

A

IN THE HIGH COURT OF JUSTICE

Wednesday, 19 February 2014

BEFORE:

B

MR JUSTICE LEWIS

BETWEEN:

C

NICK BROWN

Claimant/Respondent

- and -

CANAL & RIVER TRUST

Defendant/Appellant

D

MR WESTGATE appeared on behalf of the Claimant

MR STONER QC appeared on behalf of the Defendant

E

Proceedings

F

Digital Transcript of Wordwave International Ltd (a Merrill Corporation Company)

8th Floor, 165 Fleet Street, London, EC4A 2DY

Tel No: 020 7421 4036 Fax No: 020 7404 1424

Web: www.merrillcorp.com/mls Email: courtcontracts@merrillcorp.com

(Official Shorthand Writers to the Court)

G

No of Words: 30,922

No of Folios: 429

H

OPENING SUBMISSIONS BY MR WESTGATE

A MR WESTGATE: My Lord, I appear on behalf of the claimant and Mr Stoner, Queen's Counsel (several inaudible words), appears on behalf of the defendant, the Canal & River Trust.

This is an application for judicial review, challenging a decision in October 2011 on the part of the Canal & River Trust to issue guidance for boaters without a home mooring.

B I have only fairly recently come into this matter. I sent a supplemental statement argument to your clerk late last night.

MR JUSTICE LEWIS: Yes, I got one this morning. Thank you very much.

C MR WESTGATE: I am extremely sorry for the delay in getting it to you but I hope it is not all bad.

MR JUSTICE LEWIS: No, it is very helpful but, in fact, you have sailed in these waters before, actually; you are familiar with them?

D MR WESTGATE: Yes, we will end up perhaps looking at some of the same reasoning that arose in the previous case.

The initial grounds for judicial review were framed rather more widely than the present challenge but after permission of being refused on the papers, it was eventually granted by Jackson LJ, confined to one matter, which is whether the guidance accurately reflects further requirements of section 17 of the 1995 British Waterways Act.

E That is a matter of considerable substance to boaters, who need to know where they stand because those who are not compliant may, in addition to losing their licence and not being entitled to be granted a licence, be liable to have enforcement action taken against them under, in particular, section 13 of the 1971 Act, to which we will come, and section 8 of the 1983 Act.

F Indeed, neither of those sections in fact requires the sections to be enforced through court proceedings and they do permit some reaction although, as I understand it, it was always the practice of BWB to enforce through court proceedings; I do not know whether that is still the practice of the Canal & River Trust.

Given the narrow way in which the point is now free(?), there is perhaps little to be served in taking you through the way the pleadings were put earlier.

G MR JUSTICE LEWIS: Yes, I had gone through them and I had worked my way through them over some time but to a large extent (overspeaking)

H MR WESTGATE: Well, I will not ask you to revisit any of that, in that case.

In which case, again, the background facts can be set out very, very briefly for the purpose of this challenge. The claimant and his friend live on two boats which are kept on the canal network. They set out their circumstances in their statement, in the claimant's statement, and it is perhaps not necessary for me to go to that

because his individual circumstances are not germane to the point in issue. As far as the --

A

MR JUSTICE LEWIS: Would it be helpful for me to know if he has either a houseboat certificate or a pleasure boat?

MR WESTGATE: He has a pleasure boat certificate.

MR JUSTICE LEWIS: He does have a pleasure boat certificate?

B

MR WESTGATE: Yes and it is granted to him under subparagraph (ii) of section 17(3)(c).

MR JUSTICE LEWIS: (overspeaking) I do not think that can be right.

C

MR WESTGATE: Yes so to anticipate, there are, as it were, two gateways to getting a pleasure boat certificate; one is that you have a permanent mooring or you have a mooring where it can be kept. The other is that if you do not have a mooring, then you have to be engaged or you have to use the boat, bona fide in navigation, throughout the period of the licence without stopping for more than 14 days. The claimant gets through the second gateway. As I understand it, there is no point being taken in these proceedings that the degree of movement that he is engaged in does not comply.

D

MR JUSTICE LEWIS: I know you said (overspeaking) not relevant but the reason why this case is of importance to him is: he may either be refused a pleasure boat certificate when it comes up for renewal or if he is going to get it on the Trust's analysis, he needs to have a mooring available.

E

MR WESTGATE: Yes, he either needs to have a mooring available or be using a pleasure boat for bona fide navigation. His concern is that the Canal & River Trust may deny him a licence or may assert that his degree of movement is not sufficient and one of the concerns that he and other boaters has is that that, whatever the arguments may be about the substantive meaning of navigation, the guidance itself is unclear and fails to provide sufficient clarity as to what boaters need to do or not do in order to default(?), fail(?) or comply with the statutory provisions.

F

I do not know if you have had a chance to look at his statement but --

MR JUSTICE LEWIS: Yes, I have read it and there is not a great deal of material in the statement, actually.

G

MR WESTGATE: No, that is right. (pause) At page 301, paragraph 4.7(?) he lives within Flossie and Freya while Freya is under restoration. Freya is currently in the boatyard, undergoing restoration and when that is complete, she will back(?) on her home mooring.

Then he says he is itinerant; he works from the boat and I(?) think the boat is also part of his work. He then, at paragraph 5, deals with the concerns he has as to what The Guide requires him to do.

H

A MR JUSTICE LEWIS: The impression I have formed is that he lives on the boat, he works on the boat, his focus is Reading, his doctor(?) is in Reading, his postal address is in Reading and that is, as he says, his focus.

MR WESTGATE: That is right but also at paragraph 4.2, he says:
“I travel on the Kennet and Avon Canal, the Grand Union Canal and the Oxford Canal.”

B MR JUSTICE LEWIS: He does not tell us when --

MR WESTGATE: He does not tell us when or how far or --

MR JUSTICE LEWIS: -- or how far or anything.

C MR WESTGATE: -- no, he does not but, as I say, his focus in this challenge is on compliance with the guidance and how that matches the section 17 requirements. There is not, at present, any issue before the Court as to whether or not his movements at present do comply but his concern is that he is vulnerable to an assertion being made in due course by the CRT that he is not moving sufficiently. His concern is that if the guidance does indeed require him to move more extensively throughout the network, then that will cause him to move to an excessive distance away from the ties that he has and the areas that he has as his, as it were, focus; that is his paragraph 5.14.

D MR JUSTICE LEWIS: Or he gets a mooring where he is.

MR WESTGATE: That would be an alternative, although there are obviously difficulties about that supply and demand with the moorings (overspeaking)

E MR JUSTICE LEWIS: Not that I am aware; I have seen no evidence on that but anyway.

MR WESTGATE: Well, no, but it is (overspeaking)

F MR JUSTICE LEWIS: (overspeaking) the extent of his evidence, though. What he is concerned with is that he will be refused a pleasure boat certificate, which is not about whether it is a houseboat or a pleasure boat; he will be refused a pleasure boat certificate unless he can demonstrate that the guidance is wrong and imposes additional restrictions.

G MR WESTGATE: Yes and the corollary of his being refused a pleasure boat certificate appears to be, on the defendant's reasoning, that he would be treated as a houseboat if he is not engaged, bona fide, in navigation and that follows from the definition of houseboats and pleasure boats I can offer you too.

So far as the defendant is concerned, again, the background facts are fairly brief, so far as relevant. The defendant's successor to the British Waterways Board and the British Waterways Board itself took over responsibility from the British Transport Commission for the canal network.

H The details of the succession instrument are set out in the statement of Mr Johnson(?) and are exhibited to his statement but it is not necessarily the parties

A are agreed to take you to the detail of those transfer arrangements because the meaning of the statute with which we are concerned crystallises before then so all one really needs to know is that where the “BWB” appears, one can substitute “CRT”.

CRT, then, manages some 2,200 miles of English waterways and that is mostly managed now for amenity purposes; that is described by Mr Johnson in his statement at paragraph 35. He says there are now some 35,000 boats on the network, which is up from 22,000 in 1990.

B It is right to observe, though, that not all inland waterways are maintained by the Trust. Other waterways fall within other jurisdictions. For example, the Environment Agency is responsible for some and others, such as the Port of London Authority, have a responsibility for other waterways. So although the network is extensive, it is not something that is exclusively under the control of CRT and, indeed, certain parts of the network are isolated from other parts of the network and one can only get between one part and another part by moving onto a waterway under the administration of somebody else.

C Your Lordship asked me about the differences between houseboats and pleasure boats. Private craft can be divided, for present purposes, into two classes and those are houseboats, which ought to be self-explanatory but the statutory definition is somewhat counterintuitive because, as you will see when we come to it, it does not have to be either a boat or a house; the essential characteristic is that it is static.

D MR JUSTICE LEWIS: That is your submission, yes.

MR WESTGATE: If someone has a houseboat, then those need a houseboat certificate under the 1971 British Waterways Act and if someone is living on it, according to CRT, then it also needs planning permission. That is not accepted as a universal proposition by the claimant but nothing turns on that for the purposes of this case.

E The second category is pleasure boats which are, in effect, all the rest of private craft and the essential difference between those and houseboats is that these are ones which are used bona fide for navigation.

F There is only one kind of licence for pleasure boats but, as I said, there are two routes to getting it. One is if you have a home mooring and the other is, if you do not have such a mooring but you satisfy section 17(3)(c)(ii) of the 1995 Act. It might be helpful, although you are going to need to come back to it, to look at that section now to see what the ingredients of it are. If I can ask you to look at the authorities, sir.

MR JUSTICE LEWIS: I have it here.

G MR WESTGATE: Tab 7 and section 17 sets out the kinds of certificate. “Houseboat certificate” means a houseboat certificate issued under the Act of 1971. Then “licence” means:

“A licence issued by the board in respect of any vessel, allowing the use of any vessel in any waterway.”

H MR JUSTICE LEWIS: Before we leave that point, both of you seem to be saying there are different statutory powers giving rise to the need for a licence. I have not

located the relevant statutory power and I think we may need to. I do not seem to have the bye-laws; if I have, I have not been able to --

A

MR WESTGATE: They are in the authorities bundle at tab 12.

MR JUSTICE LEWIS: All right, then, that is my fault. Yes. (pause)
You need a houseboat certificate and a licence and you need a licence or?

B

MR WESTGATE: No, the terminology is that “houseboat certificate” applies to a houseboats; that is under the Act of 1971.

MR JUSTICE LEWIS: Yes.

C

MR WESTGATE: A “pleasure boat certificate” is a pleasure boat certificate issued under the Act of 1971 and that applies to pleasure boats held on river waterways. When the 1971 Act was passed, the licensing requirement for pleasure boats only applied to river waterways but then in 1975 and 1976 the British Waterways Board introduced bye-laws that required you to have a licence. So you either have a licence, if you are a pleasure boats on a canal, or you have a pleasure boat certificate if you are a pleasure boat on a river.

D

MR JUSTICE LEWIS: So you get a licence under the bye-laws if you are on a canal and you are a pleasure boats?

MR WESTGATE: Yes.

MR JUSTICE LEWIS: You get something called a “pleasure boat certificate” if you are on a river way which is not a canal.

E

MR WESTGATE: Yes and then you get a “houseboat certificate” if you are a houseboat anywhere.

MR JUSTICE LEWIS: All right.

F

MR WESTGATE: I think there is also something called a “gold certificate” that allows you to do both rivers and canals because the boat may be under the jurisdiction of the CRT so they give you a licence for both.

MR JUSTICE LEWIS: At some stage I would be interested to see the statutory power about river ways for pleasure boats and I would be interested to see the statutory power that you say gives the right to make the bye-law that has this --

G

MR WESTGATE: Yes, I will come to that but they are all, for the purposes of section 17, called relevant consents.

MR JUSTICE LEWIS: Exactly, yes.

MR WESTGATE: Then 17(3) requires that:

H

A

“Notwithstanding anything in any enactment but subject to subsection (7), 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.”

B

Those are two conditions that are not in issue here that deal with river-worthiness and insurance. Then (c), which is in issue here:

(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;”

C

That is what is compendiously referred to as a “home mooring” 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.”

D

So those are the two routes to the grant of a relevant consent as a pleasure boat; either you have to have a home mooring or you satisfy (c)(ii).

E

MR JUSTICE LEWIS: Just so that you know, I do not find those two routes by which you get the licence helpful because it seems to me the context is you would not get a licence, whatever kind of licence it is (licence, pleasure boat certificate or houseboat) unless either the board are satisfied that you have a mooring where it can be kept or you meet (c)(i) and (ii).

So it seems to me that is the context is refusal of a licence. It is not just a route to getting a licence; they can refuse you a licence if they are not happy because you have not got a place to keep it or because you are not meeting the requirements of (c)(i) and (ii) and because of (c)(i), that may throw light on (c)(ii).

F

MR WESTGATE: Certainly ... (pause) if the board is to stay satisfied then they must grant the licence, provided (a) and (b) are also satisfied.

MR JUSTICE LEWIS: Yes.

G

MR WESTGATE: Which is why I’ve used the language of “route 2” because if those conditions are satisfied then you get your licence but they are independent conditions, although of course they do appear in the same --

MR JUSTICE LEWIS: Yes, what I am suggesting is: are they not meant to cover everything? You either have a mooring or you are moving around all the time; that is what the legislature had in mind.

H

MR WESTGATE: Well, you have either got a mooring --

MR JUSTICE LEWIS: You either have a mooring or you are doing enough of the moving around and therefore you would get a licence; that is the difference, really.

A

MR WESTGATE: Indeed. The question is: you either have a mooring or the vessel is used bona fide for navigation, whatever that means. The central question to the parties is how much of the network that requires you to move around. Terms such as “any one place” are part of that debate and the component elements but, yes, the division is not self-evident, then, under (c)(i) and (ii) between having a mooring and moving around the whole network or constantly moving around the whole network. It is satisfying the composite statutory term, “Used bona fide for navigations throughout the period,” and so on and that is what I am going to come to, to satisfy you that that does not require extensive movement throughout the network.

B

That is the statutory test. Also, the reason why it is perhaps not helpful to refer to those being mutually-exclusive ideas is that someone who has a home mooring, if they are a pleasure boat, will also be engaged bona fide for navigation.

C

MR JUSTICE LEWIS: Will be engaged in it but it is not what it is for.

MR WESTGATE: Well, the boat will still have to be for bona fide navigation; I will explain why that is so when I go through the statutory provision. As I have indicated, the claimant is the owner of what is licensed as a pleasure boat and does not have a home mooring and therefore he has to come within subparagraph (ii).

D

The defendant’s position is summarised in the statement of Mr Johnson that there is what they would characterise as perhaps an abuse of that class of owner or boater if they do not move position. They claim that then causes congestion at popular sites, to the detriment of casual users because such boaters might remain in those popular sites for excessive periods. They also suggest that enables them, unfairly, to avoid the cost associated with a home mooring and so depriving the defendant revenue, are causing resentment for the people who have paid for their own mooring.

E

I note in connection with that that if that is the problem, then that may also shed some light on the idea of how far one has to move around the network because it is not necessary for someone with that problem to require people to move far afield. The solution to that problem is to ensure that people do not stay too long at the popular spots because once they move then a space is released and that idea is, we say, captured in the 14-day requirement in (c)(ii) which is itself subject to such shorter periods as are sometimes posted at popular sites. Nothing about how far conditions of that kind can properly be imposed by the legislation.

F

If there is a problem going beyond that, then it may well be that the difficulty lies more with the fact that the present legislation has sought to borrow language that has evolved for a different purpose and the remedy is to do what the Trust and British Waterways Board has done in successive years, which is to seek additional powers through private acts. It is notable that each of the Acts, the 1971, 1983 and 1995 Acts, are all private Acts and, in fact, there are other private Acts in between when one in particular has(?) issued their rights.

G

Whether there is a real or substantial problem or not, for some years, British Waterways Board and Trust has sought to address the requirement for bona fide navigation by giving guidance and it is perhaps helpful now to look at the successive forms of that guidance, exhibited in the statement of Mr Johnson. The

H

A first so-called mooring guidance was in 2004 and that is page 230 of volume 2. At that time, British Waterways adopted the language of “continuous cruising” to describe the kind of licence that was caught(?) by subparagraph (ii) which indicates what they sought to require because the idea of a continuous cruise implies a journey of some length. That, of course, is not the term that one gets in the statute but in the first paragraph under the heading “Navigation”:

B “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.”

That is, making a journey and the reference there is to the Shorter Oxford English Dictionary.

C Then it says, “A cruise is a journey or series of journeys”, which I do place some stress on, “making for no particular place or calling in at a series of places”. Again, that is the Shorter Oxford English Dictionary. Then it says:

D “Therefore, subject to stops of permitted duration, those using a boat licensed for continuous cruising must genuinely be moving in a journey or series of journeys. Such genuine cruises take place throughout the period of the licence and therefore require progression around the network or at least a significant part of it.”

