superstore, shops, restaurants, a cinema complex and other leisure facilities.

3. The construction of the Marina was authorised by a private statute, the Brighton Marina Act ("BMA 1968"). The long title acknowledged that yachting, cruising and boating was expanding around the south coast of England and that it would be to the public benefit for existing facilities at Brighton for those purposes to be increased, together with facilities for the accommodation and recreation of tourists, visitors and residents on the sea front. The Act therefore authorised the reclamation of land from the sea, the carrying out of harbour works, and the development of the marina, residential and recreational facilities. Section 5(1) authorised BMCL to construct a number of Works, including new headquarters, piers, a quay and roads. Section 5(2) authorised BMCL to "extend, enlarge, alter, replace or relay" the works within the limits of deviation.

4. Brighton Corporation (the predecessor of Brighton Borough Council) purchased from the Crown the freehold of the land needed for the marina development. In March 1972 it entered into an agreement with BMCL for the carrying out of the infrastructure works, which were completed in 1977. The marina was opened by HM the Queen in 1979. On 12 March 1980 Brighton Borough Council granted a lease of the marina site to BMCL. This lease was replaced by a lease granted to BMCL on 27 July 2005 by the successor authority, Brighton and Hove City Council.

5. On 4 April 2006 Brunswick Developments Group plc obtained planning permission for a residential-led mixed-used development at the marina. Works to implement the permission were carried out but the scheme was not completed. On 23 May 2013 a fresh planning permission was granted for a revised scheme under section 73 of the Town and Country Planning Act 1990 ("TCPA 1990").

6. The currently permitted scheme includes the construction of a deck with an area of about 2.08 hectares over a "spending beach" and an area of sea to the south of that beach. This deck lies to the south of existing development within the marina (built on Work number 7 in BMA 1968). It would lie to the east of the West Breakwater (Work number 1 under BMA 1968) which in physical terms forms the westerly edge of the harbour. Boats entering the marina pass through an outer harbour entrance on the eastern side of the West Breakwater in a dredged navigation channel which proceeds northwards for a short distance before turning 90° towards the east, to arrive at the inner entrance to the harbour. It is important to note that this navigation channel lies clear of the area to the north which includes the spending beach and the area of sea which would be occupied by the deck. The "spending beach" is so called because of its designated function; namely to absorb and dissipate wave energy.

7. The development for which planning permission has been obtained includes the

construction of 11 buildings. Phase 1 of the scheme involves the construction of buildings F1 and F2 on an extension to the pier identified as Work number 6 in BMA 1968 (and forming the northern side of the inner entrance to the harbour). Phase 2 involves the construction of 9 buildings on the new 2 hectare deck. Eight of the buildings would range in height from 2 to 13 storeys. The ninth building, K, would rise 40 storeys and lie at the south western corner of the scheme, adjacent to the West Breakwater.

8. The Claimant lives at R5, Marine Gate, Marine Drive, Brighton, a flat located within an art-deco 1930's block overlooking the sea front, the marina and the proposed development. "He and many others are seriously concerned about the effects of the proposed development, inter alia on their outlook, south across the Marina and the sea beyond" (paragraph 2 of the Claimant's Statement of Facts and Grounds). Of course, the impact of phases 1 and 2 of the marina development upon residential and local amenity would have been matters for the local planning authority to consider when planning permissions were granted in 2006 and 2013. It does not appear that either of those decisions was the subject of any legal challenge.

9. On 19 December 2013 the Defendant granted to BMCL (i) a marine licence under MCAA 2009 and (ii) a consent under section 24 of BMA 1968 in respect of phase 1 of the scheme. Consent under section 24 was required for "tidal works" authorised by the Act, that is works on, under or over tidal waters or tidal lands below "the level of mean high-water springs". No legal challenge was made to the marine licence.

10. But on 19 March 2014 the Claimant made an application for judicial review in respect of the section 24 consent. It was submitted that a section 24 consent could only be issued in relation to works authorised by BMA 1968 and that the phase 1 works were not so authorised because (inter alia) (a) they did not fall within section 5(2) as works to extend, enlarge, alter, replace or relay the works which had been specifically authorised under section 5(1) and (b) even if they did, the powers in section 5(2) were subject to the time limit in section 23, which required works authorised by the Act to be completed by 1 October 1979; and (c) in any event they were impliedly prohibited by section 40 of the Act. The challenge was dismissed by Patterson J on 27 June 2014 ([2014] EWHC 2136 (Admin)). An appeal to the Court of Appeal was dismissed on 26 June 2015 ([2015] EWCA Civ 650).

11. Both the judge and the Court of Appeal held that because the statutory works were to be constructed in a hostile environment, the sea, and would need to be replaced from time to time, or altered, extended or enlarged, the time limit in section 23 applied to the works originally authorised under section 5(1) and not to works subsequently carried out under section 5(2) in relation to those original works. They also held that the phase 1 works fell within section 5(2) of BMA 1968.

12. By the time of the hearing in the Court of Appeal it had become common ground that section 40 of BMA 1968 did not contain an implied prohibition of works outside the geographical limits described in that provision, but that if BMCL wished to carry out development outside those limits it would need statutory authority therefor, whether by a private Act or by a marine licence under section 71 of MCAA 2009 or by an order under the Harbours Act 1964. BMCL accepted though its Leading Counsel, Mr. Richard

Drabble QC (who also appeared for BMCL in the present proceedings) that parts of phase 2 of the project were not authorised by BMA 1968 and that any further authorisations required, for example under MCAA 2009, would have to be obtained ([2015] EWCA Civ 650 paragraphs 23 to 26).

13. Sullivan LJ noted that "the real issue between the Appellant and the First and Second Respondents was whether the carrying out of phase 2 of the development would amount to an unlawful interference with the public right of navigation", an issue "which would require consideration of matters of fact and degree" and could not be resolved in that appeal (paragraph 26). In these proceedings the Claimant has indeed sought to make the lawfulness of the marine licence granted on 24 February 2016 turn upon whether the development proposed for phase 2 would unlawfully interfere with public rights of navigation.

14. For completeness, I mention that on 31 October 2015, over 4 months after judgment had been handed down in the Court of Appeal, the Claimant applied to re-open the hearing of the appeal under CPR 52.17 on the grounds that the Court had misunderstood his Solicitor advocate to have accepted that section 40 of BMA 1968 did not contain an implied *prohibition* on the carrying out of works outside the ambit of that Act. On 3 December 2015 Sales LJ rejected the application, so that the Court's "ruling" at paragraph 25 of [2016] EWCA Civ 650 still stood.

15. Thereafter the Claimant applied to the Supreme Court for permission to appeal in relation to the section 40 issue. That application was refused on 12 May 2016. By then phase 1 was "materially complete" (see paragraph 5 of the Statement of Facts and Grounds in the present claim).

16. The remainder of this judgment is set out under the following headings:-

(1) The grounds of challenge
(2) The application for a marine licence and the decision-making process
(3) "A Sea Change – A Marine Bill White Paper"
(4) The statutory framework
(5) Grounds 1 and 3
(6) Ground 2

## The grounds of challenge

17. Section 69 deals with the determination of applications for a marine licence. Subsection (1), which lies at the heart of the grounds of challenge, provides:-

> "(1) In determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the appropriate licensing authority must have regard to –
> (a) the need to protect the environment,
> (b) the need to protect human health,
> (c) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant."

