

B E T W E E N :

BRITISH WATERWAYS BOARD

Claimant

and

PAUL DAVIES

Defendant

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J U D G M E N T

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1. These proceedings arise out of a dispute between the British Waterways Board and the defendant in respect of his keeping of a narrow boat on the Kennet and Avon canal. The claimants have declined to issue him with a licence to use his narrow boat on the canal as they contend that he does not satisfy the conditions needed to obtain one. They say that under the relevant legislation he must show either that he has a long term mooring for his boat or that the boat will be bona fide used for navigation throughout the term of the licence. It is accepted that the defendant does not have a long term mooring for the boat but he contends that by regularly moving it from mooring to mooring the requirement of use for navigation is fulfilled. The Board does not accept that the periodic moving of the boat on the canal amounts to use for navigation within the meaning of the legislation. It is contended therefore that in the absence of a licence the boat must be removed from the canal. Declaratory and injunctive relief is sought to require its removal.

2. The dispute between the parties has given rise to two sets of proceedings, listed together for hearing before me. The principal action concerns the entitlement or otherwise of the defendant to be granted a licence to use his narrow boat on the canal. In the second action British Waterways has claimed the sum of £325 for mooring charges levied against the defendant for overstaying at a visitor mooring. At the outset of the hearing before me I was told that it had been agreed that the second claim would not be pursued by the Board as the fundamental issue between the parties, raised in the first action, was as to the meaning of the statutory provisions relating to the grant of licences to use inland waterways. Indeed the hearing before me was limited to evidence and submissions relating to this issue, and questions as to the relief (if any) to be granted were left to consideration in future in the light of my ruling as to the meaning of the statutory provisions.

3. By way of background it will be helpful to set out the history of the Kennet and Avon canal and its management. The river Kennet was made navigable from its junction with the Thames to Newbury as long ago as 1723. The river Avon was made navigable up to Bath in 1727. The canal between Newbury and Bath was opened in 1810, but most of its traffic was lost when the Great Western Railway was opened in 1841. The railway took over the management of the canal in 1852. The canal was nationalised in 1947, together with the railways and many other inland waterways. It was vested in the British Waterways Board by the Transport Act 1962 when the British Transport Commission was disbanded. The condition of the canal had deteriorated over many years and by 1962 there were sections which could not be used due to poor lock maintenance and lack of dredging. However local pressure groups prevented it from being closed and from the 1960's it was restored, initially largely due to voluntary work. It was formally re-opened in 1990 and restoration was completed in 2003, with the help of a grant from the Heritage Lottery Fund.

4. I turn briefly to describe the British Waterways Board and its functions. The Board was established as a statutory corporation by s.1 of the Transport Act 1962 and it took over the operations of the former British Transport Commission in respect of over 2000 miles of inland waterways. Its powers derive principally from the British Transport Commission Act 1954 and from successive British Waterways Acts of 1971, 1975, 1983 and 1995. Additional powers are provided under byelaws. There is, as the defendant accepts, now no general public right to use the inland waterways managed by British Waterways and their use is controlled by the granting of licences and by imposing conditions, enforceable ultimately by the power to remove non-compliant vessels. Substantial growth in the use of inland waterways led to legislation, the British Waterways Act 1995, which tightened the requirements for obtaining a licence. I shall set out shortly the provisions of that Act with which these proceedings are principally concerned, but in general terms section 17 of the Act required all vessels used on the waterways either to have a permanent mooring site or to be used bona fide for navigation throughout the period of the licence. This was achieved by making the issue of licences conditional on the Board being satisfied either that the vessel would have a permanent mooring site or that it would be used bona fide for navigation throughout the period of the licence. The section also made the issue of a licence conditional upon the vessel complying with relevant standards for construction and equipment, and having appropriate insurance in respect of injury to third parties.

5. The number of permanent mooring sites that exist on the inland waterways owned by the Board is very limited. They are let to individual boat owners on a year to year basis. Vacancies in respect of such moorings, directly managed by the Board, are offered to the public by auction. The majority of permanent moorings are on marinas connected to the waterways system but not owned or operated by the Board. The cost of renting a permanent mooring site can range from £1500 to £3000 a year. Persons using the canals are able to moor casually for short periods or to use designated visitor moorings for short periods of up to 14 days. Exceeding a designated period of stay may incur a mooring charge, as was claimed against the defendant in the second action. Any permanent mooring used for residential purposes must have appropriate planning consent.