So, at that time, the guidance suggested that you had to have what, in effect, was a single act of navigation, as it were, which took you around the network and it did not say what “significant part” was.

E MR JUSTICE LEWIS: The next paragraph they are trying to get a contrast, are they not?

MR WESTGATE: They are; they say:

“Thus, short trips within the same area, bridge-hopping and shuffling backwards and forwards doesn’t meet the legal requirements of continuous cruising.”

F They certainly are setting up a contrast there and there are some minimal movements, which do not count, and other longer movements which do. The difficulty is that the boundary seems to be very much at the more extensive end of that spectrum because although they draw the contrast between short, repetitive movements such as “bridge-hopping”, which would be maybe a movement of perhaps a very short period and then “backwards and forwards” --

G MR JUSTICE LEWIS: Yes, both “bridge-hopping” and “shuffling backwards and forwards”. What they are saying is, “We do not want you to pretend you are not a house, when you are a house”. That is all it is, is it not?

H MR WESTGATE: Yes, you get the idea, “We do not want you to have minor movements which are a pretence, when the reality is you are static”.

That, as an idea, is something which the claimants would not disagree with, if the idea is to cut out pretences or shams but this goes much further than that because

this appears to say that bridge-hopping and shuffling backwards and forwards is not good enough. The difficulty is it is then qualified by --

A

MR JUSTICE LEWIS: Do you disagree with him? He is bridge-hopping and shuffling backwards and forwards; do you accept that it is right to say that those things are not for navigation?

MR WESTGATE: Not necessarily but it does depend and it will depend on the distance travelled and the pattern.

B

The key objection here is when one goes to the language “a smaller part of the network” and “a significant part of the network”. This is a network which is 2,200 miles long and which has bits that are separated off from other bits. How far is one saying one has to go? The later guidance talks about 10 miles not being enough but then is “a significant part” tens of miles; hundreds of miles? There is simply no clarity here.

C

The impression given is that it has to be a significant proportion of the network and that goes far beyond the statutory requirement, which is aimed at preventing sham or pretence movements; it is not aimed at stopping navigation over a relatively-confined period, a relatively-confined area, perhaps around a centre or focus or base.

D

MR JUSTICE LEWIS: So it is aimed at shams, not aimed at stopping moving around a focus or place?

MR WESTGATE: Yes. (pause) Then one comes on to the definition of “place”, which is part of this concept, where it has:

E

“The law requires that stops during such journeys should not be in any one place for more than 14 days. ‘Place’ means ‘neighbourhood’ or ‘locality’, not simply a particular mooring site or position.”

We accept the second part of the proposition “not simply a particular mooring site or position”, not that that can then adequately be expressed by the idea of “neighbourhood” or “locality”.

F

MR JUSTICE LEWIS: “Place” is bigger than a “particular mooring site” but not as big as “neighbourhood” or “locality”?

MR WESTGATE: Yes. (pause)

G

MR JUSTICE LEWIS: So what is in between a “mooring site” and a “neighbourhood” or a “locality”?

MR WESTGATE: It is essentially the word “place” and one that it is perhaps not helpful to elaborate. What one is doing is perhaps replacing one open-textured word with another open-textured word that does not mean the same thing.

The next part of this bit of the guidance really seeks to emphasise the progressive journey idea in navigation because it makes the point:

H

“Therefore to remain in the same neighbourhood for more than 14 days is not permitted.”

A That is obviously right if “neighbourhood” does not mean “place” or “place” does not mean “neighbourhood”. Then it says that:

“The necessary movement can be done in one step or short gradual steps.”

B Again, that is that right depending on whether “place” can be put(?) as “neighbourhood”. Then it goes on to say:

“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 ...”

C Then it only gives the exceptions of reaching the end of a waterway:

“or reversing the direction of travel in the course of a genuine progressive journey [whatever that actually means].”

D It then has some observations about what constitutes a “neighbourhood” and then:

“... not possible (nor appropriate) to specify distances that need to be travelled, since in densely populated areas different neighbourhoods will adjoin each other and in sparsely populated areas they may be far apart ...”

E Then it goes on:

“Exact precision is not required or expected - what is required is that the boat is used for a genuine progressive journey, i.e. a cruise.”

F That is really subject to the same points that I make under “Navigation”; that navigation does not apply “a genuine progressive journey” of that kind. Nor, indeed, does it imply that one has to go from X to Y to Z. Navigation can perfectly properly take place between X and Y and then back to X again. It will depend on the circumstances how far a repetitive movement of that kind will count to navigation. There is not a necessary implication in the idea of navigation that one must always be going to Z nor, indeed, that when one goes past Z one has to go on to somewhere else. (pause)

Then you have guidance about:

“14 days or such longer period as is reasonable in the circumstances.”

G Criticism is made of that on the basis that it is unduly restrictive about what may be reasonable, but I perhaps do not need to dwell on that for the present.

MR JUSTICE LEWIS: Is it part of your case that when we get to the guidance it is in force, not the one we are looking at now then?

MR WESTGATE: Yes.

H MR JUSTICE LEWIS: You are still saying that that too must be struck through because it is *ultra vires*?

MR WESTGATE: That is right.

A The 2004 guidance was subject to some minor revision in 2008. I do not need to take you to that.

The next event is the decision of O'Malley J in British Waterways Board v Davies [2010], which is at pages 236 to 243. That was a case where Mr Davies was on a narrow boat, which was subject to pleasure boat certificate, again without a home mooring. We see a description of his pattern of movement at paragraph 6 of that judgment, page 238. (pause)

B MR JUSTICE LEWIS: I have worked from the one in the main authorities bundle. Are they not the same?

MR WESTGATE: Yes, I think they are. Yes. I can go to the authorities bundle (overspeaking)

C MR JUSTICE LEWIS: It is just that I have marked it up, that is all.

MR WESTGATE: In that case, I will go to that one. It is tab 29. One sees there he:
D "is the owner of a narrow boat named 'Biddy', which he uses [principally] 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 ... no permanent mooring ... 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."
E

MR JUSTICE LEWIS: I am sorry. It would have been helpful to have had a bit more detail about your own client. I get a sense that he is not that different from Mr Davies on his evidence.

F MR WESTGATE: The evidence before this court does not go one way or the other on that. He accepts he does say that he navigates on ...

MR JUSTICE LEWIS: He states in conclusion that what he does is navigation because it is obviously what navigation is. What he does not tell me is, "I do 13 days on one side of Reading. I travel two miles. I do another 13 days on the other side of Reading. Then when the clock ticks, I move back to the first site at Reading". I just do not know.

G The impression I get is that his situation is not dissimilar from Davies. The use of words such as "focus" and "my daughter was living with me because I've moved away" and "I am living with a new partner," all gives the impression of that is where he lives. It is on the boat, not on the land but it is within relatively confined circumstances. It is surprising that he has not, which is on the claimant's as well as the defendant's, given me a bit more detail. Anyway, there we are.

H

A MR WESTGATE: Yes, what he does do is say that he travels three canals, Grand Union, Oxford and, I think, Kennet and Avon. Mr Davies was confined to this stretch on Bath and Bradford.

We go to paragraph 14. The outcome in this case was that the judge held that that level of movement was not sufficient to amount to bona fide navigation for the purpose of section 17(3)(c)(ii). The judge in that case focused on what the defendant was using his boat for. That is five lines down, paragraph 14:

B “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 ... 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.”

C
D The central part of that conclusion appears to be that it is not bona fide for navigation because it is simply being used in order to maintain his land base, if I can put it that way.

MR JUSTICE LEWIS:

E “His purpose in keeping the boat on the short stretch of the canal ... is so that his home is within convenient distance of his place of work and his social circle.”

F I appreciate your client is self-employed, but that is why it sounds awfully like the same focus(?) with very limited evidence. It sounds as if it is his focus, his social circle, his doctor, his daughter and his postal address is Reading. It looks as if that is his focus and what he wants is to keep the boat within that focus. As I say, that is the evidence that he has put in and I just have to make of it what I can.

MR WESTGATE: Certainly, his evidence is that that is what he would wish to do. Davies, of course, is not a binding decision on this court.

MR JUSTICE LEWIS: No.

G MR WESTGATE: The claimant’s case on this application is that as long as the movements do count as navigation, they do not cease to be navigation because you are doing it in order to remain close to a particular area.

MR JUSTICE LEWIS: It might cease to be bona fide navigation. That is the problem, yes.

H MR WESTGATE: If that ceases to be bona fide (overspeaking) because the ...

A MR JUSTICE LEWIS: You are not ceasing the navigation simply because they do not fit the purpose of remaining within particular dates.

MR WESTGATE: Yes or if that is part of the object. (pause) With respect to O'Malley J, the emphasis on use as a home was in a sense taking his eye off the statutory test. The question is whether the movement that he undertakes and the pattern was navigation for the purposes --

B MR JUSTICE LEWIS: I thought the question is: is it for navigation?

MR WESTGATE: It is used "bona fide for navigation".

MR JUSTICE LEWIS: Yes, that means "for" not "in" (overspeaking)

C MR WESTGATE: No, indeed. Yes and that again is something that may be significant. Then at paragraph 15, the judge held that:

"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' ..."

D That is a reference back in effect to the 2004 guidance. Then he goes on to say:

"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 ... 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'."

E Pausing there, that may be so, but it is far from clear from the guidance what it is that you need to do in order to satisfy. It talks about loose terms like "a substantial part of the network" or "a small part of the network" and that is still the case:

F "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."

G So that was the ...

H MR JUSTICE LEWIS: You do not like that, though, do you?

A MR WESTGATE: No, but it may well be that there are some minimal movements that (inaudible). The idea that moving up and down is necessarily not navigation is -- it goes in --

MR JUSTICE LEWIS: “Bona fide for navigation.” I think that is the point. The Act is not saying, “This is navigation. You are moving on the water”. The Act is trying to draw a distinction between something that is a home and something that is a boat in the way that I would use the word, not knowing the first thing about boats.

B MR WESTGATE: Yes.

C MR JUSTICE LEWIS: If he is living there and he happens to be off the land and on the water, that is fact(?). It does not change by shifting six inches to the left every Monday morning. If it is being used for something different (he has decided to go for the life on the ocean waves and he is up and down the network at the other extreme), then he is now somebody who is not living on a boat instead of a house. He is somebody who is going up and down the sea. That is what he saying, is he not?

MR WESTGATE: Yes, but the --

D MR JUSTICE LEWIS: That is the sea but (overspeaking)

E MR WESTGATE: Yes, the waterways but the question really is where the dividing line comes. We accept the minimal movements that are just intended to give the impression that you are not static and you are moving about a bit will not be sufficient because they would not be called bona fide.

We are not going into the deliberations on the bill. One of the examples that was given there, which is perhaps instructive as to what would not be bona fide navigation, is someone who has a house boat and they every now and again take it to a watering station and then take it back again. That would not be sufficient.

F MR JUSTICE LEWIS: I do wonder whether this case has any useful purpose, you see. One can expect interesting questions of view about section 17 and you can look at if the guidance is a decent stab(?) at getting section 17 right or it is not a decent stab. But ultimately, do you not have all the details at hand and would it have been helpful if Mr Stoner had probably(?) given us the facts?

G MR WESTGATE: I do take your point. It may well be that this is something that will be better addressed on individual circumstances. The reality is that that will tend to be cases like Mr Davies where the board has come to the end of whatever discussion it has with the boater and is taking enforcement action. In those cases, one does have a very sharp focus on what is being done and what is not being done.

H MR JUSTICE LEWIS: Why does Mr Brown not tell us how often he moves and where he moves? It looks suspicious, I am afraid. I am sure I am not right to be suspicious but the whole language in the statement is evasive, “focus”, “my daughter”, “my doctor”. I just --

MR WESTGATE: I appreciate the points you are making. I am not able at the moment to give you chapter and verse about where and when he moves or has moved.

A

MR JUSTICE LEWIS: You never can do because he cannot give evidence. Anyway, you still say that even though it would be better to have facts (overspeaking)

MR WESTGATE: There are, as it were, clear-cut challenges to the guidance on the basis that even the present guidance, which I am about to come to, requires a level and extent that simply does not on any view meet the requirements of statute. The equation of place with locality or neighbourhood is misleadingly to enlarge the idea of place. The apparent limitation on what is reasonable in all the circumstances when one cannot look and say it is longer than 14 days is too restrictive.

B

There are those points which one can address independently of the individual facts although I fully accept your point that it may be that a challenge of this kind is more appropriately addressed on individual factual circumstances where there has been a trial and findings.

C

One then comes on to the current guidance. I say it is current guidance. In fact, there is a 2012 (overspeaking)

MR JUSTICE LEWIS: 2012. It is the 2011 I am worried about, is it not?

D

MR WESTGATE: That is right. I have discussed it with Mr Stoner. I will show you what the main difference is as I am going through the 2011 guidance. The 2011 guidance now appears as a schedule to the “General Terms and Conditions for Boat Licences” which is found at page 245. (pause) 1.4 defines a houseboat there. It is slightly different from the statutory conditions we are going to come to, but it says:

E

“‘Houseboat’ means a boat whose predominant use is for a purpose other than navigation --”

MR JUSTICE LEWIS: Hang on, which ...?

MR WESTGATE: Page 245. It is 1.4, the definition of “houseboat”.

F

MR JUSTICE LEWIS: So you are reading the conditions of the guidance?

MR WESTGATE: Yes.

MR JUSTICE LEWIS: I beg your pardon, yes.

G

MR WESTGATE: So the definitions are:

“‘Boat’ means the boat named in your application ...

‘Home mooring’ is a mooring or other place [it curiously says ‘place’] where the boat can reasonably be kept and may lawfully be left when not being used for cruising ...

‘Houseboat’ means a boat whose predominant use is for a purpose other than navigation and which, if required for the purpose, has planning permission, for the site where it is moored. A houseboat

H

may be used for navigation from time to time provided it does not become its predominant use ...”

A

Paragraph 2 states that:

“The licence allows you to use the boat in any waterway including mooring for short periods while cruising ...

3.1 ... does not allow you to moor the boat in any waterway except for short periods whilst cruising ... does not give a right to moor that is sufficient to meet the requirement in the British Waterways Act 1995 for the boat to have a home mooring ...

B

3.3 The only exceptions to the requirement to have a home mooring are ...

(b) if you cruise continuously without staying in any one place for more than fourteen days ...”

C

It says those are explained in schedule 2 and then:

4 Continuous Cruisers

4.1 You must cruise in accordance with the British Waterways Act 1995. The guidance for boats without a home mooring is contained in Schedule 2 ...”

D

Although the language of the guidance has changed, the sense one still gets in the terms and conditions is that it is intended to capture the idea of continuous cruising that was in the earlier guidance.

MR JUSTICE LEWIS: I understand what you say but what it actually said is:

“You must cruise in accordance with the British Waterways Act ...”

E

All that says is you must comply with the law.

MR WESTGATE: Certainly, which is why we say it is an empty plate(?) about whether or not section 43 can propose(?) a different solution(?).

F

MR JUSTICE LEWIS: I understand that, yes. Is 254 the actual guidance?

MR WESTGATE: That is right and the key legal requirements are the same as we saw before. Then --

MR JUSTICE LEWIS: Just go through it bit by bit to see if there is any point. Do you disagree with the first sentence?

G

MR WESTGATE: No. It would be --

MR JUSTICE LEWIS:

“If a boat is licensed without a home mooring it must move on a regular basis.”

H

MR WESTGATE: It obviously has to move every 14 days.

MR JUSTICE LEWIS: Yes, I think I will agree with you.

A

MR WESTGATE: I do agree but what “regular basis” means is to be gathered from section 17. The difficulty always with guidance like this is that one is trying to be helpful by giving guidance, but often you can end up paraphrasing language which is better left as the statutory language.

B

MR JUSTICE LEWIS: Yes, but you do not disagree with first sentence. You do not agree with the second sentence?

MR WESTGATE: No and then the three legal requirements are --

MR JUSTICE LEWIS: You do not disagree with those either?

C

MR WESTGATE: No, they simply state that ...

MR JUSTICE LEWIS: So that it is fine so far, yes. Then the navigation. Just go through the sentence (several inaudible words). You do not disagree with “The law requires ...”, do you?

D

MR WESTGATE: No, or the next one.

MR JUSTICE LEWIS: Or the next one. So good so far. “Travelling on water involving movement in passage or transit.” You do not actually disagree with that?

