

JUDGMENT : Mr Justice Lightman: High Court Administrative Division. 26<sup>th</sup> June 2003.

## INTRODUCTION

1. This is an application by the Dart Harbour and Navigation Authority ("the Authority") made with permission granted by me on the 8<sup>th</sup> February 2003 for judicial review of a decision ("the Decision") made by the Secretary of State for Transport Local Government and the Regions ("the Secretary of State") on the 18<sup>th</sup> December 2002 by a letter of the same date ("the Decision Letter"). By the Decision the Secretary of State determined that the Authority had unreasonably refused to grant a licence under section 33 of the Dart Harbour and Navigation Authority Act 1975 ("the Act") to Captain Wyatt in respect of the mooring of his vessel, the Diana Joan, ("the Vessel") alongside St Peter's Quay ("the Quay") in Totnes Devon. The application raises questions of construction of the Act of some importance and difficulty on which I received the greatest assistance from Counsel. References in this judgment to sections are to sections of the Act.

## FACTUAL SUMMARY

2. Dart Harbour is a tidal harbour on the River Dart ("the River") between Totnes in the North and the mouth of the River in the South, the Authority is the harbour authority constituted and incorporated in 1975 by the Act and the jurisdiction of the Authority is limited to the harbour (see section 38). Under section 20 the duties of the Authority include the provision and maintenance of harbour facilities in the River, the taking of such measures as it may consider necessary for the navigation and handling of vessels in the harbour and the turning to account of its resources so far as not required for the purposes of the undertaking. Section 30 confers upon the Authority the power to turn to account land belonging to the Authority (whether or not covered by water) by granting leases or licences to use or occupy. I shall for convenience refer to such leases and licences as "occupational licences".
3. Section 33 (to which the sidenote is "Mooring") confers upon the Authority as harbour authority: (a) the right to place and use "moorings, buoys and similar apparatus" (which I shall refer to together as "apparatus") in the harbour; (b) the right in return for a (management) fee (currently £26) to grant licences to other persons to place and use apparatus within the harbour (which I shall refer to as "harbour licences"; and (c) the obligation in the circumstances specified in section 33(3)(b) not unreasonably to refuse harbour licences and in the circumstances specified in section 33(3)(c) not to refuse harbour licences. So far as material section 33 reads as follows:

*"33(1) The Authority may place, lay down, maintain, use and have moorings, buoys and similar apparatus in the harbour on land owned or leased by the Authority, or in which they hold an appropriate interest, and on any other land with the consent in writing of the owner and lessee thereof.*

*(2) No person other than the Authority shall place, lay down, maintain or use, nor alter, renew or extend moorings, buoys and similar apparatus within the harbour unless he is licensed to do so by a licence granted under this section, nor except in accordance with the terms and conditions upon which such licence is granted.*

*(3) The Authority may from time to time, on such terms and conditions and for such period as they shall think fit, grant a licence to any person to place, lay down, maintain or use, and to alter, renew or extend, a mooring, buoy or similar apparatus within the harbour;*

*PROVIDED that-*

*(a) nothing in any such licence shall entitle a person to place, lay down, maintain, use, alter, renew or extend any mooring, buoy or similar apparatus on land not owned or leased by him or by the Authority, or in which he has no appropriate interest;*

*(b) the Authority shall not unreasonably refuse to grant a licence-*

*(i) to an owner or lessee of any land not leased by the Authority with respect to a mooring on that land;*  
*or*

*(ii) with respect to a mooring or to a mooring or berthing area existing on 4<sup>th</sup> December, 1974;*

*and any question whether the grant of a licence has been unreasonably refused shall be determined by the Secretary of State;*

*(c) in any case to which both heads (i) and (ii) of paragraph (b) of this proviso apply the Authority shall not refuse to grant a licence, and if on the grant of such licence the Authority impose terms or conditions*

*which in the opinion of the applicant for the licence are unreasonable, the question of the reasonableness or otherwise of such terms or conditions shall be referred to and determined by the Secretary of State. ...*