18. The Claimant applied to quash the grant of the marine licence on the following grounds, which in summary were:-

(1) The MMO failed to consider whether the phase 2 works would constitute an actionable interference with public rights of navigation;

(2) Applying the correct legal test, the proposed works would unlawfully interfere with public rights of navigation and the court should so declare;

(3) Where proposed works unlawfully interfere with public rights of navigation, the MMO was not empowered to grant a marine licence under section 71 of the MCAA 2009 unless a harbour revision is also made extinguishing those rights or permitting that interference.

As I explain below, the seemingly absolute approach in ground 3 was subsequently modified.

19. On the first day of the hearing an application was made to amend the grounds of challenge. This was strongly opposed by the Defendant and the Interested Parties. I refused the application for reasons which I gave in an *ex tempore* judgment that day.

20. Mr. Drabble QC stated that the Interested Parties do not accept that public rights of navigation are exercisable within the Brighton Marina because of the effect of Section 30 of the BMA 1968 and the decision by Parliament not to incorporate in that legislation the "open port" provision in Section 33 of the Harbours, Docks and Piers Clauses Act 1847. Mr. George Laurence QC, who appeared on behalf of the Claimant, disagrees with that contention. However, the parties agree that I do not need to resolve that issue, on the basis that for the purposes of this decision I should assume that public rights of navigation are exercisable by the users of those vessels which are permitted to enter the harbour.

**The application for a marine licence and the decision-making process**

21. Meanwhile, on 10 August 2015 BMCL made an application to the Defendant under section 67 of the MCAA 2009 for the grant of a marine licence under section 71 for phase 2 of the project. The application described the proposed works as the construction of a new deck, a car park suspended from the deck and blocks A, B, C, D, H1, H2, H3, J and K rising from the deck. It was stated that blocks A, J and K would be built between October 2015 and January 2020 and the remaining blocks between January 2018 and December 2025.

22. The application for a marine licence was divided into two parts, the first relating to blocks A, J and K with their associated deck and suspended car park and the second relating to the remainder of phase 2. The application proposed that blocks A, J and K would be built within a temporary, dewatered cofferdam. The application responded to a

question about other consents which had been obtained by referring to the planning permissions granted in 2006 and 2013 and the related Environmental Statements. Of particular importance was a "Statement on Rights of Navigation" prepared by HR Wallingford on behalf of BMCL to support the application.

23. Drawing SK600, which was also submitted with the application, shows those parts of the proposal which fall o*utside* the limits of deviation under the BMA 1968. They include block K, the 40 storey building. BMCL also made an application for consent under section 24 of the BMA 1968 for those works falling *within* the limits of deviation. However, by letter dated 13 January 2016 BMCL withdrew its application for section 24 consent, having received advice that it was not required.

24. The Defendant undertook consultation on the application for a marine licence over a 6 week period starting on 18 September 2015. The bodies consulted included the Maritime and Coastguard Agency, Trinity House, the Royal Yachting Association, the Crown Estate and the Harbour Master for the Brighton Marina. The application was advertised in two local newspapers in accordance with section 68 of MCAA 2009, namely in a manner "best calculated to bring the application to the attention of any persons likely to be interested in it". The public were given 4 weeks from 29 September 2015 to make representations. Notices were also placed in prominent public locations in the area. In addition, the application and associated documents were placed on the Defendant's public register. No complaint is made about the adequacy of the consultation and publicity procedures followed.

25. Paragraph 10 of the Statement of Facts and Grounds correctly observes that the marine licence applied for in August 2015 and granted in February 2016 authorises (inter alia) the installation of a series of piles to protect the support structures of the phase 2 buildings fronting on to the sea together with booms between these piles. Permission to apply for judicial review was granted on this basis. The object is to protect those structures against collision by vessels in the marina and to prevent craft from inadvertently accessing the area beneath the new deck. These protective piles form a barrier close to the footprint of the new development. Neither the application under Section 69 nor the licence granted under Section 71 involves the installation of any additional piling and barriers along the northern side of the navigation channel. The position was made clear in a letter to the MMO dated 10 August 2015 from HR Wallingford, BMCL's Consultants, and also in a letter from the MMO's Solicitors to the Claimant's Solicitors dated 13 September 2016. This is common ground between all the parties. Had the licence included these further works, the proposal before the MMO would have been to restrict access to a greater area of the marina.

26. The Statement on Rights of Navigation which supported the application for the marine licence said that:-

> (i) The navigation channel in the Outer Harbour is clearly marked by buoys and the channel itself is dredged [the Statement made no proposal to alter those arrangements for the channel];

(ii) The development will not encroach upon the navigation channel at any time during or after construction;

(iii) The spending beach is not safe to navigate. There are many concrete and steel projections related to the original marina construction works which protrude from the beach and constitute hazards to navigation. There are warning signs in place;

(iv) The spending beach is not dredged as that would negate its purpose of absorbing energy;

(v) At low tide most of the beach is exposed and areas outside the dredged navigation channel are too shallow for navigation;

(vi) There are akmons on the perimeter of the spending beach which present hidden obstructions;

(vii) The Harbour Master advises that the area is not safe for navigation and the use of the area is restricted by bye-laws;

(viii) The new buildings are to be protected by a series of piles attached to the side of the new support structures to resist impact damage, and booms will be installed to prevent inadvertent access to the area beneath the development.

27. The application for a marine licence was also accompanied by a Method Statement for Substructure Installation, paragraph 3.2.5 of which contained the same information on measures to protect the proposed development. The position was made clear by the drawing included with the Statement.

28. Responses to the proposal included the following:-

(i) *John Davey – the Harbour Master*

The function of the spending beach, to dissipate the force of waves entering the Outer Harbour, would not be harmed by phase 2. Access to the spending beach is restricted to authorised personnel. Because the spending beach is hazardous for vessels and the general public, no one would suffer loss of access as a result of the development. Although phase 2 would use a small part of the water area in the Outer Harbour, this area is outside the navigable channel, the water depth is low, it is adjacent to navigational hazards and it is therefore unsafe for use. A CCTV survey during June and July 2015 showed only one or two vessels in that area over that period. Fishing, diving and the propelling of a vessel other than by engine is prohibited in the area and so there would be no loss of amenity for small vessels or fishermen;

(ii) *Brighton Marina Yacht Club*

Because of the large tidal range, the navigable channel, which is dredged and has a safe depth, is marked by buoys. Users of the harbour are advised not to stray from this channel, especially at low water. The spending beach is not used by yachts as grounding in this area is not recommended;

(iii) *The Royal National Lifeboat Institution*

The spending beach has a number of underwater obstacles and silt which makes the area un-navigable for water users. The RNLI has no operational need to use that area;

(iv) *Marine and Coastguard Agency*

The proposal would be unlikely to have an adverse impact on safety of navigation provided that all maritime safety legislation is followed;

(v) *Trinity House*

Trinity House had no objections to raise and no requirements for marking.

29. The Claimant made representations on the application by letter dated 11 October 2015. He stated that the navigable channel is "insufficient on some occasions" because in strong south-west winds some vessels perform a 360° turn to the north of that channel in order to lower the mainsail. He also relied upon anecdotal evidence to contend that the spending beach is sometimes used as a safety measure of "last resort" in an emergency such as engine failure or rudder fouling. He did not claim any wider navigation use for the area in question, nor did he claim to be personally affected as a user of the harbour.

30. The representation submitted by the Claimant was similar in content to the evidence contained in paragraphs 23 to 26 of the third witness statement of Professor John Watts (dated 28 May 2015) lodged in support of the appeal to the Court of Appeal in the first judicial review. In paragraph 21 of his statement Professor Watts said that the spending beach had three functions, namely (a) reducing wave reflection, (b) protecting Work No 7, and (c) providing a safe exit for boats to go aground if they get into trouble.

