Neutral Citation Number: [2013] EWCA Civ 73

Case No: A3/2012/0788

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
THE HON MR JUSTICE HILDYARD
HC07C02340

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2013

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE JACKSON
and
LORD JUSTICE LEWISON

- -

Between :

NIGEL MOORE	**Appellant**
- and -	
BRITISH WATERWAYS BOARD	**Respondent**

- -
- -

The Appellant appeared in person

MR CHRISTOPHER STONER QC (instructed by Shoosmiths LLP) for the Respondent

Hearing date: 27th November 2012

- -

Judgment

Lord Justice Mummery:

Introductory

1. This is an appeal from an order made by Hildyard J on 16 February 2012. In accordance with the judgment (reported at [2012] 1 WLR 3289) the order set out a succession of declarations on issues in proceedings brought by the claimant, Mr Nigel Moore, against the defendant, the British Waterways Board (BWB), known since 2 July 2012 as the Canal & River Trust following a transfer of statutory functions. The object of the claimant's action is to establish a right to moor vessels long term in part of the Grand Union Canal (the GUC) at Brentford, Middlesex, so that the claimant does not need the permission of BWB to do so and cannot be lawfully required by BWB to remove the vessels.

2. The principal ground of Mr Moore's appeal is that the judge was wrong to hold that, in the absence of BWB's permission, the long term mooring of vessels on a semi-tidal stretch of the GUC, close to the junction of the canalised River Brent element of the GUC and the River Thames, is "without lawful authority" within the meaning of s. 8 of the British Waterways Act 1983 (the 1983 Act). The judge found that the claimant had not demonstrated any right under the general law to moor vessels permanently, either in right of riparian ownership or possession, or otherwise.

Background

The parties

3. The claimant had care of 4 vessels which were moored for several years on a stretch of the GUC. They were moored alongside riparian land, which, for the purposes of this action, BWB accepts is in the possession or occupation of the claimant. Unlike the rest of the GUC, that particular part of the canal has a tidal element and is subject to a public right of navigation. The vessels were occupied as the sole residential homes of the occupants. The claimant occupies a vessel called "*Gilgie."* The vessels were thus moored otherwise than for temporary purposes ancillary to, or in the process of, navigation on the GUC, such as in loading and unloading, or for repairs, or to shelter from the weather conditions.

4. BWB is the statutory navigational authority for the GUC. It derives its powers from British Waterways Acts passed between 1971 and 1995. Purporting to act as such statutory authority for the management of the GUC, BWB served notices on the claimant on 21 July 2007. The notices, which stated that they were given pursuant to s.8 of the 1983 Act, demanded the removal of his vessels within 28 days on the ground that they were moored in the GUC "without lawful authority."

The proceedings

5. On 4 September 2007 the claimant started proceedings against BWB for a declaration that the notices served on him were unlawful and that he had a right to moor the vessels without BWB's permission.

6. Mr Martin Mann QC gave a judgment on preliminary issues on 12 March 2009. The claimant successfully appealed from part of that order on 5 February 2010: [2010] EWCA Civ 42. A list of issues was then drawn up at a case management hearing in preparation for trial, which took place before Hildyard J in November 2011. Some of the issues turned on the construction of the Grand Junction Canal Act 1793 (the 1793 Act) and of more recent legislation, in particular on the extent to which common law rights were preserved or amplified by the legislation. Others issues related to whether the s.8 notices had been served for an improper collateral purpose; whether, in serving the notices, BWB acted in breach of a legitimate expectation on the part of the claimant as to how those powers would be exercised; and whether article 8 of the European Convention on Human Rights was engaged in respect of the claimant's occupation of the vessel *Gilgie* as his home.

7. Those matters are relevant as background to this appeal, but there is no need to explore them in detail, as the judge's rulings on them are not appealed. So I turn to the parts of the order that are appealed.

