

Between

CANAL & RIVER TRUST

Claimants

And

GEOFFREY DOUGLAS MAYERS

Defendant

JUDGMENT

1. THE CASE

- 1.1. This case is a claim by the Canal and River Trust ("CRT") (which is the successor of the former British Waterways Board ("BWB")) for declaratory relief and injunctions against Mr Mayers ("GDM") who is the owner of a 72ft "Narrowboat" called "Pearl". In essence, the claim by CRT is for the removal of Pearl from the canal system because GDM has persistently refused or failed to comply with the licensing regime imposed by CRT for the management of the inland waterways of this country.
- 1.2. GDM asserts that the licensing regime is not accurately based on the legislative framework and is therefore unlawful. He says he is complying with the statutes. There is a full list of the issues in section 6 of this judgment.
- 1.3. The case was heard over 4 days from 30th April to 3rd May 2013. The evidence was concluded but submissions were not. I therefore arranged for written submissions from counsel. Submissions were received from Mr Stark for GDM on 21st May 2013, 24th May 2013 and 11th June 2013 (there is some controversy over whether this exceeds what I allowed but I have read them all and taken them all into consideration) and from Mr Moss for CRT on 20th May 2013. There was also a reply by Mr Stark on 15th July to a specific questions I raised about s 156 of the Equality Act. I then delivered a draft of this judgment to Counsel in late July. In that draft I had neglected to take account of the concession made by CRT that in licensing boats for use on the canals, it is exercising a public function and as a result I received further submissions from Mr Stark on this subject. I have therefore redrafted the relevant section of this draft judgment (section 10) to take account of the concession
- 1.4. This draft written judgment has been sent to Counsel on the usual basis for minor corrections to be suggested. Replies were received from both Counsel and these have been taken into account in completing judgment. It may now be regarded as a fully written judgment and may be utilised without restriction save that it must not be selectively quoted so as to give a misleading impression as to its contents.

2. THE CANAL LEGISLATION

2.0.1. The canal system was constructed and has since been maintained pursuant to Private Acts of Parliament. The jurisdiction is therefore entirely statutory, though it is subject to the rule applicable to Private Acts of Parliament that in cases of ambiguity the interpretation should be that which is least advantageous to CRT. Several authorities were cited in relation to this proposition but since there is no controversy over the proposition, it is not necessary to refer to them.

2.0.2. The legislative history relevant to this case can be summarised as follows:

2.1. The Transport Act 1962

2.1.1. Section 1 set up British Waterways Board to own and manage the canal system and other inland waterways.

2.1.2. Section 10 requires the Board to provide its services with due regard to "efficiency economy and safety".

2.1.3. Section 27 transferred the relevant assets to the Board.

2.1.4. Section 43 (3) provides that the Board:

"Shall have power to demand, take and recover such charges for their services and facilities and to make the use of those service and facilities subject to such terms and conditions as they see fit."

2.1.5. On its face, this provision appears to permit BWB (and hence CRT) to impose whatever regime they like. The wording quoted would justify any form of restriction or condition. However, s43 provides no sanction for breach of the regime save the implication that, if they can make the use of the services and facilities subject to conditions, they can presumably refuse access to the facilities and services if the conditions are not met.

2.1.6. However, it is very important to note that, in this case, CRT do not rely on any such general power, they rely on specific powers which are in the later Acts (see below) and which are much more restricted. The provisions in s43 are referred to in CRT's closing submissions but were not relied on at all in the course of the case as necessary in support of the relief claimed indeed it was made clear on behalf of CRT throughout the trial that they rely **ONLY** on the specific legislation.

2.2. The Transport Act 1968

2.2.1. This Act placed a duty on the Board to maintain the waterways in a suitable condition and repealed any previous private legislation or enactments in respect of particular waterways.

2.3. The British Waterways Act 1971.

2.3.1. Section 3(1), defined a "houseboat" as meaning any boat save one which is "bona fide used for navigation".

2.3.2. Section 13 provides that:

"(1) It shall not be lawful to moor, place, keep or maintain a houseboat on an internal waterway...unless a certificate, in this act referred to as a "houseboat certificate", in relation to it is then in force..

(2) if any houseboat shall be moored, placed, kept or maintained contrary to the provisions of section (1) of this section or in contravention of any of the conditions attached to the houseboat certificate in respect of such houseboat, the Board may by notice in writing require the person having control of the houseboat to remove...it...Any such notice shall be given by leaving it or sending it in a prepaid letter addressed to the person having control of such houseboat at his usual or last known residence...or by exhibiting the same in a conspicuous position on such houseboat and shall specify the period (not being less than 28 days) within which such removal...shall be complete.

(3) If any person fails without reasonable cause to comply with any notice given by the board under the provisions of subsection (2) of this section...the Board may at any time after the expiration of the period specified in such notice remove...the houseboat referred to in the notice ".

2.4. The British Waterways Act 1973.

2.4.1. Section 2, defines a "vessel" as "any ship, boat or barge".

2.4.2. Section 8 provides that:

"(1) "relevant craft" is any vessel which is...left or moored...without lawful authority...

(2) the board may remove any relevant craft after giving not less than 28 days notice to the owner of the relevant craft stating the effect of this section shall "

2.5. The British Waterways Act 1995

2.5.1. Section 17 (3) reads, (so far as relevant):

"Notwithstanding anything in any enactment...the board may refuse a relevant consent in respect of any vessel unless

(a) ...the vessel complies with the standards applicable...

(b) ...an insurance policy is in force in respect of the vessel...

