

**BRITISH WATERWAYS
KENNET AND AVON CANAL MOORING STRATEGY STEERING GROUP**

**ENFORCEMENT POLICY
PROPOSALS BY
THE NATIONAL BARGEE TRAVELLERS ASSOCIATION
14th APRIL 2011**

1 PREAMBLE

Further to the work of the K&A MSSG the Group has arrived at the point of making proposals for how enforcement could be made to work on the K&A. It has since inception of the MSSG been believed by the members of the Group that the work of the Group would materially form the core of other mooring strategies elsewhere in the BW jurisdiction. In addition considerable time has been spent by members of the Group in good faith to this end.

In February 2011 it became apparent that the approach to be taken on the River Lee was radically different and therefore the assumption that “we had to do a good job because the work was to be used elsewhere” was undermined.

On 31st March 2011 the judgement in *BW v Davies* was handed down and it became apparent that the judgement was defective, appealable and therefore its usefulness as an authority and thus guidance was marginalised.

Further work off-line has started to reveal the statutory basis for enforcement and, more specifically, the limits that BW is entitled to proceed to in its enforcement activity. The implications of the work of the Group appear to be paving the way to a strategy that will exceed these statutory limits.

Finally the impact of the Equality Act 2010 that came into force at the beginning of April 2011 has an impact on the way that the Group concludes management of live-aboard boaters in that this demographic group holds a protected characteristic that in turn means that the Equality Act is engaged and provides protection to that demographic.

BW has always said that it reserved the right to reject the work product of the Group if BW believed that the work product was unacceptable to BW. This is clearly a shadow of a spectre that has hung over the Group since inception but nonetheless the Group has engaged in good faith to work through the issues. It is admirable that the Group has reached a relatively conciliatory position noting the extreme divergence of views at the outset.

However the issues we refer to above all converge on a state of affairs in which the bona fides of the objective of the Group appears to now be undermined making it difficult to make rational recommendations in relation to enforcement. This paper therefore seeks to do this in a difficult legislative context.

2 KEY ISSUES

To recap on the key issues:

ITEM	ISSUE	CLASS.
(a)	Itinerant Live-aboards depend on the use of the towpath for mooring; this creates an effect of “blocking out” other users in some circumstances	Education-cc
(b)	The population for Itinerant Live-aboards appears to be on the increase	Strategy
(c)	There is concentration of Itinerant Live-aboards in some areas	Education-cc
(d)	There appears to be congestion in key areas during the holiday season	Education-cc
(e)	There is a perception of some Itinerant Live-aboards leaving personal possessions on the towpath causing a nuisance to other towpath users; this may also have negative “visual amenity” effects as much as constituting “physical obstruction”.	Education-cc
(f)	There is a perception that the use of the canal by Itinerant Live-aboards has a service provision cost impact; the reality of this appears to be related to maintenance cost rather than “service provision” per se.	Education-3 rd parties
(g)	The use of towpath by Itinerant Live-aboards restricts the use of the canal by anglers.	Education-anglers
(h)	There is a perception of unfairness on subscribers to long-term moorings in relation to the non-paying by Itinerant Live-aboards	Education-subscribers
(i)	There remains obscurity in relation to licence compliance and the meaning of bona fide for navigation	Education-cc

It is of note that this list matches closely the list of issues presented by BW in the River Lee mooring strategy work.

It is of note that several of these issues are qualified as being “perceptions” rather than hard-and-fast properties. The recent work of the Group has included the conducting of an audit of the western K&A to identify precisely what is the circumstance in relation to congestion and use, and maintenance condition of the bank (having impact on the ability to moor). While imperfect, it is noticeable that this appears to have been the first occasion in recent years that this has been done, surprising considering that these issues and perceptions are longstanding.

The column marked “Class” is referred to in Section 4 below.

3 LEGISLATIVE FRAMEWORK

Enforcement is bound by legislative framework: the two are inseparable and to seek to prepare an enforcement regime is not simply disingenuous: it is unlawful as it constitutes acting ultra vires.

