



Legal Review

Nabo News Supplement

Geoffrey Rogerson, on behalf of NABO Council

Between 2004 and 2009, NABO was concerned that the then BW was acting outside the scope of the 1995 British Waterways Act and as a result took legal advice from the noted London barristers, Blackstone Chambers. This supplement is a summary of that legal advice, which confirms NABO's suspicions of the illegality of five areas of CRT's operations. The items described below are the areas in question, together with legal opinion as to their illegality or illegitimacy (without lawful authority).

BW/CRT references/statements

- BW Policy document, September 2010, point 14.3: *'Time limits will be published and signed along with any restrictions on return frequency. The time limit means the total time spent within the designated stretch, whether or not the boat changes its position within the stretch.'*
- CRT Towpath Mooring Plan, August 2012, Page 2, Point 3.1: *'Designate visitor mooring stretches; sign them clearly at start and endpoints; specify 'return rules' in the form of max. x days within any calendar month.'*
- CRT Towpath Mooring Plan, August 2012, Page 4, Point 6.1: *'What has been missing in most cases from our time limits is any indication of how soon a boater may return. This has hampered our ability to enforce the stay limits.'*
- CRT Towpath Mooring Plan, August 2012, Page 12: Neighbourhoods. *'Having left a neighbourhood it is not permissi-*

- 1 No return rules—illegal. Limited number of days permitted at a mooring within a calendar month—illegal.
- 2 £25 penalty for overstaying—illegal. £50 penalty for unauthorized mooring—illegal.
- 3 Roving/community mooring permit—illegitimate.
- 4 Place—may not be defined under the '95 Act. Varying rules for different regions—illegitimate. Requires consistency over all canals.
- 5 Continuous cruising guidelines.

ble to return to it without having completed the full 20km journey.'

- K&A Towpath Mooring Plan, August 2012: *'Specify return rules in the form of maximum days within any calendar month.'*
- BW Press Release, 25.10.2012: *'New signage showing a limit of total days per month as well as the maximum stay time for a single visit.'*
- CRT Council Meeting, 27.9.12: 1. (re bona fide navigation): *'The only sanction provided within our statutory powers is to remove the boat from the waterway.'* 3.iii Visitor Moorings: *'What they currently lack is an indication of permissible return times. This of course makes it difficult to enforce since boaters may legitimately move away for as little as 24 hours and then return.'*

Legal advice

No return is proscriptive and therefore illegal. Therefore anything that flows from that is illegal too.

Introduction

Nothing in this article should be construed as NABO providing formal legal advice on any specific current or future legal action taken by a member or other individual. Neither NABO nor its officers will be liable in the event that this information is used as legal advice either with additional legal representation or not.

No return rules

ILLEGAL

Limited number of days permitted at a mooring within a calendar month

ILLEGAL

NABO comment:

This, of course, would apply to ALL boats.



£25 penalty for overstaying

ILLEGAL

£50 penalty for unauthorized mooring

ILLEGAL

NABO comment:

To state that a £25 penalty suddenly becomes a service or facility is pure sophistry.

BW/CRT references/statements

- CRT Feedback on K&A Mooring Plan, 12.12.12, page 3 para. 5 d: *'Our great concern about the groups' proposals are that they include no measures to deter new arrivals.'*
- Policy Document, BW, 2010, para. 14.7: *'Invoices will be issued for all charges. Outstanding invoices must be settled before a licence or mooring permit will be renewed.'*

Legal advice

- A deterrent penalty charge is not a service charge.
- It is illogical to get people to pay for something you don't want them to do. Surely enforcement is the answer.
- A penalty is illegal.
- The licence fee is the permit to be on the waterways. It can be refused but it cannot be made conditional on an unpaid penalty.
- 6.1.2. BW's legal power to deny a licence is limited by the terms of

s.17(c) (ii) of the 1995 Act. If the boater satisfies BW of the matters contained in that subsection, he is entitled to be granted a licence and BW cannot modify the terms of the 1995 Act by producing interpretative guidance (Blackstone Chambers).

- 6.2.7. It is a general principle of law that public authorities require express statutory authority to levy charges (McCarthy and Stone (Developments Limited) v Richmond upon Thames LBC (1992) AC48). Section 43(3) of the 1962 Act provides a power to demand charges for BWs services, but this is not the same thing as a power to fine. The General Terms do not provide a contractual power to raise a fine either, even though there is a section which deals with the consequences of breach of the conditions of the licence (condition 8). In any event, such a contractual term would also require a statutory basis (Blackstone Chambers).



Community/roving mooring permits

ILLEGITIMATE

NABO comment:

The payment of, say, £1000 for a community mooring permit is in effect a penalty for letting you do something that is unlawful.

BW/CRT references/statements

- *'Our powers to regulate mooring lie in the British Waterways Act 1995, which requires that a boat must have a permanent, home mooring unless it is being used for navigation throughout the period of the licence. The guidelines do not apply when your boat is on its home mooring.'*
- BW Mooring Document, Para. 3.3ii: *'Permit holders will be treated as having a home mooring and permits will be subject to all applicable terms of the mooring agreement for our directly managed moorings.'*

Legal advice

- The Act requires that a mooring will be available.