(c) ...either...(i)...a mooring or other place where the vessel can reasonably be kept and may lawfully be left will be available for the vessel, whether on the inland waterway or elsewhere

...or...(ii)...the vessel...will be used bona fide for navigation throughout the period for which the consent is valid without remaining continuously in any one place for more than 14 days or such longer period as is reasonable in the circumstances"

2.5.2. This subsection is at the heart of this case. Under it, CRT issue two types of permit for boats, one for boats which have a "home mooring", the other for those which do not. These are required by the section to be "*bona fide used for navigation throughout the period...*". CRT's term for this is "continuous cruising" and it is GDM's allegation that the CRT definition of "continuous cruising" is not justified by the statute. It is this contention which led him to provoke this litigation.

2.5.3 Subsections 17 (4) and 17 (5) (again so far as relevant) read:

(4) "*...if...(a) the vessel does not comply with the standards applicable...or...
(b) an insurance policy is not in force in respect of the vessel...or...
(c) either...*

*(i)it appears to the board that a mooring or other place
such as is referred to in subsection 3 (c) (i) above is not
available for the vessel*

*...or.. (ii) the vessel has not in fact been used for bona fide
navigation in accordance with subsection 3 (c) (ii)*

*...the Board may give notice requiring the holder of the relevant consent to
remedy the default within such time as may be reasonable (not being less than
28 days)*

*(5) If the holder of the relevant consent does not comply with any notice served
pursuant to subsection (4) above then the relevant consent shall determine on
the date the notice expires"*

2.5.4. These are the provisions on which CRT rely as justifying their revocation of GDM's licence. They say that once the licence is revoked, Section 13 of the 1971 Act and Section 8 of the 1973 Act empower them to require its removal or to remove it.

2.6. The British Waterways (Transfer of Functions) Order 2012

2.6.1. This transferred the powers and functions of BWB and its ownership of the canal system to CRT. The order was approved by Parliament in June 2012. The replacement was not quite total but the reservations are not relevant to this case.

3. THE UNDERTAKING

3.1. Before the passage of the 1995 Act, which introduced the requirement that a boat must either have a home mooring or be engaged in bona fide navigation throughout the period of its licence, BWB gave an undertaking to Parliament. The text is recited in full at tab 42 of the supplementary bundle.

3.2. The undertaking was to apply to any vessel which:

a) was on the inland waterways without having either:
(i) an on line (which means on the canal itself) mooring for which BWB were prepared to grant a permit; or
(ii) a mooring which was not on the canal itself where it could lawfully be kept

b) was not a vessel customarily used bona fide for navigation without remaining in any one place for more than 14 days or such longer period as was reasonable in the circumstances; and

c) had not changed ownership since 25th October 1994.

3.3. The undertaking was that BWB would not refuse a licence on the basis that no mooring was available, nor would they serve a notice requiring the owner to secure a mooring.

3.4. However, the undertaking would cease to have effect in respect of any vessel for which a mooring had been offered to the owner and either accepted or unreasonably refused.

3.5. It is clear that the newly introduced Section 17 (3) was intended to restrict long-term towpath mooring to those who were more or less continually travelling, and that the undertaking was intended to protect those who already had this lifestyle but did not satisfy the requirement that the vessel must be "*bona fide used for navigation throughout the period*" until a mooring could be found for them.

3.6. The reason for the introduction of Section 17 (3) seems to have been an increase in reports of congestion at visitor moorings (page 586) and a CRT briefing paper dated September 2012 (pages 593 to 620) refers to "*the emergence of informal residential boating communities along certain stretches of our towpaths in urban areas of the south and east, largely in response to the housing shortage*".

3.7. At page 594, the same briefing paper contains this section:

"Legislation in 1995 gave us power to require that boats should have a lawful home mooring, unless they were used "bona fide" for navigation. Shorthand for this is that they "continuously cruise" The legislators decided...that it was reasonable that boats engaged in continuous journeys did not need to have a home mooring. Precisely what was meant in the Act by "bona fide navigation" and "without remaining continuously in any one place for more than 14 days or such longer period as is reasonable in the circumstances" has been the subject of increasing and sometimes acrimonious debate within the boating community since 1995."

4. THE GUIDELINES

- 4.1. BWB (and subsequently CRT) published what they call "Mooring Guidance for Continuous Cruisers". There are copies at pages 137 to 138 and 304 to 306 of the documents bundle. (The wording has been altered since but the wording at the relevant time is in the bundle) At page 305 it reads:

"Navigation" The law requires that the boat will be bona fide used for navigation throughout the period of the licence. "Bona fide" is Latin for "with good faith" and is used by lawyers to mean "sincerely" or "genuinely".

"Navigation" in this context means travelling on water i.e. making a journey. A "cruise" is a journey or series of journeys "making for no particular place or calling at a series of places"

Therefore, Subject to stops of permitted duration, those using a boat licensed for continuous cruising must genuinely be engaged on a journey or series of journeys. Such journey or cruise must take place "throughout the period of the licence" and therefore requires progression round the network or at least a significant part of it"

Thus short trips within the same area "bridge hopping" and shuffling backwards and forwards along a smaller part of the network does NOT meet the legal requirements for continuous cruising. The law requires a genuine progressive journey (a cruise) around the network or significant part of it."

"Place" The law requires that stops during such a journey should not be "in any one place for more than 14 days". "Place" in this context means a neighbourhood or locality, NOT simply a particular mooring site or position.

Therefore to remain in the same neighbourhood for more than 14 days is not permitted. The necessary movement from one neighbourhood to another can be done in one step or by short gradual steps. What the law requires is that if 14 days ago the boat was in neighbourhood X, by day 15 it must be in neighbourhood Y. Thereafter, the next movement must normally be to neighbourhood Z, and not back to neighbourhood X (with obvious exceptions such as reaching the end of a terminal waterway or reversing the direction of travel in the course of a genuine progressive journey".

The guidance does specifically say (at p305) that " *this guidance does not have the force of law but seeks to interpret the law as set out in section 17 British Waterways Act 1995.*"

- 4.2 This interpretation is highly controversial.