The legislative framework available for use includes:

Transport Act 1962	General powers to impose conditions - s.43(3)
BW Act 1971	Specifies of “bona fide for navigation” used to designate houseboats (as a negative – a boat used bona fide for navigation is not a houseboat) but does not provide a definition – s.3
BW Act 1983	Power of removal of a vessel - s.8
BW Act 1995	Itinerant Live-aboards to move after 14 days to another place - s.17(3)(c)(ii) A navigator mooring in a manner that is non-compliant has 28 days to remedy a breach – s.14
European Convention on Human Rights / Human Rights Act 1998	Right to due process (ie opportunity to present a defence and for that defence to be heard) - Art 6 Right to respect for home – Art 8 Right to equal treatment (ie without prejudice) – Art 14
Equality Act 2010	Policy-making must actively engage “protected characteristics”, of which philosophy vis-à-vis nomadism (ie itinerant live-aboard) is engaged
Case law (“authorities”)	Southport Corporation v Morriss [1893] 1 QB 359 Weeks v Ross [1913] 2 KB 229 Crown Estate Commissioners v Fairlie Yacht Slip Ltd [1979] SC 156 Curtis v Wild [1991] 4 All ER 172 Steedman v Scholfield [1992] 2 LLR 163 R v Carrick District Council Ex Parte Prankerd (The "Winnie Rigg") [1999] QB 1119 R v Goodwin [2006] 1 WLR 546 Moore v British Waterways Board [2009] EWHC B12, [2010] EWCA Civ 42 - very little to assist. But NOT BW v Davies until heard by the High Court in Chancery; also BW v Davies contains defects

Although s.43 of the 62 Act provides for BW to impose conditions as it sees fit these are tempered by the subsequent legislation. Although s.43 might be considered to give BW “carte blanche” this is in fact not the case.

The control of Itinerant Live-aboards falls under s.17(3)(c)(ii) of the 95 Act (specification of “bona fide for navigation” and “place”) and the procedure for violation is covered under s.8 of the 83 Act, tempered by obligations under Arts 6 and 8 ECHR. Unfortunately the 95 Act does not provide much assistance in relation to the definitions of “bona fide for navigation” or “place” and the case law was of little assistance.

The case of BW v Davies would have been a useful starting point except (1) it was in the County Court and therefore is not an authority apart from in Mr Davies’ specific case and (2) is in any event defective and therefore reliance upon it questionable. There is ongoing work in this respect to try to bottom out these two expressions (but which remains work in progress). This work however does so far indicate that “bona fide for navigation” does provide a definition and this is paraphrased below.

In addition policy must be made within a context of the Equality Act 2010.

Most importantly the powers of BW have been set with, in effect, a “ceiling” and BW is not permitted to exceed this ceiling. This is most pertinent in relation to s.17(3)(c)(ii).

4 MOORING DESIGNATIONS

It has become clear that the designations that the MSSG has worked so hard in laying out specifically for the western end of the K&A and (in terms of the wider application) the process by which the issues of congestion and overstaying are managed through designating mooring restrictions appears to be unlawful.

It has become apparent that BW has no powers to designate specific stretches of towpath as carrying mooring restrictions and, specifically, to then impose regulation (specifically sanction for non-compliance).

It follows that any quasi-regulation has to be “advisory” and that compliance by boaters must be on a voluntary basis alone. It follows that this makes for the invidious task of BW persuading Itinerant Live-aboards to comply with “advisory guidance” having spent years persecuting them (unlawfully) for doing what the boaters believed was lawful.

In turn it follows that there are four courses of action that BW can take in this respect:

- (1) cease and desist and “just live with it”;
- (2) create new legislation making the work product of the MSSG (or the effect of its work in the creation of mooring restriction zones) mandatory with non-compliance sanctionable;
- (3) create some quasi-statutory framework by the mis-application of existing regulation; or
- (4) “the leopard must change its spots” – BW must persuade boaters that it is a new organisation genuinely looking to the needs of Itinerant Live-aboards; that it has turned its back on years of systemic persecution; that the new guidelines are voluntary; that they are for the best interests of the canal as a whole; that Itinerant Live-aboards are greeted with open arms and will be supported but self-policing is also necessary; that this will be a workable solution.