*(5) The Authority may charge a reasonable fee for the grant of a licence under this section, but such fee shall not exceed an amount sufficient to recover the reasonable costs arising from the application for and the issue of the licence, and any necessary supervision of the mooring in respect of which the licence is issued."*

4. The Act confers upon the Authority powers to regulate vessels within the harbour. Section 3 incorporates provisions of the Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Act"). These include section 51 which confers on the Authority power to appoint a harbour master; section 52 which provides that the harbour master may give directions regulating (amongst other things) the entry into, the going out, the lying in or at the harbour, the mooring and unmooring of vessels; and section 58 which confers upon him the power (in default of compliance with his directions) himself to effect what he has directed. Section 3 of the Act further provides that the power conferred on the harbour master by section 52 of the 1847 Act shall extend to giving directions prohibiting the mooring of vessels in any particular part or parts of the harbour. Section 39 of the Act confers on the Authority the power to make byelaws. By the 1998 Byelaws made pursuant to that section, provision is made that a vessel shall not be moored so as to obstruct in any manner whatsoever the free passage of vessels in the harbour; and that vessels shall moor, anchor, berth and move in accordance with directions of the harbour master. The overriding responsibility of the Authority and the Harbour Master is the maintenance and improvement of safety standards within the harbour, a responsibility emphasised by the Port Marine Safety Code published and distributed in March 2000 which (as the Minister for Shipping says in the Preface) heralds a new approach to management of safety in ports and in particular aims to raise prevailing safety standards.
5. The bed of the River ("the fundus") is owned by various bodies, but the greater part is vested in the Duchy of Cornwall. By a lease dated the 19<sup>th</sup> November 1990 ("the Lease") the Duchy of Cornwall leased to the Authority the fundus owned by it for a period of 21 years from March 1983. The Duchy's leasing powers require that the Duchy reserve the full and fair annual rent. The rent reserved under the Lease is not a fixed sum, but a proportion of total receipts arising from the commercial management of the fundus by the Authority, and it is a term of the Lease that the Authority shall use its best endeavours to enhance the income derived therefrom. Pursuant to its obligations under section 20 and the provisions of the Lease and in exercise of the power conferred by section 30, since 1987 the Authority (as landowner) has granted occupational licences in return for payment of occupancy fees. The status of this charge was considered at a public inquiry held on the 25<sup>th</sup> and 26<sup>th</sup> February 1988. In his report to the Secretary of State ("the Report") the Inspector Mr Vine determined that the charge was one made at common law by the Authority as a person with a proprietary interest in the fundus and a charge that they were entitled to make under section 30. In a letter sent after the Report the Secretary of State said that he did not necessarily accept that the Authority was entitled to make this charge and recommended that the legal position should be clarified. I fully agree with the Inspector, and would only add that, as it seems to me, the provisions of section 20 and the Lease in any ordinary circumstances impose upon the Authority an obligation to exact an occupancy charge.
6. Captain Wyatt is the owner of a converted cider warehouse on the Quay. He has for many years kept the Vessel alongside the Quay secured by warps passing from the fore and aft of the Vessel to bits and cleats and a post on the quayside which are on private land outside the harbour. When tied to these bits, cleats and post, the Vessel floats over or at low tide grounds on the fundus.
7. On the 11<sup>th</sup> May 2000 Captain Dowden, the Authority's Harbour Master ("the Harbour Master"), wrote to Captain Wyatt telling him that he required an (occupational) licence from the Authority to moor the Vessel there and requesting him to find an alternative mooring until a licence was issued.
8. Captain Wyatt replied requesting a mooring licence. The letter is now lost. On the 17<sup>th</sup> May 2000 the Chairman of the Authority wrote back that his request for a mooring licence would be considered by the Authority at its meeting on the 5<sup>th</sup> June 2000. She went on to say that the Authority was entitled to charge a mooring licence and a fundus rental backdated for six years, but they might be waived. The mooring licence was required to keep the Vessel in the berth which it occupied.

