



Neutral Citation Number: [2011] EWHC 1184 (Ch)

Case Nos: HC10C00894, HC10C00969, HC19C00970, HC10C00971

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2011

Before :

MR JUSTICE MORGAN

Between :

**HUMBER OIL TERMINALS TRUSTEE
LIMITED**

Claimant

- and -

ASSOCIATED BRITISH PORTS

Defendant

**Nicholas Dowding QC and Mark Sefton (instructed by DLA Piper UK LLP) for the
Claimant**

David Holland QC (instructed by Eversheds LLP) for the Defendant

Hearing dates: 19th & 20th April 2011

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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MR JUSTICE MORGAN

Mr Justice Morgan:

Introduction

1. On 19th and 20th April 2011, I dealt with a case management conference in four actions where Humber Oil Terminals Trustee Ltd (“HOTT”) is the Claimant and Associated British Ports (“ABP”) is the Defendant. A large number of points were argued and decided at the case management conference. One of the matters considered was an application by HOTT, which was expressed to be made pursuant to CPR r. 35.9, for an order that ABP do prepare, file and serve on HOTT a witness statement detailing the costs of operating, maintaining and investing in the Port of Immingham, and the allocation of those costs to the various operations in the Port. At the hearing, HOTT submitted that it could also rely on CPR Part 18 (dealing with Further Information) or CPR Part 31 (dealing with Disclosure) as the basis of its application. At the conclusion of argument, I informed the parties of my decision not to make the order sought and that I would give my reasons for that decision in due course. This judgment now sets out those reasons.

The facts

2. ABP is the freehold or leasehold owner of certain land and premises at the Port of Immingham. It is also the harbour authority for that Port for the purposes of the Harbours Act 1964: see the definition in section 57(1) of that Act. HOTT is the lessee of parts of the Port under four separate leases. The principal lease was granted to HOTT on 29th August 1970, by the British Transport Docks Board, for a term of 40 years from the 1st January 1970. Pursuant to section 5(1) of the Transport Act 1981, the British Transport Docks Board is now known as “Associated British Ports” i.e. ABP. The parties have referred to the premises demised by this lease as the Oil Jetty and to this lease as the Oil Jetty lease. ABP’s title to the seabed on which the Oil Jetty sits is pursuant to a 999 year lease held from the Crown so that, to that extent, the Oil Jetty lease is an underlease. Nonetheless, I will adopt the description used by the parties and refer to it as the Oil Jetty lease. The other three leases are not material to the matters discussed in this judgment. It is common ground that HOTT has the benefit of Part II of the Landlord and Tenant Act 1954 in relation to the Oil Jetty lease.
3. On 2nd January 2009, ABP served on HOTT a notice pursuant to section 25 of the 1954 Act to end the tenancy of the Oil Jetty on 31st December 2009. The notice stated that ABP would oppose the grant of a new tenancy on the ground of opposition set out in section 30(1)(g) of the 1954 Act. HOTT has duly applied for the grant of a new tenancy pursuant to the 1954 Act in one of the four actions which I considered at the case management conference. ABP has served a Defence to this claim in which it repeats its ground of opposition. ABP has also applied pursuant to section 24A of the 1954 Act for the determination of an interim rent. Directions were originally given for the trial of a preliminary issue in relation to the ground of opposition and, later, it was directed that the application for an interim rent would be tried on the same occasion as the trial of the preliminary issue.
4. The Oil Jetty lease contains a clause which is central to the present issue. Clause 6(a) is an agreement and declaration that:

“The Board shall not without the previous written consent of the Lessees levy or raise any dues in respect of Lessees’ Vessels for calling at or loading or unloading any Lessees’ Oil and Products or goods at the demised premises or using the Berths or any dues in respect of goods handled at the demised premises or passengers using the demised premises or in respect of any vessel for calling at the demised premises for bunkering ...”

5. Clause 6(a) refers to “the Board”. The Oil Jetty lease defined that expression as the British Transport Docks Board. That Board is now called ABP. Further, “the Board” was defined to include the reversioner for the time being immediately expectant on the termination of the lease.