E

MR WESTGATE: I do not disagree with it but it needs to be qualified here. The difficulty in going through this sentence by sentence, saying I do not disagree with this, is one then ends up with the overall impression being given and one has to look at these passages as a whole. In the “Navigation”, while that sentence might be unobjectionable in itself then is qualified by:

“Therefore, subject to stops of permitted duration, those using a boat licensed for continuous cruising must genuinely be moving, in passage or in transit throughout the period of the licence.”

F

That is not accurate because it implies that what is required is a single journey throughout the period of the licence.

MR JUSTICE LEWIS: Yes:

“Therefore, subject to stops of permitted duration, those using a boat licensed for continuous cruising ...”

G

Those terms are defined below as:

“‘Cruise’ and ‘cruising’ are used in this guidance to mean using a boat bona fide for navigation.”

H

So we remind ourselves of that:

“Therefore, subject to stops of permitted duration, those using a boat licensed for [bona fide navigation] ... must genuinely be

moving, in passage or in transit throughout the period of the licence.”

A

It is actually correct, is it not?

MR WESTGATE: No because what it suggests is a single journey throughout the period of the licence.

B

MR JUSTICE LEWIS: Where does it say that?

MR WESTGATE: What you are talking is you have to be:
“... genuinely be moving, in passage or in transit, throughout the period of the licence.”

C

What it does not cover is a situation, as was suggested by the 2004 guidance, where you could have a series of journeys.

MR JUSTICE LEWIS: It does not say you cannot have a series of journeys. All it says is:

“... subject to stops of permitted duration, those using a boat licensed for [navigation] ... must genuinely be moving, in passage or in transit throughout the period of the licence.”

D

That is all it says. It does not say anything more, whether it is one journey or two journeys or anything.

MR WESTGATE: Except one then does have to read it where it says, “Importantly ...”

E

MR JUSTICE LEWIS: Yes, but that is the bit that I asked you, “You do not like that” and you say that is wrong.

MR WESTGATE: If the “Importantly ...” section was not there, then one could say that the remainder of this was not incompatible with section 17. It would be an incomplete statement of what section 17 requires but that would not perhaps necessarily be --

F

MR JUSTICE LEWIS: You would not strike it down as being incomplete.

MR WESTGATE: No.

MR JUSTICE LEWIS: You would encourage them to write it more.

G

MR WESTGATE: Exactly and it would be something that would then be open to debate on the facts of an individual case.

MR JUSTICE LEWIS: But then you simply do not have enough facts about your client. I am only speaking aloud(?). We then have to do the best we can on this general guidance. You have not put the facts since you are stuck with the words. Just remind me which bits of the words you do not like in the “Importantly ...”.

H

MR WESTGATE: It is the:

“... short trips within the same neighbourhood, and shuttling backwards and forwards along a small part of the network ...”

MR JUSTICE LEWIS: So you say that is bona fide navigation, do you?

MR WESTGATE: What you cannot do is say that that cannot be bona fide navigation. There may be circumstances where the movement is so small that it does not count. The idea that repetitive movement or movement backwards and forwards or the movements have to be across more than a small part of the network is to read words into the requirement of bona fide navigation that are not there.

MR JUSTICE LEWIS: Obviously, centre(?) of the fight(?) at the moment is in:
“... short trips within the same neighbourhood, and shuttling backwards and forwards along a small part of the network do NOT meet the legal requirement ...”

It does not meet the legal requirement. Just remind me why it does not meet the requirement because you can have a short trip within the same neighbourhood.

MR WESTGATE: Yes, and that is bona fide navigation or you can move around a small part of the network and that is also bona fide navigation.

MR JUSTICE LEWIS: It is not moving around a small part. It is “shuttling backwards and forwards”. You have to read the whole thing.

MR WESTGATE: Again, the difficulty with “shuttling backwards and forwards” is what does it mean? If what you are saying is shuttling --

MR JUSTICE LEWIS: It means going backwards and forwards.

MR WESTGATE: Except that if you are going in 20 steps along a 40-mile stretch of the network, is that “shuttling backwards and forwards along a small part of the network”? Or is it just moving up and down a couple of hundred yards?

MR JUSTICE LEWIS: Then you would have an argument on the facts of each case, whether or not the guidance has or has not been breached. In terms of this guidance (which is your only case at the moment in the abstract), apart from saying short trips would be bona fide in some circumstances, although we have not identified which ones, or query about what a “small part of the network” means when it is clear that what it is getting at is the “shuttling backwards and forwards” and (inaudible) whether you can say you can shuttle backwards and forwards.

MR WESTGATE: Again, it depends. You can shuttle backwards and forwards, depending on the nature of the shuttling and the nature of the movement. It may well be that within a very short distance, A to B and back to A again and then back to B again over and over again --

A MR JUSTICE LEWIS: They are(?) particular facts, yes, and you might say, “This guidance is only guidance”. Although it says that, you either have to depart from the guidance or the guidance does not apply to this set of circumstances.

It seems to me the problem is it is getting over an idea and either the idea is right or wrong. If in a very unusual set of circumstances it was capable of being bona fide navigation (even if it is the kind of shuttling backwards and forwards that this is talking about), the guidance itself as a stab at trying to get to the core meaning is not a problem.

B It is saying, “This has to be boat. It has to be moving around. If you are just trying to dodge the Act by moving a little bit up and down all the time or by just moving a little bit now and again, that is not what it is aiming at. If you are looking at the abstract words of the guidance, it is only guidance. It is not describing every set of circumstances and it is capturing an idea, is it not (overspeaking)

C MR WESTGATE: Except what it does do is purport to say in the “Importantly ...” paragraph that:

“Short trips [whatever those mean] and shuttling backwards and forwards along a small part of the network do NOT ...”

D It is not that it “may not” be depending on the circumstances. If you are doing that, then you simply “do NOT meet the legal requirement” and so what it purports to do is say that you have to move.

E The difficulty is that, given that you have to move every 14 days, if you are moving within a small part of the network, then over the course of a year, say, which is the usual period of a licence, then you are almost certainly going to be on one view shuttling backwards and forwards over that small part of the network. Consider someone who is moving, say, over a 40-mile stretch and moving 4 miles every 14 days. Over that stretch, they are necessarily engaging in a degree of repetitive movement, which no doubt CRT would say is “shuttling backwards and forwards” over the course of the licence.

F MR JUSTICE LEWIS: It has a footnote and it sounds as if you are trying to make a case there might be circumstances (and we do not know whether this is one or not) and just because there might be circumstances, we must strike down the guidance. It just seems a little bit unreasonable (overspeaking)

G MR WESTGATE: What is misleading about it is that it carries the sense that in order to comply a boater is going to have to move across what is more than a small part of the network. What has come out of this guidance is the opposite of “a small part of the network” found in the 2004 guidance. In a sense, the 2004 guidance was clearer about what it seemed to be requiring because it talked about “a significant part of the network”. That was the contra-distinction to the “small part of the network”. So it is either “a small part of the network” or a “significant part”.

H MR JUSTICE LEWIS: You prefer the 2004 guidance because it is easier to have a go at it. You do not have the 2004 guidance. You have the 2011 guidance. All that says is you have to be:

“... moving, in passage or in transit, throughout the period of the licence.”

A You must be navigating and generally be “moving, in passage or in transit”. Then there is a footnote to Davies (and if Davies is right, that is fine), saying, “And don’t think you’re going to get away with this, chum, by going up and down (inaudible) a 10-mile stretch of the same canal”. That is all it is saying. That is not *ultra vires*, is it?

B MR WESTGATE: It is because although it does not include the offending words in the 2004 guidance, it carries the same sense. It says you cannot be bona fide navigating if all you are doing is moving along a small part of the network.

MR JUSTICE LEWIS: It does not say that.

MR WESTGATE: I appreciate it says “shuttling backwards and forwards” but --

C MR JUSTICE LEWIS: You cannot say it means something different from what the words say in order to say because it means the thing that it does not say, I do not like. The words are “shuttling backwards and forwards”. What refers to Davies is only guidance and all it is saying, “Look, read Davies, be careful. Moving six inches to the left every Monday morning is not going to get you out of this”.

D MR WESTGATE: We are not suggesting moving six inches to the left does. The difficulty that it creates is that, given the geographical realities and given the fact that you have to move every 14 days, then the idea of shuttling backwards and forwards is actually the same as saying, “You cannot confine your movements to a small part of the network”. “Shuttling backwards and forwards” is simply a pejorative way of describing the kind of movement that will necessarily take place over a small part of the network if you are moving within a small part of the network. That is to --

E MR JUSTICE LEWIS: If it said “moving backwards and forwards”, would you mind? Would it be unlawful(?)? Is it just “shuttling” you do not like?

F MR WESTGATE: If it said simply “shuttling” but if what it did was to express the idea that pretences or sham movements were not permitted, then that would be one thing. What this appears to do is to capture genuine movements or genuine navigation but within a confined area. That is where it goes wrong. I appreciate I am attacking this guidance, rather than criticising it for not being better guidance. We would be better off focusing on what the requirement of “bona fide navigation” actually was and how that is intended simply to distinguish pleasure boats from houseboats which is what we say is the key idea.

G MR JUSTICE LEWIS: Yes, but starting first with the shuttling(?) that you have made and so your client has put in the evidence that he has put in, you are saying that that is wrong because Davies is wrong. You can actually move “backwards and forwards along a small part of the network” in the context of Davies and still not have to get a home mooring licence?

H MR WESTGATE: That is right, yes.

MR JUSTICE LEWIS: If you are wrong on that, thereafter it is (overspeaking)

A MR WESTGATE: If I am wrong on that, I say it is still goes far. What it does not do is say “If you do more than Davies, then you are all right” and although --

MR JUSTICE LEWIS: It does not say “If you do more than Davies, you are not all right”.

B MR WESTGATE: Indeed not, but if boaters were told “If you do more than Davies, then you are all right”, then they might not like it but they would at least know where they stand and (overspeaking)

MR JUSTICE LEWIS: That is not a complaint of the guidance in *ultra vires*. That is a complaint if you would like them to say more(?).

C MR WESTGATE: Exactly, but ...

MR JUSTICE LEWIS: It cannot be *ultra vires* surely.

MR WESTGATE: What makes this *ultra vires* is that, although it refers to Davies, it then goes on to imply that you have to do more than that. What you have to do more than that is to do more than travel along a small part of the network.

D MR JUSTICE LEWIS: If it is wrong to us if it reproduces(?) Davies and Davies is wrong. It is wrong in the sense of *ultra vires* unlawful and a breach of section 17 because it implies you have to travel more than a small part?

E MR WESTGATE: Yes. In fact, it expressly says you have to travel more than a small part.

MR JUSTICE LEWIS: No, it does not. It says “shuttling backwards and forwards” with a footnote to Davies.

MR WESTGATE: Yes.

F MR JUSTICE LEWIS: Your client chose to fight it on the words not on the facts.

MR WESTGATE: No, I appreciate that I am stuck with what I have (overspeaking)

G MR JUSTICE LEWIS: So that is your case on navigation really; either that Davies is wrong or if Davies is not wrong (even though it says “shuttling backwards and forwards”), the reference to “a small part” implies that it has to be more than a small part. There are lots of things you do not like but you recognise that, marking it out of ten, it is good guidance rather than saying it is *ultra vires* guidance? That is your case on navigation then, is it?

H MR WESTGATE: That is the navigation section. When it talks about “a small part of the network”, that is something which has to be read together. Again, I am going to go back to the 2004 guidance because it refers in that case to “a genuine cruise”.

MR JUSTICE LEWIS: Yes, but we have got beyond that. We did the guidance because of Davies. It is not helpful to go back to something that has been changed, is it?

A

MR WESTGATE: Except that when one has (inaudible) and what is meant when it talks about “a genuine cruise”.

MR JUSTICE LEWIS: What it says. “Using a boat bona fide for navigation” defines it and that is just not wrong, is it? It is just one word with five letters or six letters instead of a phrase.

B

MR WESTGATE: Except that the difficulty with that is one then has to read it together with the whole of what is said on “a place”. This is the same as the 2004 guidance, immediately underplays where it says, “Therefore to remain in the same neighbourhood”.

C

MR JUSTICE LEWIS: Yes, so that is moving then on to “neighbourhood” and “place”.

MR WESTGATE: It is and that is a separate point. This really gives meaning, as it were, to the idea about “small part of the network”. It talks about what it requires and it is the 14 days ago period and the only difference is it uses A, B and C rather than X, Y and Z.

It then says:

D

“... (with obvious exceptions such as reaching the end of a terminal waterway or reversing the direction of travel in the course of a genuine cruise).”

Although it says:

E

“The terms ‘cruise’ and ‘cruising’ are used in this guidance to mean using a boat bona fide for navigation.”

when you come to the idea of “a genuine cruise”, what seems to be implied here is it is something that is at least greater than A, B to C. It carries the sense of a lengthy journey, which is exactly what the idea of “a cruise” is treated as being a synonym for in the 2004 guidance because that referred to a “genuine progressive journey, i.e. a cruise”.

F

When the guidance, which again is addressed to boaters who will be using language like “cruising” (and it uses the idea “a genuine cruise”, not simply “cruising”), then what it carries with it is the idea that bona fide navigation can only take place in the course of a journey of some length. That then has to come back to the idea of what it means to be moving across more than a small part of the network.

G

MR JUSTICE LEWIS: Hold on. It says:

“What the law requires is that, if 14 days ago the boat was in neighbourhood A, by day 15 [forget about ‘neighbourhood’ for the moment] it must be in neighbourhood B ... Thereafter, you normally go on to C, not back to neighbourhood A ...”

H

That is just saying what “shuttling” is, is it not? You must not go up and down between A and B. You have to be not shuttling backwards and forwards between

A and B. That is all it is saying. There might be exceptions in which A and B are at the end of the waterway but if you are just looking at the words, not the facts, it is not telling you anything about ...

This is why this challenge is really unhelpful to everybody, I think. It is not carrying the implication of a journey of some length. If you read the black letter words on the page and if you read it up to “Navigation”, all it says is it cannot be A/B, A/B, A/B. It is normally going to be A/B/C. It does not tell you if there is going to be a D, E and F. I know you want to read it in and imply it so you can strike it down but it does not really say that, does it?

MR WESTGATE: There are two points here. There is the idea of “a genuine cruise” which I say, when read in combination with the “small part of the network”, does carry the idea of a greater extent. It also carries the idea of a single journey, rather than a series of journeys. So the --

MR JUSTICE LEWIS: So “genuine” equals, what, “significant” and it is a single journey, not ...?

MR WESTGATE: Yes and that is (overspeaking)

MR JUSTICE LEWIS: Where do you get that from?

MR WESTGATE: Again, you read “genuine cruise” together with the bit under “Navigation”, the paragraph immediately above “Importantly ...” where it says: “... subject to stops of permitted duration, those using a boat licensed for continuous cruising must genuinely be moving, in passage or in transit throughout the period of the licence.”

What one has there is a “continuous cruising” and that says “a genuine cruise” and it has to be in the course of a genuine cruise. The idea is that one has to be on the same genuine cruise throughout the period of the licence, which is a point at which the 2011 guidance is in fact stricter than the 2004 guidance. That did refer to a series of journeys but this one seems only to refer to one journey.

Then the second point under the A, B, C movements under “Place” is that although it is in one sense simply repeating the idea of shuttling backwards and forwards so that A to B is not good enough, a movement from A to B and thereafter back from B to A is not incompatible with the idea of navigation, again depending on the circumstances. The only circumstances in which it suggests that you can go back to A again is if you are at:

“... the end of a terminal waterway or reversing the direction of travel in the course of a genuine cruise.”

MR JUSTICE LEWIS: What other occasions would there be?

MR WESTGATE: It is unhelpful to talk about “the course of a genuine cruise”. What -

MR JUSTICE LEWIS: If you have not reached the end and you have not changed your mind and you are going backwards, what else would you be doing?

A MR WESTGATE: What is unhelpful to do is talk about that as having to take place within the context of “a genuine cruise” because that adds an idea to navigation that simply is not there in the statute.

MR JUSTICE LEWIS: Except that “cruise” is defined as “using a boat bona fide for navigation”. So if you put the full phrase in, “reversing the direction of travel in the course of [using a boat bona fide for navigation] ...” Are those exactly(?) the words of the statute, is it not?

B MR WESTGATE: It would be but if that is the case then the --

MR JUSTICE LEWIS: The guidance does not give you very much guidance at all.

MR WESTGATE: No, but then again I take the point (overspeaking)

C MR JUSTICE LEWIS: (overspeaking) another point. You are saying this is unlawful. I just have problems. They do say:

“The terms ‘cruise’ and ‘cruising’ are used in this guidance to mean using a boat bona fide for navigation.”

D If they just had BFN and instead of using the words “cruise” and “cruising” and BFN, you go letters, you would be stuck, would you not? All they have done is use nice English instead of acronyms.