31. It does not appear that any other body representing the interests of those using the marina harbour, navigation interests in general, or members of the public, raised the concerns identified by the Claimant and by Professor Watts or, indeed, any other concern in

relation to possible interference with rights of navigation. *In practical terms*, the points set out in paragraphs 29 and 30 above represent the sum total of any possible interference with public rights of navigation upon which this claim rests.

32. Nonetheless, the Defendant took the trouble to re-consult the Harbour Master, the Royal Yachting Association and the Marine and Coastguard Agency on these specific points. The RYA confirmed that it had no outstanding concerns on this aspect. The Harbour Master explained that the number of boat movements at the entrance to the Marina is relatively low compared to other facilities. He stated that the Marina's byelaws prohibit the use of sails within the harbour but that some boat owners "might at times take liberties" by altering their sails within the harbour entrance, given its low usage. However, the lowering of sails should be carried out in an area where there is plenty of "sea room" and before entering the harbour. That is accepted and sound practice which accords with the byelaws. A CCTV camera permanently trained on the area north of the navigable channel for 5 months up to the beginning of November 2015 had revealed that only 9 vessels had strayed from the channel and without any necessity to do so. The RNLI were invariably involved in all marine emergencies at the Marina and knew of no occasion in the last 20 years when they had needed to beach a vessel on the spending beach. There are two safer options elsewhere. Lastly the Marine and Coastguard Agency raised no concerns in response to the re-consultation.

33. The Defendant issued the marine licence on 24 February 2016 after having evaluated all the evidence and the representations it had received. The covering letter made it plain that the decision to grant the licence did not absolve BMCL from obtaining any other consents or approvals which might be required before carrying out the works for phase 2. Section 4 of the licence itself sets out in plain terms the scope of the activities which are licensed. It contains a description of the works authorised under Section 71 of MCAA 2009, which refers to the deflector piles positioned around the supporting piles for blocks A, J and K and shown on the drawing at schedule 7 to the licence. The construction method for the deflector piles is set out in schedule 2 to the licence. Thus, it is clear that the marine licence which has been granted does not authorise any additional piles, booms, or nets along the northern side of the navigable channel. By the end of the hearing this had become common ground between the parties. Thus, before the developer could install any additional or alternative measures for protecting the structural supports of the development which require a marine licence, they would need to make the appropriate application under section 67 of CMAA 2009.

34. Before reaching its decision to grant the licence the Defendant analysed the evidence and consultation responses, issue by issue. In summary, the Defendant decided to prefer the evidence supplied by BMCL and the consultation responses from independent authoritative sources to the objections raised.

35. On the issue of whether the proposed deflector piles immediately adjacent to the structural piles supporting the development, would be sufficient without additional deflector piles along the northern boundary of the navigation channel, the Defendant concluded from the information supplied by the developer's structural engineering consultants that the proposed design would provide a satisfactory defence. The Claimant does not advance any legal challenge to that conclusion.

36. The Defendant produced a Decision Report which provided a summary of the basis for its decision to grant the marine licence. Section 4 of the document dealt with a number of relevant considerations, including the compliance of the proposal with the UK Marine Policy (for the purposes of Section 58 of the MCAA 2009), Environmental Impact Assessment, the Habitats Directive, the Beachy Head Marine Conservation Zone and protected species, the Waste Framework Directive and the Water Framework Directive.

37. Section 5 of the report dealt with other relevant considerations including the subject of "navigation". It began by referring to the general objective of the MMO set out in Section 2(1) of the MCAA 2009 to exercise its functions so that activities carried out in the UK marine area are managed, regulated or controlled "with the objective of making a contribution to the achievement of sustainable development".

38. The report then continued:-

> "In determining marine licence applications, the MMO must have regard to the need to protect the environment, human health, and to prevent interference with legitimate uses of the sea (and such other matters as thought relevant) (section 69 MCAA).
>
> The MMO received representations regarding disruption to existing navigational rights by the construction of the Phase 2 towers. MMO has consulted widely on the application with advisors on navigational safety including the BMHM, RYA and MCA. The applicant has also provided a detailed statement regarding the potential navigational impacts, which includes correspondence from the Brighton Marina Yacht Company, Royal National Lifeboat Institute and Premier Marina (Brighton) stating that they consider *there are no navigational impacts from the proposed Development*.
>
> *Whilst it is not for the MMO to conclusively determine the scope of public rights of navigation, it does take into account all legitimate uses of the sea* and all other relevant considerations. In making its determination the MMO has had regard to public representations alongside the views of MMO advisors. The MMO is satisfied that the proposed Development *will not interfere with public rights of navigation or prevent the existing safe navigation* within Brighton Marina. Furthermore, it is the harbour master's statutory obligation to manage navigational safety within the Marina and is required (under the conditions of the marine licence) to regularly notify mariners during the proposed development." (emphasis added)

39. The MMO also wrote to the Claimant on 25 February 2016 setting out summary responses to points he had raised in the consultation process. On the subject of "impacts to navigation" the letter stated:-

> "3.1 You also made representations regarding the disruption to existing navigational rights by the construction of the Phase 2

> towers. MMO has consulted widely on the application with experts on navigational safety including the Brighton Marina Harbour Master, the Royal Yachting Association and Marine and Coastguard Agency. The licence holder has also provided a detailed assessment regarding the potential navigational impacts, which includes correspondence from the Brighton Marina Yacht Company, Royal National Lifeboat Institute and Premier Marina (Brighton) stating that there are no impacts. Whilst it is not for the MMO to conclusively determine the scope of public rights of navigation, it does take into account all legitimate uses of the sea and all other relevant considerations.
>
> 3.2 In making its determination *the MMO has had regard to your comments alongside the expert views of its advisors provided through consultation. The MMO assesses each application on a weight of evidence approach* and is satisfied that the licensed activities will not interfere with public rights of navigation or prevent the existing safe navigation within Brighton Marina. Furthermore, it is the harbour master's statutory obligation to manage navigational safety within the Marina." (emphasis added)

40. The letter to the Claimant is significant because it was produced and sent virtually contemporaneously with the Decision Report. It cannot be said, therefore, to involve *ex post facto* reasoning. The letter explains a little more fully the approach taken by the MMO. Both documents stated that whilst it was not the MMO's function to determine the scope of public rights of navigation, the MMO had addressed the subject of interference with "legitimate uses of the sea" (a clear reference to its function under section 69(1) of MCAA 2009). The MMO referred to the wide consultation it had carried out and explained that it had considered representations from members of the public alongside the views of specialist advisers and experts on navigation and safety. The MMO had applied a "weight of evidence" approach and concluded that the proposals would not interfere with "the existing safe navigation within Brighton Marina." The additional reference to the MMO being satisfied that the proposed activities would not interfere with public rights of navigation cannot be read in isolation. Instead that text must be read in the context of (a) the preceding statement that it is not the MMO's role to determine the scope of public rights of navigation, (b) section 69(1) and (c) the consultation responses it had received. Read fairly and as a whole it is plain that the MMO's decision was concerned with whether there would be any practical interference with the exercise of public rights of navigation as a legitimate use of the sea, and not with the legal question of whether there would be an actionable interference with those rights. Accordingly, the witness statement of Mr Mark Herbert, the case officer who drafted the Decision Report, is consistent with a proper understanding of that Report.

41. Before discussing the grounds of challenge it is convenient to deal with the background to MCAA 2009 and the statutory framework.

**"A Sea Change – A Marine Bill White Paper"**

42. This White Paper was laid before Parliament in March 2007 (Cm 7047) and was the

subject of public consultation leading to the publication of the bill which was enacted as MCAA 2009.