The order

8. The material parts of the order under appeal provided that:-

> "3. That it be and is hereby declared that a riparian owner has no entitlement, simply by reason of that riparian ownership, to moor a vessel alongside their riparian land otherwise than temporarily to facilitate access and for loading and unloading.
>
> 4. That it be and is hereby declared that the vessel "Gilgie" is unlawfully moored because it is not moored pursuant to public rights of navigation nor pursuant to any special or particular right entitling it to moor at its current location and no lawful right to moor there having been established.
>
> 5. That Mr Moore be required to move the vessel "Gilgie" from the waterways managed by British Waterways on or before 16th May 2012, including the tidal element of the Grand Union Canal between Bax's Mill/The Boatman's Institute and the junction of the Grand Union Canal with the River Thames, save in so far as Mr Moore exercises public rights of navigation over the said tidal stretch and/or cruises British Waterways managed inland waterways in accordance with the terms and conditions of the licence issued in respect of the vessel "Gilgie" failing which after 16th May 2012 British Waterways shall be entitled to exercise the statutory powers vested in it by section 8 of the British Waterways Act 1983.
>
> 6. That Mr Moore be forbidden, whether by himself or by instructing or encouraging any other person on or after 16th May 2012 from mooring the vessel "Gilgie", or any other vessel in his control, on the tidal element of the Grand Union Canal between Bax's Mill/the Boatman's Institute and the junction of

> the Grand Union Canal with the River Thames, otherwise than for temporary purposes ancillary to or in the process of navigation, or at a lawful mooring."

9. The judge ordered the claimant to pay BWB 25% of its costs of the action, such costs to be the subject of a detailed assessment, if not agreed, and to pay the sum of £5000 on account of those costs.

10. The judge refused the claimant's application for permission to appeal. I worded the grant of permission to appeal cautiously.

The appeal

11. Does the claimant have "lawful authority" to moor his vessels permanently on the part of the GUC running alongside the riparian land possessed or occupied by him in Brentford? Or can he only moor there temporarily for the purpose of access and for loading and unloading?

12. The answer to those questions does not turn exclusively on the statutory powers of BWB, which accepts that, if it is lawful at common law for the claimant to moor the vessels permanently alongside his riparian land, he has the necessary "lawful authority" within the meaning of s.8 to do that. Lawful authority derived from the common law would provide a complete answer to the notices served by BWB. Section s.8 applies to vessels moored "without lawful authority": it does not just apply to the case of vessels moored without the permission of BWB.

13. Statutory bodies equipped with powers and rights (and subject to duties) continue to expand without replacing all the private and public rights and remedies for wrongs available under the common law. If the claimant's contention that he has unmodified common law mooring rights is correct, the notices are invalid: he does not need permission from BWB, as statutory authority, to do what the common law permits him to do.

The judgment

14. The judge carefully examined a mass of factual and legal materials. It is unnecessary to re-visit most of it in order to decide this appeal. On the key question of the construction and application of s. 8 the judge held that the claimant had not demonstrated that he had "the right to moor" vessels permanently along his part of the bank; that he had moored them "without lawful authority"; and that BWB had sufficient power under the legislation to serve the statutory notices in respect of vessels under the claimant's care.

15. The judge rejected the claimant's contention that BWB had used its powers for an improper collateral purpose, but upheld his claim that he had a legitimate expectation that, in exercising its powers under s.8, BWB would abide by its own prescribed and invariable procedures. Those issues do not arise on this appeal nor does the claimant's reliance on article 8 of the European Convention on Human Rights.

16. As for the common law position, the judge concluded that "the ordinary rights incidental to ownership of riparian land do not include a right of permanent mooring." See [74]. He agreed with BWB that:-

> " 76. …in so far as the claimant asserts an entitlement to moor alongside the canal bank he occupies, there is no ordinary riparian right entitling him to moor his vessel there except temporarily for the purpose of access, and for loading and unloading."

17. The claimant had not therefore shown any "lawful authority" to moor vessels permanently alongside the riparian land. The judge agreed with BWB that the words "without lawful authority", which focus on the lack of authority, were broad enough to catch a vessel moored where no right to moor could be demonstrated. See [155] and [159]. The claimant had not shown any established right to use the GUC for permanent mooring, whether derived from a right of or incidental to riparian property, or under the terms of a duly issued permit, licence or certification: see [160].

18. The judge explained that certain matters, which are relevant to this appeal, were not in dispute in this action :-

    (1) The relevant stretch of the GUC has a tidal element due to its proximity to the junction of the GUC and the River Thames, which is itself tidal at that point. See [25].