9. The minutes of the Authority's meeting on the 5<sup>th</sup> June 2000 read as follows:

*"5. CORRESPONDENCE*

5.1 *Peter Wyatt. The Harbour Master had written to him asking him to move his boat as a licence is required to be allowed to moor on Authority fundus. Mr Wyatt states that he has kept a boat on the wall for 11 years and that he owns the wall. The ownership of the wall is not in question. Mr Wyatt's boat 'Diana Joan' is moored over fundus leased by the Authority and it grounds on this fundus at low water. The boat is therefor (sic) on or over land leased by the Authority and the Authority is entitled to either ask for the boat to be removed from it's (sic) property or to levy a charge. Prescriptive rights do not apply in this case.*

5.1.2 *It was proposed by Mr Watson and seconded by Mr Hawkins and carried unanimously that, 'following the Board meeting, the Harbour Master should write to him asking him to remove the boat as under the Act the boat is a navigational hazard and is also on DHNA fundus. If he complies past fundus rental payments will be waived.'"*

10. On the 7<sup>th</sup> June 2000, the Harbour Master wrote to Captain Wyatt stating that the Authority was not prepared to "permit any unauthorised mooring on or over the river bed that they lease from the Duchy of Cornwall".

11. On the 14<sup>th</sup> June 2000, Captain Wyatt's solicitor wrote to the Authority inquiring as to the decision reached at the meeting on the 5<sup>th</sup> June 2000 concerning his request for a mooring licence. The next letter on the file is a latter from the Authority to the solicitor dated the 11<sup>th</sup> July 2000 the relevant part of which reads as follows: *"The Dart Harbour & Navigation Authority is entitled to regulate the position in which 'Diana Joan' is moored as landlord of the fundus of the River Dart.*

*At the meeting of the Authority on 5<sup>th</sup> June the Authority decided that 'Diana Joan' should be moved as it is a navigational hazard and is also moored on fundus leased by the Dart Harbour & Navigation Authority. The same resolution went on to agree to waive the past fundus rental payments to which the Authority is entitled provided that your client complied with my letter of 7<sup>th</sup> June 2000.*

*Your client's request for a mooring licence was not considered at the meeting of 7<sup>th</sup> June 2000.*

*The Dart Harbour & Navigation Authority have at all times adhered to the Dart Harbour & Navigation Authority 1998 Bylaws.*

*In light of the fact that your client has received an instruction from me, as Harbour Master, and presently has his boat on fundus leased by the Authority I would advise you to pass onto your client that his boat should be removed immediately. The wall the vessel is moored to has nothing to do with this matter, and furthermore no prescriptive rights apply.*

*I hope that this fully explains our position and that I can now rely on your client's co-operation."*

12. Captain Wyatt did not move the Vessel and on the 24<sup>th</sup> July 2000 the Harbour Master again required it to be removed as occupying the fundus leased by the Authority, and in default threatened to move it himself. Captain Wyatt replied in a lengthy letter dated the 3<sup>rd</sup> August 2000. After complaining that his request for a mooring licence had been considered in committee and not by the Authority as a whole, in paragraph 3 he went on as follows: *"...3. Article 33 of the Act (reference H) defines the requirement for a 'licence to moor'. Para 3(b) states – 'the Authority shall not unreasonably refuse to grant a licence –*
- (i) to an owner or lessee of any land not leased by the authority with respect to a mooring on that land; or*
- (ii) with respect to a mooring or to a mooring or berthing area existing on 4<sup>th</sup> December 1974;*
- and any question whether the grant of a licence has been unreasonably refused shall be determined by the Secretary of State;'*

*The term 'mooring' is not defined in law. The most authoritative definition is in 'The Oxford Companion to Ships and the Sea' and makes it clear that the term refers to the buoys, chains, anchors and gear which comprise the mooring and not the space which the moored vessel occupies. Diana Joan is not moored to the wall at St Peter's Quay but **berthed alongside**. No where [sic] in the Act or the Bye Laws is there any requirement for a 'licence' to berth alongside a private jetty. Quite obviously, the Act was framed at a time when the traditional rights of landowners to keep boats on or secured to, their property was recognised! If the term 'mooring' is used to include a berth alongside then the gear which comprises the mooring – the bollards, bits and rings, are in the case of St Peter's Quay, all on private property. The Quay has been a 'berthing area' since 1863 (the date on the former warehouse walls) at least."*

He then invited the Authority to reconsider its decision of the 5<sup>th</sup> June 2000, accepted his probable liability to payment of rent for the fundus and indicated his preparedness to pay this rent.