Harbour dues

6. It is common ground that the dues which are the subject of clause 6(a) are the ship, passenger and goods dues which fall within section 26 of the Harbours Act 1964 although, as I understand it, the possibility of the imposition of passenger dues does not arise in the present case. Section 26(2) of that Act provides that, subject to later provisions in that Act, the harbour authority has power to demand, take and recover such ship, passenger and goods due “as they think fit”. The limitation imposed by section 27(1) that certain charges must be reasonable does not apply to ship, passenger and goods due because they are “excepted charges” for the purposes of section 27. By section 30, a list showing the ship, passenger and goods dues for the time being exigible by virtue of section 26 must be kept, open for inspection, at the harbour office. Section 31 provides for a right of objection to ship, passenger and goods dues. The objection may be made by a person with a substantial interest in the matter. Section 31(2) identifies a number of different grounds on which such an objection may be made. Section 31(2)(ii) allows an objection on the ground that the charge ought to be imposed at a rate lower than that at which it is imposed. The objection is made to the Secretary of State. Section 31 lays down some procedural directions as to how the matter is to be dealt with. By section 31(6), the Secretary of State may either approve the charge for a defined period or give to the harbour authority such direction with respect to the charge as would meet the objection to it.

Interim rent

7. ABP’s application for an interim rent under section 24A of the 1954 Act falls to be dealt with in accordance with section 24D of that Act. By section 24D(1), the interim rent in this case will be the rent which it is reasonable for the tenant to pay while its tenancy of the Oil Jetty continues by virtue of section 24 of that Act. By section 24D(2), the court must have regard to the rent payable under the current tenancy but otherwise subsections (1) and (2) of section 34 of the Act apply to the determination of the interim rent as they would apply to the determination of a rent under section 34 if a new tenancy from year to year of the whole of the property comprised in the current tenancy were granted to the tenant by order of the court. By section 34(1), so far as at present relevant, the rent payable under a new tenancy granted by order of the court shall be such as may agreed between the landlord and the tenant or, as in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent) the holding might

reasonably be expected to be let in the open market by a willing lessor subject to the express disregard of four specified matters (one of which is a disregard of certain tenant's improvements).

8. It is common ground that the notional tenancy from year to year for which a rent is to be assessed in accordance with section 34(1) will be a tenancy which contains a provision in the same terms as clause 6(a) of the Oil Jetty lease and that such a clause is not a term "relating to rent". It will follow that the presence of such a term in the notional tenancy from year to year will be a relevant consideration when assessing the rent pursuant to these provisions.

The expert evidence

9. Pursuant to directions given by the court, the parties have served expert valuation evidence on the subject of the amount of the interim rent. The expert valuer instructed by HOTT is a Mr Norman BSc, MRICS and the expert valuer instructed by ABP is a Mr Watson BSc MRICS.
10. In his report, Mr Norman states that the market rent under section 24D (that is before regard is had to the rent under the current lease) is £1.9 million. He referred to clause 6(a) of the current lease and stated that the question of dues did not arise because the annual tenancy assumption and the disregard of tenant's improvements meant that he was required to value a jetty which would not be capable of use for a period of at least 12 months, so that ship and goods due would not fall to be payable to the harbour authority even if clause 6(a) were not present in the notional tenancy.
11. Mr Watson takes an entirely different view. He assessed the market rent for the Oil Jetty as £27,839,500 per annum. He then applied a 10% discount to reflect the assumption of a tenancy from year to year, producing a market rent for such a tenancy of £24,055,000 per annum. It is plain from reading his report as a whole that a substantial part of the rental value he arrived at is attributable to the fact that the tenant under the notional tenancy will be exempted from paying ship and goods dues. He arrived at his rental value of £27,839,500 per annum by taking an average of rents assessed using different valuation methods. One of the methods he used was to consider the rent which would represent an appropriate return on capital. Before addressing the significance of clause 6(a) he arrived at a rent, which would be an appropriate return on capital, of £14,432,000. He then considered the impact of clause 6(a). He referred to the standard charges made at this port. He stated that a tenant with the benefit of clause 6(a), releasing it from such charges, would pay a much higher rent to secure such an advantageous position. In effect for every £1 of dues saved pursuant to clause 6(a), the tenant would pay 75p by way of additional rent to the landlord. He then increased the rent of £14,432,000, arrived at as explained above, to £28,725,000 to reflect the benefit to the tenant of clause 6(a). He then used the figure of £28,725,000 together with figures arrived at by using other valuation methods to produce the average rental value of £27,839,500, to which I have already referred. It is plain from these figures that Mr Watson says that the benefit to the tenant of the presence of clause 6(a) in the notional lease is worth tens of millions of pounds every year.
12. Appended to Mr Watson's report is a report by a Mr Garratt. He is the managing director of a consultancy company in the fields of port, shipping, rail and freight