    (2) The claimant is in possession or occupation of the relevant area of the bank of the GUC by virtue of which he claimed the riparian rights to moor vessels permanently without BWB's permission. See [34] and [35]. BWB took no point on whether the claimant had a sufficient interest personally to assert any riparian right. BWB accepted that the claimant could, in these proceedings, seek to demonstrate that the disputed notices are invalid on the grounds that the claimant summarised in his skeleton argument i.e. that the vessels "were all within a public navigable river, moored to private riparian property." See [36].

    (3) BWB did not rely on any common law right of ownership, such as ownership of either the bed or the bank of the GUC alongside the moorings, to justify service of the s.8 notices. See [13]. BWB relied only on its powers as statutory navigation authority responsible for the management of the GUC. Its case was that it had power to require the removal of the claimant's vessels, as they were permanently moored without any common law right to do so or without any permission granted by it and therefore "without lawful authority."

    (4) The claimant for his part did not assert in this action any claim to ownership of the bed of the GUC as entitling him to moor any vessels. [13]. (The normal legal position is that in non-tidal waters the bed of a river is owned by the riparian owners, whereas in tidal waters the bed of the river is vested in the Crown.)

Claimant's submissions

19. The claimant's skeleton argument, which, combined with the Appeal Notice, is 140 pages long (only 20 pages less than his skeleton argument at trial), complains that practically every aspect of the decision against him was wrong.

20. The respondent points out that the claimant's skeleton departs from his case based on riparian rights and seeks to introduce new arguments, such as claim to customary rights or rights conferred by the 1793 Act; that it contains sweeping assertions that are palpably incorrect; and that it re-introduces preliminary issues decided against him at an earlier stage by Mr Martin Mann QC, but not then appealed (e.g the right of public navigation, which ceased to be a live issue before the trial, and does not entitle the claimant to "keep" vessels in publicly navigable waters in the sense of indefinite periods of mooring.)

21. I broadly agree with BWB that the claimant's essential case below and on this appeal is based on riparian rights at common law. I will concentrate on his submissions on that issue.

22. First, the finding of the judge that riparian ownership gives no right to moor a pleasure boat for longer than needed to step on or off board is a denial of any mooring rights whatsoever attaching to riparian land and is contrary to centuries of established case law and practice. Riparian rights allow all uses of the water that do not affect others. The judge's ruling illegitimised, at a stroke, every bankside mooring in the UK inland waterways, even though not in breach of any BWB regulation on mooring.

23. Secondly, the judge wrongly construed s. 8 of the 1983 Act as authorising seizure or expulsion from the waterways of any vessel otherwise entitled to be on those waterways and even though not in breach of any legislation or regulation. That was contrary to common sense and in violation of the common law. It also ignored the practical reality of "home moorings" in a particular location and reasonable user dependent on a prescribed place of public access or on the discretionary consent of the relevant landowner.

24. Thirdly, the judge's approach to riparian rights of long term mooring was cursory and was confused with the public right of navigation. It was also flawed in requiring the impossible, namely proof of an established right to moor permanently. Confusion also arose from the judge's failure to appreciate the difference drawn in the authorities between "moorings", which are usually taken as permanent or as a fixture, and the "act of mooring", which is a temporary act.

BWB's submissions

25. BWB did not find it necessary, any more than I have, to comment on or respond to every point of detail or cited case in the claimant's skeleton. Mr Stoner QC emphasised the following points.

26. First, the majority of the GUC is a non-tidal artificial canal, which is not subject to public rights of navigation and falls squarely under BWB's regulatory licensing scheme. There is no entitlement, even by adjacent riparian owners, to be on the non-tidal part of the GUC without BWB's consent, which is available to all on terms

27. Secondly, as found by the judge, the licensing scheme does not apply to the tidal element of the GUC, which is the subject of this litigation. This small stretch of the GUC is subject to public rights of navigation and to pre-1793 private rights, as preserved by the legislation. However, that fact did not affect the status of BWB as the navigational authority for the relevant stretch of the GUC. The claimant had to establish a legal entitlement for the indefinite mooring of his vessels there.