43. The White Paper identified 5 key areas to be addressed by legislation, which included the setting up of the MMO to provide a holistic approach to marine management and the delivery of marine policies, a new system of marine planning, with "marine plans" to guide decision-making on licence applications, and a new marine licensing system to replace existing legislation by a modern streamlined system using a more integrated approach. One object was to "change marine licensing regimes to give better, more consistent licensing decisions, delivered more quickly and at less cost by a system that is easier to understand and to use" (paragraph 1.14). In much the same vein the Government stated that the use of "marine plans" would "help reduce business costs and regulatory risks of exploiting marine resources," and "provide efficient decision-making through the licensing process" (paragraph 1.32).

44. Chapter 5 of the White Paper dealt with licensing. The Government sought to bring together licensing regimes under different statutory schemes and to "reduce overlaps in legislation applying to harbours and ports" (paragraph 5.1). The "holistic approach" was "to enable regulators to consider the wider benefits of a development alongside its potential impacts" (paragraph 5.10). The legislation would (inter alia) be "targeted on things that need to be controlled", "to ensure that a proper balance is struck between competing uses" and would be "flexible, targeted, proportionate and risk-based" (paragraph 5.12).

45. Thus, the Government proposed to introduce "a reformed regime" based on a consolidation of existing statutory codes, which would be "flexible, targeted and proportionate so that only those activities that pose a *significant risk* to the environment, marine heritage or *other legitimate uses* of the sea are subject to regulation … This regime *will sit alongside … harbours legislation* …" (paragraph 5.23 with emphasis added).

46. In the context of "harbours legislation" paragraph 5.105 stated:-

> "The current approach to authorising marine works in or near port or harbour areas is complicated and often archaic – some of the legislation dates back two centuries or more. We want to ensure wherever possible that a straightforward and consistent system of regulation applies in future. We also want to reduce unnecessary bureaucracy, and provide a clear basis for the implementation of European environmental rules."

47. The White Paper recognised that some activities can affect the interface between land and sea and therefore there was a need to integrate controls affecting both areas. The planning systems relating to land were considered to be well-developed, whereas the sectoral arrangements for coastal management needed to be improved through a "marine planning system". The new system was to be "plan led" and focused on the concept of "sustainable development," as in the case of terrestrial planning. The "plans" would comprise a UK Marine Policy Statement and a series of Marine Plans for different

coastal areas. The area to be covered by the new system of marine planning was deliberately defined to extend up to Mean High Water Springs (see eg. sections 2(1), 42, 44, 49, 51, 66 and 322 of MCAA 2009) so as to overlap with the terrestrial planning system which extends as far as the Mean Low Water Mark. The Government proposed to delegate the functions of marine planning to a single organisation, the Marine Management Organisation. These planning functions were to include not only the preparation of marine plans and licensing but also enforcement (paragraphs 2.1 to 2.9, 4.11, 4.28, 4.33 to 4.34, 4.45, 4.99, 5.2 to 5.4, 5.14, 5.62 to 5.63, 8.17 to 8.19 and 8.27 to 8.40 of the White Paper).

**The Statutory Framework**

48. Although the issues in this case primarily relate to the proper construction of section 69, it is necessary to consider that provision in the context of the new marine planning and licensing system introduced by MCAA 2009.

49. The general objective of the MMO is set out in section 2. That objective is in fact a duty imposed by subsection (1) in the following terms:-

> "It is the duty of the MMO to secure that the MMO functions are so exercised that the carrying on of activities by persons in the MMO's area is managed, regulated or controlled –
>
> (a) with the objective of making a contribution to the achievement of sustainable development (see subsections (2) and (4) to (11)),
>
> (b) taking account of all relevant facts and matters (see subsection (3)), and
>
> (c) in a manner which is consistent and co-ordinated (see subsection 12))…"

Thus, the promotion of "sustainable development" lies at the heart of the MMO's statutory functions. This is similar to the policy and statutory objectives underpinning the terrestrial planning system (see the National Planning Policy Framework and section 39 of the Planning and Compulsory Purchase Act 2004). This concept of sustainable development is not defined in the statute, but is generally understood to refer to "development which meets the needs of the present without compromising the ability of future generations to meet their own needs" (the 1987 Report of the World Commission on Environment and Development – the Brundtland Report).

50. The obligation to take into account "all relevant facts and matters" is elaborated in section 2(3):-

> "For the purposes of subsection (1)(b), the facts and matters that may be taken into account include each of the following –
>
> (a) scientific evidence, whether available to, or reasonably

obtainable by, the MMO;

(b) other evidence so available or obtainable relating to the social, economic or environmental elements of sustainable development;

(c) such facts or matters not falling within paragraph (a) or (b) as the MMO may consider appropriate…"

Thus it is made plain that the MMO is given a discretion as to the matters it will take into account in exercising its functions, which ordinarily may only be challenged on grounds of irrationality. That test may be satisfied if the court considers that in the circumstances of the case, a matter was so "obviously material" to a particular decision that a failure to take it into account would not be in accordance with the intention of the legislation (In re Findlay [1985] AC 318, 333-4; Creed NZ v Governor General [1981] 1 NZLR 172; R (Plant) v Lambeth LBC [2017] PTSR 453 at paragraphs 62 to 63).

51. Part 3 of MCAA 2009 deals with marine planning. There are strong parallels with the plan-led system under TCPA 1990 for the control of development on land. Sections 44 to 48 deal with the preparation and adoption of a "marine policy statement" for contributing to the achievement of sustainable development in the UK marine area. Sections 49 to 57 deal with the preparation and adoption of marine plans covering specific parts of the UK marine area. Paragraph 3(2) of schedule 6 requires reasonable steps to be taken to secure the compatibility of a marine plan with any relevant development plan adopted under planning legislation. Schedule 6 also sets out a procedure for the preparation, "investigation" and adoption of a marine plan, which has many similarities to the procedure for adopting development plans. Sections 62 to 63 enable legal challenges to be brought against the marine policy statement or a marine plan. Sections 58 and 59 require decision makers to reach decisions on authorisations (which include marine licences) and enforcement action which are in accordance with the marine policy statement and any relevant marine plan "unless relevant considerations indicate otherwise".

52. Part 4 of the MCAA 2009 deals with marine licensing. Chapter 1 of that Part deals with the procedures for granting marine licences. Chapter 2 deals with special cases (such as harbours – see section 78) and exemptions from licensing. Chapter 3 deals with enforcement.

53. Section 65 prohibits the carrying on of a "marine licensable activity" without a marine licence (subject to the exemptions in sections 74 to 77). Those activities are defined in section 66 and include (as "item 7") the construction, alteration or improvement of any works within the UK marine licensing area, (a) in or over the sea or (b) on or under the sea bed. The list of activities is defined in broad terms and includes the deposition of substances and objects in the sea, the scuttling of vessels, dredging, and incineration on floating vessels or structures. Thus, the list of licensable activities is concerned with a broad range of uses within the UK marine area, which may be of a permanent or a temporary nature.

54. Section 67 provides for the making of an application for a marine licence to a licensing authority. The function of determining such applications has been delegated to the MMO. Section 68 contains requirements for the publication of notices of an application and the giving of notices to local authorities affected.

55. Section 69 deals with the determination of applications for a marine licence. Subsection (1) provides:-

> "In determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the appropriate licensing authority must have regard to –
> (a) the need to protect the environment,
> (b) the need to protect human health,
> (c) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant."

56. Section 69(2) also applied to the works proposed in the present case:-

> "In the case of an application for a licence to authorise such activities as are mentioned in item 7 in section 66(1), the appropriate licensing authority must have regard (among other things) to the effects of any use intended to be made of the works in question when constructed, altered or improved."

