



Neutral Citation Number: [2022] EWHC 436 (Ch)

Case No: CR-2019-008597

**IN THE HIGH COURT OF JUSTICE**  
**THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**  
**COMPANIES COURT**

Rolls Building  
Fetter Lane  
London  
EC4Y 1NL

Date: 04/03/2022

**Before:**

**CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS**

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**Between:**

**BRADLEY BIRKENFELD**

**Petitioner**

**- and -**

**(1) JOEL EDWARD DENTON**

**(2) RICHARD JOHN HOWESON**

**(3) PAUL HOWARD ROBINSON**

**(4) ANDREW ASHE**

**(5) REBECCA PHILIP**

**(6) PROSPECT MOORINGS 2013 LIMITED**

**Respondents**

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**EDWARD DAVIS QC** (instructed by **SIMONS MUIRHEAD BURTON LLP**) for the  
**Petitioner**

**SIWARD ATKINS QC** (instructed by **TLT LLP**) for the **First, Second, Third and Fifth**  
**Respondents**

**ANDREW ASHE in-person**

Hearing dates: 1-8 February 2022  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE

**Chief Insolvency and Companies Court Judge Briggs:**

**Introduction**

1. Prospect Quay sits east of Wandsworth Park, on what was once a coal depot. In 1997 Peter Banks established a Marina for house boats (the “Marina”). The Marina now has moorings for 18 residential vessels. They are mostly substantial in size. The average vessel at the Marina is between 80ft to 100ft long and 23.5ft wide. Prospect Moorings 2013 Limited (the “Company”) holds a head licence granted by the Port of London Authority (“the PLA Head Licence”).
2. This case concerns two substantial vessels, the Caracoli and Sanctum. It is alleged that Mr Denton, the first Respondent and owner of Sanctum, and Mr Robinson, the third Respondent and owner of Caracoli, moored their residential vessels to the Marina without prior boat approval, and due to a failure to meet rules have not been granted boat approval.
3. The major issue concerns balustrades on the upper deck of the vessels. Thin balustrades joined by wire at a certain distance are said to be acceptable on the upper deck. The balustrades that have caused the dispute are joined with panes of glass. On Caracoli there is a small gap between each pane of glass and the stanchion through which wind may pass, but the gap is not significant. It is said that glass mists (the term “steams up” has been used) in certain weather conditions, reducing the view for other boat owners, and wind forces acting on the glass increase the risk of damage to the Marina.
4. The form of the objection taken by Mr Birkenfeld as petitioner, is that the first to fifth Respondents (who he has referred to as the “cabal”) breached their duties as directors. He says that as directors, “they have applied rules inconsistently, or have ignored them altogether, and, worse, they have done so with the clear intent to advance their own self-interests, which is ultimately detrimental to all the shareholders in the Company”.
5. To obtain the relief Mr Birkenfeld has made this petition claiming that the actions (or inactions) of the Respondents as directors have been prejudicial to members of the Company and the prejudice is unfair.

## **Background**

6. I can take some of the background to the Marina and the Company from the uncontentious parts of the pleadings and licences.
7. The River Thames is subject to 41 river works licences for residential use, accommodating about 280 houseboats, clustered in 11 areas on the tidal parts of the Thames. The earliest licence dates to 1972. Half of the licensees have just one or two boats on the river works, many of which are owner-occupied, or the houseboat is rented out; only five licences are for large sites, some of which are commercially operated, charging annual mooring fees. Some moorings are provided on a long-term sub-licence; a few are occupied by large multi-tenanted houseboats.
8. Prospect Reach Limited (“Prospect Reach”) obtained a river works licence from the Port of London Authority (“PLA”) to operate the Marina in July 1997. The earliest recorded sub-licence was made in August of that year between Prospect Reach and Paul Childs, who obtained rights under the sub-licence to berth 3 at the Marina. This berth is now occupied by Caracoli. At trial the sub-licence dated 21 August 1997 has been referred to as “the Childs Licence”. The Childs Licence was assigned, with consent of Prospect Reach, to Mr and Mrs Robinson for a sum of £366,000 on 16 April 2012.

9. In June 2003 the PLA Head Licence was assigned by Prospect Reach to Prospect Moorings Limited. Prospect Moorings Limited was incorporated by Mr Banks. He was its sole director and shareholder.
10. As well as his interest in the Marina, Mr Banks was involved in the development of the quayside to construct apartments and other amenities. The evidence, that has not been contradicted, is that Mr Banks was concerned to ensure compliance with the river works licence and jealously guarded against the admission of a vessel that may reduce the value of the land and water developments where boat designs were unsympathetic to the mooring. This was achieved by including a clause within sub-licences “in the interests of conserving the visual amenities of the Marina” requiring an applicant to produce “to the Company on application for a mooring detail of the design appearance and air draught of the vessel to be moored”. Prospect Moorings Limited controlled the grant of sub-licences (and therefore the admission onto a berth) to new applicants.
11. The Company was incorporated in December 2012 by Mr Nicholson. He was its first director and, at the time, the sole shareholder.
12. The Company’s objects are to oversee the ownership and management of the Marina, and to hold safe the Marina as an investment for the benefit of the holders of berths or moorings, as well as the other objects more fully set out in article 2.1 of the Company’s articles of association.
13. Although sub-licences had been granted by Prospect Moorings Limited, the licensees were not shareholders in that company. Mr Nicholson explained that it was his aim to provide a more democratic Marina where the licensees would have a greater say in its management. The Company’s constitution allotted licensees a share: one share for each berth.
14. It was not until October 2014 that the PLA Head Licence was assigned to the Company.
15. The Childs Licence was the operative licence after the Company took the head licence, but variations of the licence were soon produced. The grant of a sub-licence in the form of the Childs Licence provided permission “during the continuance of this Licence to place and maintain within the Marina for the sole purpose of mooring the vessel or other such vessel in substitution as the Company may approve in writing in consultation with the Marina Residents Association...”. The Marina Residents Association (“MRA”) comprised the licensees.
16. The MRA:  

“shall consist of one representative for each boat owner who shall have one vote in the residents association and the company shall have one representative who shall have two votes.”
17. It is agreed between the parties that the procedure to approve a vessel is different from the grant of a sub-licence. A feature of the Childs Licence is that the approval decision was for the Company alone. The Company was provided with the power to approve a vessel in writing in consultation with the MRA. It was not obliged to take account of any opinion given by any member of the MRA or the MRA as a collective, save where the

MRA unanimously approved a vessel. In such a case the Company could not unreasonably refuse to approve a vessel. It could be said that unreasonable refusal was contemplated and the Company was entitled to act unreasonably unless the MRA unanimously voted in favour of a vessel mooring at the Marina. By the licence the Company was not enjoined to reject an application where the MRA did not want a vessel on the Marina.

18. Mr Nicholson gave evidence that the Childs Licence was negotiated with Mr Banks, who wanted to have as much control over approvals as possible. He explained that the consultation requirement was a very small concession that resident vessel owners should be entitled to have a say, even if that say was ignored. Mr Banks was not attracted by the idea of being under an obligation to have regard to the MRA, where the MRA was a diverse group of boat owners who may have diverse views: Paragraph 4(iv) provides:

“In the interests of conserving the visual amenities of the Marina to present the Company on application for a mooring details of the design appearance and air draught of the vessel to be moored within the Marina...and it shall be in the Company’s discretion in consultation with the Marina Residents Association as to whether such a vessel shall be allowed to moor within the Marina PROVIDED ALWAYS that the Company shall not unreasonably withhold such approval in the event that such application carries the unanimous approval of the MRA.”

19. There were e-mail exchanges between Mr Snell and the first and third Respondents as to the meaning of the proviso. Mr Snell says he understood it to mean that approval required unanimous consent by members of the MRA. The importance of this is that his understanding informed his thinking regarding the approval of the vessels owned by Mr and Mrs Robinson and Mr and Mrs Denton. The e-mail traffic at the time demonstrates that Mr Snell was deaf to an alternative view that the proviso only operated to trigger an obligation on the Company not to unreasonably withhold approval if all members of the MRA approved a vessel.
20. The first meeting of the board of directors was held on 6 October 2014. Mr Nicholson was the sole director and shareholder. Twelve boat owners were present. Mr Nicholson expressed the view that this was a good turnout. The principal business was the allotment of shares. Of the allotments it is notable that Mr and Mrs Robinson were allotted one share (they did not have a boat on the Marina at that time), Cholso Ltd was allotted a share (managed and owned by Mr Nicholson) and Mr Snell was not allotted a share. Mr Snell gave evidence that there may be tax implications if he held a share. There is no evidence that he has taken an assignment of a share or part share since the initial allotment or that he is the beneficial owner of a share. In so far as it is contentious, I find on the balance of probabilities that he is not the holder of the legal title to a share in the Company. This is consistent with the production of a proxy for an AGM in August 2019 provided by Silja Truus to Mr Snell. No other proxy has been disclosed.
21. Returning to the first meeting, two further matters arose. First, the appointment of additional directors was discussed but no appointments were made, and secondly it was agreed to form a working party to create a new form of sub-licence to align with the democratic ideology embodied by the allotment of shares.

22. At the time of the meeting and until September 2017 the Article of Association provided:
- “A decision of the directors is taken in accordance with this article when all Eligible Directors indicate to each other by any means that they share a common view on a matter.”
23. An Eligible Director was defined as a director eligible to vote. A resolution was to be passed by a simple majority in accordance with the model Articles applicable at the time. As is apparent, Mr Nicholson was the only *de jure* director in the period to 1 February 2015. By Model Article 4 the shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action but no such special resolution invalidates anything that the directors may have done before the passing of such a resolution.
24. The minute of the first meeting records Mr Nicholson saying “The Future of the pontoons is now in our hands. If we want to make changes and can find a way of doing so, we can.”
25. The Childs Licence required a vessel to be either:
- i) the vessel known as Vrouwe having a maximum length of 24.4 meters and a maximum overall width of 23 feet and 6 inches and a maximum overall air draught (excluding and mast or safety railings) of 14 feet; or
  - ii) a replacement boat approved under clause 4(iv) or clause 2 where the upper deck shall be no more than two thirds of the overall length of the vessel.
26. Clause 2 of the Childs Licence referred to Vrouwe “or such other vessel” that complied with the dimension requirement in 16.1, in substitution as the Company may approve in writing.
27. It was said during trial that the Childs Licence was unworkable as the MRA had been disbanded. I am not sure that is correct, since the MRA was never an association or formal body but did comprise those interested in the admission of new vessels to the Marina. In closing there was some concession that the Childs Licence was workable and did not prevent approval of a boat coming to Marina under its terms, where the decision on approval was primarily a decision of the Company.
28. A different form of licence was produced for Sanctum owned by Cholso Ltd (the “Cholso Licence”). There are some relevant differences between the two licences namely:
- i) The mechanism for approval required an application to be submitted that provided details of design, appearance and dimensions of the replacement or new vessel;
  - ii) The maximum air draught excluded “any mast, safety railing (or similar)”; and
  - iii) A simple majority of shareholders entitled to vote was sufficient to secure approval.
29. As foreshadowed, on 1 February 2015 additional directors were appointed to the board. Mr Nicholson was joined by Vikki Nelson, Joeske Van Walsum and Kate Robinson - all resigned on 3 October 2016. They were succeeded by Gary Snell, Paul Robinson, Joel Denton and Richard Howeson. Joel Denton resigned on 18 January 2017 to be appointed

again between 24 April 2019 and 9 December 2020. His last period serving as a director coincided with the appointment and resignation dates of Mr Robinson's tenure as director. Gary Snell resigned on 27 March 2019 and Becky Philip and Andrew Ashe were appointed on 6 August 2019. Mr Birkenfeld and Mr Bonham have not acted as directors. The post of director does not bring with it any financial benefits.