28. Thirdly, the claimant's case on private riparian rights at common law was correctly decided by the judge against him. Those rights to moor against riparian land are in the main access rights. They include a right to moor to facilitate access and to stand by the riparian land for reasonable periods, but not a right to moor per se indefinitely along side his land for as long as the riparian owner pleased. See *William Lyon v. The Wardens of the Fishmongers Company and the Conservators of the River Thames* (1876) 1 AC 662 and *Original Hartlepool Collieries v. Gibb* (1877) 5 Ch D 713.

29. Fourthly, on the construction of s. 8 of the 1983 Act, a vessel could be removed from the waters managed by BWB, if there was no lawful authority for it to be there. The judge's application of the provisions to the facts of this case was correct. The preservation of the public right of navigation and of private riparian rights by s. 43 of the 1793 Act is consistent with BWB's status as the navigational authority for the relevant stretch of the GUC so that those who wish lawfully to exercise preserved rights may do so. For the presence of the vessel on that part of the GUC to be lawful, it had to be justified by reference to a preserved private riparian right or a public right of navigation.

30. Fifthly, the judge's finding for the claimant as to legitimate expectation in relation to the process adopted before the service of the s. 8 notices did not extend, as the claimant now attempted to argue, to a legitimate expectation that *Gilgie* could remain moored in its current location and there was no basis in fact for so holding.

Discussion and conclusions

31. The judge put the mooring rights point in this way:-

> "37. The parties also confirmed that it is no longer in issue in these proceedings whether (i) the claimant occupies in his own right or as licensee and/or (ii) is entitled to exercise the riparian rights of a riparian owner. It is accepted that the relevant issue to be decided in this context is whether a riparian owner of the land in question would have a right to moor. If such a riparian owner would have such a right, I assume that BWB accepts that

> this should be taken to be a good answer to the section 8 notices served."

32. As indicated in that passage, the mindset at trial was naturally influenced by the positive nature of the mooring right asserted by the claimant i.e. that under the common law he had a riparian right to moor vessels permanently in that particular stretch of the GUC and that provided the "lawful authority" answer to the s.8 notices served by BWB.

33. That approach sidelined the question whether, quite apart from any established riparian right, the claimant was doing anything unlawful at common law by the mooring of his vessels along side the canal bank in that part of the GUC. BWB's statutory power to require removal of the vessels did not extend in terms to the removal of any vessels moored in the GUC without its permission: it was limited to vessels moored unlawfully (i.e. "without lawful authority"), which is not quite the same thing.

34. I agree that one would expect BWB to have a general statutory power to manage the mooring of vessels on the GUC and that its permission to moor in the GUC would normally be required. However, special features of this dispute make it necessary to inquire into not only what *rights* the claimant could establish as a matter of private law or public law, but also whether his actions amount to the commission of an actionable *wrong,* either at common law or under statute, which would entitle the BWB to require the removal of the vessels on the ground that they were *unlawfully* moored on the GUC.

35. As noted above, s.8 does not confer on BWB a general statutory power to require the removal of vessels moored in the GUC without its permission: BWB's power under s.8 is exercisable only in a case where the vessel is there "without lawful authority." BWB accepts that that "lawful authority" is not confined to the case of a person who has a permission from BWB. If what is done with the vessel on the GUC is lawful at common law, the mooring is with, not without, "lawful authority" under s.8.

36. The s.8 notices would clearly be invalid if the claimant established a positive private law or public law riparian right to moor vessels to the bank. He failed to do that. In my judgment, the judge correctly held that no such riparian right existed at common law. The riparian right to moor was more circumscribed and falls short of a permanent mooring right. On that point the legal position is as stated by Lewison LJ in his judgment, which I have read in draft. There is nothing that I can usefully add to his exposition of the general law on riparian rights.

37. However, that is not the end of this matter. As BWB can only require the removal of vessels unlawfully on the GUC, it is necessary to ask whether, even in the absence of an established riparian *right* to moor, the claimant, on the particular facts of this case, was committing any *wrong* at common law or under statute, which made what he was doing unlawful? If he was not, what power had BWB under s. 8 to require removal of the vessels?