In summary analysis:

It is apparent that Option (1) is not something that BW can entertain without being held guilty of maladministration – if there is genuinely an issue (which may be a moot point of course).

Option (2) falls foul of (a) insufficient parliamentary time to work up new legislation; (b) the impending approach of the change of status of BW into a charity; (c) what appears to be general impetus for delivery of a solution, that parliamentary time would inherently slow down; and (d) most significantly no budget to pay for the time and legal costs.

Option (3) suggests that BW will then be obliged to sit back and wait for a judicial review (which will happen sooner or later, probably sooner in the present climate of legally well-informed Itinerant Live-aboards).

This paper therefore engages Option 4 which – surprisingly enough – appears to be also most consistent with the principles of the requirements of the Equality Act: conciliation and genuinely getting to grips with the base needs of the demographic and turn away from systemic persecution.

5 PROACTIVITY

5.1 *Rising Population – A Strategic Issue*

Turning to the third column of the table in Section 2 above, the first element relates to the assertion of a rising population of Itinerant Live-aboards. There is scant data to support this hypothesis as the only data proffered by BW to date appears to be based on mis-application of licensing statistics. In addition recent interaction between the NBTA and SoS CLG has revealed that there is no intention of including Itinerant Live-aboards in caravan counts required as part of the bi-annual Gypsy Traveller Accommodation Assessments mandated by the Housing Act 2004. This is something that is challengeable, but provides no assistance to BW.

Therefore the first objective is to quantify how many boats on the system genuinely constitute Itinerant Live-aboards – and this has to be done in a way that does not violate Art 8 ECHR. An appropriate approach would be to instigate a “caravan count-style” study per the GTAAAs (by one of the universities who conduct the GTAAAs) to assess the scope of the problem.

If this study shows that the population is rising and that it is likely to rise (and by how much) then BW has a similar problem to engage as local authorities in the provision of caravan pitches for itinerants: firstly identify itself as a quasi-housing authority and secondly find a way of providing “transit moorings”.

This work is strategic and isn’t resolved by pragmatic “snapshot dependent” measures such as those presently being considered by MSSG.

In particular BW has a difficulty of minimal budget to implement a given solution so the few materials that it has to work with include

- (a) renovation of bank to make more moorings available away from the existing congestion (by way of maintenance), and encouragement of Itinerant Live-aboards to take advantage of these moorings by the provision of basic services associated with these moorings
- (b) working with commercial organisations to provide a parallel to housing association housing: cheap moorings either in-line or off-line provided on a commercial basis, licensed by BW in a manner that is easy and painless to engage but which obligates the provision of transit moorings on a low cost or free-of-charge basis but governed by appropriate regulation that requires the appropriate movement, with planning actively and proactively supported by BW (as opposed to simply “not opposed”)
- (c) Through long term actively working with representative groups and unaffiliated boaters to develop and maintain the strategy so that a culture of self-policing becomes instilled. The migration of MSSG to an interactive forum would be an example of this.

5.2 Cruising Habits – An Issue of Education

There is no rocket science behind an appreciation that when the holiday boats come out that the key holidaying hot-spots will become overcrowded. Part of the interaction with the itinerant live-aboard community includes reminding this demographic of the need for holiday boats (BW relies on the revenue and distasteful as it may seem to Itinerant Live-aboards, this is a necessary means for the canal system to be maintained) and requesting that the community avoid these areas when the peak season is in play.

In relation to concentration of higher density populations, the proper enforcement of s.17(3)(c)(ii) combined with intensive communication (delivering clarity of message both in delivery and content) to the itinerant live-aboard community would encourage movement. An intensive programme of education informing boaters what they can do and what they cant under the existing legislation, lay out where the legislation is vague, why it is vague and what this means in real terms and how to translate this into

The use of the Lengthsman approach to deliver this information and support will make this a non-hostile, non-confrontational activity rather than delivering a message of repression and enforcement.