30. Over the years since the Company took the head licence from Prospect Reach existential threats have occupied the minds of the residents of the Marina. The first concerned the term of grant from the PLA, the second the supply of essential services to the Marina and the third, erosion. All these matters required the volunteer directors with the help of shareholders to investigate, spend time and energy to manage and resolve difficult situations for the benefit of the community. The e-mail traffic suggests that Mr Nicholson (when a director), the Robinsons, the Dentons, Mr Howeson and Mrs Philip (latterly Mr Ashe) have been deeply involved in finding solutions to these threats.
31. Occupying the directors and shareholders in 2015 was the term of grant in the head licence assignment. The minutes of a combined AGM and EGM dated 6 October 2015 record Mr Nicholson "trying to reach the PLA in order to get [them to] review the PM13/PLA licence". The issue did not go away. At an EGM in February 2016: "A group of shareholders had got together as a result of their frustrations that nothing appeared to be happening and had agreed that they would consider legal action against the Company if an acceptable new PLA Licence was not in place within 45 days of the Meeting." Mr Nicholson and Mr Howeson addressed the meeting in the spirit of a "truth and reconciliation session":

"When the permission was sought from the PLA to extend the pontoons, a Supplemental Licence had to be drawn up to allow this and at that time it was suggested (by John Ball at the PLA) that the Term was altered to be 'in perpetuity'. Naively and unfortunately, this seems to have been executed without any legal advice and only recently it was realized that the wording used in the Supplemental Licence (dated May 2014) did not mean 'in perpetuity' and actually meant that we had only a one year licence. Additionally, neither Charles nor the owners of PML felt the need to inform the PM13 shareholders (all of whom were affected) as a matter of courtesy."

32. The evidence reveals a pattern of failure by Mr Nicholson to inform the shareholders about issues that may have affected them. The failure does not necessarily lead to a conclusion that that he did not do or refrain from doing a thing. I infer that he felt some responsibility and did not want to spread unnecessary concern. In my judgment he has a "sunny side up" personality which was borne out whilst he was cross-examined. When challenged about failing to respond to e-mails concerning Sanctum and not disclosing the measurements of the vessel when asked to do so, he made clear that there was no need to do so since he informed the investigating director (Mr Van Walsum) that the measurements were appropriate. He didn't respond to provide specifics as: "the maximum dimensions are not in doubt"; "I didn't want to stir up anything" and "I felt at the time that probably everything would settle and would ultimately be okay with this".
33. Of note is that a simple majority was used for the approval of Morgenstern on 16 May 2016.



34. Sanctum arrived on the Marina on 22 January 2016. Caracoli followed in June 2016.
35. The evolution of a new licence to approve boats coming onto the Marina was non-linear and slow. It was not until 14 June 2016 a draft of the new boat approval procedure system had been produced. Under the “Notes” the document states “No constructions on roof (except simple guard rails) allowed”. I infer this inclusion was a direct result of Sanctum’s arrival in January 2016”.
36. At the meeting held on 14 June 2016 (which appears to be a meeting of directors) there was a discussion about a new boat approval process. Present at the meeting were Mr Snell, Mr Stricker, Mrs Robinson and Mr Van Walsum. There was a discussion about the approval of a boat known as Monarch. The minute records:

“I said: ‘I have no knowledge of it being approved. Perhaps Ben could tell me the situation.’ and received the following answer 9/6/16.

'We didn't have any approval formula at the time so sent a picture for Charles to circulate for opinion, which I believe did happen. We didn't receive any objections'

To which I have answered:

‘Please could you send me a copy of that email (with the picture) and can you let me have all the relevant measurements of your boat?’

I also mailed Charles, asking what he had sent out.

We have not heard, so until we have, I propose this boat is not approved. (14/6/16)

Rolf comments: yes there was an approval formula (as per the old licence)”

37. The record is of interest as firstly, Mr Nicholson had been asked a specific question, it was in his interest to respond but he did not. Secondly, it provides an example of the board or shareholders questioning the Company’s approval of a new boat to the Marina. Thirdly, the measurements of the new boat appear to be very important. As Mr Nicholson went on to explain in evidence, measurements were of paramount importance as they are set by the PLA. A plan provides the overall length, width and air draught maximums for each berth. Lastly, Rolf Sticker informed the Company that the licence approval would have been made pursuant to the new boat approval system.
38. There were also discussions in respect of Sanctum and Caracoli. In respect of Sanctum complaints were made about the glass balustrade in that at times the glass misted: “I realise that we must act reasonably but propose that this boat is not approved at this point and have written to Charles to say so. Please let me know your views.” Mr Snell agreed. Mrs Robinson explained that Caracoli has glass as does Sanctum. As the issue appeared to be constrained to the problem of misting Mrs Robinson suggested that “anti-steam” be investigated. Mr Snell is quoted as saying: “that it was unanimously approved is not

correct. I for one disagreed with the skylight as there is a 14 foot limit that it would violate. I believe I was not alone in this objection. I have not seen any further design for approval.” In fact, he had been informed that the skylight would be reduced in height. Mr Snell was at this stage adopting the position that he was required to vote in favour of approval if approval was to be granted (unanimously). Mr Van Walsum explained that approval was in the discretion of the directors and that “no unanimous approval is or was ever required. In any case we have moved on and are working on the basis of majority approval now.” Mrs Robinson was not voting but if she had I infer she would have voted in favour of her own vessel. Mr Stricker and Ms Cutress were in favour and Mr Van Walsum proposed that Caracoli be treated “as approved”. He added a condition that there be an investigation into anti-mist glass. The condition meant very little.

39. At a board meeting held on 23 June 2016 where Vikki Nelson, Charles Nicholson Joeske Van Walsum, Rolf Stricker, Richard Howeson were present, the sub-licence presented to the board was “approved” and Mr Nicholson was to “issue the sub-licences forthwith.”
40. On 27 June 2016 Mr Van Walsum was tasked with “monitoring/dealing with approval of new boats...the applicant needs to provide visual images of the proposed boat...to one of the shareholders...who needs to propose that the boat in question be approved or not approved, stating the reasons and forward the application to shareholders...if the proposer approves the boat it goes through provided all shareholders have been given due notice...”. It is common ground that he vacillated when it came to deciding whether the glass balustrades should be permitted as a general principle on a mooring, finally deciding, contrary to some evidence in e-mails, that they should be permitted.
41. The Cholso Licence was executed by the Company in favour of Cholso Ltd on the same day for “the boat known as Sanctum”.
42. On 24 August 2016 the Company and Cholso Ltd assigned the licence for Sanctum to Joel and Jane Denton:

“By a Licence (hereinafter called the "Licence") dated the 27th day of June 2016 and made between the Company and the Licensee, the Company licensed the Licensee to place and maintain the vessel known as Sanctum (the "Vessel") at berth 15 Prospect Quay in the Borough of Wandsworth for a period commencing on 27th day of June 2016 and continuing in perpetuity for a term of 125 years subject to the covenants and conditions therein contained....In consideration of the covenant by the Assignee set out below, the Company hereby grants to the Licensee, a Licence to assign all of its interest in the Licence to the Assignee”.

43. There were other iterations of a draft sub-licence introduced. Ahead of the AGM on 3 October 2016 Mr Van Walsum wrote to all members:

“Somehow at some point Meaghan's boat was accepted into the marina (the first, I believe that was long, tall and wide, and without gangways all round). Don't misunderstand, we have to accept the distant past. What we do about the present (the three new boats) and future is what matters... Unfortunately we do

not know Jane/Joel's [Dentons of Sanctum] position as we have not had the chance to talk to them yet. (We also feel very sorry for them to find themselves with this on their hands). With the Robinsons have (sic) had a rough time getting their stunning boat here and dealing with all the repairs and delays, to which we are most sympathetic. We have had a number of exchanges and have suggested that if they do not agree to withdraw their glass structure, we should get an arbitrator involved or engage a QC to reconfirm the correctness of the Company's position... Paul/Kate's boat [the Robinsons of Caracoli] is not such a major problem for us just now but we do care intensely for the whole community and the long-term well-being of the Moorings, which is what motivates us."

44. Mr Nicholson had departed the Marina by this time. Mr and Mrs Denton had retained £10,000 from the asking price of over £1.7m paid for Sanctum and the mooring in case there was a dispute about the vessel and they felt that there was no need to intervene at this time to argue that approval had already been provided by the Company. Similarly, the Robinsons did not respond to the e-mail sent by Mr Van Walsum to state that Caracoli had been approved and should not be on the agenda. Their reasons for not speaking out are similar. The Marina comprised a close-knit community and as such it was important to obtain a general consensus as: "we wanted to live in harmony with our neighbours".
45. The owners of Sanctum and Caracoli expressed confusion about procedures and outcome of meetings. They articulated the view that some members were in favour of glass balustrades one day and changed their minds the next. The voting system was changing. That may not be surprising where the directors were volunteers and had busy lives working and bringing up families. It is also not surprising that confusion crept in.
46. There was a high number of e-mail exchanges. Mr Robinson gives evidence that he spent some time seeking to encourage those at the Marina who did not approve of the glass balustrades to get on side as he wanted harmony at the Marina. Mr Bonham was one of the more vocal opponents concerned that the glass would "steam up" and reduce the visual amenity. He wrote to Mr Bonham on 20 July 2016:

"Re glass we would like to adopt a policy of try it (as manufactured now) and review. If it steams up or goes opaque we will look to other solutions such as netting. We think it will be fine and largely be minimally visible, but of course we cannot be sure, so need to be open to review."
47. Mr Bonham and Mr Snell were in a minority. It is apparent that the only issue in respect of the glass was the danger that it would reduce the views. Anthea Maton wrote to Mr Van Walsum on 26 July 2016:

"Regarding the discussion on glass, I think we should allow it now, and if, at a later date, the glass is causing a problem, such as becoming opaque, the matter should be dealt with."
48. Meaghan Fitzgerald also wrote to Mr Van Walsum in July 2016:

“The glass balustrades would seem to me to be a problem if they become opaque. If they are see-through and not blocking views then that’s ok with me so as Charles and [Mrs Robinson’s] are already built I’d wait and see.”

49. Paula Bendon (who was to promote a vote on the issue in 2019) wrote to the other members of the Company on 20 July 2016:

“I am approving [the Robinson’s] boat but would like to see a clear glass balcony. A suggestion going forward would be to reduce the size of the glass balcony, so minimising the view obstructed by other boats.”

50. Lyndsay Russell e-mailed Mr Robinson to say that they did not know enough about glass to know whether they would remain clear.

51. At the meeting of members held on 3 October 2016 members returned to the issue of new boat approval and the sub-licence. It was resolved that the issue of boat approval was “to be dealt with in the form of an addendum attached to the Sub Licence, so that it can be improved from time to time.” The minute records:

“Final wording of Sub-Licence Para 5.2 was agreed by a vote with 13 in favour to include the wording “the approval of new vessels...Prospect Mooring New Boat Approval System... PROVIDED ALWAYS that the Company shall only approve such vessel in the event that such application carried not less than a simple majority approval of the Company’s shareholders entitled to vote...”

52. Directly after the vote approving the above wording follows:

“A two thirds majority was suggested instead of a simple majority. This was left to be thought about and hopefully to be concluded at the next meeting.”

53. This illustrates that there was plenty of scope for confusion.

54. The same minutes record that there were objections to the glass balustrade on Sanctum and Caracoli. It was agreed that the Articles of Association should be improved. Mrs Robinson was asked to form a subcommittee to head this task: I was told at trial that Mrs Robinson was or had been a qualified lawyer. She did not appear at trial.