- A community/roving mooring permit would not conform to this requirement.
- Roving mooring permits are illegitimate. Under the existing proposal it is not guaranteed that a place will be available to a permit holder as the site may well be full. The Act requires that a mooring will be available, however, CRTs own proposed regulations for permit holder moorings state 'temporarily allocated'.
- BW cannot alter the meaning of the '95 Act to create new categories of boaters. If BW is dissatisfied with the '95 Act, the solution lies in seeking an amendment to the primary legislation and not in distorting its meaning by means of guidance (Blackstone

Chambers).

The community mooring permit would seem to endeavour to establish a new category of boater other than that of the '95 Act section 17 3(c) (i) and (ii). The wording is quite clear in the Act, 'either/or'. On the question of roving mooring permits, NABO has previously obtained Counsel's Opinion.

BW's powers to make byelaws are limited by the grant of authority in the relevant statute, in this case the

British Transport Commission Act 1954 (as amended by the British Waterways Act 1971 and 1975). As such BW cannot use the power to create byelaws in order to circumvent the limitations on its powers contained in primary legislation. The answer for BW is to seek an amendment to the 1995 Act to create a new category of waterway user which would then be subject to explicit statutory conditions (Blackstone Chambers, Temple).

BW/CRT references/statements

- **Headline Conclusions** from Consultation Report Meeting, Hatton, 28th May 2010: *'The strategies should define how far a boater must move in order to comply with BW continuous cruising guidance.'*
- **Legality of defining place.** Quotation from the CRT Terms and Conditions for Community Mooring Permits: *'.. defines conditions and arrangements for mooring along the towpath along a specific stretch of waterway, including definitions of place as proper interpretation of the intent of section 17 (iii) (c) of the 1995 Act.'*

Legal advice

In purporting to limit discretion, fix stringent requirements, and interpret primary legislation, the guidance is, in my opinion, *ultra vires* the 1995 Act.

First, the guidance sets requirements that go beyond those specified in the Act. The necessity to move every 14 days and to move at least ten lock miles, for instance, are requirements BWB does not have the power to fix: they are in excess of the requirements defined in section 17 of the 1995 Act. The discretion Parliament has granted BWB to consider under section 17 of the

1995 Act cannot be fettered by an inflexible policy.

BWB lacks the power to define words in section 17 of the 1995 Act. In its letter of 29 June 2001, BWB accepts that any interpretation of the 1995 Act is ultimately a matter for the courts, but then seeks to justify its definition of the word "place" by claiming it is assisting users (i) by giving guidance as to what BWB considers appropriate practice and (ii) that anyway the terms of the Licence Agreement (issued under powers contained in s.43 of the Transport Act 1952) are also relevant and enforceable as a matter of contract. In my opinion, this wholly fails to deal with the point. To fix such a stringent, arbitrary and arguably excessive definition to the word 'place', and then to rely on that definition throughout the Code, would be lawful only if Parliament meant 'place' to have such a meaning or if BWB were entitled to define the word itself. I do not believe either to be the case. BWB cannot escape this by attempting to rely on the Licence Agreement as a matter of contract because section 17 of the 1995 Act sets out conditions for licences. BWB cannot circumvent the 1995 Act in this way. In any event, the Courts will not construe statutory words with reference to either BWB's contractual terms or the





Code.

Finally, the complexity and confusing nature of the Code, which requires the addition of illustrations (A to B to C etc.) in an attempt to explain it, is potentially so uncertain as to fall foul of the principle of legality and the general requirements of the rule of law. For all, or any, of these reasons, I think it is reasonably likely a Court would find the Code to be ultra vires, and that decisions made by BWB relying on the Code would therefore also be unlawful (Blackstone Chambers).

- The discretion Parliament has granted BWB to consider under

section 17 of the 1995 Act cannot be fettered by an inflexible policy (Blackstone Chambers).

- Primary legislation is not to be construed by reference to general policy statements or departmental guidance (R v Secretary of State for the Environment and others (1994) 4 A11 ER 352 at 365g per Potts, J.).
- 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 (Lord Bingham, Rule of Law. 2010).



BW/CRT references/statements

- **Headline Conclusions** from Consultation Report Meeting, Hatton, 28th May 2010: *'The strategies should define how far a boater must move in order to comply with BW continuous cruising guidance.'*

Legal advice

- BWB purports to issue the licence conditions pursuant to their powers under section 43(3) of the Transport Act 1962. That sub-section gives the BWB general powers to recover sums and make use of its services and facilities on such terms as it thinks fit. Section 43(3) of the Transport Act 1962 thereby provides BWB with a power to require licences and set the terms and conditions of those licences.

However, such a power is not unlimited. Subsequent Acts of Parliament, for instance Part III of the 1995 Act, have made more specific provision for the conditions of licences. Further, the BWB purports to issue the Code under its powers to regulate moorings in the 1995 Act. Clause 4 of the Code states that

the Code 'sets out standards to comply with s.17' of the 1995 Act, and clause 4(c) of the Code provides that continued failure to comply with the Code entitles BWB to use powers to revoke a licence under section 17(5) of the 1995 Act.

In purportedly defining and regulating 'continuous cruising' in the Code, BWB is seeking to rely on and issue guidance on section 17(3)(c) of the 1995 Act, and the meaning of 'bona fide navigation'. It seems to me, therefore, that BWB's powers to regulate this area are derived from the 1995 Act, and it cannot rely on its general powers to set the terms of licences derived from the Transport Act 1962 as a basis for terms that go beyond those specified in the 1995 Act (Blackstone Chambers).

- *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* (Sir Robert Megarry, V-C in Metropolitan Police Commissioner (1979), 1. Ch 344 at 357C).