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**20 May 2014**

**Brown vs Canal & River Trust – summary of key points**

The Canal & River Trust is committed to being open and transparent. Specifically we are committed to making available information regarding the recent Judicial Review hearing.

Following the hearing held in London on 19 February we obtained copies of the official Court approved transcript of the Judgment and the transcript of the court proceedings that led up to the Judgement. We then asked the court whether there was any objection to us publishing these transcripts and we were informed that although Mr Justice Lewis did not have any issue with us publishing the approved judgement (which we did on our [website](http://canalrivertrust.org.uk/media/library/6404.pdf) recently) he did not approve of us publishing the transcript of the court proceedings.

***Update 21 May 2014: You can now read the email exchange between the Canal & River Trust and the Court.*** [***Please click on this link to view.***](http://canalrivertrust.org.uk/media/library/6438.pdf)

We note that the unapproved transcript of proceedings has recently been made available elsewhere on the internet, in spite of Mr Justice Lewis not having approved its publication.

Mr Justice Lewis didn’t give his approval, we understand, because he did not want the transcript of the hearing to be misinterpreted as a judgment of the court, stating that the transcript of the hearing is simply a record of what was debated and discussed during the proceedings (which has not been checked by either party or the Judge) and is not binding in any way. Until we have that permission we’ve not felt it right or proper to go against the express wishes of a High Court Judge.

We refute any suggestion that we do not want boaters to see the transcript; we support the full disclosure in principle, but wish that others had not gone against the views of the Judge by circumventing the approval process.

*The hearing*

Regarding the hearing, Mr Justice Lewis did not reach a decision on the claim itself, following the discontinuance of the action by Mr Brown and, as such, there is no binding Judgment on which courts may rely on in the future. However, a number of relevant points were discussed during Mr Justice Lewis’s questioning of the claimant’s case and this note summarises them.

*Brown’s challenge not supported by evidence*

Mr Justice Lewis did not see the point of Mr Brown’s challenge on the Trust’s Guidance in the abstract.

Firstly, he did not see how Mr Brown could establish that the Guidance was unlawful in the absence of a proper factual context. Mr Justice Lewis noted that Mr Brown had not provided enough evidence of his own boat movements against which it would be possible for a court to judge whether the Guidance accurately reflected the requirements of the Act. In fact, the Judge expressed some interest as to why Mr Brown had not submitted evidence on his own boat movements, which he surmised (on the limited evidence before him) were probably very similar to the movements of Mr Davies (in British Waterways –v- Davies heard in Bristol County Court on 31st March 2011) which had been held by a county court judge not to meet the requirements of bona fide navigation. Mr Justice Lewis was very reluctant to get into abstract arguments in the absence of a set of facts and queried whether the case had any useful purpose at all.

*Guidance not in itself objectionable*

Secondly, during proceedings, it became increasingly obvious from the Judge’s questioning of Mr Brown’s counsel, Martin Westgate QC, that he saw very little which was objectionable in the actual wording of the Guidance and in particular that he did not agree with Mr Westgate’s assertion that there was anything in the wording which created an overall impression of not being in compliance with the Act. The Judge appeared to view the Guidance as a valid interpretation of section 17(3)(c)(ii) of the British Waterways Act 1995, in terms of setting out the Trust’s general approach to the requirement for boaters without a home mooring to use their vessel bona fide for navigation throughout the period of their licence. He repeatedly challenged Mr Westgate to identify which words in the specific clauses from the Guidance he objected to.

*Definition of ‘Place’*

Mr Justice Lewis did observe that the word “place” was used both in section 17(3)(c)(i) in the context of a home mooring or other “place” where a boat may be kept, and in section 17(3)(c)(ii) in the context of a boater without a home mooring not remaining in any one “place” for more than 14 days. The Judge commented that usually it was desirable to interpret a word in the same way where it appeared in the same legislation, however, he came to no conclusion about whether the word “place” could be interpreted in the same way here (and indeed spent some time reflecting on the quite different meaning implied).

*Bona fide navigation is not ‘shuffling’ – Davies case helpful*

The Judge accepted that defining bona fide navigation was difficult to do in the absence of a factual context of a particular case, although he did agree that a boater could not simply “shuffle” between one place and another nearby place for the purposes of section 17(3)(c)(ii) and that the Davies case was helpful in this regard. He reiterated that whether a particular boater was, in fact, complying with the terms of this subsection would always turn on the facts of the case and this was why he was unwilling to get into a detailed analysis of hypothetical scenarios of boat movement. He challenged Mr Westgate by asking him whether it was his case that an otherwise static boat making an occasional trip to a canalside pub could theoretically be in bona fide navigation.

*Brown discontinues review and costs awarded to the Canal & River Trust*

Mr Brown decided to apply to discontinue the judicial review only after the Judge had clearly implied that he did not see any merit in his claim and that he could not make a judgement in the absence of specific facts about boat movements, whilst seeming to find nothing unlawful in the Trust’s Guidance.

At the end of the trial, Mr Justice Lewis ordered Mr Brown to pay the Trust’s considerable costs up to the date when Mr Brown obtained Legal Aid funding (which carries with it automatic protection against having to pay the other side’s costs). In addition, there was also a relatively small amount of costs incurred by the Trust prior to the decision of Lord Justice Jackson in summer 2013 to allow the judicial review to go ahead which are not recoverable.

Whilst he understood that Mr Brown was not represented until just before the trial, Mr Justice Lewis noted that Mr Brown’s written grounds for review were very lengthy and difficult to digest. He acknowledged that this would have resulted in the Trust having incurred considerable wasted costs when preparing for the hearing.

As is usual with such court cases, the Trust will be submitting a detailed breakdown of its costs figures to Court before a specific costs figure can be approved and will then proceed to recover the costs it has incurred on this abortive process.