MR WESTGATE: Except that the difficulty with the nice English --

E MR JUSTICE LEWIS: You think they are up to no good really. Your client does not trust them an inch and he thinks they are going to apply the guidance to stop him doing what he is doing but he will not tell us what he is doing.

MR WESTGATE: Again, I appreciate this may be marking the guidance, rather than being something that goes to the lawfulness of the guidance. What is objectionable about the use of the language “cruise” is that it is loaded language. Words like “cruise”, “shuttling backwards and forwards” all create an impression of a particular degree of movement that is needed (overspeaking)

F MR JUSTICE LEWIS: They cannot win. If they use the word “shuttling”, it is pejorative. If they say “A and B and C” so it is not pejorative, you say they are doing other things wrong. Any suggestions that you make(?)? If Davies is right, it is right. All they are trying to say is, “Don’t think you can avoid the need for having a place to keep your boat by moving up and down the same stretch of waterway repeatedly”. That is what they are saying. If that is right, there is nothing wrong with the guidance.

G MR WESTGATE: What is wrong with it, if Davies is right, is that it extends the idea of the same stretch of waterway to anything that is not greater than a small part of the network. That is going back to the point I have already talked about under “Navigation”.

H

MR JUSTICE LEWIS: I think really use(?) then Davies actually because they do a footnote from Davies.

A

MR WESTGATE: Again, this is subject to whether Davies is right. If what said was “a small part of the network” or a bench(?) word for “a small part of the network” is the ten miles in Davies, moving along it a couple of miles every 14 days or so, then we can still say it was wrong because Davies is wrong; but that it would be an accurate transposition of the decision in Davies. This goes beyond Davies although it footnotes that as an example. The actual language is “small part of the network” which, given the size of the network, is unhelpful.

B

MR JUSTICE LEWIS: It might be unhelpful but it is not unlawful (overspeaking)

MR WESTGATE: It is unhelpful to the point of being unlawful, we would say, because the implication is it is the dichotomy; if it is small and significant.

C

MR JUSTICE LEWIS: Yes, I have the submission; that you say that you have lots of things lurking and that and you must strike it down, putting all these things together and ignoring the definitions and it is terrible.

MR WESTGATE: What it really needs to do is build from what the requirement of bona fide navigation and “place” is perhaps more --

D

MR JUSTICE LEWIS: Place is a separate thing (overspeaking)

MR WESTGATE: Exactly and that is a ...

The short point there, without developing it, is that “place” is not the same as “neighbourhood” or “locality”. It is more than “mooring site” or “pitch”, the idea that there may be mooring places where boats are conventionally moored or stay.

E

The central problem here is that although “place” may well be a term which is difficult to define in the abstract (yet something that one tends to recognise when one sees it), that is the statutory language that is used. It is not appropriate for guidance then to seek to use a substitute term whose plain intention is to use something that is bigger or wider than one would normally consider to be comprehended in the term “place”.

F

Equally, it does not express the usage of boaters on canals because it is using one concept in a different context. For example, a canal boat would move through a particular neighbourhood or locality but may not have much in common with that neighbourhood or locality. The characteristics of the canal are peculiar to the canal itself. Whether it is passing through Chelsea or through a rural area, the canal itself will have a particular character.

G

To say that one has to determine places along the canal by reference to the external characteristics of the neighbourhood or locality does not really match what would be the idea of “place” along the canal. It may well be that the idea of “place” along the canal is something that will develop according to usage. It might be partly to do with what this place is called. It might be partly to do with what place has traditional stopping places. It might be partly to do with the convenient arrangements of services along the canal and so on. Those are nothing to do with the locality which is more a geographical or administrative construct that happens outside but alongside the canal.

H

A One example I give is a famous run of locks in Devizes. There is a series of locks. One might say the locality is Devizes because both sides of that sequence of locks are in a particular locality. No boater would say that because it takes all day to go through the locks. So if you are on one end of the locks, then you are clearly in a different place from the other end of the locks.

B I make that point simply to say that the idea of “place” along canals simply cannot be equated to neighbourhood or locality. So all that the defendant is doing in this guidance is swapping one term that is the statutory term (that may be subject to some difficulties of definition around the edges but does not in fact cause any practical difficulty or there is no evidence of it causing practical difficulty) for what, we would say, a more imprecise term such as “neighbourhood” or “locality” that simply is not in the statute and whose only function seems to be to expand the meaning of “place” to a wider geographical extent.

C MR JUSTICE LEWIS: Speaking of that, I have not focused on it. Looking at the Act, actually, I wonder whether there is not a different problem with the guidance. Looking at the Act and section 17(3):

“The board are satisfied that a mooring or other place where the vessel can reasonably be kept ...”

D That says “a mooring or other place”. Mooring is a place. It may not be a mooring; it may be another place. Then you go on to the next one which says “continuously in one place”. I have just raised it and I have not thought about this. What they are saying there is you cannot moor it in one mooring or a place equivalent to a mooring for more than 14 days. That 14 days was not meant to define the circumstances in which you do not have to have a mooring. That is just an add-on. It is not a definition of what is bona fide for navigation. That just says, “And don’t forget: if you are actually tied up for more than 14 days at the same place, that is going to fall foul of it anyway”. Just because you tie up on Monday at one place and then you move it 200 yards on Tuesday, you still would not be all right, not because of being in any one place for more than 14 days but because then it is not bona fide use for navigation if you look at it overall.

MR WESTGATE: Certainly, that is one reading of this.

F MR JUSTICE LEWIS: Whether it is right or wrong though, that is different from what you were submitting.

MR WESTGATE: Yes, it is because --

MR JUSTICE LEWIS: Yes, so I must be wrong then.

G MR WESTGATE: I do not put it on that basis. When I come on to the function of 14 days, we would say that that is to determine a permitted level of stops within the course of whatever “bona fide navigation” means. During those 14 days, as it were, both sides have certainty and one does not ask “What are you doing within those 14 days?” The periods, as it were, are ...

H MR JUSTICE LEWIS: Yes, but would you not still be all right? Would you not be able to say, “If I tie it up on one spot for 13 days, the fact that I have been tied up for 13 days cannot [on your case] involve the problem because I have only been tied up

A for 13 days”? The question for the trust would be: if on the fourteenth you moved it 50 yards downstream and tied it up on a different mooring for another 13 days, they would start thinking, “Now, what is he up to?” Then on the 29th day or whatever it is, 26th day, you suddenly moved back to the first one, then they would say, “Bingo, it is not bona fide use for navigation. You are shuttling”.

That is nothing to do with the definition of “in any one place”. “In any one place” is a carve-out. If it is tied up for no more than 14 days, nobody is going to say there is a problem. Once there is something else, more than 14 days or shuttling, then there is a problem but that is not from this sort of(?) reading, is it?

B MR WESTGATE: It is not the --

MR JUSTICE LEWIS: It is not their reading, I know.

C MR WESTGATE: No and it is not one that we would urge. We agree with the first lot of that. The 14 days is not a problem and is not open to CRT to say it is not (overspeaking)

MR JUSTICE LEWIS: (inaudible) 14 days in one place which is more than one mooring, it is not a problem. Is that what you are saying?

D MR WESTGATE: Yes. We would not go so far as to say that “place” can be equated simply with any mooring spot. Another way of considering that might be: what would the position be if someone with a pleasure boat licence but without a permanent mooring is at a spot, say, where there are ten mooring places? In the course of the 14 days, they leave one mooring pitch, go away for a day with a planned journey that goes off to a particular place or a particular destination. That would be something that on any view would be an act of bona fide navigation. Then they come back and they do not moor at the same pitch. They moor ten yards further down. In that example, we would accept that if you are doing that for more than 14 days in the same group of pitches --

E MR JUSTICE LEWIS: So say you have one stretch of water (it may be that I just know(?) what we are talking about because you have got into caravans now), what is a mooring place when it is at home? Is it a 10-metre or whatever, 30-metre stretch of land with a post where you tie it? Is that right?

F MR WESTGATE: Some mooring places are like that where there will be a bollard or something that you can tie up to. Some will be places where there will be some more permanent structure, a jetty or something of that kind, that you can moor against. If you have a permanent mooring place, then you will have rights normally to moor in a particular stretch of waterway, either in a basin or what are sometimes called online moorings, which are ones that are on the course of the canal. Then of course there is casual mooring in the course of a trip where, if you are between towns, for example, you moor up against the canal and then hammer some spikes into the earth and tie your boat up to that.

G H MR JUSTICE LEWIS: If you took the train to Wales, which I obviously do a lot, on the right-hand side of the train window as you go down towards Wales, there is a chunk of the Thames with a lot of very nice boats. It is about a mile, I think. It

may be less than a mile and there are lots of very expensive boats there. There are not ten places. You are saying there is one place with ten boats. There is one place with ten mooring places. That could be a place?

A

MR WESTGATE: That could be a place, yes.

MR JUSTICE LEWIS: Are you saying “any one place” in (ii) cannot mean the same as “place” in (c)(i)?

B

MR WESTGATE: It does have that consequence but not necessarily because it is mooring or other place. For example, there could be a basin and of course a place does not even need to be on the waterway. For example, there could be a boatyard.

MR JUSTICE LEWIS: It must follow that “place” is used differently because a mooring is a place in (c)(i) because something that is not a mooring is “another place” by definition, is it not?

C

MR WESTGATE: Yes.

MR JUSTICE LEWIS: You could rewrite it and say that is (inaudible) that a place which is a mooring or “another place” and it would be the same thing. When you get to (c)(ii) on your case and, indeed, if you look from Mr Stoner’s case (although I may not have understood his case because I have only thought about this and I might (inaudible) for my own) you would logically expect the word “place” to mean the same thing in both subsections. When it is talking in (ii) about “continuously in any one place”, it could say “continuously in any one mooring”.

D

MR WESTGATE: That is right and it is difficult in fact to see what the ... They do seem to be dealing with different ideas though because “the other place” for the purposes of (i) is anywhere where you can reasonably keep the vessel.

E

MR JUSTICE LEWIS: It is the same for (c)(ii), “in any one place”, i.e. a mooring or some other place where the vessel can reasonably be kept. It is just looking at “the place” where the thing is, not a place in a different sense of “spot”, which is a word you have used, or “locality” or “neighbourhood”. All that is saying is they are carving out. If you are tied up for 13 days, you are all right. It is a carving out from the rest of it, not a definition about “bona fide use for navigation”.

F

MR WESTGATE: We certainly accept the carving out part of it. It is not a mooring because some other ...

G

MR JUSTICE LEWIS: It is a place and a place may be a mooring on one analysis or it may be another place.

MR WESTGATE: A mooring has a physical location and so in that sense is a place that will include a mooring or other(?) where the area in which a mooring is located will be a place. That does not necessarily imply that “mooring” and “place” are necessarily coextensive. A mooring will have to be within a place but it does not follow that --

H

A MR JUSTICE LEWIS: A mooring is a place in (c)(i). (pause)
Do you see the problem that I have?

B MR WESTGATE: No, I do. The problem is “other”, which, if you said, “mooring all place”, then there would be no difficulty. I think I have to accept that the approach I am putting forward does have the consequence that any one place -- and these are composite terms -- may well be more extensive than “other place” because it, we accept, would not cover simply an individual mooring or, as I incorrectly put it, “pitch” but it is a specified mooring.

C MR JUSTICE LEWIS: Let me just let you get on and mention that I have understood that. At the moment, in terms of your submission, you have more than a mooring site and you have “place” in (c)(ii) is different from “place” in (c)(i). So let me just let you get on and explain to me what it means and how it is significant to your case (inaudible).

MR WESTGATE: The only relevance for present purposes is taking you through this guidance to try and --

MR JUSTICE LEWIS: Yes, (overspeaking)

D MR WESTGATE: -- make good the point that whatever “place” means, it does not actually transpose it to say “neighbourhood” or “locality”.

I did say that as I was going to take you through this part of the guidance I was going to point out what that differences are with the 2012 guidance. That task will be easier if I could lay my hands on the 2012 guidance. If I can ask for that guidance to be passed up to you, just so that ... (handed)

E The main substantive change is in this section because it qualifies the A/B/C idea somewhat. So, if you look to the first page of this 2012 guidance, it says:

F “Therefore to remain in the same neighbourhood for more than 14 days is not permitted. Necessary movement from one neighbourhood to another can be done by one short step or by short gradual steps. What the law requires is that if 14 days ago the boat was in neighbourhood A, by day 15 it must be in neighbourhood B or further afield.”

G It is the “or further afield” which is new. Then it says, “Thereafter the next movement must be at least to neighbourhood C”. It is the “at least” which is new. It does not add significantly to the sense of the 2011 guidance, and, having discussed it with Mr Stoner, I think it is common ground that if the 2011 guidance is lawful then the 2012 guidance is as well. Then if the 2011 guidance is defective then the 2012 guidance will need to be revised as well.

H MR JUSTICE LEWIS: It is not going to help you but at the moment I think the guidance is unhelpful by using “neighbourhood” as “sense of place” because it is trying to confuse the two things: the exception, 14 days tied up in the same spot with the broader definition, and it is trying to say, by the looks of it, that you can only stay in any one place for more than 14 days and it is saying, “That means any one neighbourhood”. So, you have to move from the neighbourhood. But it is not

the continuously in one place for more than 14 days. That is the problem for your client. It is the need to be using a boat bona fide for navigation throughout the continuous period. Sorry, is that clear or unclear?

A

MR WESTGATE: No, no. It is, yes.

MR JUSTICE LEWIS: But that is not going to help your client in the long term.

MR WESTGATE: No. The argument is against people in my client's position, Mr Davies' position. It has tended to be not so much an objection to the length of stays when they stay; it is the degree of movement when they move, which is said not to come within bona fide navigation.

B

MR JUSTICE LEWIS: Anyway, Mr Stoner (inaudible) about that. I am sure at some stage he will tell me why that is wrong as well.

So it more than a mooring site. It is different from (c)(i) and it is wrong to say "locality" or "neighbourhood" because they import concepts and ideas that are not relevant to this (c)(ii) place?

C

MR WESTGATE: Exactly, yes,

Then the next part of the guidance is, "14 days or such longer period is reasonable in the circumstances".

D

MR JUSTICE LEWIS: That is (inaudible), is it not, reasonable in the circumstances, yes.

MR WESTGATE: Yes. The short point here is that it is clearly an objective test for reasonable circumstances but one cannot limit that to cases where further movement is prevented outside the reasonable control of the boater. There may be other circumstances where it is reasonable to stay for longer. But the guidance here seems to restrict it to matters like a temporary mechanical breakdown and so on. In particular --

E

MR JUSTICE LEWIS: What examples would there be of (overspeaking) control of the boater in this context? Simply saying, "I want to stay here," is that not contrary to the whole thrust of it?

F

MR WESTGATE: One example is the end of it where it says:

"Unacceptable reasons are a need to stay within commuting distance of place of work or study."

G

It may well be that as a long-term matter you cannot say, "I want to stay here for six months because my child is at school and I want to stay here until the end of term". But there may well be circumstances that for a reasonable period after 14 days personal commitments of that kind are matter which would be capable of falling within reasonable grounds for ... or making something reasonable in the circumstances to remain for longer than 14 days.

H

A MR JUSTICE LEWIS: So, you and your partner have had a child and it has just had its fifth birthday and it is enrolled in St Martha(?) Primary School. It is reasonable to stay until he is 11 and then to leave the school for St Michaels next door, so it is reasonable to stay until 18.

B MR WESTGATE: That is why I am saying it has to be reasonable in the circumstances. I am not suggesting that it can be used to turn a pleasure boat into an extremely long-term houseboat. But to say 14 days is an absolute limit and work or places of study are simply not acceptable reasons for extending anything beyond 14 days is simply to set limits in advance to what should be a broad judgment to exercise in accordance with all the circumstances.

MR JUSTICE LEWIS: But you can(?) (overspeaking)

MR WESTGATE: I said the commuting distance suggest a --

C MR JUSTICE LEWIS: Exactly. And what they are saying is, "Don't think you can use it as your home and go to school from here or go to work from here (overspeaking) made to be something different from --"

D MR WESTGATE: If the word "commuting" is intended to cover, as it were, a long-term planned stay, then I can see that it is difficult to say that that is a bad example. But the sense one gets from this is that matters personal to the boater do not qualify and the only things that qualify will be emergencies such as mechanical breakdown or --

MR JUSTICE LEWIS: No, there is illness too.

E MR WESTGATE: -- or serious illness whereas there may well be circumstances where work related conditions or study related circumstances do mean it is reasonable to stay for longer than 14 days. That is (overspeaking)

MR JUSTICE LEWIS: Given that this is (overspeaking) to the guidance, you do not object to the first sentence under 14 days or a longer period?

