



Neutral Citation Number: [2013] EWCA Civ 73

Case No: A3/2012/0788

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
THE HON MR JUSTICE HILDYARD
HC07C02340

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2013

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE JACKSON
and
LORD JUSTICE LEWISON

Between :

NIGEL MOORE
- and -
BRITISH WATERWAYS BOARD

Appellant
Respondent

The Appellant appeared in person

MR CHRISTOPHER STONER QC (instructed by Shoosmiths LLP) for the Respondent

Hearing date: 27th November 2012

Approved Judgment

Lord Justice Mummery:

Introductory

1. This is an appeal from an order made by Hildyard J on 16 February 2012. In accordance with the judgment (reported at [2012] 1 WLR 3289) the order set out a succession of declarations on issues in proceedings brought by the claimant, Mr Nigel Moore, against the defendant, the British Waterways Board (BWB), known since 2 July 2012 as the Canal & River Trust following a transfer of statutory functions. The object of the claimant's action is to establish a right to moor vessels long term in part of the Grand Union Canal (the GUC) at Brentford, Middlesex, so that the claimant does not need the permission of BWB to do so and cannot be lawfully required by BWB to remove the vessels.
2. The principal ground of Mr Moore's appeal is that the judge was wrong to hold that, in the absence of BWB's permission, the long term mooring of vessels on a semi-tidal stretch of the GUC, close to the junction of the canalised River Brent element of the GUC and the River Thames, is "without lawful authority" within the meaning of s. 8 of the British Waterways Act 1983 (the 1983 Act). The judge found that the claimant had not demonstrated any right under the general law to moor vessels permanently, either in right of riparian ownership or possession, or otherwise.

Background

The parties

3. The claimant had care of 4 vessels which were moored for several years on a stretch of the GUC. They were moored alongside riparian land, which, for the purposes of this action, BWB accepts is in the possession or occupation of the claimant. Unlike the rest of the GUC, that particular part of the canal has a tidal element and is subject to a public right of navigation. The vessels were occupied as the sole residential homes of the occupants. The claimant occupies a vessel called "*Gilgie*." The vessels were thus moored otherwise than for temporary purposes ancillary to, or in the process of, navigation on the GUC, such as in loading and unloading, or for repairs, or to shelter from the weather conditions.
4. BWB is the statutory navigational authority for the GUC. It derives its powers from British Waterways Acts passed between 1971 and 1995. Purporting to act as such statutory authority for the management of the GUC, BWB served notices on the claimant on 21 July 2007. The notices, which stated that they were given pursuant to s.8 of the 1983 Act, demanded the removal of his vessels within 28 days on the ground that they were moored in the GUC "without lawful authority."

The proceedings

5. On 4 September 2007 the claimant started proceedings against BWB for a declaration that the notices served on him were unlawful and that he had a right to moor the vessels without BWB's permission.

6. Mr Martin Mann QC gave a judgment on preliminary issues on 12 March 2009. The claimant successfully appealed from part of that order on 5 February 2010: [2010] EWCA Civ 42. A list of issues was then drawn up at a case management hearing in preparation for trial, which took place before Hildyard J in November 2011. Some of the issues turned on the construction of the Grand Junction Canal Act 1793 (the 1793 Act) and of more recent legislation, in particular on the extent to which common law rights were preserved or amplified by the legislation. Others issues related to whether the s.8 notices had been served for an improper collateral purpose; whether, in serving the notices, BWB acted in breach of a legitimate expectation on the part of the claimant as to how those powers would be exercised; and whether article 8 of the European Convention on Human Rights was engaged in respect of the claimant's occupation of the vessel *Gilgie* as his home.
7. Those matters are relevant as background to this appeal, but there is no need to explore them in detail, as the judge's rulings on them are not appealed. So I turn to the parts of the order that are appealed.

The order

8. The material parts of the order under appeal provided that:-

“3. That it be and is hereby declared that a riparian owner has no entitlement, simply by reason of that riparian ownership, to moor a vessel alongside their riparian land otherwise than temporarily to facilitate access and for loading and unloading.