distribution. He was asked to prepare a report to assist ABP in determining what would be a fair and reasonable rate for ships and cargo dues for movement of bulk oil, and related products, over the Oil Jetty at Immingham. Mr Garratt referred to the power of a harbour authority to charge dues. He referred briefly to Government and EU policy which he said focussed on a number of matters including the need for ports to have resources to cover the fixed costs of maintaining the harbour in accordance with the statutory duty of a harbour authority and the right of the harbour authority to charge a market price. Mr Garratt then referred in detail to the charges made at Immingham and elsewhere. He stated that published tariffs for dues were invariably discounted after negotiation. He considered that the charge which ABP could reasonably make at Immingham would be revealed by considering the rates charged at comparable ports. He concluded that a rate of £1.50/tonne for consolidated ship and goods dues was justified at Immingham.

13. Mr Garratt did not suggest that the amount of ship and goods dues which it would be reasonable to charge at Immingham would be calculated by reference to the cost to the harbour authority of performing its statutory duties and/or carrying out its other functions at the port. Further, ABP's valuer, Mr Watson, did not suggest that an assessment of the additional rent which would be negotiated to reflect the benefit to the tenant of the presence of clause 6(a) in the notional tenancy would be calculated by reference to such cost.

Mr Fitzgerald's evidence

14. In correspondence between the solicitors for the parties, HOTT raised the question of the costs to ABP of performing its statutory duties and performing its other functions at the port. HOTT asked to be provided with disclosure of documents which would show the level and the detail of such costs. ABP served evidence (Mr Fitzgerald's fourth witness statement) which sought to deal with this request. ABP had earlier served evidence (Mr Fitzgerald's second witness statement) in relation to another issue in the case, concerning the applicability of the principles of competition law, which issue was the subject of a judgment given by the Chancellor on 24th February 2011: [2011] EWHC 352 (Ch). HOTT submitted that some passages in this witness statement were relevant to the present issue. I will therefore refer to these two witness statements.
15. In Mr Fitzgerald's second witness statement, he referred to open negotiations which had taken place between the parties at a meeting on 6th April 2010. At that meeting, ABP proposed an alternative to a continuation of the landlord and tenant relationship in relation to the Oil Jetty. The alternative involved a termination of the Oil Jetty Lease and a commercial arrangement under which ABP would control the Oil Jetty and would permit HOTT to use the Oil Jetty and the port on terms that HOTT paid combined ship and goods dues and further charges for cargo handling. In paragraph 14 of this witness statement, Mr Fitzgerald said that harbour dues contributed "to the costs of operating, maintaining and investing in the infrastructure of the Port of Immingham". In paragraph 26 of that witness statement, he said that these charges "were designed to make a fair contribution to the costs of operating, maintaining and investing in the port facilities". Elsewhere in his witness statement, Mr Fitzgerald described in more detail the negotiations in April 2010 and a draft Memorandum of Understanding ("MOU") which had been put forward by ABP as a basis for negotiations.