6. The defendant is the owner of a narrow boat named "Bidly", 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 Upon 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 he 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. He applied for and was granted annual licences from 2004, although there was occasional friction with the British Waterways Board. His last licence expired in June 2008 and the process of renewal was held up at times by various issues including his non payment of charges for overstaying at moorings, the negotiation of the rate of instalments payable, and his failure to complete the application form to the Board's satisfaction and to provide requisite documentation. In October 2008 the Board served enforcement notices on him under s.13 of the British Waterways Act 1971 and s.8 of the British Waterway Act 1983. His payments by instalments of his 2008-9 licence were returned to him. Renewal of his 2009-10 licence has been declined. The present proceedings were commenced in March 2009.

7. The formal claim in the main action before me is first for a declaration that the Board is entitled to recover the defendant's vessel from the canal pursuant to its statutory powers under section 13 of the British Waterways Act 1971 and section 8 of the British Waterway Act 1983. Secondly an injunction is sought requiring the defendant to remove the vessel from the canal and to restrain him from mooring it at various specified locations. The defence raises a number of matters. It challenges the legality of the enforcement notices. It alleges that the Board has unreasonably refused to grant the defendant a licence. It contends that the enforcement notices and the proceedings are unreasonable and disproportionate, and infringe the defendant's rights under the ECHR to respect for his home and to the peaceful enjoyment of his possessions. It challenges the Board's entitlement to charge for the grant of licences and it contends that the defendant's use of the boat for navigation qualified him for the issue of a licence. Other matters were raised which were not pursued at the hearing because counsel agreed that the central issue in the case was the construction of section 17 of the British Waterways Act 1995 and whether the defendant's use of his boat constituted use for navigation within the meaning of that section. In the Reply the claimants joined issue with matters raised in the Defence and set out their case on the construction of section 17.

8. In the course of the hearing before me I heard oral evidence from three witnesses called by the British Waterways Board: from Russell Bennett and Jane Lee, enforcement officers, and from Nigel Johnson, corporate services director and senior in-house lawyer with the Board. Each had filed detailed statements which set out the history of the dealings between the claimants and the defendant. I also heard from the defendant who had similarly filed a detailed witness statement. There was little or no dispute as to the significant facts of the case. The issue was as to whether the

defendant, by regularly moving his vessel from mooring to mooring, satisfied the requirement in section 17 of the British Waterways Act 1995 of bona fide use for navigation throughout the period of the licence.

9. Section 17(3) of the British Waterways Act 1995 provides:

“Notwithstanding anything in any enactment..., the Board may refuse a relevant consent in respect of any vessel unless-

- (a) The applicant for the relevant consent satisfies the Board that the vessel complies with the standards applicable to that vessel;
- (b) An insurance policy is in force in respect of the vessel and a copy of the policy, or evidence that it exists and is in force, has been produced to the Board; and
- (c) Either-
  - (i) The Board are satisfied that 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 an inland waterway or elsewhere; or
  - (ii) The applicant for the relevant consent satisfies the Board that the vessel to which the application relates *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.”

By section 17(1) of that Act “relevant consent” is defined as meaning a houseboat certificate, a licence, or a pleasure boat certificate. The effect of this provision is to equate all forms of licence granted by the Board.

10. Counsel for the Board, Mr Christopher Stoner QC, had prepared a comprehensive skeleton argument, which he developed further in his closing submissions. He explained that the phrase “used bona fide for navigation” had originated from section 3 of the British Waterways Act 1971. This interpretation section had provided separate definitions for a “pleasure boat” and a “houseboat”. Effectively a pleasure boat was defined as any vessel which was not a houseboat and a houseboat was defined as any vessel except one which was “used bona fide for navigation”. For practical purposes therefore, if a vessel was used bona fide for navigation, it was a pleasure boat. If it was not so used, it was a houseboat. The Act then went on to make provisions for the registration and licensing of pleasure boats (on rivers) and houseboats (on rivers and canals). In 1975 the requirement for pleasure boats to be licensed on rivers was extended by bye-law to their use on canals. Mr Stoner accepted that the phrase “used bona fide for navigation” must be presumed to have the same meaning in both the 1971 and the 1995 Acts, although it was further qualified by other language in the latter Act. There were no decided cases in which the phrase had been authoritatively construed. However the word “navigation” had been judicially interpreted in a number of decided cases. In *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* [1979] SC 156 the Court of Session held that a public right of navigation did not incidentally include a right to lay fixed moorings. Mr Stoner quoted a passage from the judgment of Lord Cameron (p.182):

“In my opinion the basic concept of the word “navigation” is of passage or transit through

navigable waters whether they be tidal or non-tidal ... As Mr Weir put it, in the concept of the word "navigation" is the essential notion or idea of passage, of movement in, and communication, by sea or, I would add, in all navigable waters. By the Oxford Dictionary "navigation" is defined as "the action of navigating: the action of practice of passing on water in ships or other vessels". The underlying concept is clearly one of movement as opposed to rest."