4. That it be and is hereby declared that the vessel “*Gilgie*” is unlawfully moored because it is not moored pursuant to public rights of navigation nor pursuant to any special or particular right entitling it to moor at its current location and no lawful right to moor there having been established.

5. That Mr Moore be required to move the vessel “*Gilgie*” from the waterways managed by British Waterways on or before 16th May 2012, including the tidal element of the Grand Union Canal between Bax's Mill/The Boatman's Institute and the junction of the Grand Union Canal with the River Thames, save in so far as Mr Moore exercises public rights of navigation over the said tidal stretch and/or cruises British Waterways managed inland waterways in accordance with the terms and conditions of the licence issued in respect of the vessel “*Gilgie*” failing which after 16th May 2012 British Waterways shall be entitled to exercise the statutory powers vested in it by section 8 of the British Waterways Act 1983.

6. That Mr Moore be forbidden, whether by himself or by instructing or encouraging any other person on or after 16th May 2012 from mooring the vessel “*Gilgie*”, or any other vessel in his control, on the tidal element of the Grand Union Canal between Bax's Mill/the Boatman's Institute and the junction of

the Grand Union Canal with the River Thames, otherwise than for temporary purposes ancillary to or in the process of navigation, or at a lawful mooring.”

9. The judge ordered the claimant to pay BWB 25% of its costs of the action, such costs to be the subject of a detailed assessment, if not agreed, and to pay the sum of £5000 on account of those costs.
10. The judge refused the claimant’s application for permission to appeal. I worded the grant of permission to appeal cautiously.

The appeal

11. Does the claimant have “lawful authority” to moor his vessels permanently on the part of the GUC running alongside the riparian land possessed or occupied by him in Brentford? Or can he only moor there temporarily for the purpose of access and for loading and unloading?
12. The answer to those questions does not turn exclusively on the statutory powers of BWB, which accepts that, if it is lawful at common law for the claimant to moor the vessels permanently alongside his riparian land, he has the necessary “lawful authority” within the meaning of s.8 to do that. Lawful authority derived from the common law would provide a complete answer to the notices served by BWB. Section s.8 applies to vessels moored “without lawful authority”: it does not just apply to the case of vessels moored without the permission of BWB.
13. Statutory bodies equipped with powers and rights (and subject to duties) continue to expand without replacing all the private and public rights and remedies for wrongs available under the common law. If the claimant’s contention that he has unmodified common law mooring rights is correct, the notices are invalid: he does not need permission from BWB, as statutory authority, to do what the common law permits him to do.

The judgment

14. The judge carefully examined a mass of factual and legal materials. It is unnecessary to re-visit most of it in order to decide this appeal. On the key question of the construction and application of s. 8 the judge held that the claimant had not demonstrated that he had “the right to moor” vessels permanently along his part of the bank; that he had moored them “without lawful authority”; and that BWB had sufficient power under the legislation to serve the statutory notices in respect of vessels under the claimant’s care.
15. The judge rejected the claimant’s contention that BWB had used its powers for an improper collateral purpose, but upheld his claim that he had a legitimate expectation that, in exercising its powers under s.8, BWB would abide by its own prescribed and invariable procedures. Those issues do not arise on this appeal nor does the claimant’s reliance on article 8 of the European Convention on Human Rights.

16. As for the common law position, the judge concluded that “the ordinary rights incidental to ownership of riparian land do not include a right of permanent mooring.” See [74]. He agreed with BWB that:-

“ 76. ...in so far as the claimant asserts an entitlement to moor alongside the canal bank he occupies, there is no ordinary riparian right entitling him to moor his vessel there except temporarily for the purpose of access, and for loading and unloading.”

17. The claimant had not therefore shown any “lawful authority” to moor vessels permanently alongside the riparian land. The judge agreed with BWB that the words “without lawful authority”, which focus on the lack of authority, were broad enough to catch a vessel moored where no right to moor could be demonstrated. See [155] and [159]. The claimant had not shown any established right to use the GUC for permanent mooring, whether derived from a right of or incidental to riparian property, or under the terms of a duly issued permit, licence or certification: see [160].

18. The judge explained that certain matters, which are relevant to this appeal, were not in dispute in this action :-

(1) The relevant stretch of the GUC has a tidal element due to its proximity to the junction of the GUC and the River Thames, which is itself tidal at that point. See [25].