F MR WESTGATE: The "14 days or longer or such period as is reasonable in the circumstances," that is simply a quotation from the (overspeaking)

MR JUSTICE LEWIS: Yes, but the first sentence underneath it, there is nothing wrong. That would be a circumstance where it was outside the means of control of the boater.

G MR WESTGATE: That is included within those circumstances but it is not a --

MR JUSTICE LEWIS: It is not the only one but it --

MR WESTGATE: It is not the only one.

H MR JUSTICE LEWIS: -- does not have the words "only", does it?

MR WESTGATE: It does not but then the --

A MR JUSTICE LEWIS: Then it gives examples.]

MR WESTGATE: But the examples are all ones within that first sentence. The remaining sentences appear to be expositions of the first one, which is the --

B MR JUSTICE LEWIS: I accept they are examples. So, if you were doing a black letter law and you are doing your guidance and then you have to stay longer, asked the local staff and they have reviewed the circumstances. Then you have another thing that says: where difficulties persist and the boat to unable to continue the cruise then they can start charging. But then it says, "Don't think you can use it as your base for pleasure(?) seeking(?). It is not the equivalent of the 7.40 from Sussex or wherever you come from". Is there anything *ultra vires* for any of that? It is the sense, you say; it is the *ultra vires* sense.

C MR WESTGATE: No. When you read it in the whole, and leaving aside the unacceptable reasons at the bottom, the ...

MR JUSTICE LEWIS: The implication is there can only be --

D MR WESTGATE: It is more than an implication. The first sentence says:
"Circumstances where it is reasonable to stay in one neighbourhood or locality for longer than 14 days are where further(?) --"

MR JUSTICE LEWIS: All right. There is a definition and the only definition.

E MR WESTGATE: Exactly, and it is over-restricted. The examples given are examples of circumstances where movement is prevented by circumstances(?) outside the reasonable control of the boater are ...

MR JUSTICE LEWIS: It is not (inaudible) in its guidance, indeed(?) by the path(?) you can always go and explain to them and ask to stay longer?

F MR WESTGATE: No, and part of the difficulty with that is that although it is guidance to boaters, it works two ways. It is guidance that gets applied by the enforcement officers as well. So, if they are going to read this as being a definition of what counts as reasonable circumstances, then they are applying unwarranted limitation on the Act.

G MR JUSTICE LEWIS: What matters personal to the boater would count under the Act as a not contemplated (inaudible)?

MR WESTGATE: Some work or study matters might and it may well be that family circumstances might.

H MR JUSTICE LEWIS: What do you mean by "family circumstances"?

MR WESTGATE: This refers to serious illness but, again, the implication is that it is the serious illness of a boater rather than serious illness of somebody else.

A

MR JUSTICE LEWIS: Where does it say that?

MR WESTGATE: It does not. But there could be some family, let us say, emergency or there could be some need to visit someone or spend time with a family member which cannot be stated as being something that prevents further movement. Perhaps the reason why serious illness here does refer to the boater rather than somebody else is that it seems to be a serious illness that has to prevent further movement rather than simply being something that makes it reasonable not to move further.

B

Take, for example, someone who is staying in a particular location where -- take the claimant's example. His daughter is studying in Redding and then at the end of the 13th day there is some matter that needs him to be with his daughter. Maybe she is ill or maybe there is some other crisis. He could, of course, move. His movement is not prevented. But it would be reasonable in all the circumstances for him to remain. What this does not do is accommodate that kind of case.

C

I accept that all this happens against the background where what is expected is bone fide navigation throughout the period of the licence. That is the background against which judgments like this have to happen. But nonetheless, within that, there are all sorts of circumstances that may arise where it is reasonable for there to be a further period beyond the 14 days. What this appears to do is to cut that off by saying, "It's only really when it's something that stops you moving". (pause)

D

MR JUSTICE LEWIS: I wonder if the guidance is not putting too much weighting on all of this because looking at (c)(ii):

E

"The applicant for the relevant consent satisfy the board that that the vessel to which the application relates will be used for bona fide 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."

That is a get out clause if it is in a place for less than 14 days it is all right or if it is there for longer and it is reasonable it is all right, if it is longer in the context of the boat being moved. The real thing that is going to determine everything is whether it is being used bona fide for navigation. If you would say that is still the exception for such a longer period.

F

MR WESTGATE: The 14 days is something which is both a statement of a period where (overspeaking) stops.

G

MR JUSTICE LEWIS: You will always get that limit(?) of 14 days.

MR WESTGATE: You always get 14 days.

MR JUSTICE LEWIS: (overspeaking) 14 days, yes.

H

A MR WESTGATE: But equally, if you stay beyond 14 days it would be open to the CRT to say, “We don’t care whether you’re navigating bona fide for the rest of the time. You always overstay”. So, if you had someone who was doing exactly what the CRT say should happen but they stay 21 days every time they stop somewhere, then the CRT would be entitled to say, “That in itself is something that means next year we are not satisfied that you are satisfying the without remaining condition”. So, although in part it serves the function of defining a no questions asked period, if I can put it that way, for 14 days, it is also an outer limit where unless there is a reasonable extension, CRT can refuse you a licence next time round simply because you are staying too long.

B MR JUSTICE LEWIS: You are there 15 days, yes. It is not just a benefit; it is also a burden.

MR WESTGATE: Yes. (pause)

C MR JUSTICE LEWIS: It is a separate condition, though, that has to be satisfied.

MR WESTGATE: That is right.

MR JUSTICE LEWIS: It is both an exemption and a condition.

D MR WESTGATE: Yes. One can see why that happens and why it is put in that way. When I come to look at the statutory scheme, it is part of the reason why I say that one is to look at it as a statutory scheme rather than be too diverted by common law ideas of what navigation means. But what it does is create a statutory degree of certainty. Much here is uncertain about the definition of navigation and place but 14 days is clear, both for the benefit of the CRT and the individual boater. (pause)

E MR JUSTICE LEWIS: Yes. That is the 14 days and if you do not like (inaudible) navigation and you do not like the place and you do not like the reasonable circumstances (overspeaking) interpretation, yes.

F MR WESTGATE: Yes. That is, I think, as far as I need to go with the guidance. What I am going to do now is take your Lordship through the statutory (overspeaking)

MR JUSTICE LEWIS: Yes, that is very helpful.

MR WESTGATE: -- what we say is the correct approach to bona fide navigation. The main statutes are all in bundle 1 of the authorities.

G MR JUSTICE LEWIS: And onwards(?) you will show me the licence provision for the use of the waterways?

MR WESTGATE: Yes.

H MR JUSTICE LEWIS: (several inaudible words) observe that statute and then we will move on gradually there. Okay. So, which tab?

A MR WESTGATE: The starting point is the British Transport Commission Act which gave the British Transport Commission -- it is tab 2. The canals, as your Lordship will be aware, were very often constructed under private Acts and were then nationalised when they were taken over the British Transport Commission. Then the British Transport Commission Act 1954 section 16 empowered the commission to make bye-laws. One can see that there is definition of a canal in 16(1). Then at 16(2) the commission from time to time made bye-laws for regulating the use of the canal and:

B “...the conduct of all persons who shall be on the canal for all or any of the following purposes.”

Then ...

MR JUSTICE LEWIS: It does not say anything about licensing.

C MR WESTGATE: No, it does not. But it does provide for:

“... determining the description, size and construction of vessels that may be used on the canal and specified parts thereof and the means by which the conditions on which such vessels may be navigation(?) used”.

D So, that would be wide enough to say that you can only navigate or use something on the canal if --

MR JUSTICE LEWIS: you have a licence.

MR WESTGATE: -- you have a licence on some other condition.

E MR JUSTICE LEWIS: It is an offence, okay. So, if you did not have a licence you would be liable to an offence, would you?

MR WESTGATE: That is right. What it did not do was give any other enforcement powers. So, what it did not do is give powers to remove or to seek an injunction or something of that kind.

F The next Act was the Transport Act 1962, which unfortunately is in the next tab but it is not headed “Transport Act” but that is what it is. Section 27 is the power of ministers to give directions to boards, including the British Waterways Board. Then by section 31(5), provision is made for the breakup of the British Transport Commission and 31(5), which is page 4 of this internal pagination, there is transfer to the British Waterways Board:

G “The property rights are now permitted and private permissions undertaken constituted by their inland waterways(?)”.

H Then the statutory functions were transferred to the board also by section 32. So the board then had power to make bye-laws under the 1954 Act. Then section 43, I should note really in passing, because not a great deal, I think, is going to turn on it for the purpose of this hearing, it is the power of the board to -- and it is section 43(3), the board and the Canal & River Trust:

“... should each have power to demand so it can recover or leave(?) such charges for their services and facilities and the use of those services and facilities, subject to such terms and conditions that they think fit.”

MR JUSTICE LEWIS: Broad enough to impose a condition that they have a licence?

MR WESTGATE: We would say not but --

MR JUSTICE LEWIS: (overspeaking) in the first one, then? (pause)

MR WESTGATE: What it refers to is that you have entered into some arrangement with the recipient to provide the services and utilities at 43(8). So, what it --

MR JUSTICE LEWIS: No, the services are defined down below and they include the use of any known(?) waterway and you can make use of those services, the use of any known waterway, subject to such terms and conditions as they think fit. That is not talking(?) about(?) 16(2)(a), which you have just told me covered licensing.

MR WESTGATE: 16(2)(a) is to do with making bye-laws for regulating the use of the canal. This is making the use of services which are primarily ones which are provided by arrangement between the board and the individual, to be subject to certain terms and conditions. Certainly, at this stage it does not oblige the board to deal with someone. In other words, the section 43 read on its own, subject to any public right they might have, if someone were to come and say, “I would like to come and use this waterway,” but then nothing in section 43 obliges the board to agree to that. But if they do agree to it then they are entitled to do so on such terms and conditions that they see fit.

MR JUSTICE LEWIS: Where do you get that from? There is not any reference to agreement or is it a power on the board? “They shall have power to demand, take and recover such charges,” i.e. people are using it because they are allowed to use it and if they want to they can make the use of those services subject to conditions. They can say, “Yes, you can use the waterway but it’s subject to the condition that you have a licence and you don’t put bad substances in the river and you don’t throw dead animals overboard”. But I still do not see why, if you accept that 16(2)(a) is broad enough, 43 is not broad enough. I do not think anything turns on it.

MR WESTGATE: Nothing does turn on it. The distinction may lie in 16(2)(a), which expressly is to make bye-laws for regulating use and for the conduct of persons, whereas the imposition of terms and conditions under 43(3) is something which is where those services are provided, which, following the 1968 Act, can really only be, in the case of canals, at least, subject to some arrangement between the CRT and the board because public right of navigation has been removed. But your Lordship is right that nothing turns on this because it is not a live issue. Certainly, as far as the board is concerned, they appear to have taken the view that it was necessary to make bye-laws under the 1954 Act to impose the licensing power. So, they certainly appear to have taken the view that section 43(3), although it entitles them to impose conditions, if someone comes along and seeks to use their

waterways, it does not entitle them to impose a requirement for licences. Certainly what it does not do would be to get any enforcement powers beyond the power to recover the charges.

A

MR JUSTICE LEWIS: Anyway, I am not going to be dealing with that, by the sound of it, so I do not need to worry about it for the moment then.

MR WESTGATE: The next Act is the Transport Act 1968, and 105(5) of that Act removed the public or private rights of navigation that had been conferred by the private Acts that created the inland waterways. There are numerous exceptions to that which occupy many pages of the law reports in this area but fortunately we do not need to go into any of those. However, I do refer you on to section 115 of that, which is at page 4 of this tab, which provides that:

B

“In section 105 and 112 references to any right of navigation of a waterway or canal include references to any right to use or keep a vessel or craft in a waterway or canal.”

C

That, together with section 105, is relied on by the defendants, as I understand, but it is showing that there is no public or private right of navigation over the network, and that includes any use or keeping of the vessel. So, that is beyond what is normally understood by “navigation”. That being so, there is in a sense another side to this because what section 115 illustrates is that it expands the use or the term “navigation” to cover things that would not normally be caught by that term, because ordinarily using or keep a vessel or craft is only caught within the common meaning of navigation where it is incidental to navigation. Precisely what that covers in a matter for debate. But this seems to cover any use or keeping of a vessel or craft and brings it within the meaning of term “navigation”.

D

That being so, we are much closer to the idea that when one looks to subsequent provisions that control navigation and use navigation, then they are concerning themselves with a statutory code that deals with all types of use caught by section 115.

E

MR JUSTICE LEWIS: I suppose in a nutshell that is right because it takes in 115 and 112. Secondly, I do not understand what is significant about the word at the moment in 115 that you say I ought to bear in mind when I come to the other Act.

F

MR WESTGATE: It is any right to use or keep, and that is said to be included in references to a right of navigation. For example, if you had a boatyard, ordinarily a boatyard would not be caught by the term “navigation” but it would be, if it was pursuant to any right, a right to use or keep any vessel or craft. What you have by statute here is the idea of navigation being expanded beyond simply stopping or mooring in the course of a continuous journey, which is the sense that the defendants seek to superimpose on the statutory scheme.

G

MR JUSTICE LEWIS: It is only for 115?

MR WESTGATE: It is only for 115 but the argument advanced by the defendant has as one of its starting points and there is no public right of navigation over the canal network and therefore the terms that are imposed and the licences that are imposed are the source of your right to be on the canal. If that is the case, then the statutory

H

framework is also the source of your right to keep in any other way on a canal. That may assist when we come to ask, what does navigation mean for the purposes of the 1995 Act and the 1971 Act?

It is the 1971 Act I will now turn to. We are now getting into the ones that specifically deal with the use of houseboats and the like on the canal and other waterways. It is tab 6. We see from the recitals(?) that it was thought to be

“...expedient for the board to be empowered to regulate the use of pleasure boats and houseboats, and certainly being on waterways, and make charges therefore.”

Then you have the definition section in section 3 which is:

“‘Houseboat’ means any boat or barge or vessel or structure or any part, remains wreckage thereof whether or not the same can be used or intended to be used for human habitation, but does not include any boat, barge, vessel or structure which is bona fide used for navigation.”

Then one has the definition pleasure boat over the page which is:

“Pleasure boat means a yacht, launch ... [and various other types of craft] but does not include a vessel being used solely as a tug or for the carriage of goods or a houseboat or a mooring stage or a pontoon.”

So far as houseboat or pleasure boat are concerned, they are mutually exclusive categories and what distinguishes them, because the list of the types of craft largely overlap although it is difficult to quite know what is intended by the more extensive list of pleasure boats and that is not included with houseboats, but it is a boat or vessel or ship, then what stops it being a houseboat, assuming it is not being towed to be broken up or something like that, is whether it is being bona fide used for navigation.

MR JUSTICE LEWIS: Bona fide use for navigation is a pleasure boat by definition?

MR WESTGATE: That is right. Because if it was not being bona fide used for navigation, at least if it is boat then it will be a houseboat.

Then the regulatory powers start in part 2 which deals with pleasure boats and then section 5 provides that the requirement of a pleasure boat certificate if the pleasure boat is being held on a river waterway.

MR JUSTICE LEWIS: You would have a licence issued to it by the board.

MR WESTGATE: That is right.

MR JUSTICE LEWIS: Is that not the section that says they can licence pleasure boats?

MR WESTGATE: It says -- it does not ...

MR JUSTICE LEWIS: Is it not implicitly granting the power to grant a licence and requiring it? You say it presupposes that there is some pre-existing power under which the licence is granted.

A MR WESTGATE: It presupposes certainly some in pre-existing practice. It certainly empowers them to licence it. What it does not deal with is what the position is if you are not licensed. In any event, this only relates to river waterways. The remaining parts of this part deal with the detail of how you would produce and prove(?) the certificate but I do not need to go into that.

I then want to go to 13 and that deals with houseboats. That provides:

B “It shall not be lawful to moor, place, keep or maintain any houseboat in an inland waterway (whether or not the houseboat shall have been so moored or placed before the passing of this Act) unless a certificate ... ‘houseboat certificate’, in relation to it is then in force.”

That is any inland waterway, rivers or canals or anything else. Then provided:

C “Nothing shall prejudice or affect any obligation existing under the enactment to obtain the consent of any local authority within whose area the houseboat is or is proposed to be moored, placed, kept or maintained ...”

D What one gets from that, I would suggest, is that the idea of a houseboat is that it is something that each of the verbs there; moor, place, keep or maintain, are suggestive of something that is kept in one place and that is emphasised by the proviso which makes it clear that you are going to place it in the area of a particular local authority.

Then when one looks at (2)(a) which is the power to remove a houseboat on notice been given, what the BWB can do is:

E “Require the person having control of the houseboat to remove or demolish it and to clear and restore the surface of that part of the inland waterway from or on which the houseboat has been removed or demolished or to comply with the conditions imposed.”