5. THE RELEVANT FACTS

- 5.1. Three officers of CRT gave evidence as did GDM. What emerged is that although there is considerable controversy over the behaviour of one side or the other, none of it is relevant to the issues I have to decide. The relevant facts are not in dispute at all. The recital which follows is therefore undisputed.

- 5.2. "Pearl" was built in 1935. It is 72 feet long and marginally under 7 feet wide. It was acquired by GDM in 1990 and he rebuilt it in 1990-91. Since then it has been his permanent and only residence.
- 5.3. From 1991 onwards, the vessel was kept wholly or mainly on the Trent & Mersey Canal. The Trent & Mersey is about 95 miles long. Paradoxically, it does not connect directly to the Mersey, that connection is provided by the Bridgewater Canal with which the Trent & Mersey connects at Preston Brook. The Trent intersection is at Derwent Mouth in Derbyshire.
- 5.4. Near the north western end of the Trent & Mersey lies Anderton where a short side spur of the Trent & Mersey Canal leads to the famous Anderton Boat Lift which provides a connection between the Trent & Mersey and the Weaver. Anderton is about two and a half miles from Northwich by road, a little less via the Weaver, a little more via the Trent & Mersey. There are two Marinas at Anderton, Anderton Marina and Uplands Marina. There are also facilities provided by CRT for fuel, water and waste disposal.
- 5.5. GDM is not yet 65 but is in effect retired on health grounds. He has had depressive episodes so prefers to remain near his GP practice which is in or near Northwich. (Though the medical evidence shows that recent attendance on his doctor is minimal) In evidence, he was quite emphatic that he does not like to remain in the same exact position and that left to himself he would move up and down the Trent & Mersey canal always within 10 or 15 miles of Northwich and Anderton. He lives on an income of about £145 per week in pensions and benefits. It follows that it would be very difficult for him to afford a home mooring (which could not be obtained for any less than about £25 per week. I was told that at the time of this hearing, 9 were available on the Trent & Mersey Canal at guide prices between £1100 and £2200 per annum).
- 5.6. This problem would be avoided if Housing Benefit were available but Housing Benefit would almost certainly not be paid if he left the mooring for long periods (left to himself, he would not use it at all).
- 5.7. There is also the problem that if he did remain permanently on a home mooring, this would constitute a change of use for planning purposes. Planning Permission would then be required and it seems highly unlikely that it could be obtained. Most moorings are in marinas and the owners are not usually prepared to permit full time residential use. I was informed by Counsel for CRT, on instructions, that there is no "on line "mooring on the Trent & Mersey with planning permission for residential use and that, so far as was known, neither CRT nor BWB had ever made an application for the use of an on line mooring for residential use.
- 5.8. For a period of about 12 to 18 months in about 1998, Pearl did have a home mooring in the Uplands Marina. For a while, the Local Authority paid housing benefit to cover the cost but GDM made very little use of the mooring and when they discovered, that the mooring was not being used, the Local Authority ceased to pay and GDM abandoned the mooring. After that, Pearl was

subsequently licensed for continuous cruising without a home mooring. This form of licence was last renewed in September 2009.

- 5.9. The records of sightings of the Pearl by BWB and CRT officials since April 2003 are at pages 481 to 483 of the bundle. The relevant columns are the second, which gives the date of the relevant sighting, and the eighth, headed "Floc. affected" which gives the place of the sighting. "TM" refers to the Trent and Mersey, "SU" is the Shropshire Union and "OX" is the Oxford Canal. The three digit number which follows is the kilometre distance along the canal and the final figures are the specific location within that kilometre. It can be seen that after November 2005 the vessel was only ever seen on the Trent & Mersey and always between Km 12 and Km 15. It was sighted consecutively at exactly the same location (002 at Km 15) on many occasions.
- 5.10. The result was extensive correspondence between BWB/CRT and GDM. BWB/CRT asserted that their guidelines were not being complied with, GDM replied, often heatedly, that the CRT guidelines interpretation of Section 17 (3) of the 1975 Act is wholly wrong.
- 5.11. On 9th January 2009, GDM wrote a two-page letter to BWB complaining of them serving a letter on him stating that he had been on the same mooring for more than 14 days and needed to move. He sent a copy of the letter to his MP.
- 5.12. On 13th January 2009, GDM made a level 2 complaint using BWB's own complaints procedure. The complaint was answered by one of BWB's Directors. He said that in order to facilitate GDM in pursuing the case to the Ombudsman, they would not take any enforcement action for the time being.
- 5.13. GDM did make a complaint to the Ombudsman. His main complaint was that the mooring guidelines did not conform to the wording of subsection 17(3) of the Act. The Ombudsman then refused to deal with the complaint because he said the interpretation of the Act is a matter of law for the Courts. GDM then withdrew the complaint.
- 5.14. On 9th December 2009, Miss Helen Waterman, an Enforcement Officer employed by CRT, sent GDM a letter (pages 139 -140) which said (inter alia):
- "According to our records, you do not have a mooring where you can lawfully leave your boat and we have noticed that your boat has been moored on the offside of Bridge 193 on the Trent and Mersey Canal for longer than 14 days. Our initial sightings indicate insufficient movement to meet our legal requirements...you have three options in order to comply with our requirements...*
- (1) use your boat for continuous cruising as set out in the guidance...or...*
 - (2) obtain a mooring where you can lawfully leave your boat...or...*
 - (3) remove your boat from our property and water.*
- If you decide to use your boat for continuous cruising, I must ask you to begin keeping adequate evidence of your boat movements...or*

Please contact me at within 28 days from the date of this letter to let me know what you intend to do. If you do not we can take your licence away"

The letter went on to threaten removal of the boat from the canal.