55. At the “next meeting” held on 8 November 2016 it was stated that “The Sub-Licence was not as yet approved as several shareholders wished to suggest amendments to schedule 8”. Schedule 8 was dedicated to new boat approval. The schedule forbids the use of glass balustrades”. It was at this meeting that Mr Robinson suggested “we vote on the glass balustrades.” Mr Bonham, who openly objected to the glass balustrades, is recorded as refusing to allow a vote. The reason given: “the directors perceived [the glass balustrades] contravenes the licence agreement and suggested that if they thought that the balustrades do not contravene the licence then they should agree...” to instruct counsel. It is not part of this case that the chair of the meeting improperly refused a vote, but the fact of the

refusal and the reason provided for the refusal prevented Mr and Mrs Denton and Mr and Mrs Robinson from seeking approval. This is relevant as they are criticised for failing to procure a vote. The refusal presumed that the existing licences were the operative licences where either the Company (Childs Licence) or a simple majority of members (Cholso Licence) could determine a boat approval. It is the petitioner's case that none was voted upon until a meeting in September 2017 when a new form of licence with schedules was approved.

56. Although there are minutes of the management committee, it was common ground at trial that decisions made by the committee did not bind the directors or members under the earlier form of Articles of Association. Unlike the earlier Articles of Association, new Articles were adopted in 2017 that gave specific (but limited) powers to the management committee. Until the adoption it was the function of the committee to make recommendations. The minute of the meeting held on 29 November 2016, where only 6 people were present, records that the new sub-licence including schedule 8 was approved by the committee. The sub-licence and schedule 8 were said to be "attached" to the minute, but the sub-licence appears from the e-mail not to have been attached.
57. There remained in the minds of the management committee some doubt as to whether the sub-licence could be issued to any boat owner since the dispute regarding services continued and the outcome of the dispute had the potential to affect the sub-licence, where the Articles of Association had not been altered. The issue was resolved at a meeting held on 10 January 2017 where Mrs Robinson explained that a new form of sub-licence could not be issued "without the PQ licence". PQ is short for Prospect Quay. The PQ licence was a licence for services. She suggested that all the documents should have a "Legal review" before issue in any event.
58. This did not advance the issue of Sanctum or Caracoli's approval. Despite the earlier declarations that the "New Boat Approval System" had been approved at earlier meetings Mr Bonham raised the issue of amending it at a management committee meeting in April 2017. I infer that the management committee did not, at this time, have the final version of the boat approval system. The next management committee meeting took place in February 2018. Prior to that was an Extraordinary General Meeting ("EGM") in September 2017.
59. The EGM on 27 September 2017 was well attended: Gary Snell (director), Richard Howeson (director), Nick Bonham (meeting chairman), Joel & Jane Denton, Lindsay Russell, Charles Nicholson, Joeske Van Walsum, Anthea Maton, Gill Cutress & Rolf Stricker, Paula Bendon, Paul Robinson (for the first half of the meeting by phone), Kate Robinson (second half of the meeting) and Dan Philip. It was at that meeting that the new Articles of Association were approved and adopted.
60. This EGM assumes some importance in these proceedings. It is argued that it was at this meeting that the new Articles of Association (the "New Articles") were adopted and provide, under article 4.7, that any new vessel to be berthed at the Marina must be "approved in accordance with all rules and regulations as set forth by the sub-licence of [the Company]".
61. The New Articles do not specify the version of sub-licence, but it is argued that that this is a reference to a form of sub-licence purportedly approved and adopted by the Company

at the same meeting. It is common ground that the New Articles were approved and adopted at the meeting. The minutes of the meeting, in my judgment, make this clear:

“Ratification of the “new” Articles of Association. This was presented by Gary Snell who explained that a few corrections have been made after a number of discussions with the shareholders - the chairman of the meeting asked the shareholders present to ratify the corrected Articles. All the shareholders present affirmed that the new Articles should be adopted.”

62. There is a dispute as to whether a new form of sub-licence was approved.
63. Other items were raised at the meeting such as the erosion issue (completion of the riverbed work had not been completed), insurance, electricity supplies and pontoon floorboards.
64. The next event was the Annual General Meeting held on 24 April 2018. The minutes of the EGM held on 27 September 2017 “were tabled and approved.” There followed a report from the treasurer and new sub-licences were provided by Mr Denton and Mr Snell. The minute does not record how many shareholders received the new sub-licence but in oral evidence Mr Denton said that five (including Mr Birkenfeld) took the sub-licence. Progress was made on the erosion issue with the insurers offering to pay 90% of sheet piling: sheet piling was recommended and approved by the PLA.
65. Under the item “any other business” Mr Snell proposed a motion that “Ben [Byrne] should come to a conclusion with regard to how we can amicably sort out the balustrades problem”. The resolution passed was that in the absence of an “accepted” compromise solution within 30 days, “a vote by the shareholders as controlled by the Articles of Association and the Sub-licence agreement would be arranged”. Mr Byrne did not put forward a compromise solution within that period and accordingly no compromise solution was accepted.
66. The minutes of the EGM held on 9 December 2020 record that the directors had commissioned a safety report on behalf of the Company, following recommendations in the PLA Sep 2020 publication ‘a Safer Riverside’. No one at the meeting objected to the commission. The minutes record:

“The report by Beckett Rankine, one of the companies recommended by the PLA in the publication, makes a number of safety recommendations and is attached with the AGM notice.”
67. In considering the Beckett Rankine report the shareholders wanted “James Hickson to manage the process of dealing with the recommendations contained in the Beckett Rankine October 2020 Safety Report”. The report is summarised as follows:

“The report also specifies requirements (2.4) and makes recommendations (3.3) regarding edge protection for individual boats. Whereas the directors believe the responsibility for safety on board boats belongs with the boat owner, it is also

clear that there is a risk not only to boat owners but also to the company and its management if we insist on maintaining regulations that stand in the way of boat owners meeting these modern safety standards.

We will therefore be seeking the views of shareholders to indicate which one(s) of the edge protection specified in section 2.3 of the report that they would like to see permitted on boats. For the avoidance of doubt, this would simply be to allow boat owners to meet modern safety standards. It does not require them to make changes as ultimately, responsibility for safety on board boats belongs with the boat owner.

The types of edge protection in the report are as follows:

- a) Clear glass balustrades, 1,100mm high that comply with BS 6180:2011 – ‘Barriers in and about buildings - Code of Practice’
- b) Tight woven stainless-steel mesh balustrades 1,100mm high that comply with BS 6180:2011
- c) Curved hand-railing 1,100mm high that comply with BS 6180:2011
- d) Fencing with vertical members 1,100mm high that comply with BS 6180:2011”

68. A new boat arrival was approved. Amendments were proposed to the licences. The chair explained: “Note that the directors cannot change anyone’s [existing] licence without their agreement”.
69. The minutes record that Mr Denton and Mr Robinson thought their position as directors were no longer tenable given that, as far as the directors were concerned: “whatever they do is challenged as prejudice or inappropriate.” Reference is made to the “toxic environment at the moorings” and difficulties arising from “the current litigation”. A vote of confidence in the directors was taken. Mr Snell, Mr Stricker and Mr Bonham abstained while at the same time declining to stand as directors. The remaining thirteen members offered their confidence. Mr Ashe is noted for saying that all shareholders needed to vote in favour, otherwise the position of director would be untenable. It was resolved that “outside directors to manage the company” should be investigated.
70. On 1 February 2021 the directors, Messrs Howeson, Ashe and Mrs Philip, circulated an agenda for the EGM (to be held on 16 February 2021) that included a proposal that schedule 8 and 9 of the 2018 Sub-Licence be incorporated into a handbook for members. If boat approval was added to a handbook rather than a licence, it was thought, there would be more flexibility to change the conditions for approval when the need arose. The vote was carried.

71. Another item on the agenda concerned the safety rails. This was contentious. One safety rail proposal made by Paula Bendon was that a boat owner may install clear glass balustrades.
72. The minutes of the meeting held on 16 February 2021 record members being invited to put forward alternative safety rail solutions, but none was forthcoming. Mr Birkenfeld had written to the directors: “why hadn’t the directors done anything about health and safety before?” Mr Snell raised “a point of order” noting that “glass” was a live issue in legal proceedings and by voting on the issue all shareholders could be ensnared by the proceedings and “that could be anything from derivative actions...”
73. The installation of glass vote was carried: it is recorded as having a majority with 71% in favour.
74. One matter that Mr Robinson repeatedly stated in cross-examination was that he was concerned to take down the glass balustrades and erect a different form of safety rail (to protect his three children) as there was no consensus as to what reasonable safety rail (that would safeguard a child from slipping through a bar or under a metal string between two posts) would be well received. It was not until the AGM on 16 February 2021 that it was resolved that safety rails (110 cm high) with a curved hand railing or fencing with vertical members would be an acceptable alternative.
75. Mr Snell was a witness supporting the petition for unfair prejudice. In his written evidence he explains:
- “In summary, the Moorings are a construction of piles driven into the South bank of the Thames riverbed in Wandsworth, to which a series floating pontoons are attached so that they can fall and rise with the tide. The pontoons are essentially a series of floating walkways to which boats are moored and which carry various service cabling and pipework. The Moorings thereby provide the means by which river house boats can be permanently moored.”
76. Mr Snell is the occupant of a vessel at berth 4 of the Marina which sits opposite Caracoli at berth 3 held by Mr and Mrs Robinson. These berths are at the further reaches of the Marina extending into the River Thames. Due to their positions on the Marina they are more exposed to the forces from the Thames, such as the tide, than those positioned nearer land. The berths furthest from land are subjected to the effects of passing shipping traffic, the wind, tide and wave height. The PLA guidance is that in normal times:
- “The tidal rise and fall can be as much as 7m and the flow can reach 4 knots (more around bridge, piers, moorings etc.) so attention must be paid to both the direction and the strength of the tide and the stream.”
77. Expert evidence agreed that 4 knots is the “normal maximum” but exceptional weather makes for greater extremes and challenges.
78. Mr Snell and Mr Bonham (another supporting witness) gave evidence that the physical condition of the Marina is important for safety and functionality. It requires maintenance.



The evidence is that this is particularly so given that some vessels are large: “the moored boats, which move with the wind and the tide ... can exert considerable forces on the Moorings. The boats are moored closely to pontoons, to piles and to other boats. Therefore, if they come loose or move too much within their berth, they can cause huge damage to other boats and the Moorings themselves.” Marine engineer experts gave evidence about the effect of glass balustrades to the Marina’s structure. The evidence supports the view that any increase in surface area increases the risk. The addition of glass may make some difference where severe conditions conspired.

79. Mr Birkenfeld does not live on the Marina.

80. I now turn to the pleaded case.

### **Letter before action and the pleaded case**

81. On 5 August 2019 Mr Birkenfeld sent a letter before claim. The letter of claim stated that Mr Denton and Mr Robinson were in breach of duty by failing to recognise that they had a conflict between their personal interests and those of the Company and prevented the Company from “addressing the problems caused by the facts that the Vessels contravene the established rules...” Curiously the letter before claim acknowledges that Mr Denton and Mr Robinson hold “old form” sub licences and cites schedule 8 to the 2018 Sub-Licence before reaching the conclusion that the “Vessels have not been approved”.

82. The pleaded case is essential to claims made under section 994 so that the Respondents know the case they have to meet, and the court can keep the proceedings within manageable bounds: *Re Tecnion Investments Ltd* [1985] BCLC 434 at 441; *G&C Properties Limited* [2019] EWCA 2046 Civ at para 35 et seq. This is important to have in mind since part of the cross-examination of the Respondents concerned Mr Robinson’s involvement in organising the Bendon vote and any conflict that arose. It was accepted that the issue was not pleaded and did not form part of the case. I shall not make findings on the issue.