F Then the same thing from (a) which is the default power of the board to do the same thing on service of notice that has been provided. Again that is suggestive that what you have with a houseboat is something which is fixed in such a way that it is likely to change the surface of some part of the inland waterway in some way by some sort of fixing. That ties in with the back-to-back part of the definition that a houseboat is whatever is not used bona fide for navigation.

G That is the essential division between classification that exists to this day, that houseboats are, as it were, static things and things that are used bona fide for navigation are everything else. If that is the case then it follows that the idea or the meaning of the phrase “bona fide used for navigation” is certainly in the 1971 Act intended to cover that degree of movement that is sufficient to stop you being a houseboat, because that is the function that it serves.

H What one then has to think about is what kinds of movement are going to be caught by that because it is going to be the kinds of movement that will be met by pleasure boats of any description including pleasure boats that are kept for most of the time in a marina and have a pleasure boat certificate. For example, if someone has a boat in a marina that they visit every month or so, and then they take it out for a short journey perhaps to a stretch of canal where there is a stopping place or a pub or something of that kind. They go with their friends there and they spend a

bit of time, and then they go back again to the marina. That is bona fide navigation because if it was not, then the boat to which that applies would have to have a houseboat certificate and not a pleasure boat certificate.

A

MR JUSTICE LEWIS: That is looking at the movement but it is not the movement; it is the purpose, is it not?

MR WESTGATE: What you have there is it is simply a recreational movement which is repetitive because it is simply, to use the language of the guidance, shuttling backwards and forwards. You can take it out for a particular purpose or you can take it out for no purpose at all. You can take it out simply because you want to go about on the canal for a bit and then come back again.

B

The meaning of bona fide use for navigation has to be sufficiently flexible or sufficiently undemanding to accommodate that kind of movement or that kind of activity. That being so, there is no requirement that bona fide navigation in that sense has to take place for a particular long voyage or over a particular length of time, or with any particular object in mind, particularly given that the dominant usage now of the canal is for amenity and enjoyment.

C

MR JUSTICE LEWIS: On this analysis, prior to the 1995 Act, visiting a pub once a year ... you live in a houseboat. You shift it down to the Dog and Duck, have lunch. You obviously do not drink because you are on the boat. Having had your orange juice, you get back on the boat and you go from the Dog and Duck back to where it has been for the last 11 months and 29 days, and you wait until the same day next year.

D

MR WESTGATE: Again, what that might then be said is what you are doing there is a shamner(?). It might be said that if it is your --

E

MR JUSTICE LEWIS: Why is it a shamner? It is exactly what a pleasure boat does and all you have to do is what a pleasure boat does. The rich owner goes to the Dog and Duck and has a chauffeur driver, has a gin and tonic, and comes back on Christmas Day. That is what a pleasure boat does, does it not?

MR WESTGATE: What you might then say is if it is not being bona fide used for navigation, it is being bona fide used for something entirely different and navigation is such an occasional use that it does not change that basic use. Again, I am loathe to come up with examples that come from the Hansard(?) extract because we are not going to those, but one of the examples that was thrown around there was what do you do if somebody is travelling for six months and then static for six months? Is that bona fide for navigation or not?

F

MR JUSTICE LEWIS: I just wonder if you are just defining it in a circular way, not only in a (inaudible) way but in a sense it is the wrong way around. You are saying a pleasure boat can go back and forwards once, therefore so can a houseboat. But the question is first of all is it a houseboat or a pleasure boat, and that is when you start off with bona fide for navigation. It is not going to be a pleasure boat if it is just once a month from the marina, under this Act.

H

A MR WESTGATE: Again, the difficulty might be why not. If you have a pleasure boat licence and you satisfy 17(c)(i), you want to use the boat to move around. For one reason or another you are busy and you cannot get to do it more than a couple of times a year. The boat is still used, bona fide used for navigation. If you ask someone why else do you have your boat? You do not have it just to keep it in the marina. You have it so that you can make use of it for navigation when you want to.

B MR JUSTICE LEWIS: You are saying that is why houseboats -- you are saying you have to bear in mind static. Really a houseboat is the tail and the dog is the pleasure boat. Static is where you live in.

MR WESTGATE: It does not have to be somewhere you live.

MR JUSTICE LEWIS: It would have to be used, or intended to be used for habitation.

C MR WESTGATE: It is quite difficult to think of why someone would have a houseboat for those purposes but not intend to live in it. I suppose you could have it for storage or something.

D MR JUSTICE LEWIS: It is hard to imagine what it is meant to mean, then, is it not? If you have wreckage at the bottom of your garden which you cannot live on ...

MR WESTGATE: You may or may not live on it but the point is whether you live in it or not, it is a houseboat even though it is a part of some wreckage. It may well be that in times gone by, that there were licences for something that were just left and were used for storage, and that is caught by houseboat. The fact is most people now if they have something like that will live in it.

E MR JUSTICE LEWIS: It is jolly weird, is it not?

MR WESTGATE: As I say, the houseboat can either be house or a boat but that is the definition. It is very instructive as to what the term "bona fide used for navigation" is because it is at this stage that the idea of continuous cruising and the idea of 17(c)(3)(ii) had not arisen at all. The function of this phrase is as I say, to describe that degree of movement which is necessary to deprive something of the status of an essentially static structure or the status of being a houseboat.

F You can split the phrase up and ask, what does navigation mean in that context? It clearly means more than simply movement, any kind of movement over water. But it is sufficient to cover any kind of ordered movement in the sense of any kind of trip or something under the deliberate control of someone who is navigating the vessel in the sense of deliberately and orderly moving it over water. That is a meaning of navigation that we say is consistent with cases that have been decided in a rather different context.

G H MR JUSTICE LEWIS: We have skipped over a section there. I had not thought that section 17 was doing what you were saying i.e. defining that degree of movement sufficient to stop it being a houseboat. Because I simply read the section 17(1) first and there were licences, there were houseboats and there pleasure boats, and section 17(3) applied to all of those whether you were a houseboat or a pleasure

A boat, and you had to meet the standard, you had to have insurers and you either had to have a mooring or you had to have continuous bona fide -- will be used bona fide for navigation throughout the period for which the consent is valid. That seemed to be looking at bona fide for the whole period and I had seen it as one exception, the 14 days or such longer period as is reasonable, you would not get into difficulty there. But I did not really see it as defining the scope of navigation in a sense of trying to deal with the difference between a houseboat and a pleasure boat. I saw it more as dealing with when you could avoid having a mooring. You could avoid having a mooring if you are constantly moving.

B
MR WESTGATE: That is what CRT say it is. But the difficulty then is that they have chosen to use language that has a different origin in the 1971 Act and it does not appear to be suggestive it has a different meaning in the 1995 Act than the 1971 Act. When one comes to break down the component parts of the test in section 17 -- before I come to this, I ought just to finish off taking you through the legislation. I have shown you section 13 of the 1971 Act.

C
The next stopping point is the British Waterways Act 1983 in the next tab. That does not really tell us anything about the definitions here but it gives the power in section 8 (it is page 9 of the internal pagination) for the board to remove the craft which is left or moored without lawful authority. Again that is exercisable on notice.

D
MR JUSTICE LEWIS: The craft, is that a houseboat or any vessel, is it?

MR WESTGATE: It is any vessel which is sunk, stranded or abandoned, or which is left therein without authority. There has from time to time been a debate about the relationship between that and section 13 but again that does not need to concern you.

E
Then one comes to the 1995 Act. Section 17(3), the standards and insurance conditions, then the paragraph 2 has in effect three conditions if one breaks down the requirement. The first is that the vessel will be used bona fide for navigation. Secondly, that use has to be throughout the period for which consent is valid. Thirdly, that it has to be without remaining continuously in only one place for more than 14 days or such longer reasonable period. Those are in effect the three elements that need to be satisfied.

F
Although in this section they are in distinction to the case where someone has a permanent mooring, if someone has a home mooring, the phrase "used bona fide for navigation" has the same meaning as it has in 1971.

MR JUSTICE LEWIS: You are looking here, somebody has come in and they want a licence for the next 12 months.

G
MR WESTGATE: There are two parts to it. That is the first part that you have to satisfy the board that that is what you are going to do.

H
MR JUSTICE LEWIS: Notwithstanding anything in the enactment but subject to (inaudible), the board may refuse the relevant consent. So, the only circumstances which in which I can get consent would be is if somebody has applied for a licence because their licence is due to come to an end before they want(?) their first licence and they are asking for a licence, the board say, "No, I am not going to

give you a licence” and the question is why are they not giving you a licence. Not because of anything you have done in the past but because of circumstances to do with how they think you are going to use it in the future.

A

MR WESTGATE: Yes, that is --

MR JUSTICE LEWIS: Then they have to look at will you use it bona fide for navigation for the whole time that the licence is valid, and without stopping in any one place for more than 14 days or such longer reasonable period. Is that what they are saying? On Monday, looking at what you are going to do for the next 12 months, they are looking forward.

B

MR WESTGATE: That is right. The reality is that they will tend, as I understand it, to take someone’s word for it on the first occasion. Then on the following year if it turns out they have not been doing that, then they are rather more sceptical about whether or not the conditions are going to be fulfilled for the following year. It also has a further --

C

MR JUSTICE LEWIS: The guidance must be read in that sense, then. It is giving guidance about what you should be doing over the next 12 months. It is not assessing, although you may look at what they did in the past as an indicator of what they are going to do in the future ...

D

MR WESTGATE: It also describes a circumstance in which a licence can be terminated, though. Subsection 4 provides:

“If (subject to subsection (6) below) the vessel does not comply with the standards applicable to the vessel on the date when the consent was granted, or ... [and then (c)(ii)] (in the case of a vessel in respect of which a relevant consent is issued ... the vessel has not in fact been used bona fide for navigation in accordance with the said subsection (3)(c)(ii); the board may give notice requiring the holder of the relevant consent to remedy the default within 28 days.”

E

If you do not remedy it then the consent terminates. In practice it may well be that power is little used because it may be more convenient simply to wait for the licence to expire and then not grant a new one.

F

MR JUSTICE LEWIS: This guidance has to be read in that context, then, though, even though you could have it revoked. It is telling you ...

MR WESTGATE: It is telling you what you need to satisfy the board you are going to do, but also what you have to do during that period on payment revocation(?).

G

MR JUSTICE LEWIS: It actually talks about if it will be met. If we forget the guidance now, bona fide for navigation, you would say, has to take the context of 1991 and ... I suppose. Why have they put the extra bits in?

H

MR WESTGATE: Largely it seems to be to meet the concerns that they have had about clogging sites. If one approaches it first of all by considering what 1(c)(i) requires,

A that the board has to be satisfied that the mooring or other placement of the vessel (several inaudible words) and will be available. That does not mean, though, that if it is available then the boat is not engaged in bona fide navigation because the pleasure boat will be. It is just that it has somewhere to go when it is not actually travelling.

B Then the requirement is in (ii) that the boat has to be used bona fide for navigation, so it could not cover a houseboat under this paragraph because that would never be deemed navigated. But that use then has to continue throughout the period for which the consent is valid. Really, the heart of it comes in without remaining continuously in any one place for 14 days because that is the real additional requirement, that the -- you have to move every 14 days and that of course avoids the clogging problem that Mr Johnson describes.

C What the board has to be satisfied of is that you are in a case in sub paragraph 1, it may not much matter to the board if in the course of the year you stop navigating because they ought to give you the houseboat certificate, but the boat is off the waterways or is moored safely so the board does not need to be concerned about that. So, when you look at what the board can do to terminate a licence in 4(c)(i) the right to terminate does not apply in a 3(c)(i) case, the boat ceased to be used for navigation. Someone says, "I have given up taking this boat out altogether and I am never going to do it again". The power to terminate the licence only arises if the mooring or other place ceases to be available.

D MR JUSTICE LEWIS: What is the chap getting away by not having to show (c)(i)? He does not have to have a place available, he does not pay a charge? Why are people trying to squeeze into (ii)?

E MR WESTGATE: It is two things. I appreciate there is no evidence on this. It is firstly the lack of availability of mooring places, and then secondly their cost. And of course some people prefer the freedom of being able to simply move around from place to place even if they are doing so within a short area. Some people would rather not be tied to one place. They would rather move up and down.

MR JUSTICE LEWIS: Free spirits on boats as well.

F MR WESTGATE: It depends how free you are. You may well wish to be a free spirit because you like to move around between four or five places rather than stay based in one place. But the thrust of the board's objection, as it were, is that it is people who are trying to avoid the difficulty in cost finding a mooring.

G MR JUSTICE LEWIS: I still do not see what 17(c)(ii) is dealing with. There a number of ways in which you can conceptualise it. Is "used bona fide for navigation" the key? And the other things are either defining it or giving you exemption from it. Or are they cumulative conditions or exemptions? It has to be bona fide for navigation but in some way they are subtly qualifying that by saying "and will be used throughout the period for that purpose" i.e. is actually going to be moving not stationary. But there is an exception if you are only in one place for 14 days or less.

H MR WESTGATE: Yes, the exception is as you said, both a benefit and a burden. It enables someone who is moving, whether progressively across a network or not, or

in some other way, if whatever they are doing is otherwise sufficient to satisfy navigation.

A

MR JUSTICE LEWIS: But you are saying there is a third category in (iii). There are those boats that have a mooring place. There are those that are within (ii), and they can include your client and then there is another group who are not using it bona fide for navigation and do not have a mooring available and they are the ones that are caught. The more you look at this statute, the weirder it becomes. I do not even see what it is trying to do, you know. You read it and it is obvious and then you read it again and it is de-obvious.

B

MR WESTGATE: Certainly it is difficult to see what, throughout the period which consent is valid, adds to the use of bona fide of navigation because if you are -- unless it is simply looking forward, in which case --

C

MR JUSTICE LEWIS: I think if it is for navigation in the way that has normally been understood, but also it is poor navigation, i.e. constantly navigating, if you like, and then there is a balance thing, but if you stop for 14 days or if you have fallen off the bridge and you have hurt yourself, you would have a bit longer and that is what it is doing. Will it be used and you have to keep going; it does look like continuous though, does it not?

D

MR WESTGATE: It is continuous in the sense that between the 14 days you have to do what is enough to be bona fide navigation.

MR JUSTICE LEWIS:

“It will be as bona fide as four navigations throughout the period for which the consent is valid.”

E

That is what it has to be used for.

MR WESTGATE: Yes, but that is --

MR JUSTICE LEWIS: But you would not have done if you remain continuous in any one place for less than 14 days?

F

MR WESTGATE: Yes.

MR JUSTICE LEWIS: But that is a separate qualification and you have to be planning to be constantly on the move, on one analysis. I have not come to a view yet, I am just trying to work out what it means.

G

MR WESTGATE: In one sense one cannot object to the idea of you have to be planning continuously to be moving --

MR JUSTICE LEWIS: Yes, but what does that mean?

H

MR WESTGATE: -- but that does not say anything about how far and you get to the meaning of how far by considering what does bona fide of your navigation mean and you answer the question, what does bona fide of your navigation mean by

asking, what does a pleasure boat have to do? Because if it is good enough for a pleasure boat with a mooring, it has got to be good enough for a pleasure boat without a mooring; with the same phrase.

A

MR JUSTICE LEWIS: Just pausing, we will stop there, but that means that the annual trip to the Dog and Duck is enough.

MR WESTGATE: There may be difficult cases like that, but what it certainly does not do is that you have to progress around a significant part of the network.

B

MR JUSTICE LEWIS: Yes, but I do not think the governance(?) says that. That is your problem.

MR WESTGATE: (several inaudible words)

C

MR JUSTICE LEWIS: (several inaudible words).
All right. Is that all? Could we turn to ...?

MR WESTGATE: Yes.

MR JUSTICE LEWIS: Just in terms of timing, because it is down for two days, but ...

D

MR WESTGATE: One way or another, I have said most of what I am going to say. I have to show you a couple of cases but that is -- but I have told you what I think about the guidance and I do not need to come back to that.

MR JUSTICE LEWIS: Yes, I have the guidance point.

E

MR WESTGATE: I am going to be about another half hour, I would have thought.

MR JUSTICE LEWIS: Just so you know what I am thinking at the moment, I may change my mind after the lunch hour. I do wonder whether I should be doing anything at all about the guidance without the facts of a particular case. I really do wonder whether it is not more of a problem than it is, because at the moment if I am going to deal with it in the abstract, you always try to keep things alive rather than kill them off and you can read the guidance in a very clever black-letter way that shows that everything is hunky-dory. But you say it does not go to the reality?

F

MR WESTGATE: That is right.