- 5.15. GDM did not reply and on 28th of January 2010 Miss Waterman wrote again (page 141) stating:

"If you fail to provide me with the evidence requested within (14 days)...I will have no alternative but to terminate your licence with immediate effect"

- 5.16. GDM replied on 5th February 2010 (page 144). He said in terms that he was remaining in the same position as he wanted BWB to take him to Court. He seems to have been unaware that he could himself have applied for declaratory relief and seems to have assumed that the only way of obtaining a Court decision was to force BWB to sue him.

- 5.16 On 16th February, Miss Waterman wrote purporting to terminate the licence with immediate effect (page 146). On the same day, she served on GDM what purported to be a notice of the intended removal of a vessel under Section 8 of the British Waterways Act 1993 (pages 147-149) and a notice requiring GDM to remove the boat from the canal (pages 150-151).

- 5.17 GDM replied on 21st February 2009 asserting that the actions of BWB were unlawful and illegal (page 153).

- 5.18 On 31st March 2010 Miss Waterman wrote a letter before action (page 155) and proceedings were commenced with the issue of a Part 8 Claim Form dated 15th July 2010.

6. THE ISSUES

- 6.1. CRT claim that they are entitled to require GDM to remove the boat from the canal if he is not willing to comply with their regulations. They further say that if he does not remove it they are entitled to do so and they seek declaratory and injunctive relief accordingly. It is important to note that, whatever was said in the letters, at this trial they have not relied on the terms of the Guidelines, only on the wording of Section 13 of the 1971 Act, Section 8 of the 1973 Act and Section 17 of the 1975 Act.

- 6.2. GDM asserts that:

- (a) What he was doing may well not have complied with the Cruising Guidelines but these guidelines are unlawful because they are not justified by the wording of Section 17 (3). He also asserts that what he was doing was in compliance with Section 17 (3).
- (b) In any event, the notices served on him were not compliant with the procedure required by the Act and were therefore invalid.

- (c) The actions of CRT are in contravention of the undertaking given to Parliament and are therefore unlawful.
 - (d) The actions of CRT are both direct and indirect discrimination against him as a disabled person and a breach of the Public Sector Equality Duty under the act which would render the actions of CRT unlawful or invalid
 - (e) The actions of CRT will deprive him of his home, that to do so is disproportionate, and that it is a breach of Article 8 of the European Convention on Human Rights and hence a breach of the Human Rights Act.
- 6.3. There are clear anomalies in both positions. CRT clearly regard the occupation of moorings by permanently resident boat owners who do not move very much as a significant problem (see paragraphs 3.5 and 3.6 above). However, neither the statutory regime in subsection 17 (3) nor the guidelines can deal with this problem. A boat which has a home mooring is not required to be "bona fide used for navigation throughout the period of the licence" but neither is it required ever to use its home mooring. The Act requires that the mooring is available, it does not say it must be used. The guidelines also have this effect. The boat is still subject to the restriction that it must not stay in the same place for more than 14 days but there is nothing whatever to stop it being shuffled between two locations quite close together provided they are far enough apart to constitute different places. If those who are causing the overcrowding at popular spots have home moorings anywhere in the country the present regime cannot control their overuse of the popular spots. Such an owner could cruise to and fro along the Kennet and Avon Canal near Bristol and the home mooring could be in Birmingham and totally unused.
- 6.4. The result is that CRT require GDM to acquire and pay for a home mooring which he cannot afford and would not use at all. He could then do exactly what he wants to do. It was conceded on behalf of CRT in the course of argument that if GDM acquired a home mooring for Pearl, he would be left undisturbed provided he did not infringe the 14 day requirement which would be the case if he behaved as he wished to as described at the end of paragraph 5.8.
- 6.5. This would be of no advantage whatever to CRT. They charge exactly the same for a continuous cruising licence as they do for a home mooring licence. The home mooring would most probably be in a private marina so the fees for that would not benefit CRT. They would be payable to the marina owners (Marina owners do pay a small charge to CRT for the water supply via the canal but it is not significant).
- 6.6. The result would be that by paying about £25 a week (which he can ill afford) to a third party with no significant advantage to CRT, for a mooring he does not want and would not use, GDM would be free to do what he told me he wants to do. So would any other resident boat owner who could afford a mooring. This would do nothing to ease the overcrowding in certain areas which is causing the concern.

- 6.7. However, GDM's position contains an even more serious anomaly. He provoked this litigation in order to obtain a decision on whether the Continuous Cruising Guidelines are or are not justified by the statutory regime and in particular subsection 17 (3). However, by refusing to move at all he has unquestionably put himself in breach of the subsection because if Pearl is not moving at all it is certainly not navigating and GDM is also in breach of the 14 day rule. An intention to provoke litigation is certainly not a reasonable cause for staying longer than 14 days in the same place.
- 6.8. This, and the decision by CRT not to rely at trial on the guidelines at all but only on the wording of the statutes, means that it is not necessary for this Court to rule on whether the guidelines are justified by the statutes. I need only decide whether what was physically done by GDM with Pearl over the relevant period does or does not comply with the statutes, and in particular with subsection 17 (3). Thus, GDM's own actions have deprived this Court of the ability to rule on whether the guidelines are congruent with the statutes which was his main purpose in provoking the litigation.
- 6.9. The result is that this decision is no use whatever as any form of test case. The decision is totally facts specific.

7. **"Bona Fide Used for Navigation throughout the Period of the Licence"**

- 7.1. As I have just explained, it is wholly unnecessary to the decision I have to take for me to rule on whether the wording of the guidelines is or is not justified by the provisions of Section 17 (3) of the 1995 Act. In this case CRT have made it abundantly clear that they rely only on s 17 not the Transport Act and not the guidelines. It follows that CRT have the power to revoke or refuse to renew a licence, and hence to require the removal of the boat (and if it is not removed to remove it themselves) if, but only if, the provisions of Section 17 (3) are engaged. Whether the guidelines match the section or whether the guidelines have been breached is irrelevant. Whether the terms of the Guidelines could be justified under the Transport Act is irrelevant. What matters is whether the terms of Section 17 (3) have been engaged.