13. On the 7<sup>th</sup> August 2000 the Authority reconsidered the position. The minute reads as follows:  
"...2. MR WYATT  
2.1 The Chairman read out a letter she had received from Mr Wyatt.  
2.1.1 This was discussed but the Board were still of the same opinion that as landlords we have absolute rights and Mr Wyatt does not have his facts quite right.  
2.1.2 It was then proposed by the Chairman seconded by Mr E Strouts and resolved that 'No licence would be granted to Mr Wyatt and if 'Diana Joan' reappears alongside St Peter's Quay the Authority will use it's [sic] powers as landlords and authorise the Harbour Master to remove the boat.'"
14. On the 14<sup>th</sup> August 2000 Captain Wyatt made a complaint to the Secretary of State that the Authority had unreasonably refused his application for a licence to moor. He went on:  
*"I enclose (enclosure 2) a copy of article 33 of the Dart Harbour and Navigation Authority Act 1975. This act (sic) was framed rather badly in a more gracious age, when owners of river bank had a traditional right to berth their boats on that bankside. The term 'mooring' has, as far as I can determine, no legal definition. The 'Oxford Companion to Ships and the Sea' which is probably the most authoritative book of seamanship definitions makes it clear that a 'mooring' is the buoys, chain and anchors (i.e. the gear) that make up the mooring and not the space occupied by the moored vessel. Diana Joan is not 'moored' but berthed alongside. No where [sic] in the act is there a requirement for a mooring licence for vessels berthed on a private quay, although article 33(3)(b)(ii) does mention the term 'berthing area'. If it is accepted that an alongside berth is indeed a 'mooring' then in my case, the 'gear' – the bits, rings and warps are on private land and meet the conditions of article 33(3)(b)(i).*  
...  
*I am prepared to pay a rental for the fundus at the normal rate and I am also prepared to pay for a licence under the terms of article 33(5) of the Act.*  
*I now submit that I have been unreasonably refused a 'licence to moor' if I indeed need one and would ask you, the Secretary of State, to arbitrate in accordance with the conditions laid down in article 33 of the Act."*
15. Correspondence then ensued between the Secretary of State and the parties. The Authority contended that section 33(3) conferred on the Secretary of State no jurisdiction to entertain the challenge by Captain Wyatt to its decision of the 7<sup>th</sup> August 2000 to refuse to grant (as landlord) a licence to moor alongside the Quay and (going beyond this) defended its decision on environmental policy grounds and on the ground that the mooring represented a danger to navigation. Most particularly the Authority challenged the existence of any jurisdiction on the part of the Secretary of State on the grounds that: (1) the application to the Authority made by Captain Wyatt and refused by the Authority was for the exercise of the Authority's power under section 30 to grant an occupational licence to use part of the fundus (and not of its power to grant harbour licences for moorings under section 33); and (2) if (contrary to the Authority's primary contention) Captain Wyatt's application could be regarded as an application under section 33(3) for a harbour licence to use the bits, cleats and posts for mooring the Vessel in the harbour, section 33 had no application since the bits, cleats and posts were outside the harbour. On the 1<sup>st</sup> October 2001 the Secretary of State wrote to both parties saying that, subject to any comments from either party, he was minded to issue a decision that he had jurisdiction to determine Captain Wyatt's application under section 33 of the Act, that the Authority had not given adequate reasoning or justification of their mooring policy, that there was no evidence to suggest that the mooring represented a danger to navigation and accordingly that the licence applied for had been unreasonably refused. The Authority and Captain Wyatt made further written submissions and on the 18<sup>th</sup> February 2002 the Secretary of State published the Decision Letter.
16. The Decision Letter recorded the Authority's objection to the exercise of jurisdiction by the Secretary of State on the ground that the Authority's decision had been merely a decision under section 30 to refuse an occupational licence to berth on land owned by the Authority. But the Decision Letter did not go on to consider or deal with this objection. It may be noted that the objection was dealt with in a manner of speaking in the earlier provisional decision letter dated the 1<sup>st</sup> October 2000, but the reasoning in question in that letter was quite properly abandoned in the Decision Letter itself.