G

MR JUSTICE LEWIS: But then you have got section 17 which is more interesting, but courts do not usually give abstract --

MR WESTGATE: Exactly. I am not asking you to write a treatise on section 17.

MR JUSTICE LEWIS: Yes, I like it very short. But then, why are we here, apart from the pleasure of seeing you, Mr Westgate?

H

MR WESTGATE: We will, with Mr Stoner, I think reflect on that over the lunch break, yes.

A

MR JUSTICE LEWIS: I do wonder if there is any need to this court case, frankly.

MR WESTGATE: I -- it is --

B

MR JUSTICE LEWIS: It is either that I will not be helpful for you, because I would be obsessive and look at the guidance and (inaudible) or I will look at 17 and say, "Oh gosh, that is probably difficult. I cannot see that I am going to do anything to help anyone".

MR WESTGATE: No, no, I fully take your Lordship's point.

MR JUSTICE LEWIS: Yes. So you might even think is there any need for this case?

C

MR WESTGATE: I will reflect on that over the short adjournment.

MR JUSTICE LEWIS: You must assure your client, although I am intervening and asking you questions, I have not actually come to a final conclusion other than one should be here for a purpose, not for no purpose.

D

MR WESTGATE: Yes, thank you.

(A short break)

E

MR WESTGATE: Yes, my Lord, I am grateful to you for giving us a little more time this afternoon. Having listened to what you had to say this morning, in particular whether there is any utility to be served in these proceedings going ahead, as it were, an abstract challenge to the guidance, the claimant would seek to withdraw and not pursue the challenge further.

MR JUSTICE LEWIS: That is probably very sensible, because there has been useful airing of all the issues and I gather you are standing counsel to (inaudible) other trusts. So you want to withdraw?

F

MR WESTGATE: Yes. The only outstanding question then is costs.

MR JUSTICE LEWIS: Yes, I will have to deal with that in just a second. Mr Stoner, is it not, yes?

G

(SUBMISSIONS BY MR STONER)

H

MR STONER: It is. Looking at the CPR and this coming as something of a surprise, what I would say is that we had always taken the stance on this side, that this was an odd use of the judicial review procedure in circumstances where there was not actually a factual context. Even if Mr Brown had put in a more detailed witness statement, the factual context there would have been not of a decision made by my clients, but of the possibility of a decision they may make, which becomes rather difficult. But that was one of the reasons why we resisted this claim.

A Even our summary grounds of assessment were on a -- were relatively detailed and indeed, my learned junior, one of the grounds that he -- well, the main ground he advanced for resisting a protective costs order that Mr Brown sought at any early stage was in effect the academic sterility of this particular claim and certainly it brings us no joy to say that we had anticipated that whoever heard the substantive hearing, we now know may well be in a position of saying, "What am I actually being asked to consider here?" because it has always seemed to me that there are two levels of argument. It becomes very difficult, for example, to say that it was *ultra vires* of my client to amend its guidance in light of when Davies was an unappealed decision.

B It may not be binding on this court but in my submission it was perfectly responsible management of the waterways to say there has been a case in relation to this. The judge in that case, from my recollection, in particular did not like the phrase, "Genuine progressive journey". There was some aspects of whether that meant that you had to go to all four corners of the waterway on every journey of the inland waterway network, and so amendments were made and ultimately permission was granted by Jackson LJ in the way that he did and what he said, of course, my Lord will need little reminding was that he granted permission which was actively pursued by Mr Brown in the form of an appeal after there had been an oral renewal and in fact Cox J had unusually gone to the trouble of a reserve judgment and at page 155 of bundle 1, what Jackson LJ said was:

D "The permission is limited to the claimant's claim that the 2011 guidance document does not comply with section 17(3)(c)(ii) of the British Waterways Act."

E Again, personally, on behalf of my client, permission having been granted and we may be somewhat less than happy about that; not least because by way of example in terms of actual judicial review we say that this application was out of time, which had been accepted and that permission to appeal that was refused but then was not, we would say, considered in relation to this point, but there we go.

MR JUSTICE LEWIS: The fact of the matter is Jackson LJ did give Mr Brown permission --

F MR STONER: Exactly.

MR JUSTICE LEWIS: -- but he specifically did not add that it was permission to apply out of time, and it was the validity of the guidance with section 17(3)(c)(i) and (ii). So there is the cost for everything else which is one issue and then there is the cost of that issue.

G MR STONER: Yes, but I maybe in some difficulty because it seems to me under the CPR a party is entitled to discontinue at any time. I think that is 38.2 of the CPR, "A claimant may discontinue all or part of a claim at any time". There then a proviso in relation to the permission of the court being required if the court has granted an injunction or there is an undertaking that is not appropriate, or where there is an interim payment that is not appropriate, or where there is more than one claimant. But what the CPR also provides at 38.4 is that where the claimant discontinues under rule 38.2(i):

A

“The defendant may apply to have the Notice of Discontinuance set aside, although the defendant may not make an application under this rule more than 28 days after the date when the Notice of Discontinuance was served on him.”

B

I confess, because this happened so recently I have not considered the authorities. There is relatively little in the notes; it refers to a couple of cases, because it says, “A Notice of Discontinuance is an abuse of process”.

The reality of the situation here, and why my client resists insofar as it can, the notion of a discontinuance is that Mr --

MR JUSTICE LEWIS: Resisting the discontinuance.

C

MR STONER: Yes. Insofar as I can, and the reason I did that is Mr Brown is legally aided, so ...

MR JUSTICE LEWIS: As from 6 February.

D

MR STONER: Yes, so he has the cost protection, if you like, for the purposes of the continuance of the hearing. The position is that my client’s costs up to date, I think, are well over £100,000.

MR JUSTICE LEWIS: You have two separate sets of costs. You have the costs of section 17(3) issue and you have the rest of the costs.

MR STONER: Yes.

E

MR JUSTICE LEWIS: Some of which you would not get anyway. You do not get the costs of the Cox hearing, you do not get the costs of the Jackson hearing.

MR STONER: There was in fact a -- in fact, again, unusually but because of the way it was put, because there was a 71 page statement of case advanced, in fact we made an application for costs at the early stages and that was granted by Eder J, so we have some costs there.

F

MR JUSTICE LEWIS: Normally in (inaudible) you get the acknowledgement of service. You do not usually get the oral hearing, save(?) there are a set circumstances where you can.

G

MR STONER: No, what actually happened, we did not get the costs at the oral hearing, but we got the costs of the acknowledgement to service because that was quite detailed, so in fact there was a £15,000 costs order there.

MR JUSTICE LEWIS: Yes, I saw that; it was £10,000(?) and it went up -- yes indeed, but anyway, you have £15,000. So that is everything up to the hearing of the -- before Cox J, right?

H

MR STONER: Yes, and after -- if one simply looks in terms of the costs from when permission was granted by Jackson LJ, the costs for us -- I have not got that as a

precise figure, again; obviously I was not anticipating making any submissions of this nature until a few minutes ago, but they will be substantial.

A The bigger picture is this. That you have seen it to a certain extent in this case, that there are County Court judgments, the most notable one of which is the Davies case, where both my learned friend and I crossed swords.

MR JUSTICE LEWIS: (several inaudible words)

B MR STONER: Yes, and same sides and similar arguments to an extent, not in so much detail. You have seen the response to that which is, "Well, that is a County Court judgment, it is not binding on anyone", and that is the difficulty that my clients face in relation to County Court judgments. There are other cases coming through the system where there is a factual context for a County Court judge to consider the section 17(3) argument but I resist simply on this basis, that having come this far and expended this much money, I do recognise that there is a real difficulty in what you are being asked to do and in fact one of the first questions I had from my learned friend this morning is, "What relief was actually being sought?"

C But what we had anticipated would happen in light of Jackson LJ's permission was, there are two levels. There is the actual challenge to the guidance but really to determine whether the guidance is right or wrong, there is the subsidiary level of what is the proper interpretation of section 17(3)(c)(ii) and it had been hoped on this side that, and as a responsible public authority, that we could get some guidance from, as it turns out, your Lordship, in relation to that. It may well be that you say, "Well, I hear what you say, but I think that is not sufficient to resist the actual discontinuance", but your Lordship will understand the massive frustration on this side that having come this far and incurred significant costs; even if there is a costs order, and with the opportunity with other cases in the pipelines of some clarification, my clients have engaged in this process to hope there be some clarification.

D
E
F MR JUSTICE LEWIS: Just one minute. The costs from the grant admission from Jackson LJ to 6 February, we will deal with in just a moment, to see whether or not there needs to be an order for that. I understand your clients were unable to run the waterway system and they would like something concrete but I would probably never be able to give them what they want, because I think it is pretty clear that I would tend to take a rather, if I did anything at all, an abstract view of the guidance and I was going to say whether Davies was right or wrong, there is very limited facts on whether the guidance met it. But the reality is, you have to have facts really rather than guidance and I have expressed observations about places in the neighbourhood where I have some concerns as to guidance and your clients may find if they went on that they might not (inaudible).

G MR STONER: Well, yes.

MR JUSTICE LEWIS: It is possible to (inaudible) everybody in a court case; not just one party.

MR STONER: Yes, but I think from my client's perspective, as a public authority --

H MR JUSTICE LEWIS: You just want to know.

A MR STONER: If your Lordship said -- you clearly had not heard our arguments, but if your Lordship said something negative from our perspective on one view, then at least that is clarification.

MR JUSTICE LEWIS: No, I can see that.

B MR STONER: And what is the other frustration is that having had this what potentially is a colossal waste of public money and time, I anticipate what will happen is that if my clients are not satisfied; I am not sure at the present moment whether Mr Brown's boat is back out of dry-dock and on the waters or not, but if they are not satisfied that it is in compliance with section 17(3) as my clients interpret it, then an enforcement process will take place which will then end up in County Court proceedings. The costs associated with those County Court proceedings and then there will be, no doubt, an appeal on one side or the other, or I suppose one should say a real possibility of an appeal, with a yet further waste of time and money. That is the concern.

C MR JUSTICE LEWIS: I can see that. There is the counter argument, of course, you need the (inaudible) and at least if you have an appeal, whilst it is hugely frustrating for your clients ...

D MR STONER: Yes. But as I say, I put that forward --

MR JUSTICE LEWIS: Yes, I understand that.

E MR STONER: -- simply having a look on the basis that it does apply; it does appear to be that someone who is a defendant or a respondent who is faced with an application for discontinuation, I think technically, no one is going to worry about this even in this post Mitchell(?) era of a notice being served and et cetera, et cetera.

MR JUSTICE LEWIS: I would probably believe that, I am going to anyway.

F MR STONER: Yes, but you have my concerns in relation to that, but perhaps whilst I am on my feet, just as at the opening is if you are against me on that, and this an end of the matter then the usual order on a discontinuance under 38.6 is that:

G "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which are defended against him, the claimants discontinues incurred on or before the date on which the application is made in this particular case."

MR JUSTICE LEWIS: Yes, we are realistically looking at the costs from Jackson LJ's order true on 6 February; they cannot be --

MR STONER: Yes, I think that is right.

H MR JUSTICE LEWIS: I will hear what Mr Westgate has to say on both of those?

(SUBMISSIONS BY MR WESTGATE)

A MR WESTGATE: Yes, as far as the discontinuance point is concerned, as Mr Stoner has fairly pointed out, that CPR 38 is on the face of it an unqualified right to discontinue, although it is fair to say that is subject to serving notice of discontinuance that then would ordinarily trigger an entirely new set of side matters and so given that we are at a stage where I have not served notice and where there is a -- it is practically impossible for Mr Stoner to serve his counter issues, I do need permission of the court, one way or the other, to effect the discontinuance.

B MR JUSTICE LEWIS: Yes, yes.

C MR WESTGATE: The short point is the same reasons that have prompted the claimant's decision to withdraw the claim are -- which is that it is not, having listened to what your Lordship has to say this morning particularly, it is not -- this case is not an appropriate vehicle to turn -- to embark on a general discussion of what is or is not appropriate in relation to the guidance; but the guidance can be abstract. He is said to be compliant with section 17 without some underlying facts. That point is good for the claimants; it is good for the defendants as well. For the defendants to resist discontinuance it would then invite this court to embark on, with respect, even more an unreal exercise in assessing particularly guidance both against a background where there are no facts and against a background where the claimant recognises that and does not wish to proceed with the challenge against that background. It produces a rather unreal situation where it would not be right for the court to continue. That is all I propose to say on the discontinuance question.

D So far as costs are concerned, the position is that the order of Jackson LJ; there are two points here. Firstly, it is a question of practicality and what really a cost order would achieve in a case of this kind, because the order of Jackson LJ which is at page 153 is silent on costs and the effect of that is that by CPR 44.13(a) that there is a deemed order for claimants costs in case and that must replace the order of Cox J that granted costs when refusing permission because the effect of this order is to grant permission and so that --

E MR JUSTICE LEWIS: So the costs in the case replaces Cox J's order?

F MR WESTGATE: That is right. So as at 24 July last year when that order was made, the position was that the claimant was entitled to claim his costs in the case. He, of course, he has not succeeded in his case so he is not entitled to that. But it means the costs before then (overspeaking)

G MR JUSTICE LEWIS: Because it is withdrawn, should I not certainly reinstate Mrs Cox J's order and then even there the position from Jackson LJ to, I think it is 6 February. Why should I not reinstate Cox J's order?

H MR WESTGATE: Because it has already been dealt with by Jackson LJ.

MR JUSTICE LEWIS: No, it was dealt with then, but now we have moved on and now I am going to grant permission, if I decide so to do, but on turn, because you claim

£15,000 first of all. If you had lost you would have paid that £15,000 and you would have paid any other costs such as the legal aid (inaudible).

A

MR WESTGATE: No, because the sequence is Mrs Justice Cox refuses permission and orders £15,000 summarily assessed. But that order is then appealed and that ends up with Jackson LJ granting permission to apply for judicial review and that order then must replace Cox J's order because she had refused permission.

B

MR JUSTICE LEWIS: There is going to be a new one now because (several inaudible words). What is wrong with that?

MR WESTGATE: Because the court is (inaudible) in respect of the earlier cost orders, because the order was for claimant's costs in case, not for cost reserved. If the costs were then reserved then they would be entitled to --

C

MR JUSTICE LEWIS: But why is it not 38.6?

MR WESTGATE: Because the deemed interim order, is one which is made under CPR 44.13(a) which deals with certain deemed orders and when the court grants permission for judicial review then the deemed order is an order for claimant's costs in case.

D

MR JUSTICE LEWIS: I will have a look at that. 44.3 you said?

MR WESTGATE: It is 44.13.

MR JUSTICE LEWIS: 13 or 1(3)?

E

MR WESTGATE: Sorry, my Lord, I had it a moment ago and now ... (pause) Yes, I am sorry, it is 44.13. It is page 1379 and it is 44.13(1)(a):

“Where the court makes an order, an order granting permission to appeal; an order granting permission to apply for judicial review; or any other order and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case.”

F

MR JUSTICE LEWIS: Yes, and then:

“Any party affected by a deemed order for costs under paragraph (2) may apply at any time --”

MR WESTGATE: No, no that is right, yes. It is the --

G

MR JUSTICE LEWIS: Why cannot (several inaudible words)?

MR WESTGATE: Yes, but the fact that the application has now been withdrawn in the light of what happened at the hearing, it is not a reason to disturb an earlier order which was intended to -- order, that the deemed effect of which is simply to give the claimant the benefit of having secured the grant of permission. The point being that up until the point of permission it would have been open to British Waterways Board to say, “We are going to consent to permission on this issue”,

H

but they did not; they resisted and so they are not entitled to their costs having resisted permission. So simply because the claimant has now lost, there is no reason for saying that the earlier cost order which was in his favour should be disturbed. He has not --

MR JUSTICE LEWIS: The earlier cost order was a deemed cost order (several inaudible words) to service, at the end of the day.

MR WESTGATE: That is right.

MR JUSTICE LEWIS: And I cannot believe that 44.13 was meant, for example, to say if you get costs on -- so if you get permission by means of a Court of Appeal application because you have been refused(?) twice below and if the defendant is ultimately successful; the defendant who is ultimately successful should be in a worse position and not be able to get the advantage of service simply because it took the claimant two goes in the High Court and one in the Court of Appeal; two in the Court of Appeal, before they got costs. It cannot have been the intention of that?

MR WESTGATE: Why not, in the sense that if the -- the rule is that if somebody puts in a summary of reference and acknowledgment of service and then does not succeed in resisting permission, then they will not get their costs at that stage because --

MR JUSTICE LEWIS: Yes, but they get them when they win. Why not when they withdraw?