The use of this information delivery would also be a good device to deliver a message of “please keep your towpath tidy” (noting that there is a tradition of Itinerant Live-aboards down the years of “putting things on the towpath”).

A clear and carefully worked message clarifying what a itinerant live-aboard is entitled to do on the canal, and what a subscription mooring holder is entitled to in addition will address the issue of any perception of unfairness of the itinerant live-aboard held by the fee-payers.

The Waterways Code specifies that anglers should not fish within 5 metres of an occupied moored vessel or from lock landings, water points, etc or in a way that otherwise interferes with navigation. Conversely vessels should not moor up adjacent to where anglers are already fishing. A memo to angling clubs and notes on rod licence renewals could be used as a reminder of this.

Regional and sub-regional communication between BW and members of the local population (perhaps through the parish councils) would provide a mechanism for delivery of maintenance budgets and plans. The development of existing fora to create parallels to the River User Groups on the Thames would provide an opportunity for this type of communication.

The implications for maintenance improvements could also be delivered. In turn this could include how these measures would assist the itinerant live-aboard demographic and the general amenity of the locality itself. This would, the NBT believes, go a long way to dilute away a perception of “Itinerant Live-aboards unfairly using resources”. Most of all this communication could also propagate the message that “additional boats means additional licence fee revenue and thus additional maintenance budget”.

5.3 Lengthsmen –Education Delivery

The use of Lengthsmen would be undertaken as messengers of the new guidance; they would be trained or already equipped with communication skills and knowledge of the statutory basis for lawfully navigating and mooring. They would also be equipped and encouraged to assist boaters in difficulty.

Their remit would be in particular to engage with overstayers and assess the need for the grant of a Movement Waiver Notice, request whether a Notice is required and grant one on reasonable request. In the absence of satisfactory conclusion the itinerant live-aboard would be reminded that he has 28 days to achieve compliance.

Lengthsmen could also ask for reasons for non-licensing and in particular if this arose from an inability to pay and to then use discretion in relation to credit control. The itinerant live-aboard would be reminded that he has 28 days to achieve compliance.

Existing BW Enforcement Officers could be redesignated as Lengthsmen for budget reasons.

“Boat checking” will cease as an activity. The budget will be used instead to supply further Lengthsmen.

The deployment of “Patrol Notices” will cease. Instead an overstayer will be given an “Advice Letter” drafted in terms of guidance and request to move rather than a “quasi-parking ticket”. Only if an Advice Letter is ignored will a statutory process be engaged, the first step of which will be a warning that a claim will be made to the Court for compliance, followed by service of a sealed claim form after an appropriate period. The itinerant live-aboard has the right to defend such an action. Even at this stage should the non-compliant boater then comply the matter will be discontinued and no further action taken.

The 95 Act provides for the withdrawal of a licence or refusal to issue a new licence if repeated violations of s.17(3)(c)(ii) are manifest by the navigator, with the metric defined by the number of times that the navigator has exceeded 14 days without a valid reason. However this excludes the concept of “progressive journey” as stated above. There should be transparency in relation to the number of violations that constitutes the threshold, the ability to easily examine the record and at the time of licence renewal a list for the logged violations provided in the renewal pack (equivalent to the list of endorsements on a driving licence).

The Lengthsmen will be equipped with technology to perform orderly monitoring of boat movements without being oppressive in terms of surveillance. This technology will also provide for the issue of Advice Letters, Movement Waiver Notices and warning letters. Real-time on-line checks of the grant for a despatched but not displayed licence will also be available.