(2) The claimant is in possession or occupation of the relevant area of the bank of the GUC by virtue of which he claimed the riparian rights to moor vessels permanently without BWB’s permission. See [34] and [35]. BWB took no point on whether the claimant had a sufficient interest personally to assert any riparian right. BWB accepted that the claimant could, in these proceedings, seek to demonstrate that the disputed notices are invalid on the grounds that the claimant summarised in his skeleton argument i.e. that the vessels “were all within a public navigable river, moored to private riparian property.” See [36].

(3) BWB did not rely on any common law right of ownership, such as ownership of either the bed or the bank of the GUC alongside the moorings, to justify service of the s.8 notices. See [13]. BWB relied only on its powers as statutory navigation authority responsible for the management of the GUC. Its case was that it had power to require the removal of the claimant’s vessels, as they were permanently moored without any common law right to do so or without any permission granted by it and therefore “without lawful authority.”

(4) The claimant for his part did not assert in this action any claim to ownership of the bed of the GUC as entitling him to moor any vessels. [13]. (The normal legal position is that in non-tidal waters the bed of a river is owned by the riparian owners, whereas in tidal waters the bed of the river is vested in the Crown.)

Claimant's submissions

19. The claimant's skeleton argument, which, combined with the Appeal Notice, is 140 pages long (only 20 pages less than his skeleton argument at trial), complains that practically every aspect of the decision against him was wrong.
20. The respondent points out that the claimant's skeleton departs from his case based on riparian rights and seeks to introduce new arguments, such as claim to customary rights or rights conferred by the 1793 Act; that it contains sweeping assertions that are palpably incorrect; and that it re-introduces preliminary issues decided against him at an earlier stage by Mr Martin Mann QC, but not then appealed (e.g the right of public navigation, which ceased to be a live issue before the trial, and does not entitle the claimant to "keep" vessels in publicly navigable waters in the sense of indefinite periods of mooring.)
21. I broadly agree with BWB that the claimant's essential case below and on this appeal is based on riparian rights at common law. I will concentrate on his submissions on that issue.
22. First, the finding of the judge that riparian ownership gives no right to moor a pleasure boat for longer than needed to step on or off board is a denial of any mooring rights whatsoever attaching to riparian land and is contrary to centuries of established case law and practice. Riparian rights allow all uses of the water that do not affect others. The judge's ruling illegitimised, at a stroke, every bankside mooring in the UK inland waterways, even though not in breach of any BWB regulation on mooring.
23. Secondly, the judge wrongly construed s. 8 of the 1983 Act as authorising seizure or expulsion from the waterways of any vessel otherwise entitled to be on those waterways and even though not in breach of any legislation or regulation. That was contrary to common sense and in violation of the common law. It also ignored the practical reality of "home moorings" in a particular location and reasonable user dependent on a prescribed place of public access or on the discretionary consent of the relevant landowner.
24. Thirdly, the judge's approach to riparian rights of long term mooring was cursory and was confused with the public right of navigation. It was also flawed in requiring the impossible, namely proof of an established right to moor permanently. Confusion also arose from the judge's failure to appreciate the difference drawn in the authorities between "moorings", which are usually taken as permanent or as a fixture, and the "act of mooring", which is a temporary act.

BWB's submissions

25. BWB did not find it necessary, any more than I have, to comment on or respond to every point of detail or cited case in the claimant's skeleton. Mr Stoner QC emphasised the following points.

