Damian

This is an Open Letter

I am writing to you in your capacity as the Chairman of MSSG and Officer of BW.

I am writing because of evidence that has recently come to light and events that have unfolded in the last week. I must stress that these issues have a direct impact on the work product of the Group. Subject to the conclusion of appropriate review of the evidence (which may very well have to be and certainly in part will be judicial) it will invalidate the work product of the Group. In anticipation of that possibility we have a responsibility to consider its impact and conduct ourselves appropriately now, given the implications.

The first concern relates to participation in K&A MSSG. NBTA has a great concern not only for ourselves but the other participants of the Group. Some members have quite rightlyexpressed great concern in their own right in relation to the voluntary effort committed to the group combined with the instance where BW might not accept the work product of the Group. If we are correct about this evidence then the work product of the Group (in its present form) will be inherently negated thus wasting this committed effort.

Secondly we have a concern about being engaged in a process which appears to be legally in contempt of Parliament. As a product of having sight of counsel’s opinions and the draft judgement in BW v Davies, Panda Smith and I have been researching material in the Parliamentary Archives, specifically the background behind the BW Act 1995. It is also incumbent on me personally to understand this data as I have been asked to represent a party in an action bought by BW against another boater. On 4th May the Court authorised me to act as advocate in this matter. I have outlined the evidence and the legal basis for the negation that stems from it below. In the circumstances I believe that we should commence the meeting tomorrow by considering whether the work of the K&A MSSG should continue. If we should continue, we must consider the implications of this evidence and how we should amend our own brief if the evidence holds true.

Best regards

Nick Brown, Legal Officer, National Bargee Travellers Association, 8 May 2011

**Explanatory Note**

BW enjoys a “catch all” power under s.43 of the 1962 Transport Act in relation to its management of the waterways. However it is reasonable to conclude that subsequent legislation modifies this “catch all” accordingly. Further, legislation that acts as an “override” (eg the Human Rights Act and the Equality Act) further qualify this “catch all”. We are all aware of the British Waterways Act 1995. The bill behind the 1995 Act was drafted by BW and introduced in the House of Lords in 1990 as a Private Bill (the “1990 Bill)”. The 1990 Bill was considered by a Select Committee in the House of Lords (“HLSC”) in 1991 which made a number of amendments.

The 1990 Bill was then considered by a Select Committee in the House of Commons (“HCSC”) in 1993 and 1994 which also reviewed the 1990 Bill and made further amendments. There was then a debate, it went to division and it finally passed into law after Royal Assent in January 1995. The minutes of both Select Committees are in the Parliamentary Archives. It is these documents that constitute the evidence that I am referring to. My understanding from law is that where a judge is performing adjudication he applies the law as written (“off the page”) but overlays the “Will of Parliament” especially where there is ambiguity. Obviously he also takes into account any parallel legislation or any overrides (as above) and his obligations under Halsbury’s Rules relating to Private Acts.

In the instance of the 1995 Act the Will of Parliament is defined by the work product of the HCSC as this was the last stage of decision making in its drafting (resulting in any material change) before becoming law. It follows that the minutes of the HCSC are decisive in determining the Will of Parliament. In this instance this means that the Will of Parliament (as documented in the minutes of the HCSC) has an overriding effect over s.43 of the 1962 Act (in relation to matters considered by the HCSC). In this instance this has direct bearing on the imposition by BW of statutory mooring restrictions.

In the original 1990 Bill BW had wording that referred to the ability to impose fines for a breach of a mooring restriction. BW also had a provision in the 1990 Bill to post signs designating mooring restrictions. In the HCSC sessions the HCSC forbade BW to impose fines (apart from in the most extreme of cases – specifically where a perpetrator was guilty of executing a dangerous act or was impeding navigation (itself a dangerous act). This included the right to fine for a mooring restriction violation.

Secondly as a result of this, BW withdrew the wording relating to the posting of signs designating mooring restrictions. BW had previously presented evidence that stated that signs designating mooring restrictions were advisory in nature. Thirdly BW also withdrew the wording relating to the designation of mooring restrictions. Fourthly BW had laid out in the wording an offence for failing to abide by an instruction of a BW officer. This was also denied by the HCSC.

As a consequence this meant that BW was confirming that any mooring restriction would remain as “advisory” and not “obligatory”.

The HCSC also considered wording proposed in an amendment by the HLSC relating to “no return within” in the context of “bona fide for navigation” by itinerants without permanent moorings. “No return within” restrictions were rejected by the HCSC.

As part of the same evaluation the question of “bona fide for navigation” (“BFN”) was also discussed. What was concluded was that BFN is defined not by the distance travelled when navigating or the manifestation of a progressive journey. Instead BW confirmed in its own evidence that BFN is defined by the time spent **not** navigating. The proposed amendment by the HLSC referred to above proposed that BFN was determined by not remaining in any one place for more than 14 days in any one calendar year. The HCSC rejected this and confirmed “continuously in any one place for more than 14 days” (ie removing the “calendar year” criterion and adding “continuously” meaning that boats could return to the same place).

In addition BW presented evidence that the test of a boat being used BFN, was that the boat had remained continuously in one place for 14 days or fewer unless it was reasonable to stay longer. It is of note that BW presented this on the basis that BW believed that it was a simple and easy way for the itinerant boater to know that he was complying with the proposed legislation.

A further principle in law is that legislation is written in “living words” and the meaning of the words does not change with changing circumstances. If the circumstances change then it is incumbent on the sponsor of the legislation (or another party who has concern for the context that is no longer met by the legislation) to make advances to Parliament (ie with a fresh bill) for new legislation either to repeal the legislation that is no longer fit for purpose or to make amendments as appropriate. In the interim the prevailing legislation is binding and must be interpreted in the courts in line with the original meaning of the words and the original Will of Parliament.

These factors combine to provide an override over s.43 so as to prevent BW from designating statutory mooring restrictions and from setting movement rules.

This is Sally Ash's reply:

This is your personal view Nick.   It is unlikely that our lawyers would agree.   We have a pressing need to develop new management guidance, which is what we have invited all you to assist with.  This guidance can of course IN DUE COURSE, be legally challenged by the BTA if they wish to do so, using normal judicial process.

Sally