83. The plans (renderings) for Sanctum circulated prior to its arrival included a glass structure on the upper deck. No director or member of the Company opposed the glass structure before Sanctum arrived at the Marina or for 6 months after its arrival.

84. In respect of Caracoli it is said that there was a failure to provide drawings that included the glass balustrades prior to her mooring at the Marina. The evidence supports the position that at the time Caracoli was under construction the Company knew of the intention to add glass.

85. In relation to both vessels the glass was fitted whilst moored at the Marina. The principal reason for fitting at the Marina is that it was thought unwise to fit the glass prior to towing the vessels from the ship builder in Southampton.

86. The pleaded case in respect of Sanctum is that Mr Denton did not obtain the approval of the Company for Sanctum in accordance with clause 4(iv) of the Cholso Licence with the Company, nor did he obtain approval under the 2018 Sub-Licence.

87. The pleaded case in respect of Caracoli is that Mr and Mrs Robinson did not obtain the approval of the Company for Sanctum in accordance with clause 4(iv) of the Childs Licences with the Company, nor did they obtain approval under the 2018 Sub-Licence.
88. The basis for asserting unfair prejudice is that the directors are in breach of their duties owed to the Company. The duties relied upon are the statutory duties as provided by the Companies Act 2006 (“CA 2006”).
89. It is pleaded that there was a conflict of interest when Mr Denton and Mr Robinson were directors in that they kept their vessels at the Marina in the absence of approval. The best interests of the Company included a duty to keep the Marina safe and to conserve “the visual amenities” of the Marina. It is averred that the glass balustrades:
- i) Interfere with light and the views over the river;
  - ii) Reduce the circulation of air; and
  - iii) Cause or risk damage to the infrastructure of the Marina.
90. In respect of the vote concerning the glass it is pleaded that the 2018 Sub- Licence:
- “was unanimously approved by the members of the Company at the annual general meeting held on 24 April 2018, on the basis that it would then be entered into by all Berth-holders. However, neither Mr Robinson nor Mr Denton has entered into the sub-licence. The sub-licence contains an express prohibition on the use of glass balustrades.”
91. The conflict of interest breach pleaded is that Sanctum and Caracoli were kept at the Marina without approval when it was in the interests of the Company that all members/moorings were intended to be governed by the 2018 Sub-Licence:
- “There was and continues to be a conflict between the personal interests of Mr Robinson and Mr Denton in keeping their boats with their glass balustrades at the Moorings despite the fact that they had have not been approved by the Company, on the one hand, and the interests of the Company in having all Berth-holders under the same form of licence.”
92. It is pleaded that Mr Robinson and Mr Denton failed to agree to be governed by the 2018 Licence.
93. The AGM held on 24 April 2018 and the resolutions purportedly passed are relevant to the petitioner’s case as it is said that the Mr Robinson and Mr Denton were given a 30 day grace period (the “30-day Issue”) in which to resolve the issue of the boat approval or face a vote governed by the 2018 Sub-Licence that (a) expressly prohibits the use of glass and (b) requires a 75% majority in any event (where the Petitioner, Mr Stricker, Mr Bonham and Mr Snell could block the vote being passed):
- “the directors were required to procure that the question of whether or not the glass balustrades on Caracoli and Sanctum were to be allowed be determined by way of a vote of the

members (on the basis that an affirmative result would require a majority of not less than 75% of the Company's members (not including the owner of the boat in question))."

94. Mr Robinson, Mr Denton and Mr Howeson are said to be in breach of duty by failing to organise a vote within the 30-day time frame or within a reasonable time. This particular breach was not advanced with great enthusiasm in closing but it remains part of the case. It is pleaded that "Messrs Robinson, Denton and Howeson delayed any decision being taken..."

95. A vote took place on 4 June 2019 and less than 75% voted in favour of retention of the glass balustrade.

"The result of the said vote of members was that, of the 18 members entitled to vote, 11 voted in favour of allowing the glass balustrades on Caracoli and Sanctum, and 6 voted against (with Mr Robinson and Mr Denton each abstaining on the vote in respect of their own boat)"

96. The glass remained on the vessels and the vessels remain at the Marina. It is pleaded that all Respondents are in breach of duty by failing to give effect to the outcome of the June 2019 vote. Mr Davies QC says in his written argument: "It is the Petitioner's case that by disregarding the outcome of the members' vote and failing to require the glass balustrades to be removed, the directors have breached their duties to the Company" and:

"The failure to abide by the decision of the members in respect of the glass balustrades is prejudicial in itself, because it undermines the integrity of the arrangements on the basis of which members participate in the Company and the value of members' investment. That is quite apart from the ongoing environmental considerations and damage due to windage."

97. The glass balustrades resolution put on the agenda on 1 February 2021 is said to have been circulated in breach of duty. It is pleaded that as a matter of fact the purpose of adding these proposals was to influence or affect "to the personal advantage of the Respondents or certain of them the course and/or the outcome of these proceedings, and absent such purpose, they would not have proposed the glass balustrades resolution."

98. The outcome of the Bendon Vote was that the proposals were passed by a simple majority: 69% majority in favour of the glass balustrades on Caracoli and Sanctum (the Reply disputes whether this figure is accurate although admits that more than a simple majority was secured). It is pleaded that the resolution to withdraw schedules 8 and 9 from the 2018 Sub-Licence was not passed by special resolution (in accordance with the Articles of Association) and therefore had no effect. In respect of the glass balustrade the resolution did not reverse the earlier resolution passed in June 2019 and does not have retrospective effect.

99. In summary Mr Birkenhead claims that the Respondents are in breach of duty for permitting Sanctum and Caracoli to have glass structures, keeping the vessels on the

Marina where a resolution had been passed not to allow glass balustrades and seeking to undermine the negative resolution by putting to members a further vote.

100. The defence to the petition can be shortly stated. The Company did not approve the 2018 Sub-Licence. Accordingly, it did not apply. If the 2018 Licence was approved by the Company, the operable terms for boat approval in June 2019 only applied to new vessels, and not vessels that were governed by earlier licences unless the licensee expressly surrendered the licence that had previously governed the boat's approval and adopted the 2018 Sub-Licence. Accordingly, the terms for boat approval provided by the 2018 Sub-Licence did not apply to Sanctum or Caracoli.

101. In respect of Sanctum, the Cholso Licence was a new grant. Mr Nicholson, the sole director of Cholso Ltd and the Company at the time, circulated images of the boat to all the boat owners at the Marina by an email sent on 13 October 2014. No objections were made. The Cholso Licence expressly gave consent to Cholso Ltd for the mooring of Sanctum. Cholso Ltd sold Sanctum to the Dentons and assigned the Cholso Licence by a deed of assignment dated 24 August 2016.

102. As regards Caracoli, the Childs Licence was assigned to the Robinsons by a deed made on 16 April 2012 and the Robinsons agreed to be bound by the covenants in the Childs Licence. The Company approved and therefore consented to the mooring of Caracoli at berth 3. This was confirmed by Mr Nicholson, the Managing Director of the Company, in an email to the Robinsons sent on 10 July 2016.

103. It is admitted that a minority of shareholders were unhappy with the glass balustrades but averred that the unhappiness was unwarranted.

104. As, it is pleaded in the points of defence, Mr Denton and Mr Robinson had obtained the Company's consent for their respective vessels with glass balustrades, there was no breach of duty.

105. In respect of the 30-day Issue recorded under "AOB" in a minute of the meeting in April 2018, Mr Byrne was to seek to reach a conclusion about how to sort out the balustrades problem "amicably" and in any event it is irrelevant as the licences had already been granted (it is conceded that it is irrelevant if the court were to find prior approval). In any event the AGM on 24 April 2018 did not resolve that in the absence of an agreement within 30-days the shareholders would vote on a special majority. The Respondents plead that "There was some discussion about whether a vote to approve should require a special majority, but there was no agreement to that effect. Absent that agreement, the shareholders can only have agreed that the vote would be a simple majority vote." In any event, so the Respondents plead, delay was not deliberate as the directors:

"...had to deal with an erosion issue on Mr Birkenfeld's berth and (to a lesser extent) with issues arising from his proposed new boat, which was generally considered too large for the Moorings. All this took a lot of time, especially the erosion issue because the board had to deal with various insurers, engineers, the PLA, the Environment Agency and other third parties. The directors were therefore too busy to deal with the problem about the glass balustrades."

106. As regards the move of schedule 8 from the 2018 Sub-Licence to a handbook, the resolution was proposed by Mr Clacher and seconded by Mr Tydeman. Mr Clacher's evidence has been accepted in full.
107. Mr Ashe and Mrs Philip adopt the defence by the first to third Respondents. They both aver that Mr Birkenfeld's real "motive" for presenting the petition is to "build a boat larger than his licence allows and larger than allowed by the Port of London Authority."
108. In reply, it is denied that the 2018 Sub-Licence was not approved and adopted for general use and that there was an agreement and understanding that all members of the Company would adopt it.

### **Witnesses**

109. It is convenient here to provide my assessment of the witnesses.

#### Mr Birkenfeld

110. In his evidence in chief Mr Birkenfeld explained that he expected to join a "rule based" organisation, that he was disappointed to discover he had been subjected to unfair decisions "taken by a cabal" and that Mr Denton and Mr Robinson as directors had acted in conflict of interest "disregarding decisions of the members". He names Mr Snell as the person able to: "detail how the directors have failed to ensure that the correct procedures have been followed as regards obtaining the approval of these boats with their forbidden glass balustrades..." The relationship between Mr Birkenfeld and Mr Snell was not explored in cross-examination, however from: (i) the reliance put on Mr Snell to explain the "detail", (ii) e-mail exchanges between him and Mr Snell and (iii) answers given during cross-examination, it is likely that Mr Birkenfeld's views of the occupants and any unfairness he purported to suffer at their hands was not experienced (if they were experienced at all) by him first hand. The "cabal" are volunteer directors appointed democratically by members. The accusation about disregarding decisions of members is an open-ended complaint without detail or apparent understanding about how decisions are or were made.
111. Mr Birkenfeld was asked about the number of threats he had made against the directors and members to take legal action. He was taken to an e-mail exchange with Mr Snell where, using vindictive language, he made clear that he would use the legal system to crush those opposing his plans:
- "There are two asshole neighbours on the mooring that never met me, never spoke to me, now they claim they do not want me on the mooring after I purchased. No logical or legal reason, just they claim I am not allowed to build a boat and replace Longfellow, jealousy, envy et cetera. I have retained a top solicitor in London and I will get satisfaction through the legal system, and crush them."
112. Mr Birkenfeld's only evidence that two "neighbours" had said that he is "not the kind of person we want" at the Marina is an e-mail sent to him by Mr Snell. Mr Snell says he overheard a conversation where two neighbours talked about a book written by Mr Birkenfeld that included an account of his sexual exploits. Mr Snell advised Mr

Birkenfeld to act otherwise: “the little mafia will have its way by innuendo and prejudice”. Asked how he envisaged satisfaction he hesitated and chose to say:

“I was being attacked with possible litigation in this country first off, but also being slandered by people I have never met, and being accused of certain things. Being not only I am an American but being a Jew, this didn't sit well, considering that I was being slandered behind my back.”