- 7.2. The first stage therefore is to determine whether Pearl was:

"Used bona fide for navigation throughout the period for which the consent was is valid without remaining continuously in any one place for more than 14 days or such longer period as was reasonable in the circumstances"

- 7.3. This requires consideration of the meaning of the phrase "bona fide used for navigation". In that context, I was referred to a substantial number of authorities. Of those in the bundle provided, the following are relevant to this issue:

WEEKS V ROSS [1913]2 KB 229

CROWN ESTATE COMMISSIONERS V FAIRLIE [1979] SC156

R V GOODWIN [2006] 1 WLR 546

BWB V DAVIES (31/0302011) HH Judge O'Malley, Bristol County Court
BROWN V CRT [2012] EWHC 3133
BWB V WARD (Bristol County Court)

- 7.4. An attempt was made in CRT's closing submissions to argue that some of these authorities are defining "in navigation" not "for navigation" and that this and the context in which the phrases are used makes a difference. I do not accept this. What is required is to ascertain the meaning of "bone fide used for navigation throughout the period of the licence" and they are all helpful for this purpose.
- 7.5. **WEEKS V ROSS [1913] 2 KB 229** was an appeal by way of Case Stated from a decision by a Magistrates' Court that two boats which were used for carrying 25 and 20 passengers respectively back and forth on pleasure trips along a course of a mile and a half of river and canal at Exeter, did not require certificates as to survey from the Board of Trade because they were not "vessels involved in navigation". The Divisional Court of the Kings Bench Division unanimously reversed the Magistrates' decision.
- 7.6. The Court was referred to the decision in **SOUTHPORT V MORRISS [1893] 1 QB** (in which it was held that a launch used on a marine boating lake was not "used in navigation") and accepted that the decision was correct. The launch was used only on an enclosed sheet of water described as a "pleasure pond". However, the two boats at Exeter were not the same. There was clearly navigation in the canal because seagoing ships used it to get to the docks. Channel J observed:
- "...it is a place for navigation...and...it is not the less navigation by this launch than by any other craft; the launch is navigating".*
- 7.7. Bray J concurred *"In my opinion there could be no other proper finding than that the vessel was used for navigation. A river is a place for navigation and a canal is a place for navigation and they are none the less places for navigation because as it happens the vessel only used a portion of them."*
- 7.8. **CROWN ESTATE COMMISSIONERS V FAIRLIE [1979] SC156** was a decision on whether fixed moorings attached to the sea bed were an incident of the public right of navigation. That made it necessary to define "navigation". Lord President Emslie said (page 173) *"There can be no doubt that navigation is the action or practice of passing on water by vessels of all kinds"*.
- 7.9. Lord Cameron gave (at p 182) a very similar definition:
- "In my opinion the basic concept of the word is of passage or transit through navigable waters whether they be tidal or non tidal...by the Oxford Dictionary "navigation" is defined as "the action of navigating: the action or practice of passing on water in ships or other vessels."*
- 7.10. **R V GOODWIN [2006] 1 WLR 546** was a criminal case involving at jet-ski which, while under the control of the Defendant, had been involved in an accident in which the rider of another jet-ski had been seriously injured. The

Defendant was charged with doing an act as the master of a ship which caused or was likely to cause serious injury. It was held that although the jet-ski was capable of being a vessel used in navigation, (and hence a ship) its use for simply having fun on the water without the object of getting anywhere could not be described as navigation. The Court of Appeal held that *"those authorities which confine "vessel used in navigation" to vessels which are used to make ordered progression over the water from one place to another are correctly decided"* (page 557).

7.11. **BWB V DAVIES (31/0302011)** was a decision by HH Deputy Judge O'Malley DL sitting at Bristol County Court. As such it is persuasive rather than authoritative. Given that he is a retired full time Circuit Judge of considerable distinction, it is very persuasive. The Practice Direction on the Citation of Authorities of 9th April 2001 directs that County Court cases should not be cited except to illustrate the level of damages in personal injury cases or cited in the County Court *"in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available."* Since there is no higher level case (other than the next one in this list, which counsel for GDM argued should not be cited at all) in which the expression *"Bona fide used for navigation throughout the period of the licence"* has been considered, this decision presumably meets this second requirement.

7.12. Mr Davies was the owner and occupier of a houseboat kept on the Kennet & Avon Canal. The relevant facts are recited by Judge O'Malley at paragraph 6 of the judgement as follows:

"The defendant is the owner of a narrow boat named "Biddy", which he uses as his home. Since 2004 he has kept it at various moorings along the canal, principally on the 10 mile stretch between Bath and Bradford-on-Avon. He has a modest income as a support worker for the deaf/blind and he works in Twerton, to the west of Bath. He has no permanent mooring for the boat but contends that his use of the boat constitutes use that is "bona fide...for navigation" which accordingly qualifies for the issue of a licence from the British Waterways Board. He moves the boat, usually a mile or two at a time, never remaining at any given mooring for more than 14 days. His choice of that particular stretch of the canal is determined, according to his evidence, by his need for access to his place of work, and by proximity to his friends and to necessary services".