5.4 Clarification of Legislation

It is generally accepted that the legislation is vague. It has come to light that this was done on purpose specifically in order to especially protect the Itinerant Live-aboard (and other boaters) avoid the rigours that precision would imply. Although the legislation is difficult to understand on face value, when combined with this and other underpinning principles it is actually straightforward. Clarity by way of explanation of the underpinning principles is therefore required. Unfortunately the recent efforts in *BW v Davies* to provide some clarity have been not only unsuccessful but contradicts these underlying principles. It should be noted that many Itinerant Live-aboards are highly articulate, qualified and intelligent to evaluate legislation. However others are not and clarity is required.

The following definitions shall be adopted (nothing that these are long and wordy and should be refined – the objective of laying out these phrases is to explain the underpinning principles):

s.17(3)(c)(ii) “place”	<p>Somewhere that can be distinguished from somewhere else; by name; by geography; by distance; by political boundary; by natural boundary.</p> <p>Place is not “somewhere else further up the moorings” or an “adjacent mooring designation”; equally it is not a different parish (a parish may contain several “places”) although passing over a parish boundary does constitute a new “place”. It is a new suburb or village; a town can contain several “places”.</p>
s.17(3)(c)(ii) “being used bona fide for navigation”	<p>Navigation is the nautical art or science of conducting a vessel from one place to another. The navigator must be able (1) to determine the vessel’s position and (2) to determine the future course or courses to be steered to reach the intended destination. “Navigation” is more than simply “movement on water” and includes the additional element of planned or ordered movement from one place to another.</p> <p>The phrase “being used ... for navigation” means that the vessel is capable of being navigated and that navigation is taking place (or that the navigator has moored, an activity ancillary to navigating).</p> <p>The phrase “bona fide” means and that the navigation is genuine and not a sham.</p> <p>In aggregate, and according to the legislation, the definition is (1) for the navigator to determine and (2) is also determined by the length of mooring time in between navigating passages by the 14-day mooring time. A stay of more than 14 days is used as a metric to diminish the bona fides of the navigation whereas a stay of 14 days or less makes the navigation bona fide.</p> <p>Note that definition excludes concepts of (a) progressive journey (b) any relative comparison of time spent between navigating and mooring (c) any concept of linear distance travelled or locks traversed; or (d) that the navigation has to have some specific purpose (apart from reaching the destination).</p>

s.17(3)(c)(ii) "14 days or longer ..."	<p>Normally an Itinerant Live-aboard would expect to move after 14 days. However there are circumstances when this is not possible or the navigator considers it reasonable (at his sole discretion although obviously challengeable by BW). Exceptions can include (but are not limited to)</p> <ul style="list-style-type: none"> Accidents Illness Pregnancy Family emergency Bereavement Holiday Mechanical breakdown Ice Navigation stoppage <p>If in the skipper's sole discretion he considers that his vessel is unsafe to navigate and would endanger the lives of himself, his passengers or others in navigating</p> <p>This list will be expanded as experience of specifying exceptions develops.</p>
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Note that the use of the phrase "neighbourhood" or "locality" is seen as confusing. As they pay no part in the definition of "place" they should not be used.

If a boater wishes to make use of a longer stay in a given place then it is proposed that he completes a "Movement Waiver Notice" which justifies the extended stay, for how long (including a departure date) and some contact details. BW then endorse this Movement Waiver Notice but noting that this is to authenticate not to veto. The navigator would then display this in the window of the vessel. The Movement Waiver Notice could also bear a 2-D barcode that can be scanned by a smart phone and identify the content of the notice so that it may be scanned by a passing BW Lengthsman for currency. Blank Movement Waiver Notices could be downloaded from the Waterscape web site, printed out by the Lengthsman on his mobile printer or obtained from a BW office.

5.5 Other Delivery of Clarification

Notice board space will be provided for the display of this material. In addition the provision of information relating to local engineering and other boater-relevant tradesmen will be made available. It will also be possible to post "Help Wanted" notices. In general the development of a firm working relationship between all sectors of the live-aboard community and BW (using multiple delivery mechanisms) is sought.

This information will also be replicated on Waterscape.com. The implementation of social networked information dissemination and the use of RSS will also be engaged. However it is assumed that communication abilities varies within the demographic and so no one channel of communication will be relied upon.

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