57. Section 69(3) to (5) deals with the MMO's discretionary power to consult and its obligations (i) to allow the applicant an opportunity to make representations on the responses from consultees and (ii) to have regard to representations received from interested persons:-

> "(3) The appropriate licensing authority must have regard to any representations which it receives from any person having an interest in the outcome of the application.
>
> (4) A licensing authority may –
>
> (a) from time to time consult any person or body it thinks fit as to the general manner in which the licensing authority proposes to exercise its powers in cases involving any matter in which that person or body has particular expertise;
>
> (b) in relation to any particular application, consult any person or body which has particular expertise in any matter arising in relation to that application.
>
> (5) If the appropriate licensing authority consults any person or body under subsection (4)(b), it must give the applicant the opportunity to make representations to the licensing authority about any observations made by the person or body."

58. Section 70 gives the MMO a broad discretionary power to cause an inquiry to be held into an application for a marine licence.

59. By section 71(1) the MMO must, after considering an application, grant the licence sought unconditionally, or subject to such conditions as they think fit, or refuse the application. There is a broad power to impose conditions relating to the activities authorised by the licence and precautions to be taken or works to be carried out in connection with or in consequence of those activities (section 71(2) and (3)). A licence may specify that it is to remain in force indefinitely or for a defined period of time (section 71(4)). Section 73 confers a right of appeal on the applicant for a marine licence against decisions under section 71.

60. Section 72 empowers the MMO to serve a notice varying, suspending or revoking a licence in a range of circumstances. Subsection (3) allows such a notice to be given (inter alia) "in the interests of safety of navigation".

61. Section 78 deals with cases where the MMO considers that an application for a marine licence should be considered together with a "related application" for a harbour revision order under the Harbours Act 1964. I return to this below.

62. The MMO's enforcement powers in Chapter 3 of the MCAA 2009 include the ability to serve a compliance notice under section 90 on a person holding a marine licence who has failed, or is failing, to comply with a condition of that licence when carrying on an activity under that licence. The notice may require such steps to be taken as the MMO considers appropriate to ensure that the condition in question is complied with, provided that it is also satisfied that (section 90(3)):-

> "the carrying on of the activity has not caused, and is not likely to cause, any of the following –
>
> (a) serious harm to the environment;
>
> (b) serious harm to human health;
>
> (c) serious interference with legitimate uses of the sea."

Thus, section 90(3) invokes the same three objectives as in section 69(1), and applies tests of *serious* harm to either the environment or human health, or *serious* interference with legitimate uses of the sea.

63. Similarly, section 102 empowers the MMO to serve a stop notice prohibiting a person carrying on a licensable activity (whether or not in accordance with a marine licence) if satisfied that the carrying on of that activity is causing (or is likely to cause) or is creating (or likely to create) an imminent risk of any of the following effects:-

> "(a) serious harm to the environment;
>
> (b) serious harm to human health;
>
> (c) serious interference with legitimate uses of the sea."

64. Under section 91 the MMO may serve a "remediation notice" on a person carrying on a

licensable activity without the requisite marine licence or in breach of a condition of such a licence if satisfied that the carrying on of that activity has caused, is causing, or is likely to cause, any of the following (section 91(5)):-

> "(a) harm to the environment;
>
> (b) harm to human health;
>
> (c) interference with legitimate uses of the sea."

A remediation notice may require the person to whom it is given to take "remedial or compensatory steps" for (inter alia) "preventing interference with legitimate uses of the sea" or "preventing or minimising, or remedying or mitigating the effects of" the "interference with legitimate uses of the sea". A remediation notice may also require the person served to pay to the MMO the reasonable expenses of any remedial or compensatory steps it takes for those purposes (section 91(7) to (9)).

65. Section 91 also invokes the same three objectives as are contained in section 69(1), but in this instance the degree of harm or interference need not be "serious". The same applies to the MMO's power in section 106 to carry out remedial works itself where a licensable activity has been carried on without a licence or in breach of the conditions of a licence.

66. Thus, it can be seen that there is continuity between the licensing and enforcement provisions of the MCAA 2009 as regards the objectives of protecting the environment and human health and preventing interference with legitimate uses of the sea. These expressions are not confined to the determination of applications for marine licences.

67. Finally, it is necessary to refer to section 14 of the Harbours Act 1964 which gives the relevant Secretary of State power to make a "harbour revision order" in relation to a harbour maintained or managed by a harbour authority (such as the Brighton Marina) for achieving any of the objects set out in schedule 2 to the Act, which include:-

> "Extinguishing public rights of navigation for the purposes of works described in the order or works ancillary to such works, or permitting interference with the enjoyment of such rights for the purposes of such works or for the purposes of works carried out by a person authorised by the authority to carry them out."

Pursuant to The Harbours Act (Delegation of Functions) Order 2010 (SI 2010 No. 674), the functions of the Secretary of State in relation to harbour revision orders have been delegated to the MMO in England and Wales.

**Grounds 1 and 3**

68. It is convenient to take these two grounds together. Initially Mr. Laurence QC contended that on a true construction of section 69(1), the MMO was obliged to consider whether

the proposed phase 2 works would constitute an actionable interference with public rights of navigation in the outer harbour of the Brighton Marina and, if they concluded that there would be such an interference, the MMO was not empowered to grant a marine licence for those works in the absence of a harbour order under paragraph 7B of schedule 2 to the Harbours Act 1968 either extinguishing those rights or permitting that interference (see paragraph 18 of Claimant's Statement of Facts and Grounds referring to paragraphs 22 - 26 of Supplement to Judicial Review Pre-action Protocol letter dated 14 April 2016 and see also paragraphs 18A – 18 D of the Amended Statement of Facts and Grounds dated 8 September 2016).

69. In this context, it is necessary to bear in mind that under ground 2 the Claimant argues that the test for determining whether there is an unlawful interference with public rights of navigation, is the same as the test for determining whether an interference with a public highway is actionable, namely any interference which is more than *de minimis*. The Claimant submits that (i) any "non-de minimis reduction in the area of the harbour available for navigation" constitutes an unlawful interference with public rights of navigation and (ii) the value or weight to be attached to the use of such rights is a matter to be dealt with under a harbour revision order and not under section 69 (Statement of Facts and Grounds paragraphs 13-16).

70. Both the Statement of Facts and Grounds and the skeleton argument on behalf of the Claimant contain little or no analysis of MCAA 2009 to justify the assertions made in either grounds 1 or 3.

71. In his oral submissions Mr Laurence QC relied primarily upon the language of section 69(1)(c), which refers to the need "to *prevent* interference with legitimate uses of the sea". He contrasted that wording with the text of section 69(1)(a) and (b), which refer instead to the need "to *protect*" the environment and human health. He suggested that "prevention of interference" is a stricter requirement than "protection" and has been deliberately chosen so as to align with the test for determining whether an interference with public rights of navigation would be unlawful. He accepted that section 69(1) (a) and (b) do not refer to *absolute* requirements, but suggested that section 69(1)(c) does. He added that the latter has been differently worded so as to preclude consideration of the extent, or degree, to which public rights of navigation would be interfered with. Mr Laurence QC also submitted that section 69(1)(c) does not allow the MMO to carry out a balancing exercise, for example between a proposed development of an area of the sea and other legitimate uses of the sea. He contended that if, applying the correct test, the MMO determines that a proposal would unlawfully interfere with public rights of navigation, then it cannot lawfully grant a marine licence unless a harbour revision order is made to extinguish those rights or to authorise that interference. Mr. Laurence QC also submitted that the procedure available under section 78 of MCAA 2009 supports his submission.