113. He returned to the theme of slander throughout his cross-examination (not experienced by him directly and therefore unable to give any particulars) saying that he had endured: “people attacking me for no reason” and “mobbing”. I find the accusations exaggerated at best. It may be that he genuinely believed that he was under attack and, if his personality type is to take offence quickly, he is robust in defence. I find it more likely than not that his real grievance concerned the rejection of a vessel he wished to build and moor at the Marina. The petition does not mention the “slander” allegations, and in cross-examination by Mr Ashe he was reminded of the warm welcome he received when he came to the mooring: Mr Birkenfeld thanked Mr Ashe for reminding him.
114. Mr Birkenfeld provided another reason for making threats to take legal action. He was being asked to pay rent for his boat occupying a mooring: money he claims he did not owe. He insisted that in turn he was being threatened with a debt claim based on the rent. There is no evidence of such a threat in January 2019. These proceedings are not based on a debt claim. As he raises the issue, and Mr Howeson was asked questions about the rent which he said was due, I observe that Mr Birkenfeld brings no evidence that he paid rent for the mooring he used.
115. A further e-mail exchange between Mr Snell demonstrates that Mr Birkenfeld wanted to obtain approval for his new vessel and that informal feedback from the management committee indicated that the proposed vessel was too large and would require additional piling and consent from the PLA. Mr Birkenfeld wrote to Mr Snell: “I just want to get this sorted. I am spending a lot of time and money, so it is imperative to get this authorised otherwise I have to take legal measures to protect my rights.” Mr Birkenfeld would refer to “protection of my rights” again as a motive for bringing proceedings. His oft used vindictive language triggered an instruction to Mr Snell to vote against a new vessel that Mr Howeson wanted to introduce: “I will not agree to anything...vote against this pathetic boat...let him approve my boat...”.
116. When giving evidence he proved, at times, to be evasive. As an example, he was asked what he thought of a plan hatched by Mr Snell and presented to him to “bring to vote the glass issue...as a pressure to get [the new Birkenfeld vessel] through...”. He first used the tactic of disengagement: “that was Gary’s idea” followed by distraction: “you are taking it a bit out of context...” and then evasion: “you will have to ask Gary...I didn’t live there.” Mr Birkenfeld had written to Mrs Philip stating that he would drop the proceedings if his vessel was approved. It was put to him that he doesn’t care about the glass balustrades and was using these proceedings as leverage to obtain approval for his own vessel. Mr Birkenfeld evasively answered: “if people rectify their malfeasance and mismanagement that was the point.” In my judgment from hearing and observing the witness his evasion was deliberate. Overall, Mr Birkenfeld was an unimpressive and was mostly an unreliable witness. I have considered his evidence at length, and reached the conclusion that, save where supported by contemporaneous documentation or

corroborated from an independent source, his evidence, both written and oral, should be treated with caution.

### Mr Snell

117. Mr Snell describes himself as a retired businessman. He was a more careful witness than Mr Birkenfeld, but his evidence suffered from a failure to adhere to his statement where he stated: “the facts and matters to which I refer are within my own knowledge”. As an example, he gave evidence that he recalled Mr Banks asking that railings be reduced or brought down in the period 1997-2004. He could not have recalled the incident since he did not live at the Marina until 2008. His evidence in cross-examination was that he spoke to Mr Banks when “working on a new licence”. His statement contains many instances of breach of CPR 57 AC paragraph 4. There are instances of his evidence in chief failing to come up to proof. His evidence was that any new boat approval would require “unanimous approval” of shareholders. To support his view, he relied on his own interpretation of clause 4.4 of the Childs Licence and maintained its correctness. Mr Snell proved influential on the Marina infecting other shareholders with misinformation and, in my judgment, he is responsible in part for preventing resolution. One vote against, on his interpretation, would have blocked approval. He was actively seeking to assist Mr Birkenfeld to gain approval for his vessel. The e-mail exchange I have referred to above is suggestive of a manipulative character seeking to trade off one thing against another. On his interpretation of the relevant sub-licence he was able with one vote to block approval and was outspoken claiming that the “system” had to be “legally followed”. Yet Mr Snell was also able to say that the Child’s Licence (or Cholso Licence) had been abandoned and there was an informal understanding that unanimous consent was required. He was incorrect and in my view, as an intelligent retired businessman, Mr Snell knew full well that he was taking the reference to abandonment in a minute of a meeting held in October 2016 too far for the purpose of suiting his own ends. That minute records that “the current scheme is not working and has been abandoned”. That is a long way from an agreement with all boat owners and the Company that existing licences provided granted to licensees for vessels moored were no longer valid.
118. Mr Snell frequently spread misinformation at the Marina. As far back as June 2016 he wrote to a director to explain that a single objection to boat approval was sufficient (it not being necessary for a majority to make the same objection). There is no evidence of such an understanding or evidence of abandonment.
119. Having infected other members with the notion that 100% of shareholders was required for approval he was able to persuade members that a concession was being offered by reducing the voting majority to 75%. There is no reliable evidence that there was any or any settled practice that required 100% of the MRA members to approve new vessels.
120. There is evidence that Mr Snell, for his own reasons, chose not to hear the views of others regarding the interpretation of the “old licence”. In early June 2016 when Mr Van Walsum thought that the approval for Caracoli could be “closed off” as approval had been given, Mrs Robinson spoke with him to explain that there was no requirement for a unanimous vote. He obstinately stuck to his view that “unanimous approval” was required. Mrs Robinson e-mailed Mr Van Walsum to say: “[he] still doesn’t get it”. The evidence of Mr Nicholson, the founding director and shareholder of the Company is inconsistent with Mr Snell’s evidence and more likely to be accurate since he was at the Marina when Mr Banks was in control.

121. Another error made by Mr Snell (likely to be deliberate) that affected his analysis was that he steadfastly believed that renderings circulated by Mr Nicholson did not show glass balustrades on four sides. They did. Mr Snell would not back down when faced with the pictorial evidence under pressure during cross-examination. He said that he “analysed the very drawings carefully”: “to me that looks like shadowing”. His intelligence is demonstrated by his creative responses.
122. Mr Snell visited the boat building yard in Southampton when Sanctum was under construction and gave evidence that he discussed various design matters with Mr Nicholson. He was asked whether he discussed the glass. He accepted he did. His written evidence is that: “it never occurred to me that there would be [glass].” My overall assessment of Mr Snell is that his evidence was motivated by a desire to support Mr Birkenfeld. His oral evidence was at times inconsistent with his evidence in chief and confused. I have reached the conclusion that, save where supported by verifiable contemporaneous documentation or corroborated from an independent source, his evidence, both written and oral, should be treated with caution.

### Mr Bonham

123. Mr Bonham provided one witness statement. He took berth 12 in 2001 and remained there until he moved to the Isle of Wight in 2021. He accepts that his memory of events was not good and that his note taking of meetings was not complete. His evidence in respect of Sanctum was that the glass balustrades were not on the plans. This proved to be an inaccurate memory and, in all likelihood, was triggered by “groupthink” where a small cohesive group tend to accept a viewpoint or conclusion of others within the group. Another example of “groupthink” is his recollection of thinking that “all shareholders need agree” to the glass. That is not to say that Mr Bonham did not have individual concerns. He says he was concerned about the glass steaming up and “as a sailor I was concerned about windage”. His view was that glass was “not allowed under the old licence or the new licence” and he was asked to “write a short note in opposition”. His evidence in chief is that it was agreed that there would be a vote on the glass that would be carried if 75% of members were in favour, however he could not remember this in cross examination. Although not initially agreeing (in cross-examination) on the issue of whether the “old licence” permitted glass he willingly conceded that it was a question of interpretation of the “old licence” and that if the “old licence” permitted glass he would have been willing to consent. He could not explain why he thought the “old licence” did not permit glass and was unable to recall (and substantiate his evidence in chief) that the management committee passed a resolution that any vote in respect of the glass would need to be carried by 75%. He was sure that he did mention that the 2018 Sub-Licence was approved in April 2018 and explained that the minutes of the meeting were circulated to others for comment.
124. Overall Mr Bonham tried to assist the court and not mislead. However, his evidence was not always reliable. He readily accepted that his memory could not be relied upon as events took place some time ago: “I am so sorry, my Lord, I am just trying to remember what happened five or six years ago, and sometimes it is hard for me to remember what happened ten minutes ago”. There are inconsistencies with his evidence, such as not permitting a vote on the glass as a “matter of principle” but agreeing to it where the requisite majority increased regardless of principle, and despite a poor memory he recalled that the Respondents voted in favour of a vote in accordance with the 2018 Sub-Licence where there is an absolute ban on the use of glass (which they deny). He allowed



himself to be influenced by Mr Snell's view of how the Cholso Licence (and Childs Licence) operated and held strong views that were not always supported. On the critical issues such as the meeting in September 2017 and April 2018 I find his evidence unreliable.

#### Mr Robinson

125. Mr Robinson had lived on the Marina renting a berth from Vikki Nelson before acquiring a berth in or around 2012. He gave honest and straight forward evidence. He answered truthfully when he could not recall reading a minute of a meeting or, on questioning, whether he was present at a particular meeting. He was challenged hard about his involvement in instructing Farrer & Co as a director and commissioning a marine engineering report. He agreed to propositions that were not necessarily in his best interests to agree to, such as the concept that every berth should be governed by the same licence; and the circulation of renderings in 2014 did not show glass balustrades. He explained that Caracoli was under construction at the same time (and at the same shipbuilders) as Sanctum and continued to be fitted after Sanctum arrived at her mooring: there had been no complaint about the glass prior to or at the time of Sanctum's arrival. He disagreed that the "old licence was no longer functioning" and gave reasons. I accept his evidence, which was not undermined, that when the glass was installed it did "mist up...but it is for very, very short periods." His evidence under sustained pressure was consistent and I find reliable. His evidence in cross examination regarding the approval provided by the Company prior to the arrival of Caracoli was consistent with his evidence in chief and the evidence given by Mr Nicholson: "I was absolutely clear of mind that [Mr Nicholson] was approving [Caracoli]... we would have been insane, I think, to have spent a seven figure sum building a boat that we didn't think we had approval for".

#### Mr Howeson

126. Mr Howeson gave honest and reliable evidence. He denied that he had "a serious dislike" for Mr Birkenfeld, as he had not had any direct dealings with him: the dealings were with Mr Snell, who appeared to act for Mr Birkenfeld. Mr Snell had withheld contact details for Mr Birkenfeld from Mr Howeson so that he could not contact him direct: "I had to do everything through Mr Snell." It is Mr Howeson who claims that Mr Birkenfeld owes him money and "Mr Snell didn't want to pay it, on behalf of the petitioner." Mr Howeson did resort to legal advice after Mr Snell invited him to do so on the basis that Mr Snell informed him that "he didn't act for Mr Birkenfeld anymore." He was tested on his "alliance" and gave a credible and straight forward response: "I have supported the fact that we need to have safe edge protection on boats, and my reason for my support on the glass issue, particularly with the Caracoli, is I knew we had three young children coming on to a boat..."

#### Mr Ashe

127. Mr Ashe represented himself eloquently and with self-confidence. His questioning of the witnesses for the petitioner was not always relevant and he was tenacious in respect of his questioning about Mr Snell's ownership of a share in the Company. When giving evidence he was careful and conceded that his personal knowledge of events was limited. He recalled a discussion about glass after he purchased the rights to a berth "and thought: well, I'm not bothered about glass anyway." He thought he recalled attending a meeting where Caracoli was approved but could not recall the date or time of the meeting. When

tested he could not be sure. Mr Ashe was not able to spread much light on events and was unsure of what had happened and when: “I wouldn't have even known at the time what approval meant. I had no concept of even what a licence was at that time; and unfortunately, I know a bit more now.” I shall treat his evidence with some caution for this reason.