MR WESTGATE: Only if they make an application under 1(a) of 44.13 because the default rule is claimant's cost in case, which means that they would not get their costs at that stage. It would only be -- there would then have to be some reason, but beyond simply the fact that you had won at the end of the day, because otherwise the deemed order would be costs reserved.

MR JUSTICE LEWIS: I understand, I have never looked at t 44.13. I still think at the moment that the very least the Board can ask for it under 1(b).

MR WESTGATE: They can certainly ask for it.

MR JUSTICE LEWIS: And it seems to me that when you not only do not continue, but withdraw, because it is realised that there is not a suitable factual foundation for this, that is certainly a case in which a court could exercise its discretion and say, well right, these -- as a start go back to where you were prior to the granting of permission, that would not be an improper discretion, would it?

MR WESTGATE: One wonders how it got to a situation where prior to 6 February the claimant was self-represented into --

MR JUSTICE LEWIS: He was never going to be liable, so why should he be worse off now?

A MR WESTGATE: He is going to liable because he does not have not any cost shield, until 6 February, and so he would be liable to be personally liable, but of course he is someone who -- in deciding whether he has acted in a way that would merit him losing the benefit of his claimant's costs and his deemed costs order, it is relevant that he was in effect given encouragement by the order of Jackson LJ to continue with the case.

B MR JUSTICE LEWIS: In what circumstances would an order be made into one thing then?

C MR WESTGATE: It is a little reminiscent of the arguments we have just been having about guidance(?), that it is difficult in advance to think of the kind of circumstances. But I think there might be some situation where the claimant had behaved in a way which is deserving censure in some way or perhaps at the hearing for judicial review it was something arises that casts doubt on whether permission should have been granted at all. If it is some failure of disclosure, down the road, something of that kind, then it obviously is the right of the court to revisit the question.

D There will be all sorts of circumstances that might arise where the -- it would be right to revisit the order in the light of facts as they emerge. But that is not the case here. This is simply a case of a claimant coming to a different view about the propriety of proceeding with the claim and ultimately, although it has come rather late, at a saving of court time and time to the defendants, although I give little credit for that given the lateness of the ...

E MR JUSTICE LEWIS: What about costs then between -- because there have been (inaudible) costs today and so on. There would quite a lot of costs that would have been incurred, I imagine, before 6 February?

F MR WESTGATE: That is right, and the reality there is that those would be costs that would be subject to the delayed provisions --

MR JUSTICE LEWIS: Only up to 6 February, if they meet the --

G MR WESTGATE: Up to 6 February. For the period between Jackson LJ's order and then 6 February, again, one has to ask what has been incurred in that period, because when one looks at the detailed grounds and when one looks at the skeleton argument, they bear a very strong similarity to what was already done in relation to the order from Cox J. And I appreciate that may be a bit of a two-edged sword because you may take the view that, well it would not be right to deprive them of their costs before Cox J and then to say that having been entitled to those costs, they cannot get them again because they are only doing the same work. But one has to ask, really, what are the practicalities, given that Mr --

MR JUSTICE LEWIS: The detailed grounds costs come after Jackson LJ.

MR WESTGATE: Yes, they do.

H MR JUSTICE LEWIS: And before 6 February?

A MR WESTGATE: No they did not. But they involve is without in meaning this in any way pejoratively, they are in effect a rewrite of the summary grounds because the summary grounds were very full grounds in themselves and so the detailed grounds really cover much the same ground.

MR JUSTICE LEWIS: Your client did not help himself, actually in terms of --

B MR WESTGATE: No, I fully appreciate that and that the grounds could have been rather more succinct.

MR JUSTICE LEWIS: Then there is the -- not the skeleton, no, then skeleton ...

MR WESTGATE: Yes, 19 February, that is --

C MR JUSTICE LEWIS: No, it is 4 February. Gosh, they have got in two days according to this date. Is that right, Mr Stoner?

MR STONER: Certainly the skeleton was filed before -- I am just trying to find the provisions, because in fact we were informed that there was legal aid funding on the 11th and that is when those instructed, my learned friend, came onto the record but again I am scrambling to see if that is relevant in terms of the order.

D MR WESTGATE: It is the legal aid shield, as it were, arises from the point of the legal aid being granted, rather than notice.

MR JUSTICE LEWIS: No, it is granted on notice, is it?

MR WESTGATE: Yes, but it does not matter because it is two days before anyway.

E MR JUSTICE LEWIS: So, putting it crudely, there was £15,000 spent on acknowledgement of service which you say you cannot get because of 44.13.

MR WESTGATE: Unless you revisit it.

F MR JUSTICE LEWIS: Unless I revisit it. You are saying that in reality the DTI(?) ground was off a word processor but if I give them the cost of the DTI ground it would not matter if the £15,000 was switched from one to the other, and, in any event, there is the skeleton which replaces it and there may be briefings anyway, so you say that in fact not to lose the £15,000 is not going to help very much, because it would all come under unless I start refusing them their costs, the detailed grounds and the skeleton.

G MR WESTGATE: Yes. If one then asks what is going to happen on assessment, if you get an assessment, would we then say, well look the detail grounds and the skeleton are really the same as summary grounds so you should not get anything on that and one has to consider what realistically is going to happen here? Because Mr Brown is without funds; he is someone who is publically funded now and so if you grant costs, there is a bit at the beginning and there is a bit at the end but the defendants do not recover in any event, subject to the point of re-visiting the earlier order.

H

A And then in the middle, the defendants would have to submit a bill. They then have to draw up the costs -- they incur the costs of drawing up a bill, they would have to do that within three months. If they do not do that within three months they lose their entitlement anyway, unless they seek permission to extend the time. And so in effect what one is doing, if one grants costs, although one can understand the frustration and one can understand their wish to get across the order perhaps to encourage the others, but the practicalities that if it is going to mean anything, then all it really involves is an invitation to run up further costs in preparing for a detailed assessment that will then be contested which will ultimately yield no real benefit because how is it going to be enforced against the claimant?

B
MR JUSTICE LEWIS: (overspeaking) for a start.

C MR WESTGATE: There is then going to be a further set of questions about how far it can be enforced against someone when they -- which is something which is their home. And so one can see the further satellite procedures that it may end up. It is tempting to say, well there should be an order for costs, obviously following the event that has happened.

MR JUSTICE LEWIS: But what I am --

D MR WESTGATE: But one has to ask specifically --

E MR JUSTICE LEWIS: -- thinking at the moment. If you do not want to address the file but sometimes it is helpful. If you persuade me to go down the rule 44.13 and I say, "All right, okay, they have not got the benefit of acknowledgement of service costs now; that is water under the bridge and is there is not a reason to re-visit it", that will be applying the rule strictly. Well if I do that under 44 and do the same under 38.6 and say well in that case, discontinuance, 38.6 and there is no reason to depart from one; there is no reason to depart from the other. Then there will be, and you have to have an argument if they decide to go down that route of the detailed grounds of the skeleton and I would be interested to know whether or not the brief fees -- if I am entitled to know -- if I am not entitled to know then do not tell me, whether the brief fees were delivered before the 6th, because that is going to be a ginormous figure and I thought they would be if the skeletons were done.

F
(SUBMISSIONS BY MR STONER)

G MR STONER: On that point, the reason I turned around was to clarify with my learned friend, is that slightly unusually because this is a public authority and you observed earlier; I am unsure I would classify myself as standing counsel for the CRT but I am privileged enough to do a lot of work for them and because there were certain uncertainties over looking at minutes and matters of that sort, there was an application to adjourn this case last week which Mr Brown made whilst he was in person which was vacated the day before we -- both my -- certainly myself and I think my learned junior as well have done this on an hourly basis, as opposed to a fee.

MR JUSTICE LEWIS: Just like TSOL(?) then, you just do an hourly rate for all the work you have done.

A

MR STONER: It is not a formal arrangement, but in effect that is the way, certainly I have operated it, so that in fact --

MR JUSTICE LEWIS: So a lot of the work will have been done before 4 February and some will have been done after 6 February?

B

MR STONER: Yes.

MR JUSTICE LEWIS: They will not be substantial costs then.

MR STONER: We did not get on to the minutes but -- until my learned friend confirmed yesterday evening that they were not -- that he was not relying on the minutes. The minutes had to be considered, they are voluminous, and I had spent four days last week considering them. Now, I am not sure --

C

MR JUSTICE LEWIS: Well you are stuck with that anyway, I think, because that is after 6 February.

MR STONER: Yes.

D

MR JUSTICE LEWIS: And that is ready down to general application I think.

MR STONER: Yes, but I suppose what -- the short point I can say in answer to my Lord's point is there is not a brief fee that was incurred on a particular day.

E

MR JUSTICE LEWIS: No, TSOL would not be -- the Government hourly rate, okay. Mr Westgate, you have heard what I have said. That I am going to just follow the rules now then.

(SUBMISSIONS BY MR WESTGATE)

F

MR WESTGATE: If I am given a choice as to which rule to follow, or which rule not to follow, then the difficulty is that one simply has to ask what overall, rather than looking technically at them, what the effect of the deemed order is and what effect of the discontinuance is and treating them all, as it were, in principal in issue. There is a real question here as to what the -- where this is actually heading and it is really being said that the CRT is going to go to the extra cost of drawing up a bill, and getting --

G

MR JUSTICE LEWIS: That is a matter for them, not for you.

MR WESTGATE: It may be that if I do not accept it. If what they are really doing is asking for an order now that is in effect symbolic, because they do not really think they are going to do anything --

H

MR JUSTICE LEWIS: That is a matter for them. They do not need to tell me whether it is symbolic or not. I am just going to deal with the -- it seems to me, to be

A perfectly honest, I have mentally assumed that it would be acknowledgement of service costs but I see your argument about that. I had mentally assumed it would be the cost between Jackson LJ's order and the 6 February. I have to say, although I understand Mr Brown is deeply concerned about this, and he has put in a huge amount of work, he and his friend clearly have researched this considerably, I did find quite a lot of the material unhelpful and unnecessary and difficult to digest and I do think that, was it Cox J at some stage said that it was not very helpful?

B MR WESTGATE: I think it was Jackson LJ who said he (inaudible) yes.

C MR JUSTICE LEWIS: Yes, and even after that, I mean the claimant's skeleton is quite difficult to follow. I have had a few goes at it and your skeleton played it down completely, so a lot of the costs; it is unfortunate because he is a litigated person and so on, but one would not feel that it would be unfair in any way that somebody had to deal with any extra cost generated by that. Some of them are not going to be sought because they came after 6 February.

MR WESTGATE: That is right. The costs are not on 6 February if you are minded in principle of the order, then of course the order should be for costs anyway and that would simply be subject to the order not to be enforced without permission of the court.

D MR JUSTICE LEWIS: Yes, because of the way it has gone I will give each of you one last opportunity to change my mind. My current view -- do you want to make a note of what my current view is, and I will give you each a brief opportunity to say why that is wrong. My current view is I am minded to grant permission to discontinue. I am minded to accept the arguments of Mr Westgate re: the acknowledgement of service costs. I am minded to, in the judgment, make it clear that the costs from the order of Jackson LJ to 6 February be paid by the claimant to the defendant and that the period after 6 February; the costs be paid, but it is not going to matter, because it is going to be subject to the legal aid protection.

E MR WESTGATE: That is right.

F MR JUSTICE LEWIS: Yes. Thus -- and I minded to give a very short judgment; the less said the better without aim -- with the intention that you (inaudible) order out, in light of that.

MR WESTGATE: Yes.

MR JUSTICE LEWIS: Is there anything you want to ask me to dwell on before I --

G MR WESTGATE: The only point maybe is that I have made my submissions on the practicalities of the costs order, but one does also need to step back here and consider what the argument all about. It has resulted in some issues being ventilated before the court even though it has not resulted in a final resolution.

H MR JUSTICE LEWIS: Although (several inaudible words) by lunchtime, I thought. It was getting better.

A MR WESTGATE: There had been an interesting discussion but it had gone no further than that. But certainly it is one of those cases where although Mr Brown himself is personally obviously very interested in this, he was concerned to clarify the position on a matter which is of some public interest to those who use the waterways for various reasons.

MR JUSTICE LEWIS: You need the facts and you just never told me the facts.

B MR WESTGATE: No, I appreciate that, and that ultimately why it was an exercise that was ending up going nowhere, but that is all I have to say on that.

MR JUSTICE LEWIS: Did you have anything that you wanted to say perhaps, Mr Stoner?

(SUBMISSIONS BY MR STONER)

C MR STONER: My Lord, just a couple of points. I think it is principally, as I understand it, on the fact that my Lord's indicated you are minded to accept the discontinuance, I have said what I wished to say on that and in relation to your indication, you are minded to say that Mr Brown has to pay the costs from the date of permission from Jackson LJ to 6 February and indeed thereafter, but from 6 February there is the cost protection. I am just not sure what the usual wording is.

D MR JUSTICE LEWIS: That can be sorted.

MR STONER: But that can be sorted, and I will take my learned friend's word that the cost protection does indeed kick in, because I cannot find the provision from the date of the actual --

E MR JUSTICE LEWIS: (overspeaking), he is almost certainly right on that, I imagine.

MR STONER: I think he is.

MR JUSTICE LEWIS: If it is wrong ...

F MR WESTGATE: I will check myself.

G MR STONER: Yes, but I also say that it is perhaps unfair just to tee my learned friend up like that; I think that probably is right, but I just cannot in the scrambling around at the moment. That just leaves the acknowledgement of service costs and what I say about that is that if one can just very briefly look at how this unfolded? My clients received a 71 page statement of case. With all due respect to Mr Brown, as my Lord has indicated in relation to the skeleton argument, it takes several readings before it becomes penetrable. I understand what he is saying, but it does take quite a lot of work and there were a large number of issues in that and insofar as Jackson LJ, there may be a deeming provision.

H In my submission it would put Mr Brown at a better position and would not reflect the reasons why the order was made if it, in essence, the deeming order is allowed to stand because a large element of the arguments, for example, the Equality Act, the Human Rights Act and we also say the minutes, in view of what Jackson LJ

said, were not allowed to go ahead, and, in fact, Eder J, when he considered the matter on paper, his order is at page 124, he simply says:

A “The claimant shall pay the defendant’s costs which I summarily
assess in the sum of £15,000 provided that this order shall not be
enforced without further order of the court. The reasons in
principal; the defendant is entitled to its costs to date including the
B preparation of the acknowledgement of service and summary
grounds. The figure claimed is very high, but this would seem to
me the result of the claimant’s lengthy statement of claim, although
I have reduced the figure slightly. None of the matters referred to
in section 12 of that statement of claim provides any basis to deny
the defendant its costs.”

C Et cetera, and that reasoning was effectively picked up by Cox J in her unusually
reserved judgment reflecting the fact that this was quite involved at that stage.

MR JUSTICE LEWIS: And nobody attended of course before Jackson LJ, say for Mr
Brown. Just -- not that it is relevant, did anyone attend, yes, Mr Beale(?)
attended --

D MR STONER: Yes, but he was not -- in fact it was very useful that he attended because
as it transpired because Sky TV, I am told for other reasons, were setting up for an
inquiry or something of that sort and that meant that the court --

MR JUSTICE LEWIS: So that is how we had a note, yes.

E MR STONER: -- the court’s recording system was not working so we had a note, so
that is why we had it, but my learned junior was not, as is perhaps usual in the
Court of Appeal -- we had not been directed to attend, so he was not even called
on and the fact remains that although there may be a deeming provision, Jackson
LJ did refuse permission to appeal from Cox J’s order. It does not automatically
appear from the order, but from the note at page 158 --

F MR JUSTICE LEWIS: No, it does not then. I suspect that nobody ever anticipated,
although if anybody would have known the cost of provision it would be Jackson
LJ, as the general editor of the White Book, but even Jackson LJ cannot constantly
keep in mind every provision of every rule.

G MR STONER: Exactly, and in fairness to Jackson LJ, on a busy -- the usual early
morning application before he is going into another appeal, as I understand it, but
he expressly says, “I therefore do not give permission to appeal”, and the order
that was extant at that particular moment in time was that -- and therefore was not
overturned was that there be an order for £15,000 in costs.

H So I am not sure, looking at 44.13 whether the deeming provision extends beyond
the actual costs incurred with the order granting the permission to appeal. In this
case the order granting permission to apply for judicial review; namely, the
hearing before Jackson LJ. But if it does not, then in my submission, in the
circumstances of this case, because those costs were directed so specifically and
principally at grounds which were either not the subject of permission or even

insofar as they were the subject of permission elements; namely the minutes were not, then this is a case where it would be inappropriate to reinstate the order of, in fact, I think it is Eder J as continued by Cox J.

A

MR JUSTICE LEWIS: That is very helpful, thank you, Mr Stoner.

(Hearing concluded)

B

C

D

E

F

G

H