72. With great respect, the Claimant's argument involves a fundamental misunderstanding of MCAA 2009, and of section 69(1) in particular, and I have reached the firm conclusion that it has to be rejected.

73. Mr. Laurence QC accepts that the licensing regime under MCAA 2009 covers a wide

range of works ranging from major coastal development to relatively small scale works such as moorings. He also accepts that a licence may authorise works of either a temporary or permanent nature, and either for a temporary period or permanently. If the Court were to accept the Claimant's reading of section 69(1)(c), *a fortiori* if it were to accept the test for unlawful interference he advocates, the MMO would have to refuse applications for marine licences in most or nearly all cases unless a harbour revision order is also obtained. In response to that difficulty, and departing from the way in which ground 3 was originally formulated (see paragraph 68 above) Mr. Laurence QC suggested that the MMO would still nonetheless be empowered to grant a marine licence without a harbour revision order if there were "overwhelmingly strong reasons" for doing so. Alternatively, he submitted in his reply that the MMO would have to refuse a marine licence for works which would unlawfully interfere with public rights of navigation, save in "exceptional circumstances".

74. Thus, the Claimant's original attempt to suggest that section 69(1)(c) imposes an absolute, or virtually absolute, requirement, in contrast to section 69(1) (a) or (b), has broken down. The concepts of "overwhelmingly strong reasons" or "exceptional circumstances" involve the striking of a balance. Moreover, the Claimant's argument relies upon an approach, which is nowhere to be found in the language of section 69(1), or elsewhere in the MCAA 2009.

75. A further fundamental flaw in the Claimant's argument is that Mr. Laurence QC accepts that a marine licence cannot legitimise an actionable interference with public rights of navigation. That is why he insists that a harbour revision order is necessary for that purpose. But the Claimant's argument fails to justify why it should then be a legal requirement for the MMO to assess under section 69 (or section 71) whether the works to be licensed would unlawfully interfere with public rights of navigation if the grant of a marine licence cannot authorise any such interference. It is quite common for projects to require more than one type of consent before they may proceed, sometimes under overlapping regimes. The mere grant of one consent does not obviate the need to obtain any other consent that may be required under other statutory controls. If there is a need to obtain a harbour revision order so as to legitimise what would otherwise be an unlawful interference with public rights of navigation, that would be a freestanding legal requirement. This does not depend upon the construction of section 69(1)(c) for which the Claimant contends, or even the existence of the marine licensing regime.

76. Section 78 of MCAA lends no support to the Claimant's argument. This provision applies where an applicant requires a marine licence *and* he has made a "related application for a harbour order," or the harbour order authority (ie. the MMO) has reason to believe that it will be made (section 78(1)). A "related application" is an application under sections 14 or 16 of the 1964 Act in relation to "the activity" for which the marine licence is required, or other works to be undertaken in connection with that activity (section 78(2)). Where applications for both a marine licence and a harbour order have been made *and if* the MMO decides that the two applications should be considered together, that procedure is to be followed (section 78(3)). Where one application has been made but not the other, and the MMO decides that the two applications should be considered together, then whichever of the two applications is received first is not to be considered by the MMO until it receives the other, and then both applications must be

considered together (section 78(4) and (5)).

77. Because section 78 only applies where the tests in subsection (1) are satisfied, in a case where just one application has been made, the application of section 78(4) and (5) depends upon the MMO having "reason to believe" that the second application will be made. Unless that requirement is met, the MMO's discretionary power under section 78(4) to determine that the two applications be considered together does not arise. Even then, the legislation does not mandate that the two matters are dealt with together. It is a matter for the MMO's discretion. It follows that section 78 is entirely consistent with the analysis that section 69(1)(c) does not prevent the grant of a marine licence for works which unlawfully interfere with public rights of navigation, but leaves that issue to be addressed by an application under section 14 of the Harbours Act 1964. Section 78 is, as its title suggests, a procedural provision which enables the delay and cost of dealing with applications for marine licence and harbour orders separately to be avoided. It does not go beyond that.

78. I agree with Ms. Blackmore (who appeared for the Defendant) and Mr. Drabble QC that section 69(1) has to be read as a whole and that sub-paragraph (c) is a compendious expression. The MMO "must have regard to the need to prevent interference with legitimate uses of the sea". This provision refers to legitimate uses of the sea, not to public rights of navigation. Legitimate uses need not derive from public rights of navigation. They may derive from, for example, marine licences already granted for a wide range of activities, including fixed structures and their uses.

79. "The need to prevent interference" with such uses is not an absolute requirement. First, "need" does not connote something which is indispensable. "Need" is a relative concept, which varies according to the value judgment which the decision-maker applies to the subject-matter, the prevention of interference with legitimate uses of the sea. That is reinforced by the opening words, "must have regard to". The subject-matter of paragraph (c) must be taken into account by the decision-maker, along with sub-paragraphs (a) and (b).

80. A provision stipulating that the decision-maker must have regard to a particular subject, generally amounts to no more than an obligation to take that matter into account. It is generally for the decision-maker to decide how much weight to give to that subject in the circumstances of the particular case under consideration, especially where the statute (1) requires the authority to have regard to other matters as well (ie. the protection of human health and of the environment) and also (2) permits the authority to have regard to "such other matters as [it] thinks relevant". Not all these considerations will necessarily pull in the same direction, whether in favour of granting or refusing a licence application, and it will be necessary for the decision-maker to decide on how much weight to give to them and to strike a balance (see eg. City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1457). For example, a proposal may affect more than one "legitimate use" of the sea and may do so in different ways, whether beneficially, adversely or neutrally. The MMO may decide that one of these aspects is more important, or has more weight, than another. The MMO may strike a balance between these and other considerations. Section 69(1), together with sections 2(1) and 58 of the MCAA 2009, provides a legal framework for bringing relevant considerations together.

81. Mr. Laurence QC referred to paragraph 241 of the Explanatory Notes relating to section 69(1)(c):-

> "Legitimate uses of the sea include (but are not limited to): navigation (including taking any steps for the purpose of navigational safety); fishing; mineral extraction; and amenity use."

This passage further undermines the Claimant's argument. It is plain that the phrase "legitimate uses of the sea" is not limited to public rights of navigation. Moreover, the fact that Parliament had in mind matters such as amenity and fishing demonstrates that it did not use the word "interference" so as to connote an interference of an actionable kind in a court of law. Parliament did not express section 69(1)(c) so that it has the effect of requiring the MMO to consider whether in some cases a harbour revision order might be necessary.

82. Just as planning control is concerned with factors relating to the use of land (Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281, 1294), marine licensing is concerned with use of the sea. Those uses are not limited to navigation, nor is the focus on rights of navigation. Amenity uses and development in the form of mineral extraction are examples of legitimate uses of the sea. Given that section 69(1) is relevant to whether or not an application for a marine licence should be granted, it can be seen that "legitimate" is not used simply to refer to a lawful use or to legal rights, but in a broader sense to describe justified, proper or acceptable uses. Thus, "legitimate" allows the MMO to evaluate the merits of a use or of competing uses, including existing uses. Accordingly, the MMO can decide how much weight or merit to give to a proposal to use an area of sea for temporary development such as mineral extraction, or for permanent development such as residential or commercial buildings, as compared with the extent to which practical use is made of that area for navigation or indeed other "legitimate uses". For example, in the present case it is plain from the evidence received by the MMO that the spending beach and area of sea affected by the phase 2 works are used for only very limited navigation purposes and relatively infrequently.