7.13. The decision is to be found at paragraph 14:

"In deciding whether the defendant's use of his boat relieves him of the requirement to have a permanent mooring the question has to be asked "What does the defendant use his boat for?" This involves consideration of the purpose for which he uses the boat. Is it to be used for navigation, or for some other purpose? If he uses it for navigation, is he so using it throughout the period of the licence? It is accepted and asserted by the defendant that he uses it for his home. It seems to me that the use of a boat as a home does not necessarily exclude a co-existent use for navigation. Indeed a person who continuously cruises the waterways in the manner envisaged by the Board might well be

living full-time on his boat and have no other home. The question remains-for what purpose does the defendant use the boat? Is it for navigation? I have come to the conclusion that the defendant's use of the boat is not and will not be "for navigation". His use of the boat is as his home, and his movement of the boat is not use bona fide for navigation, it is incidental to its use as a home. His purpose in keeping the boat on the short stretch of the canal between Bath and Bradford-on-Avon is so that his home is within convenient distance of his place of work and his social circle. His purpose in moving the boat is to attempt to escape the requirement to have a permanent mooring. His movement of the boat is not use that is bona fide for navigation and in my judgement the Board was justified in concluding that the applicant did not qualify for the issue of the licence."

"The phrase "used bona fide for navigation" involves consideration of the purpose of the use, rather than the extent of the movement."

- 7.14. **BROWN V CRT [2012] EWHC 3133** was a decision of Mrs Justice Cox on an application for permission to apply for judicial review. She was thus concerned only with whether the case was arguable. Counsel for GDM, Mr Stark argues that this brings this case within is in one of the categories referred to in paragraph 6.2 of the Practice Direction I quoted in relation to the previous case. "Decisions on applications that only decide that the application is arguable" The Practice Direction states that such a decision "may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law".
- 7.15 It is also worthy of note that it was only a 30 minute hearing though the reserved Judgement must have taken rather longer than that to write.
- 7.16. The case was concerned with an application for permission to apply for judicial review of the 2011 guidelines on the basis that they were not justified by the legislation. In fact the decision was that permission for judicial review was refused on the basis that the guidelines were an accurate summary of the legislation and that the contrary proposition was NOT arguable. Mr Moss for CRT argues that this does not fall within the provisions of the PD.
- 7.17. On any view, the case would be persuasive but it is not in fact of much help in this case. The reasoning advanced on behalf of Mr Brown relied very heavily on Parliamentary Materials and the main decision was that these were not admissible.
- 7.18. In the present case the only provision relied upon as supporting the claim by CRT is Section 17 (3) of the 1995 Act. As I have already said, this case does not call upon me to make any declaration as to whether the guidelines match the legislation, only whether the actions of the Defendant match one particular part of the legislation which is a purely factual decision on the specific facts of this particular case.
- 7.19. **BWB V WARD (1st June 2012) (Bristol County Court) (HH Judge Denyer)** was another County Court case in which BWB sought a declaration

that they were entitled to remove a boat from the Kennet & Avon Canal and an injunction to prevent its return. The boat did not have a license at all partly because its owner objected to paying a late payment charge and partly because it did not have a boat safety certificate. The decision is therefore of no help in relation to the meaning of "bona fide use for navigation throughout the period of the licence" although I am indebted for its clear analysis of the relevant legal provisions.

7.20. There are many other authorities in the bundle supplied to me but none relates to this particular issue.

7.21. It seems to me that the expression "navigation" clearly means the process of undertaking any purposeful journey from one specific point to another by water. The addition of the words "bona fide" import an entirely subjective element and merely mean that the journey must be undertaken for genuine purposes and not for the purpose of circumventing the legislation, when in reality the intention of the boat owner is to stay as nearly as possible in the same place.

7.22.1. It is, as I have already said several times, unnecessary for me to comment on whether the guidelines match the legislation. I do so in only two respects and with the express proviso that this does not form part of the decision.

7.23.2. I think the guideline's interpretation of "in the same place" is correct. It cannot be taken to mean "in exactly the same position" because to do so would drive, perhaps not a coach and four but at least a horse drawn narrow boat through the purpose of the legislation. The requirement not to stay in the same place for more than 14 days is imposed on boats with either form of licence so if it could be satisfied by moving 50 yards the legislation would be wholly ineffective. I agree that it only makes sense if it is interpreted in a much more general sense. If a boat were moved 500 metres within the parish of Anderton it would in my view be in the same place. If it were moved to Northwich, over 2 miles away, it would not.

7.22.3. I consider the requirement imposed by CRT that a substantial part of the network is used cannot be justified by relying solely on section 17(3). That section requires "bona fide navigation throughout **the period of the licence**" not "bona fide navigation throughout **the canal network**". The requirement is temporal not geographical. In my view it does NOT follow from:

"Such journey or cruise must take place "throughout the period of the licence"

-that it

"therefore requires progression round the network or at least a significant part of it"

7.22.4. If a person who lived permanently on his or her boat had specific reason for making repeated journeys over the same stretch of canal between two points sufficiently far apart to be regarded as different places, it would in my view be purposeful movement by water from one place to another and hence "bona

fide navigation". In the course of argument I used the example of someone who lived on his boat and was also using the vessel commercially to move coal from a mine to an iron foundry only a few miles away and then returning empty for another load.

7.22.5. To take an extreme example, in its heyday, the Mersey Ferry operated continuously to and fro over the same stretch of water which is less than a mile wide. No one would ever have accepted the suggestion that the ferry boats were not bona fide used for navigation throughout the period of their operations.

7.22.6. The canal boats which gave Ellesmere Port its name by taking pottery from Ellesmere to its port on the Mersey for shipment overseas used only the restricted part of the system involving the Shropshire Union Canal from Ellesmere Port to Nantwich, and the Llangollen Branch from there to Ellesmere. Again, it could not seriously be suggested that the boats were not "bona fide used for navigation throughout the relevant period."

7.22.7. I agree with HH Deputy Judge O'Malley DL that *"the phrase "used bona fide for navigation" involves consideration of the purpose of the use, rather than the extent of the movement"*. CRT rely heavily on that decision as supporting their position but in respect of the requirement to use a significant part of the network it has precisely the opposite effect.

7.22.8. The distinction between purpose and area is also clear from **WEEKS V ROSS** (see paras 7.5-7.7) in which the launch was using only part of the canal at Exeter but was still held to be "navigating":

"they are none the less places for navigation because as it happens the vessel only used a portion of them."

