



## Clarity cut adrift: Human rights arguments triable in mooring cases

By Elizabeth Tremayne

### Introduction

1. Judgment has been handed down by the Court of Appeal in *Jones v Canal & River Trust* (2017) EWCA Civ 135. The case concerned a claim brought by the Canal and River Trust ('the C&RT') to remove Mr Jones' boat using its powers under the British Waterways Acts 1971 and 1983 ('the Acts') and for injunctive relief restraining him from mooring, navigating or securing his boat on any of its waterways. Mr Jones raised an Article 8 European Convention on Human Rights defence arguing, *inter alia*, that the C&RT had not carried out any or any adequate proportionality assessment. The county court at first instance struck out the Article 8 defence, a decision which the Court of Appeal has now overturned.

### Background

2. Inland waterways are to a significant extent vested in and controlled by C&RT (excluding sections of the River Thames regulated by the Environment Agency (see the recent case of *Environment Agency v Paul Barrass and others* [2017] EWHC 548 (Admin)). Anyone wishing to navigate or moor on the waterways requires one of a number of licences or consents. In this case C&RT issued a licence to Mr Jones for *bona fide* navigation. His boat having remained static for a number of years, C&RT attempted to exercise its statutory powers of removal. The correct application of the relevant provisions of the Acts was agreed to be a matter in issue for trial, but one aspect of the Defence – the alleged Article 8 infringement - was disposed of summarily.

### Proceedings in the County and High Court

3. C&RT applied for an order dismissing Mr Jones' Article 8 defence on the basis that the case should be judged according to the same criteria applicable to public housing authorities seeking possession of residential premises (*Manchester City Council v Pinnock*

---

[2010] UKSC 45 (**'Pinnock'**); *Hounslow LBC v Powell* [2011] UKSC 8 and *Thurrock BC v West* [2012] EWCA Civ 1435). *Pinnock* established that in such cases: *'if an Article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained.'*(Lord Neuberger [61]).

4. The county court at first instance in *Jones* adopted the analogy with a social housing landlord and struck out the Article 8 defence principally on the basis that there would be too a significant burden on C&RT if it had consider the ECHR in respect of every alleged breach of licence. The High Court went further still, dismissing Mr Jones' appeal, concluding: *'As a public body which is not a housing authority, the trust cannot owe any duty to the Appellant in relation to his housing needs under Article 8. Accordingly any test to be applied to a local authority housing department would not apply and no proportionality argument, however it is to be determined, can arise'*.
5. Lewison LJ granted permission for a second appeal. Before the Court of Appeal Mr Jones argued, *inter alia*, that the county court was wrong to apply the 'exception' given to social housing landlords from the requirement of a *'structured approach'* to the proportionality question under Article 8.

### **Court of Appeal**

6. McCombe LJ, giving judgment for the Court, considered the position set out by Lord Neuberger in detail, in particular *'exceptionality'* – the Supreme Court's view that it would only be in exceptional cases that Article 8 proportionality would even arguably give a right to continued possession where the applicant had no right under domestic law to remain.

- 
7. The Court of Appeal also considered the recent Divisional Court decision (Beatson LJ and Nicol J) in *Akerman v LB Richmond* [2017] EWHC 84 (Admin) in which Adam Heppinstall of Henderson Chambers successfully resisted an Article 8 defence. The appellant sought to overturn his conviction in the Magistrates Court for breaches of by-laws in keeping his vessel moored for longer than statutorily permitted. He challenged the lawfulness of the byelaws on rationality grounds and contended that the making of them was a disproportionate interference with his Article 8 rights. The District Judge found that the byelaws had been made, not to deprive the boat owner of a home, but to prevent them treating the site in issue as a permanent mooring and that they did not render the occupier homeless; the boats were moveable and there were other permanent moorings available in the borough. She held that Article 8 was not engaged but, even if it was, the interference was proportionate.
  8. The Divisional Court considered that whilst, in principle, Article 8 could be engaged *'The authorities show that a trespasser will only be able to trump the rights of an owner of property by invoking Article 8 in an exceptional case...this is particularly so where the owner is a public authority which holds the land for the general public such as the respondent in this case. It follows that in my judgment an interference with Article 8 rights such as that by the byelaws restricting the mooring of boats in certain places was not, in the circumstances of this case, disproportionate where the boats subject to the restriction were homes'* [43]. The appeal was dismissed and convictions upheld.
  9. McCombe LJ distinguished *Akerman* and similar cases where the boat owner could not assert a prior licence. Where, as in *Jones*, the case involved a legitimate licence having been given by the body controlling the waterway, the Court determined that a first instance judge should not dispose of Article 8 arguments before coming to a decision on whether the licence conditions had been broken.