17. The Decision Letter went on to hold that: (1) for the purposes of section 33 apparatus is to be licensed though situate outside the harbour if it is to be used by a vessel within the harbour; and accordingly a licence could be granted in respect of the bits, cleats and post if they were to be used as attachments for ropes securing vessels moored within the harbour; and (2) section 33 enabled occupational licenses to be granted to moor vessels on and over land belonging to the Authority if the land in question was a mooring or mooring or berthing area on the 4<sup>th</sup> December 1974. The relevant part of the Decision Letter reads as follows:

*"Although it is agreed that section 33 does not apply to the placing of the moorings being used by the appellant, because they are outside the area of the harbour, the Diana Joan when using the moorings, is within the harbour. There is therefore a question as to whether section 33(3) applies in respect of the grant by the Authority of a licence to the appellant which enables him, while within the harbour, to make use of a mooring which is itself outside the harbour.*

*It is to be noted that section 33(1) refers to the placing, laying, maintaining, using, etc of moorings. It is also noted that section 33(2) and (3) of the 1975 Act and the proviso (a) to section 33(3) all refer to the placing, laying down, maintaining or use of moorings. Thus placing and using are given in the alternative in section 33(2) and (3) and the proviso to (3). This suggests that a licence may be given for either the placing of a mooring within the harbour or for its use within the harbour. Further, proviso (b) to section 33(3) refers to a mooring or a mooring or berthing area. This suggests that section 33(3) applied to a mooring in its sense of apparatus and a mooring in its sense of an area in which a boat may be moored. As the proviso is a limitation on section 33(3), it cannot therefore have a wider application than that of section 33(3). The reference in the proviso to both a mooring and a mooring area therefore indicates that section 33(3) is intended to deal with both the apparatus and the area within which it is to be used. Thus in section 33(3), the Secretary of State considers that Proviso (b)(ii) provides that the Authority shall not unreasonably refuse to grant a licence with respect to a mooring area or berthing area within the harbour which was existing on the 4<sup>th</sup> December 1974, whether or not the mooring apparatus itself is within the harbour.*

*The Secretary of State has therefore concluded that the refusal of the licence is subject to the determination of the Secretary of State as to its unreasonableness, in accordance with the Dart Harbour and Navigation Authority Act 1975."*

18. The Decision Letter went on to hold that the area alongside the Quay where the Vessel was berthed had been a berthing area before the 4<sup>th</sup> December 1974 within the meaning of section 33(3)(b); that the refusal of permission to keep the Vessel alongside the Quay on fundus leased by the Authority on environmental grounds was unreasonable; and that the preponderance of evidence suggested that the mooring did not represent a danger to navigation. The Secretary of State accordingly determined that the licence requested had been unreasonably refused.
19. The Authority applied for permission to seek judicial review of the Decision on the 14<sup>th</sup> May 2002. The Acknowledgement of Service and Summary Grounds were lodged on the 10<sup>th</sup> June 2002. Permission was refused on paper on the 12<sup>th</sup> July 2002. On the 18<sup>th</sup> July 2002 the Authority renewed its application. At a hearing on the 9<sup>th</sup> September 2002 Silber J adjourned the application for three months to enable the parties to consider mediation. The Authority has at all times been anxious to proceed with the mediation process. But the Secretary of State was not prepared to participate in any mediation process: he insisted that any mediation should proceed between the Authority and Captain Wyatt alone. And unhelpfully Captain Wyatt was not willing either to pay half the costs of mediation or take part in a mediation paid for by the Authority alone because "he who pays the piper calls the tune". The application accordingly had to proceed to a full hearing.