38. I am alerted to the possibility that the claimant was not committing any wrong by a pithy observation of Sir Robert Megarry V.-C. in *Metropolitan Police Commissioner* [1979] 1 Ch 344 at 357C:-

> "England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden."

39. During the course of oral argument in this court it emerged that the multiplicity of issues generated by this dispute and the paper mountain of materials googled by Mr Moore had overshadowed the significance of that basic, if not totally accurate, maxim of English Law supportive of Mr Moore: what is not prohibited is permitted. That notion was at the core of the first element of AV Dicey's classic statement of the Rule of Law in 1885 (see *Introduction to the Study of the Law of the Constitution* 8th Edition at p. 183), accentuating the need in law enforcement to prove distinct breaches of established law. The notion also survives Lord Bingham's re-formulation in *The Rule of Law* (2010), emphasising the accessibility of law and the need for it to be, so far as possible, intelligible, clear and predictable, so that the citizen knows when his actions would be unlawful. Those "rule of law" considerations apply to the power of BWB to require the claimant to remove vessels from the GUC, because its exercise depends on whether the vessels are moored unlawfully.

40. In this long running battle it is entirely understandable that BWB wishes to establish and exercise its statutory power to manage moorings on the GUC under pain of removal of unlawfully moored vessels. The point is that, if the claimant is doing nothing wrong in mooring his vessels alongside his part of the bank, then he has acted within the law, not contrary to it. If what he does is lawful, BWB has no power under the legislation, from which its statutory powers derive, to compel him to remove his vessels from their moorings.

41. In the light of what BWB accepted at trial I am unable to identify what unlawful act the claimant was committing that entitled BWB to serve a notice under s.8. During the hearing of the appeal Mr Stoner QC accepted that BWB has not alleged that the claimant has obstructed the public right of navigation by other members of the public. Nor has he committed any wrong to the riparian owners, as it was agreed, for the purposes of the action, that he has the rights of riparian owner in possession or occupation of the canal bank at the point of the moorings. Nor has he committed any wrong as regards the canal bed of the GUC with the tidal element, since the BWB makes no claim in this action to any title to or right to possession of it. BWB simply relied on its statutory powers, but Mr Stoner QC was unable to point to any power entitling BWB to require the removal of vessels when no private or public wrong was committed.

42. In brief, BWB has no statutory power to compel removal of vessels from this stretch of the GUC when no wrong is committed by the mooring of the vessels alongside the bank possessed or occupied by the claimant. Although the common law does not recognise a positive riparian right to moor alongside the bank permanently, the absence of that right does not necessarily connote the commission of a wrong and the presence of an unlawful mooring. If what the

claimant was doing was not a legal wrong, he was entitled to do it. If he was entitled to do it, he was not doing it "without lawful authority" within s.8, because the law allows him to do what it did not prohibit at common law or by statute.

43. At the end of all the arguments running to hundreds of paragraphs in the claimant's skeleton submissions, the question for decision by this court is this: what wrong, if any, was the claimant committing by mooring his vessel to a part of the canal bank, which has been treated as belonging to him, so that the barge remains stationary in the water flowing over the canal bed, which has been treated as not belonging to BWB? If no wrong, such as obstruction to the public right of navigation or to rights of access enjoyed by other users of the canal or trespass to the canal bed or the canal bank, was committed by the appellant, he was and is acting lawfully and BWB had no powers, statutory or otherwise, to require him to remove his vessels.

44. In this appeal the position simply is that, on the agreed facts about the bed and the banks of the GUC at the relevant point, BWB had no power under s.8 to require the claimant to remove vessels the mooring of which was lawful, as their presence was not unlawful: BWB is unable to support its notices on the basis that the mooring of vessels by the claimant was "without lawful authority" within s.8.

Result

45. I would emphasise two points in allowing this appeal.

46. First, I would hold that the s.8 notices were invalid, on the narrow ground that they required the claimant to remove vessels when the BWB had no power to do that, as the presence of the vessels at a permanent mooring on the GUC was, on the agreed or conceded facts, not prohibited at common law or by statute and was therefore lawful.

47. Secondly, the judge was correct in his legal ruling that a riparian right does not include a positive right to moor permanently in the GUC. Indeed, on that general point of common law, I agree with the conclusion of the judge and with the judgment of Lewison LJ.