83. The reference to "navigational safety" also reinforces the conclusion that section 69(1)(c) is concerned with matters of degree, rather than absolute requirements. Safety is concerned with risk, including matters such as the nature and likelihood of a hazard occurring.

84. The same approach is to be found in section 69(1)(a) and (b). The protection of the environment is not an absolute requirement. The concept depends upon such matters as the sensitivity of the receptor, the nature and extent of the effects that the proposed works would have, the degree of seriousness of those effects and the opportunities for mitigation. A similar analysis applies to the protection of human health. The mere identification of a potential adverse effect would not of itself deprive the MMO of the power to grant a marine licence, any more than would the mere fact that the installation of a licensable work would interfere, to some degree, with navigation, or rights of navigation. Instead, it is for the MMO to decide how much weight to attach to matters falling within section 69(1). The mere fact that a proposal requires some form of environmental permit in addition to a marine licence, does not impinge upon the MMO's

power to grant a marine licence, any more than a possible need in certain cases to obtain a harbour revision order to extinguish or curtail public rights of navigation.

85. It is also relevant that the three objectives in section 69(1) appear in other parts of MCAA 2009, notably sections 90, 91, 102 and 106. These provisions are concerned with the taking of enforcement and remedial action to deal with harm to the environment or human health or an "interference with legitimate uses of the sea". Under certain provisions the power is not engaged unless the harm or interference is judged by the MMO to be "serious", but in other cases that additional test does not apply. Either way, the legislation enables the MMO to assess whether enforcement or remedial action should be taken, according to its judgment on the nature and degree of the adverse effect in question and the balance it strikes between the relevant considerations involved. There is nothing in the legislation to suggest that Parliament intended that a materially different approach should be adopted under section 69, or specifically under section 69(1)(c), when the MMO decides whether a marine licence should be granted.

86. Sections 2(1), 58 and 59 apply to the MMO's function of determining under section 69 whether a marine licence should be granted. The MMO is under a duty to exercise its licensing function so that the carrying on of licensable activities is regulated in order to make a contribution to sustainable development, and also by reference to the UK Marine Policy Statement and any applicable marine plan. Those obligations further reinforce the view that section 69(1) is concerned with the MMO's evaluation, weighing and balancing of the various considerations to which it has regard. That approach in the legislation is incompatible with the singling out of one factor, interference with public rights of navigation, for treatment in the manner suggested by the Claimant. Claimant's submission that, by virtue of sections 69(1)(c) (and section 78), the MMO is unable to grant a marine licence where a proposal would give rise to any actionable interference with public rights of navigation (or, according to its modified submissions, except where there are "overwhelmingly strong reasons") is inconsistent with the balancing exercise which section 69(1) requires the MMO to perform when deciding whether or not to grant a marine licence.

87. These statutory obligations on the MMO reflect Parliament's intention to model the marine licensing system on terrestrial planning control, with adaptations. The Claimant's interpretation of section 69 is also inconsistent with the Government's approach in the White Paper on the Marine Bill, which was to provide a streamlined, simple licensing system which is flexible, targeted and proportionate, so that only those activities that pose a significant risk to other legitimate uses of the sea are subject to regulation. The new system was intended to enable a balance to be struck between competing uses and to be risk-based. On the Claimant's case the mere fact that there would be some interference with public rights of navigation would necessitate the making of dual applications for marine licences and harbour provision orders in many situations, whereas according to the MMO, that is currently necessary in only a small number of cases. This would be the outcome even where there is little or no prospect of any party seeking to bring an action for interference with public rights of navigation, a result which would be contrary to the objectives of the legislation.

88. Mr. Laurence QC sought to draw an analogy with the law on the protection of public

rights of way. But he accepted that there are significant differences. A highway generally follows a distinct route, of a defined width, between certain locations. The "UK marine area", the coastal areas around the UK, are large amorphous areas of water, rather than distinct routes. Generally public rights of navigation are not confined to such routes or channels. In a marina development navigation may typically take place in navigable channels provided and maintained as such. But in the case of the Brighton Marina it has not been suggested that the use of the navigable channel of the outer harbour would be adversely affected by the phase 2 works.

89. In relation to highways, Mr Laurence QC referred to section 130 of the Highways Act 1980, which imposes a duty on a highway authority "to assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are the highway authority…" No similar obligation has been imposed on the MMO. Instead, the MMO has a set of discretionary powers which allow it to take enforcement action where it judges that to be appropriate by reference to (inter alia) the nature and/or degree of an interference with "legitimate uses of the sea."

90. Where it is thought that public rights of navigation are being obstructed, the position remains that the following range of remedies is available (Halsbury's Laws 5th edition Vol. 101 paragraphs 693-698):-

> (i) Proceedings brought by the Attorney General on behalf of the Crown in respect of its prerogative right of conserving navigation;
>
> (ii) A relator action in the name of the Attorney General;
>
> (iii) Proceedings brought by a local authority in the interests of the inhabitants of its area under section 222 of the Local Government Act 1972;
>
> (iv) Criminal proceedings in respect of a public nuisance;
>
> (v) Civil proceedings in nuisance by a private individual who suffers special damage beyond that suffered by the public generally.

In practical terms, whether a developer will apply for an order, such as a harbour revision order, to extinguish public rights of navigation will depend on the view it takes as to whether or not the development will involve an actionable obstruction of such rights.

91. Duties of the kind set out in section 69(1) of MCAA 2009 are not uncommon. I have drawn an analogy with planning legislation. Reference may also be made to the public sector equality duty in section 149 of the Equality Act 2010. Subsection (1) provides:-

> "(1) A public authority *must*, in the exercise of its functions, *have*

*due regard to the need to –*

> (a) *eliminate* discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it." (emphasis added)

Subsequent subsections elaborate on the content of this duty.

92. The public sector equality duty is not an obligation to achieve a particular result, but instead a duty to have due regard to the need to achieve "the goals" set out in section 149 (Dyson LJ in R (Baker) v Secretary of State for Communities and Local Government [2008] LGR 239 at paragraph 31). As Elias LJ pointed out in R (Hurley & Moore) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 Admin, provided that the decision-maker appreciates the potential impact of his decision on the specified "objectives" and the desirability of promoting them, it is for the decision-maker to decide how much weight to give to those matters (paragraph 77). The approach taken by the draftsman in section 69(1) of MCAA 2009 is similar in that it identifies three statutory objectives to which regard must be had, and not requirements (or absolute requirements) which must be satisfied, and then leaves the decision on the weight to be given to those matters and other relevant considerations to the decision-maker, the MMO.

93. For these reasons I am unable to accept the Claimant's construction of section 69(1)(c), whether as originally put forward in the Claim or as subsequently modified. That provision is not directed at the issue of whether the works proposed in a licence application would give rise to an actionable interference with public rights of navigation. Rather it is directed at the issue of whether the proposal would interfere with legitimate uses of the sea, including, but not limited to, the use of the sea for the purposes of navigation, and if so whether any such interference would afford a sufficient ground for refusing the application. Here the MMO discharged its obligation under section 69(1)(c) admirably. It went to substantial lengths to collect evidence on the relevant navigation issues. It re-consulted on the relatively narrow points raised by the Claimant. Having regard to the weight of the evidence, the MMO decided that the proposed activities would not interfere with navigation or safety of navigation in the entrance to the marina so as to justify refusing the application. Plainly, in order to be able to reach that conclusion there was no statutory requirement, or any need, for the MMO to determine whether the effect on public rights of navigation would also be actionable. The nature and extent of that effect were matters of judgment for the MMO and there is no public law ground for impugning their judgment. For these reasons grounds 1 and 3 must be rejected.