#### QUESTIONS OF LAW

20. At the hearing before me a series of issues of law were raised requiring determination. These included (but were not limited to) challenges by the Authority to the jurisdiction of the Secretary of State to entertain the invitation of Captain Wyatt to adjudicate on the reasonableness of the Authority's decision and (assuming that such jurisdiction was established) a challenge to the criteria for testing the reasonableness of its decision applied by the Secretary of State and the rationality of the Decision itself. These challenges raise general issues of law which the parties are anxious that I should resolve and

which I shall address in turn. The Authority also raises a series of other challenges which (for reasons which I shall explain) I can deal with relatively summarily

**(1) Relationship of sections 30 and 33**

21. The Decision Letter raises questions as to the relationship between sections 30 and 33 and whether section 33(3)(b) authorises the grant of an occupational licence. The Authority is vested by the Act with the power under section 30 to exploit by the grant of occupational licences for valuable consideration its ownership of land and under section 33 (as harbour authority) to grant harbour licences in return for a management fee to place and use apparatus within the harbour. There can be no question of the power to grant harbour licences and exact fees under section 33 displacing the power to charge fees for occupational licenses granted under section 30 as arose in **Ipswich BC v Moore and Duke** [2001] EWCA (Civ) 1273. The scheme clearly provides for both powers to be exercisable concurrently. Further the grant of a harbour licence under section 33 cannot dispense with the need to obtain a grant of an occupational licence from the Authority (if owner) under section 30 or from anyone else who may be the owner of the fundus: see section 33(3)(a). A grant of a harbour licence under section 33 may be valueless without a grant of an occupational licence under section 30, but that does not mean that the grant of a harbour licence under section 33 in any way dispenses with the need for a grant under section 30. But the facts that a licence under section 33 would be valueless without a grant of an occupational licence under section 30 and that a grant under section 30 will not be forthcoming may be a good reason for refusing a licence under section 33, for the grant of the licence under section 33 in those circumstances would serve no useful purpose and the fee exigible under section 33(5) would be paid for no practicable purpose.
22. It is important to point out (contrary to the passage in the Decision Letter previously cited) that section 33, and in particular section 33(3)(b)(ii), does not contemplate the grant of an occupational right to moor. The whole section is concerned only with licensing the placing and use of apparatus in the harbour. Section 33(3)(b)(ii) merely provides that the Authority cannot unreasonably refuse a licence to place or use such apparatus with respect to a mooring or to a mooring or berthing area existing on the 4<sup>th</sup> December 1974. In case of such a mooring or such a mooring or berthing area, the same occupational licence is required as in respect of any other mooring or area: only in respect of the section 33 harbour licence is the applicant's path eased.
23. Whilst, as I have already said, the powers under section 30 and section 33 are distinct, they are both powers conferred on the Authority for the purposes of fulfilling its statutory function: see **R v Somerset County Council ex parte Fewings** [1995] 1 WLR 1037. That consideration must inform every exercise of the Authority's powers. Accordingly if the fulfilment of its functions requires the placing or use of apparatus by an applicant for a harbour licence under section 33, and the fulfilment of its functions likewise requires the grant of a licence under section 30, the Authority would be required (at any rate in any ordinary circumstances) to agree (as well as to the harbour licence) to the grant on reasonable terms of the occupational licence under section 30.
24. In the light of this examination of sections 30 and 33, it is apparent that the holding of the Secretary of State that section 33 authorised the grant of occupational licences on or over land belonging to the Authority if the land was a mooring or a mooring or berthing area on the 4<sup>th</sup> December 1974 is wrong in law.