Note on oral hearings

48. I add a short comment on the value of oral hearings, as demonstrated in this constitution which, in one week, allowed two appeals by litigants in person. In each appeal the success was the result of legal or factual arguments the full implications of which were neither taken on board in the judgment below nor appreciated in this court prior to the oral hearing.

49. Doubts are sometimes expressed about how often oral advocacy affects the actual outcome of appeals. Judicial experience affirms the value of oral hearings of appeals. Sometimes there are dazzling, even terrifying, displays of advocacy, but more often the hearing is a down-to-earth exercise in pro-active judicial engagement with the case: talking through unfamiliar, confusing or difficult

factual and legal aspects; disentangling what matters from what does not matter; bringing order and understanding to the discussion of what matters by judicial thinking aloud to test legal propositions and to double-check facts; and ensuring as far as possible that, in conjunction with the pre-reading of the papers, the court has a good grasp of what the parties are getting at.

50. Some litigants in person, such as Mr Moore, become formidable experts in their own case, while lacking expertise in the handling of legal concepts and familiarity with the vocabulary of the law. With them the oral hearing is an opportunity to clarify, even to correct, the court's understanding of their grievance. On this appeal we did not allow the claimant to read out his skeleton argument, any more than we allowed Mr Stoner QC to read out his. Instead, there was an examination of particular aspects of the case in order to focus the appeal on what exactly the claimant said was wrong with the judgment against him and why.

51. The summary of conclusions at the end of the very thorough and careful judgment of Hildyard J was an excellent agenda for that discussion. In that way we were able to identify the key points for decision on the appeal. They were much narrower than the list of issues before the judge.

52. The result of doing the best that we could in the course of the one day available for the appeal, which did not look particularly promising on paper, is that it has succeeded in the end, though not on all the detailed arguments canvassed in the grounds of appeal and the skeleton arguments.

Footnote on the River Thames and the Rule of Law

53. This appeal called to mind "a frolic in jurisprudence" that Mr Moore did not uncover when googling for authorities on riparian rights and the Rule of Law. The case is that of *R v. Haddock* circa 1927 reported only in Sir Alan Herbert's *Uncommon Law* (1937 at page 24). The "judgment" is that of an imaginary Court of Appeal ruling on a legal submission by the tireless litigant, Mr Albert Haddock, when he was charged with jumping from Hammersmith Bridge into the River Thames in the middle of a regatta. The court rejected his submission that "this was a free country and a man could do what he likes if he does nobody any harm", holding that this was not a free country and it would be a bad day for the Constitution and the legal profession when it is. The Lord Chief Justice declined to commit himself on what offence Mr Haddock was guilty of and cited the (spoof) legal maxim *factum clarum, jus nebulosum* (the clearer the facts, the more dubious the law).

Lord Justice Lewison :

54. English law does not recognise the ownership of water. Instead it recognises ownership of "land covered by water". Sir William Blackstone summarised the common law in his Commentaries on the Laws of England (vol 2 p 18) thus:

> "It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and I cannot bring an action to recover

> possession of a pool or other piece of water by the name of water only; either by calculating its capacity, as for so many cubic yards; or by superficial measure, for twenty acres of water; or by a general description, as for a pond a watercourse or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water is a moveable wandering thing … But the land, which that water covers, is permanent, fixed and immoveable; and therefore in this I may have a certain, substantial property; of which the law will take notice, and not of the other."

55. This passage in Blackstone was specifically approved by the Court of Queens Bench in *Race v Ward* (1855) 4 El & Bl 702. So it comes about that consistently with the common law Schedule 1 to the Interpretation Act 1978 contains the following definition:

> ""Land" includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land."

56. Since it is ownership or possession of the bed of the waterway that counts, it follows that a person commits a trespass against the owner or possessor of the bed if, for example, he sails or rows a boat in the water above the bed. This proposition is illustrated by the decision of Mummery J (as my Lord then was) in *Lovett v Fairclough* (1991) 61 P & CR 385 in which fishermen trespassed against the owner of the bed of the River Tweed by fishing from boats above the river bed. In *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171, 198 Fletcher Moulton LJ put it thus:

> "In my opinion the rights of the owner of soil covered either intermittently or permanently by the sea are well settled. They differ from those of the owner of soil not so covered in this respect only,—that while so covered they are subject to the free exercise by the public and every member of it of the rights of fishing and navigation."