**Ground 2**

94. Although the Interested Parties maintain that public rights of navigation are not exercisable within the Brighton Marina, the court has not been asked to determine that issue (see paragraph 20 above), and the MMO did not proceed on that basis. Nor did the Defendant's decision suggest that the usage of the area affected by the development fell outside the scope of any public rights of navigation. Given the outcome of grounds 1 and 3, the issues which the Claimant seeks to raise under ground 2 as to what is the correct legal test for determining whether an interference with public rights of navigation is actionable, and whether that test was satisfied in this case, do not arise for decision. Ground 2 must therefore fail.

95. I am nevertheless grateful to Counsel for the interesting arguments they advanced on the test to be applied and in deference to them I will set out my views very briefly.

96. There is some divergence of opinion in the textbooks which reflects differences of opinion in the case law. Halsbury's Laws (5th ed Volume 101) deals with interference with public rights of navigation at paragraphs 692 and 698 for tidal waters and paragraph 705 for non-tidal waters. It states that "to constitute a nuisance … there must be some actual obstruction of a navigable river which produces inconvenience for the public in the use of the river for the purpose of the navigation" and that this is a question of fact. Likewise, Wisdom's The Law of Rivers and Watercourse (4th ed) states at page 67 that whether an obstruction in a navigable river amounts to a nuisance is a question of fact: an encroachment is not necessarily a nuisance because this depends upon whether the public is inconvenienced. Where the consequences are slight or the encroachment is of a trifling nature the courts may not intervene. On the other hand Coulson and Forbes on the Law of Waters (6th edition – 1952 at p 527 et seq) sets out in some detail the various views expressed in a number of authorities without settling on a single statement of principle as set out in other text books. To my mind this reflects a degree of uncertainty in the case law.

97. Mr Laurence QC placed considerable reliance upon Attorney General v Terry (1874) LR 9 Ch 423 which, along with the decision of Sir George Jessel MR at first instance, he subjected to detailed analysis. However, I do not consider that, read as whole, that decision lays down the principle that the test for interference with public rights of navigation equates to that applied in the case of highways and other public rights of way on land, and therefore that any obstruction which is more than *de minimis* amounts to an actionable nuisance. Much of the reasoning in this and in other decisions dealing with navigation issues is fact-sensitive. For example, Mellish LJ recognised that in other cases it might be possible to say that there are "spots in a river where space is not wanted" for navigation and "where that which would otherwise be a nuisance might not be such an obstruction of the highway as to make it the duty of the court to interfere" (page 431).

98. In Iveagh v Martin [1961] 2 QB 232 Paull J was of the view that an injunction could be obtained to remove an obstruction which "seriously interferes" with public rights of navigation (p 273). That view is consistent with some of the earlier dicta. In R v Betts (1850) 16 QB 1022 it was stated that the mere erection of piers in a navigable river to

support a bridge was not actionable. Instead the true question was one of fact for the jury, namely whether "a damage occurs to the navigation in the particular locality." In R v Shephard (1822) 1 LJOS 45 it was held that whether an obstruction produces inconvenience for the public in the exercise of rights of navigation is a question of fact (see also R v Lord Grosvenor (1819) 2 Stark 511 and Denaby and Cadeby Main Collieries v Anson [1911] 1 KB 171, 195-6, 206).

99. On the legal argument I have heard, I would not be prepared to uphold the submission of Mr Laurence QC (see paragraph 69 above) on the legal test to be applied for determining when an interference with public rights of navigation is actionable.

100. Furthermore, I do not think that it is appropriate for the Claimant to ask the Court to decide in a claim for judicial review whether the proposed development would involve an actionable interference with public rights of navigation in the marina or to consider granting declaratory relief on that issue. This is a question of fact which is unsuitable for determination in proceedings of this kind, which are essentially to do with the legality of the decision taken by the Defendant. The challenge to the grant of the marine licence does not involve any factual issue which it would be necessary for the court to determine for itself, unlike judicial review cases which raise, for example, issues of procedural fairness or bias, or the infringement of human rights.

101. Furthermore, it should be noted that since the summer of 2016 the coffer dam to facilitate the carrying out the phase 2 development has been maintained within the marina around the full footprint of that phase, as described in the application for the marine licence, and no complaint has been made by any of the users of the harbour of an interference with navigation (see paragraph 9 of Mr Drabble's skeleton). The Claimant has not disputed that point. There is an air of complete unreality in the Claimant's attempt to argue that the development involves an actionable interference with public rights of navigation.

102. For completeness I should mention a further criticism of the MMO's Decision Report advanced by Mr Laurence QC. He submitted that it was based upon an incorrect legal test for determining whether an interference with public rights of navigation is achievable, or that the reasons given were inadequate. The MMO has no *statutory* duty to give reasons for its decisions. But Mr. Laurence QC accepted that it would not be appropriate to consider the reasons given any more strictly than in cases where a statutory duty exists (see eg. the principles in Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153 and South Bucks D.C. v Porter (No. 2) [2004] 1 WLR 1953). The Decision Report should be read on the basis that it is addressed to persons who are familiar with the issues raised by the application documents and the representations made in response. Self-evidently there is no requirement for the document to deal with every issue which has been raised or to deal with matters in detail. The reasons which are given should not be read with "excessive legalism or exegetical sophistication". Applying these familiar principles, and reading the relevant passages of the Decision Report fairly and as a whole, I do not accept that the decision-maker was purporting to decide whether the proposed works would involve an actionable interference with public rights of navigation (see paragraph 40 above). The MMO was not under any legal obligation to determine any such issue and the reasons given do not

reveal any legal flaw or inadequacy of reasoning.

## Conclusion

103. For the reasons set out above all the grounds of challenge fail and the application for judicial review must be dismissed.

## Application for permission to appeal

104. The Claimant asks for permission to appeal. I refuse the application because I do not consider that the proposed grounds of appeal have a real prospect of success and there are no other compelling reasons for an appeal to be heard.

105. With regard to ground 1, the Claimant now accepts that there is continuity between the licensing and enforcement provisions in the MCAA 2009 and that the latter have a bearing on the proper construction of the former (paragraph 66 of the judgment). But the Claimant attempts to avoid the conclusion drawn in paragraph 85 by re-writing section 91 of the MCAA 2009 so that it refers to "interference with … public rights of navigation" rather than to "interference with legitimate uses of the sea." Furthermore, the proposed grounds of appeal offer no challenge at all to the analysis of the legislation in paragraphs 73 - 89 and 91 - 93 of the judgment. Instead, it simply appears to be suggested that the Claimant's construction of section 69(1)(c) should be adopted because the longstanding remedies identified in paragraph 90 of the judgment would otherwise be inadequate to protect public rights of navigation. The argument ignores the fact that those were the remedies available before MCAA 2009 was enacted and there is nothing in that statute, or in the legislative history, to indicate that Parliament enacted section 69(1) and section 78 so as (inter alia) to create a new mechanism for preventing an actionable interference with public rights of navigation.

106. With regard to ground 2, the application for permission to appeal states that the Claimant no longer seeks a declaration in the present proceedings that public rights of navigation would be infringed by the phase 2 works, on the basis that if he is allowed to appeal under ground 1 and is successful in that respect, the application for a marine licence would have to be re-determined by the MMO who would then have to decide that issue for themselves. It appears that the Claimant would wish to argue in the Court of Appeal that the legal test put forward by Mr Laurence QC for determining when there is an actionable interference with public rights of navigation is correct. However, the Claimant appears to accept that this point could not even be considered unless permission to appeal is granted on ground 1. Because I have refused permission to appeal on ground 1, I also refuse permission to appeal on ground 2.