16. The MOU referred to combined harbour dues at the rate of £1.25 per tonne. This figure was to be subject to annual indexation by reference to RPI. A note of the discussions in April 2010 showed that ABP sought to justify the rate of £1.25 per tonne by reference to comparable charges. That note also showed that, in relation to the suggested charges for cargo handling, “this aspect” should be on a “cost plus” basis. Thus, there appeared to be a difference between the approach to be adopted to the assessment of harbour dues and the approach in relation to cargo handling charges. In the case of the latter, the charge would reflect the underlying cost of the service; in the case of harbour dues, the charge would be based on the rates being charged in comparable circumstances.
17. Mr Fitzgerald’s fourth witness statement specifically addresses the request made by the solicitors for HOTT for disclosure of documents relating to certain costs incurred by ABP in relation to the port and also addresses the request made under CPR 35.9 that ABP prepare and serve a witness statement giving certain details of such costs. Mr Fitzgerald’s fourth witness statement is a detailed one and I will attempt to summarise the main points in it. He explained the background to his second witness statement. He referred to the report from Mr Garratt, to which I have already referred. He stated that HOTT and its shareholders pay harbour dues in relation to other jetties and facilities elsewhere in the port. He said that they had negotiated with ABP the rates payable by way of harbour dues and had never asked for a breakdown of ABP’s costs in any respects in the course of such negotiations. He then dealt more generally with the way in which harbour dues are negotiated with ABP’s customers. He said that neither he nor his colleagues had ever been asked to produce details or analyses of ABP’s costs in any relevant respect. He stated that such costs were not a factor in any negotiation of charges in the commercial market. On that basis, he suggested that disclosure in these proceedings of information about costs was not appropriate.
18. Mr Fitzgerald then put forward other objections to production of the information as to costs sought by HOTT. He stressed the burdensome nature of the original request for disclosure of documents. As to the request for a statement of the costs of operating, maintaining and investing in the port, he stated that it would be extremely difficult to provide such a statement, particularly as plans for investing in the port were constantly changing and were being reviewed. He suggested that allocation of costs between various operations in the port would be arbitrary and artificial; further, it would be extremely difficult, open to a great deal of subjectivity and would take a significant period of time to complete. Finally, Mr Fitzgerald stated that information as to ABP’s costs was commercially sensitive and it would not consider disclosing such information to its customers.
19. I have now referred to the evidence given by Mr Fitzgerald and to the comments in the various experts’ reports. HOTT did not serve any evidence of its own commenting on Mr Fitzgerald’s fourth witness statement. In particular, there was no witness statement from a valuer, to be called on behalf of HOTT, putting forward the opinion that the costs in question would be relevant to the notional negotiations between a landlord and a tenant as to the amount of rent which one would reasonably expect to be agreed for a tenancy of the Oil Jetty, from year to year, containing a clause equivalent to clause 6(a) of the Oil Jetty lease. Further, there was no witness statement from any other expert, to be called on behalf of HOTT, putting forward the opinion that the costs in question would be relevant as to the amount of harbour dues which

would be agreed between the harbour authority and a user of the port. HOTT submitted that there had only been a limited time between receipt of Mr Fitzgerald's fourth witness statement and the case management conference. I suggested to Mr Dowding QC, who appeared (with Mr Sefton) on behalf of HOTT, that I would either have to act upon the evidence which was before me or, alternatively, consider an application by HOTT for an adjournment of this part of the case management conference to give HOTT an opportunity to put in evidence which they would say was relevant to the present point. In the event, HOTT did not seek any such adjournment and Mr Dowding made submissions as to why Mr Fitzgerald's evidence in his fourth witness statement was not conclusive, or even helpful.

HOTT's submissions

20. HOTT made submissions both written and oral as to why the court should order ABP to disclose the information as to costs referred to above. HOTT's skeleton argument stressed that the hypothetical negotiation contemplated by ABP's valuation approach was one in which a port authority demanded an enormous sum by way of rent in return for exemption from harbour dues. It was submitted that the hypothetical tenant would not agree to this without undertaking a detailed analysis of what it would have to pay in the absence of clause 6(a). The tenant would bear in mind its statutory right to challenge the harbour dues under section 31 of the 1964 Act. The tenant would demand detailed information from the harbour authority about the basis of the proposed harbour charges, including cost information, and the hypothetical landlord would agree to provide it.
21. In addition, Mr Dowding submitted that Mr Fitzgerald's fourth witness statement was not conclusive and not even helpful. The court would be concerned with the approach which would be taken by the hypothetical landlord, which would not necessarily be ABP, acting through Mr Fitzgerald. What Mr Fitzgerald had done, or not done, in negotiating harbour dues with HOTT or its shareholders or other customers would not bind the hypothetical landlord who might act differently. Further, it was possible that when Mr Fitzgerald came to be cross-examined in these proceedings he might be persuaded to accept that he would be prepared to reveal information as to ABP's costs in the course of negotiations, particularly in view of the large sums involved in the valuation approach put forward on behalf of ABP. Mr Dowding submitted that it would be most unfortunate if such an admission were to be made in the course of the trial and the trial then had to be interrupted while ABP complied with an order which might be made by the trial judge requiring disclosure of such cost information; better by far, it was submitted, to order the disclosure of this information at this stage and avoid any possible disruption to the smooth running of the trial. He further submitted that even if the hypothetical tenant did not know what the relevant costs were, the hypothetical landlord/harbour authority would know those costs and that knowledge would or might influence the negotiating stance of that landlord/harbour authority.
22. Mr Dowding also drew my attention to two decisions made by the Secretary of State for Transport under section 31 of the 1964 Act in relation to objections to harbour dues. The first of these decisions was dated 25th April 2006 and concerned Wisbech Port and Harbour. That decision concerned conservancy charges. In meeting the objection, the harbour authority had put forward detailed information as to its costs and its income and showed that it had been operating at a deficit. It contended that it was entitled to levy a charge which eliminated the deficit. The Secretary of State held