57. In *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276 [2002] Ch 25 Peter Gibson LJ took the view that to discharge water into a canal would amount to a trespass against the owner of the bed of the canal "given that the land covered by the water is owned by another". Equally it seems to be possible to acquire title by adverse possession of a river bed by mooring a vessel in the waters above it: *The Port of London Authority v Ashmore* [2010] EWCA Civ 30 [2010] 1 All ER 1139.

58. Ownership of the bed depends on what kind of waterway is in question. In tidal waters there is a presumption that the bed is owned by the Crown. Ownership of the bed may of course be transferred; and, in the case of the River Thames, the river bed is now vested in the Port of London Authority. In non-tidal rivers and streams there is a presumption that each riparian owner owns half the bed up to the mid-point between the banks (*ad medium filum*). It is, in my judgment,

important to recognise that in some cases dealing with the rights of riparian owners the owner in question owned not merely the bank but also part of the bed. Plainly a riparian owner who also owns part of the bed is entitled to place structures on the bed or to moor indefinitely a vessel above his part of the bed without committing a trespass. Whether by so doing he creates a nuisance or interferes with public rights of navigation is a wholly separate question.

59. Acts which might amount to trespass can sometimes be justified by reliance on a right to carry out those acts. In the case of a navigable river, the public has a right of navigation which would justify navigating a vessel above the river bed. Exercise of that right would preclude the owner of the bed from bringing an action in trespass unless the right were exceeded. Thus it is common ground that if Mr Moore's activities interfered with the public right of navigation of other users of the waterway; or if he unreasonably interfered with his neighbour's right of riparian access to the waterway, they would be activities exceeding the scope of the public right of navigation and hence would not be legally justifiable. The essence of the public right of navigation was summarised by Lord Diplock in *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, 545 as follows:

> "A public right of navigation in navigable waters that form part of a port is a right enjoyed by every member of the public to pass and repass over the whole of the surface of the water in vessels of such draught as the depth of water below any particular part of the surface permits and to keep such vessels stationary in the water for a reasonable time for navigational purposes in the course of a voyage (e.g. waiting for a tide) or for the purpose of loading, unloading or transhipping goods or passengers or waiting to do so."

60. However, the public right of navigation does not include the permanent right to occupy any particular stretch of water. As Paull J put it in *Iveagh v Martin* [1961] 1 QB 232:

> "In the same way, so far as navigation is concerned, I may have to wait for a favourable wind; I may have to load or discharge cargo, and I may have to do repairs necessary or desirable before again setting out to sea, but I may not permanently occupy a part of the water over a foreshore even if I am doing something which incidentally assists the navigation of others."

61. The same point in relation to indefinite occupation is made in *Denaby and Cadeby Main Collieries Ltd v Anson* (by AT Lawrence J p 176 and, on appeal, by Fletcher Moulton LJ pp 198-202 and by Buckley LJ p 211). Mr Moore referred us to the direction given to the jury by Wood B in an anonymous case in 1808 reported as a note to *Harmond v Pearson* (1808) 1 Camp 515, 517. Wood B is recorded as having said that the public right of navigation includes a right to "unload, moor and stay there as long as they please". In the light of the authorities to which I have referred I do not consider that the last part of this dictum can be taken literally, at all events if it is intended to signify that the owner of the bed could not maintain an action in trespass.

62. In other cases acts which would otherwise amount to a trespass can be legally justified by reliance on an easement or on a customary right. But no such question arises in this case.