### Mr Denton

128. Mr Denton gave straight forward and reliable evidence. He was not able to give evidence about the approval of Sanctum in 2016 since he was the assignee of the Cholso Licence. He was questioned from the period February 2018. He perhaps answered more than one question, when neatly summarising his case in cross examination: “In my mind, then and now, both the boat and the glass were approved when we purchased them. A lot of people were unhappy with the glass, I understood that when we bought the boat, and I was always happy - my wife and I were always happy to change the glass if people wanted us to take it down or remove it, and - what we kept coming back to was a simple majority. If more people wanted it down, we would take it down. That's where that comes from.” He explained the “glass vote” was an attempt to make “things easier” in the community. He fairly accepted that the 2018 Sub-Licence had been drafted for “new licence holders” and he produced a version for occupants of berths (even though he was not a director at the time). He qualified his answer, consistent with his evidence in chief, to say that there was no intention that the Robinsons and Dentons would have the licence: “it's...up to each berth holder...some people didn't want a new licence. Some people desperately wanted a new licence in order to be able to transact, sell their boats; a number of people didn't want a new licence and were happy to be governed by the conditions of their existing licence”. Only five berths took the 2018 Sub-Licence. Mr Denton earnestly disagreed with the proposition that he had agreed to a vote to be governed by the terms of the 2018 Sub-Licence. I accept his evidence. Mr Denton made the point in cross-examination that if the 2018 Sub-Licence applied to the existing vessels on the Marina most vessels would fail the stringent requirements, and have to be towed away.

### Mrs Philip

129. In her evidence in chief Mrs Philip explains: “I was appointed director, as part of that role, I decided, along with Andrew Ashe, to review the history surrounding this issue in a bid to try and resolve matters and move things forward, in a positive direction. I was not a shareholder at the time when either Caracoli or Sanctum were brought onto the Moorings, and as such was an independent party.” It was a noble aim and not seriously questioned. Cross-examination focused on her report and her independence. Mrs Philip gave evidence that, although a friend of the Robinsons and Bonhams (she had never met Mr Birkenfeld), she investigated the issue of glass and “came to my own conclusion about that.” She produced her report because “there was a huge issue amongst shareholders, as to what should or shouldn't happen to the glass.” She wanted to “draw a line”. She interviewed many of the shareholders including Mr Snell and Mr Bonham. Mr Bonham gave her “a running history of what happened with the boats...speaking to me in conversation. He did, I think, in a couple of emails, he mentioned the April 2018 minutes.” She accepted that she relied on advice provided by Farrer & Co and having reviewed the licences concluded that the vote should be on a simple majority. Much of the cross-examination was aimed at criticising her approach or failing to take account of one document or another and in particular the April 2018 minute. Her evidence was that she believed, having researched the history of boat approvals, that the two vessels had been approved,

“prior to the Bendon vote, and the Bendon vote was merely a way of Mr Denton and Mr Robinson saying: look, if everybody genuinely hates the glass and a safe alternative can be found, we will take it down”. She explained that the Robinsons and Dentons had informed all members of this. She concluded that Mr and Mrs Robinson and Mr and Mrs Denton did not adopt the 2018 Sub-Licence and that the “old licence” did not require a 75% majority. Mrs Philip was not present at that meeting. The directors commissioned a report on windage as it had been raised in the letter before claim. They are criticised for doing so. She accepted that some of her report could have been clearer, but the criticisms made of the report she produced were highly unlikely to mislead. The report was non-binding, an attempt to heal wounds and bring the community together. It was not intended as legal advice but an objective review. Mrs Philip gave an honest account of her actions and provided truthful and reliable evidence.

### Mr Nicholson

130. Mr Nicholson was an impressive witness. The evidence he gave was simple. From December 2012 to 1 February 2015, he was the sole director of the Company. His evidence is the Cholso Licence amounts to approval of Sanctum by the Company. No other approval was required. The basis upon which the approval was given was that the dimensions of the boat did not exceed those permitted for the particular mooring. He explained this objective measure prevented subjective decision making. Secondly, the Company had given approval for Caracoli prior to her arrival at the Marina. He accepted that the approval had not been given in writing at the time, but that was made good by an e-mail when asked to provide confirmation of the approval in July 2016. He explained that the number of berths was increasing from 14 to 18 and there was need for a new sub-licence but the existing sub-licences were functioning. His uncontested evidence is that the MRA was never “set-up”; “never really actually operated”, elaborating that the “old system of approval was not a [MRA] system, it was a director system”. Asked why he had not gone back to the board to approve the vessels after additional directors had been appointed, his unequivocal response was approval had been provided prior to their appointment: “I don't think there is anything underhand going on here, because it fitted all the dimensions. There was nothing contentious about it, so I just had to get on.” It was put to him that he had never thought he was acting as a director when giving approval: “you never, during this period, actually, in your mind, thought: I am now approving the boat on behalf of the company, did you?” His response: “I thought that a lot.” He added that he was “conscious of this process the whole way through” the approval of these vessels, and that all previous vessel approvals had been approved in a similar manner. The Company did not inform the MRA as a matter of habit that a new vessel had been approved.

131. Mr Nicholson was pressed on many issues including the circumstances surrounding the purported approval of Caracoli. Mr Nicholson’s evidence was that he had thought of the approval as approval by the Company and that he was concerned that the Robinsons would not understand sufficiently the importance of ensuring a new vessel fell within the dimensional parameters set for the berth:

“So, I went down [to the ship builder] more than once and certainly had at least one meeting with the designer of the boat, the guy actually drawing the lines of the boat, to absolutely make it crystal clear that this boat would not be approved if it – if it turned up and it was bigger than the dimensions. So, I was very, very clear with him what the dimensions actually meant.”

132. This is evidence of the witness and sole director of the Company taking his responsibilities seriously. He was tested on the failure to disclose any approval to the directors engaged in producing the new boat approval system. The absence of written proof of approval and the failure to tell the directors provided fertile ground for cross-examination. Despite intense cross-examination and the obvious failure to disclose, he did not seek to avoid the hard questions, providing an honest and credible account of his actions.

### **Legal framework**

133. There is no difference between the parties as to the legal principles relevant to this case. I shall set them out in brief.

134. Section 994 of the Companies Act 2006 provides so far as material:

“(1) A member of a company may apply to the court by petition for an order under this Part on the ground-

(a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.”

135. In *Re Unisoft Group Ltd (No. 3)* [1994] BCLC 609 at 611, Harman J. explained that the words “act” and “omission”:

“.....are wide and anything that the company does or fails to do can be relied upon. But wide as the category of acts may be it is necessary that the act or omission is done or left undone by the company itself or on its behalf. Thus, voting at a general meeting, whether annual or extraordinary, may result in a resolution being passed or defeated. The resolution is, obviously, an act of the company notwithstanding that the votes which pass or defeat it are the votes of members which are their private rights which...can be exercised as they choose. The acts of the members themselves are not acts of the company and cannot found a petition under [section 994].”

136. To satisfy the test of unfair prejudice the acts or omissions have to be unfair and prejudicial. Unfairness is a notion. In *Grace v. Biagioli* [2006] 2 BCLC 70 at [61], the Court of Appeal highlighted the following principles from the speech of Lord Hoffmann in *O’Neill v. Phillips* [1999] 2 BCC 1:

“(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually

take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith"...; the conduct need not therefore be unlawful, but it must be inequitable."

137. Unfairness may also lie in a breach of the fiduciary duties owed by the directors: *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

138. The authorities show that prejudice is not a narrow concept. In *O'Neill v. Phillips* [1999] 1 BCLC 1 at 15, Lord Hoffmann said that "the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed". Prejudice may be found in the form of an economic and non-economic act or omission. More recently Lady Justice Arden explained in *Re Tobian Properties Limited* [2012] 2 BCLC 567 that fairness is contextual, and it is "also flexible and open-textured. It is capable of application to a large number of different situations."

139. In *Re Coroin Ltd (No. 2)* [2012] EWHC 2343 at 630 David Richards J took this further and considered prejudice from the point of view of economic loss and non-economic loss:

"Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of the member as such, without any financial consequences, may amount to prejudice falling within the section. Where acts

complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice”

140. The learned Judge in *Re Coroin* sounded a warning: “if the management had been in breach of duty to the company but no loss to the company resulted, the company would not have a claim against those directors”. Taking that principle and applying the test of unfair prejudice he considered that it would be “difficult for a shareholder to show that nonetheless as a member he has suffered prejudice.”
141. In *Re Tobian Properties Limited* Arden LJ observed that the “courts are also given wide powers to fashion relief to meet the circumstances of a particular case. Parliament clearly intended the courts to adopt a flexible approach to proceedings under section 994, and to be flexible in the exercise of their powers in relation to these proceedings.”
142. Accordingly, the relief the Court may award if unfair prejudice is found to exist, is wide and a matter of discretion.

## **Discussion**

### **Approval of the 2018 Sub-Licence**

143. In providing the background to this petition I noted that the EGM on 27 September 2017 was well attended. The minutes of the meeting were circulated and approved at the meeting held in April 2018. It is common ground that the New Articles were approved. The minutes do not record that the Company approved a new form of sub-licence (the 2018 Sub-Licence) or that it was presented to, considered or subjected to a vote at the meeting.
144. In his oral evidence Mr Snell thought he had presented the EGM with the 2018 Sub-Licence. This was not mentioned in his witness statement. He thought that he had circulated it by e-mail prior to the meeting. Mr Snell provided no basis for his belief. His evidence was shown to be wrong. The e-mail he circulated attached the New Articles only.
145. Not only is there no mention in the minutes (drafted and circulated by Mr Bonham a few days after the EGM) but Mr Bonham states: “Gary Snell and I believe [the minutes] reflect the discussions and outcomes of the EGM.” Mr Robinson gave evidence that he had no recollection of the 2018 Sub-Licence having been circulated for approval. It is true that he was only able to remain at the meeting until Mrs Robinson attended for the remainder, but there is no suggestion that the 2018 Sub-Licence was presented in the second half of the meeting. The minutes as drawn were later approved.
146. Several matters are clear from a reading of the minute. First, the 2018 Sub-Licence (including schedule 8) remained under discussion. Secondly, the minute fails to disclose that a resolution was put to vote, and it follows fails to disclose the outcome of any such vote. And thirdly, the service agreement with Prospect Quay was voted on and approved. Article 42 of the Model Articles provides that a “resolution put to the vote of a general meeting must be decided on a show of hands unless a poll is duly demanded in accordance with the articles.” In my judgment Mr Birkenfeld cannot rely on the statutory presumption that the minutes of the April 2018 meeting are correct and at the same time

rely on the minutes of the September 2017 meeting being incomplete, inaccurate or incorrect.

147. Mr Snell's assertion that the 2018 Sub-Licence was approved at the September 2017 EGM is without contemporaneous documentary support. His recollection is inconsistent with the contemporaneous documents and with the evidence given by Mr Robinson. I find his oral account given in cross-examination unreliable. Any presumption in favour of an accurate minute is, I find, rebutted. Apart from the inconsistencies this finding is supported by the minute of a management committee meeting held on 5 February 2018. The minute records:

“The good news of the day was that finally we are in possession [of] a licence and service charge agreement signed by Prospect Quay Limited and Prospect Moorings 2013 Ltd.”

148. The management committee knew that the service charge agreement may affect any sub-licence and the recommendation not to finalise the sub-licence until the outcome of the service charge agreement was certain. This provides a good reason why the 2018 Sub-Licence was not put to the vote.