**(2) Location of Apparatus**

25. The question raised is whether (as held by the Decision Letter) a licence is required under section 33 in respect of the bitts, cleats and post, though they are outside the harbour, if they are used by the Vessel in the harbour. This question requires consideration of the purpose underlying the provisions of section 33 as well as the language of that section.
26. As it seems to me, the purpose of section 33 is to complement the sections vesting in the Authority control over vessels using the harbour by giving the Authority control over apparatus within the harbour and in particular its installation, maintenance and use. The safe and efficient management of the harbour requires control over both. The safe and efficient use of the harbour does not require control over installations outside the harbour: where a vessel moored within the harbour is attached by ropes to

such installations, the Authority is vested by the other sections of the Act with control over the vessel and its mooring: there is no need for any recourse to section 33.

27. Turning to the language of sections 33(2) and (3), the issue raised is whether the words "*within the harbour*" govern the words "*moorings, buoys and/or similar apparatus*" or the verb "*use*". The former is clearly correct for two reasons. First the words "*within the harbour*" immediately follow and qualify the preceding nouns and the verb "use" is only one of a number of verbs in the subsection and none of the others is apposite to any acts to be done in respect of apparatus situate outside the harbour. Secondly the word "moorings" connotes tackle in the harbour itself. I have been taken to a number of authorities and textbooks to obtain definitions of the verb "*to moor*" and the noun "*mooring*". The verb "to moor" has no technical meaning. A vessel may be "moored" to the shore or alongside: see e.g. **Liverpool & North Wales SS Co Ltd v. Mersey Trading Co** (1908) 99 LT 863 at 867-8). But the nouns "mooring" and "moorings" have been judicially defined as "*a mode of anchoring a vessel by means of a fastening in the ground, either an anchor or something heavy or a chain and buoy, as will allow a vessel picking up the buoy when she returns to it and so coming to rest*" per Lord Esher MR in **A-G v. Wright** [1897] 2 QB 318 at 320-1. The nouns are likewise defined in a series of works cited to me e.g. as "the ground tackle laid to keep a vessel at a certain position in a harbour when she has secured to or picked up the mooring buoy" (the *Sailing Dictionary* by Joachim Schult); "*gear usually consisting of anchors or clumps, cables and a buoy to which a ship can secure*" (*Mariners' Handbook* 7<sup>th</sup> ed); "*a permanently placed anchor with a pendant and buoy to which a boat can be secured*" (*Modern Seamanship* by Dan Dodds); and "*a permanent position in harbours and in estuaries to which ships can secure without using their own anchors*". (The *A-Z of Sailing Terms* by Dean and Kemp). The word "moorings" in section 33 connotes tackle in or above the water in the harbour itself: it does not extend to apparatus on land e.g. a capstan or the bits, cleats and post which secure the Vessel in this case. This meaning is confirmed by the context, namely legislation where the jurisdiction of the Authority is limited to the harbour, and by its use in the collocation of words "*moorings, buoys and similar apparatus*". The Secretary of State accordingly was wrong in law in holding that the Authority could or should grant a harbour licence to use the bits, cleats and post.

**(3) "Unreasonably Refused"**

28. The issue raised before me is whether the word "unreasonably" in section 33(3)(b) means "Wednesbury unreasonably" (i.e. irrationally) or whether there is a lower test for interference with the Authority's decision by the Secretary of State. The Secretary of State clearly adopted the latter view, and the Authority challenge this view as erroneous in law.
29. The meaning of the word must in all cases turn on its statutory context. The very high threshold of "*Wednesbury unreasonable*" has been adopted as the public law test of the validity of decisions of bodies entrusted by Parliament with competence to make administrative decisions. Judicial restraint is called for in this context in exercise of the judge-made judicial review jurisdiction and this is reflected in the requirement for proof of irrationality. There are however statutory contexts where this construction is inapposite and, in place of the public law test, what is called for is a straightforward factual test based on all the material before the reviewing body: consider **Reg v Hampshire CC ex parte W**. *Times Law Reports* June 9<sup>th</sup> 1994. The present case is clearly an apposite case for the straightforward reconsideration by the Secretary of State in the light of the full facts of the reasonableness of the Authority's decision. The disappointed applicant for a licence already has a right to challenge the decision of the Authority on Wednesbury grounds in judicial review proceedings. For the added protection and safeguarding of the rights and legitimate expectations of disappointed applicants section 33(3)(b) introduces a new two-tier decision-making process. In this context Parliament cannot sensibly have intended by use of the word "*reasonably*" to require that the Secretary of State should apply the same strict test as a judge in judicial review proceedings. The provision of the second tier and the identity of the decision-maker at the second tier militate in favour of giving a common-sense (rather than technical) meaning to the term and affording the applicant a hearing where he can require the merits of his application to be examined as well as the merits of the Authority's decision. The Secretary of State is not free to substitute his own view for that of the Authority, but he can and should decide on the basis of the material before him as a matter of common-sense and common justice whether the previous decision was just, fair and reasonable. This is what the Secretary of State set out to do in the Decision Letter. In my judgment