- 
10. The Court of Appeal accepted that in most cases summary judgment on an Article 8 defence could be reached without C&RT needing to lengthily rehearse its aim in enforcing licence decisions but that: *'the burden of dealing with an Article 8 defence is one that will from time to time...have to be shouldered by the court in assessing a defendant's personal circumstances and in the balancing exercise in weighing those circumstances against the "given" represented by the Respondent's aims in the proceedings'* [59]. The Court gave examples of circumstances which were not suitable for the summary disposal of Article 8 including where, for instance, it is argued that: *'a boat occupier's Article 8 rights...[are] outweighed by the management requirements of the Respondent, in a case where there are continuing genuine disputes as to whether licence conditions have been satisfied or where there are other issues in play, such as questions under the Equality Act 2010'* [48].
11. Applying that rationale to the facts, McCombe LJ gave three reasons for allowing the appeal: *'First, while I agree that the Respondent's property rights in the canal and the public interest in the management functions exercised by the Respondent can usually be taken as read, I am not satisfied that the judge could properly dispose of the Article 8 considerations before deciding whether the licence conditions had truly been broken and that property rights and management rights under s.8 of the 1983 Act, therefore, could be invoked unquestioningly, subject only to Convention rights. Second, it was not sought to argue that the Appellant's defence under the Equality Act 2010 could be summarily determined; it survives on the pleadings. Third, the Respondent seeks extensive relief, including injunctions restraining any mooring of any duration on the K & A canal, restraining navigation upon any of the extensive waterways controlled by it and an order for immediate removal of the Appellant's home, viz. the boat, from the K & A canal'*. The Court remitted the case back to the county court for the trial of all issues including the various limbs of the Article 8 defence.

---

## In conclusion

12. The judgment leaves significant uncertainty over the circumstances in which public bodies should carry out proportionality assessments before taking action to remove vessels. Whilst the Court introduced a distinction between Article 8 arguments where the owner/occupier is/was a licence holder and where he/she is not, this is (a) not characterised as a mandatory gateway for summary disposal, and (b) a curious distinction to draw given the licence at issue in *Jones* was never a licence to reside but simply to navigate and therefore qualitatively different to that of a residential tenant acting in breach of a tenancy. Insofar as one can extrapolate relevant principles from the judgment and the authorities to which it refers, they appear to include:

- (a) A public authority exercising statutory powers to remove a vessel in which someone is living can face a legitimate question over proportionality;
- (b) where the owner/occupier has no prior right in relation to the land or waterway – whether by licence, consent or equivalent – an Article 8 defence is more likely to be disposed of summarily;
- (c) where the owner/occupier has a prior right in relation to the land or waterway, but has exceeded its terms or conditions, the scope of the right should be determined prior to Article 8;
- (d) the more extensive the relief sought the less likely it is that an Article 8 defence would be dealt with summarily;
- (e) as a matter of fact, evidence that the removal would not preclude the owner/occupier from living on a boat in the relevant locality will be persuasive;
- (f) cases which also involve other species of defence such as under the Equality Act 2010 are less likely to be subject to summary disposal.

Elizabeth Tremayne

April 2017

[Adam Heppinstall](#) and [Elizabeth Tremayne](#) are both experienced in a range of landlord and tenant and real property litigation and have, in particular, advised and represented clients involved in a variety of waterways and mooring disputes.