that the harbour authority was entitled to levy a charge to cover its costs and to assist in reducing the historic accumulated deficit. The second decision was dated 14th October 2010 and concerned Bembridge Harbour. The Secretary of State accepted the recommendations of an inspector who had held a public inquiry into the objection. I was not provided with a copy of the inspector's report. The Secretary of State's decision letter referred to the fact that the inspector had received information from the harbour authority as to its expenditure and income. The inspector appears to have thought that the financial information was incomplete. The inspector appears to have attempted to apportion the harbour authority's costs to the harbour dues which were charged. The ultimate conclusion was that the dues had not been set at an uneconomically high level and the dues were duly approved. Mr Dowding submitted that these two decisions showed that if HOTT did not have the benefit of clause 6(a) and was liable to pay harbour dues to the harbour authority under the 1964 Act, then HOTT would be able to object to the level of the harbour dues levied by the harbour authority and in the course of the Secretary of State's consideration of the objection, it would be likely that the harbour authority would put forward to the Secretary of State information as to its costs in relation to the harbour. In that way, HOTT would obtain access to such information.

23. Based on the above considerations, Mr Dowding submitted that the requirements of CPR r. 35.9 were satisfied and that the court should make the order sought under that rule. Alternatively, the court could make the order sought under CPR r. 18.1(1)(a) or under CPR r. 31.12.

ABP's submissions

24. Mr Holland QC on behalf of ABP submitted that the information sought by HOTT, relating to the costs incurred by ABP in operating, maintaining and investing in the port, was quite simply irrelevant to any question arising in relation to interim rent. He took me to the reports which had been provided by Mr Norman (on behalf of HOTT) and by Mr Watson and Mr Garratt (on behalf of ABP) and he relied upon the fourth witness statement of Mr Fitzgerald. He submitted that the costs in question had no part to play in connection with the hypothetical negotiations between the landlord and the tenant as to the rent payable assessed in accordance with section 24D and section 34 of the 1954 Act. He relied on the fact that there was no statement from a valuer, or other expert, to be called on behalf of HOTT which put forward the opinion that such information would play any part in hypothetical negotiations, whether as to rent or as to harbour dues. As no such opinion had been expressed, no attempt had been made to provide a reasoned basis for such opinion.
25. Mr Holland drew my attention to a further decision of the Secretary of State for Transport in relation to an objection pursuant to section 31 of the 1964 Act. This was a decision dated 30th June 2010 in relation to Langstone Harbour. The Secretary of State accepted the recommendation of an inspector appointed to hold a public inquiry into the objection. The decision letter appended the inspector's report which ran to 68 pages. Although Mr Holland referred to this decision, he did not appear to me to rely on anything in it to advance his submissions. Mr Dowding, in reply, did not make any comment on this decision. Mr Holland also made some general submissions about the differences between three different types of ports, namely, trust ports, municipal ports and commercial ports. He said that Wisbech was a municipal port, Bembridge and Langstone were trust ports and Immingham was a commercial port. It appears from

the many policy documents which are referred to by the inspector in relation to Langstone that there are, or may be, differences between the policies which are to be applied in relation to the different classes of ports. Although Mr Holland summarised the matter as I have described above, and although what he said was not contradicted, I would wish to be cautious about making any specific findings in these respects. I do not think that I have sufficient reliable information to allow me to do so. In view of all these considerations, I think that I need only refer briefly to the inspector's report in relation to Langstone. It appears that the inspector had regard to some financial information as to the expenditure incurred by the harbour authority. The inspector held that the dues levied by the harbour authority enabled it to move closer to a commercial operation so as to allow for proper maintenance of the harbour with a reduced level of public subsidy; this was in accordance with government policy: see paragraph 5.133(3)(i) of the inspector's report.