accordingly the Decision is not open to challenge on the ground that the Secretary of State applied the wrong test of reasonableness.

**(4) The decision of the Authority to refuse a harbour licence**

30. The issue is raised whether the Decision is open to challenge on the ground that there was in fact no prior decision of the Authority to refuse a harbour licence. Section 33(3)(b) commits to the jurisdiction of the Secretary of State the determination of the question whether a harbour licence has been unreasonably refused. The question may embrace two elements. The first is whether there has been a refusal (e.g. whether the delay in dealing with the application is tantamount to a refusal). The second is whether the refusal is unreasonable. I accordingly uphold the Secretary of State's contention that he had jurisdiction to determine both these questions. But regretfully I must hold that he failed to address the question or determine whether the Authority had refused a harbour licence. Beyond this it is quite clear that the Authority only had before it an application for an occupational licence under section 30 and the only decision which it made was to refuse such a licence. It is to be noted that Captain Wyatt in his application was seeking, and seeking only, a licence to berth the Vessel at the Quay: he made no reference at any time to any wish for a licence to use the bitts, cleats or post and indeed he made no reference to them at all. The Secretary of State had no answer to the Authority's contention in this regard. There is no answer and this must surely be the explanation why the Secretary of State left it unanswered. For this reason also the Decision must be quashed.

**DECISION**

31. In the light of the holdings which I have already made, the Decision clearly should be quashed: (1) because the decision of the Authority challenged was not a decision on an application for a harbour licence under section 33, but on an application for an occupational licence under section 30 which is not the subject of review by the Secretary of State under section 33(3)(b). The Secretary of State never addressed this issue; (2) because an application could not be made under section 33 for an occupational licence; and (3) because a harbour licence could not be granted to use the bitts, cleats and post since they did not constitute moorings, buoys or similar apparatus within the harbour within the meaning of section 33. I reject the challenge to the Decision Letter on the ground that the Secretary of State failed to apply the Wednesbury test of unreasonableness in reviewing the decision of the Authority.
32. Going beyond the three successful grounds of challenge to the Decision, the Decision Letter is challenged on a series of further grounds. The grounds of challenge are that the reasoning and content of the Decision Letter are unsatisfactory and likewise the decision-making process was unsatisfactory in that the Secretary of State did not disclose to the Authority representations made by Captain Wyatt prior to the Decision Letter.
33. The parties have however agreed that it is unnecessary for me to examine in detail or elaborate on these further grounds of challenge in this judgment and that it is sufficient for me to say that I consider that these additional grounds of challenge are well-founded and that I would also quash the Decision on these grounds also. In mitigation of the criticisms made of the Secretary of State he was faced with a novel and difficult area of law and practice and his task was not assisted by a degree of confusion in the correspondence between the parties. He did not have (as I had) assistance from Counsel.

**CONCLUSION**

34. I accordingly quash the Decision, holding as I do that the Secretary of State had no jurisdiction to entertain the application made by Captain Wyatt, that the Secretary of State ought to have held that there was no decision by the Authority to refuse an application by Captain Wyatt for a harbour licence and that in any event the Decision and decision-making process by the Secretary of State are unsatisfactory to such a degree as to require the grant of this remedy to the Authority.

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