7.22.9. However, distance does have some relevance. If the boat moves 100 miles it is much easier for the owner to establish that he is bona fide navigating than if it moves only 100 yards.

7.23. In the course of his evidence, GDM told me (see paragraph 5.5) that his purpose in living on a boat was to be able to move from place to place. This means that, like Mr Davies

"His use of the boat is as his home, and his movement of the boat is... incidental to its use as a home."

Also, in close parallel with Mr Davies:

"His purpose in keeping the boat on the short stretch of the canal between (Anderton and Northwich)... is so that his home is within convenient distance of his (GP's surgery and the facilities he uses at Anderton).

7.24. In my view the key to Judge O'Malley's decision in the case of Mr Davies is the next factual finding:

"His purpose in moving the boat is to attempt to escape the requirement to have a permanent mooring. His movement of the boat is not use that is bona fide for navigation and in my judgement the Board was justified in concluding that the applicant did not qualify for the issue of the licence."

- 7.25. Whether this would be true of Mr Meyer if he did move up and down the Trent and Mersey is not something I can decide. It would depend on his motive. If he did have a genuine reason for each movement it might well be "navigating" even though his boat is his home. If in reality he wanted to stay in the same "place" and was just moving aimlessly to avoid the 14 day requirement, it would not.
- 7.26. However, what was actually done with Pearl by GDM most certainly did not amount to "bona fide navigation". The records quoted at paragraph 5.5 show that for a period of five years prior to the purported revocation of the licence, Pearl had never been spotted anywhere on the network other than on the same 3 km stretch of the T&M and then frequently consecutively in the same place on many occasions. It may well be that there was a reasonable explanation: illness, ice, or mechanical breakdown, for some of the periods for which he remained in the same place but that could only apply to a small proportion of the time. The terms of the section are engaged unless the vessel is bona fide used for navigation **and** it does not stay in the same place for more than 14 days or such longer period as is reasonable in the circumstances.
- 7.27 In fact, it is common ground that towards the end of the period, GDM was deliberately not navigating in order to provoke this litigation. The letter referred to in paragraph 5.12. makes this very clear indeed. I have already referred to the paradox that this action by GDM has deprived this court of jurisdiction to make any decision on the whether the guidelines are congruent with the litigation, which is what he wanted to challenge. I have in fact expressed a (very limited) view on this but it is wholly irrelevant to the decision.

8. ADEQUACY OF THE NOTICE GIVEN

- 8.1. The argument on behalf of GDM as to the adequacy of the notice runs as follows:
- (a) The legislation empowering the board to revoke the licence requires a notice requiring the owner to remedy the defect and giving at least 28 days for him to do so (1995 Act s17 (4)). It is argued that the letter of 9th December 2009 [page 139-140] does not purport to be a notice and does not specify a time limit
 - (b) It is also argued that when the letter was sent the boat was iced in so GDM could not move it at all so there was a reason for remaining in the same place

- (c) The defect was not cured by the letters at pages 141 and 145 because the letter at page 141 gave only 14 days notice and in any event the canals was frozen so compliance was impossible
- (d) Hence the certificate was not validly revoked. It had been granted in September 2009 for one year so it was still in force at the time when the litigation was commenced

- 8.2 In my view, the argument is wholly misplaced. Section 17(4) of the 1995 Act provides that the board **may** give notice requiring the holder of the consent to remedy the default within a time limit of not less than 28 days. Mr Moss, counsel for CRT points out in his closing submissions that the section is discretionary, not mandatory. I accept that argument and the conclusions which flow from it but in my view the letter series does unquestionably give the requisite notice.
- 8.3. It is very clear that the letter of 9th December 2009 does give precisely the notice CRT is empowered to give. It states the nature of the complaint (not using the boat for genuine navigation throughout the period of the licence), it specifies the action required giving three options, use the boat for continuous cruising, or obtain a mooring or remove the boat from the canal. The letter does specify a period of 28 days within which the decision on which to do is to be notified and it does warn that if this period is not complied with they can take the licence away. It goes on to warn that they can remove the boat after giving not less than 28 days notice. It therefore also meets the requirements of notice under Section 8 of the 1983 Act albeit the 28 days notice given would not start to run until the revocation under section 17(4) of the 1995 Act had taken effect.
- 8.4. GDM did not comply with the notice. Ice is irrelevant. The notice did not require him actually to move the boat, it merely required a decision as to what course of action he was going to take. If he decided to take the continuous cruising option all he had to do was tell them so and point out that he was unable to move the vessel for the time being because it was iced in. I have no doubt that had he said this and had he undertaken to move the boat as soon as the ice melted this would have been accepted. In the event he did not reply at all. CRT could therefore have treated his certificate as revoked at the end of the 28 days. In fact they gave him another 14 days in the letter at page 141 and they did not serve the notification that the licence had been revoked and requiring removal until 18th February more than two months after the original letter. Even then they did not commence proceedings until July 2010 by which time ice would be extremely unlikely.

9. BREACH OF THE UNDERTAKING

- 9.1. This too can be dealt with very shortly. The undertaking expressly stated that it would cease to have effect in respect of any vessel for which a mooring had subsequently been offered to the owner and either accepted or unreasonably refused.

- 9.2. The second statement of GDM himself gives the detail that there was a mooring in 2008. It follows that subsequent to the giving of the undertaking the vessel had been offered a mooring and the owner had accepted it. Hence the undertaking has no application to this vessel at this time.

10. DISABILITY DISCRIMINATION

- 10.1. Most of the 2010 Act came into force in October 2010 which was after the commencement of proceedings. The previous Act is not pleaded but it is argued that there is now a continuing duty which affects the conduct of the litigation and whether it is appropriate for CRT to seek the removal of Pearl from the canal system.