26. Mr Holland also submitted that the hypothetical tenant who would be negotiating the rent for the Oil Jetty on the terms of a lease which was to include clause 6(a) would not know what the hypothetical landlord's costs would be. That information would simply not be available to any such hypothetical tenant. Further, if one were attempting to assess the level of harbour dues which would be negotiated between a harbour authority and a person wishing to use the harbour, again the user of the harbour would not have that information available to it. Mr Holland submitted that information which would not be available to the hypothetical negotiating tenant or user would be irrelevant to the course of the negotiations and was therefore irrelevant and inadmissible at a trial to determine the amount of the interim rent. He relied on Cornwall Coast Country Club v Cardgrange Ltd [1987] 1 EGLR 146.

Discussion and conclusions

27. The valuation case which is put forward on behalf of ABP assumes that the hypothetical willing landlord which grants an annual tenancy of the Oil Jetty is able to confer on the hypothetical tenant the benefit of clause 6(a) of the Oil Jetty Lease. In order for the landlord to be able to confer on the tenant an exemption from harbour dues the landlord must be able to bind the harbour authority not to levy harbour dues on the tenant. In effect, the landlord must be the harbour authority. I did not understand HOTT to challenge that assumption. In these circumstances, there was no argument before me as to the validity of the assumption made in ABP's case, and I will proceed on the basis that the assumption is correct.
28. Whether the application for an order that ABP provide information as to its costs is made under CPR r.35.9 or CPR Part 18 or CPR Part 31, the information which is sought must at least be relevant to some issue which the court will be asked to try in the course of determining the interim rent. It is no part of the case put forward by Mr Norman on behalf of HOTT that the cost of operating, maintaining or investing in the port is relevant to his assessment of the rental value of the Oil Jetty. Similarly, it is no part of the case put forward by Mr Watson or Mr Garratt on behalf of ABP that these costs are relevant to their assessment of the rental value of the Oil Jetty or the likely level of harbour dues, if the same were to be charged. HOTT has not put before me any material which attempts to show that a valuer whom it intends to call as an expert will wish to rely upon these costs to assess the rental value of the Oil Jetty. Similarly, HOTT has not put before me any material which attempts to show that another expert

whom it intends to call will wish to rely upon these costs to assess the likely level of harbour dues, if the same were to be charged.

29. Although I have not been provided with any material by HOTT which would directly support a finding that the costs in question would be relevant to the assessment of interim rent in this case, I have nonetheless considered whether I should find as a matter of common sense, or by the use of logic alone, that these costs would be relevant to that assessment. My conclusion is that it is not apparent to me either by the use of common sense or by the use of logic that the costs in question will be relevant to the assessment of interim rent.
30. When the hypothetical landlord and tenant negotiate on the rent payable for an annual tenancy of the Oil Jetty they will no doubt take into account a large number of considerations. An annual tenancy granted by a harbour authority and containing clause 6(a) might be considered to be of greater benefit to the tenant than an annual tenancy which does not contain clause 6(a) and which leaves the harbour authority free to levy harbour dues on the tenant. I have deliberately used the word “might” because I do not mean to pre-judge the point made by Mr Norman on behalf of HOTT that if the Oil Jetty is not capable of use for the duration of the annual tenancy, then no dues would in any event be payable. If the presence of clause 6(a) and the consequent exemption from harbour dues is perceived to be a benefit to the tenant, then the landlord and the tenant will wish to consider what sum the tenant should reasonably be expected to pay for the benefit of clause 6(a). As a matter of logic, I can see that the parties might consider that this sum should reflect, to an appropriate extent, the amount of the dues which would otherwise be levied by the harbour authority. The 1964 Act does not lay down any formula for the determination of the amount of harbour dues and it is open to the harbour authority and the hypothetical tenant to negotiate and agree upon the level of those dues. In this way, the parties negotiating the rent for the annual tenancy might wish to reflect the amount of the harbour dues which would be agreed if they were instead negotiating the amount of the harbour dues. However, I do not think that I can hold as a matter of common sense or logic that the negotiating parties would agree a rent, which reflected an exemption from harbour dues, by reference to the costs to the harbour authority of operating, maintaining and investing in the port.
31. There is no necessary connection between the costs to the harbour authority of operating, maintaining and investing in the port and the amount of the harbour dues which it is reasonable to expect would be agreed in a hypothetical negotiation as to such dues. The hypothetical tenant or other user of the port will not have access to information about those costs unless the harbour authority is willing to provide that information. Although a user of the port who does not have the benefit of clause 6(a) and who is therefore liable to pay harbour dues has the ability to object to the Secretary of State about the level of the dues, the hypothetical negotiating tenant does not have that ability. The hypothetical negotiating tenant has the right not to agree to take the annual tenancy but it does not have the right to pursue an objection under section 31 of the 1964 Act in the course of the negotiations as to rent. Further, even if one were to contemplate what would happen in the course of a possible objection under section 31 of the 1964 Act, the harbour authority will not necessarily put forward a case to the Secretary of State which relies upon its costs of operating, maintaining or investing in the port, or some of those costs. I was not shown any