26. First, the majority of the GUC is a non-tidal artificial canal, which is not subject to public rights of navigation and falls squarely under BWB's regulatory licensing scheme. There is no entitlement, even by adjacent riparian owners, to be on the non-tidal part of the GUC without BWB's consent, which is available to all on terms
27. Secondly, as found by the judge, the licensing scheme does not apply to the tidal element of the GUC, which is the subject of this litigation. This small stretch of the GUC is subject to public rights of navigation and to pre-1793 private rights, as preserved by the legislation. However, that fact did not affect the status of BWB as the navigational authority for the relevant stretch of the GUC. The claimant had to establish a legal entitlement for the indefinite mooring of his vessels there.
28. Thirdly, the claimant's case on private riparian rights at common law was correctly decided by the judge against him. Those rights to moor against riparian land are in the main access rights. They include a right to moor to facilitate access and to stand by the riparian land for reasonable periods, but not a right to moor per se indefinitely along side his land for as long as the riparian owner pleased. See *William Lyon v. The Wardens of the Fishmongers Company and the Conservators of the River Thames* (1876) 1 AC 662 and *Original Hartlepool Collieries v. Gibb* (1877) 5 Ch D 713.
29. Fourthly, on the construction of s. 8 of the 1983 Act, a vessel could be removed from the waters managed by BWB, if there was no lawful authority for it to be there. The judge's application of the provisions to the facts of this case was correct. The preservation of the public right of navigation and of private riparian rights by s. 43 of the 1793 Act is consistent with BWB's status as the navigational authority for the relevant stretch of the GUC so that those who wish lawfully to exercise preserved rights may do so. For the presence of the vessel on that part of the GUC to be lawful, it had to be justified by reference to a preserved private riparian right or a public right of navigation.
30. Fifthly, the judge's finding for the claimant as to legitimate expectation in relation to the process adopted before the service of the s. 8 notices did not extend, as the claimant now attempted to argue, to a legitimate expectation that *Gilgie* could remain moored in its current location and there was no basis in fact for so holding.

Discussion and conclusions

31. The judge put the mooring rights point in this way:-

“37. The parties also confirmed that it is no longer in issue in these proceedings whether (i) the claimant occupies in his own right or as licensee and/or (ii) is entitled to exercise the riparian rights of a riparian owner. It is accepted that the relevant issue to be decided in this context is whether a riparian owner of the land in question would have a right to moor. If such a riparian owner would have such a right, I assume that BWB accepts that

this should be taken to be a good answer to the section 8 notices served.”

32. As indicated in that passage, the mindset at trial was naturally influenced by the positive nature of the mooring right asserted by the claimant i.e. that under the common law he had a riparian right to moor vessels permanently in that particular stretch of the GUC and that provided the “lawful authority” answer to the s.8 notices served by BWB.
33. That approach sidelined the question whether, quite apart from any established riparian right, the claimant was doing anything unlawful at common law by the mooring of his vessels along side the canal bank in that part of the GUC. BWB’s statutory power to require removal of the vessels did not extend in terms to the removal of any vessels moored in the GUC without its permission: it was limited to vessels moored unlawfully (i.e. “without lawful authority”), which is not quite the same thing.
34. I agree that one would expect BWB to have a general statutory power to manage the mooring of vessels on the GUC and that its permission to moor in the GUC would normally be required. However, special features of this dispute make it necessary to inquire into not only what *rights* the claimant could establish as a matter of private law or public law, but also whether his actions amount to the commission of an actionable *wrong*, either at common law or under statute, which would entitle the BWB to require the removal of the vessels on the ground that they were *unlawfully* moored on the GUC.
35. As noted above, s.8 does not confer on BWB a general statutory power to require the removal of vessels moored in the GUC without its permission: BWB’s power under s.8 is exercisable only in a case where the vessel is there “without lawful authority.” BWB accepts that that “lawful authority” is not confined to the case of a person who has a permission from BWB. If what is done with the vessel on the GUC is lawful at common law, the mooring is with, not without, “lawful authority” under s.8.
36. The s.8 notices would clearly be invalid if the claimant established a positive private law or public law riparian right to moor vessels to the bank. He failed to do that. In my judgment, the judge correctly held that no such riparian right existed at common law. The riparian right to moor was more circumscribed and falls short of a permanent mooring right. On that point the legal position is as stated by Lewison LJ in his judgment, which I have read in draft. There is nothing that I can usefully add to his exposition of the general law on riparian rights.
37. However, that is not the end of this matter. As BWB can only require the removal of vessels unlawfully on the GUC, it is necessary to ask whether, even in the absence of an established riparian *right* to moor, the claimant, on the particular facts of this case, was committing any *wrong* at common law or under statute, which made what he was doing unlawful? If he was not, what power had BWB under s. 8 to require removal of the vessels?