- 10.2. However there is a serious problem for GDM in that there is no adequate evidence that he has a Protected Characteristic within the meaning of the Act. In order to qualify, a disability must be a physical or mental impairment such that it has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

- 10.3. GDM himself says that he is suffering from depression and I accept that this is true. It is also clearly true that he is taking antidepressant medication but there is no evidence whatever that it has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. There are two notes from his doctors in the papers at pages 508 and 512. At page 508, Dr Dixon writes

"This gentleman has been treated for anxiety and depression since 2006 when he was commenced on antidepressants. His mental state was stable from 2007 to 2010. In October 2010 he consulted a colleague regarding increased anxiety regarding the action which British waterways were taking against him resulting in a change of dose of antidepressant. He has seen me only once dated 11. 8.11 following this. As such, I do not feel I have enough information to comment on Mr Meier's health if he were to live in conventional housing."

- 10.4. Dr Llewellyn, at page 512 writing in December 2012 states:

"Mr Mayers lives on a narrow boat and has been with our Surgery for a number of years. He is rather a reclusive individual and at times, can get very anxious. He tends to moor either in Middlewich or Acton Bridge which is fairly close to our practice in case he needs a doctor. I think he would get extremely anxious if he was forced to leave his boat as this suits his lifestyle. I have not seen him personally since 2006."

- 10.5. It is by definition impossible to discriminate on the grounds of disability either directly or indirectly in relation to a person who is not disabled. Mr Stark, Counsel for GDM concedes in his final submissions that *"It is accepted that the medical evidence before the court makes it difficult to establish that the Defendant was disabled"*.

- 10.6. He then goes on to rely on the Public Sector Equality Duty introduced by s 49A of the Disability Discrimination Act 1995 and replaced by s149 of the Equality

Act 2010. Although the earlier Act is referred to in submissions, it is not pleaded but Mr Stark nevertheless argues that the failure by CRT to take account of the duty means that their decision to continue with this claim is fatally flawed. He argues that there is a continuing duty to keep the litigation under review and this was the case after the present Act came into force.

10.7. He accepts that neither the present nor the previous provision creates any private law cause of action but argues that the duty is a public one and that, if the decision by CRT is invalidated by failure to comply with the Public Equality Duty, he is entitled to rely on that invalidation. He relies on KAY v LAMBETH LBC [2006] 2 AC 465 and on MANCHESTER CITY COUNCIL v PINNOCK [2011] 2 AC 104 and BARNESLEY MBC v NORTON [2011] HLR 46 in support of the proposition that breach of a public duty may give rise to a defence in these circumstances.

10.8. Reliance is placed on PIRETTI v ENFIELD LBC [2010] EWCA Civ 1104 in which the Court of Appeal held that the duty under s 49A of the Disability Discrimination Act 1995 could potentially be engaged and relevant when a Housing Authority reached decisions on homelessness.

10.9. However PIRETTI was (obviously) a case about a Housing Authority which is undoubtedly a public authority and undoubtedly has functions relating to housing. The result is that the Public Sector Equality Duty applies to ALL its functions including decisions in individual cases and that the duties of the authority are directly concerned with housing. Both factors are essential to the decision.

"The duty under s 49A applies both when the local authority is drawing up its criteria and when it applies them in an individual case, both of these being an aspect of carrying out its functions". (para 25 of the Judgment.

10.10. I accept the argument that there is a continuing duty but it is clear from PIRETTI that in order to rely on breach of the Public Sector Duty the Defendant needs to establish three matters:

- (a) That either the authority is a public authority or that it is exercising a public function
- (b) That its duties include a duty to consider the relevant factors when it makes decisions
- (c) That there is a realistic prospect that the disability of the Claimant is a relevant factor.

10.11. It seems to me that each of the three presents serious problems for Mr Mayers. As to the first, the duty applies to public authorities and to private persons and bodies exercising public functions. The Act defines "Public Authority" as including anyone who exercises public functions but it does not apply to someone who is not a public authority if the nature of the act concerned is private.

10.12. CRT is not a public authority. I am told that CRT conceded that, in licensing boats to use the canal, it is exercising a public function. I accept this, though I have no note or recollection of the concession, but this case is not directly about the exercise of the licensing function. The present Act was not in force when the licensing function was exercised. The previous Act is not pleaded. To bring this case within the umbrella of the present Act what is relied on is a continuing duty to review the case. That is a decision about the process of this particular litigation and it is difficult to see how that can be regarded as a public function. It is unquestionably the case that Pearl does not have a licence.

10.14. As to the second factor, CRT has no function at all, public or private, in relation to housing. Even if it does have a public sector duty in relation to Pearl to ensure that its policies do not cause an unfair disadvantage to disabled people it is difficult to see how this could feasibly include consideration of their housing needs. The canals are a transport system. They are not intended for residential use.

10.15. As to the third, it is clear from PIRETTI that there must be a failure to take account of material which raises a real possibility that disability is relevant (see para 35 of the judgment). In the present case, on the facts, there is no such possibility. Mr Mayers is not disabled within the definition in the Act.

11. HUMAN RIGHTS ACT

11.1. The first and second problems also afflict the Human Rights Act claim. The Act binds public authorities and others when (but only when) they are exercising public functions (s 6). As has already been demonstrated:

- (a) CRT is not a public body and was not exercising a public function in taking decisions relating to this litigation
- (b) It has no duties in relation to housing. Article 8 is not relevant to its decisions

12. RESULT

12.1. It follows that CRT are entitled to judgment and to the relief they seek. However, CRT indicated at trial that if they succeeded to this extent, they would give GDM a further opportunity to consider his position before removing Pearl from the canal. In those circumstances I will fix a date to hand down this judgment and invite submissions at that hearing as to the form of order to be made.

Derek R Halbert
Designated Civil Judge, Cheshire
22nd November 2013