provisions which govern any public inquiry which might be held in the course of an objection under section 31 of the 1964 Act which would lead to the harbour authority coming under an obligation to disclose any costs information to the Secretary of State or to the objector.

32. So far, I have commented on (1) the fact that HOTT has not put forward any expert or other evidence to explain the way in which the costs in question would be relevant to the assessment of an interim rent and (2) my inability by the use of common sense or logic to determine that such costs would be relevant to that assessment. I next ought to consider the evidence which I have from Mr Fitzgerald to see in what way that evidence bears on this question.
33. Mr Fitzgerald's fourth witness statement is emphatic that on all the occasions when Mr Fitzgerald or any of his colleagues negotiated the level of harbour dues with users of the port, ABP did not ever put forward any information as to any costs incurred by ABP either in running the port, or in investing in the port, as a justification for the level of dues which it was seeking to negotiate. Similarly, there has not been any occasion in the course of such negotiations when a user of the port has asked to be provided with such information as to costs. Indeed, Mr Fitzgerald's evidence is not confined to the period of time when he has been employed by ABP; nor is it confined to the port of Immingham. He refers in paragraph 25 of his fourth witness statement to a period of 20 years during which time he has negotiated harbour dues on behalf of ABP and on behalf of other UK port companies and in relation to Immingham and other ports. Further, it is clear from Mr Fitzgerald's evidence that ABP would not be willing to provide information as to its costs whether that reluctance was because the provision of the information would not be regarded by ABP as helpful to its negotiating position or because the provision of such information would be burdensome or because such information is considered by it to be commercially sensitive more generally.
34. Mr Dowding submits that Mr Fitzgerald's experience is not relevant or helpful. Mr Dowding submits that the hypothetical willing landlord will not be, or will not necessarily be, ABP and it will not, or will not necessarily, use Mr Fitzgerald as a negotiator. That may be technically correct. However, Mr Fitzgerald's evidence was not restricted to the attitude of ABP but also referred to the attitude of other port companies. Further, Mr Fitzgerald's evidence referred to negotiations carried on by his colleagues. In addition, HOTT did not point to any feature of Mr Fitzgerald's evidence which I should regard as personal to him or to ABP and which would be unlikely to apply to another harbour authority operating a commercial port like Immingham. Further, HOTT did not put forward any evidence that other harbour authorities, in relation to a commercial port like Immingham, conduct negotiations as to harbour dues in a way which is different from ABP. In view of this state of the evidence, I think that I need only mention in passing and not consider in any detail a difficulty which Mr Dowding's own submission might create for his case, namely, if the hypothetical willing landlord is not ABP, how would the hypothetical willing landlord be in a position to put forward ABP's own information as to its costs at Immingham in the course of negotiations for an annual tenancy of the Oil Jetty.
35. Mr Dowding also submitted that the evidence might look very different at the trial and it might emerge that when Mr Fitzgerald is cross-examined that he would be prepared to agree that, in the course of negotiations as to the rent for an annual tenancy of the

Oil Jetty, he would be prepared to reveal ABP's costs information in order to assist ABP in those negotiations. On the material before me, that possibility seems remote. On the material before me, the information as to costs which is sought by HOTT will not be relevant to the assessment by the court of the interim rent. I do not think that a mere speculation as to a somewhat remote possibility that the evidence at the trial could be different would justify me in ordering disclosure of the information in question at this stage.