This passage was approved in *Moore v British Waterways Board* [2009] EWHC B12 (Ch) where it was held that a public right of navigation does not include an ancillary right to moor other than temporarily in the course of navigation. Mr Stoner questioned the applicability of a number of authorities under the Merchant Shipping Acts in which the phrase construed was "vessel used in navigation" rather than "vessel... used for navigation" as in the present case. He submitted that the word navigation meant more than mere movement, or Parliament could have distinguished between houseboats and pleasure boats in terms simply of movement. He submitted that the word navigation imported a transit, a passage, or a journey which had to be undertaken "bona fide" - in good faith. He adopted the Board's interpretation of bona fide navigation, set out in their issued guidance, in which it is equated with "continuous cruising". He suggested that the defendant's purpose in moving from mooring to mooring was simply to avoid the requirements of the 1995 Act, and that accordingly he lacked good faith. He contended that the use of the word "place" in section 17(3)(c)(ii) did not refer to a single mooring but, at the very least, to a neighbourhood or locality. He submitted that to adopt the defendant's contentions would frustrate the whole policy of the 1995 Act by allowing two boat owners periodically to swop adjacent temporary moorings and then claim that their boats were used bona fide for navigation.

11. Counsel for the defendant, Mr Martin Westgate QC, had also prepared a detailed skeleton argument. He contended that "navigation" meant no more than movement over water from place to place. There was no need for a progressive journey. "Bona fide" meant genuine, or not a sham. There was no implication that a particular distance was required to be travelled, and so the shortness of the distance travelled by the defendant's boat did not prevent its use from amounting to navigation. He referred to a number of decided cases which, he contended, supported these propositions. In *Steedman v Scholfield* [1992] 2 LLR 163 Sheen J held that a jet ski was not a "vessel used in navigation" within the meaning of the Merchant Shipping Acts because navigation was "planned or ordered movement from one place to another", whereas a jet ski was not used for that purpose. In *R v Goodwin* [2006] 1 WLR 546, another jet ski case, the Court of Appeal expressly approved those authorities which confined the phrase "vessel used in navigation" to vessels which were used to make an orderly progression from one place to another. In *Weeks v Ross* [1913] 2 KB 229 a small steamer which plied downstream from Exeter for a distance of 1½ miles was held to be "used in navigation". He submitted that the words "bona fide" did not import to "navigation" the concept of a continuous journey. They were directed eliminating the sham movement of a boat, say for a distance of a few yards. The defendant's deliberate compliance with the law could not deprive his actions of good faith. He was entitled to do the minimum that was necessary to comply with section 17 of the 1995 Act. Mr Westgate contended that various provisions of the 1971 Act demonstrated that a houseboat was envisaged to be a static vessel, and that

use “bona fide for navigation” defined the degree of movement, ordered movement from place to place, that prevented a vessel from being a houseboat. If under the 1971 Act it was “bona fide use for navigation” which classified a vessel as a pleasure boat as opposed to a houseboat, the same use should now disqualify a vessel from being a houseboat. The meaning of same phrase in two acts of Parliament could not change simply because of the increase of traffic on the waterway system. He sought support for the contention that movement from place to place constituted navigation from the provisions of Schedule I, paragraph 15, of the 1995 Act. This allowed a houseboat to be moved from place to place, and provided for its houseboat certificate to be deemed to be a pleasure boat certificate or licence when being so used. He submitted that this deeming provision was necessary only because such movement amounted to “bona fide navigation”. He challenged the assertion that a boat had to be continuously cruising to be used bona fide for navigation as the 1995 Act allowed stops of up to fourteen days. There was no requirement in the Act for any journey to be progressive as “place” only meant anywhere that was separately identifiable from anywhere else.

12. The contention that the enforcement notices and the proceedings infringed the defendant’s rights under the ECHR was addressed by both counsel in their skeleton arguments but was only touched upon in their respective submissions. They invited me simply to rule upon the question of the construction of section 17 of the 1995 Act. It was accepted that in the event of a finding that the defendant’s vessel was not used bona fide for navigation he should be allowed a period within which to comply with the section. I was invited nonetheless to give a provisional view on the proportionality of the claimant’s actions.