149. The 2018 Sub-Licence is different in several ways to the Childs Licence or the Cholso Licence. Relevant to the issue before the court is schedule 8 to the 2018 Sub-Licence which governs new boat approval. The approval of a new vessel requires a members' vote. The vote will only be carried if a 75% majority is secured. There is an absolute prohibition of glass balustrades on upper decks. By clause 5.2 of the 2018 Sub-Licence the Company:

“shall approve the mooring of such vessel... solely in accordance with the regulations set out for the approval of new vessels agreed by the Shareholders from time to time (“the Prospect Moorings New Boat Approval System” (set out in Schedule 8) PROVIDED ALWAYS that the Company shall only approve such vessel in the event that such application carries not less than 75% approval of the Company's Shareholders entitled to vote (and, for the avoidance of doubt, the Licensee shall not be entitled to vote at such meeting in his capacity as a shareholder.”

150. The “New Boat Approval System” in schedule 8 states:

“Roofs (upper decks) can be fitted with railings which should be no more than safety railing height (43.3”). Glass or other materials are not permissible because it forms a visual barrier.”

151. The proposal made by Mr Snell at the meeting under “any other business” that in the absence an acceptance of a compromise a vote take place in accordance with the “Articles of Association and the Sub-licence agreement” must be read in light of the Company's sub-licences with the owner of a vessel. As the 2018 Sub-Licence was not a licence of the Company that licence is excluded from the menu of possibilities. I have no doubt that Mr Snell thought it convenient to raise the vote at the end of the meeting as he believed the statement made by Mr Bonham was either true or he had convinced other members that it

was true. If the 2018 Sub-Licence provided the rules for a vote on existing moored vessels, as contended, the vote was a foregone conclusion. Mr Birkenfeld and Mr Snell would win the day without a vote. This outcome had not escaped the attention of Mr Snell.

152. It is for this reason that those attendees known to favour glass (for whatever reason) are more likely than not to have voted against any proposal that the 2018 Sub-Licence govern a vote that concerned the introduction or removal of glass balustrades from existing vessels. The contention that they voted in favour of such a proposal is contrary to common sense and the run of e-mails prior to the meeting. Further, Mr Denton amended the minutes of the meeting held on 5 February 2018. He explained (convincingly) in cross-examination that he was frustrated by the failure to hold a vote on the glass balustrade and wanted to put the matter behind him. The amendment stated that he thought that there had been some agreement that there would be a simple ballot (by email) on the glass balustrades. The question could be put in “yes” or “no” terms and be carried by a simple majority: “If the vote is no, then subject to the glass being removed the boat will be deemed approved and the new license will be issued. Failure to remove the glass in the event of a majority no vote to glass will mean no new license will be issued and may trigger further action...”. In my judgment, there was no vote as contended for by Mr Birkenfeld.
153. Reliance has been made on the distribution of the 2018 Sub-Licence at the meeting in April 2018. In my judgment the fact of distribution of the 2018 Sub-Licence does not equate to approval at the EGM in September 2017. It is explicable on the basis that Mr Bonham announced at the beginning of the April 2018 meeting that the minutes of the EGM held on 27 September 2017 were approved and that the “salient points mentioned” in the minutes were: “the Articles of Association and the new Licence were unanimously approved.” Members tended to (at that time) trust each other and did not question the accuracy of Mr Bonham’s statement. The statement he made was startlingly inaccurate as I have found, and misleading. This error has fed mistrust between the parties and the likelihood of litigation grew. The mis-statement made by Mr Bonham, and repeated by him at a meeting on 5 June 2018 became embedded: it is little wonder that the will of the Respondents began to wane, as demonstrated by some e-mail traffic in May 2018. It is of course repeated in the argument of Mr Birkenfeld: “It was not until 27 September 2017 that the new form of sub-licence was finally approved, alongside the Articles”.
154. Mr Byrne, charged with seeking a compromise was also convinced by the mis-statement. He wrote an email on 28 May 2018 stating that the Company will proceed “on the basis of 75% required to succeed in the vote as there is no other option mentioned in our base documents.” Mr Bonham was quick to agree.
155. It is true that Mr Birkenfeld was keen to agree to the 2018 Sub-Licence. One possible explanation put forward was that obtaining a new licence assisted him to raise finance. I make no finding as to why he was enthusiastic.
156. Given the failure of the Company to approve the 2018 Sub-Licence it follows that it was not adopted and does not represent a licence of the Company.
157. In my judgment, the Respondents were right to resist the question the misinformation provided by Mr Snell and Mr Bonham. They were not in breach of any duty owed to the Company by countering a false premise upon which the Company was said to operate. I



find that the Bendon Vote was an attempt to reconcile the different community factions. I accept as genuine the language used by Ms Bendon in her e-mail dated 19 June 2019:

“As many of you know we have been trying to resolve the issue regarding glass on the boats Sanctum and Caracoli for some time. As promised on several occasions we (the non-conflicted Directors, Paula and Dick) wish to bring this to a vote and the whole matter to a rapid and sensible conclusion.”

158. The vote proceeded on the basis that the two vessels be “grandfathered” as “they were built under the old licences and Articles”. The outcome of the vote (Mr Snell did not abstain on this occasion), was a clear majority in favour of the glass balustrades on Sanctum and Caracoli. The Respondents were prepared to accept the outcome of the Bendon Vote. Mr Snell, Mr Bonham and Mr Birkenfeld should have been prepared to do so too, however they insisted that a 75% majority had not been reached.

#### Approval of Sanctum

159. It is common ground that a licence exists (dated 27 June 2016) that permits Cholso Ltd to moor Sanctum at the Marina. It is argued that the licence is invalid and that the grant of the licence is not sufficient by itself to evince approval for Sanctum. In support of the position that there was no approval is the failure to consult the MRA, the date of the licence (where the board had increased by the appointment of additional directors) and a position taken on authority (it is said that Mr Nicholson and Mrs Robinson did not have authority to execute the licence on behalf of the Company). Mr Birkenfeld has put the Respondents to “strict proof” that the Company provide authority for the licence. I observe that “strict proof” does not accord with the rules of evidence in a civil case. It is for Mr Birkenfeld to show, on the balance of probabilities, that the licence was granted without the authority of the Company. Nevertheless, this case does not turn on who carries the burden.

160. The factual matrix in which the sub-licence was executed includes (i) a prior distribution of the plans for the build of Sanctum (the renderings); (ii) the renderings showing a glass construction on the upper deck; (iii) no objections having been received from the members of the MRA or shareholders save that the circulation of the renderings should include the measurements. Mr Nicholson had made it clear that the measurements were within those permitted by the PLA for berth 15; (iv) nineteen months after circulation of the renderings a minority of members objected to the glass; (v) Mr Nicholson was known as the owner of Sanctum and lived on her when she was moored at the Marina; (vi) when Sanctum was under construction Mr Nicholson was the only director and shareholder of the Company; (vii) Mr Snell visited the shipbuilder and spoke with Mr Nicholson (on his own evidence) and discussed the glass. Mr Snell did not object to the glass; (viii) at the time the licence was executed the board of directors comprised Mr Van Walsum, Ms Nelson, Mrs Robinson and himself; (ix) I find by inference (no other member of the board has given evidence) from the foregoing that all members of the board knew that Mr Nicholson owned Sanctum and was seeking to obtain a licence; and lastly (x) Mr Nicholson had made it clear that he would be selling Sanctum and assigning the sub-licence.

161. I accept as a truthful account given by Mr Nicholson the following:

- i) Despite no written record of his decision as director and shareholder in the period prior to February 2015, he thought he was exercising a power on behalf of the Company to approve Sanctum;
- ii) He gave considerable and continuing thought to what he was doing when acting on behalf of the Company when considering new boat approvals;
- iii) He was careful to ensure that Sanctum was built to fall within the measurement guidelines for berth 15. He considered that the maximum measurements permitted provided a simple and objective decision making test;
- iv) He was keen for Mr Van Walsum to work through a new sub-licence when he was later appointed director. The aim of a new sub-licence was to provide criteria for new boat approvals arriving at the Marina where, to reflect the self-governing nature of the Marina, the members would have influence;
- v) Even though he had approved Sanctum he was aware that some boat owners would have different views and different values. That did not affect the approval. I accept that he did not inform the shareholders at large as “I was trying to pick my way very carefully because I felt at the time that probably everything would settle and would ultimately be okay with this”; and “because it’s like poking a bees’ nest”. He was prepared to take the longer view on the basis the members would realise that an “approval system that looked backwards was very dangerous as we could all say something is wrong with other boats” and that the issue would be resolved;
- vi) In order to complete the sale to the Dentons he needed the Cholso licence (this was a question in cross-examination and was answered in the affirmative);
- vii) The Cholso licence was not drafted by Mr Nicholson;
- viii) The meeting on 23 June 2016 authorised the licence to be issued to all boats;
- ix) The board of directors authorised Mrs Robinson and Mr Nicholson to execute the Cholso licence; and
- x) At the time of execution of the licence he “didn’t think there was a problem with the boat approval to do with the glass balustrades”.

162. In my judgment, it is more likely than not that Sanctum received boat approval whilst it was under construction at the ship builder after the renderings had been circulated. Mr Nicholson’s evidence that he would not have spent a large sum on building the vessel unless approval had been given represents the truth.

163. I find that Sanctum, as a new vessel (and not a substitute vessel) to the Marina, obtained its licence with the authority of the Company. The licence provides permission to moor the vessel at the Marina subject only to the “terms conditions covenants, rights and obligations set out in this licence.” Later, and with less relevance, the board of directors knew that Mr Nicholson had a personal interest in obtaining the licence and gave authority to issue.

#### Approval of Caracoli

164. Caracoli occupies berth 3 at the Marina. The petition states that: “Sometime after Caracoli originally came to the Moorings, a glass balustrade was fitted around the boat’s superstructure. This glass balustrade had not been included on the original drawings that had been submitted by or on behalf of Mr Robinson to the Company.” It is accepted that the form of licence provided to the Robinsons included clause 4(iv) of the Childs Licence and that approval “was a matter of discretion of the Company.” The case against the Respondents that put them in breach of duty stems from: “Neither Mr Robinson nor [Mrs Robinson] obtained approval of the Company in accordance with clause 4(iv) [of the Childs Licence]”

165. The Robinson’s case is simple. Caracoli was approved by Mr Nicholson at a time when he acted as the decision-making organ of the Company. The approval, not made in writing at the time, was confirmed (in writing) by way of an email sent on 10 July 2016. This e-mail has been characterised as “entirely disingenuous” as he did not express any view on behalf of the Company.

166. Much then depends on the evidence of Mr Nicholson. Mr Birkenfeld argues that approval is implausible given what transpired in the years 2016-2019. His silence is indicative of a lack of conviction.

167. The evidence in chief given by Mr Nicholson on the subject is as follows:

“As I have already explained, under the prevailing sub-licences at the time that Kate and Paul circulated drawings of Caracoli, there was nothing stopping a houseboat from arriving on the Moorings as long as it had director’s approval (being the approval of the Company) and it satisfied the prescribed berth dimensions for the relevant mooring. As explained above, from 14 December 2012 to 1 February 2015 I was the sole director of the Company and therefore had authority to approve designs for new boats on behalf of Caracoli. Although I may not have confirmed this formally in writing, I approved of Caracoli when the drawings were circulated throughout 2013 and 2014.”

168. In cross-examination Mr Nicholson explained why he remained silent at the time drafts of the Company’s amended sub-licences were under discussion. The fact of the silence gives rise to understandable scepticism or cynicism but in my judgment, Mr Nicholson was not making up his reasons. He put the issue of the retention money in respect of Sanctum into context (£10,000 on a sale value of £1.7m) and was asked about his motivation for giving evidence:

“Q. But in a sense, you do retain an interest in relation to the glass issue, don't you?”