36. Mr Dowding also suggested that Mr Fitzgerald's evidence as to the normal course of negotiations as to harbour dues was not relevant to a case where the amount involved by way of harbour dues, or by way of increased rent to reflect an exemption from harbour dues, were as much as tens of millions of pounds per annum. I am not able on the material before me to hold that Mr Fitzgerald's evidence is only applicable to cases involving smaller sums.
37. ABP relied on the decision of Scott J in Cornwall Coast Country Club v Cardgrange Ltd [1987] 1 EGLR 146. That decision was itself based on the decision of the House of Lords in Lynall v IRC [1972] AC 680, a case dealing with the open market valuation of shares in a private company for the purposes of estate duty. The basic point made in Lynall is that when one carries out an open market valuation of an asset, one can take into account the information which would be available in the open market to the notional purchaser but one cannot take into account information which would not be so available. This principle applies equally whether the open market valuation concerns capital value or rental value. Cardgrange applied that principle to a rental valuation, even where the method of valuation was a profits method of valuation and even where the information which was sought related to the actual profits of the business at the actual property which fell to be valued. Cardgrange is not without its critics: see Woodfall on Landlord and Tenant, para. 8-052 footnote 2 and Hill & Redman's Law of Landlord and Tenant, para. A [2385]. Nonetheless, it was followed in Electricity Supply Nominees Ltd v London Clubs Ltd [1988] 2 EGLR 152 where Hoffmann J said that he could not see how information about profitability, which the market did not know, could be relevant to the question of what the market would have thought. HOTT did not submit that I should not follow Cardgrange and, in any event, I clearly must follow the decision of the House of Lords in Lynall.
38. In my judgment, on the material before me, there is no real basis for supposing that the hypothetical tenant negotiating the amount of rent payable for an annual tenancy of the Oil Jetty, which tenancy contains clause 6(a), would be aware of the information as to the costs incurred or to be incurred by the harbour authority. The only suggestion that such information would be provided to the hypothetical tenant is on the basis that the hypothetical landlord would volunteer such information to the tenant. I have already decided that this suggestion is only a speculation as to what is a remote possibility. If such information as to costs would not be available to the hypothetical tenant, I do not see how such information could affect the negotiation which is carried on and which results in the parties agreeing upon a rent for the annual tenancy. I do not see how, as suggested by Mr Dowding, the fact that the hypothetical landlord might have access to such information, would affect its negotiations with the hypothetical tenant.
39. HOTT referred to the fact that in Urban Small Spaces Ltd v Burford Investment Co Ltd [1990] 2 EGLR 120, an arbitrator in a rent review arbitration had ordered

disclosure of certain information even though that information would not have been available in the open market and was not therefore admissible as evidence at the arbitration. The High Court refused permission to appeal against the decision of the arbitrator, holding that categories of documents which ought to be disclosed were not limited to documents which were admissible in evidence. However, if (as I hold) the costs information in question is not admissible in evidence because it does not relate to any issue which is to be decided, HOTT did not suggest any basis on which it would be right for the court to order its disclosure.

40. HOTT's application is principally made pursuant to CPR r.35.9. That rule does not define the information which can be made the subject to an order. However, it is implicit that the information which is sought is, at least, relevant to an issue in the case. I have found that the information which is sought in the present case is not relevant to an issue in this case. It must follow that I should refuse to make an order under r. 35.9 for its disclosure. For the same reason, I refuse to make an order under CPR Part 31 for disclosure of documents which contain the information which is sought. CPR r.18.1(1) refers to "any matter which is in dispute". In the present case, there is no relevant dispute about the costs involved in operating, and in investing in, the port and, accordingly, it would not be right to make an order requiring ABP to give information about such costs.