13. It is apparent that the wording of section 17(3) entitles the Board to refuse to issue a licence if it is not satisfied either that a mooring site will be available to the vessel, or that the vessel will be used bona fide for navigation throughout the period of the licence (subject to it being able to stay in one place for up to 14 days). The application form for a licence asks for particulars of the “home mooring” at which the boat will be kept when it is not cruising. Alternatively there is a declaration which the applicant can tick which states: “The boat will cruise continuously. I understand and will comply with British Waterway’s Mooring Guidance for Continuous Cruisers.” The wording on this form is obviously based on the Board’s interpretation of section 17. In respect of the boat’s mooring and its use for continuous cruising (to adopt the Board’s terminology), the applicant is invited to make assertions as to the future: as to the location of the boat’s “home mooring”, or alternatively as to its use bona fide for navigation. Whether or not the Board accepts an applicant’s assertions as to future use may well depend on the current or past use of the vessel. Although in the defendant’s application for a licence dated 13<sup>th</sup> January 2009 the defendant gave no details of any mooring and omitted to tick the box claiming that he would be “continuously cruising”, the true state of affairs was by then well known to the parties. The Board knew that the defendant did not accept their interpretation of section 17 which would require him, if he did not have a permanent mooring, to satisfy them that he would be cruising continuously on the waterways system in the manner contemplated by the Board’s guidelines.

14. The British Waterways Act 1995 gave the Board power to control the use of the waterways by requiring, by means of the licensing system, all vessels to have a permanent mooring unless they are used bona fide for navigation throughout the period of the licence granted. 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 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 Upon 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 judgment the Board was justified in concluding that the applicant did not qualify for the issue of a licence. I do not accept Mr Westgate's argument that under the 1971 Act it was "bona fide use for navigation" that defined the degree of movement that prevented a vessel from being a houseboat. It was the purpose of the use of the vessel which determined whether it was a houseboat or a pleasure boat. If it was not used for navigation it was a houseboat. His argument that the deeming provision in Schedule I, paragraph 15, of the 1995 Act indicates that any movement of a houseboat is bona fide navigation is ingenious but it is apparent from the provision that its purpose is to subject houseboats to the same controls as pleasure boats if and when they are on the move. The phrase "used bona fide for navigation" involves consideration of the purpose of the use, rather than the extent of the movement.

15. It follows from the above that, in general terms, I favour the construction of section 17 that is contended for by the claimants. It happens that the Board have published guidance to the public in their "General Terms and Conditions for Boat Licences". This speaks of the need to have a "home mooring" unless the vessel is licensed on a "continuous cruising basis", and of the need for "continuous cruisers" to be engaged in a genuine progressive journey around the network, or a substantial part of it, not staying moored in the same locality or neighbourhood for more than 14 days. The guidance expressly states that it does not have the force of law, but is based on professional legal advice as to the meaning of section 17 of the 1995 Act. Indeed Mr Johnson said that he had himself drafted it. It is obvious that a boat owner who follows the Board's guidance will be able to satisfy them that his use of the boat is "bona fide for navigation". I think it right to say however that my decision is not to be taken as fully endorsing the board's guidance. It is possible to envisage use of a vessel which fell short of the Board's concept of continuous cruising but which still qualified the vessel for a licence under section 17(3)(c)(ii). What is clear to me is that the

defendant who is clearly living on the boat cannot successfully claim that he is using it "bona fide for navigation" by moving it every so often up and down a short stretch of canal.

16. I was invited to address the question of the proportionality of the proceedings themselves and of the relief that has been sought. I must admit to uncertainty as to the purpose of this invitation. It seems obvious to me that, in the event of the dispute between the parties as to the meaning of section 17 and the defendant's entitlement or otherwise to a licence, the claimants were justified in bringing the proceedings. As to the relief that may, in the discretion of the court, follow success of the claimant's contentions, it seems to me that this is dependent on events yet to occur and arguments yet to be presented.

17. Copies of this judgment are to be circulated by the court office to the parties' representatives. The judgment is in draft in the sense that the parties are invited to draw the court's attention to any typographical or other obvious errors. I am uncertain as to whether the parties, having received my ruling on section 17, require it to be embodied in some formal order of the court. If so they are invited to submit an agreed form of words. There will need to be a formal pronouncement of judgment in open court at some date in the future. If there is to be a further hearing pronouncement of judgment can take place then. If there is no further hearing judgment will be pronounced on a date to be notified but the parties and their representatives need not attend.

HH Deputy Judge O'Malley DL - Bristol County Court - 30<sup>th</sup> November 2010.