A. Well, yes. I was reminded of this, yes. I think I still do. And I say “I think”, because this is something that was not discussed between me and the lawyer”

169. I did not take from the answer provided by Mr Nicholson that he was motivated to give evidence by the notion that he would be in a better position to recover the retention sum. He explained that the retention was in respect of a number of possible issues at the time:

“there was a number of things. So first of all, the paper paint colour- there was an objection to the paint colour and I would have very happily changed the paint colour on the boat should anyone- should there have been any sort of agreement about what colour to change it to. I would have happily cut down the height- there was a conversation about the prow...steps right at the end of the pontoon...there were these things bubbling along...”.

170. In any event the case for Mr Birkenfeld did not close on the basis that Mr Nicholson was giving false evidence motivated by an opportunity to recover the retention or for any other reason. I have said that he was an impressive witness and although this does not mean that all his evidence should be accepted at face value, I accept it as representing the truth on the key issues. I accept his reasoning for not informing Mr Van Walsum in respect of his poll or others on the board of directors that he had approved Caracoli when he was the sole director and member of the Company. It is striking, that Mr Nicholson wrote (by e-mail) to Mr and Mrs Robinson on 10 July 2016 stating that he approved Caracoli when the plans were circulated and continued to do so. The e-mail was never produced by the Robinsons or Mr Nicholson during the discussion about boat approval. This is consistent with his account.
171. It is not argued that the e-mail correspondence is not genuine or not written on the date it bears. The argument against the e-mail constituting written approval developed in the following way. First, it was said that Mr Nicholson was giving his personal permission and not approval on behalf of the Company: see paragraph 130 above. Secondly, that the e-mail was written on request of Mr and Mrs Robinson. And lastly, in closing, it was argued that at the time the e-mail was written, Mr Nicholson was not the sole director and shareholder and he did not have authority from the board. He was cross-examined in respect of the first two arguments. In relation to the first argument Mr Nicholson explained that he approved Caracoli on behalf of the Company: “As a single director of the company, yes, correct”; “Well, I had approved - I had approved the Caracoli, yes.”
172. He went on to explain that during the construction of Caracoli: “the whole way through, I was absolutely worried as anything that their designer or them would come- come up with a boat that was too big for the dimensions...So I went down [to the ship builder yard] more than once and certainly had at least one meeting with the designer of the boat, the guy actually drawing the lines of the boat, to absolutely make it crystal clear that this boat would not be approved if it -- if it turned up and it was bigger than the dimensions.” He disagreed with the proposition that his approval was not in the capacity of director. I find that there was approval, and the approval was in his capacity as director of the Company. There is no evidence that he was being remunerated to travel to the ship builder to ensure Caracoli’s fitness for the berth. His concern that the vessel complied with the dimensional rules is more likely than not to have been a concern of the Company and members than a personal concern. The trouble he took to ensure that the measurements were accurate and not outside the permissible range is consistent with his belief that he had made or was making a decision about boat approval. I find his evidence truthful on the issue.
173. Mr Nicholson acknowledged that he had written the e-mail on request of the Robinsons. It was not suggested that this alone invalidated its content. The e-mail could have been couched in clearer language, it is true, but it need be remembered that Mr Nicholson is not a lawyer and was not anticipating attending court 6 years later to discuss each word and meaning. Having regard to the factual background, the intention is clear.

174. It was accepted by Mr Nicholson that he did not go back to the board of directors in July 2016 to ask it to authorise the approval already given. No authority was cited in argument for the proposition that he was required to do so. It is not suggested that Mr Nicholson did not have authority to approve Caracoli when he was acting as sole director and was the only member of the Company. Once approved by the decision-making organ of the Company, it seems to me that the Company is bound unless there is a vitiating circumstance. None has been advanced. In my judgment, it is axiomatic that there was no requirement for Mr Nicholson to ask for approval of a decision made by the Company prior to the appointment of additional directors. If there were such a requirement every decision of a board would need to be ratified by a replacement board or when additional directors are appointed. That does not represent the law.
175. An issue raised, but not developed in closing argument, focused on whether any approval given for Caracoli was invalid because it had not been reduced to writing immediately after it was given orally.
176. The Childs Licence (where relevant) states: "... to place and maintain within the Marina for the sole purpose of mooring the Vessel or other such vessel in substitution as the Company may approve in writing..." (emphasis added). Caracoli is a "substitution" vessel. The argument is not new. It can be traced back to Roman law where Justinian decreed that a contract required to be evinced by writing was not binding until put in writing.
177. The oral approval given by the Company was substantive and the requirement to put the approval in writing, in my view, procedural. There is no doubt that Mr and Mrs Robinson relied on the oral approval. Mr Robinson testified that the cost of build made it imperative that the vessel was approved before too much money was spent at the shipbuilders.
178. In any event it does not answer the question posed which is whether the procedural element of approval must be made at the same time as the substantive. In my judgment Clause 2 of the Childs Licence (which requires the approval to be in writing whereas clause 4(iv) does not) cannot be read to impose such a temporal condition where none has been expressed: see *L Batley Pet Products Ltd v North Lanarkshire Council* [2014] UKSC 27, where Lord Hodge said that the "starting point is the words the parties have chosen to use."; and the meaning has to be assessed in the light of the natural and ordinary meaning of the clause, see *Arnold v Britton* [2015] A.C. 1619. It was not argued that a term should be implied. Construing the clause applying the principles of interpretation of contracts I find there is no requirement that approval was to be reduced to writing at the same time.
179. In my judgment paragraph 10 of the defence to the petition has been made out.

### **Breach of duty**

180. It is admitted that the Respondents, when occupying the office of director of the Company, owed statutory duties to the Company as provided by the Companies Act 2006. The duties include a duty to exercise their powers for the purpose for which they are conferred (s.171 of the Companies Act 2006); to exercise the powers in what the directors consider in good faith to be likely to promote the success of the company for the benefit of the members as a whole (s.172)); a duty to exercise independent

judgment (s.173); a duty to exercise reasonable skill and care (s.174) and a duty to avoid a situation giving rise to a direct or indirect interest which conflicts, or which might possibly conflict, with the interests of the Company (s.175).

181. All allegations for breach of directors' duties flow from a purported failure to obtain approval for Sanctum and Caracoli.
182. I do not understand it to be contested, given the findings I have made, that the allegations of breach of duty are unsustainable.
183. In my judgment Mr Ashe and Mrs Philip acted reasonably and properly in seeking to find a solution to an impenetrable problem created by Mr Birkenfeld and Mr Snell. At times the Respondent directors were bamboozled by the insistence that the minority were right, particularly in respect of their insistence that unanimous and then special majority voting was required. I accept the evidence of Mr Howeson, Mr Robinson, Mr Denton, Mr Ashe and Mrs Philip (who all gave similar evidence) that they were seeking to find solutions that worked for the whole community. The agendas for the management committee, AGMs and EGMs demonstrate that many of the directors and members were working hard to ensure the Marina had supplies from PQ, resolve erosion issues, provide safe pontoons and to ensure that the moorings were safe for young, old and infirm alike. Mr Ashe asked all members to have confidence in the directors and allow them to work for all. His reasonable offer was met with a negative response by the minority.
184. On the other hand, Mr Birkenfeld, an unsatisfactory witness, was unable to explain his motivation to bring this petition with any great clarity. He was "agitated" because he had "done nothing wrong"; he was "mobbed", "defamed" and upset because he tried to "meet with people" to discuss his new boat proposal. After the letter before claim (but prior to the petition being issued) he sent an e-mail "If my houseboat gets confirmed ... this entire conflict goes away immediately." Mr Atkins led the following questions and Mr Birkenfeld answered:

"Q. It is perfectly obvious from this email, isn't it, that if your boat had been approved in October 2019, you would not have proceeded to issue a petition in December 2019; that is perfectly obvious from this email, isn't it?

A. It is a possibility that that might have happened, yes.

Q. In fact you only issued the petition because your boat had not been approved?

A. No, that is incorrect.

Q. Why else did you issue it then?

A. Because they are wrong, it is right versus wrong and the glass balustrades are wrong.

Q. Well, in your witness statement, you say that you are seeking to vindicate your rights as a shareholder, and in fact all

the other shareholders, to have the company run properly in accordance with the rules?

A. Yes.

Q. But this email tells us you would have been happy to forget all about that if your boat had been approved; that is exactly what it is saying?

A. I just answered you.”

185. In my judgment Mr Birkenfeld brought these proceedings because he thought glass was bad and no glass was good but not exclusively. His motivation included other reasons that had nothing or little to do with unfair prejudicial conduct in respect of his position as member, including putting pressure on the Respondents to vote in favour of a licence he chose to adopt where he required a 75% majority in circumstances where drawings of his vessel showed dimensions that risked breaching the PLA Head Licence.

### **Two other issues**

186. Two further issues flow from my findings that can be dealt with shortly. First the misting of the glass. I accept Mr Robinson’s evidence that the glass “steams up” seldomly and when it does it is for short periods. Secondly, the lack of air on the mooring complained about by Mr Snell after of the arrival of Caracoli. Mr Nicholson explained that there would be less river breeze if a vessel is berthed in front (or behind) another. Mr Snell experienced a time when Caracoli was not berthed in front of berth 4. Mr Snell may be correct that he receives less river breeze than before Caracoli was moored at berth 3, but there is no evidence that the glass balustrade is solely responsible. The Petitioner’s expert marine engineer concludes that that the glass balustrades does alter the circulation of air, but the extent of alteration is less easy to assess. It has not been said that the alteration is material.

187. Lastly, there is a concern that the glass balustrades may affect the structural integrity of the Marina during storms when water flow is exacerbated by flood water. Mr Beck, the expert for the Respondents, does not disagree but having taken a series of measurements and made a number of calculations, concludes that the “additional transverse windage of the glass balustrades on Sanctum adds about 9% to the windage area compared to the no handrail rail clear deck situation. The percentage of the transverse load is far smaller at about 4% of the unfactored loads... There is a larger percentage increase in the longitudinal windage but this only accounts for 5% of the total force and is not the governing case for the piles.” His evidence was that there is a built-in margin of error (he termed it conservatism) as the load conditions “will never occur simultaneously”, and concludes that the vessels have been moored for over 5 years and the additional windage has “not caused any visible damage to the piles, pontoons, or pile guides and is unlikely to do so in the future.” The joint report agreed that the keep loads for Caracoli is 1.86 meters above the pontoon keep level and this increases “the bending moment.” Some work to the keep may be wise as there is a danger that it will “run off the top of the pile, coming free” with the knock-on consequence that the load is transferred to other piles. The increase of load to other piles increases the chances of failure. The experts agree that the actual distribution of loads is “very difficult to determine”, and the risk of “run off” is

not easy to state scientifically. Although there was a difference between the experts, they agree that at the highest the selected loads are “highly unlikely” to occur simultaneously.

188. As I have found that approval was provided to the two vessels under consideration I need not decide between the experts. Any increase in surface area can be said, without too much controversy, to increase risk, and the risk may be calculated mathematically depending on wind speed, current speed, wave heights, wash speeds, berthing loads and whether the load is increased by longitudinal or traverse pressures. It is perhaps worth recording that a difficulty encountered by the experts was that the piles could not be inspected below the level of the riverbed. Mr Towler fairly explained that the Marina is “approaching the point where one would wish to be looking at either revibrating those piles down or looking at perhaps some form of extra work. We are at about a midlife point in the marina”. He was suggesting a programme for maintenance and works should be on the Company’s agenda due to the age of the Marina.

### **Conclusion**

189. The petition is dismissed. I invite the parties to agree an order.