63. The second point I wish to make is that in considering whether Mr Moore's vessel is moored "without lawful authority" it is important to be clear about the perspective from which the question is asked. In some of the cases to which we were referred the question arose as between neighbouring riparian owners. In *Original Hartlepool Collieries Company v Gibb* (1877) 5 Ch D 713 a colliery company owned a wharf abutting the River Thames. It was 125 feet long. One of their vessels was 175 feet long, with the consequence that when it was brought alongside the wharf to unload its cargo it overlapped Mr Gibb's adjoining wharf. In order to prevent the overlapping Mr Gibb moored large wooden obstructions to his own wharf which prevented the colliery company's vessel from coming alongside their wharf. Sir George Jessel MR granted an injunction to prevent that obstruction. He held that as a riparian owner the colliery company had a right to access their wharf from the river. That right had to be exercised reasonably, but it was not necessarily unreasonable to access the wharf with a vessel that was longer than the wharf itself. He continued:

> "In ascertaining, however, the reasonableness of the acts of the Plaintiffs, one consideration must not be overlooked. Besides a reasonable right of access, they have a reasonable right of stopping, as well as of going and returning in the use of the highway. But what is a reasonable right of stopping? That must depend upon circumstances. You cannot lay down *à priori* what is reasonable. You must know all the circumstances. It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus if that were the easiest mode of moving it out of the way, and the omnibus might lawfully stop there until the wheel was put on in order to take it out of the way, if that were the best mode of taking it out of the way and a reasonable and usual mode. Nobody would deny that if the blacksmith chose to carry on his trade of repairing omnibuses immediately opposite his own house, and for that purpose, not keeping any one omnibus more than a reasonable time for his work, he kept omnibuses opposite his house or shop, or smithy-door for that purpose, that would be an obstruction of the highway, and would be a nuisance. You must look at the circumstances. So, again, it is perfectly reasonable that *A.* shall put his carriage before his house door, even although it may overlap his neighbour's door. For instance, take the houses which have been divided—houses in *Portland Place* —that is a familiar instance to me, and I dare say to most of us —where two doors immediately adjoin. It is impossible to draw up a carriage to the one without overlapping the other. There is no doubt that it is quite a reasonable thing to stop a carriage there for the purpose of taking up and setting down, or even for the purpose of waiting there a reasonable time."

64. Sir George Jessel's analogy with the blacksmith conducting his trade on the highway seems to me to indicate that if a vessel overlaps a neighbour's riparian land indefinitely it would amount to an unreasonable exercise of rights of which the neighbour would be entitled to complain. But it is important to understand that the neighbour's ground of complaint (at least in relation to the Thames whose bed is vested in the Port of London Authority) would be that his neighbour's activities amounted to a nuisance.

65. Nuisance is an interference with possession of land, and is actionable only on proof of damage. It was for this reason that in *Booth v Ratté* (1890) 15 App Cas 188 the Privy Council examined at length the plaintiff's right to possession of the soil of the Ottawa river over which his floating wharf and boathouse lay. They came to the conclusion that either he had paper title or he had possession; either of which was sufficient to enable him to maintain an action in nuisance against an upstream saw mill whose refuse interfered with his enjoyment of his floating wharf and boathouse. That case is not, in my judgment, authority for the proposition that a riparian owner is entitled as against the owner of the river bed to place a floating jetty or boathouse for an indefinite period over a part of the river bed that he does not own.

66. It is perfectly true that a riparian owner is entitled to the natural flow of the watercourse passing by his property; and that he is also entitled to access to and egress from his riparian property, even if he does not own any part of the soil. This is clearly established by the decisions of the House of Lords both in *Lyon v Fishmongers' Co* (1876) 1 App Cas 662 and in *Tate & Lyle Industries Ltd v Greater London Council*. But I have not been persuaded that there is authority to support the proposition that as against the owner of the bed of the waterway a riparian owner is entitled to maintain a floating structure or vessel indefinitely.

67. In the present case neither side contended that they were entitled to ownership or possession of the bed of the waterway. No complaint has been raised against Mr Moore either by a neighbour, or by anyone seeking to exercise the public right of navigation or by anyone who claims to be the owner of the bed of the waterway and who asserts a claim in trespass. I therefore agree that, on these special facts, for the reasons given by Mummery LJ and these supplementary reasons, the appeal should be allowed. I wish to make it clear, however, that different considerations might well apply if a claim in trespass were brought against Mr Moore by the owner of the bed of the waterway over which his vessel is moored.

Lord Justice Jackson

68. I agree that this appeal should be allowed for the reasons stated by Mummery LJ and Lewison LJ.